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Summary record of the 1126th meeting

Topic:
Representation of States in their relations with international organizations

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in paragraph 5 of article 101 might be dispelled if it were made clear that the provision proposed by Mr. Kearney was applicable only if a sending State had not discharged its obligation under article 101 within two years.

110. Mr. ROSENNE said he supported Mr. Ago's view that the Commission should finish its work with a single text, which would not be one adopted by a small majority, but would represent the view of the Commission as a whole. He too believed that there was a close connexion between article 100 and paragraph 5 of article 101, which represented a compromise between two radically opposed points of view.

111. He also believed that alternative A, as a matter of law and practice, came much closer to the mark than alternative B, especially in view of the addition of the new paragraph 5 to article 101.

112. He thought Mr. Kearney had made a convincing case for his proposal. That proposal appeared to refer to certain kinds of claim involving specific sums of money, such as hotel, restaurant and shop bills, but he (Mr. Rosenne) had previously drawn attention to a different kind of claim, namely, a continuing and unliquidated claim, arising out of a continuing legal dispute²⁴ and he assumed that Mr. Kearney's proposal did not apply to that. He also hoped that Mr. Kearney would clarify the relationship between his proposal and paragraph 5 of article 101, as well as its relationship with the procedure for consultations envisaged in article 50.

113. Mr. KEARNEY said he did not think that Mr. Ago had represented the position of the Swiss Government quite accurately, since in paragraph 3 on the comments of governments on article 100 in the Special Rapporteur's sixth report (A/CN.4/241/Add.6) it was stated that the governments of Canada, Pakistan, Switzerland, Finland, Japan, the Netherlands, Sweden, the United States, France and Turkey had expressed a preference for alternative B. That paragraph went on to say: "In support of their position the Government of Switzerland drew attention to 'the fairly loose ties delegates have in the host State where their stay is only temporary' and added that 'In the circumstances, this wording of the text ensures adequate protection'". He realized, of course, that the Swiss Government had a variety of arrangements for international organizations, some of which, like the International Labour Organisation, appeared to be in a better position than other of the agencies of the United Nations.

114. On the question whether paragraph 5 of article 101 met the needs of the present draft, he pointed out that it had been taken over from an earlier article on waiver of immunity, which had been couched in even stronger terms. All the States which had expressed their preference for alternative B, many of which were host States, had made their choice in the light of that stronger text.

The meeting rose at 6.10 p.m.

²⁴ See 1108th meeting, para. 82.

1126th MEETING

Wednesday, 30 June 1971, at 10.5 a.m.

Chairman: Mr. Senjin TSURUOKA

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

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.6 and 7; A/CN.4/L.175)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 100 (Immunity from jurisdiction) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the two alternatives A and B for article 100 submitted by the Drafting Committee (A/CN.4/L.168/Add.6).

2. Mr. AGO (Chairman of the Drafting Committee) said that after considering the question at some length the Drafting Committee had come to the conclusion that it would be better to continue the discussion of the two alternatives in the Commission itself.

3. Several members of the Drafting Committee preferred alternative A, but generally speaking, they did not think they could accept Mr. Kearney's amendment (A/CN.4/L.175) which, in their opinion, would nullify the principle involved and make the article difficult to apply. Other members of the Drafting Committee were in favour of alternative B. They were prepared to accept Mr. Kearney's amendment, but preferred the text of alternative B as it stood.

4. In general, therefore, the Drafting Committee believed that Mr. Kearney's amendment did not provide a solution, so that the choice remained between alternatives A and B, which were already before the Commission.

5. Mr. KEARNEY said he had proposed his amendment to alternative A for article 100¹ merely in the hope that it might help the Commission to achieve a compromise. He himself preferred alternative B. He therefore withdrew his amendment.

¹ See previous meeting, para. 102.

6. Mr. ROSENNE said experience showed that texts adopted in the Commission by only a small majority were not conducive to success in the diplomatic phase of the codification process. Since alternatives A and B were both adequate from a technical point of view, and since the views of members appeared to be evenly divided, he would suggest that, as an exception, the Commission put forward both texts. That would provide a convenient point of departure for the diplomatic phase of the codification work.

7. Sir Humphrey WALDOCK said that, although his first choice was alternative B, he would not hesitate to accept alternative A if there were not enough support for alternative B; his views were probably shared by some others. The position of certain other members, on the other hand, was perhaps the opposite: they would prefer alternative A but, failing its general approval, might be prepared to accept alternative B.

8. Mr. USHAKOV said that if the Commission opted for alternative B, paragraph 5 of article 101 would become pointless.

9. Mr. AGO (Chairman of the Drafting Committee) said that as the Special Rapporteur had proposed alternative A, which was also closer to the corresponding provision on permanent missions, alternative B was a sort of amendment and, as such, should be put to the vote first.

10. He himself was prepared to accept either of the proposed alternatives, but he could not agree that there should be any difference in treatment between permanent missions and delegations. If the Commission adopted alternative B, it would therefore have to amend corresponding provisions relating to permanent missions and permanent observer missions. If it was not prepared to amend those provisions, he thought it had no choice but to adopt alternative A.

11. Mr. USTOR suggested that in order to avoid discussion on the question of priority, successive votes should be taken on the two texts in order to ascertain which had more support; in that way a vote would be taken on alternative B even if a majority pronounced in favour of alternative A.

12. Mr. BARTOŠ said that if the first text put to the vote were adopted, the second would be automatically excluded. The two alternatives were not separate texts which could exist side by side; only one of them could be adopted. It was for the Commission to decide which should be put to the vote first.

13. Mr. CASTRÉN said he was in favour of alternative B. If that alternative were adopted, he did not think it would be necessary to amend the corresponding provision relating to permanent missions, since there was a fundamental difference between permanent missions and delegations.

14. With regard to the order in which the two texts should be put to the vote, alternative B should be voted on first since it was an amendment to the text proposed by the Special Rapporteur.

15. Mr. ROSENNE said he would prefer alternative A, provided that paragraph 5 of article 101 was retained; the provisions of that paragraph were really an integral part of alternative A.

16. Mr. AGO (Chairman of the Drafting Committee) suggested that since, for certain members of the Commission, the choice between alternatives A and B depended on the retention of paragraph 5 of article 101, the best course would be to suspend the discussion on article 100 and pass on to article 101.

17. The CHAIRMAN said that, for the reason given by the Chairman of the Drafting Committee and in view of the absence of some members, it would seem desirable to defer a decision on article 100. Consequently, if there were no objection, he would take it that the Commission agreed to suspend consideration of article 100 for the time being.

It was so agreed.²

ARTICLE 101

18. Mr. AGO (Chairman of the Drafting Committee) said that paragraphs 1 to 4 of article 101 were based on article 33, which was the corresponding provision for permanent missions.

19. The Drafting Committee had thought it advisable to add a new provision, paragraph 5, based on the recommendation in resolution II, on consideration of civil claims, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities.³ In the draft articles, the provision was no longer a recommendation, but placed the sending State under a legal obligation, when there was a civil action, either to waive the immunity of the person concerned or to use its best endeavours to bring about a just settlement. Thus, articles 100 and 101, taken together, would guarantee the practical settlement of nearly all civil cases.

20. Furthermore, the legal obligation to seek a just settlement might lead to the initiation of the consultation and conciliation procedure provided for in article 50, to which the host State could have recourse if it considered that the sending State was not really trying to find a means of settlement; and that would provide an additional guarantee of the settlement of civil cases. Thus paragraph 5 was extremely important.

21. The text proposed for article 101 read:

Article 101

Waiver of immunity

1. The immunity from jurisdiction of the representatives of the delegation to an organ or to a conference and members of its diplomatic staff and of persons enjoying immunity under article 105 may be waived by the sending State.

2. Waiver must always be expressed.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude them from

² For resumption of the discussion see 1134th meeting, para. 47.

³ United Nations, *Treaty Series*, vol. 500, pp. 218-220.

invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Mr. USTOR said that article 32 of the 1961 Vienna Convention on Diplomatic Relations⁴ contained an identical provision on waiver of immunity, but without any title. The corresponding article 45 of the 1963 Vienna Convention on Consular Relations,⁵ however, was entitled "Waiver of privileges and immunities" and stated in paragraph 1 that the sending State might waive "any of the privileges and immunities provided for in Articles 41, 43 and 44" of that Convention. On the other hand, article 41 of the 1969 Convention on Special Missions⁶ was entitled "Waiver of immunity" and made no reference to privileges; it referred specifically to "Waiver of immunity from jurisdiction".

23. Since article 101, like article 41 of the Convention on Special Missions and unlike article 45 of the Vienna Convention on Consular Relations, did not refer in any way to privileges, the waiver of which was not in any case a practical proposition, he proposed that the present title, "Waiver of immunity" be amended to read: "Waiver of immunity from jurisdiction".

24. Mr. AGO (Chairman of the Drafting Committee) said he could accept that proposal.

25. Mr. TAMMES said that in view of the importance attached to paragraph 5, he would like to have some clarification from the Chairman of the Drafting Committee on a specific point. Was it a matter for unilateral decision by the sending State whether it should "use its best endeavours to bring about a just settlement of the case"?

26. It was worth noting that section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations⁷ provided that a Member State was "under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice and it can be waived without prejudice to the purpose for which that immunity is accorded". That language made it clear that the matter was one for the unilateral decision of the Member State concerned and was therefore not open to judgment by a third party in the context of any applicable procedure for the settlement of disputes.

27. Mr. AGO (Chairman of the Drafting Committee) said that the decision whether or not to waive immunity

was clearly unilateral and was left to the discretion of the sending State, which was not obliged to explain its decision to anyone. On the other hand, paragraph 5 imposed an objective obligation on the sending State; the host State would therefore have grounds for complaint if that obligation were not fulfilled and would be free to resort to the consultation or conciliation procedure.

28. Sir Humphrey WALDOCK said he agreed with the Chairman of the Drafting Committee. The provisions of paragraph 5 were also of importance in relation to those of paragraph 1, sub-paragraphs (a), (b) and (c) of alternative A for article 100.

29. The question whether an act should be considered as having been performed in the course of official functions, in other words "on behalf of the sending State", or "outside" the official functions of the person concerned, was a critical factor for determining whether the act was covered by immunity or not. Consequently, on the question of the application of the exceptions set forth in the various sub-paragraphs of alternative A, paragraph 1, a conflict of views could arise between the sending State and the courts of the host State. The sending State could take an extensive view of what constituted the official duties of the person concerned and claim that if the courts of the host State assumed jurisdiction in a particular case, they were violating the terms of the convention that would emerge from the present draft articles. The sending State would thus be claiming that the dispute related to the interpretation of that convention.

30. In his view, paragraph 5 of article 101 had very general importance; for regardless of any dispute on the proper interpretation of the provisions of article 100, the obligation to ensure a just settlement of the case, set forth in paragraph 5 of article 101 would exist.

31. Mr. REUTER said that, in general, he agreed with Mr. Ago. However, paragraph 5 was not so exceptionally important as Mr. Ago believed it to be, unless it was considered from the point of view of procedure rather than substance.

32. With regard to the substance, paragraph 5 did not add anything to the obligations of the sending State, since privileges and immunities were accorded only for the performance of functions, and no one enjoyed them in his personal capacity. In fact, therefore, the sending State was merely required by an obligation of good faith to do everything possible to avoid obstructing the administration of justice.

33. From the procedural point of view, on the other hand, paragraph 5 might be extremely important, but the Commission could not yet say what its effect would be, for two reasons. The first reason was that the present text referred only to a dispute between a representative and a private person, in other words a private dispute and not a dispute between governments. Since private disputes involved delicate questions of judgment, the sending State could not be asked to bring excessive pressure to bear on its representative, so the obligation stated in paragraph 5 could only relate to conduct. If

⁴ *Ibid.*, p. 112.

⁵ *Op. cit.*, vol. 596, pp. 298-300.

⁶ See General Assembly resolution 2530 (XXIV), Annex.

⁷ United Nations, *Treaty Series*, vol. 1, p. 22.

the Commission wished to go further, it would have to amend the text of the paragraph.

34. The second reason was that the Commission had not yet decided what to do about procedures for the settlement of disputes. Paragraph 5 could be of major importance if—and only if—the procedures adopted were sound.

35. Mr. USHAKOV reiterated that if the Commission adopted alternative B for article 100, paragraph 5 of article 101 would be completely pointless.

36. Paragraph 2 (a) of alternative B for article 100 provided for immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of official functions. That meant that the immunity from jurisdiction did not apply where the acts complained of were performed outside the exercise of official functions. Hence it could only be in the case of acts performed in the exercise of official functions that the sending State must either waive immunity or use its best endeavours to bring about a just settlement of the case, as provided in paragraph 5 of article 101. He could not accept a provision to that effect. If the Commission adopted alternative B for article 100 and paragraph 5 of article 101, diplomats would no longer enjoy immunity from civil jurisdiction.

37. Mr. CASTRÉN said that paragraph 5 of article 101 was very valuable and important. He could not agree with Mr. Reuter that it did not impose any obligation on the sending State; the obligation, although not a strong one, did exist.

38. However, the new provision did not provide a complete guarantee of the settlement of disputes, as Mr. Ago had said. There was still the possibility of recourse to consultations and conciliation, which would not guarantee a positive result either. The guarantee was further weakened by the fact that, in both cases, the sending State would be taking a unilateral decision, and unfortunately States were not always objective.

39. He agreed with Mr. Ushakov that the Commission could not adopt both alternative B for article 100 and paragraph 5 of article 101. He would prefer it to adopt alternative B and delete paragraph 5.

40. Mr. ROSENNE said he agreed that the provisions of paragraph 5 of article 101 were essential to alternative A for article 100. Nevertheless, they were also highly desirable, and would have an independent function to perform, if alternative B were adopted.

41. He noted that the word "case", at the end of paragraph 5, was rendered in the French version by the word "*litige*" and in the Spanish version by the word "*litigio*". Bearing in mind the provisions of the corresponding articles on permanent missions and permanent observer missions, the word "case" should be construed in the broad sense of "matter" rather than in the narrow sense of "lawsuit", which was perhaps conveyed by the French "*litige*" and the Spanish "*litigio*". He therefore suggested that the French and Spanish terms be reconsidered.

42. Mr. REUTER explained that he had not said that paragraph 5 did not establish an obligation. On the contrary, it did establish an obligation relating to conduct, which was of some importance.

43. With reference to Mr. Ushakov's comments, he said that in the exercise of his functions a representative was not only covered by immunity from proceedings, but also enjoyed a real irresponsibility. According to alternative A, proceedings could be taken against a representative only for acts committed outside the exercise of his official functions. A representative who travelled by car from his home to the headquarters of the organization was acting in the exercise of his official functions and was therefore covered by immunity from jurisdiction; but if he caused an accident, any State of good faith would consider itself obliged to use its best endeavours to bring about a just settlement of the case.

44. Mr. YASSEEN said that immunity was not synonymous with irresponsibility. Immunity from jurisdiction did not mean that the person concerned was presumed to be irresponsible and that the case must not be settled. The reason why he was reluctant to accept paragraph 5 was that he thought it unnecessary to state a rule prescribing conduct which was in any case required as a matter of good faith between States. In general, States did not hesitate to compensate persons injured by one of their representatives.

45. However, if the Commission adopted alternative A for article 100, he could accept paragraph 5, although it stated an obligation relating to method and not to result, since it might open the way for procedures for the international settlement of disputes.

46. Mr. USTOR said that no doubt there could be differences between the view of the sending State and the pronouncements of the courts of the host State on the question whether a particular act was to be regarded as performed in the exercise of the official functions of the person concerned. That type of difficulty was, however, a general feature of diplomatic law and could arise in connexion with all matters of immunity.

47. With regard to the provisions of paragraph 5, the main issue was the legal nature of the immunity from civil jurisdiction in the case of acts performed in the exercise of official functions. In most of those cases, the immunity belonged to the sending State itself and not to the person concerned. The act in question was an act of the State on whose instructions the person concerned had acted. It was not so much a matter of the diplomatic immunity of an individual as of the absence of jurisdiction over the acts of foreign States.

48. What the drafters of paragraph 5 had had in mind was the case of a person enjoying diplomatic immunity, but acting on his own behalf, not the case of an act of State. There had been no intention to prejudge the question whether a State would be prepared to submit certain of its acts to adjudication by the courts of another State.

49. It was therefore clear that if alternative A were chosen for article 100, it would rule out paragraph 5 of

article 101, because that paragraph had not been intended to apply to acts of State.

50. Mr. KEARNEY said that not all of those who had drafted paragraph 5 had had in mind non-official acts exclusively. As far as he was concerned, he had envisaged such cases as court action resulting from an accident caused by a diplomatic agent in a hurry to attend an official meeting.

51. The point raised by Mr. Rosenne on the meaning of the word "case" raised the important question how far it was necessary to go before the provisions of paragraph 5 went into operation.

52. On a broad interpretation, it might be considered sufficient for the claimant to write to the permanent representative asking him to make arrangements for a waiver of immunity; a refusal by the latter to do so would then bring the provisions of paragraph 5 into play. A second and narrower approach would be to require the claimant to institute court proceedings; if objection were raised by the defendant on grounds of immunity and his objection were upheld by the court, the provisions of paragraph 5 would then operate.

53. Personally, he preferred the first approach. The term "case" should not be taken as a formal requirement; it should be construed in the broad sense of a claim rather than in the narrow sense of a lawsuit.

54. Mr. AGO (Chairman of the Drafting Committee) said he agreed with Mr. Kearney that, to be effective, paragraph 5 had to be interpreted as broadly as possible. The Drafting Committee might examine whether the wording could be improved in that respect.

55. Mr. Reuter had said that paragraph 5 added nothing to the obligations of the sending State. He himself did not share that view. Paragraph 5 imposed on the sending State the obligation to endeavour to find an extra-judicial settlement of a claim. He thought it was the first time that international law had included such an obligation, which went far beyond good faith.

56. Mr. Reuter had also said that paragraph 5 could only refer to actions between private persons. But if the sending State did not use its best endeavours to bring about a just settlement of the case and the host State accused it of having failed to fulfil the obligation provided for in paragraph 5, such an action would become a dispute between States.

57. Mr. Castrén had said he would prefer to drop paragraph 5 of article 101 so as to be able to adopt alternative B for article 100. Actually, when taken together, the provisions of alternative A of article 100 and paragraph 5 of article 101 should lead more frequently to complete settlement of cases than the provisions of alternative B. Because it granted wider immunities, alternative A limited the possibility of recourse to judicial procedures, but the system provided that when an action was brought, it could be settled either by judicial means, if the sending State chose to waive immunity, or out of court if it did not, inasmuch as the sending State was under an obligation to seek means of reaching a practical settlement.

58. On the other hand, while alternative B of article 100 did not grant such extensive immunities, it provided no guarantee that the victim would be adequately compensated after winning a case, since representatives of States also enjoyed immunity from measures of execution. Consequently, the end in view was better achieved by the combination of alternative A for article 100 and paragraph 5 of article 101.

59. Mr. CASTRÉN said he maintained his position despite the explanations given by the Chairman of the Drafting Committee.

60. Mr. REUTER suggested that the words "*du litige*" in the French version of paragraph 5, be replaced by the words "*de l'affaire*".

61. In reply to Mr. Ago, he said that the whole of his own previous statement had been based on the distinction between obligations of substance and obligations of procedure. So far as substance was concerned, he entirely agreed with Mr. Yasseen. When a State had recourse to immunity from measures of execution contrary to equity and good faith, it violated a fundamental rule of public international law.

62. Mr. AGO (Chairman of the Drafting Committee) said he accepted Mr. Reuter's suggestion.

63. Mr. USHAKOV said that the only possible interpretation of the provisions under consideration was that civil jurisdiction operated only with respect to acts committed outside the exercise of official functions, so that paragraph 5 of article 101 could refer only to acts committed in the exercise of official functions. Those provisions were not concerned with immunity from measures of execution.

64. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 101 as proposed by the Drafting Committee, subject to a possible amendment of the title and to the replacement, in the French version, of the word "*litige*" by the word "*affaire*". A similar change should be made in the Spanish version.

*It was so agreed.**

65. The CHAIRMAN invited the Commission to consider articles 102 to 108 as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 102

66. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 102 was based on article 34 of the Vienna Convention on Diplomatic Relations,⁹ article 33 of the Convention on Special Missions¹⁰ and article 36 of the present draft. The only difference of substance between articles 102 and 36 related to sub-paragraph (f). In article 36 that sub-paragraph read: "registration, court or record fees, mortgage dues and stamp

* For resumption of the discussion see 1134th meeting, para. 56.

⁹ United Nations, *Treaty Series*, vol. 500, p. 114.

¹⁰ See General Assembly resolution 2530 (XXIV), Annex.

duty, with respect to immovable property, subject to the provisions of article 26". The clause "with respect to immovable property" appeared both in article 34 of the Vienna Convention and in article 33 in the draft on Special Missions as adopted by the Commission in 1967,¹¹ but it had been deleted from the Convention on Special Missions as a result of the adoption, by 24 votes to 23, with 39 abstentions, of an oral amendment proposed by the representative of France in the Sixth Committee.¹² The clause had not been included in paragraph (f) of article 102, because in 1970 the International Law Commission had followed the Convention on Special Missions.

67. But if the clause were now omitted from article 102 and retained in article 36, the result would be that permanent missions would have to pay registration, court or record fees, mortgage dues and stamp duty with respect to movable property only, whereas delegations would have to pay them on all property, movable and immovable. The practical effect of such a difference in treatment would be very small, since such charges rarely applied to movable property. The Drafting Committee therefore proposed that permanent missions and delegations should be treated on an equal footing in that respect, the clause in question being retained in article 36 and added to article 102.

68. A minor change had been made at the end of sub-paragraph (c): since the Drafting Committee had made article 109 into paragraph 4 of article 108, the reference had been amended accordingly.

69. The text proposed for article 102 read:

Article 102

Exemption from dues and taxes

The representatives in the delegation to an organ or to a conference and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 108;

(d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 95.

70. Mr. EUSTATHIADES said that the insertion of the words "with respect to immovable property" had

the effect of exempting the persons concerned from taxes on movable property. In view of the relatively short duration of the functions of delegations, it might not be appropriate to grant them such exemption. Possibly the Commission had been too liberal in its draft on Special Missions.

71. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee was simply proposing that the Commission return to the position it had taken with regard to special missions. The French amendment submitted in the Sixth Committee had only been adopted by the barest majority and in the present case it might well be that the Commission's point of view would be endorsed by the Conference of Plenipotentiaries.

72. The drafting of sub-paragraph (f) had been complicated by the fact that, with respect to movable property, it contained an exception to an exception. That exception had been included because taxes on movable property were generally payable by the person concerned, whereas taxes on immovable property were borne by the State.

73. Mr. REUTER said he considered article 102 acceptable. In fact, the exception to the exception contained in sub-paragraph (f) related only to very rare eventualities, such as the case of a lien on a ship. Hence the change made by the Drafting Committee was of only minor practical significance.

74. Instead of choosing that solution, the Drafting Committee could have left sub-paragraph (f) applicable to all property, movable and immovable, which would have been slightly more advantageous to the host State. The most important question was which wording would make the convention more acceptable.

75. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 102 as proposed by the Drafting Committee.

*It was so agreed.*¹³

ARTICLE 103

76. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had brought article 103 into line with article 38 of the draft. In doing so, it had eliminated a number of differences in drafting, the main one being at the beginning of paragraph 1, where the phrase "Within the limits of such laws and regulations as it may adopt" had been replaced by the phrase "in accordance with such laws and regulations as it may adopt". The Committee had considered the two phrases to be very similar. The first appeared in article 35 of the Commission's 1967 draft on Special Missions, while the second was used in article 38 of the present draft and in article 36 of the Vienna Convention on Diplomatic Relations. In its commentary to the draft Convention on Special Missions, the Commission had not indicated why it had not followed the wording of the

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, pp. 362-363.

¹² See *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 87, document A/7799*, paras. 47-49.

¹³ For resumption of the discussion see 1134th meeting, para. 63.

Vienna Convention, thereby implying that the difference between the two phrases was not significant.

77. The Drafting Committee had not inserted in paragraph 1 (b) the phrase "including articles intended for his establishment", which appeared in the corresponding sub-paragraph 38; since article 103 dealt with delegations, whose functions were generally of short duration, that phrase would be out of place.

78. The text proposed for article 103 read:

Article 103

Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the delegation to an organ or to a conference;

(b) articles for the personal use of a representative in the delegation or a member of its diplomatic staff.

2. The personal baggage of a representative in the delegation or a member of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

79. Mr. EUSTATHIADES said he would like the commentary to contain an explanation of how the first phrase in paragraph 1 was to be understood.

80. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 103 as proposed by the Drafting Committee, subject to Mr. Eustathiades's remark concerning the commentary.

*It was so agreed.*¹⁴

ARTICLE 104 (Exemption from social security legislation, personal services and laws concerning acquisition of nationality)

81. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 104 in square brackets, because the Working Group was considering making it a general provision. The Committee therefore proposed that the Commission defer consideration of the article for the time being.

82. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal,

*It was so agreed.*¹⁵

¹⁴ For resumption of the discussion see 1134th meeting, para. 69.

¹⁵ For resumption of the discussion see 1134th meeting, para. 60.

ARTICLE 105

83. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had slightly changed the wording of the first two paragraphs of article 105¹⁶ so as to bring them into line with article 40, but had left intact those differences which it considered justified. In particular, the Committee had thought it necessary to retain the distinction between the members of the family who accompanied members of delegations, in article 105, and the members of the family forming part of the household of members of permanent missions, in article 40. The verb "accompany" was appropriate in article 105, because of the temporary character of delegations.

84. In paragraph 1, the Drafting Committee had retained the words "or permanently resident in the host State". Thus the paragraph applied to members of the family of a representative in a delegation or of a member of the diplomatic staff of a delegation on two conditions: that such members of the family were neither nationals of the host State nor permanently resident in the host State. Those words were not included in paragraph 1 of article 40, since that provision applied to the members of the family of a permanent representative or of a member of the diplomatic staff of a permanent mission on condition only that such members of the family were not nationals of the host State. The Committee had considered that the difference in treatment thus established between delegations and permanent missions was justified, in view of the short time spent by members of delegations in host States. If they joined a member of their family permanently resident in the host State, there seemed to be no reason why that person should enjoy the privileges and immunities referred to in article 105, paragraph 1, for the duration of the delegation's functions.

85. In paragraphs 3 and 4 of article 105 the Commission had not, in 1970, reproduced the clause "who are not nationals of or permanently resident in the host State". In the corresponding paragraphs of article 40, that clause concerned members of the service staff of permanent missions and private staff; it was unnecessary there because the point was covered by article 41, which dealt with members of permanent missions and persons on the private staff who were nationals of or permanently resident in the host State. Since article 106 specified that the provisions of article 41 applied also in the case of delegations, the Drafting Committee had not included that clause in article 105; it also intended to propose that the clause be deleted from article 40 when the draft articles were revised.

86. The title of article 105 had been brought into line with that of article 40.

87. The last sentence of paragraph 4 of article 105 had been slightly changed in the French version, in order to provide a better rendering of the idea expressed in the

¹⁶ For previous text see 1109th meeting, para. 62.

English. The Drafting Committee intended to make the same change in the French version of article 40.

88. The text proposed for article 105 read:

Article 105

Privileges and immunities of persons other than the representatives in the delegation to an organ or to a conference or than the members of its diplomatic staff

1. The members of the family of a representative in the delegation to an organ or to a conference who accompany him and the members of the family of a member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 98, 99, 100, 102, in paragraphs 1(b) and 2 of article 103 and in article 104.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 98, 99, 100, 102 and 104, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 103 in respect of articles imported at the time of their entry into the territory of the host State to attend the meeting of the organ or conference.

3. Members of the service staff of the delegation shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and the exemption from social security legislation provided for in article 104.

4. Private staff of members of the delegation shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the delegation.

89. Mr. EUSTATHIADES, referring to paragraph 2, said he must reiterate his doubts about the advisability of granting the privileges and immunities referred to in articles 98 and 99, 100, 102 and 104 to members of the families of the administrative and technical staff of delegations to an organ. Such privileges and immunities could only be justified by the need to ensure the regular performance of functions.

90. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the phrase, in paragraph 2, "except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 100 shall not extend to acts performed outside the course of their duties" had been drafted in case the Commission adopted alternative A for article 100. It would have to be revised if alternative B were adopted.

91. The CHAIRMAN said that if there were no objection he would take it that the Commission provisionally approved article 105 as proposed by the Drafting Committee.

*It was so agreed.*¹⁷

¹⁷ For resumption of the discussion see 1135th meeting, para. 14.

ARTICLE 106

92. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had made no change in article 106, the text of which read:

Article 106

Nationals of the host State and persons permanently resident in the host State

The provisions of article 41 shall apply also in the case of a delegation to an organ or to a conference.

*Article 106 was provisionally approved.*¹⁸

ARTICLE 107 (Privileges and immunities in case of multiple functions)

93. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that the Committee had placed article 107 in square brackets, because the Working Group intended to make it a general provision. The Commission therefore proposed that the Commission defer consideration of the article for the time being.

94. The CHAIRMAN said that if there were no objection he would take it that the Commission accepted the Drafting Committee's proposal.

*It was so agreed.*¹⁹

ARTICLE 108

95. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that in the text adopted by the Commission in 1970, article 108 had consisted of three paragraphs, corresponding to the first three paragraphs of article 42.²⁰ Article 109 had had two paragraphs, the provisions of which corresponded to those of paragraph 4 of article 42. In order to bring articles 108 and 109 as closely into line with article 42 as possible, the Drafting Committee had converted article 109 into paragraph 4 of article 108. For the last sentence of that paragraph it had, however, preferred the wording adopted by the Commission in 1970 for article 109, paragraph 2, although it differed slightly from the corresponding provisions of article 42 of the draft and article 39 of the Vienna Convention on Diplomatic Relations. When the draft was reviewed, the Committee intended to use the same wording for article 42.

96. The text proposed for article 108 read:

Article 108

Duration of privileges and immunities

1. Every person entitled to privileges and immunities under the provisions of this part shall enjoy such privileges and immunities from the moment he enters the territory of the host State on the occasion of the meeting of an organ or conference, or,

¹⁸ For resumption of the discussion see 1135th meeting, para. 19.

¹⁹ For resumption of the discussion see 1135th meeting, para. 43.

²⁰ See *Yearbook of the International Law Commission, 1970*, vol. II, document A/8010/Rev.1, chapter II, section B.

if he is already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person entitled to privileges and immunities under this part have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation to an organ or to a conference, immunity shall continue to subsist.

3. In case of the death of a member of the delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

*Article 108 was provisionally approved.*²¹

The meeting rose at 1 p.m.

²¹ For resumption of the discussion see 1135th meeting, para. 22.

1127th MEETING

Thursday, 1 July 1971, at 4.15 p.m.

Chairman: Mr. Senjin TSURUOKA

Present: Mr. Alcívar, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldoock, Mr. Yasseen.

Relations between States and international organizations

(A/CN.4/221 and Add.1; A/CN.4/238 and Add.1 and 2; A/CN.4/239 and Add.1 and 2; A/CN.4/240 and Add.1 to 7; A/CN.4/241 and Add.1 to 6; A/CN.4/L.162/Rev.1; A/CN.4/L.168/Add.7)

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles 110 to 116 *bis* as proposed by the Drafting Committee (A/CN.4/L.168/Add.7).

ARTICLE 110

2. Mr. USHAKOV, speaking on behalf of the Drafting Committee, said that article 110¹ corresponded to article 43 of the draft. The essential difference between the two articles had lain in the provisions of paragraph 4 of article 110, which were not included in article 43 or in the corresponding article 40 of the Vienna Convention on Diplomatic Relations.² Those provisions had read:

“4. The third State shall be bound to comply with its obligations in respect of the persons mentioned in paragraphs 1, 2 and 3 of this article only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the delegation, members of their families or couriers and has raised no objection to it.”

3. On the other hand, the opening sentence of paragraph 1 of article 43, which was based on article 40 of the Vienna Convention on Diplomatic Relations, contained a clause not included in article 110, reading: “which has granted him a passport visa if such visa was necessary”. A similar clause was to be found in paragraph 3 of article 43 where it applied to couriers of the permanent mission.

4. There was thus a major difference of substance between article 43 of the draft and article 40 of the Vienna Convention on the one hand, and article 110 on the other. Under the terms of the first two articles, it was sufficient that the third State should have been asked for a visa, if a visa was necessary. Under the terms of article 110, even if a visa was not necessary, the third State had to be informed of the transit in advance, so that it could object if need be.

5. The Drafting Committee had noted that the provisions of paragraph 4 of article 110 were based on paragraph 4 of article 42 of the Convention on Special Missions³ and had considered that while they might be justified in the case of special missions in view of the great variety of their functions and nature, such provisions were hardly justified in the case of delegations to an organ or a conference. It had therefore deleted paragraph 4 of article 110 and had inserted the clause relating to a visa in paragraphs 1 and 3.

6. In the French version of paragraph 3, the Committee had departed slightly from the wording of the Vienna Convention on Diplomatic Relations in order to bring paragraph 3 into line with paragraph 1. It intended to do the same in article 43.

7. For the rest, the Committee had modelled article 110 as closely as possible on article 43. In the interests of clarity and concision, however, in the second sentence of

¹ For previous text see 1109th meeting, para. 83.

² United Nations, *Treaty Series*, vol. 500, pp. 118-120.

³ See General Assembly resolution 2530 (XXIV), Annex.