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Summary record of the 1113th meeting

Topic:
Representation of States in their relations with international organizations

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reconsideration in the light of the views expressed during the discussion.

*It was so agreed.*²¹

The meeting rose at 12.55 p.m.

²¹ For resumption of the discussion see 1117th meeting, para. 31.

1113th MEETING

Friday, 4 June, 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Albónico, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Elías, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldo, 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)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles proposed by the Drafting Committee (A/CN.4/L.168 and Add.1).

ARTICLE 26

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had deleted the words "of the permanent mission" from the title of article 26.

3. For the reasons given by Mr. Kearney,¹ the Committee had amended the beginning of paragraph 1 to follow the model of article 32, paragraph 1 of the Vienna Convention on Consular Relations.² It could, indeed, be argued that the text of paragraph 1 adopted in 1969³ referred only to taxes levied on persons and not to those levied direct on buildings.

¹ See 1094th meeting, para. 6 *et seq.*

² United Nations, *Treaty Series*, vol. 596, p. 288.

³ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 209.

4. It had been held that paragraph 2 established a difference in treatment between States which owned the premises of their permanent missions and States which only rented them. The Commission had stated in paragraph (3) of the commentary to article 26 that it intended to examine the matter again in the light of the views of governments. As the Special Rapporteur had observed in his sixth report, the comments of governments did not clearly indicate how to dispose of the question (A/CN.4/241/Add.3, para. 16 under article 26). The Drafting Committee had therefore made no substantive change in paragraph 2 and had confined itself to a minor drafting amendment to the Spanish text.

5. The Commission had asked the Drafting Committee to consider the inclusion of a passage in the commentary drawing attention to the present inequality of treatment as between owned and rented premises,⁴ and the Special Rapporteur had asked the Committee to transmit to the Commission a proposal which read:

"A statement would be included in the commentary to this article drawing the attention of governments to the matter and suggesting to them that it would be desirable to avoid discriminating between owned and leased premises and to put an end to present inequality of treatment between them."

6. The text proposed by the Drafting Committee for article 26 read:

Article 26

Exemption of the premises from taxation

1. The premises of the permanent mission of which the sending State or any person acting on its behalf is the owner or the lessee shall be exempt from all national, regional or municipal dues and taxes other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State, the permanent representative or another member of the permanent mission acting on behalf of the mission.

7. Mr. USTOR reserved his position on article 26, paragraph 2, but welcomed the proposal to include in the commentary a passage referring to the discussion on that paragraph and drawing the attention of governments to the matter.

8. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 26 in the form proposed by the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 27

9. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 27, which read:

⁴ See 1094th meeting, para. 15.

⁵ For resumption of the discussion see 1133rd meeting, para. 1.

Article 27

Inviolability of archives and documents

The archives and documents of the permanent mission shall be inviolable at any time and wherever they may be.

10. Sir Humphrey WALDOCK asked to be reminded of the reason for not including in article 27 the second sentence of the corresponding article 26 of the 1969 Convention on Special Missions:⁶ "They should, when necessary, bear visible external marks of identification."

11. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said he thought the reason for putting visible external marks of identification on the archives and documents of special missions was that such missions were temporary. It did not seem necessary in the case of permanent missions.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 27.

It was so agreed.⁷

ARTICLE 27 bis

13. Mr. USHAKOV, speaking on behalf of the Drafting Committee, drew attention to the fact that at its twenty-first session, as stated in the commentary to article 48,⁸ the Commission had considered the possibility of including in the draft a provision on the obligation of the host State to allow members of permanent missions to enter its territory, but had postponed its decision until the second reading. In the light of the comments made by several governments and by the secretariats of the United Nations and the International Atomic Energy Agency, the Special Rapporteur had submitted to the Commission, as a basis for discussion, the text of a new article 27 bis, entitled "Entry into the host State" (A/CN.4/241/Add.3). It was that text, in an amended form, which the Drafting Committee was submitting to the Commission; it would consider later in which part of the draft article 27 bis should appear.

14. The text proposed by the Drafting Committee for article 27 bis read:

*Article 27 bis**Entry into the territory of the host State*

1. The host State shall permit entry into its territory to members of the permanent mission and members of their families forming part of their respective households.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1 of this article.

15. Mr. USTOR said that the host State had an obligation not only to permit the persons mentioned in paragraph 1 to enter its territory, but also to allow them

to leave and re-enter it as often as necessary. At the present stage, however, he would not propose that article 27 bis be amended to state that additional obligation, provided that the commentary explained that the provisions of the article also covered exit and re-entry.

16. Mr. REUTER said that in the French text of the title and paragraph 1, it would be more correct to say "*entrée dans son territoire*" than "*entrée sur son territoire*".

17. Mr. USHAKOV, speaking as a member of the Commission, suggested that in the French text of paragraph 2 the word "*mentionnées*" should be replaced by the word "*visées*".

18. Mr. ROSENNE noted that the same question had arisen a number of times in connexion with other articles. He suggested that the Drafting Committee should go through the whole draft when it was completed in order to ensure uniformity in such matters.

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 27 bis as proposed by the Drafting Committee, with the drafting changes just proposed by members of the Commission, on the understanding that the final position of the article in the draft would be decided later, and taking into account Mr. Ustor's remark concerning the commentary.

It was so agreed.⁹

ARTICLE 28

20. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 28, which read:

*Article 28**Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure freedom of movement and travel in its territory to all members of the permanent mission and members of their families forming part of their respective households.

21. The CHAIRMAN said that, if there were no comments, he would take it that the Commission provisionally approved article 28.

It was so agreed.¹⁰

ARTICLE 29

22. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the only change made by the Committee in article 29 was to the Spanish text: in the first sentence of paragraph 7, it had replaced the word "*puerto*" by the word "*punto*".

⁶ General Assembly resolution 2530 (XXIV), Annex.

⁷ For resumption of the discussion see 1133rd meeting, para. 5.

⁸ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

⁹ For resumption of the discussion see 1135th meeting, para. 64.

¹⁰ For resumption of the discussion see 1133rd meeting, para. 8.

23. The text proposed for article 29 read:

Article 29

Freedom of communication

1. The host State shall permit and protect free communication on the part of the permanent mission for all official purposes. In communicating with the Government of the sending State, its diplomatic missions, its permanent missions, its consular posts and its special missions, wherever situated, the permanent mission may employ all appropriate means, including couriers and messages in code or cipher. However, the permanent mission may install and use a wireless transmitter only with the consent of the host State.

2. The official correspondence of the permanent mission shall be inviolable. Official correspondence means all correspondence relating to the permanent mission and its functions.

3. The bag of the permanent mission shall not be opened or detained.

4. The packages constituting the bag of the permanent mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the permanent mission.

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the permanent mission may designate couriers *ad hoc* of the permanent mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the permanent mission's bag in his charge.

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

24. Speaking as a member of the Commission, he noted that, in the French text, the second sentence of paragraph 1 seemed to suggest that the diplomatic, permanent and special missions and consular posts mentioned belonged to the permanent mission, not to the sending State.

25. Mr. REUTER suggested that the passage should be amended to read: "*ainsi qu'avec les missions diplomatiques, les missions permanentes, les postes consulaires et les missions spéciales de celui-ci.*"

26. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 29 as proposed by the Drafting Committee, with the amendment suggested by Mr. Reuter.

*It was so agreed.*¹¹

¹¹ For resumption of the discussion see 1133rd meeting, para. 11.

ARTICLE 30

27. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 30, which read:

Article 30

Personal inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

28. After an exchange of views on the drafting of the French text in which Mr. REUTER, Mr. USHAKOV, Mr. EUSTATHIADES and Mr. YASSEEN took part, the CHAIRMAN said that, at the beginning of the second sentence, the word "*Ils*" would be replaced by the words "*Ceux-ci*", and that it would be explained in the commentary that "*Ceux-ci*" referred to the permanent representative and the members of the diplomatic staff of the permanent mission.

29. Mr. ALCÍVAR requested that the Spanish text of article 30 should be redrafted on the basis of the French text. He suggested that that task should be left to the Languages Division of the Secretariat.

30. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 30, subject to the necessary changes in the French and Spanish texts.

*It was so agreed.*¹²

ARTICLE 31

31. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 31, which read:

Article 31

Inviolability of residence and property

1. The private residence of the permanent representative and of the members of the diplomatic staff of the permanent mission shall enjoy the same inviolability and protection as the premises of the permanent mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

32. Mr. ALBÓNICO noted that article 31 purported to give the private residence of the persons concerned the same inviolability and protection as the premises of the permanent mission. Since a qualification had been introduced into article 25 concerning such occurrences as fire, the remarks made on that subject in the discussion on article 25¹³ also applied to article 31.

¹² For resumption of the discussion see 1133rd meeting, para. 14.

¹³ See previous meeting, para. 47 *et seq.*

33. Mr. USTOR said he thought the point was covered by paragraph 1. However, it could also be mentioned specifically in the commentary.

34. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission provisionally approved article 31.

*It was so agreed.*¹⁴

ARTICLE 32

35. Mr. USHAKOV, speaking on behalf of the Drafting Committee, drew attention to paragraph (4) of the commentary, concerning paragraph 1 (d).¹⁵ Owing to a wide divergence of views among its members, the Commission had decided to place that sub-paragraph in square brackets and to bring it to the attention of governments. Several governments had submitted comments on the subject but, as the Special Rapporteur had pointed out, those comments were "not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved" (A/CN.4/241/Add.3, para. 21 under article 32).

36. Most members of the Drafting Committee had been in favour of including sub-paragraph (d) of paragraph 1 without the square brackets in the text of the article, with a slightly different wording to reflect the frequently expressed desire that the vehicles of members of the permanent mission should be insured against third-party risks. The Drafting Committee had replaced the words "official functions of the person in question", of which there was no definition, since they were functions carried out on the instructions of the Government of the sending State, by the words "functions of the permanent mission", which were defined in article 7. In addition, it had added at the end of the sub-paragraph the words "and only if those damages are not covered by insurance".

37. The text proposed by the Drafting Committee for article 32 read:

Article 32

Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) a real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

(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 and only if those damages are not covered by insurance.

2. The permanent representative and the members of the diplomatic staff of the permanent mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b), (c) and (d) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

38. Mr. TAMMES said he welcomed the inclusion of paragraph 1 (d) in article 32, as advocated by a number of governments and by several members of the Commission. The provisions of that sub-paragraph corresponded to those of article 31, paragraph 2 (d) of the 1969 Convention on Special Missions, but with the significant addition of the words "and only if those damages are not covered by insurance". A reference to insurance was acceptable in so far as insurance coverage meant better protection for individual victims of accidents, but he had some doubts about the net effect of the phrase added. The question arose whether it meant that, if the damages were covered by insurance, the general rule of immunity was restored; if so, the insurance company would be able to hide behind the policy-holder's immunity. Coverage by insurance would be ineffective if the principle of immunity was allowed to interfere with the payment of compensation.

39. Mr. ALBÓNICO observed that the proposed new text of paragraph 1 (d) met a legal necessity: that of enabling the victim of a traffic accident caused by a vehicle driven outside official duties to bring an action for damages. Admittedly, the requirement that the vehicle should have been used "outside the exercise of the functions of the permanent mission" introduced a complication; it would be extremely difficult for the injured party to establish that the vehicle had been so used. That difficulty, however, was inevitable, and the requirement in question made the provision consistent with sub-paragraphs (a), (b) and (c) of paragraph 1, which dealt with other cases of litigation relating to the private interests of the persons concerned.

40. The concluding proviso relating to insurance coverage raised a number of difficulties. The most serious one was that of proving liability. Many insurance companies did not settle a claim unless the liability of the driver was established. In countries like his own, which adhered to the subjective system of liability, the only valid proof was a court decision sentencing the driver for a violation of traffic regulations. Since, in many countries, a case of that kind was classified as a criminal and not a civil matter, an exception to the immunity from the criminal jurisdiction of the host State would be needed to allow sentence to be passed on the permanent representative or

¹⁴ For resumption of the discussion see 1133rd meeting, para. 17.

¹⁵ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 212.

a member of the diplomatic staff of the permanent mission. The matter could perhaps be clarified in the commentary.

41. Another difficulty was that the insurance covered the damages only up to the amount insured; hence the injured party would not necessarily receive full compensation even if the damages were "covered by insurance".

42. Despite those difficulties, he was prepared to support paragraph 1 (*d*), because it was a progressive development by comparison with earlier texts.

43. Mr. ROSENNE agreed that the proposed paragraph 1 (*d*) marked a step forward. The first part of the text stated a common provision of diplomatic law which had not given rise to any insuperable difficulties of interpretation or application. The concluding words concerning insurance, however, failed to deal with the major problems involved. Two of those problems had been stressed in the debate in the Sixth Committee. The first was the need for a provision requiring the persons concerned to carry accident insurance. In an inter-State treaty such as the draft now under discussion it was not, of course, possible to impose such a requirement upon individuals, but it was possible to impose upon governments an obligation to see that certain insurances were effected.

44. The second problem, to which Mr. Tammes had drawn attention, was the need for the relevant provisions "to be so drafted as not to enable insurance companies to evade their obligations by relying on the immunity of the insured" (A/CN.4/241/Add.3, para. 4 under article 32).

45. The third problem was to decide what was meant by the requirement that the damages should be "covered by insurance", when that requirement was prescribed in a multilateral treaty; the text of the treaty might or might not become part of the municipal law of a signatory country, according to the system followed by that country. The application of the provision also raised the question whether the insurance was adequate and reasonable—a matter which should be dealt with in the text of the article itself.

46. Consequently, while he welcomed paragraph 1 (*d*), he could not, for the time being, support the concluding proviso. The matter derived added significance from the Drafting Committee's recommendation to delete the closely related article 34, on the settlement of civil claims (A/CN.4/L.168). He urged that article 32, and especially paragraph 1 (*d*), should receive further consideration.

47. Mr. KEARNEY said he found the expression "covered by insurance" extremely ambiguous. As Mr. Tammes had already pointed out, it left unsolved the key problem whether an insurance company was to be allowed to hide behind the immunity from jurisdiction of the insured. The point was particularly important in countries where the injured party could not bring an action direct against the insurance company and consequently had to sue the individual defendant.

48. Furthermore, the proposed sub-paragraph did not deal with the question of adequacy of compensation.

If the insurance company made a settlement which did not fully compensate the injured party, the question would arise whether that party could bring an action for the balance.

49. In order to deal with those problems, he proposed that the words "covered by insurance" should be replaced by "compensated by insurance". If an insurance company relied on the immunity from jurisdiction of the insured to avoid settling the claim, the damage could not be said to have been compensated. Similarly, if an insurance company made an inadequate payment, the damage would not be fully compensated.

50. For the sake of consistency in wording, he suggested that the expression "outside the exercise of the functions of the permanent mission", used in paragraph 1 (*d*), should be replaced by the well-established formula "outside his official functions", which was used in paragraph 1 (*c*) and in the corresponding provision of the Vienna Convention on Diplomatic Relations.¹⁶

51. Sir Humphrey WALDOCK said he shared the concern expressed by previous speakers. The use of the phrase "covered by insurance" could give rise to much discussion and could weaken the provisions of paragraph 1 (*d*). The intention was to require the damages to be met and to make it clear that the possibility of private action would subsist until the claim for damages was settled through insurance. He would prefer to drop the concluding phrase of the sub-paragraph rather than leave it in its present defective form. A provision on the lines of article 31, paragraph 2 (*d*) of the 1969 Convention on Special Missions¹⁷ would leave a simple right of action in the case of traffic accidents; it was better not to weaken that safeguard by introducing a proviso of the kind proposed by the Drafting Committee.

52. The proviso also suffered from a drafting defect: the words "and only if" were intended to establish an exception to the exception set forth in the first part of the sub-paragraph, and should be replaced by the words "and where".

53. He would be prepared to support paragraph 1 (*d*) if a satisfactory text could be found for the concluding proviso.

54. Mr. USTOR said that the provisions of paragraph 1 (*d*) clearly imposed a restriction on immunity from jurisdiction. That restriction was not imposed by article 31 of the 1961 Vienna Convention on Diplomatic Relations; it had been taken from article 31, paragraph 2 (*d*), of the 1969 Convention on Special Missions. A permanent mission should obviously be placed on the same footing as a diplomatic mission, not a special mission. The difference in treatment between diplomatic agents and permanent representatives established by the Vienna Convention on Diplomatic Relations and the article under discussion would be particularly invidious in such cities as Paris, which were host not only to permanent missions to an international organization, but also to the diplomatic missions accredited to the host State.

¹⁶ United Nations, *Treaty Series*, vol. 500, p. 112, article 31.

¹⁷ General Assembly resolution 2530 (XXIV), Annex.

55. In any case, the problem which paragraph 1 (*d*) was designed to solve was an artificial one. The question of damages was settled by third-party insurance, which was already compulsory in most States and was bound to become so throughout the world.

56. For those reasons, although the wording had been improved and could be improved still further, he reserved his position on paragraph 1 (*d*);

57. Mr. YASSEEN said that at first, when the Commission had taken up article 32, he had thought that the problem dealt with in paragraph 1 (*d*) would hardly arise in practice, because in most host States third-party insurance was compulsory. But he now saw the value of that provision in the case of host States in which such insurance was not compulsory, even though they were becoming increasingly rare.

58. The word "covered" was adequate, since the amount of cover would be stated in the insurance policy. It was when the vehicle was not insured for the amount of damage caused that an action for damages could be brought. He could therefore accept paragraph 1 (*d*).

59. Mr. ELIAS said that the text proposed by the Drafting Committee for paragraph 1 (*d*) represented a compromise between those who opposed the inclusion of any such provision and those who wanted a provision on the lines of article 31, paragraph 2 (*d*) of the 1969 Convention on Special Missions. After a long and difficult discussion, the Drafting Committee had agreed to retain the sub-paragraph, but with the addition of the concluding proviso concerning insurance coverage.

60. The suggestion that the expression "compensated by insurance" should be used instead of "covered by insurance" had also been made in the Drafting Committee, but he had objected to it as being no clearer. He agreed with Mr. Kearney, however, that the expression "outside the exercise of the functions of the permanent mission" was inconsistent with the language of sub-paragraph (*c*); it also differed from the language used for the same purpose in article 31 of the Convention on Special Missions and in many provisions of other existing instruments.

61. He suggested that paragraph 1 (*d*) should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

62. Mr. USHAKOV, speaking as a member of the Commission, said that the situations referred to in sub-paragraphs (*c*) and (*d*) of paragraph 1 were quite different. In his opinion, the Drafting Committee had been right to use the words "outside his official functions" in the one case and "outside the exercise of the functions of the permanent mission" in the other.

63. The first formula was taken from article 31, paragraph 1 (*c*) of the Vienna Convention on Diplomatic Relations, and was intended to extend immunity from jurisdiction to a permanent representative or a member of the diplomatic staff of a permanent mission who, for example, made a purchase for the sending State or the permanent mission. In such a case the person concerned

was performing official functions, but not functions of the permanent mission as such.

64. Sub-paragraph (*d*) of paragraph 1, had its counterpart in the Convention on Special Missions, but not in the Vienna Convention on Diplomatic Relations. It was designed to preserve immunity from jurisdiction in cases where the person concerned caused an accident when using a vehicle in the exercise of functions which were genuinely functions of the permanent mission.

65. Mr. BARTOŠ agreed with Mr. Ushakov. When a State instructed its permanent representative or a member of the diplomatic staff of its permanent mission to make a purchase for it, the person concerned should not be subject to the civil and administrative jurisdiction of the host State. He was acting as an *ad hoc* commercial representative of his State, and not exercising official functions of the permanent mission. It was obvious, however, that such activities must not be contrary to public policy in the host State. That distinction had often given rise to disputes, and the Commission should give the necessary explanations in its commentary to article 32.

66. Mr. EUSTATHIADES said it should be specified in the commentary that the reference to a vehicle in paragraph 1 (*d*) also covered vessels and aircraft, which were mentioned in article 43, paragraph 2 (*b*) of the Vienna Convention on Consular Relations.¹⁸ The Commission's texts should be drafted for the future, when some situations which were at present extremely rare might become more common. It was necessary to ensure that the omission of any reference to vessels and aircraft was not interpreted as excluding those means of transport.

67. The CHAIRMAN noted that the Commission was in favour of referring article 32 back to the Drafting Committee for reconsideration in the light of the opinions expressed.

*It was so agreed.*¹⁹

ARTICLE 33

68. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had only made a few drafting changes in the English and Spanish versions of article 33.

69. The text proposed for article 33 read:

Article 33

Waiver of immunity

1. The immunity from jurisdiction of the permanent representative and members of the diplomatic staff of the permanent mission and of persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent

¹⁸ United Nations, *Treaty Series*, vol. 596, p. 298.

¹⁹ For resumption of the discussion see 1117th meeting, para. 41.

mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

70. The CHAIRMAN said that, in the absence of any comments, he would take it that the Commission provisionally approved article 33 as proposed by the Drafting Committee.

*It was so agreed.*²⁰

ARTICLE 34²¹

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 34, on the settlement of civil claims, was based on article 42 of the draft articles on special missions which, in turn, had been based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 14 April 1961.²² The General Assembly had not included the provisions of draft article 42 in the Convention on Special Missions, but on 8 December 1969, had adopted resolution 2531 (XXIV) embodying a recommendation based on those provisions. The Drafting Committee therefore proposed that article 34 should be deleted. At the same time, it hoped that the Commission would explain the reasons for the deletion in the commentary to article 33 and would propose that those responsible for establishing the final text of the articles should adopt a resolution similar to General Assembly resolution 2531 (XXIV).

72. Mr. YASSEEN said that, for the reasons he had given during the second reading of article 34,²³ he welcomed the deletion of the article and endorsed the Drafting Committee's suggestions.

73. Mr. KEARNEY said that, if the Commission decided to delete article 34, he thought it would be hypocritical to insert in the commentary a reference to a resolution which merely expressed the pious hope that governments would settle claims justly. In his opinion, if the Commission wished to impose an obligation on the sending State to waive immunity, it should retain article 34; if not, the less said about it the better. Since the article involved a major point of principle which was of substantial interest to a number of States, he thought that at some time the Commission would have to vote on the question of its deletion.

74. Mr. ALBÓNICO said he disagreed with the views expressed by the Drafting Committee and by Mr. Yasseen. He did not think the Drafting Committee was com-

petent to delete an article which the Commission had submitted to it for review.

75. Mr. TAMMES said that for humanitarian reasons he would regret the deletion of article 34, though in view of the inclusion of paragraph 1 (*d*) in article 32, it had perhaps lost some of its practical significance. Nevertheless, article 34 might still serve a useful purpose in cases of civil claims for damages, and the obligation to waive immunity was sufficiently qualified in the text to safeguard the performance of the functions of the permanent mission as well as its diplomatic status.

76. Mr. USTOR replying to the comment made by Mr. Albónico, said that the Drafting Committee was in the hands of the Commission and always worked on its instructions. Since it dealt with questions of substance as well as questions of form, it had discussed article 34 and had proposed its deletion for the reasons given by Mr. Ushakov. An article identical with article 34 had been included in the Commission's draft articles on special missions, but had been deleted by the General Assembly. Since it was the normal practice of the Commission to respect all decisions of the General Assembly, the Drafting Committee had considered that it would be awkward, to say the least, to submit to the General Assembly an article almost identical with one it had recently rejected.

77. Mr. SETTE CÂMARA said he fully concurred in the Drafting Committee's decision to delete article 34. Waiver of immunity was an act of sovereignty which had to be decided upon by the sending State in the light of the circumstances of each individual case. Since the question of the settlement of claims was already covered by article 32, paragraph 1 (*d*), the deletion of article 34 should present no difficulties.

78. He agreed with Mr. Ustor that the deletion of the article was merely suggested to the Commission. It might eventually be necessary to take a vote on that matter, as Mr. Kearney had said, but that did not mean that the Drafting Committee had exceeded its terms of reference.

79. Mr. ALCÍVAR said that he was in full agreement with the proposal to delete article 34 and shared the views of Mr. Ustor and Mr. Sette Câmara on the comment made by Mr. Albónico.

80. Mr. BARTOŠ said he was in favour of deleting article 34 in order to keep the conventions on diplomatic law as uniform as possible. In the present case there was no reason to depart from the rules laid down at Vienna in 1961 and to treat the permanent representative of a State to an international organization differently from the representative of one State to another State.

81. Mr. EUSTATHIADES said he could not accept the argument that article 32, paragraph 1 (*d*), covered all the cases referred to in article 34, or even a large proportion of them. Article 34 was general in scope, whereas article 32, paragraph 1 (*d*) related to only one specific category of civil claims.

82. The drafting of article 34 might leave something to be desired and it was a departure from the solution adopted in other conventions, but it had the virtue of

²⁰ For resumption of the discussion see 1133rd meeting, para. 26.

²¹ For text see 1095th meeting, para. 14.

²² United Nations, *Treaty Series*, vol. 500, pp. 218-220.

²³ See 1095th meeting, para. 62.

stressing the link between the granting of immunities and the regular performances of the functions of the permanent mission. It did not impose an obligation on the sending State, but gave a directive which was quite consistent with the general system of immunities. If the Commission decided to delete article 34, it should reproduce the whole of it in the commentary to article 33.

83. Mr. NAGENDRA SINGH said that he had no very strong feelings about article 34, but considered that it made some positive contribution by stating, in the last sentence, that the sending State "shall use its best endeavours to bring about a just settlement of such claims".

84. After a procedural discussion in which the CHAIRMAN, Mr. BARTOŠ, Mr. USTOR, Mr. ALBÓNICO and Mr. USHAKOV took part, the CHAIRMAN noted that there were differences of opinion on the question whether article 34 should be retained. He suggested that the Drafting Committee should be requested to reconsider the article in the light of the opinions expressed during the discussion, and to take into consideration, in particular, the relationship between article 34 and article 32, paragraph 1 (d).

It was so agreed.²⁴

The meeting rose at 12.55 p.m.

²⁴ For resumption of the discussion see 1117th meeting, para. 20.

1114th MEETING

Monday, 7 June 1971, at 3.10 p.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. 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; 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, beginning with article 12, on the credentials of the permanent representative.

ARTICLE 12

2. Mr. AGO (Chairman of the Drafting Committee) reminded the Commission that on 2 June it had referred the text of the article back to the Drafting Committee for reconsideration.¹ The Committee had replaced the words "or by another competent minister" by the words "or by another competent authority". Most of the members of the Commission had appeared to prefer the latter phrase, which covered the former, but was broader and allowed for the fact that in some States credentials were issued by collegiate authorities which could not be classed as ministers.

3. The text proposed by the Drafting Committee for article 12 read:

Article 12

Credentials of the permanent representative

The credentials of the permanent representative 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.

4. Mr. YASSEEN and Mr. BARTOŠ welcomed the change in wording.

5. Mr. NAGENDRA SINGH said he fully supported the Drafting Committee's text. The expression "another competent authority" was the appropriate one to use in the context. State practice showed that there were cases in which an authority other than a Minister was allowed to issue the credentials of the permanent representative.

6. Mr. USHAKOV said he could accept the text proposed by the Drafting Committee, but did not share the view held by the majority of the Commission.

7. The CHAIRMAN said that, if there were no objection, he would take it that the Commission provisionally approved article 12 in the new form proposed by the Drafting Committee.

It was so agreed.²

ARTICLE 35

8. Mr. AGO (Chairman of the Drafting Committee) said that the Drafting Committee had made no change in article 35, but considered that two observations on it should be included in the commentary.

9. The first related to paragraphs 1 and 3. As had been pointed out in the written observations (A/CN.4/239, section D.9, para. 6 [b]), there was nothing in paragraph 1 to exempt the sending State, in its capacity as

¹ See 1111th meeting, para. 60.

² For resumption of the discussion see 1132nd meeting, para. 84.