

Document:-  
**A/CN.4/L.168/Add.3**

**Text of articles adopted by the Drafting Committee: articles 49 bis and 77 bis - reproduced in document A/CN.4/SR.1119**

Topic:  
**Representation of States in their relations with international organizations**

Extract from the Yearbook of the International Law Commission:-  
**1971, vol. I**

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*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.*<sup>16</sup>

The meeting rose at 1.10 p.m.

<sup>16</sup> 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. Bar-toš, 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*<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.*<sup>4</sup>

## 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.<sup>5</sup> 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.*<sup>6</sup>

## 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.<sup>7</sup> Paragraph 1 had corresponded to article 15; paragraph 2, based on article 9, paragraph 2 of the Convention on Special Missions<sup>8</sup> 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.*<sup>9</sup>

## 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.<sup>10</sup> 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.

<sup>1</sup> Formerly article 57, paragraph 2; see 1103rd meeting, para. 68 and 1118th meeting, para. 47.

<sup>2</sup> See 1111th meeting, paras. 62 and 65.

<sup>3</sup> See *Yearbook of the International Law Commission, 1970*, vol. I, p. 107, para. 15 *et seq.*

<sup>4</sup> For resumption of the discussion see 1132nd meeting, para. 87.

<sup>5</sup> See 1111th meeting, paras. 69 and 78.

<sup>6</sup> For resumption of the discussion see 1132nd meeting, para. 97.

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

<sup>8</sup> See General Assembly resolution 2530 (XXIV), Annex.

<sup>9</sup> For resumption of the discussion see 1132nd meeting, para. 101.

<sup>10</sup> 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.*<sup>11</sup>

#### 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.<sup>12</sup> 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.*<sup>13</sup>

#### 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.<sup>14</sup> 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.<sup>15</sup>

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.*<sup>16</sup>

#### 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".<sup>17</sup> 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.<sup>18</sup>

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.*<sup>19</sup>

#### 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.<sup>20</sup> 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.

<sup>11</sup> For resumption of the discussion see 1132nd meeting, para. 104.

<sup>12</sup> See 1112th meeting, paras. 6 and 7.

<sup>13</sup> For resumption of the discussion see 1132nd meeting, para. 107.

<sup>14</sup> See 1112th meeting, paras. 9 and 10.

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

<sup>16</sup> For resumption of the discussion see 1132nd meeting, para. 110.

<sup>17</sup> See 1104th meeting, para. 34.

<sup>18</sup> See 1112th meeting, paras. 12 and 19.

<sup>19</sup> For resumption of the discussion see 1132nd meeting, para. 114.

<sup>20</sup> 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.*<sup>21</sup>

#### ARTICLE 64

23. Mr. AGO (Chairman of the Drafting Committee) explained that in view of the previous discussion on article 64,<sup>22</sup> 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.*<sup>23</sup>

#### 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.

<sup>21</sup> For resumption of the discussion see 1132nd meeting, para. 119.

<sup>22</sup> See 1104th meeting, para. 42 *et seq.*

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.

<sup>24</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, article 7.

<sup>25</sup> 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.*<sup>26</sup>

ARTICLE 50<sup>27</sup> 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

<sup>26</sup> For resumption of the discussion see 1121st meeting, para. 43.

<sup>27</sup> 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. Bar-toš, 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 Waldoock, 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.<sup>1</sup> 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<sup>2</sup> 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

<sup>1</sup> See 1115th meeting, para. 61.

<sup>2</sup> United Nations, *Treaty Series*, vol. 1, p. 30.