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SUMMARY RECORD OF THE 38th MEETING

Chairman: Mr. MADEJ (Poland)
(Vice-Chairman)

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In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland) took the Chair.

The meeting was called to order at 10.35 a.m.

AGENDA ITEM 145: REVIEW OF THE PROCEDURE PROVIDED FOR UNDER ARTICLE 11 OF THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS (A/49/258; A/C.6/49/2; A/C.5/49/13)

1. Mr. ZACKLIN (Deputy Legal Counsel and Director of the Office of the Legal Counsel), introducing the report of the Secretary-General on review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations (A/C.6/49/2), said that in its decision 48/415, the General Assembly had requested the Secretary-General to carry out a review of the procedure provided for under that article and to report thereon at its forty-ninth session, either as part of the report requested under resolution 47/226 or separately. As indicated in paragraph 3 of the report, the Secretary-General had initially planned to issue a single report covering all aspects of the internal system of justice in the Secretariat. However, it had subsequently been decided to prepare a separate report on the review of the procedure provided for under article 11 since that matter was considered to be distinct from the reform of the internal system of justice of the Secretariat. The two issues were distinct, although closely interrelated. Thus, the Secretary-General's report on reform of the internal system of justice in the United Nations Secretariat (A/C.5/49/13) proposed the establishment of ombudsman panels, which corresponded to the proposals considered by the Sixth Committee at the forty-eighth session of the General Assembly in connection with its consideration of the review procedure under article 11.

2. The matter had been raised for the first time at the thirty-third session of the General Assembly, during consideration of the more general question of harmonizing the statutes of the Administrative Tribunals of the International Labour Organization (ILO) and the United Nations. The review procedure provided for under article 11, which had been the subject of only limited interest for almost a decade, was currently the object of much criticism. The procedure had been described as deficient, unsatisfactory, ineffective, complex and contradictory. Moreover, it was felt that the procedure was not effective on a practical level in protecting staff and should accordingly be abolished. In addition, many States and some members of the International Court of Justice had doubts as to whether it was appropriate for the Court to hear cases between the United Nations and its staff members. In that connection, it should be noted that in only three out of 92 cases brought before it had the Committee on Applications for Review of Administrative Tribunal Judgements requested an advisory opinion of the Court. That function of the Court had been criticized by Judge Ago who, in a separate opinion appended to the advisory opinion of the Court with regard to Tribunal judgement No. 333, Yakimetz v. the Secretary-General of the United Nations, had said that the role played by the Court was that of an administrative appeal court and was incompatible with its mission as the supreme judicial organ of the United Nations, which was to settle international disputes between States.

3. The question of the abolition of the procedure under article 11 must be viewed in the context of that criticism. Nevertheless, as indicated in the report, the Sixth Committee might consider whether to abolish the procedure completely or replace it with a different procedure. In the 1954 advisory opinion which had led to the approval of the current procedure, the Court had concluded that, in order for the judgements of the Administrative Tribunal to be reviewed by the General Assembly, an express provision to that effect would have to be included in the statute of the Tribunal. In such a case, the General Assembly could hardly act as a judicial organ, especially since the United Nations was itself a party to the disputes.

4. In a separate opinion appended to the advisory opinion of the Court with regard to Administrative Tribunal judgement No. 158, Fasla v. the Secretary-General of the United Nations, Judge Jiménez de Aréchaga had commented that in 1954 the Court had suggested that a system of judicial review should be established from which the General Assembly would be excluded.
Judge Jiménez de Aréchaga had noted that in making that suggestion the Court had taken into account a decision adopted by the Assembly of the League of Nations in 1946 and the arguments advanced in the General Assembly in 1953 which presupposed that those essentially political bodies had the power to refuse to comply with the judgements of an administrative tribunal when they considered that it had exceeded its competence.

5. In view of the foregoing, he suggested that, if it decided to abolish the procedure provided for under article 11, the General Assembly must also decide whether Member States should be provided with the opportunity to seek an advisory opinion of the Court. Such a procedure might be envisaged in cases where there was reason to believe that the Administrative Tribunal had exceeded its jurisdiction or competence, defined by the General Assembly itself in promulgating the Tribunal's statute, or if a Member State had reasons to consider that the Tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations.

6. Mr. GAWLEY (Ireland) said that, while the procedure provided for under article 11 of the statute of the Administrative Tribunal should be abolished, other systems of balance needed to be set up, such as establishing an office of ombudsman or strengthening the provisions of article 12 of the statute, which would permit application to the Tribunal for review of judgements. In paragraph 37 of his report (A/C.6/49/2), the Secretary-General had concluded that the best solution would be to abolish the procedure. Yet, in paragraph 38, he raised the possibility of retaining the procedure in a modified form, which would allow Member States to seek an advisory opinion of the Court on two of the four grounds provided for under article 11.

7. The report on reform of the internal system of justice in the United Nations Secretariat (A/C.5/49/13) did not address the issue of the procedure provided for under article 11 of the statute of the Administrative Tribunal. None the less, according to paragraph 17 of that document, a report would be submitted to the General Assembly on the United Nations Administrative Tribunal statute and role when the new mechanisms proposed in the document had been tried

out and evaluated. Moreover, those mechanisms included ombudsman panels which would serve as mediators in cases where conciliation had not been successful. In view of those circumstances, it would be best to postpone any decision with regard to abolishing the procedure provided for under article 11 until there had been an opportunity to evaluate the mechanisms which would soon be set up. He proposed that it should be decided that, at its fiftieth session, the General Assembly would consider the question of deleting article 11 and any amendments thereto.

8. Ms. WILMSHURST (United Kingdom) said that the report of the Secretary-General on the review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations (A/49/258) contained the replies received from Member States pursuant to General Assembly decision 48/415. In their replies, all the States were in favour of abolishing that review procedure. For its part, her delegation considered that the procedure had never helped any staff member or Member State and served no useful purpose. Any possible advantage in retaining it was far outweighed by the disadvantages (false expectations, delays, costs, and inappropriateness of the procedure with regard to both the Committee on Applications for Review of Administrative Tribunal Judgements and the International Court of Justice). The report of the Secretary-General contained a draft resolution prepared by her delegation which would have the effect of terminating the review procedure by amending the statute of the Administrative Tribunal.

9. In the other report before the Sixth Committee on the same item (A/C.6/49/2), the Secretary-General had concluded that the review procedure provided for under article 11 had not proved to be a constructive and useful element of the appeal system available within the Secretariat; on the contrary, it had caused confusion and criticism, which supported the view that the best solution would be to abolish it. She welcomed that conclusion and noted that the Secretary-General considered that Member States might wish to retain the ability to challenge Administrative Tribunal judgements, although on more limited grounds. However, in that case the staff might believe that States would only challenge judgements which went against the Organization and not those which went against the staff. Furthermore, some disgruntled staff members would seek the agreement of some Member State to take up their case before the Committee on Applications for Review of Administrative Tribunal Judgements thus occasioning as many cases as before with all the consequent disadvantages.

10. In her opinion, the procedure provided for under article 11 should be abolished. The only question which remained was the timing of abolition. If it was decided to abolish it during the current year, the United Kingdom would be prepared to submit a text along the lines of the draft resolution mentioned previously. In that regard, it could be argued that it would be better to consider the question within the framework of the reform of the internal system of justice currently being considered in the Fifth Committee. However, the Secretary-General explained in paragraph 3 of his report (A/C.6/49/2) that the study of the review procedure basically dealt with an issue distinct from that discussed in connection with the reform of the system of justice. Since the Secretary-General had treated the two matters separately the Sixth Committee

should be able to do likewise. However, if the Committee felt that the question should be delayed for one more year to allow the staff to have a better picture of the changes being made to the system, her delegation could agree to postpone the adoption of a decision on the issue for no longer than a year.

11. Mr. GONZALEZ (France) said that article 11 of the statute of the United Nations Administrative Tribunal made an exception to the principle established in article 10, paragraph 2, that the judgements of the Tribunal should be final and without appeal and authorized the Tribunal to request an advisory opinion of the International Court of Justice.

12. His delegation had previously pointed out the inherent deficiencies of that system. In order to afford an opportunity to seek a review of Tribunal judgements, recourse was had to an institution which was basically political but was obliged to take decisions on the basis of highly technical legal concepts such as errors of law or rules pertaining to jurisdiction. Thus, the International Court of Justice would be seized of administrative disputes which obviously lay outside its usual purview. Even more serious was the fact that uncertainty was created with respect to the scope of the Tribunal's judgements, since the right established under article 11 was invariably interpreted as a form of appeal with the attendant delays in the procedure and the inevitable disappointment of appellants.

13. In view of the foregoing, he felt that the procedure established under article 11 served no useful purpose and was even detrimental to a sound administration of justice. It should therefore be abolished without allowing for any reservations, even with respect to States, since any exception in that regard would be misinterpreted by the other parties to whom that right was currently granted.

14. However, article 11 should not be abolished in a vacuum, but should be considered as part of the reform of the internal system of justice in the United Nations Secretariat, on which the Secretary-General had prepared a report (A/C.5/49/13). It would therefore be wise to await the decisions of the General Assembly on the preliminary recommendations of that report and the contents of a more detailed report of the Secretary-General pursuant to those decisions. Consequently, consideration of that issue should be deferred until the following session.

15. Mrs. FLORES (Uruguay) said that it appeared from the written observations submitted by Member States with respect to the procedure provided for under article 11 of the statute of the Administrative Tribunal that they were primarily concerned about the terms of reference of the Committee on Applications for Review of Administrative Tribunal Judgements, which was limited solely to the consideration of applications in order to determine whether there were grounds for requesting an advisory opinion of the International Court of Justice. Such requests had been made in only three cases, although the Committee had considered over 80 applications. Secondly, Member States were concerned about the Committee's jurisdiction. Since staff members did not always understand the extremely limited scope of the review procedure and often

submitted requests which had no prospects whatsoever of success. Lastly, there was concern about the fact that the Committee, a basically political body, was performing quasi-legal functions.

16. Consequently, a careful analysis should be conducted before any amendments were made to the statute of the Administrative Tribunal. The procedure established under article 11 should not be abolished unless another mechanism for resolving disputes was established, and the process for the reform of the internal system of justice in the United Nations Secretariat should always be borne in mind. In her delegation's opinion, the consideration of the item should be deferred until the next session of the General Assembly.

17. Mr. THAHIM (Pakistan) said that the procedure provided for under article 11 of the statute of the Administrative Tribunal did not serve much of a useful purpose; there were some inherent shortcomings in that article, especially as there was no provision ensuring that the Committee on Applications for Review was equipped with legal expertise. Furthermore, the International Court of Justice was inappropriately requested to provide an advisory opinion on disputes of an administrative nature.

18. Past experience showed that only a few applications had been allowed and that in none of those cases had the advisory opinion requested of the International Court of Justice affected the Tribunal's judgement; on the other hand, the inordinate delays in the implementation of the Tribunal's decisions was to be deplored.

19. His delegation wished, however, to stress that any move towards deleting article 11 from the statute of the Administrative Tribunal must be accompanied by an alternative practical mechanism to address all the problems which arose in relation to contracts of employment of United Nations staff members. In that context, his delegation would be willing to consider favourably the creation of an office of ombudsman to address the problems of United Nations personnel. It proposed that the consideration of the issue should be deferred until the fiftieth session of the General Assembly, pending an updated report of the Secretary-General on the reform of the internal system of justice in the United Nations Secretariat.

20. Mr. ROWE (Australia) said that, in his delegation's view, the procedure for review of judgements established under article 11 of the statute of the Administrative Tribunal of the United Nations was unsatisfactory and had failed to demonstrate its efficiency as a mechanism for protecting the staff. The Committee on Applications for Review of Judgements was not an appeal body but a political one, under whose mandate it was almost impossible to recommend an appeal to the International Court of Justice. Furthermore, it did not seem wise to burden the Court, whose real purpose was to decide on disputes between nations, with additional work.

21. Accordingly, his delegation believed that the statute of the Administrative Tribunal should be amended by removing the procedure in article 11. That would be a first step in the process of reforming the internal system of justice in

the Secretariat. At the same time, another system must be put into place to ensure the protection of the rights of United Nations staff.

22. To that end, a possible solution would be the appointment of an ombudsman who would address problems of staff members before they were submitted to the Administrative Tribunal and could also follow up its decisions. United Nations staff would thus have their interests protected effectively, instead of being offered an illusory and highly politicized mechanism for appeal to the International Court of Justice.

23. Mr. NATHAN (Israel) drew attention to Israel's views on the topic under discussion, which were contained in document A/49/258. In accordance with the review procedure provided for in article 11 of the statute of the Administrative Tribunal, Member States, the Secretary-General or United Nations staff members who did not agree with an Administrative Tribunal judgement could appeal to the Committee on Applications, which, if it decided there was a substantive basis for the application, could request an advisory opinion of the International Court of Justice. Since the establishment of the Tribunal in 1955, however, only three applications had led to such a request, and, in all three cases, the Court had decided to uphold the decision of the Tribunal.

24. Israel believed that the provisions of article 11 were inappropriate because they had the effect of conferring on a political body the ability to review Administrative Tribunal decisions, and of involving the International Court of Justice in employment issues that lay outside the traditional scope of its activities. The provisions of article 11 had not been useful in the past and it was highly unlikely that they would be in the future.

25. As indicated in the report of the Secretary-General, a reform of the internal system of justice in the United Nations Secretariat had been undertaken. Accordingly, a final decision on the item under consideration should be postponed so that the Committee could consider it in the light of the Secretary-General's conclusions on that reform.

AGENDA ITEM 143: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued) (A/C.6/49/L.14 and L.20)

A/C.6/49/L.20

26. Ms. WILMSHURST (United Kingdom), speaking on behalf of the sponsors of draft resolution A/C.6/49/L.20 (Australia, Canada, Germany, the Netherlands, the United Kingdom and the United States) said that, from the results of the informal consultations held during 1994, it was clear that there were several outstanding areas of disagreement on issues of central importance to a convention on jurisdictional immunities. Thus, it would be premature to decide, at the current session, to convene a conference to negotiate a convention as proposed in document A/C.6/49/L.14. Because of the disagreements mentioned, such a conference could end without adopting a convention or by adopting a convention without the support of a significant number of countries, with the risks that would involve.

27. In paragraph 2 of draft resolution A/C.6/49/L.20, States were invited to submit to the Secretary-General their written comments on the conclusions of the Chairman of the informal consultations held. In paragraph 3, it was decided to resume consideration of the issues of substance at the fifty-third session of the General Assembly. That would allow a period of four years for reflection before returning to consideration of the item in the Sixth Committee. The United Kingdom would have preferred five years, but other States appeared to favour a shorter period. Since it was impossible to arrive at a single compromise text, the sponsors of the draft resolution wished to make it clear that some elements of the text of draft resolution A/C.6/49/L.14 were unacceptable, especially the references to the need to make a commitment to holding a conference, since the international community had not clearly expressed its support for such a step; that was the reason for the submission of document A/C.6/49/L.20.

28. The CHAIRMAN said that the Russian Federation had joined the sponsors of draft resolution A/C.6/49/L.14.

AGENDA ITEM 139: REPORT OF THE COMMITTEE ON RELATIONS WITH THE HOST COUNTRY (continued) (A/C.6/49/L.15)

29. The CHAIRMAN said that France had joined the sponsors of draft resolution A/C.6/49/L.15.

AGENDA ITEM 134: STATUS OF THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF ARMED CONFLICTS (continued) (A/C.6/49/L.19)

30. The CHAIRMAN said that Hungary had joined the sponsors of draft resolution A/C.6/49/L.19.

AGENDA ITEM 140: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/49/L.3 and L.18)

31. The CHAIRMAN said that Japan and the Philippines had joined the sponsors of draft resolution A/C.6/49/L.18.

32. Ms. DAUCHY (Secretary of the Committee) said that, after consultations with the other sponsors of draft resolution A/C.6/49/L.3, Poland had decided to withdraw it.

The meeting rose at 11.40 a.m.