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of the Franco-Swedish Consular Convention of 1955 provided that the consul should be accorded the necessary time to consult his government if he considered that the evidence he was called upon to give might be connected with his official functions. The second sentence of the first paragraph must have been introduced precisely for those considerations. Its omission from the article might bring about delicate situations and complicate policies and good relations, particularly as articles 70 and 71 allowed the conclusion of bilateral agreements to enable the provisions of the convention to be modified. For those reasons, therefore, his delegation could not support the amendments proposing the deletion of the second sentence of paragraph 1. His delegation could, however, support the amendment proposed by the delegation of India (L.159).

37. With regard to paragraph 2, his delegation could support the Nigerian amendment (L.118) provided it was made subject to the provisions of paragraph 1. It could also support the amendment of the United Kingdom (L.135) and that proposed to paragraph 3 by Japan (L.81).

38. Lastly, having mentioned the principle of the non-amenability of consuls to local jurisdiction, he wished, rather belatedly, to draw attention to the lack of harmony between the title of article 43 (Immunity from jurisdiction) and its substance. He would suggest that it should read " Amenability to jurisdiction ", for the article treated of the exception to the rule of amenability.

39. Mr. HENAO-HENAO (Colombia) said that his delegation would vote for paragraph 1 of the International Law Commission's text. It could not support the deletion of the second sentence of that paragraph, which would weaken the principles, already approved by the Committee, of the special protection and respect due to consular officials, their personal inviolability and immunity from jurisdiction. The proposed deletion would prevent the consular official from exercising his consular functions with freedom and dignity. To compel a consular official to attend as a witness, it would be necessary to limit his freedom. His delegation could not accept the view that to decline to attend as a witness would be a failure to co-operate with the authorities of the receiving State. It might, in fact, be to the detriment of one party in judicial proceedings if the consul, with his special status and prestige, gave evidence in favour of the other party. To prevent the attendance of the consular official as a witness would be failure to co-operate. To compel him to do so, however, would hamper him in the exercise of his functions and would endanger his consular dignity. His delegation could not support the Japanese amendment (L.81), which would constitute interference with the exercise of consular functions. It would, however, support the Spanish amendment (L.151).

40. Mr. SOWA (Ghana) shared the views expressed by the representative of Norway in regard to the retention of the International Law Commission's text. It would be dangerous to expose the consular official to the risks which might arise should some of the amendments to paragraph 1 be adopted. In cases where the authorities of the receiving State called a consular official as a material witness in connexion with a serious criminal offence, for example, his life might be in danger, since a criminal gang might waylay and kill him before or after his appearance in court. As a representative of the sending State, he required and should be given protection. His delegation would vote against the proposals to change the text of paragraph 1 since it considered that a consular official should not be compelled to give evidence in court unless he himself was the defendant in the case.

The meeting rose at 1 p.m.

TWENTY-SEVENTH MEETING

Friday, 22 March 1963, at 3.15 p.m.

Chairman: Mr. VRANKEN (Belgium)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)

Article 44 (Liability to give evidence) (*continued*)

1. The CHAIRMAN invited the Committee to continue its consideration of article 44 and the amendments thereto.[1]

2. Mr. PETRENKO (Union of Soviet Socialist Republics) said that article 44 was acceptable as drafted. Its terms were analogous to those of the corresponding provisions in existing consular conventions. The second Japanese amendment (L.81) was a constructive proposal which would improve the text by codifying the recognized international practice in consular matters. The Austrian amendment (L.50) was primarily a drafting amendment designed to improve the text of the article, and the Soviet Union delegation regarded it as unobjectionable. He could not, however, accept the United States (L.6), Finnish (L.41), and Japanese (L.81) proposals to delete the second sentence of paragraph 1 of the article. For practical considerations, the proposed deletion was not advisable, for without the sentence in question the paragraph might place consular officials in an impasse. The legal arguments advanced by the United States representative had in no way convinced him, and he was still of the opinion that if the article was amended in the manner proposed the consular officials' relations with the judicial authorities of the receiving State would become more complicated. The same was true of the United Kingdom amendment (L.135), which would likewise not be conducive to better relations between States. The original text of article 44 was better.

3. Mr. KANEMATSU (Japan) said that quite often consuls were not experts on all aspects of the law of the sending State. Only a general acquaintance with the law was expected of them, and it would be going

[1] For the list of the amendments to article 44, see the summary record of the twenty-fifth meeting, footnote to para. 50.

too far to oblige a consul to give expert evidence. There was thus justification for the second Japanese amendment (L.81).

4. Mr. McCUSKER (United States of America) said that justice and fairness should be the foremost concern. A situation might arise in which a person who had been wrongly arrested could not be released except on the evidence of a consul. It was therefore necessary to make provision for the giving of such evidence, by a clause laying down the principle.

5. Mr. NWOGU (Nigeria) said that his delegation's amendment (L.118) was intended to rule out any possibility of ambiguity. His government took the view that the consul should give evidence voluntarily. It seemed inconceivable that a consul should decline to testify in cases where his evidence was required.

6. Mr. HART (United Kingdom) said he still considered that the second sentence in paragraph 1 should be deleted, because the possible risks involved for a consul in giving evidence likewise applied to any other witness. The additional sentence proposed by the Japanese delegation was sound. With regard to the changes proposed in paragraph 2, he said that the purpose of the Austrian (L.50) and Nigerian (L.118) amendments was very close to that of his own delegation's amendment (L.135), which was to avoid creating difficulties for consular officials. He was willing to withdraw his amendment and to agree to the idea that the drafting committee should draw up a final text along the lines indicated by those three delegations. He would, however, like the words " wherever possible and permissible " to stand.

7. Mr. DAS GUPTA (India) said that in the Indian amendment (L.159) the words " Members of the consulate " at the beginning of paragraph 1 corresponded to a more general idea than the words " consular official " at the end of the same paragraph. In general, the members of the consulate should not decline to give evidence. Article 41 provided for the personal inviolability of consular officials and, in any event, the fact of refusing to give evidence would hardly constitute a serious offence. The Indian amendment therefore merely reaffirmed an accepted principle. The Nigerian amendment (L.118) was very much to the same effect.

8. Mrs. VILLGRATTNER (Austria) said that her delegation would maintain its amendment (L.50) even if article 44 was amended in other respects, since consular officials should be free to decide whether to give evidence or not. They could be trusted to show their goodwill in facilitating the administration of justice in the receiving State.

9. Mr. AMLIE (Norway) said that he would vote against the proposal for the deletion of the second sentence of paragraph 1, despite the forceful arguments advanced in support of the proposal. The receiving State would lose nothing if the sentence were retained, whereas its deletion might be prejudicial to the consul.

10. Mr. HEUMAN (France), speaking on a point of order, said that the Chairman's decision to allow the sponsors of amendments to take the floor a second time in order to answer criticisms meant in effect that the case for the amendments was pleaded a second time. That was quite contrary to the spirit of the Chairman's decision.

11. The CHAIRMAN put to the vote article 44, together with the relevant amendments.

The amendments to paragraph 1 submitted by the United States (A/CONF.25/C.2/L.6), Finland (A/CONF.25/C.2/L.41) and Japan (A/CONF.25/C.2/L.81) were rejected by 30 votes to 27, with 2 abstentions.

The amendment to paragraph 1 submitted by India (A/CONF.25/C.2/L.159) was adopted by 27 votes to 12, with 27 abstentions.

The amendment to paragraph 1 submitted by the Federal Republic of Germany (A/CONF.25/C.2/L.166) was rejected by 20 votes to 7, with 40 abstentions.

Paragraph 1, as amended, was adopted by 52 votes to 6, with 9 abstentions.

The Nigerian amendment to paragraph 2 (A/CONF.25/C.2/L.118) was rejected by 36 votes to 10, with 21 abstentions.

The Austrian amendment to paragraph 2 (A/CONF.25/C.2/L.50) was adopted by 52 votes to 2, with 14 abstentions.

Paragraph 2, as amended, was approved by 63 votes to none, with 6 abstentions.

12. Mr. HEUMAN (France) asked that, when voting on the Japanese amendment to paragraph 3 (L.81), the Committee should first vote on the first phrase, " They are also entitled to decline to give evidence as an expert witness ", and then on the second phrase, " with regard to the laws of the sending State ".

13. Mr. DEJANY (Saudi Arabia) supported by Mr. DAS GUPTA (India) said that the sentence in question should be read as a whole; it would lose its sense if the second part were deleted.

14. Mr. SPYRIDAKIS (Greece) supported the French delegation's request.

15. Mr. MARESCA (Italy) said that many bilateral conventions mentioned " experts " without specifying their qualifications. Moreover, one of the consul's functions was to inform the receiving State about the laws of the sending State. Accordingly, it would be better to vote separately on the two phrases, and he supported the French delegation's request.

16. Mr. LAHAM (Syria) said that when debating the Japanese amendment, the Committee had treated it as an indivisible whole.

17. The CHAIRMAN put to the vote the French delegation's request for separate votes on the two phrases.

The request was rejected by 40 votes to 9, with 18 abstentions.

The Japanese amendment to paragraph 3 (A/CONF.52/C.2/L.81) was adopted by 40 votes to 3, with 22 abstentions.

Paragraph 3, as amended, was adopted by 59 votes to 2, with 8 abstentions.

Article 44, as a whole, as amended, was adopted by 54 votes to 2, with 12 abstentions.

18. Mr. McCUSKER (United States of America) said that he had voted against paragraph 1 and against article 44 as a whole. He had abstained in the other votes because he held that an accused person should have the right to call witnesses, who should not be able to avoid testifying by pleading their status as consular officials.

19. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said he had voted for article 44, as amended.

20. Mr. HART (United Kingdom) said that he had voted against article 44 because of the provision in paragraph 1 that a consular official must not be compelled to give evidence even in cases where, in accordance with paragraph 1, he was under a legal obligation to do so.

Article 45 (Waiver of immunities)

21. The CHAIRMAN invited the Committee to consider article 45, to which amendments had been submitted by Japan (A/CONF.25/C.2/L.82), Australia (A/CONF.25/C.2/L.152) and Tunisia (A/CONF.25/C.2/L.169).

22. Mr. MOLITOR (Luxembourg) said that article 45, paragraph 1, should refer specifically to the immunities provided for in paragraph 1 of article 43, as adopted by the Committee.

23. Mr. WOODBERRY (Australia) said that his delegation's amendment to paragraph 2 might be referred to the drafting committee as guidance in the preparation of the definitive text.

24. Mr. KANEMATSU (Japan), introducing his delegation's amendment to paragraph 2 (L.82), said that article 45, paragraph 2, as drafted by the International Law Commission was similar to article 32 of the 1961 Convention. Yet, in the case of consular relations, that provision seemed inadequate, inasmuch as the waiver of immunities concerned not only local authorities but also the sending and the receiving States. His amendment would have the effect that the States would be informed of a waiver of immunities.

25. Mr. JESTAEDT (Federal Republic of Germany) said that the Australian delegation's amendment, which the sponsor had suggested should be referred to the drafting committee, was not an amendment of form, but one of substance. Accordingly, under rule 32 of the rules of procedure, he wished to restore that amendment, which raised a question of substance that should be dealt with in paragraph 2 of the article.

26. Mr. NALL (Israel) asked how the sentence proposed by the Japanese delegation would operate if a country had only a consul and no diplomatic mission in the receiving State.

27. Mr. KANEMATSU (Japan) said that that was an exceptional case. In such circumstances, the waiver might be communicated through the diplomatic mission in another country.

28. Mr. MARESCA (Italy) thanked the representative of the Federal Republic of Germany for restoring the Australian amendment. Paragraph 2 of article 45 followed precisely the terms of the 1961 Vienna Convention, but two quite different situations were involved. The convention under consideration dealt with consular officials, and the consul should be regarded as representing his State and not as an individual. As it stood, paragraph 2 was unacceptable for it would permit the receiving State to interfere in the affairs of the sending State. The Australian amendment therefore raised an essential question of substance which should be discussed.

29. Mr. SPYRIDAKIS (Greece) said that paragraph 2 seemed acceptable to him. If, however, the Japanese representative were willing slightly to modify his amendment, he would suggest leaving the International Law Commission's text and adding the words of the Japanese amendment starting with the words " and shall be communicated ".

30. Mr. KANEMATSU (Japan) accepted that suggestion.

31. Mr. DAS GUPTA (India) thought that the Australian amendment raised a drafting point and should be referred to the drafting committee. He asked for a separate vote on the two phrases of the Japanese amendment.

32. Baron van BOETZELAER (Netherlands) said that the International Law Commission's text accorded a broad immunity to the members of consulates and that the trend of the discussion seemed to be in favour of restricting the immunity in some respects. The Japanese amendment could only complicate the situation, and he would therefore vote against it.

33. Mr. HART (United Kingdom) agreed with the Netherlands representative's remarks concerning the Japanese amendment and added that the impression should not be given that the waiver of immunities was an exceptional matter.

34. Mr. LEVI (Yugoslavia) doubted whether it was still useful to specify that the waiver should be communicated " in writing ", since the sub-amendment proposed by the Greek representative was acceptable to the Japanese delegation.

35. Mr. CHIN (Korea) said that he could not support the Japanese amendment.

36. Mr. NALL (Israel) suggested that the two phrases proposed by Greece and by Japan could be linked by some such formula as " and when possible ".

37. Mr. KANEMATSU (Japan) accepted that suggestion.

38. Mr. MARESCA (Italy) thought that the proposal by the representative of Israel had more drawbacks than advantages. The expression added would weaken the rule and introduce an element of doubt.

39. Mr. SPYRIDAKIS (Greece) proposed that the International Law Commission's opening phrase of paragraph 2 should be retained with the addition of the words " and shall be communicated in writing to the receiving State ".

40. Mr. LEVI (Yugoslavia) said that he did not see how it was possible to vote on paragraph 2 before voting on the Australian amendment.

41. The CHAIRMAN put to the vote paragraph 1 of article 45 as drafted by the International Law Commission.

Paragraph 1 was approved by 63 votes to none, with 1 abstention.

42. The CHAIRMAN put to the vote the proposal in the Japanese amendment (A/CONF.25/C.2/L.82) for the addition to paragraph 2 of the passage " shall be communicated to the receiving State in writing ".

The passage was approved by 31 votes to 22, with 11 abstentions.

43. The CHAIRMAN put to the vote the proposal in the Japanese amendment for the addition to paragraph 2 of the phrase " through the diplomatic channel ".

The proposal was rejected by 32 votes to 13, with 19 abstentions.

44. Mr. LEVI (Yugoslavia) suggested the postponement of further voting and the adjournment of the meeting.

It was so agreed.

The meeting rose at 6.5 p.m.

TWENTY-EIGHTH MEETING

Monday, 25 March 1963, at 10.40 a.m.

Chairman: Mr. GIBSON BARBOZA (Brazil)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (*continued*)

Article 45 (Waiver of immunities) (*continued*)

1. The CHAIRMAN recalled that, at its previous meeting, the Committee had adopted article 45, paragraph 1, and the first part of the Japanese amendment (L.82) to paragraph 2. The Australian amendment (L.152) to paragraph 2, after being withdrawn, had been resubmitted by the Federal Republic of Germany.

2. Mr. JESTAEDT (Federal Republic of Germany) said that he had resubmitted the Australian amendment (L.152) because he doubted whether a consul who initiated proceedings in the receiving State must first expressly waive his immunity. The amendment had the advantage of showing that the waiver was provided for by implication in paragraph 3 of the article.

3. Mr. LEVI (Yugoslavia) said that he accepted the amendment, though he regretted that it appeared to refer to the second part of paragraph 3, not to the first.

The Australian amendment (A/CONF.25/C.2/L.152), re-introduced by the Federal Republic of Germany, was adopted by 27 votes to 11, with 21 abstentions.

Paragraph 2, as amended, was adopted by 45 votes to none, with 13 abstentions.

Paragraph 3 was adopted unanimously.

4. Mr. BOUZIRI (Tunisia) introduced his delegation's amendment (L.169) to paragraph 4. He reminded the Committee of the importance attached to the inviolability granted to consular officials, which had been shown by the discussions on articles 41 and 43. But article 45, paragraph 4, seemed to him indirectly to introduce a further immunity relating to measures of execution of a judgement. That paragraph would be an attack on the sovereignty of the receiving State and on the dignity of its judges. The Tunisian delegation had not wished to ask for its complete deletion, but had sought by its amendment to change the spirit of the paragraph and restrict its unfortunate effects.

5. Mr. NASCIMENTO e SILVA (Brazil) regretted that he could not share the Tunisian representative's views on article 45. The proposed amendment might give the impression that a consul misused the privileges and immunities he enjoyed. He pointed out that, under article 43, a consul did not enjoy immunity from jurisdiction in respect of acts of a private nature, but only in respect of acts performed in the exercise of consular functions. The same applied to the provisions of article 41, to which the Tunisian representative had already objected. Therefore, article 45 dealt, not with inviolability, but with consular immunities with respect to his official acts, in other words with the problem of state immunities. How could the sending State facilitate the execution of a final judgement ? That was a matter for the local authorities. Did it mean that the consul would not even be able to defend himself in connexion with acts of a private nature before the judicial authorities ? If that were so, he would be in a position of inferiority as compared with other nationals of the sending State. The Brazilian delegation would therefore vote against the Tunisian amendment.

6. Mr. JESTAEDT (Federal Republic of Germany) said he wished to add the further comment that article 45 should be taken in its context. The only case to be considered was where the consul initiated proceedings in the exercise of his consular functions and probably on the instructions of the sending State; the judgement would then directly or indirectly affect the sending State itself. Logically, the question of measures of execution thus also concerned the sending State and that was where the question of immunities arose. Consequently, the Tunisian amendment did not seem to be acceptable.

7. Mr. HARASZTI (Hungary) said that he too was unable to endorse the opinion expressed by the Tunisian representative. The provision in paragraph 4 did not violate the authority of States; it stated a generally accepted rule of international law.

8. Mrs. VILLGRATTNER (Austria) suggested that the special rapporteur of the International Law Commission should explain whether the waiver of immunity related only to civil and administrative proceedings or whether it also related to criminal proceedings.