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Text of articles adopted by the Drafting Committee: articles 49 bis and 77 bis adopted on second reading by the Drafting Committee - reproduced in A/CN.4/SR.1121

Topic:
Representation of States in their relations with international organizations

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1121st MEETING

Friday, 18 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Barotoš, 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/Add.3; A/CN.4/L.169; A/CN.4/L.170/Add.2; A/CN.4/L.171; A/CN.4/L.173)

[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 new text for article 50 proposed by the Special Rapporteur (A/CN.4/L.171), together with Mr. Kearney's alternative proposal (A/CN.4/L.169).
2. Mr. NAGENDRA SINGH said there would be a regrettable lacuna in the Commission's work if it failed to take a positive stand on the question of the settlement of disputes. Some well-known voluntary measures for settlement did already exist, but the world had progressed beyond the forms of negotiation, conciliation, arbitration and judicial settlement which had been known ages ago. The least that could be done was to make provision for compulsory conciliation. Some advance must be registered.
3. The text proposed by Mr. Kearney in his articles 50, 50 *bis* and 50 *ter* was exhaustive. He would have been prepared to accept a shorter formulation, as had been suggested by Sir Humphrey Waldock, but feared that it might take the form to be seen in some of the existing constituent instruments and would not make the same impact as a comprehensive text. If conciliation was to be compulsory, something like article 50 *bis* was undoubtedly called for.
4. The question then arose whether each international organization should have its own conciliation commission or whether one commission should act for several organizations, in the same way as the present administrative tribunals. In his opinion the Special Rapporteur

was right in his submission that, given the multiplicity and variety of international organizations, "it would be difficult to provide for a standing uniform machinery for a rigid procedure of settlement". Sovereign States might well hesitate to submit their differences to some common tribunal like the International Court of Justice, because they were unwilling to have their differences given world-wide publicity.

5. As to whether the conciliation commission should be a permanent or an *ad hoc* body, he had originally preferred the latter solution, but after careful consideration had come to the conclusion that a permanent body would be more likely to take an impartial view of each case and produce fruitful results. The reasons was that a permanent body would already be in existence when the dispute arose, whereas an *ad hoc* body would be set up afterwards and hence might meet with difficulties regarding its composition.

6. He fully agreed with those who felt that the sending State must be included in the membership of the conciliation commission, since that was the least that could be accepted by any sovereign State. Paragraph 2 (a) of article 50 *bis* provided that three members of the Commission should be elected by the competent organ of the organization, while paragraph 2 (b) provided that one member should be selected by the host State. He assumed that one or more of the three members referred to in paragraph 2 (a) would represent the sending State, since the host State was separately provided for in paragraph 2 (b). However, since Mr. Alcívar and Sir Humphrey Waldock had the impression that the sending State was not included in the membership of the commission as envisaged in that text, it should be made clear that one of the three members elected by the competent organ of the organization would represent the sending State.

7. Mr. Kearney had gone on to propose in the same paragraph of article 50 *bis* that each member should have an alternate selected in the same way as the member. He agreed with Sir Humphrey Waldock, however, that the Commission should not go into too much detail; it should leave the question of alternates to be decided by the members themselves.

8. Paragraph 1 of article 50, as proposed by Mr. Kearney, should be retained with its present title, but paragraph 2 should form a new article 50 *bis* entitled "Settlement of disputes".

9. The wording "If any difference arises between one or more sending States . . ." was to be preferred to the wording in the Special Rapporteur's draft, "If any question arises . . .", as being more specific.

10. With regard to the involvement of international organizations in article 50 *bis*, that difficulty would be removed once the convention was adopted, since the organization, being only the sum total of its member States, would be bound to support the convention.

11. He had no objection to article 50 *ter* as such, though he would prefer the details of the conciliation procedure to be left to the conciliation commission itself

and not stated in the article. In order to shorten the article, he would suggest deleting paragraphs 1 and 2 and stating in the commentary that the procedure should be similar to that provided for in the Vienna Convention on the Law of Treaties.¹

12. Paragraph 3 of article 50 *ter*, which represented the third stage referred to by Mr. Yasseen, should be reworded on more positive and categorical lines. Article VIII, section 30, of the Convention on the Privileges and Immunities of the United Nations,² which represented existing practice in the matter, stipulated that "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice . . .", and went on: "The opinion given by the Court shall be accepted as decisive by the parties". If the Commission was to make a positive contribution to international law, the substance of those provisions should be incorporated in paragraphs 3 and 4 of article 50 *ter*.

13. Paragraph 3 of the Special Rapporteur's article 50, which safeguarded the provisions concerning settlement of disputes contained in existing international agreements, should be retained, since the Commission could not expect to impose its own formulation now, and disregard existing constituent instruments.

14. The Drafting Committee should be asked to combine the best features of the proposals submitted by the Special Rapporteur and Mr. Kearney, since each had its merits.

15. Mr. AGO said that the drafts submitted by the Special Rapporteur and Mr. Kearney considerably facilitated the Commission's task. Paragraph 3 of the text proposed by the Special Rapporteur embodied a suggestion which he (Mr. Ago) had made. Mr. Kearney's text duly emphasized the compulsory character of the conciliation procedure and mentioned the part that could be played by the International Court of Justice.

16. Although it was too early for drafting comments, it should be noted that it would be incorrect to speak of consultation procedure or to give the impression that the Commission regarded consultations as a procedure for the settlement of disputes. In fact, it was quite normal for consultations to be held, but the term "procedure" went too far. Both drafts for article 50 avoided that pitfall in paragraph 1.

17. With regard to paragraph 2, the phrase "In the event the difference is not disposed of by means of consultations", used by Mr. Kearney, seemed preferable to "If the consultations . . . fail to achieve a result satisfactory to the parties concerned", which was the phrase used by the Special Rapporteur. All consultations implied an agreement between the parties and it was important to make it clear that it was when the parties

did not arrive at a satisfactory result that the dispute should be submitted to a conciliation commission.

18. It should also be made clear that that mode of settlement was not for all disputes concerning the application of the future convention in general, but only for disputes concerning the respective rights and obligations of the host State and the sending State. Any dispute between one of those States and the organization should be submitted to one of the other modes of settlement that might be set up for that purpose within the organization.

19. It was certainly advisable to make recourse to the conciliation procedure compulsory, but in that respect the Special Rapporteur's draft was less clear than Mr. Kearney's. The latter's proposals were, however, rather ponderous. The reason why detailed regulations had been laid down in the Vienna Convention on the Law of Treaties was that it was concerned with disputes relating to the application of treaties concluded by States: no international organization was involved. In the present case, on the other hand, an organization was always interested in the settlement of the dispute, as a third party. In that situation, it should be possible to follow the solution adopted in a large number of agreements concluded between States, and also between States and private companies, which, in the event of disputes concerning the application of those agreements, provided for the establishment of a conciliation commission generally composed of three members, one to be appointed by each of the parties concerned, and a third, or umpire, to be appointed by a neutral personage, such as the Secretary-General of the United Nations, the secretary of an international organization, or the President of the International Court of Justice.

20. Article 50 might therefore, contain some such provision as "Any dispute concerning the respective rights and obligations of a sending State and the host State shall be submitted to a conciliation commission which shall be set up immediately and shall be composed of three members, one of whom shall be appointed by the sending State and one by the host State, while the chief conciliator shall be appointed by the Organization". Such a procedure would not only be automatic, but would also have the advantage of being simple and of not requiring the establishment of a permanent conciliation commission.

21. It was open to question whether there was any need, as Mr. Yasseen had suggested, to provide for other modes of settlement if the conciliation procedure failed. The concept of conciliation was still developing, and in some respects was getting closer to arbitration. Although the findings of a conciliation commission were not binding, the parties concerned would not be in a position to reject them easily. It would, however, be useful, as Mr. Kearney proposed, to stipulate that the conciliation commission could request an advisory opinion from the International Court of Justice in the name of the organization. It was obvious that such a commission should have that faculty, which was normally accorded to the organization.

¹ *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, p. 298, article 66, and p. 301, Annex (United Nations publication, Sales No.: E.70.V.5).

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

22. Mr. USTOR said there was no great difference between paragraph 1 of article 50 as proposed by the Special Rapporteur and as proposed by Mr. Kearney. He himself preferred the Special Rapporteur's text, which was the same as that adopted by the Commission in 1969. At that time, the Commission had stated in paragraph (2) of its commentary that "Article 50 is intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned".³ He hoped the Drafting Committee would give careful consideration to that commentary, since paragraph 1 in its present form did not adequately reflect the idea that consultations were not necessarily always triangular and that it might not be necessary to involve the organization.

23. Paragraph 2 of the Special Rapporteur's article 50 stated that: "If the consultations referred to in paragraph 1 fail to achieve a result satisfactory to the parties concerned . . . , the matter shall be submitted to a conciliation commission . . .". That provision called for compulsory conciliation and was therefore clear and acceptable to all. On the other hand, paragraph 2 of Mr. Kearney's article 50 envisaged optional rather than compulsory conciliation, since it stated that "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 . . .". It was made clear later, in articles 50 *bis* and 50 *ter*, that compulsory conciliation machinery would be established, but paragraph 2 contained no reference to an obligation, and he felt bound to draw the Drafting Committee's attention to that inconsistency.

24. It was Mr. Kearney's idea that unsuccessful consultations should be continued by a conciliation procedure, for which purpose he proposed a uniform conciliation commission for all organizations. Mr. Ushakov, however, had asked whether the future convention would be able to compel organizations to establish such a commission, and other members had questioned whether it would be advisable to have a uniform system of conciliation in all organizations.

25. In paragraph 5 of his Working Paper (A/CN.4/L.171), the Special Rapporteur had expressed the view that it would be difficult to establish such a uniform system; other members, however, including Sir Humphrey Waldock, had pointed out that the matters which would call for settlement would be limited to a special field and would probably be uniform in nature. He himself believed that, while such problems might be uniform from the legal point of view, they might be extremely diverse from the political point of view because of the difference in the political importance of various international organizations. Since the great majority of organizations were of a technical character, like the World Meteorological Organization, he wondered whether it would be possible to establish the same compulsory system for all of them. Perhaps it might be

better to leave it to the organizations concerned to decide what measures they should adopt when consultations failed to yield results.

26. With regard to the third stage, consisting of arbitral or judicial settlement, envisaged by Mr. Yasseen, he thought that since many of the questions which might arise would be a highly technical character, such as those involving problems of the recognition of States, the Commission should not establish an excessively strict system.

27. As to paragraph 3 of the Special Rapporteur's draft, he pointed out that the Commission had rejected a similar paragraph in 1969, because it had not considered it advisable to include it in view of the terms of articles 3 and 4.⁴ In his opinion, paragraph 3 of the Special Rapporteur's draft was unnecessary for the same reasons.

28. Mr. SETTE CÂMARA said he did not believe that consultations by themselves were likely to settle future controversies; he was therefore prepared to support some procedure for judicial settlement, arbitration and conciliation, such as that provided for in article 66 of the Vienna Convention on the Law of Treaties.

29. The multiplicity and variety of international organizations had led the Special Rapporteur to propose a general and flexible article 50, whereas Mr. Kearney had submitted an elaborate plan for conciliation machinery and had even laid down the procedure to be followed. He himself was inclined to favour the more flexible approach adopted by the Special Rapporteur, although many features of Mr. Kearney's text could be reconciled with that of the Special Rapporteur.

30. Mr. USTOR had been right to point out that the original text of article 50 had been intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned.

31. What was true of consultations was also true of the conciliation procedure; the latter was not arbitration, but only a form of negotiation, any decisions reached through it were of merely persuasive value. Mr. Ago had spoken of the evolution of the idea of conciliation during the past few years, but had recognized that it was based on moral, not on legal authority. The Annex to the Vienna Convention on the Law of Treaties defined the nature of a conciliation commission in paragraph 5, which read: "The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute".

32. He feared that the ingenious proposals made by Mr. Kearney would be unlikely to win support at a future conference, since the conciliation machinery he envisaged would limit the discretion of the parties to choose their own means of settlement. He, therefore, proposed that the two texts be referred to the Drafting Committee, with a request that it explore the possibility of extracting from them a single, eclectic formula.

³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

⁴ *Op. cit.*, 1969, vol. I, p. 48, para. 25 and p. 193, para. 34.

33. Mr. ALBÓNICO said that the Special Rapporteur's text for article 50 comprised three realistic, practical and flexible paragraphs, while Mr. Kearney's proposal was more complete, less flexible and rather complicated.

34. In his view, the importance of disputes should not be exaggerated, since they would usually relate to such questions as privileges and immunities, which would be fairly easy to settle. It was necessary to maintain a just proportion between cause and effect, and complex machinery should not be set up to deal with minor matters. It should not be forgotten that the organization had an even greater interest in a dispute than the States which might be involved in it, for it was vitally important that the proper functioning of the organization should not be impaired.

35. He was inclined to think, therefore, that three basic ideas should be established in article 50. The first paragraph should provide for consultations as a first means of settling disputes, as in paragraph 1 of the Special Rapporteur's text. The second paragraph should provide that, if the consultations failed to achieve the desired results, the way would be open for the immediate application of the existing system for the settlement of disputes between the host State and the sending State. The third paragraph should provide that, if such a system did not exist or could not be applied because the subject of the dispute was not within the scope of bilateral measures, there would be compulsory recourse to conciliation, arbitration or judicial settlement. Establishment of the rules for the precise means of settlement would be a matter for the future diplomatic conference.

36. Mr. USHAKOV said he wished to qualify the statement he had made at the previous meeting to the effect that the Commission could not impose obligations on international organizations in the draft articles.⁵

37. In point of fact, it could do so only under certain conditions, which were met, for example, in the case of article 24. That provision imposed on the organization the obligation to assist the sending State, its permanent mission and the members of the permanent mission in securing the enjoyment of the privileges provided for by the draft articles. The situation contemplated in article 24 involved not only the organization, but also the sending State and the host State, so that the Commission was entitled to draft the article within the framework of regulation of the rights and obligations of those States. Furthermore, such a provision merely codified international law or contributed to its progressive development. Lastly, the obligation stated in article 24 was subject to the reservation in the general provisions of the draft, in particular article 3, which reserved the relevant rules of the organization.

38. On the other hand, the Commission could not impose obligations on an organization with respect to questions which fell within its exclusive sphere of competence. Articles 50 *bis* and 50 *ter* proposed by Mr. Kearney imposed obligations on the organization which did

in fact fall within its exclusive sphere of competence; for they dealt with the composition of the conciliation body and the procedure to be followed, which the organization should be free to settle as it wished. The organization could establish permanent or temporary machinery, as it saw fit, and refer the matter in dispute to one of its organs or to an organ of another organization or to a temporary body already in existence.

39. Paragraph 1 of the article proposed by the Special Rapporteur provided for an obligation which the Commission could impose on the organization, since it related to consultations which concerned both the host State, the sending State and the organization.

40. Paragraph 2 stated the obligation to submit the dispute to a conciliation commission, and that obligation was also acceptable for the same reason. But paragraph 2 also imposed on the organization the obligation to set up a conciliation commission, which was a matter within its own competence. That obligation would be unacceptable unless the organization was also permitted to establish another mode of settlement, as provided in the last clause of paragraph 2.

41. It was therefore essential to make a distinction between the obligations which could be imposed on organizations and those which fell within their exclusive sphere of competence.

42. The CHAIRMAN said that most of the comments made during the discussion had concerned drafting. If there were no objections, therefore, he would take it that members agreed that article 50, as it appeared in the Special Rapporteur's working paper (A/CN.4/L.171), should be referred to the Drafting Committee together with the texts proposed by Mr. Kearney (A/CN.4/L.169), for examination in the light of the views expressed.

*It was so agreed.*⁶

ARTICLES 49 *bis* and 77 *bis*⁷

43. The CHAIRMAN invited the Commission to consider articles 49 *bis* and 77 *bis* as adopted by the Drafting Committee at second reading (A/CN.4/L.170/Add.2), subject to later review of the expression "the present articles". The texts of the two articles were virtually identical.

44. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 49 *bis*:

Article 49 bis

Non-recognition of States or governments or absence of diplomatic or consular relations

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

⁶ For resumption of the discussion see 1136th meeting, para. 2.

⁷ For previous text and discussion see 1119th meeting, para. 25 *et seq.*

⁵ See previous meeting, para. 23.

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.

45. The Committee thought the proposed wording was probably the best way of providing for all three situations—non-recognition, and absence or severance of diplomatic or consular relations—in which the rights and obligations of the host State and the sending State might be affected.

46. Mr. YASSEEN said he could accept the new wording, which was a definite improvement on the previous text and met the valid points made by various members of the Commission.

47. Mr. USHAKOV also supported the new text.

48. Mr. ROSENNE said that the Drafting Committee's French version of article 49 *bis* was to be commended, but he would suggest that, when in due course it came to retouch the whole draft, it should review the English version of paragraph 1 with a view to making it more idiomatic.

49. Mr. AGO said that the two texts were in fact completely in line with one another, since the English word "neither" corresponded exactly to the French "ni".

50. Mr. KEARNEY said that matters of style depended on taste.

51. Mr. NAGENDRA SINGH said that, in the Drafting Committee, he had suggested a somewhat simpler formulation for paragraph 1, which read:

"The absence of recognition between the host State and the sending State or the lack of diplomatic or consular relations between them shall in no way affect the rights and obligations of the host State and of the sending State arising out of the provisions of the present articles."

52. He had withdrawn his suggestion, however, and accepted the text proposed by the Drafting Committee, because it expressed the substance of the matter very clearly, even if not very elegantly.

53. Mr. USTOR said he supported the text proposed for article 49 *bis*, which should now be considered by the Drafting Committee for inclusion in the general provisions.

54. The commentary might perhaps explain that the rule in paragraph 1 also applied in relations between two sending States. Admittedly, there were few provisions in the draft articles which mentioned such relations; one instance was article 50, which provided for consultations between two or more sending States. It would be appropriate to specify in the commentary that the exercise by a sending State of its right to participate in such consultations did not imply recognition of another sending State exercising the same right.

55. Mr. ROSENNE said he would hesitate to go as far as Mr. USTOR proposed. He suggested that either

the commentary to article 49 *bis*, or perhaps the introductory comments to the whole draft, should specify that the Commission had left aside the question of relations between two sending States.

56. Mr. EUSTATHIADES said he thought that an explanation in the commentary would be appropriate and would not affect other aspects of the question.

57. Mr. ALBÓNICO suggested that it might be preferable to reverse the order of the two paragraphs. The article would then begin with the provision concerning the normal situation, namely, the establishment of a mission, and go on to deal in its second paragraph with the abnormal situation of non-recognition.

58. Mr. AGO said that the Drafting Committee had considered that idea, but had taken the view that the most important point was to ensure that non-recognition or the absence of diplomatic relations would have no effect on the rights and obligations of the host State and the sending State. The provision in paragraph 2 was a kind of general safeguard clause. Moreover, it stated a self-evident truth and was thus not so important as the provision in paragraph 1.

59. With regard to the question where article 49 *bis* should be placed, he pointed out that the article did not relate to the draft as a whole, but only to the part concerning the rights and obligations of the host State on the one hand, and the rights and obligations of the sending State on the other. It would therefore be better to leave it in Part II.

60. Mr. Ustor's point concerning relations between two sending States was so self-evident that it did not seem necessary to mention it, except perhaps in the commentary.

61. Mr. USHAKOV said he supported Mr. Ustor's proposal. There was no reason why the point should not be mentioned in the commentary, with a reference to the customary rules and practice of the organization, since it was also a general question which had already been settled, for example, in regard to the admission of member States.

62. Mr. CASTRÉN said he agreed with Mr. Ago that the present text covered Mr. Ustor's point. The Commission could, however, decide in due course whether it should be mentioned in the commentary.

63. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 49 *bis* as adopted at second reading by the Drafting Committee, on the understanding that it would later consider where the article was to be placed in the draft and what was to be included in the commentary.

*It was so agreed.**

64. The CHAIRMAN said that if there were no objections he would take it that the Commission also provi-

* For resumption of the discussion see 1135th meeting, para. 75.

sionally approved article 77 *bis*, the text of which was the same as that of article 49 *bis* except for the substitution of the words "permanent observer mission" for "permanent mission" in paragraph 2.

*It was so agreed.*⁹

PART V. *Observer delegations of States to organs and conferences*

65. The CHAIRMAN invited the Commission to consider Part V of the draft articles, on observer delegations of States to organs and to conferences, submitted by the Special Rapporteur in his working paper (A/CN.4/L.173).¹⁰ He suggested that consideration of article 117 on the use of terms be deferred until later, and that Commission now consider article 118.

It was so agreed.

ARTICLE 118

66.

Article 118

Sending of observer delegations

1. A State not member of an organ may send an observer delegation thereto in accordance with the rules of procedure of that organ.

2. A State not participating in a conference may send a delegation thereto in accordance with the rules of procedure of that conference.

67. Mr. EUSTATHIADES said he thought that in paragraph 1 the reference should be to a State not member of an organization, rather than a State not member of an organ.

68. Mr. USTOR said that paragraph 1 was in fact intended to cover two situations. The first was that of a State non-member of an organization which sent an observer delegation to a session or meeting of an organ of that organization; the second was that of a State member of an organization which was not a member of one of its organs, but which sent an observer delegation to a meeting of that organ.

69. Paragraph 2 also dealt with two situations. The first was that of a State member of an organization which, as a member, had the right to participate fully in a conference, but did not wish to do so and preferred to send an observer delegation; the second was that of a State non-member of an organization which was entitled to send an observer delegation under the rules of procedure of the conference.

70. He suggested that article 118 be divided into four parts, so as to deal separately with the four situations he had mentioned.

71. Mr. ROSENNE said he agreed with the two previous speakers, but wished to draw attention to another problem.

72. The limitation of the provisions of paragraph 1 to rules of procedure was too narrow. Article 31 of the Charter allowed "Any Member of the United Nations which is not a member of the Security Council" to "participate, without vote, in the discussion of any question brought before the Security Council" which specially affected that Member's interests. The question of the submission of a dispute to the Security Council or the General Assembly by a non-member State was dealt with in article 35 (2). Article 69 of the Charter provided that "The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member". The same rule was carried through the rules of procedure or terms of reference of the various subsidiary organs of the Council.

73. Those provisions showed that there was a much broader basis for participation, at least by States not members of an organ, than was suggested in the proposed text of article 118.

74. The same was true of paragraph 2. The question of the participation of an observer delegation in an international conference was only partly a matter for the rules of procedure of the conference. It would be recalled, for example, that at the 1958 Geneva Conference on the Law of the Sea, very serious issues had been raised following the proposal to amend the Conference's rules of procedure so as to enable States not participating in the Conference to send observers to it.¹¹ The question of observer delegations was, however, sometimes regulated in the resolution or other decision convening a conference.

75. For those reasons, he suggested that the Drafting Committee should endeavour to produce a broader formula for both paragraph 1 and paragraph 2.

76. Mr. AGO said he agreed with Mr. Ustor. He understood Mr. Eustathiades' misgivings, however, and thought that even though there should not be the least difference between the two cases, it would be better to provide separately for the situation of a State not a member of an organization, which could send only observers to all the organs of that organization, and the situation of a State member of an organization which was not a member of an organ of that organization, but sent an observer to it.

77. Mr. ALBÓNICO said that article 118 ought to reflect the changes which had been made to the wording of article 52 (Establishment of permanent observer missions) and, in consequence, to article 6 (Establishment of permanent missions) by the Drafting Committee. He therefore urged that in both paragraphs of article 118 the wording should be adjusted so as to take into account the element of consent of the organ or conference.

78. Mr. USHAKOV said that the sending of an observer delegation did not depend solely on the rules of procedure of the organ or conference concerned. The

⁹ For resumption of the discussion see 1135th meeting, para. 75.

¹⁰ See 1105th meeting, paras. 1-11.

¹¹ *United Nations Conference on the Law of the Sea, 1958, Official Records*, vol. II, pp. 3-6 (United Nations publication, Sales No.: 58.V.4, vol. II).

article should provide for cases in which the organization, the organ or the conference invited States to send observer delegations.

79. Provision should also be made for the possibility of States members of an organization being able to participate as observers in the work of any of its organs whatsoever, which likewise did not always depend on the rules of procedure of the organization or organ.

80. Article 118 should therefore consist of several paragraphs covering the various possible situations.

81. Mr. CASTRÉN said he approved of article 118 in substance, but the drafting was unsatisfactory in several respects. He proposed that paragraph 1 be amended to read:

“A State not a member of the Organization may send an observer delegation, in accordance with the rules of procedure, to the meetings of one or more organs of the Organization.”

82. In paragraph 2, the word “observer” should be inserted before the word “delegation”. Furthermore, since the sending of an observer delegation was a form of participation, the paragraph should be amended to read:

“The participation of a State in a conference as an observer depends on the rules of procedure of that conference.”

83. As Mr. Ushakov had suggested, provision should also be made for the possibility of an invitation from the organization or conference.

84. Mr. KEARNEY said he wished to protest strongly against the misuse of the terms “delegation” and “representative” throughout the articles in Part V. A “delegate” was a full participant in a meeting or conference and a “delegation” consisted of a number of delegates. There was therefore no justification for using the expression “observer delegation”. An observer could in no instance be regarded as a full participant. The expression “observer delegation” should be replaced throughout by the word “observer”.

85. Similarly, it was a misnomer to speak of an “observer representative”; the appropriate term to use was again “observer”.

86. In article 118, paragraph 1 should specify the right of a State which was not a member of an organ to “send an observer” thereto and paragraph 2 should similarly empower a State not participating in a conference to “send an observer” thereto.

87. Mr. ROSENNE said that the Drafting Committee should consider carefully whether it was appropriate to use the expression “not participating in a conference”, because of the meaning given to the term “participating” in the 1969 Vienna Convention on the Law of Treaties and in paragraph (4) of the commentary to article 78 of the present draft articles.¹³

The meeting rose at 1 p.m.

¹³ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

1122nd MEETING

Monday, 21 June 1971, at 3.5. p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tamames, 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/Add.4 and 5; A/CN.4/L.173)

[Item 1 of the agenda]

(continued)

ARTICLE 118 (Sending of observer delegations) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 118, as proposed by the Special Rapporteur (A/CN.4/L.173).
2. Mr. SETTE CÂMARA said that Part V of the draft, which dealt with observer delegations of States to organs and to conferences, was necessary to complete the Commission's work on item 1 of its agenda. The subject was related to the everyday practice of States, which frequently sent such observers.
3. It would be going too far, however, to place those observers on a par with delegations which actually participated in the work of an organ or conference. The Special Rapporteur had perhaps been led in that direction by considerations of symmetry. Practice, however, did not show that States were eager to send observer delegations with all the attributes of normal delegations or of permanent observer missions. To use the terminology of article 120, a temporary observer delegation of such a size would be neither reasonable nor normal.
4. The draft articles on observer delegations should therefore be simplified and reduced to the lower level of individual observers, which would be more in conformity with State practice. If the Commission were to take a decision on those lines, it would be easy for the Drafting Committee to purge the articles of their inflationary excesses.
5. The wording of article 118 needed some correction. For example, in paragraph 2, the words “a delegation” should be replaced by the words “an observer delegation” so as to be in line with paragraph 1.
6. Paragraph 2 referred to the sending of such a delegation by a State “not participating in a conference”.