Document:-

A/CN.4/L.168/Add.2 and Corr.1 and 2

Text of articles adopted by the Drafting Committee: articles 52-57, 57 bis, 58-62, 62 bis, 63 and 64 - reproduced in document A/CN.4/SR.1116 and SR.1118 to SR.1119

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1971, vol. I

take up article 50 when the Special Rapporteur's text was before it.

63. Mr. USHAKOV said he noted a difference in approach between the text of article 50 adopted at first reading and that proposed by Mr. Kearney. The former provided for consultations if any "question" arose concerning the "application" of the articles; the latter provided for such consultations if any "difference" arose concerning the "respective rights and obligations" of the sending State and the host State. Mr. Kearney's text was thus concerned with a difference in the interpretation of the articles and not merely with their application; hence there was no point in providing for conciliation procedure, as was done in paragraph 2, since questions relating to the interpretation of international instruments could be settled only by a competent body.

64. Mr. KEARNEY said that he himself did not see all the differences noted by Mr. Ushakov between the former text of article 50 and his new text. He had not, in fact, intended to make any drastic changes in the article. The reference to "rights and obligations" in his proposed new paragraph 1 was intended to cover both problems of interpretation and problems of application. For example, if a host State chose to place a restrictive interpretation on a clause concerning the right of entry of representatives of the sending State, that would surely affect the application of the present articles as well as their interpretation. To his way of thinking, the conciliation procedure could be followed with respect to both the interpretation and the application of the draft articles, as provided in article 66, sub-paragraph (*b*), of the Vienna Convention on the Law of Treaties.[14]

65. Mr. USHAKOV thanked Mr. Kearney for his explanation.

66. Mr. EUSTATHIADES said he welcomed Mr. Kearney's proposal, which complemented article 50 very felicitously by adding an appropriate conciliation procedure to the consultations He had only some comments of secondary importance to make on the drafting.

67. In the context of article 50, a question and a difference were not the same thing. Under the former text of the article a "question" might be either something that arose, but never attained the seriousness of a difference, or something that became a problem if the organization adopted, towards a provision of the convention, an attitude which drew different reactions from the host State and the sending State. But the word "question" could also be interpreted in the wider sense of a "difference", and to avoid wrong interpretations it might perhaps be advisable to use both words in the text and say "If any question or difference arises ...". The reason why Mr. Kearney had replaced the word "question" by "difference" was probably that his proposal provided not only for consultation machinery, but also for a conciliation procedure which could come into use when the "question" had degenerated into a "difference"; the word "difference" took on its full meaning when article 50 was read in conjunction with the proposed articles 50 *bis* and 50 *ter*. Those considerations argued in favour of using both terms in the first sentence of paragraph 1.

68. Mr. Kearney had done well to replace the words "a sending State" by "one or more sending States", for a question might concern several sending States or a difference arise between several of them and the host State. On the other hand there was no justification for replacing the words "concerning the application of the present articles" by "concerning their respective rights and obligations under the present articles". The former text covered both differences and problems for which a solution could be sought through consultation; and it also covered rights and obligations.

69. As to the drafting, since "one or more sending States" were referred to at the beginning of paragraph 1, those words should also be used later in the sentence. In paragraph 2, the subject of the first sentence should be only "any State engaged therein" and should not include "the Organization", since the latter could hardly send a written notice to its own Secretary General.

70. Mr. Kearney's draft as a whole provided for a much more complete system than the consultations under article 50 and was, in general, a well-conceived solution of the problem of settlement of disputes.

71. After a brief procedural discussion in which the CHAIRMAN, Mr. USHAKOV, Mr. ROSENNE and Mr. KEARNEY took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to await the Special Rapporteur's proposals before examining article 50 as a whole, provided that it received those proposals within a reasonable time.

It was so agreed.[15]

The meeting rose at 1 p.m.

[14] *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298 (United Nations publication, Sales No.: E.70.V.5).

[15] For resumption of the discussion see 1119th meeting, para. 81.

1116th MEETING

Wednesday, 9 June 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

later: Mr. Roberto AGO

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 and 2; A/CN.4/L.169; A/CN.4/L.170)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee, starting with article 39.

ARTICLE 39[1]

2. Mr. AGO (Chairman of the Drafting Committee) said that on mature consideration the Drafting Committee had decided to make no change in article 39, believing that in such a delicate text it was necessary to follow, to the letter, the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality.[2] The Committee had even decided against replacing the words "not being nationals", in the first phrase of the English text, by the words "who are not nationals" (A/CN.4/L.162/Rev.1).

3. The text proposed for article 39 read:

Article 39

Exemption from laws concerning acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

4. However, since article 39, like article 40, dealt with the privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff, the Drafting Committee thought it would be more logical to place article 39 after article 40, and therefore proposed that the order of the two articles should be reversed.

5. Mr. USHAKOV said he assumed that that was merely a provisional proposal, since the Drafting Committee intended to review the order of all the articles in the draft at a later stage.

6. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission provisionally approved the Drafting Committee's proposals for article 39 in the light of Mr. Ushakov's comment.

It was so agreed.[3]

PART III. *Permanent observer missions to international organizations*

7. The CHAIRMAN invited the Commission to take up Part III of the draft, concerning permanent observer missions to international organizations (A/CN.4/L.168/Add.2).

ARTICLE 52

8. Mr. AGO (Chairman of the Drafting Committee), introducing article 52, said that in paragraph 1, in order to emphasize that there must be no discrimination in the establishment of permanent observer missions, the Drafting Committee had inserted the words "and with article 75" after the words "in accordance with the rules or practice of the Organization". The Committee would consider on second reading whether a corresponding change should be made in article 6 on the establishment of permanent missions.

9. As in article 6 and for the same reasons, the Drafting Committee had replaced the words "functions set forth" by the words "functions mentioned".

10. The Committee had added a second paragraph modelled on the paragraph 2 it had added to article 6 (A/CN.4/L.168).

11. The text proposed for article 52 read:

Article 52

Establishment of permanent observer missions

1. Non-member States may, in accordance with the rules or practice of the Organization and with article 75, establish permanent observer missions for the performance of the functions mentioned in article 53.

2. The Organization shall notify the host State of the establishment of a permanent observer mission.

12. Mr. TAMMES said he could not accept the new text of article 52, for the reasons he had stated when the Commission had examined the previous text.[4] Apart from the addition of the new paragraph 2, the article was in essentials unchanged and was still ambiguous inasmuch as it might be interpreted as imposing an obligation on the organization. As the text read at present, the organization could be required to permit the establishment of permanent observer missions provided that it had no rules or practice to the contrary. The problem had been well stated by Mr. Bartoš, who had asked whether the phrase "in accordance with the rules or practice of the Organization" meant that non-member States could establish permanent observer missions if the organization permitted them to do so, or that it was for the organization to lay down the conditions governing the establishment of observer missions.[5]

13. Mr. ALBÓNICO said he did not know whether the additional words "and with article 75" meant anything in the English and French texts; in the Spanish text they were meaningless.

[1] For previous discussions see 1096th meeting, para. 77; 1098th meeting, para. 101; 1099th meeting, para. 1.

[2] United Nations, *Treaty Series*, vol. 500, p. 224.

[3] For resumption of the discussion see 1135th meeting, para. 40.

[4] See 1102nd meeting, para. 31 *et seq.*

[5] *Ibid.*, para. 53.

14. Mr. USTOR disagreed with Mr. Tammes's view that the new text of article 52 could be interpreted to mean that non-member States could compel an organization to permit them to establish permanent observer missions. The organization's rights in the matter were amply safeguarded by the phrase "in accordance with the rules or practice of the Organization and with article 75". Any remaining doubts could easily be dispelled in the commentary.

15. Mr. KEARNEY expressed dissatisfaction with the new text and particularly with the reference to article 75. Article 75, on non-discrimination, was a general article which applied to all the draft articles in the part on permanent observer missions. It was not the Commission's practice to make specific references to an article of that type; that had been made clear when it had been suggested that a reference to article 50 should be included in article 10.[6] If a reference to article 75 was accepted in article 52, there would seem to be no valid reason why such a reference should not be made in a number of other articles as well.

16. Mr. EUSTATHIADES agreed with Mr. Kearney that a general provision such as article 75, on non-discrimination, need not be expressly mentioned. In the present case, it was unnecessary to mention article 75 if the practice and rules of the organization permitted the establishment of permanent observer missions; if they did not, such a reference was even dangerous, for it would make it more difficult for organizations which did not permit the establishment of observer missions to change their policy.

17. He would not press for deletion of the reference to the rules or practice of the organization, provided that it was clearly explained in the commentary how that provision could be reconciled with the aim of making it the general practice to allow non-member States to establish permanent observer missions to international organizations.

18. Mr. USHAKOV said he doubted whether paragraph 1 could be interpreted as Mr. Tammes feared, since the establishment of a permanent observer mission, just like that of a permanent mission, was necessarily subject to the organization's consent.

19. Logically, either the reference to article 75 should be accepted, if the implicit reference to article 3 in the words "in accordance with the rules or practice of the Organization" was recognized, or all references to general provisions should be deleted. At all events, if the two references—explicit and implicit—were retained in article 52, article 6 should be amended accordingly.

20. Mr. REUTER agreed with previous speakers in finding the words "and with article 75" unacceptable.

21. Sir Humphrey WALDOCK said that, like other members, he did not think the reference to article 75 was either necessary or appropriate. It did not alter the substance of the article, since what the Commission was concerned with was the application of the principle of universality. The case of permanent observer missions presented a special problem, since it was necessary to safeguard the general position of organizations which did not have any rules or practice in the matter. Everyone could agree that the member States of an organization of a universal character should enjoy equal rights with respect to representation, but it was open to question whether non-member States should be allowed any rights at all. The real problem in such cases was, of course, essentially political and could not be solved by drafting. However, since there was nothing in the new text of article 52 to restrict the freedom of action of an organization in dealing with a non-member State, he was prepared to accept it.

22. Mr. AGO (Chairman of the Drafting Committee) said that, in appraising the wording of an article, particularly one that had to stress a number of requirements which were contradictory, but all had to be taken into consideration, it was necessary first to agree on the substance and then to see whether it was appropriately expressed. In article 52, three requirements had to be put into appropriate form. First, the will of the international organization, which was sovereign, must be respected, whether it chose to accept observer missions or not to accept them. Secondly, if the organization accepted permanent observer missions, it could make their establishment subject to certain conditions and procedures that were either defined in the rules of the organization, which was rather exceptional, or derived from its practice, which was normal. Thirdly, once an organization had agreed to accept permanent observer missions, it could not permit some States to establish them and refuse others.

23. The question was whether article 52, in its present wording, adequately reflected those three requirements. Some members feared that paragraph 1 could be interpreted to mean that the organization was obliged to accept the establishment of permanent observer missions. He did not think so. The words "in accordance with the rules or practice of the Organization" provided all the necessary safeguards, for if a non-member State wished to establish a permanent observer mission to an organization whose rules or practice did not allow it, such a mission could not be said to be established in accordance with the rules or practice of the organization. The use of those words made it quite impossible for a non-member State to establish an observer mission to an organization which did not wish it. That point should be made clear in the commentary.

24. The reference to article 75 was intended to express the idea that there must be no discrimination between non-member States. The reference was not, perhaps, superfluous, for the simple reason that the non-discrimination referred to in article 75 applied mainly to the treatment of sending States by the host State, whereas article 52 dealt with non-discrimination on the part of the organization. Perhaps it was not necessary to refer expressly to article 75 in cases where discrimination

[6] See 1090th meeting, para. 73 *et seq.* and 1091st meeting, para. 4 *et seq.*

might be practiced by the host State; but it was well to do so where it was the organization which might discriminate.

25. Article 52, as drafted, was thus a fairly satisfactory expression of the Commission's ideas and aims.

26. Mr. KEARNEY said he might not have fully understood the Chairman of the Drafting Committee, but he saw no reason to abandon a principle of drafting which the Commission had followed for a long time. Even if article 52 made no reference to article 75, there was no doubt that the latter article would continue to apply to all the draft articles on permanent observer missions.

27. Mr. REUTER said that the very clear explanations given by the Chairman of the Drafting Committee confirmed his opinion that article 52 was unacceptable. After an organization had given non-member States permission to establish permanent observer missions, the rule of non-discrimination should certainly apply as between those States, but it was impossible to accept a rule which would force organizations to choose between two alternatives: to permit all non-member States to establish permanent observer missions or to permit none. Respect for the sovereignty of the organization required that its freedom to judge for itself be protected.

28. Mr. ALCÍVAR agreed with Sir Humphrey Waldock that the problem raised in article 52 with regard to organizations, and particularly with regard to the United Nations, was a political problem. He proposed that either article 52 should include a reference to article 75 or the phrase "in accordance with the rules or practice of the Organization" should be deleted.

29. Mr. TAMMES associated himself with Mr. Reuter's remarks. The possibility of interpreting article 52 as imposing an obligation on the organization would exist only if the organization had no rules or practice in the matter; but, as was clear from the comments received from a number of organizations, many had no such rules or practice. It was, of course, possible to remove all doubt by including an appropriate reference in the commentary, but he thought it would be better to do so in the text of the article itself by using some such phrase as "in so far as this is provided for in the relevant rules of the Organization", which he had previously proposed.[7]

30. Mr. USTOR said that he could not accept Mr. Reuter's contention that an organization of a universal character could make a choice between States. In his view, the same rule should apply to non-member States as to member States: to allow organizations to discriminate by permitting some States to establish permanent observer missions and refusing others would conflict with the principle of universality to which the Commission was committed.

31. As to Mr. Kearney's objection to the reference to article 75, it should be noted that article 3, although not referred to as such, was nevertheless represented in article 52 by the words "in accordance with the rules or practice of the Organization".

32. With regard to the political content of article 52, it was true that organizations possessed a certain amount of freedom when it came to deciding whether they would or would not recognize political entities as States, but that freedom was relative and subject to the general principle of friendly relations, good faith and co-operation between States.

33. Mr. ROSENNE said that he shared the hesitation expressed by Mr. Tammes and Mr. Reuter; the new text of article 52, as presented and explained, seemed to change the whole character of permanent observer missions. He feared that the Commission was developing a tendency to include far too many rules of law in ephemeral commentaries which would disappear if the Vienna Convention on the Law of Treaties was ever properly applied.

34. It had been suggested that if the Commission accepted article 6, which permitted member States to establish permanent missions, it should also accept the same rule for application to non-member States. But that suggestion ignored the fact that before a State became a member of an organization, there was an initial process by which it became a member. However nominal the process of admission to membership in the United Nations might be today, it had still to be undergone in accordance with Article 4 of the Charter, and article 6 of the present draft articles applied only to States which had already undergone such a process.

35. He noted a slight difference between paragraph 2 of the new article 52 and article 6, paragraph 2, as provisionally approved by the Commission.[8] Article 52, paragraph 2, read: "The Organization shall notify the host State of the establishment ...", whereas article 6, paragraph 2, read: "The Organization shall notify to the host State the establishment ...". He understood the text in article 52 to mean that notification would be made after the establishment of a permanent observer mission; that had not been the meaning given to the corresponding text of article 6.

36. Mr. USHAKOV said that the sovereignty of States was subject to the rule of general international law prohibiting the practice of discrimination between States. The sovereignty of international organizations was subject to the same incontestable rule of *jus cogens*. Hence it was inconceivable that members of the Commission, who should be guided exclusively by legal and not by political considerations, should grant the organization the right to discriminate between States.

37. Mr. ALBÓNICO said that, on merely reading article 52 in its present form as a layman, he would understand it to mean that non-member States had the right to establish permanent observer missions. The phrase "in accordance with the rules or practice of the

[7] See 1102nd meeting, para. 32.

[8] See 1110th meeting, para. 18.

Organization and with article 75" was of a purely procedural, not a substantive, nature. Since a political problem was involved, he thought some explicit reference to the agreement or consent of the organization was indispensable in the article.

38. Mr. CASTAÑEDA said that non-discrimination was implicitly a rule in all international organizations. An organization was free to lay down certain conditions for membership but, if a candidate fulfilled those conditions, it could not be refused admission. That principle had been confirmed by the International Court of Justice in its advisory opinion of 3 March 1950,[9] the essence of which was that the United Nations could not deny admission to a State for any reasons other than those laid down in the Charter.

39. Mr. SETTE CÂMARA observed that, in Mr. Albónico's view, the element of consent of the organization was lacking in article 52; he, on the contrary, believed that it was present in the words "in accordance with the rules or practice of the Organization", which, as Mr. Ustor had pointed out, constituted a reference to article 3. He saw no danger that the present wording would impose an obligation on organizations to accept permanent observer missions from non-member States.

40. In his opinion, the reference to article 75 was justified for the reason given by the Chairman of the Drafting Committee. He would support the new article 52 as it stood.

41. Mr. AGO (Chairman of the Drafting Committee) said that in his previous statement he had merely tried to justify the drafting of article 52, without expressing any views on the problems of substance it raised. Some members of the Commission appeared to be mainly concerned with the substance.

42. The question raised by Mr. Tammes and Mr. Albónico related to drafting. It was indeed open to question whether the phrase "in accordance with the rules or practice of the Organization" made it sufficiently clear that the organization was not obliged to accept permanent observer missions. He would have no objection to changing that phrase if the Commission could find a better one; but it would then be necessary to amend article 6 accordingly.

43. Mr. Kearney had also raised a question of drafting when he had expressed the opinion that the reference to article 75 should be deleted because that article was a general provision applicable to the whole draft, which therefore need not be mentioned expressly. However, Mr. Ushakov's remarks concerning the implicit reference to article 3 suggested that there were reasons for retaining the reference. He would have been tempted to agree with Mr. Kearney purely on the basis of drafting, but Mr. Reuter had advocated the deletion of the reference on grounds of substance, namely, the need to uphold the organization's freedom to judge for itself.

44. It was no use asking the Drafting Committee to revise a text when the Commission had not decided exactly what it was to express. The Commission should decide whether the principle of non-discrimination was or was not applicable to the establishment of permanent observer missions by non-member States. Once that question had been settled, the choice of wording would be easy.

45. Mr. REUTER said that he had not intended to take a position on the scope of a rule of non-discrimination in general international law. He had simply meant to say that the real question was who was to decide whether a refusal did or did not amount to discrimination in a particular case. In his opinion it was clearly the organization itself which should decide, and it was in that connexion that he had referred to its sovereignty. He could not imagine that the Commission proposed to change the rule on admission to membership in the United Nations laid down in Article 4 of the Charter; nor could he imagine that the Organization had fewer rights in regard to non-member States than it had in regard to Member States.

46. Mr. ROSENNE asked whether the Chairman of the Drafting Committee could explain the relationship in time between articles 75 and 52. Specifically, what was the point in time at which the rule of non-discrimination came into operation: was it the moment when a permanent observer mission was established by the sending State, or did the rule apply retroactively or in a timeless way?

47. Mr. AGO (Chairman of the Drafting Committee) said that that was a very delicate question and deserved careful study. At first sight, it seemed that the rule of non-discrimination should apply from the moment when the organization decided to accept permanent observer missions; but that could not properly be called retroactive application. For a State which was not a member of an organization could request permission to establish a permanent observer mission at a time when the organization did not wish such missions to be established. Subsequently, that State might cease to exist, or become a member of the organization or decide not to establish a permanent observer mission. If it was still in existence, was still not a member and still wished to establish a mission when the organization decided to accept such missions, the State would probably make a new application to the organization.

48. Mr. NAGENDRA SINGH endorsed the explanations given by the Chairman of the Drafting Committee. But since article 75, on non-discrimination, applied to all the draft articles on permanent observer missions, he saw no reason to mention it specially in article 52. If the reference was nevertheless retained, the words "and with article 75" should be replaced by some such phrase as "and subject to the provisions of article 75".

49. Mr. EUSTATHIADES said that, having commented on the drafting of article 52, he wished to add three remarks on the substance. First, it was not clear whether the article simply reflected existing practice or whether it was designed to give a general direction to the practice of organizations by establishing a rule to be followed in the future.

[9] *I.C.J. Reports 1950*, p. 4.

50. Secondly, neither article 52 nor the commentary to it specified which organ of the organization was to give or refuse permission for the establishment of a mission, or on what criteria its decision would be based. The article referred only to the rules or practice of the organization; but there might be no rule and no uniform practice concerning the establishment of observer missions.

51. Thirdly, it would not be appropriate for a provision in a convention binding certain States to require organizations—which might mean their secretariats—to take a decision on a political matter and to make them responsible for settling such a delicate question as whether a given entity constituted a State. In some cases, however, an organization would have to decide that question because, as various members of the Commission had pointed out, only States could establish permanent observer missions. Since article 52 did not do so, each organization could be expected to establish appropriate procedure for the acceptance of observer missions.

52. Mr. KEARNEY observed that the discussion had revealed some concern at the difficulty of determining the meaning of paragraph 1. He proposed that the words "in accordance with the rules or practice of the Organization and with article 75" should be replaced by the words "when authorized by the Organization". That change would have three beneficial results. The first was that the organization would be left to determine how the establishment of a permanent observer mission was to be authorized. The second was that any claim that a reference to article 75 was needed in article 52 would be disposed of. The third was that the confusion as to what constituted the "practice" of the organization would be removed.

53. In reply to a question by Mr. Ushakov, he said that his proposal did not affect article 6. He saw no connexion between article 6 and article 52. The constitution of an international organization invariably contained rules on the selection of its members; the reference to "Member States" in article 6 was an allusion to an established fact. The position with regard to article 52 was entirely different, in that the constituent instrument of no international organization contained provisions relating to non-member States.

54. Mr. USHAKOV said that Mr. Kearney's amendment should be considered by the Drafting Committee. For his part he thought that if a non-member State had to obtain permission to establish a permanent observer mission, a member State should have to obtain permission to establish a permanent mission. Mr. Kearney's amendment should therefore apply to article 6 as well as article 52.

55. The CHAIRMAN noted that article 52 had given rise to differences of opinion. He suggested that the article should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[10]

56. Mr. TAMMES reminded the Commission that he had submitted an amendment to article 52.

57. The CHAIRMAN said that the Drafting Committee would take that amendment into account.

Mr. Ago, First Vice-Chairman, took the Chair.

ARTICLE 53

58. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 53 had been completely redrafted and simplified, but the substance was not affected. The text proposed by the Drafting Committee read:

Article 53

Functions of a permanent observer mission

The functions of a permanent observer mission consist *inter alia* in:

(*a*) ensuring the representation of the sending State to the Organization and maintaining liaison with it;

(*b*) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

(*c*) promoting co-operation with the Organization and, when required, negotiating with it.

59. Mr. USHAKOV reminded the Commission that in article 7, on the functions of a permanent mission, it had replaced the words "ensuring representation" by the words "ensuring the representation".[11]

60. The CHAIRMAN,* speaking as a member of the Commission, expressed regret at that change. The representation of a State to an organization was not provided exclusively by its permanent mission. But since the change had been made in article 7, it had had to be made in article 53 as well.

61. Mr. REUTER said he thought the expression "ensuring the representation" was correct in article 53, but that in article 7 it should be "ensuring representation". However, he deferred to the Commission's decision.

62. Mr. ALBÓNICO welcomed the Drafting Committee's version of article 53 as an improvement on the former text.

63. Mr. KEARNEY noted that the first part of sub-paragraph (*a*) of the Drafting Committee's text of article 53 was identical with sub-paragraph (*a*) of article 7 as provisionally approved by the Commission. The former difference between the two texts had served the purpose of making a minor distinction between the representation of a non-member State by its permanent observer mission and the representation of a member State by its permanent mission.

64. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that although the wording of

[10] For resumption of the discussion see 1118th meeting, para. 1.

[11] See 1110th meeting, paras. 47 and 62.

* Mr. Ago.

the opening phrase was now the same in both articles, article 53 mentioned the function of maintaining liaison with the organization in sub-paragraph (*a*), whereas article 7 mentioned that function in sub-paragraph (*b*). Apart from that, it had seemed that the difference between the functions of permanent missions and those of permanent observer missions should be brought out more by the commentaries than by the texts of articles 7 and 53.

65. Mr. KEARNEY observed that the difference in the organization of the sub-paragraphs did not really establish a significant distinction between the two types of representation. The function of representation would still be defined in the same terms for both types of mission, and he saw no justification for placing permanent observer missions on a par with permanent missions in that respect.

66. The CHAIRMAN,* speaking as a member of the Commission, said that the character of the representation was the same in both cases, although the permanent mission of a member State normally acted more frequently in its representative capacity than a permanent observer mission. The person appointed by the sending State was always a representative, whether he was at the head of a permanent mission or of a permanent observer mission.

67. Mr. KEARNEY reminded the Commission that, in its discussions on article 7, attention had been drawn to the difference between the representation of a member State "in" the organization by a permanent mission and the representation of a non-member State "at" the organization by a permanent observer mission.[12] That difference in wording had established a distinction which had now been lost through the use of the same preposition "to" in sub-paragraph (*a*) of both article 7 and article 53.

68. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that it was not possible to use the preposition "in"; it had been pointed out in discussion that a permanent mission represented the sending State "at" the organization, but never "in" the organization. In certain cases, the permanent representative might be authorized to represent the sending State "in" an organ of the organization, but that did not affect the position so far as the permanent mission was concerned. It would be regrettable if, in order to try to make a distinction between permanent missions and permanent observer missions, the erroneous concept of representation "in" the organization by a permanent mission were introduced into article 7.

69. Mr. USHAKOV considered that the point raised by Mr. Kearney was a matter of substance, since the representation of a member State and that of a non-member State were different in purpose. The same difference was to be found in bilateral diplomacy, between the purpose of an ordinary diplomatic mission and that of a special mission. A special mission represented the sending State only for certain specific purposes, as could be seen from article 1, sub-paragraph (*a*), of the Convention on Special Missions.[13] The commentary to article 53 should therefore make it clear that the purpose of a permanent mission and that of a permanent observer mission were not the same, although they both had a representative character.

70. Mr. REUTER said that a permanent observer mission had a monopoly of representation, which the permanent mission of a member State did not. That paradoxical situation probably explained the differences in wording between article 7 and article 53.

71. Sir Humphrey WALDOCK reminded the Commission that the text of article 53 referred to the Drafting Committee had used the words "at the Organization"; on the whole he preferred that phrase to the formula "to the Organization" now proposed by the Drafting Committee. However, he did not attach great importance to the use of one preposition rather than the other, and he noted that the corresponding French phrase "*auprès de l'Organisation*" had been given preference throughout the discussions. In his opinion the preposition used did not reflect on the character of the representation, which depended essentially on the functions performed by the mission concerned.

72. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that to the best of his recollection Sir Humphrey Waldock had explained in the Drafting Committee that the preposition "at" was the equivalent of the French "*auprès de*".

73. Mr. SETTE CÂMARA agreed with Mr. Kearney that the use of similar language in articles 7 and 53 would make it appear that the permanent mission and the permanent observer mission had the same functions. In reality, the main function of a permanent observer mission was that defined in article 53, sub-paragraph (*b*): namely, "ascertaining activities in the Organization and reporting thereon to the Government of the sending State". The function of representation, defined in sub-paragraph (*a*), did not have the same importance; that difference from a permanent mission was significant. He therefore suggested that the order of sub-paragraphs (*a*) and (*b*) in article 53 should be reversed. The resulting difference from article 7 would establish the necessary distinction between the functions of permanent missions and those of permanent observer missions.

74. Mr. ROSENNE pointed out that the character of representation depended not only on the functions of the mission concerned, but also on the sending State which the mission represented. In practice certain permanent observer missions, both at Geneva and in New York, had much greater representative activities than certain permanent missions. There were permanent missions whose activities could be quite nominal.

75. He did not believe that the use of the preposition "to" instead of "at" or "in" was very important. On the

* Mr. Ago.

[12] See 1089th meeting, para. 60 *et seq.* and 1110th meeting, para. 34 *et seq.*

[13] See General Assembly resolution 2530 (XXIV), Annex.

other hand, the introduction of the definite article "the" before the word "representation" made some difference to the meaning of the text. In its present form, he thought that article 53, sub-paragraph (*a*), did not adequately reflect the elements which, taken together, distinguished a permanent observer mission from a permanent mission.

76. As he recollected it, Mr. Yasseen's proposal that the article "the" should be inserted before the word "representation" in article 7, sub-paragraph (*a*), had originally related to the French text. The Chairman had summarized the discussion in both English and French, and had referred to the insertion of the definite article "the" in the English text; article 7 had then been provisionally approved with that change.[14] As a matter of language, the use of the definite article "the" in the English text of both article 7 and article 53 needed further scrutiny; it affected the structure of the sentence differently from the use of the article "*la*" in French.

77. Sir Humphrey WALDOCK agreed that in English it was better to say "Ensuring representation" than "Ensuring the representation", but he did not feel that there was any real difference in meaning. The changes which had been made in article 53 were simply the result of changes approved for article 7.

78. Mr. EUSTATHIADES observed that the difference between the expressions "maintaining the necessary liaison" and "maintaining liaison", used in articles 7 and 53 respectively, was certainly justified. The use of the expression "ensuring the representation" in both articles should not give rise to any difficulty because the commentaries could explain that the representation of a State by its mission did not preclude representation by other means.

The meeting rose at 1.5 p.m.

[14] See 1110th meeting, paras. 47 and 62.

1117th MEETING

Monday, 14 June 1971, at 3.5 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 6; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 53 (Functions of a permanent observer mission)
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 53 as proposed by the Drafting Committee.

2. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee now proposed that sub-paragraph (*a*) of article 53 should be worded differently from sub-paragraph (*a*) of article 7 (A/CN.4/L.168), so as to reflect the difference between the functions of permanent missions and those of permanent observer missions, as several members of the Commission had suggested. The new text read:

> "(*a*) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organization;".

The Drafting Committee left it to the English-speaking members to decide whether the definite article should be used before the word "representation" in the English text.

3. Mr. YASSEEN said he accepted the new wording, which removed the doubt about the scope of representation of a sending State by a permanent observer mission.

4. Mr. NAGENDRA SINGH said he agreed with Mr. Yasseen; the revised text was a distinct improvement.

5. Sir Humphrey WALDOCK said that if the French-speaking members of the Commission wished to use the words "*la représentation*", he could accept the inclusion of the word "the" before the word "representation" in the English version. But if the wording in French was to be "*une représentation*", then the English word "representation" should not be preceded by any article.

6. Mr. ALBÓNICO said that the text proposed by the Drafting Committee for sub-paragraph (*a*) was a marked improvement from the point of view of drafting. He still thought, however, that from the point of view of substance, there was a fundamental distinction between the institution of permanent missions, as described in article 7, and that of permanent observer missions, and that that distinction had not been brought out with sufficient clarity.

7. Mr. EUSTATHIADES said that the definite article should be retained in the French version, because it showed the difference between a permanent mission, which might not provide the only representation of the

sending State, and a permanent observer mission, which did provide the only representation.

8. Mr. ALCÍVAR said that in the Spanish text the definite article "*la*" was absolutely necessary.

9. Mr. REUTER said he approved of the text as it stood. If the Commission wished to make the distinction between permanent missions and permanent observer missions still clearer, it should amend sub-paragraph (*c*). To place those missions on an equal footing with respect to co-operation with the organization was possible, but questionable. In the case of permanent missions, such co-operation was the necessary, general and obvious consequence of participating in the work of the organization, whereas in the case of permanent observer missions it was neither so necessary nor so general and, above all, it was intermittent. It might therefore be better to find some other wording for sub-paragraph (*c*).

10. Sir Humphrey WALDOCK said that one of the functions of a permanent mission, as stated in article 7, sub-paragraph (*e*), was "promoting co-operation for the realization of the purposes and principles of the Organization". There was a real difference, however, between that function, as performed by the permanent mission of a member of the organization, and the function of "promoting co-operation with the Organization" referred to in article 53, sub-paragraph (*c*).

11. Mr. USHAKOV said he agreed with Mr. Eustathiades. The Commission must decide whether it wished to bring out a difference between permanent missions and permanent observer missions and to amend articles 7 and 53 accordingly.

12. Mr. KEARNEY said he was not sure that the distinction between the use of the definite and the indefinite article was as clear in English as it was in French. In view of the explanations which had been given, however, he thought that it would be desirable to follow the French text fairly closely and to say "the representation".

13. The CHAIRMAN asked Mr. Albónico whether he had any specific proposals to put forward that would lessen the apparent resemblance between article 7 and article 53.

14. Mr. ALBÓNICO said that he had no actual proposal to make; but he thought the distinction between a permanent mission and a permanent observer mission, as it applied to article 53, sub-paragraph (*a*), should be emphasized in the commentary.

15. Mr. USTOR noted that article 53 referred to "maintaining liaison", while article 7 used the words "maintaining the necessary liaison". The Commission should consider the distinction between those two provisions when deciding on the final draft.

16. Mr. SETTE CÂMARA said he had no objection to the Drafting Committee's text, but he agreed with Mr. Albónico that the commentary should stress the difference between the functions of a permanent mission and those of a permanent observer mission.

17. The CHAIRMAN, speaking as a member of the Commission, drew attention to the distinction which should be made between permanent representatives in New York and permanent representatives at Geneva. In New York, permanent representatives sat in all organs of which their country was a member, and the permanent mission did not have to notify the organization. Moreover, the heads of permanent missions were usually diplomats of high rank. The situation was different at Geneva. But since the draft dealt with relations between States and international organizations, and since the United Nations was the most important international organization, the text of the articles should not give the impression that the Commission was unaware of the real situation prevailing in New York.

18. Mr. AGO (Chairman of the Drafting Committee), referring to the remark made by Mr. Eustathiades, said he did not think it was correct to say that a permanent observer mission carried out all forms of representation to the organization; there were also observers, or observer delegations, which were not part of the mission. It would therefore be preferable to use the definite article in both the English and the French texts of articles 7 and 53.

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission was prepared to approve article 53 in the form proposed by the Drafting Committee.

It was so agreed.[1]

ARTICLE 34 (Settlement of civil claims)[2]

20. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that the Drafting Committee had proposed that article 34, which imposed on the sending State the obligation to waive immunity whenever that could be done without impeding the performance of the functions of the permanent mission, should be deleted. The Committee had further suggested that those responsible for establishing the final text of the articles might adopt a resolution similar to General Assembly resolution 2531 (XXIV), on the settlement of civil claims.[3] But since those proposals had deeply divided the Commission, most members being in favour of establishing an obligation and the Commission as a whole regretting the need to discard certain ideas embodied in the text of the article, the Drafting Committee now proposed a compromise solution consisting in the replacement of article 34 by a new paragraph 5 to be added to article 33, on waiver of immunity. The new provision did not establish an obligation to waive immunity, but it did impose on the sending State the duty to use its best endeavours to bring about a just settlement of the case if it was unwilling to waive immunity.

21. The text proposed for the new paragraph read:

"5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in

[1] For resumption of the discussion see 1132nd meeting, para. 68.

[2] For previous discussions see 1095th meeting, para. 14; 1096th meeting, para. 1; 1113th meeting, para. 71.

[3] See 1113th meeting, para. 71.

respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case."

22. Mr. YASSEEN said he was against the new solution proposed by the Drafting Committee. He was in favour of the method adopted by the Vienna Conference on Diplomatic Intercourse and Immunities[4] and chosen by the General Assembly for the Convention on Special Missions. A resolution would be a perfectly adequate means of expressing the idea that the sending State had a duty to make special efforts to settle claims.

23. Mr. USHAKOV said that, in his opinion, the compromise proposed by the Drafting Committee was acceptable, since the text stated an already existing rule of customary law, that States must do their utmost to bring about a just settlement of all disputes, whatever their nature. The Commission might therefore adopt the proposal; by so doing it might succeed in proposing to States a solution more acceptable than that chosen in the case of the Convention on Diplomatic Relations and the Conventions on Special Missions.

24. Mr. REUTER said he endorsed Mr. Ushakov's comments and supported the solution proposed by the Drafting Committee. He would, however, like to point out to Mr. Ago, who was Special Rapporteur on State responsibility, that by replacing article 34 by a new paragraph 5 added to article 33, the Drafting Committee was replacing an obligation relating to a result by an obligation relating to conduct.

25. Mr. CASTAÑEDA said he was not satisfied with the substance of article 34, the wording of which was far too categorical. He was prepared to accept the Drafting Committee's proposal because it corresponded more closely to the actual practice of international organizations.

26. Mr. SETTE CÂMARA said he was glad that the Drafting Committee had abandoned the formula used in article 34, which imposed upon States a general and *a priori* obligation to waive immunity. He agreed with Mr. Ushakov and Mr. Castañeda that the new paragraph 5 of article 33 was a very skilful compromise.

27. Mr. ALBÓNICO said that he too supported the Drafting Committee's proposal. States were naturally jealous about the immunities of their representatives and in the new formula there was a satisfactory balance between the rights of the host State, the sending State and the individuals concerned.

28. Mr. ROSENNE said that in the light of the full history of resolution II on consideration of civil claims adopted by the United Nations Conference on Diplomatic Intercourse and Immunities,[5] he would regret the disappearance of article 34, which stated the law on the matter as he understood it. He did not think that article had such far-reaching implications as some speakers had suggested. However, he was prepared to accept the Drafting Committee's proposal as a compromise which would give more consideration to the position of injured persons than had originally been envisaged at the Vienna Conference.

29. Mr. CASTRÉN said that, like several other members of the Commission, he thought the solution proposed by the Drafting Committee was an acceptable compromise. It was something more than a resolution, but less than the text of article 34, which would probably not have been accepted by a plenipotentiary conference. To require that the Sending State should use its best endeavours to bring about a settlement if it was unwilling to waive immunity was a reasonable and fair solution.

30. The CHAIRMAN said that if there was no objection he would take it that, although opinions were divided, the Commission was prepared to approve the replacement of article 34 by the new paragraph 5 of article 33 proposed by the Drafting Committee.

It was so agreed.[6]

ARTICLE 25 (Inviolability of the premises)

31. Mr. AGO (Chairman of the Drafting Committee) said that the Commission's reception of the Drafting Committee's first proposals for article 25[7] had discouraged it from attempting to produce a new text. The Committee therefore proposed that the Commission should revert to the wording it had adopted in 1969.[8] That text was far from perfect, but it was likely to be approved by a conference of plenipotentiaries and it had the advantage of having been approved not only by the Commission, but also, in another context, by a large majority in the General Assembly.

32. Mr. ALCÍVAR said he wished to state for the record that he was entirely opposed to the last sentence of paragraph 1 of article 25.

33. Mr. ALBÓNICO said he was prepared to accept article 25, subject to the deletion, in the last sentence of paragraph 1, of the words "and only in the event that it has not been possible to obtain the express consent of the permanent representative".

34. Mr. KEARNEY said that, although he was not satisfied with the article, he was prepared to accept it provisionally, subject to the deletion proposed by Mr. Albónico.

35. Mr. CASTAÑEDA said he fully supported the deletion proposed by Mr. Albónico. The hypothesis posited in the final clause of the last sentence of paragraph 1 was both improbable and illogical.

36. Mr. USHAKOV observed that opinion was still deeply divided on the Drafting Committee's proposal. However, there was no reason why the Commission should not provisionally adopt a compromise text which had already been endorsed by the General Assembly

[4] United Nations, *Treaty Series*, vol. 500, pp. 218-220.

[5] *Ibid.*

[6] For resumption of the discussion see 1133rd meeting, para. 26.

[7] See 1112th meeting, para. 42 *et seq.*

[8] See 1093rd meeting, para. 47.

in the Convention on Special Missions.[9] When the time came to adopt article 25 finally, members of the Commission would still be able to propose amendments to the text.

37. Mr. CASTRÉN said he supported the solution proposed by the Drafting Committee, although he thought that the Committee's first text was preferable, because it was more precise. He acknowledged that it was wiser to keep to a text which had already been accepted in an earlier convention.

38. Mr. REUTER said he would accept any text which might be proposed, since it was impossible to violate any rule of international law written or unwritten, when saving human lives.

39. Mr. NAGENDRA SINGH said he agreed with Mr. Ushakov that the Commission should provisionally approve article 25 as it stood.

40. The CHAIRMAN proposed that the Commission should provisionally approve article 25 on the understanding that members would be able to propose amendments when the time came to take a final decision on the article.

It was so agreed.[10]

ARTICLE 32 (Immunity from jurisdiction)

41. Mr. AGO (Chairman of the Drafting Committee) said that the only change the Drafting Committee had made in its previous text of article 32[11] was in paragraph 1 (*d*). In view of the possibility that, under the laws in force in certain countries, an insurance company might—as some members of the Commission feared—be able to invoke the immunity from jurisdiction of a person causing an accident as a ground for refusing to compensate the victim, the Committee had replaced the words "and only if those damages are not covered by insurance" by the words "where those damages are not recoverable from insurance", so that paragraph 1 (*d*) read:

> "(*d*) an action for damages arising out of an accident caused by a vehicle used by the person in question outside the exercise of the functions of the permanent mission where those damages are not recoverable from insurance."

42. Mr. ALBÓNICO pointed out that the provisions of paragraph 1 (*d*) stated an exception to the basic principle of immunity from jurisdiction laid down in article 32. The concluding words, "where those damages are not recoverable from insurance", were intended to provide for an exception to that exception, and would preclude an action against a member of the mission if the damages could be recovered from insurance.

43. As he saw it, the intention both of the Commission and of the Drafting Committee had been to lay down a condition for the admissibility of an action against the person concerned. If an insurance policy in force covered the damage, no action would lie.

44. He proposed that, in the Spanish text, the concluding proviso, which at present read "*siempre que esos daños no sean recobrables mediante seguro*" should be amended to read "*y siempre que esos daños no hayan sido reparados previamente mediante seguro*" ("and where those damages have not been previously compensated by insurance"). It would thus be made clear that if the insurance company concerned raised any difficulty, the injured party could bring an action for damages against the member of the permanent mission concerned.

45. Mr. ALCÍVAR said he agreed with the previous speaker. In Spanish, the conjunction "*y*" was absolutely necessary. The rest of Mr. Albónico's amendment also improved the Spanish text and he would be prepared to accept it, although in the Drafting Committee he had accepted the Spanish version now before the Commission (A/CN.4/L.170/Add.1) because it was an exact translation of the English.

46. Mr. USHAKOV said that the text of paragraph 1 (*d*) was a compromise which the Drafting Committee had reached on second reading, in the light of the comments made in the Commission. Although the present wording was an improvement on the corresponding provision of the Convention on Special Missions, he reserved his position. The Commission had decided to add to article 33 a new paragraph 5 concerning the efforts to be made by the sending State to bring about the settlement of claims, as a result of which paragraph 1 (*d*) of article 32 might later be deleted.

47. Mr. KEARNEY said he would have no objection to replacing the English text of the concluding words of paragraph 1 (*d*) by the words: "and where those damages have not been previously recovered from insurance". That wording corresponded to the amendment proposed in Spanish by Mr. Albónico and expressed what was intended more precisely. The idea which the Drafting Committee had wished to convey was that, if an insurance existed, the injured party must first attempt to obtain payment of damages from the insurance company; if he did not obtain it, he could then bring an action against the member of the permanent mission concerned.

48. Mr. AGO said he thought the word "*recouvré*" was perfectly satisfactory in the French version.

49. Mr. ALBÓNICO said that the main point of his proposal was the inclusion of the adverb "previously". If the injured party was unable to obtain payment from the insurance company, the door would be open for action in court.

50. Sir Humphrey WALDOCK said that the idea behind the concluding proviso of paragraph 1 (*d*) was not an easy one to express. The corresponding provision, article 31, paragraph 2 (*d*), of the Convention on Special Missions was not qualified by any reference to insurance. The Commission had taken the view that a provision

[9] See General Assembly resolution 2530 (XXIV), Annex, article 25.

[10] For resumption of the discussion see 1132nd meeting, para. 136.

[11] See 1113th meeting, para. 37.

on those lines would be too strict and that the right of action should not arise if the damages arising out of an accident caused by a vehicle could be recovered from insurance. It was for that reason that the Drafting Committee had accepted the concluding proviso of paragraph 1 (*d*): "where those damages are not recoverable from insurance". The effect of that proviso would be the same if the word "where" was replaced by the word "if".

51. Mr. ALCÍVAR said that, in the Spanish text, the word "*recuperados*" would be better than "*recobrables*". The word "*previamente*", though not essential, would make the meaning of the Spanish text clearer.

52. Mr. USHAKOV said there was no need to add the word "*auparavant*" in the French text, since the conjunction "*si*" conveyed an idea of anteriority.

53. Mr. ALBÓNICO said that, in Spanish, the word "*siempre*", like the word "*si*" in French, indicated a condition. That condition, however, could be interpreted in two ways. It could be interpreted as relating to admissibility, in which case no action would lie if an insurance policy covered the damage. But it could also be interpreted as a requirement that the injured party should institute proceedings against the insurance company and exhaust all existing remedies before action could be taken against the member of the mission concerned.

54. Mr. YASSEEN said he approved of the French text, but thought the other versions were not exactly in line with it. In particular, the words "recoverable" and "damages" did not seem to correspond to the terms "*recouvré*" and "*dédommagement*".

55. Sir Humphrey WALDOCK said that in the Drafting Committee he himself had at first suggested the formula "if those damages cannot be recovered from insurance". But wording on those lines would give rise precisely to the difficulties mentioned by Mr. Albónico. If an insurance policy existed, the injured party would start negotiations with the insurance company concerned. The company might then object that its policy holder was not entirely to blame for the accident and that the other driver involved was partly at fault. The question would then arise whether an action against the member of the mission concerned would be possible in such a case. He was not at all certain of the answer to be given to that question on the basis of the French text.

56. Mr. REUTER said that the word "recoverable" was perhaps satisfactory in the English text, but in French not everything which was "*recouvrable*" was "*recouvré*".

57. Mr. USHAKOV proposed that it should be explained in the commentary how paragraph 1 (*d*) was to be interpreted. In the Drafting Committee's view, the provision meant that if the insurance company refused to pay the damages, the person responsible for the accident should take proceedings against it, and that it was only if those proceedings failed that a civil action could be brought against him.

58. Mr. ROSENNE said that, after listening to the discussion, he was not at all certain that the English text of the concluding proviso was clear.

59. Mr. KEARNEY asked whether it would be acceptable in French to introduce the adverb "previously", so as to make the sequence of operations clearer.

60. Mr. REUTER said he agreed with Mr. Ushakov that the wording proposed by the Drafting Committee was clear enough. Paragraph 1 (*d*) contained a prior condition that all the legal remedies against the insurance company must first have been exhausted. It would be impossible to deal in the commentary with every imaginable hypothesis relating to those remedies in a particular system of law. If the courts declared that proceedings could not be taken against the insurance company under the national law, damages could not be recovered from insurance. If the courts did agree to hear the case, they might not order the insurance company to pay the total damages, but might find that the plaintiff had a share of the responsibility. Such a ruling would indicate that an action taken direct against the person causing the accident had no greater chance of success.

61. Mr. ROSENNE said he was opposed to introducing the adverb "previously", which might well make paragraph 1 (*d*) self-contradictory. In many legal systems, if financial reparation was made, no action for damages would lie.

62. Mr. AGO said that it would be inadvisable to insert the word "*auparavant*" in the French text. The last clause of paragraph 1 (*d*) contained a legal as well as a time element. An action could be brought direct against the person causing the damage only if he was not insured, or if he was insured but the claim against the insurance company had failed, for legal or other reasons. The provision seemed reasonably clear.

63. Sir Humphrey WALDOCK said that the question was not a purely linguistic one. As far as English legal drafting was concerned, the formula "are not recoverable" was the appropriate one to use. If that formula were to be replaced by the words "cannot be recovered", the concluding proviso might be interpreted as amounting to a requirement of exhaustion of remedies as a precondition for the action envisaged in the main clause of paragraph 1 (*d*).

64. Mr. USHAKOV observed that the French and English texts seemed to be generally acceptable. He suggested that the Spanish-speaking members of the Commission should bring the Spanish text into line with the others.

65. Mr. EUSTATHIADES said he was still in favour of making paragraph 1 (*d*) refer expressly to vessels and aircraft. Article 32 was based on the corresponding provisions of the Vienna Convention on Diplomatic Relations and the Convention on Special Missions, neither of which referred to vessels or aircraft; but article 43 of the Vienna Convention on Consular Relations[12] did cover cases in which an accident was caused by a vessel

[12] United Nations, *Treaty Series*, vol. 596, p. 298.

or an aircraft. Although such cases might seem to be rare at present, they should either be mentioned in the article itself or be referred to in the commentary.

66. Mr. USHAKOV said his impression was that article 43 of the Vienna Convention on Consular Relations referred to vessels and aircraft of the sending State. Article 32 of the present draft, on the other hand, referred to vehicles owned by the permanent representative or a member of the diplomatic staff of the permanent mission in his personal capacity. Very few States at present allowed the persons mentioned in article 32 to use vessels or aircraft for private purposes, so that the cases covered by Mr. Eustathiades's proposal would be quite exceptional.

67. The CHAIRMAN said that, if there were no objection, he would take it that the Commission provisionally approved the English and French texts of article 32 as proposed, on the understanding that the Drafting Committee would improve the Spanish text of paragraph 1 (*d*), Mr. Eustathiades's remarks would be taken into consideration in drafting the commentary to article 32.

It was so agreed.[13]

The meeting rose at 6 p.m.

[13] For resumption of the discussion see 1133rd meeting, para. 20.

1118th MEETING

Tuesday, 15 June 1971, at 11.55 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 52

1. The CHAIRMAN invited the Commission to consider article 52, which had been referred back to the Drafting Committee.[1]

2. Mr. AGO (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 52:

Article 52

Establishment of permanent observer missions

1. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 53.

2. The Organization shall notify to the host State the establishment of a permanent observer mission.

3. The Committee recommended that the Commission should use a similar wording *mutatis mutandis*, in article 6, on the establishment of permanent missions.

4. Mr. ALBÓNICO said he welcomed the Drafting Committee's new wording of article 52, paragraph 1, and article 6, paragraph 1, which met the wish of several members that the consent of the organization should be required for the establishment of a permanent observer mission or a permanent mission.

5. Mr. NAGENDRA SINGH also supported the Drafting Committee's new text of articles 52 and 6.

6. Mr. ROSENNE said he did not know of any international organization which had rules on the establishment of either permanent observer missions or permanent missions. In most cases it was a matter of practice and of decisions taken independently of the constitution and rules of the organization.

7. Mr. USHAKOV said that in drafting the new article 52 the Drafting Committee had been guided by Mr. Tammes's proposal[2] and assumed that the words "rules of the Organization" could also include rules established by practice. The application of the provisions of paragraph 1 would therefore depend on the interpretation given to those rules by each organization. Since practice had no binding force, the Drafting Committee had preferred not to mention it.

8. Mr. AGO (Chairman of the Drafting Committee) said that Mr. Rosenne had raised a very pertinent question. Mr. Rosenne thought it would be impossible to establish a mission of any kind if the expression "rules of the Organization" had to be taken as meaning only written rules, since no organization had written rules on the establishment of missions. He himself would be inclined to think that, on the contrary, if the establishment of missions was not expressly prohibited, that meant that it was always permitted. Nevertheless, the problem did exist, and the Drafting Committee had intended the rules of the organization to include its practice. Paragraph (5) of the commentary to article 3

[1] See 1116th meeting, paras. 8-55.

[2] *Ibid.*, para. 29.

stated that "The expression relevant rules of the Organization... is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization."[3] Nevertheless, as the commentary did not have the same force as the text of the articles, it might be well to specify in the definitions that rules included practice, as was the case in article 52.

9. Mr. ROSENNE said he would welcome a report by the Drafting Committee on the suggestion that there should be a closer examination of the term "rules" and on the possibility of including a definition of that term in article 1.

10. He found the proviso "if the rules of the Organization so admit" rather too strong, at least in the English version. The use of the words "so admit" would make the clause liable to several interpretations. The intention appeared to be to refer rather to the organization's permission. He would, however, be glad to hear the views of the other English-speaking members on that point.

11. Mr. BARTOŠ said that the point raised by Mr. Rosenne was very important and should be dealt with in the text of the article. Some resolutions of the General Assembly were regarded as constitutional in character: the question of special missions, for instance, had been settled by two resolutions of that kind.[4] But there were also rules of procedure of the Security Council, which laid down certain rules on the representation of governments through delegations to the Council. Mr. Rosenne had therefore been right to raise the question whether the expression "rules of the Organization" was intended to mean constitutional rules, quasi-constitutional rules or mere practice, which could be changed as the organization wished, without reference to any superior body. It would also be advisable to ascertain whether practice, once established, was binding on the organization.

12. Mr. EUSTATHIADES said it was understandable that the new text proposed by the Drafting Committee should have elicited the question put by Mr. Rosenne, but the explanations given by Mr. Ushakov and Mr. Ago dispelled all doubts. The Commission still had to decide, however, whether the word "practice" should be restored to the text or whether an explanation in the commentary would suffice. He himself would prefer to have the reference to practice put back in the text, though it was not a matter of great importance, since the commentary would explain that the rules of the organization included its practice. In any event, the new text clearly stipulated that the establishment of a non-permanent observer mission by a non-member State was an automatically enforceable right. But that left unsettled the question of the competence of the organization's secretariat to enquire whether the "non-member" was a State or not, and no organ other than the secretariat was mentioned as being empowered to oppose the establishment of a permanent observer mission.

13. Mr. KEARNEY said it was important that the draft should be consistent. In article 3, the expression "relevant rules of the Organization" had been used; that expression had been taken from article 5 of the Vienna Convention on the Law of Treaties.[5]

14. One of the Drafting Committee's reasons for referring, in article 52, only to the "rules" of the organization, rather than to its "rules or practice", was the need for consistency. If the Commission reverted to the formulation of article 52 adopted at the first reading,[6] it would give the impression that it intended to establish some distinction between articles 3 and 52; moreover, a statement in the definitions article that rules invariably included practice might not be accurate. The relationship between such a definition and the wording of the Convention on the Law of Treaties also had to be borne in mind, since complicated questions of interpretation might arise.

15. Sir Humphrey WALDOCK said he fully agreed with Mr. Kearney. In the Drafting Committee he had advocated the omission of a reference to the practice, as distinct from the rules, of the organization, partly in order not to raise problems of interpretation of the analogous formula in the Vienna Convention on the Law of Treaties.

16. During its work on the law of treaties, the Commission had considered whether it should include some definition of the rules of an organization; but it had reached the conclusion that that was not desirable, as the question seemed to belong rather to the law of international organizations.

17. The Commission was now making its first major attempt to codify the law of international organizations, and in that context there was perhaps less objection to the inclusion of such a definition. But it should not be thought that the drafting of the definition would be an easy task. What was important was that it should be made clear in the commentary that the term "rules" covered not only the constituent instruments of the organization concerned, but also such of its practice as constituted established customs binding on members so long as they were not altered by the organization.

18. Mr. REUTER said it was not for the Commission to determine what were the rules of the organization; that was a matter for each organization to decide for itself. In some organizations the rules would be the statutory written rules alone, in others they would be the statutory written rules and certain rules derived from duly adopted resolutions of certain organs—which could change—and in yet others they would be not only the constitutional rules and the written rules drawn up by the organization itself, but also customary rules. There was no law of international organizations from which an exact defini-

[3] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 198.

[4] See General Assembly resolutions 2530 (XXIV) and 2531 (XXIV).

[5] *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 290 (United Nations publication, Sales No.: E.70.V.5).

[6] See 1102nd meeting, para. 23.

tion of the expression "rules of the Organization" could be derived. If the Commission attempted such a definition it would be advancing a claim—never before asserted and against which he himself strongly protested—to establish a general law of international organizations which would decide, for all the organization concerned, what were the legal sources of the law of the organization; and that was quite impossible. He was content with the expression "rules of the Organization", precisely because it was a reference which granted a certain autonomy to each organization. In any event, he did not see by what legal instrument the Commission could produce a system of law which would be supra-constitutional and would have to be respected by all the organizations to which the draft articles applied. He therefore dissociated himself very definitely from all that had been said to the contrary. It was only with that express reservation that he could provisionally approve article 52.

19. Mr. YASSEEN said he agreed with Mr. Reuter that the expression "rules of the Organization" was a reference to the constitution of each international organization, the sources of those rules varying from one organization to another. Thus a resolution of the General Assembly, which could not be the source of a legal rule, could, even though without binding force, be regarded as a rule of the Organization. If the expression "rules of the Organization" were given a flexible interpretation, it would be possible to avoid mentioning practice, which might be a source of misunderstanding.

20. Mr. CASTRÉN said that he too found the new text of article 52 acceptable and considered that "rules" also covered customary rules. It would be advisable, however, to make that clear in the commentary.

21. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 52 as proposed by the Drafting Committee, noting the comments which were to be reflected in the commentary.

It was so agreed.[7]

ARTICLE 6[8]

22. The CHAIRMAN invited the Commission to consider article 6, with the amendments proposed by the Drafting Committee to bring it into line with article 52.

23. Mr. AGO (Chairman of the Drafting Committee) said that the amended text proposed by the Drafting Committee read:

Article 6

Establishment of permanent missions

1. Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 7.

2. The Organization shall notify to the host State the establishment of a permanent mission.

24. Mr. USHAKOV said that the reasons adduced in favour of the new text of article 52 applied equally to article 6, and the two articles should be made uniform.

25. Mr. YASSEEN said he was in favour of amending article 6 in the same way as article 52, as that would establish a symmetry between the establishment of permanent missions and the establishment of permanent observer missions.

26. Mr. ROSENNE said he found it difficult to accept the idea of symmetry between two things that were dissimilar. He reserved his position regarding the words which the Drafting Committee wished to insert in article 6.

27. Mr. CASTRÉN said he thought the amendments proposed by the Drafting Committee improved the text of article 6.

28. Mr. ALCÍVAR said he accepted the inclusion of the words proposed by the Drafting Committee, which provided a better explanation of the sources of the legal rules applicable in an international organization. Those sources included the practice of the organization. Some organizations, such as the International Bank for Reconstruction and Development, had no permanent missions. Where such missions existed, they had originated in the practice of the organization.

29. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 6 as proposed by the Drafting Committee.

It was so agreed.[9]

ARTICLE 54

30. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had redrafted article 54 on the model of the text provisionally approved for article 8.[10]

The proposed text read:

Article 54

Multiple accreditations, appointments or assignments

1. The sending State may accredit the same person as permanent observer to two or more international organizations or assign a permanent observer as a member of the diplomatic staff of another permanent observer mission or of any of its permanent missions.

2. The sending State may accredit a member of the diplomatic staff of a permanent observer mission to an international organization as permanent observer to other international organizations or assign a member of the staff of a permanent observer mission as a member of the staff of another permanent observer mission or of any of its permanent missions.

31. Speaking on behalf of the Working Group which had been set up to harmonize the different parts of the draft,[11] he suggested that the word "appointments" in

[7] For resumption of the discussion see 1132nd meeting, para. 62.

[8] For previous text and discussion see 1110th meeting, para. 18 *et seq.*

[9] For resumption of the discussion see 1132nd meeting, para. 62.

[10] See 1111th meeting, paras. 6 and 15.

[11] See 1106th meeting, para. 85.

the title of article 54 should be deleted, so that the title would read: "Multiple accreditations or assignments". In the body of the article, only the verbs "accredit" and "assign" were used.

32. Mr. EUSTATHIADES pointed out that article 54 only provided for a faculty of the sending State, without stating that the faculty was subject to the rules or practice of the organization. That should be explained in the commentary, since some organizations might not accept multiple accreditations or assignments.

33. Mr. AGO (Chairman of the Drafting Committee) said that in substance, what Mr. Eustathiades had said was correct; but all the draft articles were without prejudice to the rules of the organization, should they differ from the provisions of the draft itself. That principle might be weakened if it were mentioned in one particular case and not in another. Article 54 had to be interpreted in the way suggested by Mr. Eustathiades, whether the point was mentioned in the commentary or not.

34. Mr. USTOR said that the Commission should approve article 54 on the understanding that it might ultimately be combined with article 8.

35. Sir Humphrey WALDOCK said that the title in English, as agreed upon in the Working Group, should be "Multiple accreditations and appointments".

36. Mr. ROSENNE said it seemed curious that the word "assignments" should be deleted in the title, while the verb "assign" was used in both paragraphs of the text.

37. Sir Humphrey WALDOCK pointed out that the title for article 8 proposed by the Special Rapporteur was "Accreditation to two or more international organizations or appointment to two or more permanent missions" (A/CN.4/241/Add.2). For the sake of consistency, therefore, the word "appointment" should also be used in article 54.

38. Mr. ROSENNE suggested that, in order to avoid confusion, the Commission should refrain from dealing with the titles of articles at that stage and concentrate on the texts.

39. Mr. BARTOŠ observed that the word "*affectations*" in the French text did not correspond to the English word "appointments", which was the equivalent of the French word "*nominations*". A person could be assigned only if he was already in the service of the State, but he could be appointed whether he was in the service of the State or not.

40. Mr. CASTRÉN pointed out that the persons referred to in article 55 who might be given multiple accreditations or assignments were, in principle, already in the service of the State.

41. Mr. NAGENDRA SINGH asked whether it was generally agreed that the word "appointments" should be used in both article 8 and article 54.

42. The CHAIRMAN proposed that the Commission should provisionally approve article 54 as proposed by the Drafting Committee, on the understanding that the text could be reviewed later in the light of the final wording of article 8 and the general articles.

It was so agreed.[12]

ARTICLE 55

43. Mr. AGO (Chairman of the Drafting Committee) said that in article 55 the Drafting Committee had made only a minor drafting change in the Spanish text. The text proposed read:

Article 55

Appointment of the members of the permanent observer mission

Subject to the provisions of articles 56 and 60, the sending State may freely appoint the members of the permanent observer mission.

44. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 55 as proposed by the Drafting Committee.

It was so agreed.[13]

ARTICLE 56

45. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made no changes in article 56, the text of which read:

Article 56

Nationality of the members of the permanent observer mission

The permanent observer and the members of the diplomatic staff of the permanent observer mission should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

46. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 56 as proposed by the Drafting Committee.

It was so agreed.[14]

ARTICLE 57[15]

47. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had made the two paragraphs of article 57 into two separate articles, provisionally numbered 57 and 57 *bis* (A/CN.4/L.168/Add.2). In the article now numbered 57, no changes of importance had been made. The proposed text read:

---

[12] For resumption of the discussion see 1132nd meeting, para. 75.

[13] For resumption of the discussion see 1132nd meeting, para. 82.

[14] For resumption of the discussion see 1135th meeting, para. 37.

[15] For previous text and discussion see 1103rd meeting, para. 67 *et seq.*

Article 57

Credentials of the permanent observer

The credentials of the permanent observer shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority of the sending State if that is allowed by the practice followed in the Organization, and shall be transmitted to the competent organ of the Organization.

48. Mr. USHAKOV suggested that the phrase "if that is allowed by the practice followed in the Organization" should be placed immediately before the words "by another competent authority". In its present position, that phrase seemed to relate not only to cases in which another authority was competent, but to all the cases mentioned in article 57. However, that change could be made later.

49. Mr. ALCÍVAR said that Mr. Ushakov's amendment did not apply to the Spanish text, which was already drafted as he suggested.

50. Mr. ROSENNE said that, in the light of the discussion about the meaning to be attributed to the word "rules" in article 52, the Commission should, at the final stage of its work on the draft, give particular attention to the words "the practice followed in the Organization".

51. Mr. EUSTATHIADES thought that the absence of a comma after the words "sending State" made it clear that the words which followed did not relate to all the cases mentioned. Mr. Ushakov's proposal might make for greater clarity, however, and there was no reason to defer consideration of it.

52. With regard to Mr. Rosenne's comment, it seemed that when the article had first been drafted, the word "practice" had been intended to have a wider meaning than "rules". Practice was generally more flexible and could be adapted to each specific case. In view of the discussion on article 52, however, those terms certainly ought to be clarified and used consistently.

53. Mr. ROSENNE said there was already general agreement in the Commission that "rules" included "practice", and that that point should be brought out in the commentary and perhaps also in the definitions article.

54. Mr. SETTE CÂMARA said that he agreed with the Drafting Committee's decision to refer only to the "practice" followed in the organization in article 57, because the organization was not an authority empowered to issue credentials and that was not a matter which came within the scope of its internal rules.

55. Mr. REUTER said he fully agreed with Mr. Rosenne. In the written observations of the secretariats of certain international organizations, particularly the International Labour Office, a distinction had been made between *de jure* and *de facto* practice. Consequently, when the final text of the draft was revised, the Commission should make it clear whether, for the purposes of the application of the articles, "practice" came within the meaning of the "rules of the Organization" or whether it had a wider meaning.

56. Mr. AGO said he too thought that, when the text of article 3 and of the definitions had been finally settled, the Commission should review the whole draft in order to avoid any contradiction between different acceptations of the words "practice" and "rules".

57. Mr. NAGENDRA SINGH said he thought the Commission could approve article 57 as proposed by the Drafting Committee, provided that some satisfactory solution could be found for the problem of the word "practice". One way out of the difficulty would be to replace the phrase "if that is allowed by the practice followed in the Organization" by "if that is allowed by the Organization".

58. The CHAIRMAN suggested that the Commission should provisionally approve article 57 as proposed by the Drafting Committee, on the understanding that the wording could be reviewed later.

It was so agreed.[16]

The meeting rose at 1.10 p.m.

[16] For resumption of the discussion see 1132nd meeting, para. 84.

1119th MEETING

Wednesday, 16 June 1971, at 10.15 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.166; A/CN.4/L.168 and Add.1 to 3; A/CN.4/L.169; A/CN.4/L.170 and Add.1; A/CN.4/L.171; A/CN.4/L.172)

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.168/Add.2), starting with article 57 *bis*.

ARTICLE 57 *bis*[1]

2. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned the text of article 57 *bis* with that of article 13, paragraph 1, as provisionally approved by the Commission.[2] In the last clause of article 57 *bis*, which did not appear in article 13, it had replaced the word "permitted" by "admitted", since it believed that the latter word better reflected the idea which the Commission had meant to express in 1970.[3]

3. The text proposed for article 57 *bis* read:

Article 57 bis

Accreditation to organs of the Organization

A non-member State may specify in the credentials transmitted in accordance with article 57 that its permanent observer shall represent it as an observer in one or more organs of the Organization when such representation is admitted.

4. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 57 *bis* as proposed by the Drafting Committee.

It was so agreed.[4]

ARTICLE 58

5. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 58 with the text provisionally approved by the Commission for article 14.[5] The text proposed read:

Article 58

Full powers in the conclusion of a treaty with the Organization

1. A permanent observer in virtue of his functions and without having to produce full powers is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

2. A permanent observer is not considered in virtue of his functions as representing his State for the purpose of signing a treaty, whether in full or *ad referendum*, between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

6. Mr. ROSENNE said he hoped that the Drafting Committee would consider whether it would not be sufficient to say, in the last clause of paragraph 2, "unless it appears from the circumstances that the intention of the parties was to dispense with full powers".

7. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 58 as proposed by the Drafting Committee.

It was so agreed.[6]

ARTICLE 59

8. Mr. AGO (Chairman of the Drafting Committee) recalled that article 59, as adopted by the Commission in 1970, had had two paragraphs.[7] Paragraph 1 had corresponded to article 15; paragraph 2, based on article 9, paragraph 2 of the Convention on Special Missions[8] had corresponded to article 107 in Part IV of the draft. The Commission had observed in paragraph (2) of its commentary to article 59 that "No similar provision has been included in part II of the draft relating to permanent missions but it is the intention of the Commission to consider the inclusion of such a provision during its second reading of that part". The Drafting Committee was considering the possibility of turning article 59, paragraph 2 into a general provision applicable to all parts of the draft. It had therefore reproduced only the provisions of paragraph 1 in the text it was proposing to the Commission, which read:

Article 59

Composition of the permanent observer mission

In addition to the permanent observer, a permanent observer mission may include members of the diplomatic staff, the administrative and technical staff and the service staff.

9. Mr. NAGENDRA SINGH said that if the Commission decided to delete the original paragraph 2 of the article, the principle stated in it should certainly be included in a separate article elsewhere in the draft.

10. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 59 as proposed by the Drafting Committee.

It was so agreed.[9]

ARTICLE 60

11. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned the French and Spanish texts of article 60 with the corresponding texts of article 16 provisionally approved by the Commission.[10] The text proposed for article 60 read:

Article 60

Size of the permanent observer mission

The size of the permanent observer mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

[1] Formerly article 57, paragraph 2; see 1103rd meeting, para. 68 and 1118th meeting, para. 47.

[2] See 1111th meeting, paras. 62 and 65.

[3] See *Yearbook of the International Law Commission, 1970*, vol. I, p. 107, para. 15 *et seq.*

[4] For resumption of the discussion see 1132nd meeting, para. 87.

[5] See 1111th meeting, paras. 69 and 78.

[6] For resumption of the discussion see 1132nd meeting, para. 97.

[7] See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

[8] See General Assembly resolution 2530 (XXIV), Annex.

[9] For resumption of the discussion see 1132nd meeting, para. 101.

[10] See 1111th meeting, paras. 83 and 88.

12. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 60 as proposed by the Drafting Committee.

It was so agreed.[11]

ARTICLE 61

13. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 61 with the text of article 17 provisionally approved by the Commission.[12] The text proposed read:

Article 61

Notifications

1. The sending State shall notify the Organization of:

(*a*) the appointment, position, title and order of precedence of the members of the permanent observer mission, their arrival and final departure or the termination of their functions with the permanent observer mission;

(*b*) the arrival and final departure of any person belonging to the family of a member of the permanent observer mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the permanent observer mission;

(*c*) the arrival and final departure of persons employed on the private staff of members of the permanent observer mission and the fact that they are leaving that employment;

(*d*) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the permanent observer mission or as persons employed on the private staff enjoying privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

14. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 61 as proposed by the Drafting Committee.

It was so agreed.[13]

ARTICLE 62

15. Mr. AGO (Chairman of the Drafting Committee) said that the Committee had aligned article 62 with the text of article 18 provisionally approved by the Commission.[14] It had thereby eliminated the two differences in drafting between those articles to which the Commission had drawn attention in its commentary to article 62.[15]

16. The text proposed for article 62 read:

Article 62

Chargé d'affaires ad interim

If the post of permanent observer is vacant, or if the permanent observer is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of the permanent observer mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization.

17. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 62 as proposed by the Drafting Committee.

It was so agreed.[16]

ARTICLE 62 *bis*

18. Mr. AGO (Chairman of the Drafting Committee) said that the Commission had referred to the Drafting Committee "the question whether an article on precedence should be included in Part III or whether the matter should be dealt with in a commentary".[17] In the light of the discussion on that question in the Commission, the Committee was proposing an article 62 *bis*, on precedence, modelled on article 19 as provisionally approved by the Commission.[18]

19. The text proposed for article 62 *bis* read:

Article 62 bis

Precedence

Precedence among permanent observers shall be determined by the alphabetical order of the names of sending States used in the Organization.

20. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article *bis* as proposed by the Drafting Committee.

It was so agreed.[19]

ARTICLE 63

21. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had aligned the text of article 63 with article 20 as provisionally approved by the Commission.[20] The text proposed read:

Article 63

Office of the permanent observer mission

The sending State may not, without prior consent of the host State, establish an office of the permanent observer mission in a locality within the host State other than that in which the seat or an office of the Organization is established.

[11] For resumption of the discussion see 1132nd meeting, para. 104.

[12] See 1112th meeting, paras. 6 and 7.

[13] For resumption of the discussion see 1132nd meeting, para. 107.

[14] See 1112th meeting, paras. 9 and 10.

[15] See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

[16] For resumption of the discussion see 1132nd meeting, para. 110.

[17] See 1104th meeting, para. 34.

[18] See 1112th meeting, paras. 12 and 19.

[19] For resumption of the discussion see 1132nd meeting, para. 114.

[20] See 1112th meeting, paras. 22 and 26.

22. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 63 as proposed by the Drafting Committee.

It was so agreed.[21]

ARTICLE 64

23. Mr. AGO (Chairman of the Drafting Committee) explained that in view of the previous discussion on article 64,[22] the Committee had deleted the square brackets enclosing the words "flag and" in the title and in paragraph 1. The text proposed for article 64 read:

Article 64

Use of flag and emblem

1. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises.

2. In the exercise of the right accorded by this article, regard shall be had to the laws, regulations and usages of the host State.

24. The CHAIRMAN said that if there were no comments he would take it that the Commission provisionally approved article 64 as proposed by the Drafting Committee.

It was so agreed.[23]

ARTICLES 49 *bis* and 77 *bis*

25. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that the Special Rapporteur had submitted a working paper on the possible effects of exceptional situations on the representation of States in international organizations (A/CN.4/L.166). That paper contained three draft articles, articles 49 *bis*, 77 *bis* and 116 *bis*, intended for Parts II, III and IV of the draft respectively. After considering those articles at its 1099th and 1100th meetings, the Commission had referred them to the Drafting Committee. For the time being, the Committee was only submitting texts for articles 49 *bis* and 77 *bis*, which were virtually identical (A/CN.4/L.168/Add.3). When it had completed its first reading of Part IV, concerning delegations, it would be in a position to decide whether article 116 *bis* should be worded in the same way.

26. The new texts of draft articles 49 *bis* and 77 *bis* differed from the former texts in three ways. First, the words "does not in itself imply recognition", in the second sentence of the former texts, had been amended to read "shall not by itself imply recognition". Secondly, the words "any act in application of the present articles" had been inserted in the new paragraph 2 in order to show that neither the establishment or maintenance of a permanent mission, nor any measure taken in application of the future convention would imply recognition. Lastly, the notion of recognition of governments had been added to that of recognition of States proper, because cases of non-recognition of governments were even more common than cases of non-recognition of States.

27. The text proposed for article 49 *bis* read:

Article 49 bis

Effects of the application of the present articles on bilateral relations

1. The rights and obligations of the host State and the sending State under the present articles are not conditional upon the existence or maintenance of diplomatic or consular relations.

2. The establishment or maintenance of a permanent mission or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

28. Mr. CASTRÉN congratulated the Chairman of the Drafting Committee on his excellent introduction. All the drafting changes made in the two articles were justified and considerably improved the text.

29. He would like to know why the words "nor does it [the establishment or maintenance of a permanent mission] affect the situation in regard to diplomatic or consular relations between the host State and the sending State", which appeared at the end of the articles proposed by the Special Rapporteur, had been omitted from the articles proposed by the Drafting Committee.

30. Mr. ROSENNE said he had originally had some doubts about the advisability of dealing with the problem of recognition, but he was now prepared to accept the wording proposed by the Drafting Committee.

31. Mr. EUSTATHIADES congratulated the Drafting Committee on its text for articles 49 *bis* and 77 *bis*. Without making a specific proposal, he wished to indicate that the words "conditional upon" in paragraph 1 did not seem to him to be appropriate, at least in the French version. However, they were better than the verb "affect", which was used in the previous version of the articles.

32. As to the words "any act in application of the present articles", they might perhaps be amended to read simply "any application of these articles" or "the application of these articles".

33. Mr. USHAKOV reiterated the doubts he had expressed in the Drafting Committee about paragraph 2 of the articles under consideration. Article 7 of the Convention on Special Missions, on which the two articles in question were based, did not go into the question of reciprocal recognition by the States concerned. It was for States themselves to decide whether the establishment of a permanent mission implied mutual recognition, and no limitation should be placed on their will, as was done in paragraph 2.

34. While he could accept the text proposed by the Drafting Committee, he thought it might be better not to mention the question of recognition.

[21] For resumption of the discussion see 1132nd meeting, para. 119.

[22] See 1104th meeting, para. 42 *et seq.*

[23] For resumption of the discussion see 1132nd meeting, para. 123.

35. Mr. NAGENDRA SINGH said he would prefer paragraph 1 to follow the language of article 7 of the Convention on Special Missions, which read: "The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission".

36. He could accept the text of paragraph 2, although it could be improved, from the point of view of drafting, by inserting the word "performed" after the words "or any act".

37. Mr. USTOR proposed that the words "between them" should be added after the words "diplomatic or consular relations" in paragraph 1.

38. With regard to paragraph 2, he could understand the doubts expressed by Mr. Ushakov, because recognition was a delicate matter which States generally preferred to regulate themselves. In the interests of the universality of the organization, however, he thought the text proposed by the Drafting Committee would serve a useful purpose by allaying the fears of host States, which might otherwise oppose the establishment of a permanent mission on the grounds that the entity represented was not a State, that was to say not recognized by them.

39. Mr. ROSENNE said he could not support Mr. Nagendra Singh's suggestion that paragraph 1 should follow the language of article 7 of the Convention on Special Missions. That article had, among other things, envisaged the situation where a special mission might be sent to a State to negotiate the question of its recognition. It should be made clear in the commentary that there was no analogy between those articles.

40. He agreed with Mr. Ustor's proposal; the addition of the words "between them" at the end of paragraph 1 would be an improvement in drafting.

41. As to the objections made by some members to the words "are not conditional" in paragraph 1, he suggested that the word "conditional" might be replaced by "dependent".

42. Sir Humphrey WALDOCK supported Mr. Ustor's proposal to add the words "between them" at the end of paragraph 1. He agreed with Mr. Rosenne that there was no true analogy between article 49 *bis* and article 7 of the Convention on Special Missions.

43. He himself had no difficulty in accepting the words "conditional upon" in paragraph 1, though he wondered whether the words *conditionnés* in the French text had exactly the same meaning, since the underlying idea, as Mr. Rosenne had pointed out, was that the rights and obligations were in no way dependent on the existence or maintenance of diplomatic or consular relations.

44. Paragraph 2 served a useful purpose. Moreover, in his view, it reflected a now widespread practice which constituted existing international law, whereby host States such as Switzerland, whether as depositaries for treaties or as members of an organization, dealt with States or governments which they did not recognize, without being considered as having in any way affected their bilateral relations with those States or governments.

45. Mr. ALBÓNICO said that the reference to "rights and obligations" in paragraph 1 was not sufficiently comprehensive, since there were matters not relating to rights and obligations, such as those referred to in articles 2, 3 and 4, which should also not be conditional upon the existence or maintenance of diplomatic or consular relations. He therefore proposed that paragraph 1 should be amended to read:

> "No provision in the present convention shall be affected by the fact that diplomatic or consular relations exist or do not exist between the sending State and the host State."

46. In paragraph 2, he proposed that a full stop should be placed after the words "of the host State or its government" and that a final sentence should be added which would read: "The same shall apply to the host State with respect to the sending State or its government". In its present form, the Spanish text of paragraph 2 was not readily understandable.

47. Mr. BARTOŠ said he wished to clarify a point concerning the preparation of the Convention on Special Missions. In the draft convention submitted by the Sixth Committee to the General Assembly, a distinction had been made between the existence of diplomatic or consular relations, on the one hand, and recognition on the other. The International Law Commission's draft had recognized that special missions could be exchanged even between States which did not recognize each other.[24] But in the Sixth Committee of the General Assembly, Nigeria had requested the deletion of that clause and it had been omitted from the final text.[25]

48. It was very doubtful whether a parallel could be established, so far as recognition was concerned, between article 7 of the Convention on Special Missions and the article 49 *bis* under consideration. The former article was concerned with bilateral relations, which required that the sending State and the receiving State should be in agreement; but the establishment of a mission to an international organization, with which the latter article was concerned, was merely a consequence of the fact that the sending State was a member of that organization. In agreeing to act as host to the organization, the host State had to accept the consequences, whatever its relations with the sending State might be. Thus, countries which did not have diplomatic relations with Switzerland, or which were not even recognized by that country, had established permanent missions or permanent observer missions to international organizations at Geneva. He had, however, noticed that where a sending State and a host State which did not recognize each other were both members of the same organization, they often neglected to make the normal notifications. For that reason, he was not opposed to the idea put forward by Mr. Rosenne.

[24] See *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, article 7.

[25] See General Assembly resolution 2530 (XXIV), Annex, article 7.

49. Mr. SETTE CÂMARA said that he could accept paragraph 1, with the amendment proposed by Mr. Ustor.

50. The text of paragraph 2 proposed by the Drafting Committee was a very useful provision, particularly with the addition of the words "or its government" in connexion with both the sending State and the host State.

51. Mr. REUTER said he approved of article 49 *bis* as a whole and found paragraph 2 particularly valuable. Where permanent missions were concerned, the problems relating to recognition were very delicate, but also very real, as was shown by France's recognition of the government at Peking and its permanent delegation to UNESCO.

52. As to drafting, he supported the amendment to paragraph 1 proposed by Mr. Ustor. In the French version, the words "*entre eux*" should be inserted after the words "*le maintien*".

53. The word "*conditionnés*" in the French version seemed correct. In that particular context, it meant that the rights and obligations were not influenced by the existence or maintenance of diplomatic or consular relations. It was true that certain conditions for the exercise of those rights and obligations might be changed and that an expression such as "are not dependent on" might perhaps be more satisfactory, but as the Drafting Committee had agreed on the words "conditional upon", it would be better not to reopen the matter.

54. Mr. YASSEEN said he thought the new wording of article 49 *bis* accurately reflected positive law.

55. Although the expression "are not conditional upon" was not entirely satisfactory, a formula such as "do not depend on" would be no improvement. In point of fact, the existence of the rights and obligations referred to in article 49 *bis* was not in question; those rights and obligations existed and would exist in any case. Hence the words "conditional upon" expressed the idea better.

56. Mr. AGO (Chairman of the Drafting Committee) endorsed Mr. Bartoš' remarks concerning the inaptness of establishing a parallel with the Convention on Special Missions. Whereas that Convention governed bilateral relations between the sending State and the receiving State, the draft articles were mainly concerned with relations between States and organizations, and dealt only indirectly with relations between the sending State and the host State. Thus the absence of relations between those two States could not affect their reciprocal rights and obligations, which derived solely from their participation in an international organization.

57. The expression "conditional upon" was quite adequate from the legal point of view. It meant that the existence of diplomatic or consular relations between the sending State and the host State did not constitute a condition for the exercise of their respective rights and obligations.

58. The amendment proposed by Mr. Ustor would provide a useful clarification.

59. The rule in paragraph 2 might appear to be self-evident, but it was nonetheless useful to state it expressly.

60. The reason why the Drafting Committee had inserted the phrase "or any act in application of the present articles" was that without it certain measures taken in application of the articles might be interpreted as implying recognition. That applied to participation in consultations between the host State, the sending State and the organization, in accordance with article 50. Nevertheless, although such acts did not entail automatic recognition, as was clear from the use of the words "by itself", they could, if that was the will of the States concerned, constitute an indirect form of recognition.

61. In reply to the question put by Mr. Castrén, he explained that the Drafting Committee had deleted the last phrase of article 49 *bis*, as proposed by the Special Rapporteur, because it had seemed to the Committee to be a truism.

62. Mr. USHAKOV said he wished to make two points that had not occurred to him during the discussion in the Drafting Committee. First, the former text of article 49 *bis* had begun: "The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles." The idea expressed in that sentence had been, as it were, turned round by the Drafting Committee: the word "existence" had replaced the word "absence" and the word "maintenance" had replaced the word "severance". The former wording was clearer.

63. The second point concerned the substance: the phrase "the existence or maintenance of diplomatic or consular relations", in paragraph 1, did not cover the case of non-recognition. In his view, it was important to specify in paragraph 1 that non-recognition of the States in question or of their governments did not affect their rights and obligations under the draft articles.

64. He therefore suggested that articles 49 *bis* and 77 *bis* should be referred back to the Drafting Committee.

65. Mr. CASTRÉN said he was completely satisfied with the answer which the Chairman of the Drafting Committee had given to his question. Since it was obvious that the establishment or maintenance of a permanent mission by the sending State did not affect diplomatic or consular relations between the host State and the sending State, there was no need to say so expressly, as the Special Rapporteur's text had done.

66. Mr. ROSENNE said it was not really necessary to refer the two articles back to the Drafting Committee. The Commission could probably approve them on the understanding that the Drafting Committee, in the process of retouching the whole draft at the final stage of the work, would carefully examine two points.

67. The first was connected with the comments made by Mr. Ushakov and with Mr. Ustor's amendment to paragraph 1, which seemed to have been accepted in the course of the discussion. It was the problem of the exact expression to be given to the element of mutuality; what was involved, as he saw it, was mutual rights and obligations as between the host State and the sending State, not as between either of those States and the organization. It would be for the Drafting Committee to decide

whether that element went without saying or whether it needed to be reflected in some way in the wording of the article.

68. The second point concerned the order of paragraphs 1 and 2. The Commission might consider giving first place to the more far-reaching and more general question dealt with in paragraph 2, and second place to the more explicit provisions of paragraph 1.

69. Mr. KEARNEY said that the language of the two paragraphs was perhaps not very clear. He did share certain of the objections which had been raised during the discussion, in particular the matters for concern which had been expressed by Mr. Ushakov.

70. The net effect of the provisions in paragraph 1 seemed reasonably clear. It would not make very much difference to that effect if the negative formulation were altered; there were other ways of expressing the same idea, for instance: "The lack of diplomatic or consular relations does not affect the rights and obligations of the host State and the sending State under the present articles". The formulation proposed by the Drafting Committee had, however, been arrived at after long discussion and he himself was inclined to keep it, subject to retouching when the Drafting Committee went through the whole draft at the final stage.

71. Paragraph 2 conveyed the idea that whatever was done pursuant to the present draft articles could not be invoked in support of a claim to recognition. In that connexion, he drew attention to the recent practice regarding the recognition of governments, as distinct from the recognition of States. Because of frequent replacement of governments, a practice had evolved whereby a State did not take any formal action on the question of recognition of a new government in another State; it continued to deal with the government in power and allowed the problem of recognition to disappear; the new government might not at any stage be formally notified of its recognition.

72. In view of the fact that practice in the matter was in a somewhat fluid stage, it was desirable to confine the provisions on the subject to a general saving clause. As far as the formulation was concerned, the one proposed by the Drafting Committee seemed adequate.

73. Mr. NAGENDRA SINGH said that he fully supported the formulation of paragraph 2, but had some comments to make on the wording of paragraph 1. The basic idea of paragraph 1 was that, irrespective of whether diplomatic or consular relations existed between the host State and the sending State, the provisions of the present draft articles would apply. That being so, the paragraph could be reworded more briefly and more categorically to read:

> "The existence of diplomatic or consular relations between the host State and the sending State is not necessary for purposes of the application of the present articles."

74. The wording proposed by the Drafting Committee placed the emphasis on the rights and obligations of the two States in question. Undoubtedly, those rights and obligations did not depend upon the existence of diplomatic or consular relations between them, but there was another aspect of the matter: the fact that no such relations existed between the two States could still cast a shadow over the application of the provisions of the draft articles.

75. He realized that the wording he proposed had some similarity with that of article 7 of the Convention on Special Missions a provision which, of course, referred to bilateral relations. But the fact that the provisions under discussion referred to multilateral relations should not deter the Commission from accepting his proposed wording on its own merits, in view of the basic identity of purpose of those provisions with article 7 of the Convention on Special Missions.

76. Mr. AGO (Chairman of the Drafting Committee) said that the discussion had confirmed him in his opinion that article 49 *bis* should not speak of "the application of the present articles", but rather of the rights and obligations which, in the present articles, concerned the mutual relations between the sending State and the host State. It was obvious that there was nothing else in the draft which could be affected by non-recognition or by the non-existence of diplomatic or consular relations.

77. Mr. Ushakov had raised two points. The first was mainly a matter of drafting, but he was perhaps right in thinking that it would be better to speak of the absence or severance, rather than the existence or maintenance, of diplomatic or consular relations, since it was precisely in those two exceptional cases that the Commission wished to establish that the rights and obligations of the host State and the sending State were not affected. On the second point, Mr. Ushakov was quite right. It was true that the absence of diplomatic and consular relations could be said to cover the case of non-recognition, since non-recognition necessarily implied the absence of relations; but to make the text complete, non-recognition must also be mentioned in paragraph 1, which might read:

> "The rights and obligations of the host State and the sending State under the present articles are not affected by the non-existence or severance of diplomatic or consular relations between them or by the non-recognition of one of the States or its government by the other."

78. Mr. USHAKOV said he would be fully satisfied with that wording.

79. Mr. EUSTATHIADES agreed with Mr. Rosenne that it would be better to reverse the order of the two paragraphs. What was most important, however, was to adopt Mr. Ushakov's ideas as just proposed by Mr. Ago, particularly since many of the most recent studies on the question of recognition showed that the meaning of recognition was defined largely by reference to non-recognition. Moreover, recognition did not necessarily entail the establishment of diplomatic or consular relations. Hence it was non-recognition that should be mentioned in paragraph 1.

80. The CHAIRMAN said that, as several drafting amendments had been proposed, it seemed that articles

49 *bis* and 77 *bis* should be referred back to the Drafting Committee.

It was so agreed.[26]

ARTICLE 50[27] and proposed new articles 50 *bis* and 50 *ter*

81. The CHAIRMAN invited the Commission to consider article 50, for which the Special Rapporteur proposed the following new text (A/CN.4/L.171):

Article 50

Consultations and settlement of disputes

1. If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

2. If the consultations referred to in paragraph 1 fail to achieve a result satisfactory to the parties concerned and in the absence of agreement by the parties concerned to have recourse to another mode of settlement, the matter shall be submitted to a conciliation commission or any other mode of settlement as may be set up for the purpose of settling such disputes within the Organization.

3. The preceding paragraphs are without prejudice to provisions concerning settlement of disputes contained in international agreements in force between States or between States and international organizations.

82. He also drew attention to the three new articles proposed by Mr. Kearney (A/CN.4/L.169) to replace the former text of article 50. Those articles read:

Article 50

Consultations between the sending State, the host State and the Organization

1. If any difference arises between one or more sending States and the host State concerning their respective rights and obligations under the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

2. In the event the difference is not disposed of by means of consultations, any State engaged therein or the Organization may refer it to conciliation by a written notice to the Secretary-General of the Organization that sets forth the substance of the difference. The notice shall be transmitted to all members of the Organization.

Article 50 bis

Permanent Conciliation Commission

1. The Organization shall establish a Permanent Conciliation Commission at the Headquarters of the Organization for the purpose of seeking to reconcile differences between one or more sending States and the host State regarding their respective rights and obligations under these articles.

2. The Commission shall consist of five members selected as follows:

(*a*) three members elected by the competent organ of the Organization;

(*b*) one member selected by the host State;

(*c*) one member selected by the Secretary-General of the Organization.

Each member shall have an alternate selected in the same fashion as that member. The members and alternates shall be persons who are knowledgeable regarding international law and international organizations and who will be readily available to attend sessions of the Commission. A member shall be replaced in sessions of the Commission by his alternate whenever the member is either permanently or temporarily unable to serve.

3. Members shall have five-year terms of office on the Commission. In the event of the death, incapacity or resignation of a member or of an alternate, a successor shall be selected to serve the unexpired portion of the term in the same manner as his predecessor had been selected.

4. The Commission shall select a Chairman from among the three elected members by majority vote.

Article 50 ter

Conciliation Procedure

1. The Secretary-General shall transmit a copy of the notice required by paragraph 2 of Article 50 to the Chairman of the Commission. Any member of the Organization that has not been engaged in the consultations may participate in the conciliation proceedings by notifying the Chairman of the Commission within fifteen days of receipt of the Secretary-General's notification of proceedings.

2. The Chairman shall schedule a meeting of the Commission at as early a date as practicable to which representatives of all the members who participated in the consultations or who have requested to participate in the proceedings shall be invited. At this meeting the Commission shall determine the issues which require consideration and examine what steps are necessary in order to assist the conciliation procedure, in particular whether written and oral submissions, the taking of evidence and hearing of witnesses are required.

3. The Commission shall conduct its further proceedings in such manner as it considers will best promote conciliation. The Commission may request an advisory opinion from the International Court of Justice in the name of the Organization regarding the interpretation or application of these articles.

4. If the Commission is unable to secure agreement among the members participating in the proceedings on a resolution of the difference before it within nine months of the initial meeting, it shall prepare a report of the proceedings that it has conducted and submit it to the Secretary-General and all participating members. The report shall include the Commission's findings upon the facts and the law and its recommendations as to the course of action that should be followed by the participating parties. The time limit for the submission of the report shall be extended as required if a request for an advisory opinion has been submitted.

5. The Commission shall reach its decisions by majority vote.

83. Mr. EUSTATHIADES said he had three preliminary comments to make on article 50 as proposed by the Special Rapporteur, whom he congratulated on his work and on the text submitted. First, the system proposed—namely, that if consultations failed, the parties to a dispute should either reach agreement on another mode of settlement or submit the dispute to a conciliation commission—had the advantage of being flexible, since

[26] For resumption of the discussion see 1121st meeting, para. 43.

[27] For previous text and discussions see 1100th meeting, para. 45 *et seq.*, 1101st and 1102nd meetings, and 1115th meeting, para. 59 *et seq.*

the conciliation procedure would be initiated only as a last resort and would be compulsory only if the parties could not agree on another mode of settlement. However, the time spent in seeking another mode of settlement if the consultations failed might be long, which would be unfortunate in disputes of the kind that would have to be settled. Consequently, the system proposed by Mr. Kearney in his amendments—that of passing on direct from the consultations to conciliation—seemed preferable, at least in principle.

84. Secondly, he wondered whether the words "the parties concerned", which occurred twice in paragraph 2 of the text proposed by the Special Rapporteur, included the organization. In paragraph 1, the right to request consultations was, quite rightly, also granted to the organization, which meant that it was in the interests of the organization to resolve any difficulties. It therefore seemed necessary to define the meaning of the expression "parties concerned" more precisely.

85. Thirdly, the principle of maintaining agreements in force, stated in paragraph 3, was right as a general rule, but certain cases should be taken into consideration so as not to exclude the organization from the conciliation procedure. Under the terms of paragraph 3, a conciliation agreement between the host State and the sending State would take precedence over the procedures provided for in paragraphs 1 and 2, so that the organization would not be able to take part in the settlement of the dispute. Intervention by the organization might, however, be in the interests of the international community.

86. In short, in order to take account of the multiplicity and variety of the international organizations to which the articles would apply, he would prefer, in principle, a compulsory conciliation procedure that was more clearly defined and pre-established, such as Mr. Kearney had proposed, to the rather over-flexible procedure suggested by the Special Rapporteur, which might leave the settlement of disputes between the host State and the sending State too long in abeyance.

The meeting rose at 12.50 p.m.

1120th MEETING

Thursday, 17 June 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 50 (Consultations and settlement of disputes) and proposed new articles 50 *bis* and 50 *ter (continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's redraft of article 50 (A/CN.4/L.171) and of Mr. Kearney's proposal to replace that article by three new articles (A/CN.4/L.169).

2. Mr. KEARNEY said that at that stage he would not discuss the Special Rapporteur's new text for article 50, but would introduce his own proposal for that article and for two additional articles to be numbered 50 *bis* and 50 *ter*.

3. During the Commission's previous short discussion of article 50 he had briefly explained his reasons for proposing a rewording of the article.[1] His proposal was not intended to affect the substance of paragraph 1, but simply to emphasize that the provision related to differences regarding rights and obligations arising under the present articles.

4. His new text of article 50, paragraph 1 required a correction. In view of the reference to "one or more sending States" in the opening phrase, the words "sending State" in the latter part of the paragraph should be in the plural, and the words "either State" should be altered accordingly.

5. Paragraph 2 provided that, if the consultations referred to in the previous paragraph did not result in an agreed settlement, any State engaged in the dispute was entitled to refer the matter to conciliation.

6. The question arose whether conciliation was the most appropriate procedure for the settlement of disputes in the present instance. In deciding that question, it should be borne in mind that the subject-matter of the draft articles was already covered by existing agreements dealing with the settlement of disputes. The draft articles would apply mainly to organizations in the United Nations system, and article VIII, section 30, of the 1946 Convention on the Privileges and Immunities of the United Nations[2] provided that "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement". The

[1] See 1115th meeting, para. 61.

[2] United Nations, *Treaty Series*, vol. 1, p. 30.