

Document:-  
**A/CN.4/SR.466**

**Summary record of the 466th meeting**

Topic:  
**Diplomatic intercourse and immunities**

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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 of 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

the jurisdiction of the International Court of Justice in respect to disputes generally. Even though it might be admitted that States ought to accept the jurisdiction of the Court, it was questionable whether the Commission should insert a provision of that kind in a draft which did no more than codify the customary international law. In drafts which represented a progressive development of international law it might be necessary to include provision for arbitration because the subject matter was new and States might find it difficult to bind themselves in the absence of such provision. The arbitration clause might also be appropriate in multilateral conventions on technical or economic matters, in which some provision for the settlement of disputes must be made. When, however, the Commission was engaged in codifying the substance of the law, it did not normally enter into the question of how the law was to be enforced. But compulsory arbitration had to do with enforcement. There was no more reason why States should resort to arbitration in disputes relating to diplomatic intercourse and immunities than in disputes relating to any other matter on which customary international law was firmly established. While it might be generally desirable for States to resort to arbitration in such matters, it was not particularly desirable to do so in one case rather than in another. Consequently, he doubted whether a compulsory arbitration clause was a necessary part of the draft under discussion and he thought that in future drafts of that kind the Commission should think carefully before inserting a provision for compulsory arbitration.

2. He agreed with those who had criticized Mr. Tunkin's proposed amendment of article 37 on the ground that it was superfluous since it added nothing to what was contained in existing treaties or agreements between the parties. It would be better either to have no arbitration clause at all or to have a definite provision for compulsory arbitration.

3. Mr. VERDROSS said that while he thought the ideal solution would be the one proposed by Mr. Scelle, he realized that many States might not be prepared to accept a compulsory arbitration provision, and he therefore supported Mr. Matine-Daftary's proposal for a separate protocol providing for compulsory arbitration, so that States could accept the convention either with or without the protocol.

4. Mr. AMADO said he was in favour of the deletion of article 37, which was irrelevant to the Commission's task and altogether outside the scope of its work. The only merit of the article was that it was preferable to Mr. Tunkin's proposed amendment. The Commission had been entrusted by the General Assembly with the task, not of making suggestions as to how the rules relating to diplomatic intercourse and immunities should be applied but of ascertaining what those rules were and which of them had been accepted, or were capable of being accepted, in the practice of States.

5. Mr. ZOUREK agreed with Mr. François, Mr. Tunkin and Mr. Amado that the problem of the pacific settlement of disputes was a separate problem which concerned the *application* of the international

conventions and should not therefore be linked to the codification and progressive development of international law. He said that the Commission's task was not in fact to lay down rules regarding the settlement of disputes concerning the interpretation of the rules of international law, including the rules relating to diplomatic intercourse and immunities. He recalled that he had always maintained that view in the Commission. Even if it were held that the Commission should deal with questions of enforcement, he doubted whether a compulsory arbitration or jurisdiction clause should be included in a draft on diplomatic intercourse and immunities. The choice of the means of peaceful settlement of disputes should be decided according to the nature of the disputes, and it was questionable whether disputes regarding diplomatic intercourse and immunities were of such a kind as to require submission to the International Court of Justice. Such disputes were often of a delicate nature and neither party would want to see them dealt with in the publicity which attended the proceedings of the Court or an arbitral tribunal. It was almost always in the interest of both parties to seek a friendly settlement and in the great majority of cases a solution was reached by conciliation if the matter could not be settled through the diplomatic channel.

6. He was therefore in favour of the deletion of the article. Those who were of a different view could raise the matter again when the final clauses of the convention were discussed, as among those final clauses there was often nowadays an article dealing with the settlement of disputes on the interpretation or application of the convention. It would not be right to discuss one final clause without the other.

7. Mr. AGO said that so long as it had not been finally decided what form the Commission's draft was to take the advisability of including a clause providing for compulsory arbitration or jurisdiction might have remained in doubt. Now that it was agreed, however, that the draft was to be submitted in the form of a convention, an article providing for the possibility of submitting disputes to peaceful settlement seemed an absolute necessity. The Commission had included such an article in its draft articles relating to the continental shelf. Those articles and the others relating to the law of the sea had been submitted to a diplomatic conference. So far as the draft on diplomatic intercourse and immunities was concerned the majority of the members of the Commission seemed to think that a diplomatic conference was unnecessary and that the General Assembly could itself adopt the draft in the form of a convention. The Commission was therefore under a duty to produce an ever more definitive text than in the case of the draft articles on the continental shelf. Consequently, a clause on the settlement of disputes could not be omitted. He agreed with Mr. Zourek that the Commission should not discuss only one final clause. Instead, however, of deleting that most important of final clauses, the Commission should consider completing the text with such other final clauses as might appear necessary.

8. In his opinion, a draft convention on diplomatic intercourse and immunities was typical of the kinds of convention in which a compulsory arbitration or jurisdiction clause should be included. A convention of that kind without an arbitration clause would be incomplete, and the Commission could not submit an incomplete draft to the General Assembly. Furthermore, the Commission was the body best qualified to work out a suitable text regarding the procedure for the peaceful settlement of disputes.

9. The text of article 37 as drafted at the ninth session (A/3623, para. 16) was not satisfactory. It had been adopted somewhat hastily, at a time when no decision had been taken as to the form which the draft articles would assume. The 1957 text contained no provision for unilateral recourse to the International Court of Justice, and in fact, as it stood, article 37 was little more than a *voeu*. He admitted that the text proposed by Mr. Tunkin was more logical in its wording, but unfortunately it had other grave defects. For example, it failed to make any provision for the case where the parties to the dispute did not recognize the jurisdiction of the Court. He was therefore unable to accept it. The draft should include a firm and definitive clause providing for the peaceful settlement of any dispute which might arise in the application of the convention. The 1957 text could be amended quite easily so as to become acceptable.

10. He did not agree with Mr. Scelle's suggestion that conciliation should be linked rather with settlement through the diplomatic channel than with arbitration. Conciliation was a practice more commonly associated with arbitration than with settlement through the diplomatic channel. In any case the essential point was that there should be an agreed procedure of arbitration and conciliation between the parties. Moreover, he wished to stress that article 37 would not be complete unless the final clause were modified by the addition of a phrase such as "at the request of one of the parties", as in the corresponding article of the Convention on the Continental Shelf.

11. Mr. LIANG, Secretary of the Commission, recalled that during its work on the law of the sea, and particularly the law relating to the conservation of fisheries and to the continental shelf, the Commission had been concerned in many aspects of its work with the progressive development of international law, with what might be called "international legislation". It had been thought that where no body of customary law existed, and new law had to be created, a system of arbitration must be developed so as to provide an impartial and judicial channel for securing the implementation of the new rules. That thesis could not be disputed. Members of the Commission, especially Mr. García Amador and Sir Gerald Fitzmaurice, had emphasized the importance of maintaining the arbitral machinery in connexion with the conservation of fisheries.

12. The United Nations Conference on the Law of the Sea had accepted the machinery for arbitral settlement

in connexion with fisheries but the corresponding proposal relating to the continental shelf had not secured the necessary two-thirds majority and had been rejected. One of the explanations given was that since there was provision for arbitration in a separate protocol there was no need for an arbitration clause in the convention itself. That circumstance, however, could not provide a sufficient basis for the assertion that the Conference had repudiated the basic thesis for a clause relating to the settlement of disputes even in connexion with the continental shelf.

13. An arbitration clause was especially necessary in a draft which was largely concerned with legislation. So far as diplomatic intercourse and immunities were concerned, there were two principal contentions. According to the first, a clause providing for the settlement of disputes was necessary in every draft; and according to the second, it was not necessary to insert such a clause in cases such as that under consideration, where the Commission was concerned only with the formulation of substantive rules. Both those theses were acceptable, but if the prevailing view was that there should be an arbitration clause, that principle should be uniformly applied in every draft.

14. Though he would not go so far as to say, as Mr. Ago had done, that article 37 was no more than a *voeu*, he agreed that it contained no element of compulsion. The article was in fact no more mandatory than Article 33 of the United Nations Charter providing for the choice of many methods of the pacific settlement of disputes. In other words, the obligation implied therein was so general as to preclude precise application. Draft article 37 provided that disputes "shall be referred to conciliation or arbitration". So far, however, as arbitration was concerned, until the international community accepted the elaborate machinery recommended in Mr. Scelle's draft on arbitral procedure (A/CN.4/109), he could not see how the obligation could be implemented. The article went on to say that disputes "shall be submitted to the International Court of Justice". In that connexion, he recalled that at the Dumbarton Oaks Conference in 1944 one of the proposals had been that all legal disputes should be referred to the International Court of Justice. That was a vague statement, and accordingly had subsequently been changed to the effect that disputes should be referred to the Court in accordance with the Statute of the Court. Article 37, he thought, must be interpreted in the sense that the submission must be "in accordance with the Statute of the Court". In determining the legal effect of that article, the Court itself had to proceed on the assumption that a dispute had been submitted to it in accordance with the procedure laid down in its Statute. In other words, the dispute must be referred to the Court by the parties. It might be argued that the Commission's present draft, if it should be adopted as a convention, would be one of the conventions which invested the Court with jurisdiction; but since it was not certain that Article 36, paragraph 3, of the Statute itself had the force of a provision investing the Court with compulsory jurisdiction, he doubted that article 37

of the Commission's draft could be interpreted as having that effect. Consequently, article 37 was in no way different in legal effect from the amendment proposed by Mr. Tunkin. If provision was to be made in the draft for submitting disputes to the Court, the phrase "at the request of one of the parties" must be added as had been suggested. Otherwise, the article would contain no element of compulsion at all.

15. Faris Bey EL-KHOURI said it was desirable that all States should recognize the compulsory jurisdiction of the International Court of Justice. Disputes relating to the interpretation of bilateral or multilateral conventions were bound to occur, and usually such conventions contained a clause providing for arbitration or submission to the Court as a means of securing the peaceful settlement of such disputes. It had been proposed that the Commission should leave to the General Assembly the decision whether such a clause should be included in the present draft, but he was of the opinion that it would be better to leave to the General Assembly the decision whether or not to delete a clause which had already been included. The aim of the Commission should be to promote and encourage recognition of the Court's jurisdiction. The ideal was that disputes should be settled by friendly arrangement, but if that was not possible, there must be some way of securing a peaceful settlement. The Court offered the judicial machinery of settlement. Arbitration was also a judicial process, but it was not always acceptable. Under Islamic law, for example, arbitration was not permitted in cases involving public matters. He did not wish to imply that arbitration should be discarded as a means of securing the peaceful settlement of disputes, but the ultimate resort should be to the Court.

16. He would therefore vote for the article as adopted in 1957, but would propose a slight change in the wording. Instead of "shall be referred", he would suggest that the phrase should read "may be referred". That change would meet Mr. Liang's point that the Court could take cognizance only of cases which were submitted to it in accordance with its Statute.

17. Mr. ALFARO disagreed with Mr. Amado's view that a clause providing for arbitration and submission to the Court was quite out of place and irrelevant in a draft prepared by the Commission. The task of the Commission was not merely to compile rules of international law but to give effect to the universal desire for the establishment of a single system of international law. It was the Commission's duty not merely to codify international law but to promote its progressive development. The Commission's task must, as a general rule, be carried out through conventions which were to be signed by States and which would constitute a single body of international law. Such conventions should reflect the spirit of the United Nations. They should not merely be a compilation of existing laws, but should embody what, in the opinion of the Commission, the law should be in future. It was not right that such conventions should contain no arbitration clause.

18. It was not only natural, but appropriate and

necessary, that each convention should include a clause providing for compulsory arbitration or submission to the Court. He was therefore in complete agreement with the view that article 37 should be included, either as drafted in 1957, if that form secured the consent of the majority, or as amended in the manner suggested by Mr. Scelle, Mr. Ago and others. He would vote for the version which seemed most acceptable to the majority.

19. Mr. MATINE-DAFTARY agreed with Mr. Ago that a convention without an arbitration clause was incomplete. The Commission should recognize, however, that an arbitration clause in the convention itself might not be acceptable to a great many States, for the policies and attitudes of States were not always what the Commission might desire or regard as ideal.

20. At the United Nations Conference on the Law of the Sea, a majority of States had been unwilling to accept an arbitration clause in the Convention on the Continental Shelf, but had wished the clause to be placed in an optional protocol. States were not likely to change their attitude in that respect in the immediate future, and consequently, if Mr. Tunkin agreed to withdraw his proposed amendment of article 37, he would like to repeat, in somewhat modified form, the proposal he had made at the preceding meeting, and propose that article 37 be separated from the text, and that a statement be made, either in the commentary or elsewhere, to the effect that the Commission was submitting an arbitration clause for the consideration of the General Assembly. The clause might be prepared by the Drafting Committee, and it could be left to the General Assembly to decide whether it should be embodied in a separate protocol or included in some other way.

21. Sir Gerald FITZMAURICE said that in the light of the discussion he wished to make it clear that he had hesitated with regard to article 37, not because he objected to the principle of compulsory arbitration, but because he doubted whether it was the Commission's task to lay down any provisions for enforcement when it was not creating new law but merely codifying existing law. The Commission had in the past rightly proposed means of enforcement when the substantive law and its methods of enforcement were closely interrelated, as in the articles on fishery conservation; but in the case of the draft articles on diplomatic privileges and immunities there was no such interdependence. He would not oppose the majority if it thought otherwise, but if it was decided to insert the article it should be amended as Mr. Ago had suggested. He could not accept the Secretary's interpretation of the article, which would render it useless.

22. Mr. TUNKIN said he was second to none in making efforts to develop and strengthen international law in order better to serve the cause of peace, but, he observed, there were divergent views on how those objectives could be attained. Article 37 did not embody existing international law, and if it were inserted the other articles, which were of primary importance, might be rejected, with the consequence that the draft would

fail in its intended purpose. He agreed with Mr. Matine-Daftary that the problem of settling disputes was a separate problem. If, therefore, Mr. Matine-Daftary's proposal was accepted by the Commission, he would be prepared to withdraw his own proposal.

23. Mr. AMADO reiterated his view that article 37 was out of place in the draft. He found it difficult to believe that minor diplomatic disputes could ever be referred to the International Court of Justice as the result of an article framed by the Commission. Consequently, he strongly opposed the retention of article 37.

24. Mr. YOKOTA said that there was a great difference between an article in a convention and a provision in a protocol. A convention would be incomplete without provision for the settlement of disputes relating to the convention. Moreover, the effect of a provision in a convention was entirely different from the effect of one in a protocol. If it were presented as an optional clause in a protocol, only those States most eager to adopt it would sign the protocol, whereas if it were embodied in a convention, only those States which were strongly opposed to it would formulate reservations to the article in question. The majority of States, including those which were neither very enthusiastic for nor strongly opposed to the provision, would probably accept it in the convention without demur. As it was desirable that there should be provision for the judicial settlement of disputes, he was in favour of retaining the article.

25. Mr. EDMONDS said that law did not operate in a vacuum; where the principles of law had been embodied in rules there should also be rules of procedure as an accompaniment. It was the duty of the Commission to further the development of international law; therefore it should not be content with a mere eulogy of the International Court of Justice but should actively recommend that disputes be referred to it for settlement. Such action would extend and strengthen the jurisdiction of the International Court of Justice. He was therefore in favour of the retention of article 37.

26. Mr. SANDSTRÖM, Special Rapporteur, said that if in the draft under discussion the Commission's only intention was to record existing practice in international law there was no need for article 37; but if it intended that the draft should become a convention, article 37 was necessary. He therefore favoured the retention of the article, as amended by Mr. Ago. If an international conference was held to discuss the draft, it was possible, of course, that the provision for the settlement of disputes might be relegated to the final act.

27. Mr. AGO said he could not see the advantage of codifying customary law in a convention if there was to be no provision therein for the peaceful settlement of disputes. The Commission would fail in its task if its draft did not contain such a provision. As far as the clause itself was concerned, the essential point was to decide what body would in the last analysis deal with a dispute. At the ninth session, after much discussion,

it had been decided to insert article 37; what was necessary now was not to delete all reference to the matter but to improve the text so as to establish a procedure for settlement to which recourse could be had at all times.

28. Mr. MATINE-DAFTARY could not agree with Mr. Yokota's argument. If article 37 was retained, a majority of States in a conference would oppose it, as they had opposed a similar article in the United Nations Conference on the Law of the Sea. If there was no conference, and the draft were offered to States for acceptance, a majority would make reservations in respect of article 37. Consequently, in order to avoid such a situation, the Commission should put the article in a separate protocol. There was no objection to its being amended by the Drafting Committee.

29. Mr. SCELLE said it was clear that article 37 was a necessary ingredient of a convention on diplomatic privileges and immunities. Some conventions did not need such an article, but in international and in national law there were certain fundamental principles, such as those with which the Commission was dealing, which had to be safeguarded by legal sanctions. To insert article 37 in a separate protocol rather than in the convention, therefore, would be an abandonment of the Commission's previous attitude, which was sound.

30. Secondly, Mr. Matine-Daftary's argument was open to question. If article 37 formed part of a convention it might be the subject of reservations by States, and if it was embodied in a special protocol States might not sign the protocol; but the effect in each case was the same. He was therefore in favour of its insertion as an article in the convention. If the majority of the Commission preferred the provision to appear in a separate protocol he would acquiesce, however unwillingly, while regarding such an action as a failure of the Commission to do its duty.

31. Mr. GARCÍA AMADOR said that the fate which had befallen the similar article in the United Nations Conference on the Law of the Sea did not support the view that there was a trend against compulsory jurisdiction by the International Court of Justice. In the Fourth Committee of that Conference a simple majority had supported the article, but the support of the two-thirds majority had not been obtained and hence the provision had had no chance of being accepted in the plenary Conference.

32. If the Commission desired to make the jurisdiction of the Court compulsory, as he hoped it would, the phrase "at the request of any of the parties" should be added in article 37 after the words "failing that,". He had already stated his preference for the compulsory jurisdiction of the Court (465th meeting).

33. The problem before the Commission was whether to retain article 37 in the draft or not. The Commission should remember, however, that the issue was less that of furthering the development of international law than that of the efficacy of the law. For that reason he was

in favour of the retention of the article, with the amendment he had suggested.

34. The CHAIRMAN observed that the discussion revealed two sides of the approach to the question. It was certainly logical to provide for reliefs in relation to rights and duties arising out of any legal relation and remedies in respect of such reliefs, whenever any codification was attempted concerning such a relation. But logic, though a good servant, was always a bad master. Even the Charter of the United Nations placed reliance on some residual good faith of States. The Charter did not make the Court's jurisdiction compulsory. On the other hand, too much emphasis should not be laid on the risk of the draft not getting universal acceptance. Even if not so accepted, it would serve a useful purpose as a model piece of codification. In his view good faith on the part of the States should not be ruled out altogether.

35. It seemed to him that the first proposal to be voted upon was that the substance of article 37 should be incorporated in the commentary.

36. Mr. MATINE-DAFTARY, replying to a question by Mr. García Amador, said that the commentary would contain the text of the article, subject to the drafting changes suggested by Mr. Ago and, perhaps, changes suggested by the Drafting Committee.

37. He agreed with Mr. Scelle that the article might be embodied in a separate protocol rather than in the commentary.

38. Mr. AGO thought that it might be placed in the commentary; the General Assembly would then decide where to place it definitively. But it was essential that the Commission should be clear about the content of the article.

39. Mr. AMADO said that the article should not appear either in the body of the convention or in any commentary.

40. Mr. TUNKIN said that the Commission should first decide whether the article should be transferred to the commentary or not. If it decided in the affirmative, it would have to decide in what way the article should be amended.

41. Mr. LIANG, Secretary to the Commission, thought that it would create a somewhat peculiar situation if the Commission set out a number of alternatives in its report and left it to the General Assembly to choose between them. Experience showed that in such cases the General Assembly never chose between the alternative courses. It either decided to call a conference to prepare a convention on the subject or recommended the draft as a model for the guidance of States. He therefore thought it more advisable to include whatever text the Commission saw fit to adopt as a recommendation. Then, if a conference were convened, it would be for that body to choose.

42. After further discussion, the CHAIRMAN, on the suggestion of Mr. Edmonds, put to the vote first the

proposal that the Commission should not adopt any provision on the lines of article 37.

*The proposal was rejected by 11 votes to 5, with 2 abstentions.*

43. The CHAIRMAN put to the vote Mr. Matine-Daftary's proposal that the article, as amended, be included in a special protocol.

*Mr. Matine-Daftary's proposal was rejected by 10 votes to 5, with 3 abstentions.*

44. The CHAIRMAN then put to the vote article 37 as adopted at the ninth session, together with Mr. Ago's addendum "at the request of one of the parties" after the words "failing that".

*Article 37, as amended, was adopted by 13 votes to 3, with 2 abstentions.*

#### ADDITIONAL ARTICLE 12 A (continued)<sup>1</sup>

45. Mr. SANDSTRÖM, Special Rapporteur, introduced the following text drafted by him in conjunction with Mr. Ago on the basis of a proposal by the Italian Government (A/CN.4/114/Add.3) and in the light of the Commission's discussion at its 454th meeting (paras. 43 to 74):

"The diplomatic corps may bring to the notice of the Government of the receiving State any event or circumstance which affects the corps as a whole.

"When deliberating on such action the diplomatic corps shall be composed of the heads of mission. Its doyen shall act as its spokesman.

"The doyen of the diplomatic corps shall be the senior head of mission in the highest class or, in countries where this prerogative is held to vest in the Holy See, the Apostolic Nuncio."

46. Mr. BARTOS inquired, with reference to the second paragraph, how decisions were to be taken by the diplomatic corps: by an ordinary majority, a majority of two-thirds or by some other procedure? Difficulties had frequently arisen in the past on that point, and representations made by the doyen of the corps were sometimes disavowed by certain heads of missions on the ground that, though they had taken part in the deliberations, no formal decision had been taken.

47. Mr. SANDSTRÖM, Special Rapporteur, said that he had assumed that decisions would be taken by an ordinary majority vote and that, if the voting was fairly evenly divided, the diplomatic corps would hesitate to make representations.

48. Mr. AGO thought it advisable to allow considerable flexibility on such points. He did not conceive of the diplomatic corps in terms of a properly constituted assembly and, indeed, to talk of the corps "deliberating" was hardly correct. The process of reaching a decision might take the form of bilateral consultations. Perhaps it would dispose of Mr. Bartos' difficulty, if the words "When deliberating on such action" were deleted.

<sup>1</sup> Resumed from 454th meeting.

49. Mr. AMADO considered the words "any event or circumstance" too vague. He would prefer a reference to "acts or circumstances".

50. Sir Gerald FITZMAURICE, agreeing with Mr. Ago that some change was needed in the second paragraph, suggested replacing the words "When deliberating on such action" by the words "For the purposes of such action". As had been said during the previous discussion, the term "diplomatic corps" was often used in a wider sense to include all diplomatic agents in a particular country.

51. Mr. ALFARO considered that the words "may bring to the notice of the Government" in the first paragraph were rather vague and did not reflect the practice in such matters. It would be more correct to say that the diplomatic corps might make representations or submit petitions to the Government.

52. Mr. MATINE-DAFTARY said that leaving aside the question whether the Apostolic Nuncio should automatically be the doyen in certain countries, he had no objection to the parts of the article defining the doyen and his role. The wording of the rest of the article, however, would give rise to confusion and might be described as positively dangerous. The phrase "any event or circumstance", for instance, was far too general. In any case, what was meant by events or circumstances which affected the corps as a whole? That was why he preferred that the Commission should avoid granting to the diplomatic corps such collective jurisdiction.

53. Mr. AGO said he could not see how an article on the diplomatic corps could constitute any great danger. It was very difficult to draft a suitable text. One speaker had found it too general, while another had found it too restrictive. The events or circumstances which the authors of the draft had in mind were matters which did not affect the interests of any particular country or group of countries but concerned the diplomatic corps as such. For example, in one case representations had been made by the diplomatic corps to the government of a country to point out that decisions in the case-law of their country to the effect that diplomatic agents did not enjoy immunity from jurisdiction in respect of acts performed in their personal capacity were contrary to international law.

54. Mr. AMADO said that, although Mr. Ago had made a good case, Mr. Matine-Daftary certainly had stressed a point which would be appreciated by the Latin-American countries, haunted, as they were, by the fear of collective diplomatic intervention.

55. Mr. BARTOS thanked the Special Rapporteur for his clarification. Though he could not but approve of the idea of including a provision on the composition and role of the diplomatic corps, he found it impossible to vote for the article as it stood.

56. In European countries at least, it was the practice for the diplomatic corps, quite apart from the role it played in matters of protocol and ceremonial, to bring

to the notice of the Government of the receiving State, or even to protest concerning grave cases of violation of diplomatic privileges and immunities or circumstances which prevented the proper functioning of the system of diplomatic representation. It was, in fact, recognized as competent to watch over and safeguard the normal functioning of diplomatic missions.

57. The statement that the "deliberations" of the diplomatic corps might take the form of bilateral conversation showed how important was the question of the manner in which decisions were reached. It might be a serious political matter affecting good relations between States if the representations of a doyen were weakened by letters from individual ambassadors pointing out that no formal decision had been reached on the matter.

58. Though he recognized that the prerogative of the Holy See referred to in the third paragraph was of long standing and dated from before the Regulation of Vienna of 1815, he did not agree with the principle involved. He therefore requested a separate vote on the third paragraph, on which he would abstain.

59. Mr. TUNKIN observed that the debate seemed to confirm his remark during the previous discussion that, while he had no objection in principle to such an article, he doubted whether an acceptable article could be drafted. As at present worded, the text could hardly be accepted. The diplomatic corps could act only in cases in which the Governments which its members represented could act. It could not take action in "any event or circumstance". A rapid rise in prices, for example, might well make the task of missions difficult and thus affect the diplomatic corps as a whole, but the latter would not be entitled to take any action, because the matter was an internal one for the receiving State. Unless it was qualified, therefore, the first paragraph of the article would be unacceptable.

60. The first sentence of the second paragraph was also so vague as to be hardly acceptable. Whether it was explicitly stated or merely implied that the diplomatic corps would deliberate on the action it should take, the question nevertheless arose how its decision would be reached. He did not think that it could be taken by a majority vote, for the diplomatic corps was not a supra-State organ. The Commission was in fact faced with a dilemma: either to say nothing at all on the question of the diplomatic corps or to attempt to frame an article which it would be difficult to draft in acceptable terms.

61. Mr. LIANG, Secretary to the Commission, said that, taken as a whole, the article gave the impression that the principal function of the diplomatic corps was to bring matters affecting it to the notice of the Government of the receiving State. But that was not, he thought, its normal day-to-day function. The diplomatic corps was normally concerned with matters of protocol and ceremonial, though that did not exclude the possibility of its acting as a body in grave circumstances, which were, however, of rare occurrence. Similarly, the institution of doyen was quite a normal one and he was not appointed, as the second paragraph might seem to



suggest, in order to take the action envisaged in the first paragraph. He would therefore suggest that the article might be redrafted so that the normal functions of the diplomatic corps be given precedence over its extraordinary ones. The third paragraph should, in his opinion, come first and the first and second paragraphs should be somewhat attenuated.

62. He could recall a pertinent case where many years before a Minister of Foreign Affairs of an oriental country had refused to receive the doyen acting on behalf of the accredited diplomatic representatives in a body in connexion with a protest over his country's denunciation of a treaty of extra-territoriality, on the ground that the treaties between his country and theirs made no provision for recognition of the diplomatic corps as an independent legal entity. Strictly speaking, that attitude might be justifiable, since the relations between the countries concerned were defined in bilateral treaties and not in a multilateral treaty.

63. Sir Gerald FITZMAURICE said that, although he did not altogether share the Secretary's views, he had been on the point of making a similar suggestion as to the redrafting. The interpretation placed on the article by some speakers seemed to him somewhat exaggerated. He agreed with the principle of the article. The institutions of the diplomatic corps and its doyen and the role they played in the matter of diplomatic privileges and immunities were, he thought, perfectly well known. There seemed, however, to be some confusion between a joint *démarche* by Governments and joint action by the diplomatic corps in matters affecting its status, privileges and immunities. The two had nothing in common. Whereas diplomatic representatives making a joint *démarche* required instructions from their Governments for the purpose, the diplomatic corps could make representations on matters of a protocolary character or affecting its status and privileges and immunities even in the absence of instructions from Governments.

64. Though the order of the paragraphs could be changed as the Secretary suggested, he regarded the precaution as somewhat exaggerated. The normal functions of the diplomatic corps were clearly defined in article 2 and there was no danger that article 12 A, which would come in a different section, would be misinterpreted. To meet the objections raised, he suggested replacing the words "any event or circumstance which affects the corps as a whole" by the words "any matter of an administrative, technical or protocolary character or affecting the status or privileges and immunities of the diplomatic corps".

65. Mr. AMADO proposed the following abbreviated version of the article :

"The doyen, acting on behalf of the diplomatic corps, may bring to the notice of the Government of the receiving State any fact or circumstance which concerns the diplomatic corps as a whole."

66. Mr. AGO welcomed Mr. Amado's proposal. He thought that the proposals submitted by Sir Gerald

Fitzmaurice and Mr. Amado could be referred to the Drafting Committee.

67. Mr. ALFARO observed that Sir Gerald Fitzmaurice's remarks, in which he had succinctly defined the field of action of the diplomatic corps, were very much to the point and, in conjunction with Mr. Amado's proposal, should enable the Commission to draft an appropriate text. It was not enough, however, to state that the diplomatic corps should bring matters to the notice of the Government of the receiving State. It should also be able to make representations with a view to protecting the interests of the diplomatic corps as a whole.

The meeting rose at 1.5 p.m.

#### 467th MEETING

Thursday, 19 June 1958, at 9.45 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)**

**ADDITIONAL ARTICLE 12 A (continued)**

1. The CHAIRMAN invited the Commission to take a decision on the additional article proposed at the preceding meeting.

2. Speaking as a member of the Commission, he said that there seemed to be no need to include in the draft a provision on the subject of the diplomatic corps. The question was hardly one between States.

3. Mr. ZOUREK agreed. Quite apart from the fact that the term "diplomatic corps" had two connotations, one broad (all the diplomatic staff of all the diplomatic missions accredited in a given State) and one restrictive (all the heads of missions), there was the important consideration that it represented a simple grouping of interests, a *de facto* grouping with no legal function, which exercised certain activities of a protocol nature and a *droit de regard* over the observance of diplomatic privileges and immunities by the receiving State. In that respect it bore a certain similarity to the consular corps. The proposed article tended, on the other hand, to transform the diplomatic corps into a legal institution with definite functions, and that he thought was neither necessary nor desirable. Such an article would even be harmful, as it would establish a legal basis for the unwarrantable interference of the diplomatic corps into the affairs of the receiving State. Moreover, the