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A/CN.4/SR.465

Summary record of the 465th meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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Commission was in agreement that a passage should be inserted in the report stating that the Commission had discussed the criticisms made in the Sixth Committee, and ways and means of increasing its output of work; it should stress the special kind of work it did and set out any practical conclusions it had adopted on the basis of the memorandum submitted by Mr. Zourek (A/CN.4/L.76).

55. The CHAIRMAN considered that preferably the Commission should not take a formal decision. He suggested that an account of the discussion might be included in the report of the Commission.

It was so agreed.

56. Mr. LIANG, Secretary to the Commission, replying to points raised by Mr. Zourek, said that in the practice of United Nations bodies a drafting committee as a general rule was not provided with full technical services. His only reason for mentioning the financial implications of Mr. Zourek's proposals had been that he felt that the Commission should have all the facts before it. In any case, if the Drafting Committee did not meet at the same time as the Commission, the cost would be correspondingly reduced.

57. Mr. AMADO said that on reflexion he was not prepared to support the idea that the Drafting Committee should have full technical services, for if it was provided with such services the Committee would acquire a special status, which would be an undesirable precedent.

Representation at the thirteenth session of the General Assembly

58. Mr. LIANG, Secretary to the Commission, suggested that the Commission should, as in past years, depute its Chairman to represent it at the thirteenth session of the General Assembly.

It was so agreed.

Date and place of the eleventh session

[Agenda item 7]

59. Mr. LIANG, Secretary to the Commission, said the dates suggested for the opening and closing of the eleventh session at Geneva were 20 April and 26 June 1959.

60. After some discussion, the CHAIRMAN proposed that members should discuss the possible dates among themselves and reach agreement at the next meeting.

It was so agreed.

The meeting rose at 6.15 p.m.

465th MEETING

Tuesday, 17 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Date and place of the eleventh session *(continued)*

[Agenda item 7]

1. Mr. LIANG, Secretary to the Commission, explained that, as the Commission's eleventh session would be preceded by a conference of plenipotentiaries to draft an international convention for the elimination of statelessness and followed by a session of the Economic and Social Council the dates of which were in effect fixed by the Council's rules of procedure, any dates other than those he had mentioned at the previous meeting would involve a conflict with the other meetings. Accordingly, the Commission had no other choice but to hold its eleventh session from 20 April to 26 June 1959.

It was so decided.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 33

2. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Belgium, Luxembourg, Switzerland (A/CN.4/114) and Italy (A/CN.4/114/Add.3) and to his own comments (A/CN.4/116). He was not proposing any amendment to the article. The Italian Government's proposal might be dealt with by the Drafting Committee.

3. Mr. AGO said that the Italian Government's proposal was, he believed, based on the idea that it was the duty of all diplomatic agents to respect local laws, whether or not they were entitled to privileges and immunities.

4. Mr. SANDSTRÖM, Special Rapporteur, said it was an implied term of article 33 that persons enjoying privileges and immunities were not subject to the jurisdiction of the receiving State. For that reason, it was desirable to leave its wording unchanged. The Italian Government's proposal was less comprehensive, and less concise.

5. Mr. BARTOS said that when diplomatic privileges and immunities were granted all those enjoying them should be, as a corollary, under the duty to respect the laws and regulations of the country which granted them. It was an obligation of the sending State to see that

they did so, and that State committed a breach of international law if it failed in that obligation. He agreed with the Special Rapporteur that the article was not improved by the Italian Government's proposed amendment.

6. Mr. AGO said that, in view of the remarks of the previous two speakers, he would be prepared to accept the existing text of article 33 as drafted at the ninth session (A/3623, para. 16).

7. The CHAIRMAN put to the vote article 33 as drafted at the ninth session.

Article 33 was adopted unanimously.

ARTICLE 34

8. Br. SANDSTRÖM, Special Rapporteur, referred to the observation of the United States Government (A/CN.4/114). He had no objection to article 34 being amended in accordance with that Government's observation, but perhaps the substance of the observation could be put in the commentary; alternatively, the words " to the diplomatic agent " might be omitted from sub-paragraph (*c*).

9. In reply to a question by Mr. Matine-Daftary, he said that the notification in sub-paragraph (*c*) was made when a person was declared *persona non grata* under article 6.

10. Mr. MATINE-DAFTARY thought that sub-paragraph (*c*) would be improved by the addition of the words " in accordance with article 6 ".

11. Mr. VERDROSS thought that the United States Government's observation was well founded, for diplomatic relations were between States, not between individuals, so that a State could not notify the diplomatic agent direct but must notify the Government of the sending State. He therefore suggested that the words " to the sending State " be substituted for the words " to the diplomatic agent " in sub-paragraph (*c*).

12. Mr. ALFARO supported Mr. Matine-Daftary.

13. Mr. AMADO said that sub-paragraph (*d*) was probably not necessary, as it was self-evident that the functions of a diplomatic agent came to an end on death. He proposed therefore that sub-paragraph (*d*) be deleted.

14. Mr. SANDSTRÖM, Special Rapporteur, accepted the proposals of Mr. Matine-Daftary and Mr. Verdross. With regard to Mr. Amado's proposal, he said that while death of course ended the functions of a diplomatic agent, it might be desirable to retain the sub-paragraph for the sake of completeness.

15. The CHAIRMAN said that the Drafting Committee would deal with the proposals made. He put to the vote article 34 as drafted at the ninth session, subject to drafting changes.

Article 34 was adopted unanimously.

ARTICLE 35

16. Mr. SANDSTRÖM, Special Rapporteur, referred to the additional paragraph suggested by the Government of Denmark (A/CN.4/116); in principle he had no objection to the new paragraph. In his own revised draft he proposed a new sentence (A/CN.4/116/Add.1), to remedy an apparent omission, but he was prepared to withdraw it if it were thought unnecessary.

17. Mr. ALFARO thought that the proposed new sentence was desirable. A provision which applied on the death of a diplomatic agent should apply also on his departure.

18. Sir Gerald FITZMAURICE also supported the Special Rapporteur's proposal, on the ground that it followed logically from article 31, paragraph 3.

19. The CHAIRMAN put to the vote article 35 as drafted at the ninth session, subject to drafting changes.

Article 35 was adopted unanimously.

20. Mr. VERDROSS noted that article 35 referred to the case of armed conflict, whereas there was no mention of that contingency in article 34. He considered that the omission was a lacuna in article 34.

21. Mr. ZOUREK thought that the Drafting Committee should consider Mr. Verdross' point. The difference which had just been pointed out arose from the fact that the draft contained an article concerning the end of the function of a diplomatic agent, but none concerning the end of diplomatic relations.

22. Mr. SANDSTRÖM, Special Rapporteur, pointed out that sub-paragraphs (*b*) and (*c*) of article 34 probably covered the cases of armed conflict, inasmuch as the functions of a diplomatic agent necessarily ended when diplomatic relations ceased.

23. Mr. AGO said that the problem existed not only in the case of armed conflict but also in the case of the severance of diplomatic relations.

24. Article 34 dealt only with the end of the functions of a diplomatic agent, but not with the severance of diplomatic relations. At the end of a war, for example, the same diplomatic agents might return to take up their functions, which would then have been merely interrupted, not terminated, by the intervening severance of relations. He agreed that a special provision should be inserted in article 34.

25. Mr. ALFARO and Mr. TUNKIN also considered that a new paragraph should be inserted, which should apply both to cases of armed conflict and to cases of simple severance of diplomatic relations.

26. Mr. LIANG, Secretary to the Commission, agreed. The draft as it stood contained a provision (article 1) concerning the establishment of diplomatic relations between States but none concerning the termination of such relations. No doubt the words "*inter alia*" in article 34 could be interpreted to cover cases of armed

conflict or severance of diplomatic relations, but the argument would be weak.

27. Mr. YOKOTA said that the question of the severance of diplomatic relations was extremely complicated. For example, it was not unprecedented that, despite the occurrence of hostilities between them, States maintained their diplomatic relations. Though the Drafting Committee might propose a new paragraph or article, the whole question should, he thought, be discussed in the Commission.

28. The CHAIRMAN said that the Drafting Committee would consider the question and put its proposals before the Commission.

ARTICLE 36

29. Mr. SANDSTRÖM, Special Rapporteur, referred to the amendment and additions proposed by the Netherlands Government (A/CN.4/116), which he had taken into account in his revised draft (A/CN.4/116/Add.1).

30. The Government of Finland considered that the words " acceptable to " in sub-paragraphs (*b*) and (*c*) should be replaced by " accepted by " (A/CN.4/114/Add.2) ; he made a proposal to that effect in his revised draft but would be prepared to withdraw it if it was controversial.

31. He had no objection to the Italian Government's proposal to delete the words " the good offices of " in sub-paragraph (c) (A/CN.4/114/Add.3).

32. Mr. ALFARO entirely agreed with the proposed deletion of the words " even in case of armed conflict " in sub-paragraph (*a*). The provisions of all three sub-paragraphs applied equally to the breaking off of diplomatic relations or an outbreak of armed conflict and that being so, it would be preferable to add a reference to the case of armed conflict in the opening words of the article. He made a proposal to that effect.

33. Mr. ZOUREK considered that it would be desirable to introduce the Finnish Government's proposed amendment under sub-paragraph (*c*) of article 36 ; in its observations that Government correctly described the current practice. The State which agreed to assume the protection of the interests of another State in the event of diplomatic relations being broken off, or in the event of the recall of the diplomatic mission, must first obtain the assent of the receiving State. That seemed also to be the almost general practice of States.

34. Mr. AGO said he was not in favour of Mr. Alfaro's proposed amendment to the opening words of the article. The article was concerned solely with the steps to be taken in the event of a cessation of diplomatic relations, regardless of the cause of the cessation. The case of a war is of interest only in so far as it involves a breaking off of diplomatic relations. The reference to armed conflict in sub-paragraph (*a*), on the other hand, was essential in order to emphasize the duty of the receiving State to respect and protect the premises and archives of the mission even in such an event.

35. The words " *ou interrompue* " in the French text of the opening clause did not strike him as particularly well-chosen. What was meant by the " interruption " of a mission? A more suitable wording would have to be found.

36. He was glad the Special Rapporteur had agreed to the deletion, in sub-paragraph (*c*), of the reference to " good offices ", which was inapposite in the context.

37. Mr. AMADO agreed with Mr. Ago. He added that the words " *accepté par* " would be stylistically preferable to " *acceptable pour* " in the French text.

38. Mr. TUNKIN agreed with Mr. Ago that there was no need to insert a reference to armed conflict in the opening words of the article. The text was already broad enough to cover all cases. A specific reference to armed conflict had been included in sub-paragraph (*a*) not in order to introduce any new idea but merely in order to stress a special case.

39. The reference to the withdrawal or discontinuance of missions had, he thought, been included in order to take into account the not infrequent cases where missions were temporarily or permanently withdrawn without diplomatic relations being broken off. He was in favour of keeping the article substantially as it stood, subject to drafting changes.

40. Sir Gerald FITZMAURICE suggested that the distinction between " acceptable to " and " accepted by " involved more than a mere drafting point, though Governments had possibly not appreciated that fact because the Commission had made no comment on the article. The proposed change involved the question whether the sending State must obtain the actual and previous consent of the receiving State to the choice of a third State as protecting Power. The conclusion reached at the previous session had been that the third State must be acceptable to the receiving State, in the sense that the receiving State was entitled to object to the sending State's choice. The Commission had deliberately refrained from implying that the sending State must first apply for the receiving State's consent to the third State it designated. He thought that the Commission should retain the text as it stood and explain its reasons for doing so in the commentary.

41. While he entirely agreed with Mr. Alfaro that the article covered any case of severance of diplomatic relations, whatever the cause, he shared Mr. Ago's view that it would be better to leave the opening words as they stood, since they were sufficiently general to cover any case. It was, however, desirable to specify that sub-paragraph (*a*) applied even in cases of armed conflict. That the provision could be misunderstood was evident from the Netherlands Government's proposal. The analogy drawn therein to article 31, paragraph 2, was quite false, since the latter text merely stipulated that the personal privileges and immunities of a diplomatic agent leaving the receiving State should subsist, even in case of armed conflict, until he left or for a reasonable

period in which to allow him to leave. In article 36, however, there could be no question of any limitation of the duration of protection. The principle continued to apply throughout the armed conflict or hostilities and until the settlement reached at the end thereof.

42. Mr. FRANÇOIS agreed with Mr. Tunkin, in particular, that there were cases where diplomatic missions were withdrawn without any breaking-off of diplomatic relations.

43. He was afraid that the Netherlands proposal had been misunderstood. Sub-paragraph (*a*) as it stood gave the impression that the receiving State was responsible for the protection of the premises and archives of the mission for the whole duration of an armed conflict. He was not sure, however, that such a duty really existed in international law. In the case of a prolonged conflict, the receiving State might well need to use the premises, though respecting the inviolability of its contents. In any case, that situation was governed by the law of war and the Commission's draft was concerned solely with the law in time of peace and in the transitional period between peace and war. It was precisely to establish that distinction that the Netherlands had proposed an additional article. It did not state that the duty enunciated in sub-paragraph (*a*) did not exist in case of war. It merely left the question open because the article did not purport to lay down a rule to be observed in time of war. He agreed, however, that the new article and commentary proposed by the Netherlands Government were a trifle heavy and thought that the Commission might simply delete the words " in case of armed conflict " and, as the Special Rapporteur had suggested, deal with the matter in the commentary.

44. He agreed with Sir Gerald Fitzmaurice that there was a very real distinction between the implications of the words " acceptable to " and " accepted by ". His own country, the Netherlands, had had considerable experience in acting as a protecting Power in the First World War and he was convinced that it was not the practice for the sending State to await the consent of the receiving State to the choice of the third State. It was, on the other hand, customary from the choice to be notified to the receiving State and should this State object to that choice, the sending State would then choose another State to protect its interests.

45. Mr. SCELLE said that, although agreeing with Sir Gerald Fitzmaurice that there was a clear distinction in the practical implications of the words " acceptable to " and " accepted by ", he did not regard the word " *acceptable* " in French as at all suitable since it immediately raised the question of what the conditions of acceptability might be. Since the receiving State had the right to refuse the choice, the phrase " accepted by " would be more appropriate. Perhaps the difficulty could be met by saying " provided that the receiving State does not reject its choice ".

46. Mr. LIANG, Secretary to the Commission, observed that, quite apart from the reasons put forward by Sir Gerald Fitzmaurice in favour of retaining the words " acceptable to ", there was the consideration that the use of the words " accepted by " could throw out of focus the whole process implied in sub-paragraph (*b*). That process was that the sending State should make representations to ascertain whether the third State it had in mind was acceptable to the receiving State, and once it had satisfied itself on that point the process was completed and the third State was accepted. As in the case of the appointment of a diplomatic agent to a mission, it would be inaccurate to say that the sending State might appoint as ambassador to the receiving State a person " accepted " by that State. The obligation on the sending State was to ascertain whether the condition of acceptability was fulfilled.

47. Mr. ALFARO, recalling his earlier proposal, pointed out that an outbreak of armed conflict was something quite distinct from the breaking-off of diplomatic relations and was not always covered by that concept. Armed conflict or frontier incidents might continue for quite a long time withou any formal severance of diplomatic relations. Since the Commission had adopted article 35, which contained a reference to cases of armed conflict, it seemed only logical that it should also include in article 36 a specific reference to armed conflict which applied to the whole article.

48. Mr. YOKOTA was in favour of keeping the rerference to cases of armed conflict in sub-paragraph (*a*) and of making the position quite clear in the commentary, in the light of the observations of the Netherlands Government. That Government appeared to regard armed conflict as divisible into two stages, the first stage being a reasonable period and the second stage beginning at the end of that reasonable period and extending up to the time when the conflict developed into a war in the technical sense of the term, at which point he law of war became applicable. However, the principle applied to both stages and not merely to the first stage.

49. Mr. AGO, referring to the statement that there were cases where armed conflict continued for some time without any breaking-off of diplomatic relations, said it was precisely because of that fact that no mention of armed conflict should be made in the opening clause of the article. Article 36 was concerned solely with cases involving an actual breaking-off of diplomatic relations. The duties laid down in the article were based on the assumption that diplomatic relations had been broken off.

50. He regretted that he could not agree with Mr. François. Though diplomatic privileges and immunities where part of what is called the law applicable in time of peace, it was by no means established that all the rules concerning them ceased to apply in time of war. For even in case of war, as long as diplomatic relations were not broken off, diplomatic privileges and immunities must continue to be enjoyed. Other duties, especially those provided for in article 36, were meant to safeguard certain articles in time of war, so that normal relations could be resumed when the

hostilities ceased. He could not therefore accept the idea that the duties outlined in sub-paragraph (*a*) were purely provisional. The Commission should state that they continued for the whole duration of the war.

51. After listening to the discussion on the relative merits of the words " acceptable to " and " accepted by ", he had become convinced that it would be better to use neither phrase. The phrase " accepted by " might be stylistically preferable, but it did not convey the Commission's meaning. " Acceptable to " on the other hand, as Mr. Scelle had rightly pointed out, was an expression whose juridical meaning was doubtful. Perhaps the Drafting Committee could consider replacing the words by some such phrase as " unless the receiving State refuses ".

52. Mr. AMADO, referring to the Netherlands proposed new article, said that the idea that the duties of the receiving State under sub-paragraph (*a*) should continue for " a reasonable period " only was quite unacceptable. The analogy with article 31, paragraph 2, was false, since in the case dealt with by that provision it was quite natural that the privileges and immunities of a diplomatic agent should subsist only for so long as he needed to leave the country. Moreover, how could one make the receiving State the judge of what was " a reasonable period of time " ? In an armed conflict or war the whole concept of " reasonableness " went by the board. He regretted too that he could not accept Mr. Alfaro's proposal.

53. He explained that his previous reference to the words " acceptable to " had been made on stylistic grounds only. The intention of the provision was quite clear. States engaged in armed conflict knew perfectly well that the only States elegible to serve as protecting powers were those which were neither materially nor morally involved in the conflict — neutral States, in fact.

54. Mr. BARTOS said that he was entirely opposed to the idea of elaborating the law applicable in time of war. Under the Charter of the United Nations, war was outlawed, except that defensive action might be justified pending action by the Security Council. On the other hand, it would be wise to emphasize in the article that the receiving State was bound to ensure protection of the premises and archives of a diplomatic mission even though an armed conflict had broken out between it and the sending State. He therefore preferred the reference to armed conflict to stand as drafted at the previous session.

55. Mr. SANDSTRÖM, Special Rapporteur, thought that on balance the wisest course would probably be to leave sub-paragraph (*a*) as it stood, for it was least open to misunderstanding. He was also in favour of keeping the words " acceptable to ", pending consideration of alternatives by the Drafting Committee.

56. He agreed with Mr. Ago's criticism concerning the words " *ou interrompue* ". He would have no objection to the passage in question being redrafted to read " or if a mission is permanently or temporarily recalled ". Otherwise he wished to keep the article as it stood.

57. The CHAIRMAN put to the vote Mr. Alfaro's proposal that a reference to cases of armed conflict be included in the opening words of the article and that the reference to them in sub-paragraph (*a*) be accordingly deleted.

Mr. Alfaro's proposal was rejected by 8 votes to 1, with 6 abstentions.

58. The CHAIRMAN put to the vote article 36 as drafted at the ninth session, subject to drafting changes.

Article 36 was adopted by 15 votes to none with 1 abstention.

ARTICLE 37

59. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of the United States of America, Switzerland and the USSR (A/CN.4/116). Mr. Tunkin had proposed an amendment on the lines of that proposed by the USSR Government, as follows :

> " Any dispute between States concerning the interpretation or application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation, submitted to the International Court of Justice in accordance with the Statute of the Court, or referred to arbitration in accordance with existing agreements."

60. Mr. TUNKIN said that the Commission's task was to codify existing international law and to promote the progressive development of international law. An article providing for the compulsory judicial settlement of disputes would not, he thought, further the Commission's purposes. Since only about thirty States had signified their acceptance of the compulsory jurisdiction of the International Court of Justice, it was obvious that the compulsory jurisdiction of the Court could not be regarded as a rule of existing international law. Nor could a clause providing for the Court's compulsory jurisdiction be said to promote the progressive development of international law, for unless such a clause had a reasonable prospect of acceptance by the majority of States, it would be nugatory. Furthermore, an article on the settlement of disputes was not indispensable in the draft under discussion, for the settlement of disputes had practically nothing to do with diplomatic intercourse and immunities. A draft containing such an article would probably not be acceptable to many States.

61. He would therefore prefer the draft not to touch on the subject of the settlement of disputes. If, however, the members of the Commission considered that an article on the subject was advisable, that article should be so drafted as to be acceptable not only to the thirty States which had accepted the Court's compulsory jurisdiction, but also to other States. The amendment he had proposed to article 37 was designed to meet that condition. His first proposal would be that article 37

should be deleted, but if that proposal did not find favour he would ask the Commission to consider his amendment.

62. Mr. GARCIA AMADOR said he considered that Mr. Tunkin's whole argument was without foundation, since the text of article 37 contained no express provision for the compulsory jurisdiction of the International Court of Justice. He would compare article 37 in that respect with article 73 of the Commission's draft concerning the law of the sea (A/3159).[1] Article 73 provided that disputes should be submitted to the International Court of Justice at the request of any of the parties, unless they agreed on another method of peaceful settlement. Thus, by requesting submission of the dispute to the Court, any party to the dispute could compel the other parties to submit to the Court's jurisdiction. No such provision was to be found in article 37 of the present draft.

63. While it was true, as Mr. Tunkin had said, that the compulsory jurisdiction of the Court had been accepted by less than half the Members of the United Nations, it was also true that many States were in favour of compulsory arbitration and jurisdiction as a means of settling international disputes. It was particularly desirable that a body responsible for the codification and progressive development of international law should do its utmost to promote the ideal of compulsory judicial settlement. It would make a bad impression on public opinion if the Commission adopted a position which, though supported by a large number of States, was not in keeping with the progressive development of international law and with the trend towards increasing acceptance of the Court's compulsory jurisdiction.

64. The objections to compulsory judicial settlement were in fact more apparent than real. In that connexion it was interesting to note that many of the Governments which had in the General Assembly opposed the inclusion of a clause providing for the compulsory jurisdiction of the International Court of Justice in the draft articles on the law of the sea had voted in favour of the clause in question at the recent United Nations conference on the Law of the Sea.

65. He was not only opposed to both of Mr. Tunkin's proposals, therefore, but would actually be in favour of asking the Drafting Committee to bring the 1957 text of article 37 into line with article 73 of the Commission's draft articles on the law of the sea.

66. Mr. HSU said that Mr. Tunkin's proposals seemed to nullify a fundamental idea of the Commission's 1957 text — the idea that disputes should be compulsorily settled by certain methods. If there was any fundamental objection to the inclusion of the article, he thought the question should be decided by reference to the form which the Commission's draft was to assume — whether a set of draft articles, or a draft convention. In the latter case, he thought an article on the settlement of disputes should be included.

67. Mr. MATINE-DAFTARY was also of the opinion that the Commission's treatment of Mr. Tunkin's proposal should depend on whether the draft articles were to take the form of a declaration or of a convention. He was in favour of the latter alternative, and in that case he would support Mr. Tunkin's proposal for the amendment of article 37, just as, at the United Nations Conference on the Law of the Sea, he had supported the suggestion that the provisions concerning the settlement of disputes should be embodied in the additional protocol. Article 37 as drafted, with its provision for the compulsory jurisdiction of the International Court of Justice, would deter many States from acceding to the convention. He did not oppose the idea of compulsory jurisdiction as such; in fact, he regarded it as an ideal which it was to be hoped would one day be accepted by all States, but at the moment it was not acceptable, since only thirty States had made declarations recognizing the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute of the Court.

68. Mr. FRANÇOIS observed that a discussion of the advisability of providing for compulsory jurisdiction took place whenever a clause relating to the settlement of disputes was considered. In his opinion, it would be inadvisable to insert a compulsory jurisdiction clause in every draft which the Commission prepared. The task of the Commission was the codification of the law, not its implementation. The danger was that such a clause would come to be regarded as a "*clause de style*", and reservations to it would be so automatic that the clause would lose all its value. There were special cases, as had been seen during the United Nations Conference on the Law of the Sea, in which the inclusion of a jurisdiction clause was necessary; but if such a clause were inserted in a set of draft articles on diplomatic intercourse and immunities, he did not see on what grounds a similar clause could be excluded from any draft. He therefore agreed with Mr. Tunkin that article 37 should be deleted. He could not, however, accept Mr. Tunkin's amendment to article 37, which was too vague and did not allow, for example, for the submission of disputes to *ad hoc* arbitrators. The whole matter of the settlement of disputes should be governed by the general provisions relating to the subject.

69. Mr. SCELLE said he could not agree with Mr. François that the Commission's draft on diplomatic intercourse and immunities should not contain a clause providing for compulsory arbitration or jurisdiction. Diplomatic intercourse was in fact the sphere in which provision for compulsory jurisdiction was perhaps most necessary, since the maintenance of diplomatic intercourse was the touchstone of a State's membership in the international community. If a State refused, or held that it was free to maintain or not to maintain diplomatic intercourse, it automatically excluded itself from the community of nations.

70. Article 37 provided that disputes which could not

[1] *Yearbook of the International Law Commission, 1956*, vol. I (United Nations publication, Sales No.: 1956.V.3, Vol. I).

be settled through the diplomatic channel should be referred to conciliation or arbitration. It was wrong, however, to put arbitration on the same footing as conciliation, for arbitration implied the obligatory acceptance of the arbitral award, whereas no State was obliged to accept a solution proposed by way of conciliation. He proposed therefore that the text be amended to read:

> "Any dispute between States concerning the interpretation or application of this convention that cannot be settled through diplomatic channels or by conciliation shall be referred to arbitration or, failing that, shall be submitted to the International Court of Justice."

71. Mr. Tunkin's proposed amendment was even less satisfactory than the 1957 text. If, as he assumed, the phrase "in accordance with existing agreements" related only to arbitration and not to all the other means of settlement mentioned, Mr. Tunkin's proposal would be the very negation of the whole idea of the compulsory arbitration clause. He was therefore quite unable to support the proposal.

72. Mr. ALFARO observed that Mr. Tunkin had made two proposals: one, that article 37 should be deleted; and the other that, if the article were not deleted, it should be amended in the manner proposed by the USSR Government.

73. He disagreed with the first proposal, for he considered that all draft conventions prepared by the Commission should provide for the peaceful settlement of disputes by diplomacy, conciliation, arbitration and international jurisdiction. He was much attracted by Mr. Scelle's proposed redraft of the article, which made provision for compulsory arbitration. He agreed with Mr. Scelle's criticism of the expression "in accordance with existing agreements" in Mr. Tunkin's amendment, for arbitration should be possible even in cases in which the parties to a dispute had not entered into arbitration treaties with each other. He would support Mr. Scelle's proposed redraft.

74. Mr. YOKOTA said that he was unable to agree with the views expressed by Mr. François, for he was in favour of the principle that a clause providing for the compulsory settlement of disputes should be inserted in all international conventions.

75. It had been pointed out that there was a remarkable tendency among States, especially the newly established States, to refuse the idea of compulsory arbitration and judicial settlement. It had been disappointing, too, that the United Nations Conference on the Law of the Sea had not adopted a compulsory arbitration clause. The questions dealt with by that Conference, however, had had considerable political implications, implications from which the subject of diplomatic intercourse and immunities was free. In the case of diplomatic intercourse and immunities, therefore, there should be no such objection to the adoption of a clause providing for compulsory arbitration or judicial settlement. Consequently, he was in favour of retaining the 1957 text. Mr. Tunkin's proposed amendment of article 37 was in effect nothing but the expression of the wish that disputes should be settled by peaceful means. The obligation to settle international disputes by peaceful means was, however, embodied in the Charter of the United Nations, by which all Member States were bound. Accordingly, Mr. Tunkin's proposed amendment was a mere repetition of the principle of the Charter without any real obligation to resort to compulsory jurisdiction. If any such provision were inserted at all, it should provide for such an obligation.

76. Mr. BARTOS said that in each if its drafts the Commission should be at pains to encourage the recognition of the principle of the compulsory judicial settlement of international disputes. Far from agreeing that the recent United Nations Conference on the Law of the Sea had expressed hostility to that principle, he considered, on the contrary, that the principle had been affirmed by the support of the majority of the States, though he admitted that certain concessions had been made to the minority holding different views.

77. He would be in favour either of the 1957 text of article 37 or of some equivalent formula. If necessary, an additional protocol could be drafted, but care should be taken to avoid giving the impression that the Commission denied the trend towards the extension of a compulsory international jurisdiction. He did not wish to discuss Mr. Tunkin's proposal, because it made no provision for compulsory jurisdiction.

The meeting rose at 1.5 p.m.

466th MEETING

Wednesday, 18 June 1958, at 9.50 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 37 *(continued)*

1. Sir Gerald FITZMAURICE said he had voted for article 37 at the ninth session of the Commission and would not now vote against it if the majority of the members of the Commission were still in favour of it. On reflection, however, he had reached conclusions similar to those expressed by Mr. François at the preceding meeting. Though he agreed with Mr. Scelle's remarks concerning the obligation of States to submit their disputes on questions of international law to arbitration, he thought that much of what Mr. Scelle had said was more relevant to the question of accepting