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Summary record of the 510th meeting

Topic:
Consular intercourse and immunities

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510th MEETING

Monday, 8 June 1959, at 3.5 p.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

1. The CHAIRMAN announced that, as agreed at an earlier meeting (see 505th meeting, para. 3), one meeting during the week would be devoted to the question of State responsibility.

ARTICLE 9

2. Mr. ZOUREK, Special Rapporteur, introducing article 9 (*Provisional recognition*), said that the procedure indicated in article 6 for the granting of the exequatur obviously took some time, and often the exercise of consular functions could not be suspended pending the receipt of the exequatur. The resulting problem had often been solved in practice by the method of provisional recognition. He pointed out that the provisional recognition referred to in article 9 had to be granted before the consul could take up his duties. Provisional recognition was mentioned in a number of treaties and also in national legislation, as stated in the commentary. While it had been impossible for him to ascertain whether the practice was general, he took the view that it was a useful expedient and would not be objected to if it was included in the draft. He suggested that, in keeping with the Commission's purpose of contributing to the progressive development of international law, article 9 should be considered for inclusion and then referred to the Drafting Committee for any necessary drafting changes. While it was true that some bilateral conventions provided that in the absence of objection by the State of residence a consul could begin to exercise his functions *ipso jure* before receiving the exequatur, Mr. Zourek considered that that practice was not yet sufficiently widespread to merit inclusion in the draft.

3. Mr. VERDROSS said he had no objection to article 9 but pointed out that its wording, or possibly its retention in the draft, would depend on the wording of article 7.

4. The CHAIRMAN observed that during the discussion of article 7 it had been agreed (see 509th meeting, paras. 12 and 20) that the final sentence would be amended to read "Such assent is normally given in the form of an exequatur". That amendment might call for a slight change in article 9.

5. Mr. ERIM drew attention to the connexion between article 9 and the definition of the term "exequatur" proposed by the Special Rapporteur in a new draft article on definitions. There the term "exequatur" was defined as "the authorization granted by the State of residence to a foreign consul to exercise consular functions on the territory of the State of residence, whatever the form of such authorization". It seemed to him that the "provisional recognition" described in article 9 would be covered by that broad definition of the term "exequatur".

6. Mr. ZOUREK, Special Rapporteur, pointed out that the term "exequatur" referred to final recognition, whereas article 9 referred to provisional recognition pending final recognition. A broad definition of the term "exequatur" was necessary owing to the fact that final recognition might take different forms, including also, *inter alia*, a simple communication through the diplomatic channel.

7. Mr. BARTOŠ said that article 9 was in accord with practice. He recalled the case of a Yugoslav consul-general at New York who had been given provisional recognition at a time when certain political questions had still been pending between the United States of America and Yugoslavia. Again, a Yugoslav consul-general at Zurich had been granted provisional recognition owing to an administrative delay in the grant of the exequatur.

8. There was one question, however, which he wished to put to the Special Rapporteur: where provisional recognition was granted, did the subsequent exequatur constitute the only recognition of the consul's commission or simply ratification of the earlier provisional recognition? The answer to the question would have a bearing on a consul's position so far as precedence was concerned. It would be for the Special Rapporteur to decide whether the matter should be dealt with in the text of the article or in the commentary.

9. Mr. YOKOTA said that he had no objection to article 9 but had some doubts concerning the use of the word "recognition". It might refer to the recognition of the consul's legal status, or again simply to authorization to carry out consular functions. If it referred to legal status, it might give rise to problems relating to precedence and the extent of privileges and immunities. It semed to him from the context of article 9 that the word "recognition" was limited in its scope to authorization to perform consular functions, and it might be better to amend the text accordingly.

10. Mr. EDMONDS said that in the light of the definition of the term "exequatur" suggested by the Special Rapporteur, article 9 was acceptable to him. However, he thought that the question of rank should also be dealt with in article 9. As he understood it, a consular officer granted provisional recognition was entitled for a reasonable period to the privileges and immunities of consular officers who had received the exequatur. That seemed to him a rather vague position and he felt that the Commission would make a useful contribution if it inserted a provision to the effect that a consular officer granted provisional recognition was entitled to all the rights and privileges of his office until the sending State was notified that provisional recognition had been withdrawn. Such a provision would cover both the right to exercise consular functions and the right to enjoy the privileges and immunities of consular officers.

11. Mr. TUNKIN agreed that the draft should contain an article on provisional recognition, which existed in practice. Provisional recognition became necessary when there was undue delay between the presentation of a consul's commission and the granting of the exequatur. He recalled the case of a Soviet consul-general in the Union of South Africa who had presented his commission in June and had not received his exequatur until November, owing to a procedural delay.

12. He agreed with Mr. Bartoš, Mr. Yokota and Mr. Edmonds that the question of the status of a consul who was provisionally recognized should be dealt with in article 9. He noted that article 9 referred to "recognition" while the definition of the term "exequatur" suggested by the Special Rapporteur spoke of "authorization". In his view the word should be "recognition" in both places. A provisionally recognized consul should, in general, have the same status as that of a consul who had received the exequatur and no difference in their status should be implied by a difference in terminology.

13. Lastly, he suggested that the Drafting Committee should examine articles 7 and 9 in conjunction with the suggested definition of the term "exequatur" with a view to bringing out more clearly the distinction between provisional and final recognition alluded to by the Special Rapporteur.

14. Mr. SANDSTRÖM said it was right that the draft should contain an article on provisional recognition. Any possible misunderstanding about its relationship to article 7 or to the proposed definition of "exequatur" could be easily obviated by stating clearly in the definition that the exequatur was the definitive authorization by the State of residence. Thus provisional recognition would not be confused with the exequatur.

15. Mr. MATINE-DAFTARY said that an article on provisional recognition was indispensable because there might be purely technical reasons, such as the temporary absence of the head of State, for a delay in the grant of the exequatur. He suggested that the words "if necessary" should be inserted after the word "may". Commenting on the relationship between provisional recognition and the exequatur, he said that an exequatur granted after earlier provisional recognition would have retroactive effect. He considered that the term "recognition" should be retained in preference to "authorization", in view of the wording of article 4.

16. Mr. PAL said that an article on provisional recognition should be included in the draft. Many of the points raised in the discussion were drafting points which could be easily settled, particularly after a decision had been reached on the text of article 3, paragraph 2.

17. Mr. PADILLA NERVO said that, before provisional recognition could be granted, all the requisite steps for obtaining an exequatur must have been taken, and it was generally held that the State of residence could not unreasonably delay the granting of an exequatur. The practice of Mexico, as reflected in article II of the Consular Convention between Mexico and Panama, signed at Mexico on 9 June 1928,[1] was that a consular officer who had received provisional recognition enjoyed the same privileges and immunities as those accorded to one who had been granted the exequatur. An express provision to that effect was certainly necessary in the draft.

18. The question whether it would be preferable to refer to "recognition" rather than to "authorization" could be left to the Drafting Committee.

19. Mr. ERIM, referring to the words "at the request of the State which appointed him", asked why the onus of requesting provisional recognition should be placed on the sending State; that State had already fulfilled its obligation in applying for an exequatur.

20. Mr. ZOUREK, Special Rapporteur, replying to the observations made, said that there seemed to be general agreement on the need for an article concerning provisional recognition, and he joined with other members in thinking that the provision should be amplified to cover the legal status of consular officials who had received provisional recognition. He had originally contemplated dealing with that point in the commentary, but had now come to the conclusion that it should be expressed in the text itself.

21. He could accept Mr. Matine-Daftary's suggestion (see para. 15 above) that the words "if necessary" should be inserted after the word "may". He also agreed that the exequatur would have retroactive effect from the date of provisional recognition.

22. The choice between the terms "authorization" and "recognition" was not purely a drafting matter. He had chosen "recognition" after careful reflection because it conveyed his meaning more explicitly. The substitution of the word "authorization" would have the very undesirable effect of drawing a distinction between consular officers who had received the exequatur and those who had received provisional recognition, which was surely not the Commission's intention. In fact, there should be no difference between them either with regard to the exercise of their functions or the enjoyment of consular privileges and immunities.

23. The task of ensuring consistency between the article on definition and articles 9 and 7 could be left to the Drafting Committee. The interrelationship of the last two could be further clarified in the comment.

24. In reply to Mr. Erim he said that, despite provisions to the contrary in certain conventions, it would be at variance with practice to depart from the rule that the initiative in asking for provisional recognition, either direct or through the person sent as consul, unavoidably lay with the sending State; the exercise of certain consular functions implied some derogation from the sovereignty of the State of residence and its prior consent had to be obtained.

25. If the Commission decided to insert a new paragraph covering the status of officials who had received provisional recognition, it might go some way towards solving the problem of precedence raised by Mr. Bartoš. He suggested that precedence should, in those cases, be governed by the date of the grant of provisional recognition.

26. Mr. LIANG, Secretary to the Commission, agreed with Mr. Erim that in cases where the State of residence took an unduly long time to grant the exequatur, it was unreasonable to require the accrediting State to ask for provisional recognition of a consular officer. Practice appeared to differ. The text of the Special Rapporteur was drafted somewhat along the lines of the Consular Convention between Mexico and Panama cited by Mr. Padilla Nervo (see para. 17 above), but there were provisions of a different kind in other consular conventions. Under the Convention between the United States of America and Costa Rica, signed in 1948[2]—especially article I, paragraph 3—it was left to the State of residence to judge whether provisional recognition would have to be given pending the issuance of an exequatur. According to the Consular Con-

[1] See *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 450.

[2] *Ibid.*, p. 452.

vention between the United Kingdom and Sweden of 1952[3]—especially article 4, paragraph (2)—the obligation lay clearly with the receiving State to accord provisional authorization in those cases in which the exequatur could not be granted in reasonable time. He preferred the provision contained in the last-mentioned Convention.

27. The CHAIRMAN, speaking as a member of the Commission, said that in the light of the provisions of the Consular Convention between the United Kingdom and Sweden, the balance of article 9 in the Special Rapporteur's text seemed to be wrong. It was self-evident that the receiving State could at any time accord provisional recognition before issuing the exequatur but the real point was that the responsibility for delay belonged to that State, and hence it should be under an obligation to act with reasonable speed or to accord provisional recognition so as to enable the official in question to take up his duties.

28. Mr. ERIM said that article 6 in the Havana Convention regarding consular agents, of 20 February 1928,[4] seemed to suggest that the request for provisional recognition was made when the official was appointed and not after there had been a delay in granting the exequatur.

29. Article 9 should be reconsidered and framed in a more logical way.

30. Mr. BARTOŠ said that the circumstances in which the sending State would normally ask for the provisional admission of a consular officer to the exercise of consular functions in the receiving State were those where a post had fallen vacant and it was urgently necessary that it be filled. At that stage, however, the consular commission of the officer designate would not yet have been formally presented.

31. Mr. MATINE-DAFTARY did not think it could be left entirely to the receiving State to decide in what circumstances it should grant provisional recognition. If the sending State was anxious to fill a consular post promptly, it was for that State to ask for the provisional recognition of a consular officer.

32. The CHAIRMAN said that the real question was whether, when provisional recognition was asked for, the receiving State was obliged to accede.

33. Mr. TUNKIN said he was likewise doubtful whether the words at the end of article 9—"at the request of the State which appointed him"—should stand. In practice, provisional recognition was not always granted at the request of the sending State. The receiving State might spontaneously grant provisional recognition, pending the grant of an exequatur, in order not to put a consul into an awkward position. The suggestion that the phrase should be omitted might be referred to the Drafting Committee.

34. He did not think that the question of an obligation to grant definitive or provisional recognition should be covered by any specific rule in the Commission's draft. A similar problem had arisen in connexion with article 12 of the draft on diplomatic intercourse and immunities, and had been left open. The interim status of a consular officer who had not yet obtained the exequatur should be settled, either in an addition to article 9 or in a special article.

35. Mr. ZOUREK, Special Rapporteur, said that the phrase "at the request of the [sending] State", or an equivalent phrase, occurred in a number of international conventions, including the Havana Convention of 1928. It had apparently not been interpreted as excluding a situation in which the State requested to grant the exequatur might grant provisional recognition on its own initiative. In any case, the question was one of drafting an appropriate formula to cover all possible eventualities.

36. He thought that the question whether or not a State was under an obligation to grant provisional recognition to a consular officer designate exceeded the scope of article 9 and that it was unnecessary to settle it at the present stage of the Commission's work. Moreover, it would be difficult to say that the State of residence could not refuse provisional recognition when it was agreed that it could refuse final recognition, in other words, the exequatur. The article could be sent to the Drafting Committee.

37. Mr. SANDSTRÖM said, with reference to Mr. Tunkin's remarks (see para. 34 above), that in the case of diplomatic agents the *agrément* was issued in advance, and article 12 of the draft on diplomatic intercourse and immunities did not operate until after the *agrément* had been given. Nevertheless, he agreed that the phrase "at the request of the State which appointed him" could be omitted.

38. The CHAIRMAN thought that there was one more substantive point to be settled before the article was referred to the Drafting Committee. In order to avoid any implication of compulsion on the receiving State, but to indicate that a receiving State should not refuse to grant provisional recognition unless it was not prepared to receive a particular consular officer, the article might be reworded along the following lines:

> "In the event of delay in the delivery in due form of his exequatur, a consular officer may be granted provisional recognition by the State of residence. Such grant shall not normally be refused if the receiving State is in principle prepared to receive the consular officer."

39. Mr. BARTOŠ considered that two very different sets of circumstances might give rise to provisional recognition. On the one hand, such recognition might be granted pending a detailed examination of the candidature of a consular office, which implied a reservation on the part of the receiving State. On the other hand, however, some technical difficulty might prevent the immediate grant of the exequatur; in that case the promise of definitive recognition would be implied. It was therefore extremely difficult to deal with both cases in a single general rule. The Drafting Committee should be asked to mention those two different cases in the commentary.

40. The CHAIRMAN, summing up the debate on article 9, said that the Special Rapporteur would draft an article on the interim status of consular officers recognized provisionally and that the Drafting Committee would decide whether that provision should be added to article 9 or included in the chapter on immunities. The Drafting Committee would also consider the question of the relationship of article 9 with article 7 and with the definition of the term "exequatur" proposed in the article on definitions. The Special Rapporteur had also agreed that the granting of the exequatur would be retroactive to the granting of provisional re-

[3] *Ibid.*, p. 467.

[4] *Ibid.*, p. 422.

cognition to the consular officer concerned. He suggested that article 9 could be referred to the Drafting Committee for redrafting in the light of the debate.

It was so agreed.

ARTICLE 10

41. Mr. ZOUREK, Special Rapporteur, introducing article 10 (*Obligation to notify the authorities of the consular district*), observed that the provision was consequential upon articles 7 and 9. Once a consul had been recognized, it was incumbent upon the State of residence to notify the competent authorities of the consular district, since such notification was essential to enable the consul to exercise his functions. The provision was consistent with general practice, for it was usual in most States to publish the granting of the exequatur in official gazettes and to instruct the competent authorities to give the consul the necessary co-operation. He referred to the commentary of the article. He thought that the Commission should limit its discussion to the principle involved in the article, without going into too much detail with regard to drafting.

42. Mr. YOKOTA supported the principle set forth in the article. However, inasmuch as the exact moment when the head of a consular office was *de jure* in a position to take up his duties was the time of the granting of the exequatur, he suggested that the first part of the article might be amended to read: "The Government of the State of residence shall immediately notify the competent authorities of the consular district that authorization has been given to the consular representative (or officer) to take office".

43. Mr. SCELLE thought that the most important point in the article was the double obligation involved, as stated in the commentary. What would happen if the Government of the State of residence neglected to notify the authorities concerned? Would the consular officer concerned have to acquiesce in such a gesture of ill-will, or would he have to invoke his exequatur and the consular treaty between the two countries before he could begin to exercise his functions? Under the French Constitution, a treaty prevailed over municipal law and the French Government was legally bound to carry out the provisions of treaties. He asked the Special Rapporteur whether he considered that, if a consular officer could prove his claims to be well founded, he could demand that the consular treaty should be carried out. If that were not so, there would be no need to state the double obligation in the article. That point was, in his opinion, extremely important from the purely juridical point of view.

44. Mr. MATINE-DAFTARY said that he had been inclined to regard article 10 as superfluous, since it referred only to routine matters of carrying out agreements. He had since come to the conclusion, however, that the provision was useful in the case of federal States, where the federal authority over the component parts of the State might vary in different cases. He also endorsed Mr. Scelle's arguments.

45. Mr. SANDSTRÖM considered that, since under article 4 it was a condition of the acquisition of consular status that a consular officer should have been recognized in that capacity by the receiving State, the commencement of his consular functions should date from the time of the granting of the exequatur. Moreover, he interpreted the provisions of article 7 as conveying the same idea. He considered that article 10 should end immediately after the words "has taken office" and that the idea expressed in the remainder of the article should be relegated to the commentary. As it stood, the article did not make it clear at what point the consular officer was entitled to take up his functions and to enjoy consular privileges and immunities.

46. Mr. EDMONDS doubted whether the article was necessary, since it stated something that should be taken for granted. Moreover, it was clear from the commentary that the article was intended to apply to provisional recognition; if that was so, provisional recognition should be mentioned explicitly in the text.

47. Mr. GARCIA AMADOR, replying to Mr. Scelle, said it was obvious that consular treaties would be fully applicable and were regarded as the law of the land, even in the absence of an express provision to that effect. He did not consider that the article was controversial, since it stated a standard obligation which was laid down in all international conventions on the subject. However, he thought that the drafting might be improved, for as it stood it might be misconstrued to mean that what determined the commencement of a consular officer's functions was the notification to the authorities of the consular district.

48. Mr. LIANG, Secretary to the Commission, also did not consider that the article was controversial, but thought that the words "has taken office" were used somewhat ambiguously. It should be made clear that the State of residence would notify the competent authorities before the consular officer had taken office in order that the necessary steps might be taken to facilitate the exercise of his functions. The point at which the notification should be made was that of the granting of the exequatur; when the consular officer had taken office, there was less need to notify the authorities.

The meeting rose at 6 p.m.

511th MEETING

Tuesday, 9 June 1959, at 9.55 a.m.

Chairman: Sir Gerald FITZMAURICE

Consular intercourse and immunities (A/CN.4/108, A/CN.4/L.79, A/CN.4/L.80, A/CN.4/L.82) (*continued*)

[Agenda item 2]

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES (A/CN.4/108, PART II) (*continued*)

ARTICLE 10 (*continued*)

1. Mr. ZOUREK, Special Rapporteur, replying to comments made at the preceding meeting, observed that there seemed to be general agreement on the basic rule set forth in article 10.

2. Mr. Yokota had suggested that the text should make clearer exactly when the consular officer concerned would take office (see 510th meeting, para. 42). The term "take office" had been used for practical reasons, in order to cover both the granting of the exequatur and provisional recognition. He agreed, however, that explicit reference might be made to those two acts, which marked the commencement of consular functions.