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Summary record of the 476th meeting

Topic:
Other topics

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78. Mr. SANDSTRÖM, Special Rapporteur, accepted all four suggestions.

The commentary on article 21, as amended, was adopted unanimously.

ARTICLE 22

Article 22 was adopted unanimously.

COMMENTARY ON ARTICLE 22

79. Mr. GARCÍA AMADOR observed that the opening words of the second sentence in paragraph (1) of the commentary might convey the impression that the 1957 commentary had been drafted independently of the Commission. He suggested that the words should be amended to read: "As the Commission pointed out at its ninth session".

80. Mr. LIANG, Secretary to the Commission, said that the words "One Government points out" at the beginning of paragraph (2) would leave the reader guessing what Government was meant. If reference to the particular observation was necessary, he would suggest either that the Government should be specified or that a reference to the document containing its observations should be inserted.

81. Mr. YOKOTA observed that the first two sentences of paragraph (2) might well be omitted.

82. Mr. SANDSTRÖM, Special Rapporteur, agreed that the first two sentences of paragraph (2) might be deleted. Paragraph (1) might also be deleted.

83. Mr. ZOUREK supported Mr. García Amador's suggestion as being preferable to the deletion of paragraph (1). Paragraph (2) could begin with the words "It was suggested that".

84. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of Mr. García Amador and Mr. Zourek.

The commentary on article 22, as amended, was adopted unanimously.

ARTICLE 23 AND COMMENTARY

Article 23 and commentary were adopted unanimously.

ARTICLE 24

Article 24 was adopted by 14 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 24

The commentary on article 24 was adopted unanimously.

The meeting rose at 1 p.m.

476th MEETING

Wednesday, 2 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/Add.2) (continued)

II. TEXT OF THE DRAFT (continued)

ARTICLE 25

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, suggested that the words "liable to arrest or detention, whether administrative or judicial" in paragraph 5 of the article should be replaced by "liable to any form of arrest or detention", a form of words agreed upon by the Drafting Committee in connexion with article 27.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendment.

Article 25, as amended, was adopted unanimously.

COMMENTARY ON ARTICLE 25

3. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to amend paragraph (3) of the commentary in certain respects. The words "One Government pointed out that" at the beginning of the first sentence should be replaced by the word "Formerly"; the words "this represents the practice obtaining in earlier times" at the beginning of the second sentence should be deleted, and the two sentences should be merged.

4. Mr. TUNKIN thought that the first statement in the third sentence of paragraph (3) was too categorical; the practice there described was not invariable.

5. Referring to the fourth sentence in paragraph (4), he pointed out that not all the incoming correspondence of the mission was "official"; only that emanating from official government organs could be so described.

6. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. Tunkin on his first point and suggested that the word "always" be inserted between the words "no longer" and "pass" in the third sentence of paragraph (3).

7. With reference to Mr. Tunkin's second point he said that, even if the fourth sentence of paragraph (4) was redrafted, the difficulty of deciding what was official correspondence would still remain; and as the sentence now stood, incoming correspondence must be official, to. He would not, however, object to the deletion of the sentence.

8. Mr. YOKOTA said that, in keeping with the Commission's decision not to refer to observations of

particular Governments, the last sentence in paragraph (4) should be omitted.

9. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's suggestion with respect to the third sentence of paragraph (3).

10. So far as the fourth sentence in paragraph (4) was concerned, he said that Mr. Alfaro, who had proposed the text of article 25, paragraph 2 (458th meeting, para. 32), had seemed to envisage a rather broad definition of official correspondence. He (the Special Rapporteur) had accordingly included the sentence in the commentary in order to give the Commission an opportunity to express its opinion on the matter. He agreed to delete the fourth and last sentences in paragraph (4).

The commentary on article 25, as amended, was adopted by 10 votes to none, with 1 abstention.

ARTICLE 26

Article 26 was adopted unanimously.

COMMENTARY ON ARTICLE 26

11. Mr. ZOUREK pointed out that, as worded, the commentary might convey the impression that, in the absence of any convention on diplomatic immunities, the receiving State was entitled to tax the fees charged by a foreign mission in the course of its official duties. He suggested that the commentary should be replaced by the following: "This article states a rule which is universally accepted."

12. Mr. LIANG, Secretary of the Commission, supported Mr. Zourek's suggestion. In a number of cases, the commentaries seemed to imply that the object of certain articles was to prevent States from performing certain acts. He thought it undesirable to present articles in that light. Their object was to enunciate rules of law and not to forestall certain acts on the part of States.

13. Mr. SANDSTRÖM, Special Rapporteur, agreed with both speakers and accepted Mr. Zourek's amendment.

Mr. Zourek's suggested text of the commentary on article 26 was adopted unanimously.

SUBSECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

14. The CHAIRMAN observed that the term "persons" in the introduction to subsection C should be replaced by a more specific expression.

It was so decided.

ARTICLE 27

Article 27 was adopted unanimously.

COMMENTARY ON ARTICLE 27

15. Mr. SANDSTRÖM, Special Rapporteur, agreed,

on the proposal of Mr. Tunkin, to delete the word "certain" before "measures" in the fourth sentence of paragraph (1) of the commentary.

16. Replying to an observation by Sir Gerald FITZMAURICE, Rapporteur, he suggested that the last sentence in paragraph (1) of the commentary should be left unchanged, since it had figured in the commentary on the 1957 draft (A/3623, para. 16, article 22).

The commentary on article 27, as amended, was adopted unanimously.

ARTICLE 28

Article 28 was adopted unanimously.

COMMENTARY ON ARTICLE 28

17. Sir Gerald FITZMAURICE, Rapporteur, remarked that the definition of "the private residence of a diplomatic agent" in paragraph (1) of the commentary was too wide; it would even include a club or a friend's house in which the diplomatic agent spent the night.

18. After further discussion, Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. TUNKIN's suggestion that the last part of paragraph (1) should be amended to read "includes even a temporary residence of the diplomatic agent".

19. Mr. TUNKIN remarked that the second sentence in paragraph (2) seemed to imply that a diplomatic agent's correspondence pertaining to a commercial venture in the receiving State was inviolable. He suggested that the sentence should be redrafted or else omitted altogether.

20. Mr. SANDSTRÖM, Special Rapporteur, explained that to allow the authorities of the receiving State to remove a diplomatic agent's correspondence pertaining to a commercial venture would, in effect, abolish the inviolability of his official correspondence, since it might be necessary to scrutinize all his correspondence for the purpose of determining what was official and what was commercial.

21. Mr. ZOUREK said that if the sentence was retained it would have to be clarified and the statement, which occurred in most consular conventions, would have to be added that such commercial correspondence must be kept separate from diplomatic correspondence. Since, however, the Commission considered that as a general rule it was not admissible for diplomats to engage in commerce, it would be better to omit a sentence which referred to purely exceptional circumstances.

22. Mr. SCALLE agreed with the Special Rapporteur.

23. Mr. YOKOTA said that, as the Commission had discussed the matter at some length, he would prefer some references to it to be made in the commentary.

24. The CHAIRMAN suggested that the last two sentences of paragraph (2) and the last two sentences

of paragraph (3) of the commentary should be deleted.

It was so agreed.

The commentary on article 28, as amended, was adopted unanimously.

ARTICLE 29

Article 29 was adopted unanimously.

COMMENTARY ON ARTICLE 29

25. Mr. TUNKIN suggested that the words "which is an intrinsic part of the national territory" in the second sentence of paragraph (5) should be omitted, for the statement was controversial.

26. Mr. ZOUREK considered the second sentence in paragraph (7) of the commentary too restrictive. He had understood that article 29, paragraph 1(c), covered even isolated commercial transactions. He suggested that the sentence should be omitted.

27. Sir Gerald FITZMAURICE, Rapporteur, doubted the advisability of Mr. Zourek's suggestion. Paragraph 1(c) of the article applied to cases where a diplomatic agent conducted a regular course of business "on the side". Such isolated transactions as, for instance, buying or selling a picture, were precisely typical of the transactions not subject to the civil jurisdiction of the receiving State. Annoying as it might be for the other parties to such transactions in the event of a dispute, it was essential not to except such transactions from the general rule for, once any breach was made in the principle, the door would be open to a gradual whittling away of the diplomatic agent's immunities from jurisdiction.

28. The CHAIRMAN pointed out that the article referred to "commercial activity". A single transaction would hardly constitute "commercial activity". Of course, even a single plunge in the waters of trade might suffice, but it must be in the waters of trade.

29. Mr. ZOUREK observed that it was the use of the words "professional" and "commercial" in the second sentence of paragraph (7) of the commentary that had caused him to raise his objection. The sale or purchase of articles by a diplomatic agent for his own or for his family's account, no matter how large the sum involved, did not constitute a commercial transaction within the meaning of most civil codes. A purchase was a commercial transaction only if made with a view to resale for purposes of gain. On the other hand, he did not think it necessary for a diplomatic agent to engage in continuous commercial activity in order to come under the provisions of paragraph 1(c) of the article. If the agent engaged in a single large-scale commercial transaction which ended in disaster, he should not be immune from civil jurisdiction as far as it was concerned.

30. Sir Gerald FITZMAURICE suggested that the words "an isolated commercial transaction" should be replaced by "isolated transactions of a private character".

31. Mr. SCELLE agreed with Mr. Zourek's suggestion. According to French civil law, the expression "*actes de commerce*" meant habitual transactions carried on for purposes of gain.

32. The CHAIRMAN proposed that the Commission should adopt Mr. Zourek's suggestion to delete the sentence which, as he and Mr. Scelle had shown, was unnecessary, since an isolated transaction like the one contemplated in the discussion could by no stretch of the imagination be described as a commercial transaction.

33. Sir Gerald FITZMAURICE, Rapporteur, agreed, though pointing out that Mr. Scelle had, in effect, said exactly the opposite of Mr. Zourek. According to the latter, an isolated transaction could by a very little stretch of the imagination be presented as constituting commercial activity.

34. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Zourek's suggestion and the suggestion previously made by Mr. Tunkin (para. 25 above).

35. Mr. TUNKIN observed that paragraph (9) was somewhat confusing. It stated first that there was no obligation on a diplomatic agent to testify and later gave the impression that local courts might summon him to do so. He did not think local courts were entitled to take such action; at most, they could invite him, through the mission, to give testimony *ex gratia*.

36. Mr. LIANG, Secretary to the Commission, agreed with Mr. Tunkin. He knew of no article in any code of civil procedure under which a diplomatic agent could be required to give evidence. He suggested that the last sentence in paragraph (9) of the commentary should be deleted.

37. He also wondered whether the phrase "elucidating a crime" in the third sentence of the paragraph could be improved.

38. Sir Gerald FITZMAURICE, Rapporteur, agreed that the last sentence in paragraph (9) should be deleted and suggested that the penultimate sentence be amended to read "In certain countries there are special rules concerning the manner in which a diplomatic agent's testimony is to be taken when he consents to testify." He also suggested that the phrase "in elucidating a crime" should be replaced by "in the investigation of a crime".

39. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of the Secretary and Sir Gerald Fitzmaurice.

40. Sir Gerald FITZMAURICE, Rapporteur, referring to paragraph (10) of the commentary, proposed that in the third sentence the words "whether one can speak of 'evidence'" should be replaced by the words "whether the question of the obligation to give evidence is relevant", and that the second part of the same sentence, beginning with the word "furthermore" should be deleted.

41. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments to paragraph (10).

42. Mr. FRANÇOIS suggested that in the last sentence of paragraph (12) of the commentary it would be better to say "A partial solution" instead of "Another possible solution", since the procedure in question, though generally practised, did not represent a complete solution.

43. Mr. SANDSTRÖM, Special Rapporteur, said he would be prepared to agree to the deletion of the last sentence.

The commentary on article 29, as amended, was adopted unanimously.

ARTICLE 30

Article 30 was adopted unanimously.

COMMENTARY ON ARTICLE 30

44. Mr. AGO suggested that the word "alone" should be added at the end of the second sentence of paragraph (1) of the commentary, for otherwise the sentence would be pointless.

45. Mr. SANDSTRÖM, Special Rapporteur, agreed.

46. Mr. LIANG, Secretary to the Commission, suggested that the beginning of the third sentence of paragraph (1) should be amended to read: "It is for the benefit of the sending State that the immunity . . ."

47. Sir Gerald FITZMAURICE, Rapporteur, suggested that the passage in question should be amended to read: "The waiver of immunity must be on the part of the sending State because the object of the immunity is that the diplomatic agent . . ."

48. Mr. SANDSTRÖM, Special Rapporteur, accepted Sir Gerald Fitzmaurice's amendment.

49. Mr. AGO suggested that in the first sentence of paragraph (3) the word "expressed" should be replaced by the word "made", since the waiver could be either express or implied.

50. Mr. SANDSTRÖM, Special Rapporteur, suggested that the passage in question might be amended to read: "... there is no longer any doubt but that paragraphs 2 and 3 deal only with the form which the waiver should take . . ."

51. Mr. YOKOTA suggested that in the same sentence of paragraph (3) the phrase "in order to be taken into consideration" should be replaced by the phrase "in order to be effective".

52. Mr. SANDSTRÖM, Special Rapporteur, agreed to that change.

The commentary on article 30, as amended, was adopted unanimously.

ADDITIONAL ARTICLE ON EXEMPTION FROM SOCIAL SECURITY LEGISLATION

53. The CHAIRMAN said that the commentary on the

new article would be examined later, since it was not yet available in both English and French.

The article was adopted unanimously.

ARTICLE 31

Article 31 was adopted unanimously.

COMMENTARY ON ARTICLE 31

54. Mr. FRANÇOIS doubted whether paragraph (1) of the commentary was really necessary. It asked the question whether the exemption from taxation was a right or a matter of courtesy, but the last sentence, without answering that question, stated that the exemption was a "fact".

55. Mr. SANDSTRÖM, Special Rapporteur, said that the words "*comme une règle de droit international*" had been inadvertently omitted from the French text. They should have come before the words "*que l'exemption existe*".

56. Mr. TUNKIN agreed with Mr. François. The paragraph should either be deleted or replaced by paragraph (1) of the commentary on the corresponding article in the 1957 text (A/3623, para. 16, article 26), which was much clearer.

57. Mr. YOKOTA said he also would be in favour of deleting the paragraph. It attempted to relate the grant of diplomatic privileges and immunities to the theory of "functional necessity", but diplomatic privileges and immunities had not been shown to be based exclusively on that theory.

58. Mr. SANDSTRÖM, Special Rapporteur, said he would be prepared to agree to the replacement of paragraph (1) by paragraph (1) of the commentary on the corresponding article in the 1957 text.

Subject to that amendment, the commentary on article 31 was adopted unanimously.

ARTICLE 32

Article 32 was adopted unanimously.

COMMENTARY ON ARTICLE 32

The commentary on article 32 was adopted unanimously.

ARTICLE 33

Article 33 was adopted unanimously.

COMMENTARY ON ARTICLE 33

59. Mr. SANDSTRÖM, Special Rapporteur, said that the second sentence in paragraph (3), and the words "to which attention has been drawn by several Governments" in the third sentence, should be deleted.

60. Mr. LIANG, Secretary to the Commission, said he found it difficult to understand exactly how the second half of paragraph (3) of the commentary was related

to the first half. It was unclear whether the word "legislation" in the second half of the paragraph was used in the normal sense or in a more restricted and technical sense. Many States had regulations governing the matter which were not, strictly speaking, legislation. He also wondered whether the regulations referred to meant regulations relating to the nature of the goods or regulations which would apply only in relations with certain States, for example, those which did not observe reciprocity. The phrase "*Ad hoc* regulation" in the last sentence also needed explanation.

61. Sir Gerald FITZMAURICE, Rapporteur, said he would like to ask the Special Rapporteur not to delete the second sentence of paragraph (3), but to amend it to read: "Such restrictions or conditions cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question."

62. Unlike Mr. Liang, he had no difficulty in seeing how the second part of the paragraph was related to the first. The paragraph stated, first, the principle of exemption, then mentioned restrictions and then went on to say that such restrictions were not inconsistent with the obligation to grant exemption. The second part of the paragraph stated that to give effect to those restrictions the receiving State must act in accordance with the regulations established by its legislation, and in conclusion the paragraph affirmed that, in consequence, *ad hoc* regulation in each individual case was not permissible. In other words, the authorities must act in accordance with standing regulations and were not empowered to apply special rules to individual cases.

63. To meet the difficulty in connexion with the phrase "*Ad hoc* regulation", in the last sentence, he suggested that the word "established" in the preceding sentence should be placed between inverted commas.

64. Mr. LIANG, Secretary to the Commission, said he was not entirely convinced by Sir Gerald Fitzmaurice's argument. All the matters mentioned in the first part of the paragraph were covered by regulations but not usually by legislation. Most of the regulations reproduced in the Secretariat's publication *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*¹ were not "laws". Perhaps the Special Rapporteur or the Rapporteur of the Commission could explain whether "legislation" was used in paragraph (3) in a technical sense.

65. Mr. TUNKIN said he agreed with Sir Gerald Fitzmaurice, but still thought the last sentence of paragraph (3) confusing. It would seem to exclude the possibility of a State's granting more liberal treatment than was stipulated by the regulations.

66. The CHAIRMAN suggested that in the last sentence of paragraph (3) the word "regulation" should be qualified by a phrase indicating that only restrictive regulation was meant.

67. Mr. SANDSTRÖM, Special Rapporteur, agreed to that suggestion.

68. Mr. ALFARO suggested that the meaning of the last sentence of paragraph (3) would be better conveyed if the initial phrase was replaced by the words "The disposal of each case by *ad hoc* regulations . . ."

69. The CHAIRMAN pointed out that if there was any ambiguity in the use of the words "regulations" and "legislation", that ambiguity existed in the text of the article itself, which referred to "the regulations established by its legislation".

70. He thought that if the last sentence of paragraph (3) was retained the word "therefore" should be replaced by the word "however".

71. Sir Gerald FITZMAURICE, Rapporteur, said that in English there would be no objection to the use of the word "legislation" in the context of paragraph (3). Legislation could be either ordinary or subordinate, and subordinate legislation included all the regulations which government departments were empowered to issue—for example, the regulations issued by the customs authorities.

72. He had no objection to the replacement of "therefore" by "however" in the last sentence. He would prefer the phrase "*Ad hoc* regulation in each case" to the phrase suggested by Mr. Alfaro.

The commentary on article 33, as amended, was adopted unanimously.

ARTICLE 34

Article 34 was adopted by 9 votes to 1.

COMMENTARY ON ARTICLE 34

73. Mr. ZOUREK said that he had voted against article 34 because in the drafting process its scope had become much wider than he thought desirable. The commentary reinforced his doubts about the article, for it dealt not only with the question of the nationality of children born to members of a mission but also with the question of marriage. Marriage was a voluntary act, and if the daughter of a diplomatic agent married a national of the receiving State there was no reason why such a case should not come under the legislation of the receiving State regarding nationality. Since the question of nationality on marriage was regulated by a special convention, the article should have stated simply that children, both of whose parents were nationals of the sending State and members of its diplomatic mission, did not automatically acquire the nationality of the receiving State by reason of having been born on its territory.

74. Another criticism of the commentary concerned the words "the only" used in the third sentence. They appeared to him to be inexact, as the condition referred to was not the only one governing the acquisition of nationality.

75. Mr. FRANÇOIS said that he had accepted article 34, but he could not accept the last two sentences

¹ United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3).

of the commentary, which appeared to him to be unnecessarily vague. It was not clear what "woman" was intended to be referred to in the penultimate sentence of the commentary. What, for example, was the position of the daughter of a diplomatic agent who married the national of a receiving State? Upon that marriage she ceased to be a member of the diplomatic agent's household, and therefore, presumably, she could acquire the nationality of the receiving State. Some clarification of the commentary was needed.

76. He criticized the words "solely by the operation of the law of the receiving State" in the text of article 34 itself. Marriage was the voluntary act of an individual and hence it could not be said that the consequences of marriage on nationality were produced "solely by the operation of the law of the receiving State". Some additional explanation was required in the commentary.

77. Sir Gerald FITZMAURICE, Rapporteur, said that the penultimate sentence of the commentary should make it quite clear that the woman referred to was a member of the mission who continued as such after marriage. Clearly it did not cover the case of a member of a diplomatic agent's household, for she ceased to be a member of the household when she married. Because of the possibility of such a case, he disagreed with Mr. Zourek, for the article could not be confined to the case of the birth of children, but must deal with the case of marriage as well.

78. The words in article 34 quoted by Mr. François were to a certain extent ambiguous, but it was the better view that, while the marriage itself was a voluntary act, the acquisition of nationality in consequence thereof was the direct effect of the operation of the law. The commentary should, however, be expanded to make the point clearer.

79. To meet Mr. Zourek's criticism of the third sentence, he proposed that the words "the only condition governing the acquisition of its nationality" be replaced by "an element conferring its nationality".

80. In the second sentence it would be preferable to substitute the word "parent" for "father".

81. Mr. TUNKIN suggested that the words "if the legislation of the receiving State provides for such an option" should be added to the sentence beginning "Such a child . . ."

82. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested.

The commentary on article 34, as amended, was adopted by 12 votes to 1.

ARTICLE 35

83. Mr. TUNKIN asked for a separate vote on article 35, paragraph 1. While he accepted the provisions of the other two paragraphs, he considered it inadvisable to put the administrative and technical staff of the mission on the same footing as the diplomatic staff, as did paragraph 1.

Paragraph 1 was adopted by 11 votes to none, with 3 abstentions.

Paragraphs 2 and 3 were adopted unanimously.

Article 35 as a whole was adopted by 11 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 35

84. Mr. AGO suggested that the words "is a step towards the progressive development of international law" in paragraph (5) of the commentary on article 35 were couched in rather too ambitious language. He suggested that they be replaced by the words "represents progress in international law".

85. Mr. ZOUREK suggested that the word "large" in the penultimate sentence of paragraph (7) should be deleted.

86. Mr. FRANÇOIS said that it was perhaps a trifle extravagant to say, as did paragraph (8) of the commentary, that an ambassador's secretary or an archivist might know more State secrets than the diplomatic staff. He proposed that the words "some members of" be inserted before the words "the diplomatic staff" in that paragraph.

87. Mr. AGO observed that, whereas the second sentence of paragraph (11) stated that the Commission did not feel it desirable to lay down a criterion for determining who should be regarded as a member of the family, the very next sentence, read in conjunction with the first, in fact did lay down such a criterion.

88. Mr. SANDSTRÖM, Special Rapporteur, suggested that that criticism would be met if the words "go farther and" were inserted before "lay down a criterion" in the second sentence; the passage at the end of that sentence would be replaced by the words "nor did it desire to fix an age limit for children".

89. Mr. LIANG, Secretary to the Commission, suggested the insertion of the words "if they live in the same household" at the end of the penultimate sentence of paragraph (11).

90. Mr. YOKOTA thought that the words "and special circumstances" in the last sentence of paragraph (11) should be deleted, or, if retained, should be illustrated by examples. As it stood, the passage could only give rise to confusion.

91. Sir Gerald FITZMAURICE, Rapporteur, said that special circumstances existed, where, for example, a relative kept house for an ambassador. There might not be particularly close ties in such a case, but certainly there were special circumstances, which called for special exemptions. He agreed that examples might be given.

92. Mr. AGO suggested that the word "or" be used instead of "and" between "close ties" and "special circumstances".

93. Mr. YOKOTA pointed out that article 35, paragraph 3, exempted private servants from dues and

taxes on their emoluments. Paragraph (12) of the commentary was misleading, in that it implied that they did not enjoy those immunities as of right.

94. Mr. SANDSTRÖM, Special Rapporteur, said that that objection could be met if the words "However, it thought that except in the case of nationals of the receiving State, these persons should enjoy" were omitted from the second sentence and the first sentence were joined to the rest of the second sentence by the words "except for".

95. In response to an observation of Mr. AGO, Sir Gerald FITZMAURICE, Rapporteur, suggested that in the last sentence of paragraph (13) the words "just as absence from the list did not constitute conclusive proof that the person concerned was not so entitled" should be added.

96. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendments suggested. He added that the reference to the 1957 draft in paragraph (1) could be dispensed with.

The commentary on article 35, as amended, was adopted by 12 votes to none, with 2 abstentions.

ARTICLE 36

Article 36 was adopted unanimously.

COMMENTARY ON ARTICLE 36

97. Mr. TUNKIN suggested that the words "at the time when it agrees to his appointment" be deleted from paragraph (4) of the commentary to article 36, for the *agrément* of the receiving State might be obtained later.

98. Sir Gerald FITZMAURICE, Rapporteur, said that article 36 did not specify any time limit, but it would be undesirable that the receiving State could grant privileges and immunities or take them away at any time. In other words, it should not be able, on the appointment of a diplomatic agent who was one of its nationals, to grant him certain privileges and immunities, only to curtail them or take them away a year or two later. He would not oppose Mr. Tunkin's proposal, but he thought that the position should be made quite clear.

99. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Tunkin's amendment.

100. Mr. AGO pointed out that neither article 36 nor the commentary appeared to safeguard the inviolability of a diplomatic agent who was a national of the receiving State.

101. Mr. TUNKIN said that the Drafting Committee had altered article 36 at Mr. Ago's suggestion.

102. Mr. BARTOS said that he opposed the appointment of nationals of the receiving State as foreign diplomatic agents, but if they were appointed as such they should be given all the privileges and immunities

necessary for the performance of their functions. Accordingly, they should be granted inviolability.

The meeting rose at 1.10 p.m.

477th MEETING

Thursday, 3 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.79/Add.2) (continued)

II. TEXT OF THE DRAFT (continued)

COMMENTARY ON ARTICLE 36 (continued)

1. Mr. AGO proposed that the words "inviolability and" should be inserted before the words "immunity from jurisdiction" both in article 36, paragraph 1, and in paragraph (3) of the commentary.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's proposal.

Mr. Ago's proposal was adopted unanimously.

The commentary on article 36, as amended, was adopted unanimously.

ARTICLE 37

Article 37 was adopted unanimously.

COMMENTARY ON ARTICLE 37

3. Mr. SANDSTRÖM, Special Rapporteur, said that the words "one Government raised the question" in paragraph (2) of the commentary and the words "In response to an observation received from one Government" in paragraph (3) should be omitted. The beginning of paragraph (2) would be redrafted.

4. Mr. TUNKIN pointed out that the Government referred to in paragraph (2), the Belgian Government, in its comments on article 31, paragraph 2, of the 1957 draft (see ACN.4/114), had suggested that exemption from import duties should cease on the termination of functions, whereas paragraph (2) of the commentary spoke of customs duties. The Commission had defined customs duties in paragraph (5) of the commentary on article 33 as covering both import and export duties: consequently an amendment was required.

5. Mr. YOKOTA expressed the view that paragraph (3) of the commentary should be deleted, on the ground that it merely repeated the text of article 37, paragraph 3.