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Summary record of the 1116th meeting

Topic:
Representation of States in their relations with international organizations

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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.

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. Barotoš, Mr. Castañeda, Mr. Eustathiades, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

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).

Relations between States and international organizations

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

[Item 1 of the agenda]
(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

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

ARTICLE 39¹

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

3. The text proposed for article 39 read:

Article 39

Exemption from laws concerning acquisition of nationality

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

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

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

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

It was so agreed.³

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

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

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

PART III. Permanent observer missions to international organizations

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

ARTICLE 52

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

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

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

11. The text proposed for article 52 read:

Article 52

Establishment of permanent observer missions

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

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

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

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

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

⁵ *Ibid.*, para. 53.

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

15. Mr. KEARNEY expressed dissatisfaction with the new text and particularly with the reference to article 75. Article 75, on non-discrimination, was a general article which applied to all the draft articles in the part on permanent observer missions. It was not the Commission's practice to make specific references to an article of that type; that had been made clear when it had been suggested that a reference to article 50 should be included in article 10.⁶ If a reference to article 75 was accepted in article 52, there would seem to be no valid reason why such a reference should not be made in a number of other articles as well.

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

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

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

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

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

21. Sir Humphrey WALDOCK said that, like other members, he did not think the reference to article 75 was either necessary or appropriate. It did not alter the sub-

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

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

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

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

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

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

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

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

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

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

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

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

31. As to Mr. Kearney's objection to the reference to article 75, it should be noted that article 3, although not

referred to as such, was nevertheless represented in article 52 by the words "in accordance with the rules or practice of the Organization".

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

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

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

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

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

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

⁷ See 1102nd meeting, para. 32.

⁸ See 1110th meeting, para. 18.

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

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

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

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

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

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

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

44. It was no use asking the Drafting Committee to revise a text when the Commission had not decided

exactly what it was to express. The Commission should decide whether the principle of non-discrimination was or was not applicable to the establishment of permanent observer missions by non-member States. Once that question had been settled, the choice of wording would be easy.

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

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

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

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

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

⁹ *I.C.J. Reports 1950*, p. 4.

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

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

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

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

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

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

*It was so agreed.*¹⁰

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

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

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

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

ARTICLE 53

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

Article 53

Functions of a permanent observer mission

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

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

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

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

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

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

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

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

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

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

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

* Mr. Ago.

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

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

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

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

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

69. Mr. USHAKOV considered that the point raised by Mr. Kearney was a matter of substance, since the representation of a member State and that of a non-member State were different in purpose. The same difference was to be found in bilateral diplomacy, between the purpose of an ordinary diplomatic mission and that of a

special mission. A special mission represented the sending State only for certain specific purposes, as could be seen from article 1, sub-paragraph (a), of the Convention on Special Missions.¹³ The commentary to article 53 should therefore make it clear that the purpose of a permanent mission and that of a permanent observer mission were not the same, although they both had a representative character.

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

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

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

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

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

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

* Mr. Ago.

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

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

1117th MEETING

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

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Ago, Mr. Albónico, Mr. Alcívar, Mr. Bar-toš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiadés, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldox, Mr. Yasseen.

Relations between States and international organizations

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

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

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

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

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

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

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

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

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

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