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Summary record of the 1120th meeting

Topic:

Representation of States in their relations with international organizations

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the conciliation procedure would be initiated only as a last resort and would be compulsory only if the parties could not agree on another mode of settlement. However, the time spent in seeking another mode of settlement if the consultations failed might be long, which would be unfortunate in disputes of the kind that would have to be settled. Consequently, the system proposed by Mr. Kearney in his amendments—that of passing on direct from the consultations to conciliation—seemed preferable, at least in principle.

84. Secondly, he wondered whether the words "the parties concerned", which occurred twice in paragraph 2 of the text proposed by the Special Rapporteur, included the organization. In paragraph 1, the right to request consultations was, quite rightly, also granted to the organization, which meant that it was in the interests of the organization to resolve any difficulties. It therefore seemed necessary to define the meaning of the expression "parties concerned" more precisely.

85. Thirdly, the principle of maintaining agreements in force, stated in paragraph 3, was right as a general rule, but certain cases should be taken into consideration so as not to exclude the organization from the conciliation procedure. Under the terms of paragraph 3, a conciliation agreement between the host State and the sending State would take precedence over the procedures provided for in paragraphs 1 and 2, so that the organization would not be able to take part in the settlement of the dispute. Intervention by the organization might, however, be in the interests of the international community.

86. In short, in order to take account of the multiplicity and variety of the international organizations to which the articles would apply, he would prefer, in principle, a compulsory conciliation procedure that was more clearly defined and pre-established, such as Mr. Kearney had proposed, to the rather over-flexible procedure suggested by the Special Rapporteur, which might leave the settlement of disputes between the host State and the sending State too long in abeyance.

The meeting rose at 12.50 p.m.

1120th MEETING

Thursday, 17 June 1971, at 10 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.169; A/CN.4/L.171)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 50 (Consultations and settlement of disputes) and proposed new articles 50 *bis* and 50 *ter (continued)*

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's redraft of article 50 (A/CN.4/L.171) and of Mr. Kearney's proposal to replace that article by three new articles (A/CN.4/L.169).

2. Mr. KEARNEY said that at that stage he would not discuss the Special Rapporteur's new text for article 50, but would introduce his own proposal for that article and for two additional articles to be numbered 50 *bis* and 50 *ter*.

3. During the Commission's previous short discussion of article 50 he had briefly explained his reasons for proposing a rewording of the article.[1] His proposal was not intended to affect the substance of paragraph 1, but simply to emphasize that the provision related to differences regarding rights and obligations arising under the present articles.

4. His new text of article 50, paragraph 1 required a correction. In view of the reference to "one or more sending States" in the opening phrase, the words "sending State" in the latter part of the paragraph should be in the plural, and the words "either State" should be altered accordingly.

5. Paragraph 2 provided that, if the consultations referred to in the previous paragraph did not result in an agreed settlement, any State engaged in the dispute was entitled to refer the matter to conciliation.

6. The question arose whether conciliation was the most appropriate procedure for the settlement of disputes in the present instance. In deciding that question, it should be borne in mind that the subject-matter of the draft articles was already covered by existing agreements dealing with the settlement of disputes. The draft articles would apply mainly to organizations in the United Nations system, and article VIII, section 30, of the 1946 Convention on the Privileges and Immunities of the United Nations[2] provided that "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement". The

[1] See 1115th meeting, para. 61.

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

same section made provision for a request to the International Court for an advisory opinion on any legal question involved in a difference between the United Nations and one of its Members, but stated that the opinion "shall be accepted as decisive by the parties". Thus the system instituted by the 1946 Convention was strictly judicial in character.

7. Article VIII, section 21 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations[3] made provision for compulsory arbitration for the settlement of any dispute between the United Nations and the United States concerning the interpretation or application of the Agreement, and there was a clause under which either the Secretary-General or the United States could ask the General Assembly "to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings".

8. In view of the existence of those provisions, it would not be reasonable for the Commission to formulate draft articles which would apply mainly to organizations in the United Nations system without making some provision for the settlement of disputes. He himself would prefer to have such disputes referred to the International Court of Justice or to arbitration, because either of those two methods would lead to a final settlement. He was nevertheless proposing settlement by conciliation, because that was the mode of settlement provided for in article 66 of the Vienna Convention on the Law of Treaties and in the Annex to that Convention.[4] He hoped that his proposal, based on a recent precedent, would be the means of avoiding a protracted discussion such as had taken place at the Conference on the Law of Treaties.

9. The arrangement he proposed differed in some respects, however, from the one adopted in the Vienna Convention, because of the different nature of the problems involved. The proposed procedure would cover disputes on the interpretation or application of articles which provided for some kind of privilege or immunity; such disputes could not be compared with those involving such grave matters as the termination or suspension of a treaty.

10. One important difference was that a dispute concerning the application or interpretation of the draft articles would involve the separate and conflicting interests of the sending State or States, the host State and the organization, whereas the disputes envisaged in article 66 of the Vienna Convention on the Law of Treaties would normally be between a State party to a treaty and another State party, or a group of States parties, having similar interests.

11. A second difference was that the draft articles would apply to a wide variety of organizations. It would therefore not be desirable to have a single conciliation commission to deal with all disputes regardless of their origin, as in the Vienna Convention on the Law of Treaties; it was preferable to have a separate conciliation body for each organization.

12. A further consideration was that international organizations were institutions of a permanent character. That made it necessary to establish a permanent body to settle disputes; there was a greater need for such a body than in the case of disputes which might relate to a wide variety of different treaties.

13. The most important consideration, however, was that if a dispute arose between one sending State and the host State over the present draft articles, the other sending States would be vitally interested in the outcome, since the interests of all sending States would be involved.

14. It was necessary to take those differences into account in the arrangements for conciliation. In particular, it was not possible to rely on an *ad hoc* conciliation commission to settle each dispute. The establishment of such temporary bodies might result in a diversity of rulings on the same type of problem, so that different delegations would be treated in different ways, contrary to the rule of non-discrimination. It was therefore necessary to establish a permanent commission at the headquarters of each organization.

15. With regard to the composition of the proposed conciliation commission, there were two main defects in the idea of a three-member body consisting of representatives of the sending State concerned, the host State and the Secretary-General of the organization. The first was that such a system would invariably place the representative of the organization in the invidious position of having to cast the decisive vote, thus reducing his ability to reconcile the differences between the host State and the sending State. The second defect was that such system would not take into account the interest which all sending States had in the decision reached on a dispute affecting one of them.

16. For those reasons, he proposed in paragraph 2 of article 50 *bis* that the permanent conciliation commission should consist of five members: three elected by the competent organ of the organization, one selected by the host State and one selected by the Secretary-General of the organization. No provision was made for the selection of a member by the sending State concerned in the dispute, because its interests would be adequately protected by the fact that all three members elected by the competent organ of the organization would come from sending States; it was extremely unlikely that the organ in question would elect a person from the host State.

17. He realized that, with only one member out of five selected by the host State, his proposed conciliation commission was somewhat lacking in balance but there was perhaps no way of avoiding that.

18. He proposed that members of the permanent conciliation commission should serve for a period of five years, in the interests of continuity.

19. With regard to the conciliation procedure, the provisions in his proposed new article 50 *ter* followed

[3] Op. cit., vol. 11, p. 30.

[4] *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference*, pp. 298 and 301 (United Nations publication, Sales No.: E.70.V.5).

closely those of the Annex to the 1969 Vienna Convention on the Law of Treaties, though they were not quite so detailed. The wording used in paragraphs 2 and 3 of article 50 *ter* was as general as possible. The provisions of paragraph 3 differed from the corresponding provisions of the Vienna Convention in that they allowed an advisory opinion to be requested from the International Court of Justice. He had included that provision because there was a similar clause both in the United Nations Headquarters Agreement and in the 1946 Convention on the Privileges and Immunities of the United Nations.

20. The system he proposed was intended as a residuary provision. Articles 3, 4 and 5 would make it clear that an organization was perfectly free to adopt any method of settling disputes it chose, and that the draft articles did not affect existing arrangements for the settlement of disputes provided for in the constituent instruments of international organizations or any future agreements on that subject. As a residuary rule, his proposal would be useful to organizations which did not have any established procedure for settlement. He hoped that a system on the lines he proposed would be included in the Commission's draft articles.

21. Mr. USHAKOV thanked Mr. Kearney for his explanations and in particular for his reply to the comments he (Mr. Ushakov) had made during the previous discussion.[5]

22. He fully supported the principle of the conciliation procedure proposed both by the Special Rapporteur and by Mr. Kearney. Their proposals differed slightly in substance, in that in the Special Rapporteur's text the establishment of a conciliation commission was a faculty which might be exercised by the organization. whereas that was not the case in Mr. Kearney's proposal. But since Mr. Kearney had intimated that he was not opposed to that idea, he (Mr. Ushakov) proposed that in paragraph 2 of the text for article 50 submitted by Mr. Kearney, the last part of the first sentence, should be amended to read "refer it to a conciliation body which may be established by the Organization".

23. It was open to question, however, whether the Commission could impose a compulsory method of settling disputes on an organization, since it had still not been decided whether international organizations would or would not be parties to the convention resulting from the draft articles. That was an additional reason why article 50 should state a faculty, not an obligation.

24. In paragraph 2 of the text for article 50 submitted by the Special Rapporteur, he proposed that the words "a conciliation commission" should be replaced by "a conciliation body" and the words "any other mode of settlement" by "any other settlement body".

25. As the principle underlying the two texts before the Commission had been accepted, he was prepared to approve either of them, with the amendments he had proposed.

26. He could accept both the substance and the drafting of articles 50 *bis* and 50 *ter*, but, as in the case of article 50, he doubted whether the Commission could impose special rules on an organization so long as the question whether organizations were to participate in the future convention had not been settled. It might be better simply to state in the commentary that the Commission had had before it proposals for a conciliation body and a conciliation procedure, to explain what those proposals had been and leave it to governments to decide.

27. Mr. CASTRÉN said that the two proposals to expand article 50 were most welcome, since several members of the Commission, including himself, had expressed the opinion at previous meetings that article 50, though useful, was inadequate for the settlement of disputes or other questions which might arise concerning the application of the articles, and had mentioned conciliation procedure, arbitration or recourse to the International Court of Justice as an essential complement to consultations. The compulsory conciliation procedure provided for in the two proposals before the Commission did not guarantee that a dispute would be settled in all cases, but it was nonetheless a more effective arrangement than mere consultations; moreover, it was probable that a very large majority of States, if not all, would be able to agree to provision for a procedure of that kind in the future convention.

28. It was hard to make a definite choice between the two proposals, which both had advantages; it should be possible to combine them. The title proposed by the Special Rapporteur, which mentioned the settlement of disputes as well as consultations, was more accurate and was therefore preferable. For paragraph 1, the Special Rapporteur's text—which was, in fact, the text adopted by the Commission at first reading was a better starting-point, since the phrase "question... concerning the application of the present articles" was preferable to the phrase "difference ... concerning their respective rights and obligations under the present articles" used by Mr. Kearney; for a question which was the subject of consultations might not yet be serious enough to be called a difference. On the other hand, Mr. Kearney's text was correct in stating that a difference might arise between one or more sending States and the host State, not only between one sending State and the host State.

29. In paragraph 2 of both proposals it should be specified that recourse to the conciliation procedure, or to any other mode of settlement, as the Special Rapporteur proposed, was permitted if the consultations failed to achieve a result satisfactory to the parties concerned that was to say, to the States engaged in the consultations and to the organization, as Mr. Kearney's text expressly stated "within a reasonable time", and he proposed the insertion of those words. The Special Rapporteur proposed that a question which was not settled should be automatically submitted to another mode of settlement, though he did not say how; Mr. Kearney's proposal which provided that there could be recourse to another mode of settlement on the initiative either of the States concerned or of the organization, was preferable in that respect.

[5] See 1115th meeting, para. 63.

30. He did not see what difficulties could arise from the application of paragraph 3 of the Special Rapporteur's text, as Mr. Eustathiades feared. A provision of that kind, which already appeared in several treaties on the peaceful settlement of disputes between States, was useful and made article 50 more flexible. It was also in conformity with the previous paragraph, which made provision for other modes of settlement besides the conciliation procedure.

31. He approved of the principle underlying the other two very detailed articles proposed by Mr. Kearney, articles 50 *bis* and 50 *ter*, and thought such details were useful, though perhaps they should be left to the diplomatic conference which would take the final decision on the draft articles. In any event, it would be better to place them in an annex to the draft, as had been done with similar rules in the case of the Vienna Convention on the Law of Treaties. Without going into those articles in detail, he would like to suggest that at least one member of the conciliation commission referred to in article 50 *bis*, paragraph 2, should be chosen from among the sending States concerned.

32. Mr. YASSEEN said that the mode of settlement of disputes should be suited to the kind of international relations concerned. In the case of multilateral diplomacy, with which the Commission was concerned, an attempt should be made to institutionalize the procedures and to supplement what already existed. The consultation procedure provided for in article 50 was very useful, but since it might not be possible to settle a dispute by that means and it was in the interest of the international community that it should be settled, it was right to provide for recourse to other modes of settlement, in particular conciliation, or at least to recognize the need for them, if it was considered that a uniform mode of settlement could not be established for all organizations.

33. He believed however, that the consultation procedure should be set out in a separate article. The other modes of settlement, to be provided for in case the consultations failed, should be dealt with in another article, as they had been in the Vienna Convention on the Law of Treaties, in order to make it quite clear that they constituted a new phase for the settlement of general questions of concern to an organization and to the international community as a whole.

34. It was wise to include conciliation as a stage in the settlement of disputes. In the main, the rules proposed by Mr. Kearney were acceptable. The important point was to accept the principle underlying them, without trying to ascertain, as Mr. Ushakov wished to do, whether those rules could be invoked against organizations, since the same question arose in regard to many other provisions of the draft. The organizations might perhaps have to be invited by a resolution of the General Assembly to comply with rules of that nature, but in any event the Commission could make no progress in its work if it hesitated to state them.

35. In multilateral international relations it was extremely important to arrive at a settlement of disputes, so as to complement the conciliation procedure, which was only one stage; there was reason to provide for a means of imposing a settlement and thus finally settling the dispute in the interests of all members of the organization. He was inclined to favour recourse to arbitration or to the International Court of Justice, since he thought it necessary to make provision for the final settlement of disputes, even though there was every reason to believe that, with the help of good faith, they would in most cases be settled by means of consultations or conciliation.

36. Mr. ROSENNE said he was glad that the Special Rapporteur and Mr. Kearney had submitted specific proposals to remedy the inadequacies of article 50 as adopted by the Commission in 1969.[6]

37. It was necessary to include provisions on the procedure to be applied if the consultations produced no result, and Mr. Kearney had made a convincing case for his approach.

38. In paragraph 5 of his working paper (A/CN.4/L.171), the Special Rapporteur had said that "given the multiplicity and variety of international organizations to which these articles would apply, it would be difficult to provide for a standing uniform machinery for a rigid procedure of settlement". A passage on those lines should be included in the commentary to article 50.

39. He did not believe that the Commission should take a decision at that stage on the question whether the provisions of article 66 of the Vienna Convention on the Law of Treaties and the Annex to that Convention provided the best model, even though they might be suitably adapted. The problems to which article 50 would apply concerned a relatively confined area of international relations. The difficulties which had arisen in connexion with the Vienna Convention on the Law of Treaties had been due to the fact that that Convention applied to all aspects of treaty relations.

40. In view of the statement by the Special Rapporteur to which he had just referred and of the absence of an exact analogy with the Vienna Convention, it was necessary, as a first step, to leave each organization free to evolve the kind of procedure best suited to its needs. Nevertheless, it was highly desirable that the Commission should put forward, even if only in a tentative fashion, some sort of residuary procedure or model rules on which organizations could build. That should be done in such a way as not to exclude the possibility of the adoption of joint procedures by a number of organizations. He was thinking of arrangements such as those between the Administrative Tribunal of the United Nations and the Administrative Tribunal of the International Labour Organisation. With some exceptions, the former covered all the organizations of the United Nations system having their headquarters on the American continent, while the latter covered those with headquarters in Europe. The organizations themselves might wish to adopt machinery on those lines and that possibility should be left open.

[6] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221.

41. With regard to the drafting, he agreed with Mr. Castrén that the Special Rapporteur's title for article 50 was more apt. The Special Rapporteur's paragraph 1, however, was rather too broadly drafted. It would be going too far to say "If any question arises between a sending State and the host State concerning the application of the present articles ...". The draft articles covered a wide variety of topics and a question might well arise which affected the host State as a member of the organization, but had no relation to privileges and immunities. The text proposed by Mr. Kearney for paragraph 1 put the matter in the correct perspective, but the Drafting Committee should consider whether it should not refer to "mutual rights and obligations" rather than "respective rights and obligations"; it was the rights of the sending State and the host State vis-à-vis each other, that were involved.

42. In paragraph 2, he favoured Mr. Kearney's proposal for the opening words: "In the event the difference is not disposed of by means of consultations, any State engaged therein or the Organization may refer it...". That formulation was preferable to the Special Rapporteur's, which was vaguer and more impersonal and thus open to abuse. He was not fully convinced, however, that conciliation should now be definitely chosen as the appropriate mode of settlement, and he would therefore suggest that the first sentence should conclude with some such wording as "... may refer it to such mode of settlement as may be set up within each Organization".

43. The provisions of paragraph 1 of Mr. Kearney's article 50 *bis* should be retained as a residuary rule. If the organization concerned did not have any *ad hoc* or standing arrangement for the settlement of disputes, the provisions of that paragraph concerning a conciliation commission would apply.

44. He did not believe that the Commission should adopt the remainder of article 50 *bis* or the whole of article 50 *ter* at the present stage. He agreed with Mr. Ushakov that the proposals they contained should be included in the commentary, together with a statement that they had been placed before the Commission during the discussion and that the Commission wished to put them forward for consideration during the diplomatic phase of the work.

45. Generally speaking, the proposals were acceptable to him, although some points of detail might perhaps require more careful consideration. In particular, it seemed premature to take a firm decision on the question of a request for an advisory opinion from the International Court of Justice, mentioned in paragraph 3 of article 50 *ter*. It would have to be considered whether that provision was in conformity with article 96 of the Charter.

46. If the Commission decided to include the remainder of article 50 *bis* and article 50 *ter* in the draft, he reserved his right to comment on those provisions. But it was eesential to include paragraph 3 of the Special Rapporteur's proposal in article 50, not only because the question had been considered by the Commission in connexion with the law of treaties, but also because the substance of the present draft articles made it necessary to deal with the question of the multiplicity of treaty provisions on the settlement of disputes.

47. All the provisions he had recommended for retention should form a single article consisting of four or five paragraphs, not several separate articles.

48. Mr. ALCÍVAR said he had always adopted a cautious approach to the idea of establishing compulsory procedure for the peaceful settlement of disputes. The future convention should undoubtedly include some provision for such settlement, but the question was whether it should be limited to consultations, which did not involve any element of compulsion, or whether it should go further and make a conciliation procedure obligatory.

49. In principle, he himself favoured the fairly flexible arrangement proposed by the Special Rapporteur. The conciliation procedure proposed by Mr. Kearney was more rigid; in particular, he had some doubts about paragraph 5 of Mr. Kearney's proposed article 50 *ter* which provided that "The Commission shall reach its decisions by majority vote", since to his mind it was open to question whether such a provision implied conciliation or arbitration. A conciliation commission would merely express an opinion or make a recommendation; if that opinion or recommendation was to have any binding force, the commission would have to be more in the nature of a tribunal.

50. He also had certain reservations about Mr. Kearney's proposed article 50 *bis*, under which three members of the conciliation commission would be elected by the competent organ of the organization, one member would be selected by the host State and one member would be selected by the Secretary-General of the organization. It was surely strange that a sending State which was a party to the dispute should not also be entitled to appoint at least one member to the Commission, particularly in view of the fact that several sending States might be involved in a dispute with the host State.

51. Mr. REUTER congratulated the Special Rapporteur and Mr. Kearney on their proposed articles. The Special Rapporteur's text had the merit of simplicity, while Mr. Kearney's contained a series of detailed and imaginative proposals. He also welcomed the fact that every member of the Commission was trying to arrive at a joint solution to the problem under consideration; that was encouraging for the future progress of the Commission's work.

52. Without examining the proposals in detail, he observed that the Commission should not provide for any procedure which went beyond conciliation; for if it did, quite a number of States might find the future convention unacceptable for that reason. The same would apply if conciliation was made compulsory, with procedures that would allow the organization to intervene in all disputes arising between one or more sending States and the host State; through the entry into operation of the conciliation commission, those States might subsequently be led to have recourse to other modes of settlement. Hence it might well be that certain States

which were in favour of arbitration would refuse to be bound by such a system.

53. As Mr. Ushakov had rightly observed, it should not be forgotten that the convention being prepared was to be open for signature by States, so that it would not be binding on international organizations. But as Mr. Yasseen had said, those considerations should not prevent the Commission from doing its work. The Vienna Convention on the Law of Treaties was an encouraging precedent: although that instrument had not been adopted and signed by international organizations, it contained articles which concerned them directly.

54. There appeared to be general agreement in the Commission that conciliation should be made compulsory, in addition to the compulsory consultation procedure already provided for. In fact, recourse to consultations was already, in substance though not in form, a kind of conciliation procedure. In providing for real means of conciliation, one could either make it a formal procedure based to some extent on that used for arbitration, or retain its diplomatic character in certain minor respects. The authors of the drafts had each adopted one of those two approaches. He himself found it difficult to choose between them; but he believed that if conciliation was made compulsory, it would be preferable to have a very flexible system, for a number of reasons.

55. First, there were already a number of international instruments which could be invoked for the settlement of the kind of dispute under consideration. In the case of a dispute involving the United States of America, as host State to the United Nations, it would be possible to take into consideration the Headquarters Agreement between the United Nations and the United States of America, the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on the Law of Treaties and the convention now being prepared. Each of those texts contained different provisions on the settlement of disputes, and it was therefore important to provide for a simple and flexible system in the draft provisions now under study.

56. Secondly, it was very venturesome to provide that organizations should take part in the settlement of disputes of the kind envisaged. It was true that any dispute relating to the future convention would directly involve an organization and it would therefore be a party to all such disputes. But if a rigid system was established, the organization would be systematically involved in the settlement of those disputes, even if that was not the wish of the organization itself or of the States concerned.

57. Thirdly, conciliation procedure did not have a long history in international relations. Since 1946, cases of arbitration and conciliation involving international organizations had been relatively rare. So if conciliation procedure was to be introduced into the draft articles, care should be taken to ensure that it was sufficiently flexible not to remain a dead letter. Although it was desirable to establish machinery to which recourse would be easy in all cases, the conciliators should be appointed, not beforehand and *in abstracto*, but in the light of the circumstances of each case.

58. The considerations he had put forward should not be taken to mean that he had made any definite choice: the two drafts could still be improved or perhaps combined.

59. Mr. TAMMES said it had always been his impression that, on the basis of the Special Rapporteur's draft, the Commission tended to draw up two different kinds of article; one aimed at the maximum of clarity and precision, while the other could only express the existence of a certain balance of interests. In articles of the latter kind, it was necessary to rely on a subjective assessment of those interests and to apply it with discretion. Examples of such articles were article 16, which provided that the size of the permanent mission should not exceed what was "reasonable and normal", and article 34, which provided that if the sending State did not waive immunity, it should "use its best endeavours to bring about a just settlement of such claims". If, in the application of such articles, difficulties should arise as a result of different assessments of the interests involved, the conciliation procedure would be an appropriate and elastic method of resolving those difficulties.

60. He could see no valid reason, however, why those articles which were intended to be precise and definite should not be put into effect as a result of a final decision by some third party. In that respect he was inclined to support Mr. Yasseen's views concerning a third stage in the conciliation process. That element was lacking in the Special Rapporteur's proposal and also in Mr. Kearney's, which sought a final solution only through conciliation. Mr. Kearney had indeed referred to the settlement clauses in international agreements already in force, but it was to be expected that those clauses would eventually be replaced by the corresponding clauses in the present draft.

61. He himself did not think the conciliation procedure alone would ever result in a definite decision; it was more likely to end up with a mere recommendation, so that the original dispute would, in fact, remain undecided. It should be borne in mind that article 66 of the Vienna Convention on the Law of Treaties[7] provided for a threefold solution: judicial settlement, arbitration and conciliation.

62. In general, he could accept paragraph 2 of the Special Rapporteur's proposed text for article 50; it followed article VII, section 24, of the Convention on the Privileges and Immunities of the Specialized Agencies, part of which read "If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question... shall be submitted to the International Court of Justice ...".[8] Mr. Eustathiades had asked which were the parties concerned; that question could be answered by replacing the words "satisfactory to the State and the specialized agency concerned" by the words "satisfactory to the host State, the sending State and the Organization".

[7] *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).

[8] United Nations, *Treaty Series*, vol. 33, pp. 276-278.

63. He thought that the words "may be set up for the purpose of settling such disputes" in paragraph 2 of the Special Rapporteur's proposed article 50 should be amended to read "shall be set up...". In general, he was against imposing obligations on the organization, but there were certain obligations which it must inevitably accept if it was to function smoothly. In that respect, he preferred Mr. Kearney's formula, which presented a model settlement procedure that was complete in itself.

64. He shared the doubts expressed by Mr. Ushakov and Mr. Rosenne about Mr. Kearney's proposed articles 50 *bis* and 50 *ter*, because there were some international organizations, especially those with representative assemblies and governing bodies, which might prefer to be left free to draw up rules adapted to their own specific needs.

65. Unlike some other speakers, he was somewhat puzzled by paragraph 3 in the Special Rapporteur's proposed article 50. Article 65, paragraph 4 of the Convention on the Law of Treaties read: "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes". The complicating factor was that, with the Special Rapporteur's paragraph 3, both the new and the old settlement clauses would be applicable concurrently, since some States would accept the new convention, while others would choose to be bound by the existing agreements.

66. Sir Humphrey WALDOCK said he did not share Mr. Rosenne's objection to a uniform mode of settlement, such as a conciliation procedure, on the ground that there was a considerable difference in nature and functions between international organizations. However important those differences might be, the present articles dealt with a comparatively limited subject-matter, and there was a certain uniformity in the problems to be solved in all the organizations.

67. He had some sympathy with Mr. Yasseen's suggestion that a third stage might be necessary after the conciliation procedure. Compulsory consultations were a form of supervised negotiation; conciliation, though more formal, was also a kind of supervised negotiation; and in the end a satisfactory result might not be achieved. The question then arose whether the Commission should not propose some final stage, such as compulsory reference to the International Court of Justice or to arbitration.

68. He agreed with Mr. Yasseen that if States were to be induced to consider the possibility of accepting compulsory reference to the Court or to arbitration, it might well be in the context of a convention of the kind envisaged in the present articles, since there was a certain mutuality of interests and special relations among the parties which might incline them to view such a compulsory procedure more favourably. It would be necessary, however, to provide machinery which stood a reasonable chance of being accepted by the general body of States. In that connexion, he agreed with Mr. Reuter that it might be better to adopt a comparatively simple and flexible formula.

69. Paragraph 1 of the Special Rapporteur's text confirmed the right of compulsory reference to consultations, inasmuch as it stated that the host State, the sending State or the organization could request such reference and that the consultations would then be held. In paragraph 2, however, the situation was not quite so clear, since that paragraph stated that in the event of failure of the consultations, "the matter shall be submitted to a conciliation commission . . .". That recalled the classic problem of a joint submission to arbitration by a *compromis*, or a right to institute proceedings by unilateral application; in that respect, therefore, paragraph 2 was in need of some clarification.

70. Since not only the interests of individual States, but also the proper functioning of the organization was involved, he thought it would also be possible to refer the dispute to one of the plenary organs of the organization, subject to the latter's being ready to place the matter on its agenda. That possibility did not seem to be excluded by any of the procedures so far proposed.

71. He did not share the difficulties which some members experienced with regard to paragraph 3, since it seemed clear that none of the present proposals could derogate from the general obligation of States to settle disputes in accordance with their obligations under existing treaties.

72. Nor did he share Mr. Tammes' difficulty with the words "may be set up for the purpose of settling such disputes" in paragraph 2. The general obligation envisaged in paragraph 2 would not in any case derogate from the right of the organization to establish its own conciliation procedure.

73. The draft articles prepared by Mr. Kearney contained many valuable elements, particularly the provision in paragraph 4 of article 50 *ter* that the conciliation commission should submit a report of its findings to the Secretary-General and all participating members. If a draft was to be accepted at the future conference, it must be reasonably simple and concentrate on the nature of the conciliation commission itself. In particular, if the host State was to be represented in the commission, the draft would hardly prove acceptable unless other States were also represented.

74. Mr. KEARNEY was envisaging a conciliation commission which would be a permanent body; there was merit in that proposal, but he would like to hear the views of the Commission before reaching any final decision on it.

The meeting rose at 1 p.m.