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Summary record of the 542nd meeting

Topic:
Consular intercourse and immunities

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receiving State of residence. A reference should therefore be included in the commentary to the fact that receiving States were bound to issue the identity cards, but that the cards themselves conferred no special privileges other than that of being exempted from the requirement to obtain residence permits and that all privileges and immunities enjoyed by consular staff derived from the notification that they were members of the consular corps. In several countries, and especially in France, the authorities declined to issue such an identity card to a person whom they considered *non grata*. That was something of an innovation, which the Drafting Committee might well consider, although no clause covering it need necessarily be included in the article itself.

64. Mr. AMADO observed that the reciprocity clause might be essential in bilateral conventions, but made no sense in a multilateral convention. In his opinion, the draft article was ready for reference to the Drafting Committee.

65. Mr. TUNKIN was generally in agreement with the previous speakers. He asked the Special Rapporteur why he had omitted the words "who formed part of their households", which appeared in similar provisions of the diplomatic draft, such as article 31, and he thought the phrase "their private staff" was too comprehensive.

66. Mr. ŽOUREK, Special Rapporteur, explained that he by no means insisted on the retention of the reciprocity clause, but did not agree that it was unnecessary, for it would enable parties to the convention to avoid going as far as the draft article without violating the terms of the convention. It would thus have some psychological value.

67. Mr. Yokota's criticism of the final phrase, based on the parallel with the diplomatic list, was not pertinent. The privileges and immunities of diplomatic missions were *ipso facto* recognized and could not, therefore, depend on notification, whereas in the case of consular officials, the Commission was establishing a rule on that particular point which might not yet have been accepted by all States. The authorities of the receiving State had to know who were the members of the consular staff, and only if their names had been notified to the Ministry of Foreign Affairs would the latter be exempt from registration. He would, however, have no objection to placing the proviso in the commentary.

68. Mr. FRANÇOIS had correctly pointed out that the position of members of the consular staff who were nationals of the receiving State was dealt with in draft article 42, but it was not yet known whether that draft article would be accepted. Such points might be cleared up later when all the articles were before the Commission.

69. In reply to Mr. Tunkin he said he had not used the phrase "who formed part of their households" in article 35 because he had believed that a broader term might be preferable. Not inconceivably, even a relation of one of the members of the consular staff paying a private visit to him

for several weeks (and hence not forming part of the official's permanent household) might be eligible for the benefit of the clause. With regard to the expression "private staff", he said the expression meant only the private staff brought in from abroad. It would hardly be practical to exempt members of the consular staff and members of their families from registration and residence permits, but to require such private staff — who would probably be domestic servants — to obtain them. In any case, that was a point which might be reviewed by the Drafting Committee.

70. The CHAIRMAN proposed that article 35 be referred to the Drafting Committee, on the understanding that, whatever the final wording, it would state the principle that members of the consular staff, members of their families and their private staff would be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits. The Drafting Committee might consider adding a second clause, to the effect that the names of such staff should be notified to the Ministry of Foreign Affairs of the receiving State, though the Committee should, for that purpose, take into account the terms of article 21. The general consensus was that the phrase "if they are not nationals of the receiving State" should be deleted, since the draft convention would include a general article covering the position of consular staff who were nationals of the receiving State. By general agreement, and without objection on the part of the Special Rapporteur, the reciprocity clause would be dropped, though the commentary might possibly refer to the question of reciprocity.

It was so agreed.

The meeting rose at 1.15 p.m.

542nd MEETING

Wednesday, 18 May 1960, at 9.15 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/131, A/CN.4/L.86) [continued]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES
(A/CN.4/L.86) (continued)

ARTICLE 36 (*Exemption from social security legislation*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 36, explained that it followed very closely article 31 of the draft articles on diplomatic intercourse and immunities and had been included in another form as article 31 in his first

draft.¹ He had made slight changes in the terms of diplomatic article 31 in order to differentiate between the head of consular post as an insured person and the head of post as an employer. Diplomatic article 31 was perhaps rather too condensed; it postulated a rule and admitted exceptions in respect of servants and employees "if themselves subject to the social security legislation of the receiving State", but did not specify in what circumstances they would be subject to such social security legislation.

2. In paragraph 1 the expression "members of the consular staff . . . and their families" included the head of the post, consular officials, members of the consular staff and members of their families. When the definitions in draft article 1 were revised, some more appropriate expression would probably be used; the term need not be discussed in connexion with article 36. Two conditions were laid down in paragraph 2 for the private staff in the sole employ of members of the consular staff. The Commission should not, in his view, enter into questions of drafting, but should confine its discussion to the desirability of including such an article among the draft articles on consular intercourse and immunities.

3. Mr. VERDROSS accepted the principle expressed in article 36, but thought that it would be necessary to exclude from the privilege members of the families of consular staff who engaged in a profession or occupation in the State of residence. A phrase might therefore be inserted after the phrase "nationals of the receiving State" reading: "and not carrying on a profession or occupation in the receiving State".

4. Sir Gerald FITZMAURICE said he had no objection to the inclusion of article 36, but wondered whether the draft in its present form covered a question discussed at length during the drafting of diplomatic article 31. At that time if had been pointed out that, although a member of a diplomatic mission might be exempted from social security legislation, he might be employing persons who were subject to that legislation, under which part of the contribution was payable by the employer. As would be seen from the commentary, the Commission had taken the view that the member of the diplomatic mission should not be exempted from paying the employer's share of such contributions.

5. Mr. ŽOUREK, Special Rapporteur, replied that the point was in fact covered in draft article 36. If a member of a consular staff employed a person who was a national of or permanently settled in the receiving State, he was bound, as an employer, to pay the share of the contribution payable by the employer under the social security legislation in force in that State. If a member of the consular staff brought from abroad a member of his house-

hold who was not a national of the receiving State, he would be exempt from paying contributions in respect of that person under the social security legislation of that State, except as otherwise provided by bilateral agreement between the two States. Under paragraph 3, however, even if he was exempted from such payment, voluntary participation in the social security scheme was not excluded, in so far as such participation was allowed by the legislation of the receiving State.

6. Sir Gerald FITZMAURICE thought that it might be merely a matter of drafting, but was still not convinced that the point was covered in the Special Rapporteur's text. In order to cover it, the liability of a consular officer as an employer of a person who was a compulsorily insured person would have to be preserved. It was true that paragraph 2 did not extend the exemption to the private staff who were nationals of or settled in the receiving State, but it was the liability of the employer in respect of that staff that required to be expressly stated as a derogation from the immunity laid down in paragraph 1. The point was covered in diplomatic article 31.

7. Mr. SANDSTRÖM supported Sir Gerald Fitzmaurice's view. He suggested that the point might be taken into account by the Drafting Committee.

8. Mr. ERIM concurred in the principle of exemption. The point raised by Mr. Verdross, however, warranted special attention by the Commission before the draft article was sent to the Drafting Committee. The text as it stood might be simplified by concentrating on the principle that members of the consular staff and members of their families were not bound by the social security legislation of the receiving State. He agreed with Sir Gerald Fitzmaurice and Mr. Sandström. All members of the consular staff, whether private or not, might be dealt with together in a single paragraph offering them the same option — and, in view of the provisions of paragraph 3, it was an option rather than an exemption that was involved. It was only if members of the consular family engaged in an occupation in the receiving State that there would be an exception to the rule, as Mr. Verdross had rightly pointed out.

9. Mr. YOKOTA maintained that the point raised by Sir Gerald was not covered by the present text. Paragraph 2 implied that the social security legislation would not apply to private staff, whereas under diplomatic article 31 members of the mission and members of their families were bound to comply with the social security legislation in respect of their servants. In the Special Rapporteur's draft article 36 they were exempt even in regard to their private staff. The Commission seemed to agree that they should not be exempt. The Drafting Committee should redraft the article.

10. The CHAIRMAN, speaking in his personal capacity, said that the purpose of the article was to ensure that members of the consular staff were exempt in their personal capacity from the social

¹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), p. 101.

security legislation of the receiving State, but not in so far as they were employers of servants and employees who were subject to such legislation; such a provision was contained in diplomatic article 31. An exception was provided for in paragraph 2, equivalent to the exception stated in diplomatic article 31. The Special Rapporteur seemed to believe that the terms of the exception in diplomatic article 31 had broader implications than paragraph 2 of draft article 36, which implied that members of consular staffs were not exempt from the payment of employer's contributions in respect of servants or employees who were nationals of, or permanently established in, the receiving State.

11. Mr. ŽOUREK, Special Rapporteur, confirmed Mr. Padilla Nervo's interpretation. The exemption conferred by diplomatic article 31 was qualified by an exception applicable to the employment of servants who were themselves subject to the social security legislation of the receiving State, but that article gave no criterion by which to decide who those persons were. The language was very broad. He had thought that the two conditions mentioned in paragraph 2 of draft article 36 would make it clear that, in cases where one of those conditions was fulfilled, members of the consular staff would be obliged to pay the employer's contribution. The exemption would operate in the case of staff brought in from abroad, though it would be possible for such staff to become voluntary contributors under paragraph 3. If that was not clear enough, a phrase such as "subject to the provisions of paragraph 2" might be inserted in paragraph 1. Mr. Verdross's suggested provision was acceptable, even though no similar provision appeared in diplomatic article 31; but lest such a provision be construed as covering unremunerated activities, it should specify that the occupation had to be gainful.

12. The CHAIRMAN, speaking in a personal capacity and referring to Mr. Verdross's suggestion, observed that certain privileges and immunities were recognized as attaching to consular officials if they were not engaged in commerce or other gainful occupation. That would also apply to their families and members of their household, although the term "household" was extremely broad. The Commission, in paragraph 11 of the commentary to diplomatic article 36, had stated, *inter alia*, that it did not feel it desirable to lay down a criterion for determining who should be regarded as a member of the family but had intended to make it clear that close ties or special circumstances were necessary qualifications.

13. Mr. EDMONDS concurred in the statement of the principle, but felt that the point raised by Sir Gerald Fitzmaurice should be carefully considered. In addition he said, the term "permanently established in the receiving State" used in paragraph 2 was far too indefinite. It might be asked whether anyone was ever permanently established in his residence or occupation and who was to decide whether a person was permanently

established. In many cases the decision of one court holding that a person was resident in a certain place had been reversed on appeal. Different tribunals often reached different conclusions upon the same facts relating to residence. The Drafting Committee should find more precise language.

14. Mr. SANDSTRÖM was not certain whether paragraph 2 of the Special Rapporteur's draft was indeed exactly equivalent to the exception stated in diplomatic article 31. There might be some differences as a result of a bilateral convention or under local legislation, and other persons concerned might also be subject to the social security legislation in force in the State of residence. He therefore found it difficult to accept the Special Rapporteur's draft as it stood. Mr. Verdross's suggestion had raised a much more difficult point. It was questionable whether a person belonging to the family of a member of the consular staff who was engaged in a gainful occupation was in fact a member of his household. It depended greatly on circumstances. If a person engaged in professional activities had other persons in his service, he might well be liable to pay social security contributions in respect of those persons, since there was no reason why they should be deprived of the protection of social security legislation. Mr. Verdross's suggestion was, therefore, not wholly acceptable.

15. Mr. BARTOŠ observed that a practical point arose which had, in recent times, caused many difficulties. It had happened, for example, that consuls employing local staff had, on the grounds of immunity, declined to pay the employer's share of the social security contributions in respect of that staff. By contrast with that attitude, the United States consulates in Yugoslavia, purely as a measure of goodwill and without any legal obligation, voluntarily paid the employer's share of contributions in respect of their Yugoslav employees. Payment was not made by them direct to the social security administration but through the employee who was covered by the insurance. Similarly, a special convention on a reciprocal basis covering that particular point had been signed with the United Kingdom. Those cases, however, were the exception. For practical reasons, therefore, the Commission's draft should provide that consular officers should not be exempted from the payment of the employer's share of social security contributions. Such a rule would be in conformity with the general principle that consular officers had to respect the laws and regulations of the receiving State.

16. Commenting on Mr. Verdross's suggestion he said the suggested provision was acceptable as far as it went; it should, however, be supplemented by a clause covering not only members of consular families engaged in gainful occupation, but also those engaged in other activities which were subject to compulsory insurance under, for example, international labour conventions. Such persons would include amateur pilots of aircraft, persons engaged in certain dangerous

sports and even voluntary trainees in hazardous activities. The phrase "or occupations or activities subject to compulsory insurance" should therefore be added to Mr. Verdross' form of words. To go into all the details in the body of the text would, however, make it too complicated.

17. The Special Rapporteur's paragraph 2 was broadly satisfactory, but it should contain a saving clause such as "except as otherwise provided by special bilateral agreement". Alternatively, the commentary might mention the possibility of different regulation by bilateral instrument. Private staff who were in the sole employ of members of the consular staff and who were not nationals of the receiving State should not be exempted from contributions unless an agreement existed to that effect between the States concerned. It would be inadvisable that such staff should be deprived of the protection of social security schemes.

18. The clause concerning voluntary participation in the social security system (paragraph 3) was generally acceptable, but some provision should be made to the effect that, at any rate where health insurance was concerned, the local authorities were under an obligation to accept such participation. Very serious situations had arisen, particularly in emergency cases, in countries in which no private medical practice existed and where members of the consular staff, being excluded from participation in the social security scheme of the State of residence, were thus unable to obtain hospital treatment. It was a rule of customary law that aliens had a right to medical assistance in emergencies. He was not sure how that rule might be expressed in the draft, but the Special Rapporteur should not disregard its existence.

19. Mr. ERIM observed that the points raised by Mr. Bartoš might cause more difficulty in the drafting of article 36 than had been anticipated. It would probably not be sufficient simply to instruct the Drafting Committee to prepare a draft article exactly along the lines of diplomatic article 31. That article was in very general terms, whereas it now seemed that in the consular draft the situations described by Mr. Bartoš and Mr. Verdross would have to be taken into account. The Commission, should, therefore, settle the main issue: was it desirable to introduce such an article in the draft articles on consular intercourse and immunities? The Commission was prepared to accept certain privileges and immunities for both diplomats and consuls. In the present instance, it was attempting to exempt consular officers from burdens that might impede the smooth exercise of consular functions, and it might also be able to cover certain exceptional cases such as those mentioned by Mr. Bartoš. The draft article should therefore either be complete or it should state that, with regard to social security legislation, members of the consular staff were free to choose to contribute or not to contribute to the social security scheme of the receiving State and that the details should be left for regulation by agreement between the States concerned.

20. Mr. VERDROSS said that Mr. Bartoš had raised questions of the utmost importance. A clear distinction should be drawn between the consular officer when paying social security contributions for himself and that officer when paying them for some other person. In Austria, for example, the employer and the employee each paid half the contribution. If the consular officer was not obliged to pay the employer's half, his employee would be deprived of protection under the social security scheme. The Special Rapporteur might be able to insert another paragraph covering that point, in some such terms as: "The exemption provided for in paragraphs 1 and 2 shall not relate to social security contributions payable on behalf of staff who are not nationals of the sending State". The point raised by Mr. Bartoš about health insurance was covered in paragraph 3, since under that provision it was open even to the consul himself to become a voluntary participant in the social security scheme of the receiving State.

21. Mr. BARTOŠ drew Mr. Verdross's attention to the qualification in paragraph 3, that voluntary participation would not be precluded "in so far as such participation is allowed by the legislation of the receiving State". Certain States did not allow participation unless the person concerned was permanently established in the territory.

22. Mr. AGO observed that the point raised by Mr. Verdross would be met if the Commission reverted to the construction used in diplomatic article 31. The Special Rapporteur and the Drafting Committee should base their redraft on that construction. However, the structure and wording of article 31 might well be improved. For example, the phrase should run "be exempt from the obligations provided for by the social security legislation", since "exempt from the social security legislation" was improper. The phrase concerning servants and employees in the article itself did not quite tally with what was said in the commentary; it was not clear whether it was the servants or the members of the mission who were exempted from the obligations in question. Mr. Bartoš had referred to a number of special circumstances. But surely the Commission should confine itself to the codification of general rules; otherwise, it would have to go to extremes, and might even have to consider whether a consul's hobbies should or should not be covered.

23. Mr. PAL suggested that, as the Commission was in general agreement on the substance of draft article 36 and had also agreed that it should be modelled on diplomatic article 31, the article should be referred to the Drafting Committee. The Special Rapporteur had agreed in substance with Sir Gerald Fitzmaurice but had considered that his own draft adequately covered the matter. The Drafting Committee should be particularly careful about the point raised by Sir Gerald Fitzmaurice and recognize the requirements of the situation and its inherent possibilities, to which Sir Gerald had drawn attention. It was

surely preferable to word the draft more clearly than to leave it open to differences in interpretation, thus maintaining the controversy. All the outstanding problems were thus matters of drafting.

24. Mr. AMADO said that Mr. Ago had brought the Commission back to the main issue to be decided which was, as Sir Gerald Fitzmaurice had pointed out, whether members of the consular staff were liable for social security contributions.

25. He thought that the discussion had ranged over many unessential details, and he urged that an early decision be taken to refer the article to the Drafting Committee. In that connexion, he agreed with the criticism which had been expressed regarding the drafting of article 31 of the draft on diplomatic intercourse.

26. Mr. ERIM agreed that the drafting of article 31 of the draft on diplomatic intercourse stood in need of improvement.

27. He considered it essential that members of the consular staff should be able to become voluntary participants in the social security scheme of the receiving State.

28. Mr. TUNKIN said that social security questions were extremely complicated and that if the Commission were to enter into detail in that respect, the draft would probably be unacceptable to many States.

29. Accordingly, he suggested that the Commission's draft should deal with two matters of principle. In the first place, it should provide for a system enabling persons covered by the draft to enjoy social security benefits. Members of the consular staff and employees and private staff brought in from the sending State were usually covered by the social security legislation of that State. Accordingly, it was appropriate to exempt those persons from obligations under the social security of the receiving State. In the second place, the Commission should deal with the question of obligations arising from the employment of local staff, who would not be covered by the social security legislation of the sending State.

30. Both questions of principle were adequately covered by the Special Rapporteur's draft and, as Mr. Pal had pointed out, the Commission was in general agreement with the principles embodied in article 36. The suggestions made by Mr. Verdross and other members of the Commission could accordingly be referred to the Drafting Committee.

31. The CHAIRMAN said that there appeared to be general agreement that article 36 should be referred to the Drafting Committee, together with the suggestion that article 31 of the diplomatic draft should be followed and the various other suggestions made. The Commission was agreed on the following points, namely: the rule set forth in article 36, paragraph 1; the obligation of members of the consular staff to pay the employer's contribution under the social security legislation of the receiving State in respect of local employees

and private staff; and the possibility of voluntary participation in the social security scheme of the receiving State.

32. If there were no objections, he would assume that the Commission agreed to those points being referred to the Drafting Committee.

It was so agreed.

ARTICLE 37 (*Exemption from taxation*)

33. Mr. ŽOUREK, Special Rapporteur, introduced his proposal for the following revised text of article 37:

"1. Subject to reciprocity, the receiving State shall exempt members of the consular staff and members of their families from all taxes and dues, personal or real, levied by the receiving State or by any of its territorial subdivisions, save:

- (a) Indirect taxes incorporated in the price of goods or services;
- (b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consular staff on behalf of his government for the purposes of the consulate;
- (c) Estate, succession or inheritance duties levied by the receiving State, or by any of its territorial subdivisions, subject, however, to the provisions of article 44 concerning estates left by members of the consular staff or by members of their families;
- (d) Taxes and dues on income having its source in the receiving State;
- (e) Charges levied for specific services rendered;
- (f) Subject to the provisions of article 26, registration, court or record fees, mortgage dues and stamp duty."

34. The expression "members of the consular staff" used in that text included both heads of consular posts and subordinate staff; it would be replaced by another appropriate expression when article 1 (definitions) had been revised.

35. Subject to some slight drafting amendments, his revised text of article 37 was based on article 32 of the draft on diplomatic intercourse. In that connexion, he recalled that during the period between 1919 and 1939, it had been widely asserted that general international law recognized no immunity from taxation for consuls. In fact, however, many States granted the exemption and recent consular conventions confirmed that it had become part of State practice. He cited, in that respect, the consular conventions concluded by the United Kingdom with France (1951), Norway (1951), Sweden (1952) and a number of other countries, as well as the conventions entered into by the Soviet Union with Hungary (1957), Czechoslovakia (1957), the People's Republic of China (1959) and other countries. It could, therefore, be safely concluded that the principle set forth in article 37 was a rule of international law which should not be omitted from the draft.

36. The words "Subject to reciprocity" had

been introduced for the purpose of giving States a greater freedom of action in concluding bilateral agreements. He was prepared to delete those words if the majority of the Commission objected to them, but he felt that, if they were retained, there was a better prospect that States would accept the provisions of article 37.

37. Mr. BARTOŠ asked the Special Rapporteur whether it was the intention of his text that in the receiving State members of the consul's private staff who were nationals of the sending State should not be eligible for exemption from taxation. He had no objection to those persons being left outside the scope of the exemption but, in practice, it would be difficult for the fiscal authorities to assess the tax of such persons, for the terms of the contract between the consul and a member of his private staff brought from his home country would not be known to those authorities.

38. Secondly, he asked whether the expression used in article 37 (e) "charges levied for specific services rendered" was intended to cover services rendered to a consulate.

39. Lastly, he requested the Special Rapporteur to clarify the meaning of article 37 (f).

40. Mr. ŽOUREK, Special Rapporteur, said that in his first question Mr. Bartoš had raised a rather difficult point; if the Commission so desired, he was prepared to broaden the scope of the article by including private staff.

41. In reply to the second question, he said that article 37 (e) referred to charges (other than taxes) representing payment for specific services rendered to the consular officer concerned by the receiving State or by its public utilities.

42. In reply to Mr. Bartoš's third question, he said that the purpose of the proviso "Subject to the provisions of article 26" was to make it clear that, if the sending State or the head of consular post bought premises for use as a consulate, registration fees, which in some countries were very high, would not be payable in respect of such a transaction.

43. Mr. BARTOŠ thanked the Special Rapporteur for his replies and said that he would not press the point raised in his first question. As to the second point, he said that, unless it was made clear that the charges mentioned in article 37 (e) were those made for actual supplies received or for work performed, the provision might well cancel altogether the benefit of exemption from taxation.

44. On the third point, he wished to make a reservation regarding the taxability of the acquisition of immovable property by the sending State or by the head of consular post. The rule of international law was that the sending State and the head of consular post were not exempt from the payment of fees and duties chargeable in respect of such a purchase; they were only exempted from taxes in respect of the utilisation of the premises in question.

45. Mr. ERIM criticized the reciprocity clause;

such a rule, he said, would be appropriate only if the article represented an innovation. In fact, article 37 embodied a rule which was present in many consular conventions and which had become a part of accepted State practice.

46. With regard to the taxation of income having its source in the receiving State, he was not certain that the text of article 37 (d) covered all possible cases and drew the attention of the Drafting Committee to the much fuller text in article 16, paragraph 5 (b), of the Consular Convention between the United Kingdom and Sweden, 1952.

47. Mr. FRANÇOIS said that he was grateful to the Special Rapporteur for not insisting on the reciprocity clause.

48. The words "and members of their families" did not appear in article 32 of the draft on diplomatic intercourse. That draft, however, contained an article (article 36) which enumerated the persons entitled to privileges and immunities. He asked the Special Rapporteur whether he intended to include a similar provision in the consular draft.

49. He thanked the Special Rapporteur for including the provision in article 37 (f), thus ensuring that there was no longer any discrepancy between it and article 32 of the diplomatic draft. It was his impression, however, that the majority of States exempted consuls from the fees and duties mentioned in that clause. In that connexion, he said that in the Netherlands the rule was construed to mean that foreign consular officers were not required to affix Netherlands revenue stamps to documents issued by them. However, a person producing such documents to a judicial or other authority was required to affix those stamps at his own expense. He would be glad to have the Special Rapporteur's opinion on that question.

50. Mr. AGO said that the provisions of article 32 of the draft on diplomatic intercourse were unduly restrictive. Applied to consuls, however, the same provisions seemed unduly liberal. For example, the Special Rapporteur's article 37 provided that only transfers *mortis causa* were liable to tax or duty; but other transfers of property might be equally liable, and there appeared to be no grounds for exempting members of the consular staff from the payment of those transfer charges.

51. Secondly, he criticized the "unless" clause in article 37 (b). If a State saw fit to hold property not in its own name but through a consular officer, it should accept the tax consequences of that decision.

52. In conclusion, he suggested that the Drafting Committee should be asked to formulate the exemption of consular officers from taxation in terms less broad than those used in respect of diplomatic officers.

53. Mr. MATINE-DAFTARY said that he was in agreement with the principle embodied in article 37 but suggested that the opening provision be amended so as to refer to "all or some of the taxes and dues . . .".

54. Secondly, he asked the Special Rapporteur to elucidate the meaning of the term "real" as used in the context "personal or real taxes and dues". Inasmuch as article 37 (b) provided for an exception in respect of taxes and dues on immovables, it was not clear what other taxes could be meant by the expression "real taxes".

55. Sir Gerald FITZMAURICE said, in reply to the point raised by Mr. Ago, that the proviso ("unless he holds it . . .") contained in article 32 (b) of the draft on diplomatic intercourse had been introduced because, in certain countries foreign governments could not own real property in their own name. The practice in those cases was for the foreign government to purchase property either in the name of its National Bank or in the name of its ambassador personally. There appeared to be no reason for not adopting a similar provision in respect of consular premises.

56. Mr. TUNKIN said that the principle contained in article 37 was a sound one. He thought that the Commission would be adopting the right course in codifying the existing practice, which was to exempt members of the consular staff from taxation.

57. The point raised by Mr. Ago had been dealt with by Sir Gerald Fitzmaurice. He would cite in that connexion the example of two properties on Long Island, New York, which the Soviet Union had acquired in the name of its representatives to the United Nations because the laws of the State of New York did not permit foreign governments to own immovable property in that State. Although the properties in question were registered in the name of the individual representatives concerned, they were known to belong to the Soviet Union.

58. Mr. ŽOUREK, Special Rapporteur, replying to Mr. François, said that it would be difficult to formulate, in the consular draft, an article along the lines of article 36 of the draft on diplomatic intercourse. Some consular immunities, such as personal inviolability, attached only to consular officials. Others attached both to consular officials and to consular employees, together with their families. Lastly, certain other privileges extended to private staff. He had therefore considered it more appropriate to specify in each individual article the persons eligible for the benefit of the particular article.

59. The provisions of article 37 (f) meant that a consular official or a consular employee who was a party to a contract normally liable to local stamp duty would have to pay that duty. A completely different question arose in the case of a contract signed at a consulate and intended to take effect solely in the sending State or in a third State: such a document would not be liable to any stamp duty chargeable under the laws of the receiving State.

60. The point raised by Mr. Ago regarding article 36 (b) had been satisfactorily explained

by Sir Gerald Fitzmaurice and Mr. Tunkin. As to article 36 (e), he said that provision could be expanded so as to refer to specific services rendered by the receiving State or by any of its territorial subdivisions or public services.

61. With regard to Mr. Matine-Daftary's suggested amendment ("to exempt . . . from all or some of the taxes and dues"), he said he would find it difficult to accept the amendment for it would give the receiving State the power to restrict unduly the foreign consular officer's exemption from taxation.

62. In reply to Mr. Matine-Daftary's question concerning the word "real", he said that the words "personal or real" were intended to refer to the distinction between direct taxes on immovable property and direct taxes charged *ratione personae*.

63. The CHAIRMAN suggested that, if there were no objections, article 37 might be referred to the Drafting Committee with the comments made during the discussion; the Drafting Committee would also consider whether the exemption could be made somewhat less liberal, as suggested by Mr. Ago.

It was so agreed.

ARTICLE 38 (*Exemption from customs duties*)

64. Mr. ŽOUREK, Special Rapporteur, introducing article 38, said that, in drafting the article, he had taken as a basis the minimum exemptions from customs duties found in consular conventions. The exemptions in paragraphs (a) and (b) were generally recognized, but those in paragraph (c) were more controversial. In some countries, the items mentioned in paragraph (c) were admitted duty-free for six months, and in others for a year, after the arrival of the person concerned. He had thought, however, that the minimum exemptions he had enumerated would be acceptable to all States.

65. In practice, the staff of a consulate were often granted the same exemptions as the staff of a diplomatic mission and, since the Commission was not concerned only with the codification but also with the progressive development of international law, it might decide to propose a rule whereby for the purpose of Customs privileges members of the consular staff should be placed on a footing of equality with diplomatic missions. On the other hand, the Commission might consider it preferable that such provisions should form the subject of bilateral rather than of multilateral instruments. One argument in favour of modelling article 38 on the corresponding provision in the diplomatic draft was that only States which ratified the resulting convention would be bound by the article. In his own draft, however, he had not felt free to insert such a far-reaching clause; he had taken the view that the draft of a multilateral convention should incorporate rules that were acceptable to all States. In any case it was open to the Commission to amend his draft.

66. Mr. EDMONDS said he agreed in principle with article 38. Nevertheless, the wording of paragraph (b) was too restrictive, and it might be better to use a phrase which would cover whatever was required for the performance of consular duties, including such important items as motor vehicles. With regard to paragraph (c), he thought that the phrase "items for the personal use of members of the consular staff . . ." might be preferable to "personal possessions and effects". Finally, he considered that the establishment of a time limit for the duty-free import of personal items was inconsistent with the general principle of exemption.

67. Mr. BARTOŠ agreed with Mr. Edmonds. In practice, means of transport were of great importance to the consulate, and furniture for residence of members of the consular staff should also be exempted. Accordingly, paragraph (b) might be expanded to cover those items.

68. The practice of setting a time limit of three, and then six, months for the duty-free import of items for personal use was obsolete. For example, a member of the consular staff might marry and need new furniture for a larger residence; a consular official transferred, say, from the Far East to Europe would have to ship his furniture by sea and there would be no guarantee that it would reach his new post within six months of his arrival. Furthermore, the stipulation that personal possessions and effects must be brought in from the sending States was quite unnecessary; what mattered was that such possessions should be imported for the use of members of the consular staff. Finally, the provision should extend to service staff and private servants of the consular officials who were not members of their families.

69. Mr. MATINE-DAFTARY agreed with Mr. Bartoš that the references to the time limit and to importation exclusively from the sending State were unnecessary. He also thought that the same exemptions from customs duties should be accorded to members of the consular staff as to members of diplomatic missions. The two categories of officials should be distinguished, for the purpose of Customs treatment, solely by the reciprocity clause, which should be incorporated in the consular draft. Accordingly, the article should be brought more into line with article 34 of the diplomatic draft, particularly since the word "articles" used in paragraph 1 of that draft was much more general than the Special Rapporteur's enumeration.

70. Mr. ERIM observed that the reciprocity clause did not apply to paragraphs (a) and (b) of article 38, but might apply to paragraph (c). He agreed with the speakers who thought that the latter provision should be amplified: if that were done, a reciprocity clause might be of some value. On the other hand, he drew attention to article 17 (2) of the Consular Convention between the United Kingdom and Sweden of 1952, where exemption was granted for articles imported

exclusively for the personal use of the official concerned, and pointed out that paragraph (3) (b) of the same article contained the restriction that the exemption would not extend to articles imported for sale or for other commercial purposes. If the Commission decided to amplify article 38, it should add a similar qualifying phrase.

71. Mr. PAL drew attention to the difference between paragraph 1 of article 34 of the diplomatic draft and the opening passage of article 38 of the Special Rapporteur's draft. If the Commission decided to retain the phrase "Subject to reciprocity, the following items shall be admitted free of all customs duty and other taxes", it should add a paragraph along the lines of article 17 (3) (d) of the Consular Convention between the United Kingdom and Sweden of 1952, in order to compensate for the omission of the provision in the diplomatic draft that exemption should be granted in accordance with the regulations established by the legislation of the receiving State.

72. Mr. YOKOTA agreed with Mr. Erim that paragraphs (a) and (b) should not be subject to the principle of reciprocity. Anything intended for the use of the consulate was owned and used by the government of the sending State, not by the members of the consular staff. Accordingly, the items mentioned in those paragraphs were exempt from customs duties under the existing rules of international law. The personal possessions and effects referred to in paragraph (c), however, were owned by the staff members and their exemption from customs duties was not yet a generally-accepted practice. He drew attention to paragraph (2) of the commentary on article 34 of the diplomatic draft, which stated that the exemption concerned had been regarded as based on international comity. That part of the provision was therefore *de lege derenda* and that was still more the case where members of the consular staff were concerned. Accordingly, the provision in question should be subject to the principle of reciprocity if the provision were laid down as a rule of international law. Otherwise, a State failing to exempt personal possessions of the members of the consular staff from customs duties would be committing a breach of international law; that was a situation which the majority of States would hardly be likely to accept and it would therefore be advisable to retain the reciprocity clause as applicable to paragraph (c).

73. Mr. VERDROSS said that, although the principle of exempting personal possessions from customs duties could not yet be regarded as general practice, the Commission could accept it, especially since the Harvard Draft, prepared in 1932, set forth that principle in its article 25. The very general wording of that article seemed to him to cover all eventualities, but if the Commission wished to provide a wider formula, he would have no objection. Nevertheless, he agreed with Mr. Bartoš that the references to the six-month time limit and to importation exclusively from the

sending State should be deleted; furthermore, he suggested that the uses to which the articles imported free of duty would be put should be explained somewhat more clearly.

74. Mr. AGO agreed with Mr. Edmonds that paragraph (b) was unduly restrictive and that it should be broadened to include such important items as means of transport. Enumerations were in any case dangerous, and he agreed with Mr. Matine-Daftary that it would be better to use the wording of article 34 of the diplomatic draft.

75. With regard to paragraph (c), he agreed with the speakers who had urged the deletion of references to the time limit and the importations from the sending State, and also with those who considered that the article should be brought closer into line with the corresponding provision concerning diplomatic agents. Nevertheless, he thought the expression "members of the consular staff" might be too broad. The Special Rapporteur had said during the discussion on definitions that that expression also covered service staff; it should be borne in mind that the service staff of diplomatic missions were not eligible for exemption from customs duties under the diplomatic draft.

76. Finally, he did not think that reciprocity should apply to any of the provisions of article 38. The notion of reciprocity operated bilaterally; the result of applying reciprocity in the particular context would be a great diversity of practice. The Commission should therefore lay down a rule of international law, and should avoid introducing a serious and unnecessary complication.

77. Mr. SANDSTRÖM considered that the same exemptions should be granted to members of the consular staff as to diplomatic agents, since the living conditions of both categories of officials were similar, as were the difficulties that they would experience if the exemption were not granted. Draft article 38 should therefore be modelled on article 34 of the diplomatic draft. However, if the Commission decided to retain the form drafted by the Special Rapporteur, it might be advisable to follow Mr. Pal's suggestion and to add a clause along the lines of article 17 (3) (d) of the Consular Convention between the United Kingdom and Sweden of 1952.

78. It might also be desirable to add the phrase, "However, articles imported as samples of commercial products solely for display within a consulate and subsequently re-exported or destroyed shall not be regarded as excluded from the exemption provided in this article" appearing in article 17 (3) (b) of the Anglo-Swedish Convention; he would not move that as a formal proposal, however, since the Commission might not wish to draft so elaborate a provision.

79. Mr. FRANÇOIS said he quite understood the Special Rapporteur's reluctance to model draft article 38 too closely on the corresponding provision of the draft on diplomatic intercourse

and immunities. The practical reasons for granting different exemptions should always be borne in mind. For instance, the exemption of alcoholic beverages from customs duties was covered in the case of diplomatic agents, but not (article 38) in the case of members of the consular staff. The difference might be explained by the close connexion of such an exemption with the social obligations of diplomatic agents. Yet consuls-general in large towns also had social obligations and, although the granting of such an exemption to all members of the consular staff might be open to abuse, heads of post should have that facility. The Special Rapporteur might consider inserting a provision concerning exemption of alcoholic beverages from customs duties, for heads of post only.

80. Mr. TUNKIN said that, although he agreed with the principle contained in article 38, he thought it should be brought closer into line with the corresponding provision of the diplomatic draft. While the differences between diplomatic agents and consular officers were considerable, that was not sufficient reason for such a wide discrepancy between the two texts. The Drafting Committee could undoubtedly adjust the wording accordingly, but one point in connexion with the opening sentence seemed to him to be substantive. The opening sentence in article 34, paragraph 1, of the diplomatic draft specifically mentioned compliance with the regulations of the receiving State; that provision had been discussed thoroughly in connexion with the diplomatic draft and should be inserted in article 38 also. He agreed with the speakers who had urged that article 38 should not be unduly detailed and supported Mr. Bartoš's and Mr. Verdross's remarks on paragraph (c).

81. Mr. BARTOŠ, commenting on Mr. Yokota's remarks, said he did not believe that the Commission should differentiate between the rules of international law stated in paragraphs (a) and (b) and the exemption covered by paragraph (c), which was based on the comity of nations. It was the Commission's task to codify positive international law and also to propose rules *de lege ferenda*.

82. He could not agree with Mr. Ago that the expression "members of the consular staff" was too broad. While he agreed that the clause in which those words occurred should be brought more closely into line with the diplomatic draft, he thought that the number of persons enjoying the exemption concerned should be extended as far as possible.

83. Mr. LIANG, Secretary to the Commission, drew attention to the phrase "in accordance with the regulations established by its legislation" in article 34, paragraph 1, of the draft of diplomatic intercourse and immunities, and pointed out that it was too restrictive, in that although it took into account the legislation of the receiving State, it did not give due weight to the rules established by the practice of that State.

84. In reply to Mr. François's suggestion concerning the exemption of alcoholic beverages imported by consuls from customs duties, he said that in diplomatic and consular practice and in that of the United Nations, supplies were bought in the name of the institution concerned and were distributed to officials considered to have social obligations. The head of post was usually responsible for the proper distribution of supplies.

85. Finally, he agreed with Mr. Bartoš that a draft international convention prepared by the Commission must be both a consolidation of existing law and a proposal for the development of international law.

86. Mr. ŽOUREK, Special Rapporteur, observed that there seemed to be no substantive disagreement on paragraphs (a) and (b). He welcomed the desire of members for broadening the terms of paragraph (c); nevertheless, if his more restrictive wording were replaced by that of article 34 of the diplomatic draft, the provision would cover a number of articles, such as alcoholic beverages, tobacco and jewellery, the duty-free import of which might be limited by the regulations established by the legislation of the receiving State, or at any rate by a quota system.

87. With regard to the classes of persons eligible for exemption from customs duties, he pointed out that it was impossible to make distinctions in a general article. Moreover, service staff of diplomatic missions were dealt with in a separate section of the diplomatic draft, whereas no such distinction was made in the consular draft. In his opinion, the article had been discussed thoroughly and could now be sent to the Drafting Committee.

88. The CHAIRMAN, summing up the debate on article 38, observed that the Commission had agreed on the principle contained in the article, but had asked the Special Rapporteur to follow the corresponding provision of the diplomatic draft more closely and to use more general language, instead of an enumeration. The consensus was that the references to a six months' time limit and to importations of personal possessions from the sending State should be deleted. Finally, it was thought that, to prevent any possible abuses of paragraph (c), some wording similar to the phrase "in accordance with the regulations established by its [the receiving State's] legislation" in article 34 of the diplomatic draft should be inserted. He suggested that article 38 should be referred to the Drafting Committee with those indications.

It was so agreed.

The meeting rose at 1.5 p.m.

543rd MEETING

Thursday, 19 May 1960, at 9 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities
(A/CN.4/131, A/CN.4/L.86) [continued]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (A/CN.4/L.86)
(continued)

ARTICLE 39 (*Exemption from personal services*)

1. Mr. ŽOUREK, Special Rapporteur, introducing article 39 of his draft, said that it corresponded to article 33 of the draft on diplomatic intercourse and immunities. Under paragraph (a) of article 39, members of the consular staff, their families and private staff were exempted from all personal services, such as those imposed by the receiving State on all its nationals in cases of emergency, and from all public service, such as jury duty and similar obligations. The paragraph also covered exemption from military service.

2. The provision in paragraph (b) related to exemption from material military obligations and in particular, from requisitioning, taxation or billeting; it was based on similar provisions in many consular conventions.

3. Both paragraphs contained the proviso that to be eligible for the exemption the persons concerned must not be nationals of the receiving State. Although a separate article (article 42) contained general provisions concerning the position of members of the consular staff who were nationals of the receiving State, it seemed desirable, if not indispensable, to include that proviso in article 39. Besides, such persons were also the subject of express provisions in some of the articles of the diplomatic draft, despite a general provision covering them.

4. Mr. YOKOTA drew attention to the discrepancy between the categories of persons enjoying immunity under the consular and the diplomatic drafts respectively. Under draft article 39, the exemption was granted not only to consular officials, but also to service staff and private servants, according to the definition of "members of the consular staff" in article 1. Article 33 of the diplomatic draft, however, read in conjunction with article 36 of the same draft provided the exemption only for diplomatic agents and the administrative and technical staff of the mission. (Article 36 of the diplomatic draft specifically excluded service staff and private servants from the benefit of article 33.) It would seem either that the Commission had erred in failing to exempt service staff and private servants of diplomatic missions or else that the Special Rapporteur's draft was going too far in extending