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30th meeting of the Committee of the Whole

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THIRTIETH MEETING

Monday, 27 March 1961, at 10.30 a.m.

Chairman: Mr. LALL (India)

Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4)
(continued)

Article 31 (Exemption from social security legislation)
(resumed from the 25th meeting)

1. The CHAIRMAN invited debate on article 31 and the amendments thereto.¹

2. Mr. RIPHAGEN (Netherlands) withdrew his delegation's amendment (L.187) in favour of the paragraph 5 proposed in the Austrian amendment (L.265).

3. Mr. MONACO (Italy) withdrew his delegation's amendment (L.196) in favour of the Austrian amendment, which expressed the same idea.

4. Mr. KIRCHSCHLAEGGER (Austria) announced that Switzerland and Spain had also withdrawn their amendments (L.238 and L.268) in favour of the Austrian amendment, which would replace article 31 by provisions taken, after adjustment, from articles 44 and 65 [second text] of the International Law Commission's draft on consular intercourse and immunities (A/4425). The proposed provision concerning the relationship between the instrument being prepared and other international conventions was intended to fill a gap in the draft.

5. In addition, his delegation's amendment proposed that the expression "social security" should be replaced by "social insurance". That change was based on Austrian legislation, but if other delegations had any difficulty in accepting the new expression, he was prepared to withdraw it.

6. Mr. de VAUCELLES (France) introducing his delegation's amendment (L.218), said that the second sentence of article 31 would, as had been indicated by the Assistant Director-General of the International Labour Office (25th meeting), impose certain obligations on the head of mission. Conceivably, however, the sending State might not wish him to assume those obligations. Accordingly, under the article the participation of diplomatic missions in the social security system of the receiving State should be reduced to the indispensable minimum.

7. If the amendment should be rejected, he would propose that participation be made conditional on the per-

mission of the receiving State, rather than on its legislation.

8. Lastly, he drew attention to the need to change the term "employee", which was not defined in article 1.

9. Mr. KEVIN (Australia) said that the reason for his delegation's amendment (L.226) was that, under Australian law, it was the employer, not the employee, who paid social security contributions. In view of the paragraph 3 proposed in the Austrian amendment, however, he was prepared to withdraw his amendment if the Austrian representative agreed to add the words "and members of their families who form part of their households" after the words "members of the mission".

10. Mr. KIRCHSCHLAEGGER (Austria) accepted the Australian sub-amendment.

11. Mr. CAMERON (United States of America) said that his delegation's amendment (L.262) was intended to provide the sending State with absolute exemption from the social security legislation of the receiving State in the case of services rendered by a diplomatic agent or a member of the subordinate staff to the sending State itself. Persons who were permanent residents of the receiving State would be excluded from such exemption.

12. The exemption provided for in the proposed paragraph 1 would be confined to persons employed by the sending State itself. Paragraph 2 provided that if members of the mission employed in their private service persons subject to the social security legislation of the receiving State, they had to comply with that legislation. Paragraph 3 of his delegation's amendment was a redraft of the last sentence of article 31, but he was prepared to withdraw it.

13. Mr. GLASSE (United Kingdom) said that his delegation's amendment (L.201), if read in conjunction with article 36, paragraph 1, was only a drafting amendment. He suggested that it should be referred to the Drafting Committee.

It was so agreed.

14. Mr. RUEGGER (Switzerland), supporting the Austrian amendment, said that article 44 of the draft on consular intercourse and immunities was more detailed than the article 31 under discussion; it represented the results of the International Law Commission's most recent work and took existing conditions more fully into account. Thus the Austrian proposal in fact replaced an older text by a more recent one.

15. Mr. ROMANOV (Union of Soviet Socialist Republics) thought it quite natural that the more recent of the two texts prepared by the International Law Commission should be more detailed, clearer and more generally acceptable than the earlier one. He therefore supported the Austrian amendment.

16. The United States amendment introduced the new concept of permanent residence. He was aware that the law of many countries attached considerable importance to permanent residence or domicile, but the decisive criterion should remain that of nationality. Para-

¹ The following amendments had been submitted: Netherlands, A/CONF.20/C.1/L.187; Italy, A/CONF.20/C.1/L.196; United Kingdom, A/CONF.20/C.1/L.201; France, A/CONF.20/C.1/L.218; Australia, A/CONF.20/C.1/L.226; Switzerland, A/CONF.20/C.1/L.238; India, A/CONF.20/C.1/L.254; United States of America, A/CONF.20/C.1/L.262; Austria, A/CONF.20/C.1/L.265; Spain, A/CONF.20/C.1/L.268.

graph 2 (a) of the Austrian proposal took both nationality and permanent residence into account; hence it did not entirely overlook the point which the United States delegation wished to cover.

17. Mr. YASSEEN (Iraq) supported the Austrian amendment, subject to drafting changes.

18. Mr. GLASER (Romania) said that paragraphs 1 to 4 as proposed by Austria were acceptable, but suggested that the final wording should be left to the Drafting Committee.

19. The proposed paragraph 5 stated a recognized principle of international law, but one which could also apply to other articles of the draft. A general convention would not prevent States from adopting broader provisions in bilateral or multilateral agreements. He therefore suggested that the Drafting Committee should be asked to consider whether paragraph 5 of the Austrian amendment should not be treated as a separate article applying to the whole of the draft.

20. Mr. KRISHNA RAO (India) withdrew his delegation's amendment (L.254) in favour of the Austrian amendment. He, too, doubted whether the general principle of international law stated in paragraph 5 should be embodied in an article dealing with the particular matter of exemption from social security legislation.

21. Mr. HUCKE (Federal Republic of Germany) drew attention to the use of the expression "members of the private staff" in the Austrian amendment. The expression "private staff" was used in the draft on consular intercourse and defined in its article 1. It was not used in the draft on diplomatic intercourse and he suggested that the Drafting Committee should be asked to consider the advisability of substituting the term "private servant", which was defined in article 1 (h) of that draft.

22. Mr. KEVIN (Australia) suggested that in paragraph 3 of the Austrian amendment the words "if not nationals of or permanently resident in the receiving State" should be added.

23. Mr. BARTOŠ (Yugoslavia) suggested the inclusion of a similar proviso in paragraph 1 of the Austrian amendment. Such a proviso was necessary in order to safeguard the right of the locally recruited staff of foreign missions to social security and, in particular, to old-age and invalidity benefits. Perhaps the omission was involuntary and the authors of the amendment had not intended the result obtained.

24. Mr. PATEY (France) said that his delegation's amendment (L.218) could be withdrawn if the words "the laws of" were deleted from paragraph 4 of the Austrian amendment, so that voluntary participation was made possible if "permitted by the receiving State".

25. Mr. SMITH (Canada) urged that the reference to permanent residence be maintained, since serious inequities would result from its omission.

26. Mr. CAMERON (United States of America) said that he would not be able to support the Austrian amend-

ment unless the application of paragraph 1 was confined to persons actually employed by the mission itself. It was also necessary to make proviso (a) of paragraph 2 — which excluded nationals of and residents in the receiving State — applicable to paragraph 1. Lastly, the term "obligations" in paragraph 3 should be qualified by the addition of the words "with respect to contributions".

27. The CHAIRMAN said that there appeared to be very wide support for the Austrian amendment, subject to certain adjustments, and he suggested that a small working party, consisting of the representatives of Austria, Switzerland, the United States of America, the Soviet Union and India should be appointed to prepare a redraft of article 31 on the basis of the Austrian amendment, in the light of the suggestions made by the Federal Republic of Germany, the United States and France.

*It was so agreed.*¹

Article 32 (Exemption from taxation)

28. The CHAIRMAN invited debate on article 32 and the amendments thereto.²

29. Mr. de ERICE y O'SHEA (Spain) withdrew his delegation's amendments (L.269) with the request that the Drafting Committee should bear the first of those amendments in mind, since a similar provision had been approved for inclusion in article 29, paragraph 1 (b) (28th meeting, para. 27).

30. Mr. CAMERON (United States of America) withdrew the second and fourth of his delegation's amendments (L.263). The point raised in the fourth amendment would be taken up in connexion with articles 36 and 37. The third was intended to clarify what he believed to be the intention of sub-paragraph (f) of article 32, viz., to refer to registration fees, etc., on immovable property.

31. Mr. KEVIN (Australia) withdrew his delegation's amendment (L.282), the substance of which could be covered in subsequent articles.

32. Mr. RIPHAGEN (Netherlands) withdrew the first of his delegation's amendments (L.188) in favour of the third amendment (L.239), and the second in favour of the Canadian amendment to sub-paragraph (c) (L.257).

33. Mr. RUEGGER (Switzerland) withdrew the first of his delegation's amendments (L.239) which was covered by the amendments proposed by Nigeria (L.244) and France (L.219). In addition, he withdrew the second Swiss amendment in favour of the Austrian amendment (L.235).

¹ For the continuance of the debate on article 31, see 32nd meeting.

² The following amendments had been submitted: Netherlands, A/CONF.20/C.1/L.188; United Kingdom, A/CONF.20/C.1/L.202; France, A/CONF.20/C.1/L.219; Venezuela, A/CONF.20/C.1/L.231; Austria, A/CONF.20/C.1/L.235; Switzerland, A/CONF.20/C.1/L.239; Nigeria, A/CONF.20/C.1/L.244; Japan, A/CONF.20/C.1/L.247; Canada, A/CONF.20/C.1/L.257; United States of America, A/CONF.20/C.1/L.263; Spain, A/CONF.20/C.1/L.269; Australia, A/CONF.20/C.1/L.282.

34. Mr. GLASSE (United Kingdom), introducing his delegation's amendments (L.202), said that the second was a drafting amendment. The first was intended to cover the position arising when a tax usually incorporated in the price of an article was payable separately.

35. The CHAIRMAN noted that, in consequence of the withdrawal of the first Swiss amendment, the only amendments relating to the opening passage of the article were the substantially similar French and Nigerian amendments (L.219 and L.244).

36. Mr. HAASTRUP (Nigeria) said that his delegation's amendment was of wider scope than that submitted by France, and he therefore maintained it.

37. Mr. PATEY (France) confirmed the Nigerian representative's interpretation. The French amendment would exclude not only nationals of the receiving State, but also persons who were nationals neither of the receiving State nor of the sending State.

38. Mr. MARESCA (Italy) supported the Nigerian amendment, which would exclude only nationals of the receiving State. He was not in favour of attempting to deal with the case of nationals of a third State; a State's right of taxation was primarily exercised over its own nationals.

39. The CHAIRMAN put the Nigerian amendment (L.244) to the vote, as being the one furthest removed from the original text.

The amendment was adopted by 35 votes to 16, with 19 abstentions.

40. Mr. MATINE-DAFTARY (Iran), speaking on a point of order, said that as only one article — article 37 — dealt with diplomatic agents who were nationals of the receiving State, the amendment just adopted was superfluous.

41. Mr. TUNKIN (Union of Soviet Socialist Republics) said that he had voted against the amendment, not because of any basic objection to it but because he thought that it was valueless and might even be harmful. He thought there had been a misunderstanding. Article 37 defined the privileges and immunities of diplomatic agents who were nationals of the receiving State; none of the other articles dealt with their position, and if a reference to their position was inserted in article 32, the same should be done in every other article. He suggested that the matter should be referred to the Drafting Committee.

42. Mr. HAASTRUP (Nigeria) said that he did not think his delegation's amendment could have any adverse effect. He would, however, have no objection to the matter being referred to the Drafting Committee.

It was so agreed.

43. The CHAIRMAN said that it was evident that the Committee had only wished to make it clear that tax exemption would not extend to the nationals of receiving States. He was sure the Drafting Committee would be able to remove any ambiguity or redundancy.

44. He added that the adoption of the amendment of Nigeria made a vote on the first of the French amendments (L.219) unnecessary.

Sub-paragraph (a)

45. Mr. SMITH (Canada) withdrew his delegation's amendment (L.257, para. 1).

46. Mr. KIRCHSCHLAEGGER (Austria) withdrew his delegation's amendment (L.235) in favour of the United Kingdom amendment (L.202, para. 1).

47. The CHAIRMAN recalled that the amendment proposed by Switzerland (L.239, para. 2) had also been withdrawn.

48. Mr. TAKAHASHI (Japan) said that his delegation had submitted its amendment (L.247) on the grounds that the expression "indirect taxes" was not clear and might give rise to difficulties. Taxes on goods or services could be made direct or indirect by national legislation, whereas the expression "excise taxes" (*droits d'accise*) would cover all taxes on goods or services, whether charged directly or indirectly. The amendment was based on article IV, section 11 (g) of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946.

49. Mr. GIMÉNEZ (Venezuela) withdrew his delegation's amendment (L.231).

50. Mr. JEZEK (Czechoslovakia) thought that the first of the United Kingdom amendments (L.202) would not be an improvement on the text. The phrase "of a kind which are normally" was just the sort of wording that was difficult to interpret, for who was to decide what was normal?

51. Mr. SOMERVILLE (Australia) said that the Japanese amendment was very similar to the United Kingdom amendment. He saw a difficulty, however. If the Japanese amendment were adopted, sub-paragraph (a) would refer only to excise taxes, including sales taxes, whereas the opening passage used the word "national" and hence, as he understood it, included customs duties which were dealt with in article 34. Thus exemption from customs duties would be dealt with in two articles.

52. Mr. DONOWAKI (Japan) pointed out that his delegation had also submitted an amendment to article 34 (L.248) which would, he thought, balance its amendment to article 32.

53. The CHAIRMAN put the amendment submitted by Japan (L.247) to the vote.

The amendment was rejected by 42 votes to 7, with 23 abstentions.

54. The CHAIRMAN proposed that the first of the United Kingdom amendments (L.202) be put to the vote and that the second be referred to the Drafting Committee.

55. Mr. TUNKIN (Union of Soviet Socialist Republics) doubted whether the second United Kingdom amendment was in fact merely a drafting change. The

International Law Commission's draft provided that diplomatic agents were not exempt from indirect taxes incorporated in the price of goods or services; the amendment provided, however, that a diplomat was not exempt from the tax on retail prices. In practice, that was not universally feasible, because methods of charging taxes varied from one country to another. In his opinion the amendment could only cause confusion.

56. Mr. KEVIN (Australia) suggested that any difficulties might be removed by inserting the words "whole-sale or retail" before the word "price".

57. Mr. TUNKIN (Union of Soviet Socialist Republics) thought the word "price" used by the International Law Commission was sufficient by itself.

58. Mr. GLASER (Romania) said that an amendment introducing a distinction not already made in the article was manifestly not a mere drafting change.

59. In view of the comments that had been made, Mr. GLASSE (United Kingdom) withdrew the second of his delegation's amendments (L.202). He explained, however, that it had only been introduced for the sake of precision: his delegation had considered the diplomatic agent as the ultimate purchaser of goods over the counter.

60. The CHAIRMAN put the first of the United Kingdom amendments (L.202) to the vote.

The amendment was adopted by 27 votes to 18, with 26 abstentions.

Sub-paragraph (b)

61. Mr. SCOTT (Canada) withdrew the second and third of his delegation's amendments (L.257).

62. Mr. de VAUCELLES (France) explained that the French amendment to sub-paragraph (b) added a reference to article 21 (Exemption of mission premises from tax) with the object of specifying that all buildings held privately, whether by the head of mission or by his assistants — or even by the sending State, in cases where that State had acquired or rented premises for the exclusive purpose of housing the members of the mission — remained subject to the tax legislation of the receiving State.

63. The CHAIRMAN put the French amendment to sub-paragraph (b) (L.219) to the vote.

The amendment was rejected by 26 votes to 18, with 25 abstentions.

Sub-paragraph (c)

64. Mr. CAMERON (United States of America) withdrew his delegation's amendment to sub-paragraph (c) in favour of the Canadian amendment to that provision.

65. Mr. WESTRUP (Sweden) announced that he would re-submit the United States amendment in the name of the Swedish delegation.

66. Mr. de VAUCELLES (France) said that his delegation's amendment to sub-paragraph (c) was a consequence of its amendment to article 38 (L.225), which proposed the deletion of a sentence that was not in conformity with French law. He suggested that a decision on sub-paragraph (c) of article 32 should be postponed until article 38 had been dealt with.

67. Mr. WESTRUP (Sweden) said that the United States amendment which he was re-submitting was preferable to the French amendment, because it stated clearly a principle that was recognized in Sweden and should be made clear in the convention. It would also cover the Swedish amendment to article 38 (L.293).

68. Mr. RIPHAGEN (Netherlands) thought that the Canadian amendment was better than the United States amendment because it referred to estate, succession or inheritance taxes on property in the receiving State — a limitation he was sure most delegations would wish to include in sub-paragraph (c).

69. The CHAIRMAN suggested that further discussion of sub-paragraph (c) should be deferred until the Committee had discussed article 38.

It was so agreed.¹

Sub-paragraph (d)

70. The CHAIRMAN said that, the United States amendment having been withdrawn, the only remaining amendment to sub-paragraph (d) was that submitted by Switzerland (L.239, para. 3).

71. Mr. SMITH (Canada) said he wished to re-submit the United States amendment to sub-paragraph (d). In tax negotiations, the concept of "source of income" was the subject of much controversy, and he believed that the United States amendment, which established that for diplomats the source of income was the sending State and not the State in which they worked, would be a valuable addition to article 32.

72. Mr. AMLIE (Norway) thought that the International Law Commission had erred on the generous side in requiring the diplomatic agent to pay tax only on his private immovable property in the receiving State. He should also be taxed on other property, such as investments in commercial enterprises. That would be consistent with the practice in Norway and in other countries and he therefore supported the amendment submitted by Switzerland.

73. Mr. RIPHAGEN (Netherlands) also supported the Swiss amendment, for similar reasons. Investments had nothing to do with the official work of a diplomat.

74. Mr. MATINE-DAFTARY (Iran) said he could understand the desirability of such a provision for a country like Switzerland which had an ample supply of capital, but he did not think it would help the less-developed States which needed foreign capital: a capital tax was not likely to encourage investment. He thought

¹ See 35th meeting, para. 25.

that the taxability of a diplomat's investment income should be settled by bilateral negotiation and should not be dealt with in a general convention.

75. Mr. HAASTRUP (Nigeria) said that, as was clear from the explanatory comment, his delegation's amendment (L.244) had the same purpose as the United States amendment to paragraph (d). It therefore seemed that no useful purpose would be served by adopting the United States amendment.

76. Mr. de ERICE y O'SHEA (Spain) said that in view of the new article proposed by Colombia (L.174) which was intended to prevent diplomats from conducting commercial activities or investing in commercial undertakings in the receiving State, it would be better not to mention such matters in article 32. Hence he would not support the Swiss amendment.

77. Mr. KEVIN (Australia) had some doubts about the advisability of singling out capital taxes for special mention.

78. Mr. CAMERON (United States) inquired whether the "capital taxes on investments" referred to in the Swiss amendment meant taxes on capital investment or capital gains taxes.

79. Mr. DADZIE (Ghana) suggested that the insertion of the word "private" before the word "income" might remove some of the difficulties that had arisen during the discussion; for article 32 was concerned with the diplomatic agent quite apart from his sending State. He agreed with the speakers who considered that article 32 was not the proper context for a reference to commercial undertakings.

80. Mr. BARTOŠ (Yugoslavia) said that the basis of privileges and immunities was the diplomatic function, and a diplomat was not entitled to privileges or immunities on capital, private property or investments in the receiving State. He was in favour of any amendment which supported that principle, and would therefore vote for the Swiss amendment.

81. The CHAIRMAN put the amendment submitted by Switzerland to sub-paragraph (d) to the vote.

The amendment was adopted by 25 votes to 15, with 31 abstentions.

82. The CHAIRMAN put to the vote the United States amendment to sub-paragraph (d), which had been re-submitted by Canada.

The amendment was rejected by 28 votes to 21, with 22 abstentions.

83. The CHAIRMAN thought the suggestion of the representative of Ghana that the word "private" be inserted before the word "income" in sub-paragraph (d) should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

THIRTY-FIRST MEETING

Monday, 27 March 1961, at 3.20 p.m.

Chairman: Mr. LALL (India)

Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4) (continued)

Article 32 (Exemption from taxation) (continued)

1. The CHAIRMAN invited the Committee to continue its debate on article 32 and the amendments thereto.¹

Sub-paragraph (e)

2. The CHAIRMAN said that no amendments had been submitted to sub-paragraph (e).

Article 32, sub-paragraph (e), was adopted unchanged.

3. Mr. ULLMANN (Austria) said that, according to his delegation's interpretation, the charges referred to in sub-paragraph (e) included charges for permission to install and operate a wireless or television receiver.

Sub-paragraph (f)

4. The CHAIRMAN drew attention to the United States amendment to sub-paragraph (f) (L.263).

5. Mr. CAMERON (United States of America) said that the sub-paragraph as it stood was vague. If it was meant to refer to registration and other dues on movable and immovable property it was acceptable. But if it was only intended to refer to such dues relating to immovable property, that should be specified.

6. Mr. REGALA (Philippines) thought that the actual wording of the provision suggested it was meant to refer only to registration and other dues on immovable property.

The United States amendment to sub-paragraph (f) was adopted.

New sub-paragraph proposed by France

7. The CHAIRMAN drew attention to the new sub-paragraph proposed by France (L.219).

8. Mr. de VAUCELLES (France), introducing the new provision, explained that, in addition to taxes, there were dues payable to the local authorities by reason of the occupancy of residences other than the official residence of the diplomatic agent. The object of the new provision was to specify that such dues should be payable in respect of a residence that was not the official residence of the diplomatic agent.

9. Mr. TUNKIN (Union of Soviet Socialist Republics) thought that the International Law Commission's inten-

¹ For the amendments originally submitted, see 30th meeting, footnote to para. 28. With the exception of those relating to sub-paragraphs (c) and (f) and the French delegation's third amendment (L.219) they were all either voted on or withdrawn at the 30th meeting.