Document:-

A/CN.4/SR.1115

Summary record of the 1115th meeting

Topic:

Representation of States in their relations with international organizations

Extract from the Yearbook of the International Law Commission:-

1971, **vol. I**

for the benefit of the international community—a suggestion which might be considered unreasonable interference in his country's domestic affairs. The concern expressed that article 45, paragraph 2, might lead to abuses by the host State was unwarranted and exaggerated. If such concern did exist in the Commission, that only reinforced the argument that some more elaborate system for the settlement of disputes should be provided for under article 50.

69. Mr. REUTER said that he had no enthusiasm for article 45, but had resigned himself to accepting it provisionally, for three reasons. First, as previous speakers had implied, a bad text was perhaps better than no text at all. Secondly, it must be recognized that the practice of permanent missions, though it went back a good many years, had not yet produced any dramatic incidents. Thirdly, neither the host State nor the sending State could be granted the right of final decision, but if a dispute arose it would always be possible to invoke article 50.

70. Nevertheless, the fact remained that the text of article 45 was obscure; it was one of those compromises which were open to any and every interpretation. Paragraph 1 stated a very general obligation without specifying the sanction for its breach, while paragraph 2 mentioned a possible sanction for grave cases. But the members of the Commission themselves disagreed on the interpretation of those provisions: some believed that paragraph 2 applied automatically—an opinion he did not share, since it would always be possible to invoke article 50—and others that in the case of minor violations, paragraph 2 would also be applicable, though less strictly. In any event, the article raised a more serious problem of ordinary international law, namely, the meaning of the words "Without prejudice to their privileges and immunities" in paragraph 1.

71. The last sentence of paragraph 2 was not clear either; it was impossible to imagine what criminal offence could be committed in carrying out the functions of the permanent mission as enumerated in article 7. The same applied to interference in the internal affairs of the host State, the only example which came to mind being that of delegations to organs and conferences, whose freedom of speech no one contested. He could not imagine a single instance in which the sentence in question could have any practical application to permanent missions.

72. A tribute was due to the Drafting Committee for its efforts to produce a satisfactory text, but as matters stood, and if article 50 remained in its present form, article 45 would be open to every possible interpretation.

73. Mr. EUSTATHIADES said that he too found the text lacking in clarity, particularly the last sentence of paragraph 2, which introduced an exception into a specific system of sanctions. Paragraph 1 stated a general rule, a breach of which might possibly entail sanctions, subject to article 50. Paragraph 2 went further by expressly providing for a specific sanction in cases of grave violation. The procedure provided for in article 50 would also be applied in such cases, but it would be preceded by the application of the sanction; and that made the situation in paragraph 2 clearer. Next, as a second possibility, came interference in the internal affairs of the host State, and then the exception stated in the last sentence. The scope of that last sentence was very wide, since it referred to acts performed "in carrying out the functions of the permanent mission", which in the case of missions to international organizations with a wide range of activities, meant a great variety of acts. By virtue of that exception, the permanent representative would in most cases be exonerated if he interfered in the internal affairs of the host State. Logically speaking, since such interference could entail a sanction only if it was committed outside the exercise of the functions of the mission, there was no reason and no necessity to require that it should be "grave and manifest", like the violation of the criminal law, in order to produce the prescribed effect.

74. Like other members of the Commission, he could only approve article 45 provisionally. It would be necessary to draft a very clear commentary on the lines proposed by Sir Humphrey Waldock; but the Commission could not do that until it had considered article 50.

The meeting rose at 6 p.m.

1115th MEETING

Tuesday, 8 June 1971, at 10.10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

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

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 45 proposed by the Drafting Committee (A/CN.4/L.168/Add.1).

ARTICLE 45 (Respect for the laws and regulations of the host State) *(continued)*

2. Mr. ALBÓNICO said it was his understanding that the obligations imposed by paragraph 1 of the article were general and absolute; the difference established by paragraph 2 related only to the sanction in the event of violation. A distinction was drawn between violations which were grave and manifest and those which were not. In the case of a grave and manifest violation the sending State had a duty to take one of the three measures indicated in paragraph 2, unless the person concerned had performed the act in carrying out the functions of the permanent mission. In the case of violation which was not grave and manifest, the consultation procedure provided for in article 50 would apply, over and above all other means of settlement recognized by international law.

3. However, while it was comparatively easy to determine whether a violation of the criminal law was grave and manifest, the same could not be said of interference in the internal affairs of the host State, although there was a considerable difference between, say, criticism of a policy which violated human rights, such as *apartheid*, and an attack on a specific act performed by a government.

4. He would be grateful to the Chairman of the Drafting Committee if he could answer three questions. First, who determined whether a violation was grave and manifest? Secondly, in case of a grave and manifest violation committed by a person in carrying out the functions of their permanent mission, what were the rights of the host State? Thirdly, who determined whether an act had been performed in carrying out the functions of the permanent mission?

5. Mr. ALCÍVAR said that from the outset he had had misgivings about introducing into article 45 the concept of non-interference in the internal affairs of the host State. He agreed that such interference should be prohibited, but he feared that the officials of the host State might abuse such a prohibition to give their State some control, to which it was in no way entitled, over the international organization. He was nevertheless prepared to accept paragraph 2 as a compromise formula, provided that it was made clear in the commentary that the consultation procedure laid down in article 50 would apply; it could not be left to the sole discretion of the host State to determine whether interference in its internal affairs had occurred.

6. Mr. TAMMES said that, for those who were not familiar with the long history of article 45[1] the last sentence of paragraph 2 could be disturbing. It presented as an exception to the rule laid down in that paragraph an issue which was central to the purpose of the whole draft. The rule that the sanctions prescribed in paragraph 2 did not apply to acts performed in carrying out the functions of the permanent mission was really a qualification of the general rule laid down in paragraph 1 of the article. It was, in effect, an expression of the right of the sending State to unrestricted participation in the work of the organization.

7. The best solution to the problem would be to convert the last sentence of paragraph 2 into a separate paragraph, which would read:

> "The provisions of paragraphs 1 and 2 shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission."

That change would not disturb the balance of the compromise formula proposed by the Drafting Committee.

8. He was also concerned about the time-span covered by the provisions of paragraph 2. It had been suggested that they could apply to a period when the person concerned had been in the host State before beginning to enjoy full privileges under the present articles; he was opposed to that view. The question had been raised during the discussion on article 10, and Mr. Castrén had expressed the view that, if a person previously convicted of an offence in the host State was appointed as a member of a permanent mission, that State could rely on the provisions of article 45.[2] It had even been suggested that article 45 should be one of the qualifying articles listed in article 10. He suggested that the matter should be clarified in the commentary to article 45.

9. Mr. USTOR said that he was prepared to accept the provisions of paragraph 2 as a compromise solution, but he had two points to make. First, article 45 should be one of the general articles applicable to the whole draft. Secondly, the Drafting Committee should consider broadening the language of the last sentence of paragraph 2 to cover all official functions of the persons concerned. That would be in keeping with the intention of the provision, which was to ensure complete immunity for acts of State.

10. Mr. SETTE CÂMARA said that article 45 as proposed by the Drafting Committee was far from being a perfect formulation of a rule of law; it suffered from the inevitable imperfections of a compromise. He would support it, however, because he realized that it would be very difficult to produce a better text; the critics of the present text had not been able to do so.

11. Paragraph 1 stated the rule that the privileges and immunities enjoyed by the persons concerned did not place them above the law. It also laid down the essential duty of those persons not to interfere in the internal affairs of the host State.

12. The provisions of paragraph 2 raised many controversial questions. The use of the words "grave and manifest" was intended to afford some protection to the sending State and to ensure that the severe procedure laid down in the first sentence of the paragraph would not be set in motion unless a really serious breach had been committed.

13. The concluding sentence of paragraph 2 was an essential provision. As permanent representative of his

[1] Formerly article 44; see *Yearbook of the International Law Commission, 1969*, vol. I, pp. 39-46, 172-178, 202-210, 218-224.

[2] See 1090th meeting, para. 84.

country in international organizations, he had witnessed many cases in which the exception relating to acts performed in carrying out the functions of the permanent mission had been the only protection available to a representative.

14. Mr. AGO (Chairman of the Drafting Committee) said that, since article 45 was the result of a compromise, it was not surprising that the text was now being criticized. Paragraph 1 did perhaps contain some obscurities, as Mr. Reuter had said, and might give rise to difficulties of interpretation and application. It should be noted, however, that that provision appeared in the previous Conventions and did not seem to have caused any such difficulties. The phrase "Without prejudice to their privileges and immunities" might be open to different interpretations, but the reservation it expressed was absolutely necessary. In practice it might mean that if the persons concerned enjoyed immunity from taxation, their obligation to respect the laws of the host State did not extend to its tax laws.

15. Paragraph 2 raised a number of problems, but they would not be solved by simply deleting it. The paragraph imposed an obligation to recall a member of a permanent mission both in case of grave and manifest violation of the criminal law of the host State and in case of grave and manifest interference in its internal affairs. In the absence of a tribunal competent to determine the grave and manifest character of such acts, it was necessary to rely on the judgement and good sense of the parties concerned. It was reasonable to assume that sending States would not deny the gravity of certain offences and hence would not contest their obligation to recall the person concerned. If a dispute arose, consultations could be held, which would either convince the sending State that the act committed was grave and manifest and that the person concerned must be recalled, or convince the host State that the act was not grave and manifest and that the request for recall was unfounded.

16. The reservation concerning grave and manifest violations committed in carrying out the functions of the mission related to extreme cases, but should be maintained precisely for that reason. The same provision should also appear in the part of the draft concerning delegations to organs and to conferences, where it would be particularly important.

17. The defects of article 45 seemed less important in view of the fact that the absence of such a provision might jeopardize the adoption of the convention being prepared. He was glad that the Commission and the Drafting Committee had been able to find a compromise solution which should satisfy both host States and sending States. As past experience had shown, if the draft did not contain such a provision as article 45, a plenipotentiary conference would not be able to make good that omission. In its present form, and accompanied by a suitable commentary, article 45 should be acceptable.

18. Mr. ALBÓNICO said that, in the light of the explanations given by the Chairman of the Drafting Committee, he was prepared to accept article 45 on the understanding that those explanations would appear in the commentary.

19. Sir Humphrey WALDOCK pointed out that the opening words of the last sentence of paragraph 2, "This provision", came from a text which did not contain the present second sentence. He suggested that those words should be amended to read: "These provisions".

20. Mr. YASSEEN agreed with that suggestion. However, he thought that the last sentence of paragraph 2, concerning cases in which the paragraph did not apply, also related to the duties mentioned in paragraph 1. As Mr. Tammes had suggested, it might be better to deal with the matter in a separate paragraph.

21. Mr. AGO (Chairman of the Drafting Committee) did not agree that the last sentence of paragraph 2 applied also to paragraph 1. He suggested that that sentence should begin with the words "The provisions of this paragraph".

22. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 45 as proposed by the Drafting Committee, with the amendment submitted by Sir Humphrey Waldock and amplified by the Chairman of the Drafting Committee.

It was so agreed.[3]

ARTICLE 46

23. Mr. AGO (Chairman of the Drafting Committee) said that in article 46 the Drafting Committee had added the words "or commercial" to the title to make it consistent with the body of the article.

24. The text proposed for article 46 read:

Article 46

Professional or commercial activity

The permanent representative and the members of the diplomatic staff of the permanent mission shall not practise for personal profit any professional or commercial activity in the host State.

25. The CHAIRMAN said that, in the absence of any comments, he took it that the Commission provisionally approved article 46 as proposed by the Drafting Committee.

It was so agreed.[4]

ARTICLE 47

26. Mr. AGO (Chairman of the Drafting Committee) said that in article 47 the Committee had made only drafting changes. In sub-paragraph (a) it had adopted a suggestion made by the United Nations Secretariat (A/CN.4/L.162/Rev.1); the French text of that amendment was based on article 43 of the Vienna Convention

[3] For resumption of the discussion see 1135th meeting, para. 46.

[4] For resumption of the discussion see 1135th meeting, para. 49.

on Diplomatic Relations.[5] The Drafting Committee had also inserted the word "shall" before the words "come to an end" in the introductory sentence of the article.

27. The text proposed for article 47 read:

Article 47

End of the functions of the permanent representative or of a member of the diplomatic staff

The functions of the permanent representative or of a member of the diplomatic staff of the permanent mission shall come to an end, *inter alia:*

(*a*) on notification of their termination by the sending State to the Organization;

(*b*) if the permanent mission is finally or temporarily recalled.

28. Mr. USHAKOV asked that the following clarification of sub-paragraph (b) should be included in the commentary:

"Even if a permanent mission is finally or temporarily recalled, it continues to exist so long as the permanent representative exercises his functions with the Organization."

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 47 as proposed by the Drafting Committee, taking into account Mr. Ushakov's suggestion for the commentary.

It was so agreed.[6]

ARTICLE 48

30. Mr. AGO (Chairman of the Drafting Committee) said that the second sentence of article 48, as adopted in 1969,[7] had been criticized by certain governments (A/CN.4/238/Add.1, section B.4 and A/CN.4/239/Add.2, section B.5). The Drafting Committee found that sentence unnecessary, because the means of transport in question constituted one of the facilities for departure referred to in the first sentence. The Committee had therefore deleted the second sentence. It had also made some minor drafting changes in the English and Spanish texts of the first sentence.

31. The text proposed for article 48 read:

Article 48

Facilities for departure

The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory.

32. Mr. USHAKOV pointed out that article 48 of the draft was based on article 44 of the Vienna Convention on Diplomatic Relations.[8] That article dealt with quite exceptional situations such as the breaking off of diplomatic relations between the receiving State and the sending State, which might or might not be followed by armed conflict. Article 48 of the draft was not of the same emergency character; it concerned relations between the sending State and the Organization, and was based on a request addressed by the sending State to the host State. That was why its wording was quite different from that of article 44 of the Vienna Convention and did not include, for example, the phrase "at the earliest possible moment". The difference should be clearly indicated in the commentary.

33. Sir Humphrey WALDOCK said he had no objection to the idea of indicating those differences in the commentary. However, the commentary must not give the impression that the provisions of article 48 would not apply in certain cases of extreme emergency such as the outbreak of hostilities, the possibility of which could not be ruled out. Such an emergency could affect the situation at the headquarters of an organization and create a need for special facilities to enable the persons concerned to leave the territory of the host State.

34. Mr. USHAKOV asked Sir Humphrey Waldock what hostilities he had in mind. It seemed that article 48 could apply only to hostilities between the sending State and the organization, since a conflict between the sending State and the host State did not affect relations between the sending State and the organization. Again, the severance of relations between the sending State and the organization did not create an emergency situation between the sending State and the host State, and hence did not constitute one of the emergencies contemplated in the Vienna Convention on Diplomatic Relations.

35. Sir Humphrey WALDOCK replied that the question which arose was not connected with the relations between the sending State, the host State and the organization. It was simply a question of fact. In the event of hostilities which created an emergency at the very place of the headquarters of the organization, special facilities for departure were necessary and it would be wrong to suggest anything to the contrary.

36. Mr. EUSTATHIADES noted that the Drafting Committee, in its desire to be concise, had decided that the second sentence of article 48 could be deleted if an explanation was given in the commentary. As now worded, however, the article did not impose an obligation on the host State to grant facilities unless it was requested to do so by the sending State. It was hardly possible to say in the commentary that such a request was not necessary in an emergency, for that would amount to broadening the obligation of the host State in spite of the clear terms of the article. Since he was in favour of requiring the host State to grant certain facilities to the sending State in an emergency, he was in favour of restoring the second sentence.

37. Mr. USHAKOV said he thought the former second sentence of article 48 was subject to the stipulation in the first sentence that a request be made to the host State. If so, Mr. Eustathiades need have no anxiety, since

[5] United Nations, *Treaty Series*, vol. 500, p. 123.

[6] For resumption of the discussion see 1133rd meeting, para. 56.

[7] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 220.

[8] United Nations, *Treaty Series*, vol. 500, p. 122.

a request would be necessary in all cases, even under the new wording of article 48.

38. Mr. REUTER said he agreed with Mr. Ushakov. If a permanent representative refused to leave the organization in an emergency, the host State would not force him to leave. The word "emergency" therefore applied to cases in which it was not possible to address a formal request to the host State. As in most of the articles, a reservation must be made for the case of *force majeure*. That reservation could be stated in the commentary, unless a general provision on cases of *force majeure* was subsequently added to the draft.

39. Mr. USTOR said that the commentary could make it clear that a request for special facilities would be made by the sending State only in the event of difficulty. The host State had to comply with such a reasonable request. In normal circumstances there would, of course, be no question of special facilities being requested by the sending State.

40. Mr. AGO (Chairman of the Drafting Committee), speaking as a member of the Commission, said he did not believe that the second sentence of article 48 had been intended to broaden the obligations of the host State as Mr. Eustathiades thought. It was difficult to conceive that, in the absence of a request from the sending State, the host State had an automatic obligation to place means of transport at the disposal of nationals of the sending State. The host State could offer such facilities, but could not impose them. The first sentence was therefore quite sufficient and there was no need for the obligation it stated to be further extended in the commentary. On the other hand, the commentary should make it clear that no circumstances were excluded, even though the text of article 48 differed from that of the other Conventions. In particular, the obligation to facilitate departure applied in the case of armed conflict.

41. Mr. REUTER drew attention to a difference between the first and second sentences of the former text. The second sentence referred to the necessary means of transport for the persons concerned "and their property". After the deletion of that sentence, there was no longer any mention of property in article 48. The commentary should make it clear that the provision also covered property.

42. Mr. EUSTATHIADES said that the observations of the previous speakers might perhaps suggest that the words "if requested" should be deleted, since they added nothing and did not appear in article 44 of the Vienna Convention on Diplomatic Relations. On the other hand, if the Commission prescribed a request by the sending State, a reservation for emergencies should be made in the commentary.

43. Mr. BARTOŠ said that the words "if requested" should be retained, for otherwise a host State could politely ask a mission to leave its territory and grant it the necessary facilities for doing so, on the pretext that there was an emergency. In fact it was for the sending State to decide whether it wished to request the host State to grant facilities for its nationals to leave the territory of the host State, or whether it wished its mission to stay there in spite of the alleged emergency, at the risk and on the responsibility of the sending State.

44. Sir Humphrey WALDOCK agreed that the words "if requested" should be retained; otherwise article 48 would lay an unduly broad obligation on the host State. Even with the proviso "if requested", there was no indication that the duty of the host State applied only in an emergency.

45. It was not enough to clarify the matter in the commentary, because the commentaries would disappear and the text, if construed in its natural and ordinary meaning, could be interpreted to mean that the host State was under a duty to provide facilities for departure at a mere nod from the sending State.

46. Mr. ROSENNE agreed with Sir Humphrey Waldock. He drew attention to a slight change of wording made by the Drafting Committee in the English text: the words "whenever requested", with their temporal connotation, had been replaced by the words "if requested". He suggested that the Commission should consider restoring the former phrase.

47. Sir Humphrey WALDOCK said that the use of the word "whenever" would make the obligation of the host State even broader. He preferred the word "if", which signified a condition.

48. Mr. AGO (Chairman of the Drafting Committee) explained that the Committee had had to choose between translating the word "whenever" into French literally, by the words "*chaque fois que*", and keeping the word "*si*" in the French text, but replacing the word "whenever" by "if". The Committee had chosen the second alternative, which it considered quite adequate.

49. The CHAIRMAN noted that the Commission seemed prepared to accept the article, subject to the remarks made concerning the commentary. If there were no objections he would take it that the Commission provisionally approved article 4 as proposed by the Drafting Committee.

It was so agreed.[9]

ARTICLE 49

50. Mr. AGO (Chairman of the Drafting Committee) pointed out that paragraph (2) of the commentary to article 49 explained that the sending State was free to discharge its obligation under paragraph 1 of the article in various ways: for instance, by entrusting the property and archives of the permanent mission to the diplomatic mission of another State. The Drafting Committee had considered that that possibility open to the sending State should be mentioned in the text of the article itself. Taking article 45, sub-paragraph (*b*), of the Vienna

[9] For resumption of the discussion see 1135th meeting, para. 67.

Convention on Diplomatic Relations as a model, it had therefore added a third sentence to paragraph 1.

51. In addition, since the property of the permanent mission was mentioned in the body of the article, the Committee had added the word "property" to the title. It had also made a minor drafting change in the Spanish text of paragraph 2.

52. The text proposed for article 49 read:

Article 49

Protection of premises, property and archives

1. When the permanent mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the permanent mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time. It may entrust custody of the premises, property and archives of the permanent mission to a third State acceptable to the host State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the permanent mission from the territory of the host State.

53. Mr. ROSENNE said that the text proposed by the Drafting Committee for article 49 was a considerable improvement on the former text. In particular, the new third sentence in paragraph 1 helped to clarify the concept of a "special duty" embodied in the preceding sentence, which recalled the case of the Italian general referred to by the Special Rapporteur in that connexion.[10] He suggested that in the commentary to article 49, the Commission should be rather more explicit than it had been in its 1969 commentary.

54. Mr. USHAKOV said he did not see why the duty stated in paragraph 1 should be qualified as "special". It might perhaps be advisable to delete that word, unless the Chairman of the Drafting Committee could justify its use.

55. Mr. YASSEEN thought that the use of the word "special" was necessary in article 49, which imposed a duty going beyond the general duty a host State always had to protect the property of all persons in general and of permanent missions in particular. Moreover, the duty in question also had the special characteristic of not being of indefinite duration.

56. Mr. AGO (Chairman of the Drafting Committee) said that the text was quite clear, whether the word "special" was included or not. The reason why the Special Rapporteur had seen fit to use that word was probably that, since the permanent mission was accredited to the organization, the duty of the host State to protect the property of a mission not accredited to itself was in fact a special duty. Hence the word was not redundant.

57. Mr. USHAKOV said he was satisfied with that explanation and would not press for the deletion of the word "special".

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission provisionally approved article 49 as proposed by the Drafting Committee.

It was so agreed.[11]

ARTICLE 50

59. The CHAIRMAN said that the Commission did not yet have before it all the texts relating to article 50. He reminded members that, at the end of the discussion on that article[12] the Commission had decided to refer it to the Drafting Committee, intimating that it was almost unanimously in favour of retaining the article and suggesting that, since other questions might arise during the consideration of subsequent articles, the Drafting Committee might prefer to defer consideration of it. He, as Chairman, had noted that opinion in the Commission was not unanimous regarding other methods of settling disputes and that no specific proposals had been made on legal rather than practical modes of settlement; he had suggested that the Special Rapporteur should prepare a draft "provision concerning the settlement of disputes which might arise from the application of the articles", as envisaged by the Commission in its commentary to article 50.[13] On the proposal of one of its members, the Commission had also decided to ask the Special Rapporteur to prepare a working paper on that subject, together with a draft article, on the model of his working paper on the possible effects of exceptional situations (A/CN.4/L.166). The Special Rapporteur had informed the Secretariat that he had nearly completed the work and would submit it to the Commission shortly.

60. Meanwhile the Commission had before it document A/CN.4/L.169 containing amendments to article 50 submitted by Mr. Kearney. He inquired whether the Commission would prefer to proceed immediately with the consideration of article 50 and Mr. Kearney's amendments or to wait until it received the Special Rapporteur's proposals.

61. Mr. KEARNEY said that he had submitted certain amendments to article 50 because it seemed to him that many of the problems raised by the present set of draft articles were different from those connected with the previous instruments which the Commission had taken as models. Moreover, since there appeared to be different views in the Commission concerning the proper course to adopt with regard to consultations, it would be undesirable to leave the discussion of that topic until the end of the session.

62. However, since new proposals concerning article 50 could be expected from the Special Rapporteur shortly, he suggested that the Commission should now proceed with its consideration of the other articles and should

[10] See 1098th meeting, para. 99.

[11] For resumption of the discussion see 1133rd meeting, para. 59.

[12] See 1102nd meeting, paras. 17-21.

[13] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 222, para. (5).

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

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

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

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

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

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

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

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

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

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

It was so agreed.[15]

The meeting rose at 1 p.m.

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

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

1116th MEETING

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

Chairman: Mr. Senjin TSURUOKA

later: Mr. Roberto AGO

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