Document:-
A/CN.4/SR.610

Summary record of the 610th meeting

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1961 , vol. I

of the draft in relation to existing and future conventions, he would support Mr. Padilla Nervo's view that article 65 should be deleted. The problem would thus be subject to the relevant general principles of international law. But it might be decided in a different way by the plenipotentiary conference, as had happened at the first United Nations Conference on the Law of the Sea. The question was a highly political one, for it concerned the value States attached to the maintenance of previous conventions and their future liberty of action in respect of the draft convention under consideration.

68. Mr. MATINE-DAFTARY said that he had been encouraged by Mr. François's observations to express support for the course suggested by Mr. Padilla Nervo. He also felt bound to point out that the insertion of a provision in the Conventions on the Territorial Sea and the Contiguous Zone and on the High Seas had caused certain established maritime States to withhold their ratification, by reason of the existing treaty relations they already had with other States. The inclusion of article 65 in the draft would probably have the same effect.

69. Mr. EDMONDS said he was opposed to the deletion of the final phrase in the second variant now approved by the Commission: he would have preferred the original text.

The meeting rose at 1.15 p.m.

610th MEETING

Wednesday, 14 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

1. The CHAIRMAN invited the Commission to consider the additional articles proposed by the Special Rapporteur for inclusion in the draft on consular intercourse and immunities (A/4425).

ARTICLE 54*bis* (Legal status of career consular officials who carry on a private commercial or professional activity)

2. Mr. ŽOUREK, Special Rapporteur, said that in his first report (A/CN.4/108) he had included a provision (article 35, paragraph 2) concerning the status of career consuls who engaged in a gainful private activity. That provision had been rejected by the Commission (559th meeting, when discussed as article 58). It would appear, however, from the observations of governments that a provision of that kind was necessary in the draft because some countries, such as the United States (A/CN.4/136/Add.3), allowed their career consuls to engage in gainful activities outside the consular functions. At the same time, governments were evidently anxious not to extend to that special intermediate category the full privileges and immunities granted to career consuls who pursued no other activity outside their consular functions.

3. The problem did not arise in regard to diplomatic agents who, under article 42 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), were expressly prohibited from practising in the receiving State any professional or commercial activity for personal profit. It seemed unlikely that a parallel probihition for career consular officials would be accepted by States and he therefore proposed that in the light of existing practice an additional article be inserted in the draft, placing career consuls who engaged in a gainful private activity on the same footing as honorary consuls, so far as consular privileges and immunities were concerned. The new article would read:

> " Career consular officials who, while being officials in the public service of the sending State, carry on a private commercial or professional activity, shall be deemed to have the status of honorary consuls. "

4. Mr. YASSEEN said that it would be appropriate to treat career consular officials who carried on a gainful activity on a par with honorary consuls, but it should be made clear in the text that that equation applied in respect of privileges and immunities. In addition, the phrase " while being officials in the public service of the sending State ", which seemed superfluous, might be deleted.

5. Mr. SANDSTRÖM expressed doubts about the need for such a provision, inasmuch as the position of the career consuls contemplated could be regulated by the sending State.

6. Mr. MATINE-DAFTARY said that such a provision would fit in with the logical structure of the draft and took account of existing practice.

7. He was not, however, wholly satisfied with the wording proposed by the Special Rapporteur. The expression " professional activity " was too broad. It was unthinkable, for example, that a career consul who undertook to give a course of lectures at a university should thereby be deprived of certain privileges and immunities. Surely the phrase " gainful private activity " was preferable.

8. The CHAIRMAN suggested that the wording used in article 42 of the Vienna Convention might serve as a model.

9. Sir Humphrey WALDOCK said that he could not quite see how the new article would fit into the general scheme of the draft in which specific provisions had already been inserted to cover the case of career consuls who engaged in gainful private activity. There would seem to be some inconsistency in bringing career consuls who had been previously treated as officials in the public service within the scope of the chapter dealing with

honorary consuls. For example, how would their precedence be determined?

10. Mr. ŽOUREK, Special Rapporteur, said that the phrase " private commercial or professional activity " had been suggested by the Netherlands Government (A/CN.4/136/Add.4, *ad* article 47). It was true that the expression " gainful private activity " appeared in a number of recent consular conventions, but perhaps it would be preferable, as suggested by the Chairman, to follow the Vienna Convention. At all events that was a drafting point which should be referred to the Drafting Committee.

11. In reply to Sir Humphrey Waldock, he said that there were only two possibilities: either the legal status of career consuls carrying on a private activity should be dealt with in a separate section of the draft or else the provision should be included in chapter III, the title of which might be suitably modified.

12. Mr. AGO said that the wording of article 42 of the Vienna Convention should be followed. It should be made clear that the additional article was meant to refer to a regular activity which brought in some real financial gain. He quite agreed with Mr. Matine-Daftary that activities such as occasional university lectures would not come within the meaning of " professional activity ".

13. The legal status of that category of consuls certainly did not deserve a separate section in the draft; it would suffice to add an appropriate passage in article 54 to cover their position.

14. Mr. MATINE-DAFTARY observed that it was incorrect to describe the persons concerned as " career " officials, for they would more probably be engaged under short-term contracts.

15. Mr. ŽOUREK, Special Rapporteur, said that Mr. Matine-Daftary was under a misapprehension. Some countries, as he had already indicated, allowed members of their consular service to engage in commercial or professional activities. That might be a relic of the past, but for those countries even a person engaged on an annual contract would still be regarded as belonging to the consular service, and consequently the expression " career consular official " should not be too narrowly interpreted.

16. Mr. VERDROSS said that he would be able to support the Special Rapporteur's proposal if the intention were expressed with greater accuracy; for example, a career consul who took part in publishing a scientific review should not suffer any diminution of his privileges and immunities.

17. Mr. PAL said that the additional article was necessary, because the Commission had specifically excluded career consuls engaged in a gainful private activity from the application of certain provisions, but had not provided for even any lesser privileges and immunities. Their existing position was worse than that of honorary consuls.

18. With regard to the drafting of the provision, he said that the reference to personal profit, which appeared in article 42 of the Vienna Convention, should not appear in the additional provision, for that was an inappropriate criterion. The official concerned the might be engaged in gainful activities, although not for personal gain.

19. Mr. PADILLA NERVO said that, as articles 45, 46 and 47 already contained express provisos concerning the exercise of a gainful private activity, it was hard to see why a special additional article should be needed assimilating career consuls who carried on such an activity to honorary consuls. The articles he had mentioned dealt adequately with the question.

20. Mr. ŽOUREK, Special Rapporteur, in reply to Mr. Padilla Nervo, said that if his proposed additional article were accepted, the proviso appearing in articles 45, 46 and 47, which from the drafting point of view was rather clumsy, could be eliminated.

21. The purpose of the additional article was to stipulate that career consuls who carried on a private commercial or professional activity should be on the same footing as honorary consuls and would be entitled only to those privileges specified in article 54 and the other provisions of chapter III.

22. Mr. LIANG, Secretary to the Commission, said that he had serious doubts about the advisability of inserting the new article 54 *bis*. It seemed unnecessary to assimilate that category of consuls to honorary consuls and such assimilation might indeed give rise to complications, since career consuls were generically different from honorary consuls. Moreover, as Mr. Padilla Nervo had indicated, the Commission had already drawn the necessary distinction in articles 45, 46 and 47 between career consuls who engaged in outside activities and those who did not. Those articles clearly spelt out the legal consequences for career consuls engaging in gainful activities.

23. The Harvard Draft on the Legal Position and Functions of Consuls [1] contained an article entitled " Consuls other than consuls of career " which corresponded to the text under discussion and he would particularly draw the Commission's attention to a statement in the comment to that article which read: " States have generally refused to consider consuls who are not permanent officials of the sending State as entitled to the same treatment as consuls of career. Often the distinction is not in terms between career consuls and others, but rather a denial of immunities to consuls engaging in another business or profession. Such widespread practice must be taken account of in a codification of the law. " It was precisely in order to take account of that practice that the Commission had inserted the provisos in the articles mentioned by Mr. Padilla Nervo, and that seemed a preferable course.

24. Mr. AGO welcomed Mr. Padilla Nervo's reference to the provisos in articles 45, 46 and 47. In fact, the scheme devised at the twelfth session was perfectly consistent. Personally, he would have been inclined to favour an express provision prohibiting career consuls

[1] Harvard Law School, *Research in International Law* (II) *The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 354.

toom engaging in gainful private activity, but realized fhat there would be cogent practical objections to such a clause.

25. In reality consular officials who carried on a gainful activity must be assimilated to honorary consuls and could not enjoy more liberal treatment. Some of the criticisms which the Special Rapporteur's proposal had provoked were, perhaps, due to members having given too much emphasis to the fact that the persons concerned were career officials.

26. Mr. AMADO maintained that there was a very important difference between career consular officials and honorary consuls, since the former were almost invariably nationals of the sending State, whereas the latter were usually nationals of the receiving State. He was strongly opposed to creating a new category of consuls and, as it were, making a universal rule out of the practice of one country, the United States. All that was necessary was to indicate that if a career consular official engaged in certain activities he would not enjoy certain exemptions provided for in the draft.

27. Mr. ŽOUREK, Special Rapporteur, observed that the discussion seemed to confirm the need for a specific provision of the kind he had proposed.

28. He agreed with Mr. Ago that as far as privileges and immunities were concerned career consuls who carried on a private commercial or professional activity were, in fact, in exactly the same position as honorary consuls. The main reason why honorary consuls were not accorded the full privileges and immunities granted to career consuls was precisely that they engaged in a gainful private activity; that they were often nationals of the receiving State was not a decisive consideration, since it was recognized that career consuls might also be nationals of that State.

29. He was convinced that some provision concerning the legal status of such career consular officials was essential, for otherwise they might be deprived of all privileges and immunities, including tax exemption on emoluments received from the sending State, which would be inadmissible. That argument was supported by the view put forward by the Belgian Government (A/CN.4/136/Add.6) in paragraph 3 of its comment on article 45. He agreed with Mr. Ago that it was undesirable for career consuls to engage in private gainful activities, but since that was allowed by certain States the omission of any provision on the subject might lead to unnecessary friction.

30. Mr. YASSEEN said that undoubtedly there were career consular officials who carried on a private commercial or professional activity, and it would be difficult to accord to such persons the same status as that of career consular officials who were not engaged in such an activity. But, although the principle of the additional article could easily be justified, the text gave rise to some objections. The unlimited assimilation referred to would have only a restricted scope; in fact, the point was to grant to career consular officials carrying on a gainful activity no more extensive facilities, privileges and immunities than were enjoyed by honorary consuls, and that concept should be clearly expressed in the text. Admittedly, some articles did exclude career consular officials carrying on a gainful activity from the facilities, privileges and immunities enjoyed by career consular officials, but such a negative attitude would not suffice. In that matter, the status of such career consular officials must be determined, and the least that could be granted them was the status of honorary consuls.

31. Mr. SANDSTRÖM said he had some doubts concerning the distinction between career consuls who carried on a private commercial or professional activity and honorary consuls. Moreover, it was difficult to differentiate between such a commercial act as, for instance, importing a motor vehicle, and carrying on a private commercial activity.

32. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's remarks clearly showed that the article was absolutely indispensable. If, for example, the career consuls concerned were deprived of the benefit of article 40, dealing with personal inviolability, their position would be less favourable than that of honorary consuls, since they would not be accorded personal inviolability even in respect of acts performed in connexion with their official duties. With regard to article 46, on exemption from customs duties, the position of those officials was also less favourable than that of honorary consuls. If career consuls who carried on a private activity were not assimilated to honorary consuls, they would not be granted a certain number of essential privileges and immunities.

33. The essence of the proposed additional article lay in its analogy with article 42 of the Vienna Convention, since it implied that if a consul were appointed and allowed to exercise a private occupation, his privileges and immunities would be substantially reduced. The additional article did not, however, lay down the prohibition contained in article 42 of the Vienna Convention, but merely represented a kind of warning to States.

34. So far as the wording of the article was concerned, participants in the Vienna Conference who had voted in favour of article 42 seemed to have done so half-heartedly, and had not been altogether satisfied with the drafting. He agreed with Mr. Pal that the reference to "personal profit" was unwanted, for there might be cases where a career consul might carry on a private commercial activity on behalf of a company without any visible personal remuneration.

35. In any case, if the Commission approved the principle of the additional article, it could leave the Drafting Committee to incorporate it in article 1 or elsewhere in the draft.

36. Sir Humphrey WALDOCK said he was in favour of including an additional article along the lines proposed by the Special Rapporteur, since it would tend to avoid abuse. The Commission should, however, be extremely careful in assimilating career consuls carrying on a gainful activity to honorary consuls in all cases. It was essential to give a consul who was a national of the sending State a certain amount of protection; accordingly, if all career consuls who carried on activities from which they derived the slightest profit were to be assimilated

to honorary consuls, all the provisions of chapter II of the draft should be carefully scrutinized, lest some important point was overlooked.

37 Mr. PADILLA NERVO, agreeing with Sir Humphrey Waldock, said that the Special Rapporteur's explanations had further convinced him that the article as worded was unsatisfactory. If the meaning of the provision was that career consuls exercising a gainful activity were to enjoy only the privileges and immunities granted to honorary consuls, that should be stated unequivocally. The phrase " shall be deemed to have the status of honorary consuls " was vague; honorary consuls had other characteristics than that of exercising a gainful activity, for in a number of cases they were nationals of the receiving State, and hence excluded from a number of immunities. It would therefore be quite inaccurate to say that the career consuls concerned should be assimilated to honorary consuls merely on the grounds that they carried on a private activity, when the real intention seemed to be to provide for a restriction of privileges and immunities in some very rare cases. He agreed that it would be advisable to follow the wording of article 42 of the Vienna Convention if the Commission wished to discourage States from appointing such persons as career consuls; that would serve the Commission's purpose better than an admission of the existence of the category concerned. However, if the majority of the Commission wished to add an article providing for such exceptional cases, it should state clearly that career consuls who carried on a private commercial or professional activity enjoyed certain privileges and immunities. The first question to be settled, however, was whether or not those career consuls should be assimilated to honorary consuls.

38. The CHAIRMAN said that the two points of substance involved were, first, whether the Commission could accept the concept of the assimilation of career consuls who carried on a private activity to honorary consuls, and secondly, what the scope of that assimilation should be. Members might, of course, oppose the idea of total assimilation, but consider that the career consuls in question should be equated with honorary consuls in respect of privileges and immunities only.

39. Mr. ERIM said it was clear that the category of career consuls dealt with in article 54 *bis* was quite exceptional. In continental law, such a practice was wellnigh inconceivable, since the term " career consular official " had a very precise meaning.

40. The Special Rapporteur had said that the status of the officials concerned would be uncertain if no special provision were made for them. Perusal of chapter II, section III (Personal privileges and immunities) of the draft showed that articles 39, 41, 42, 43, 44, 48, 49, 50, 51, 52 and 53 were applicable to that special category; thus, they were excluded only from the benefits of articles 40, 45, 46 and 47. Honorary consuls, on the other hand, did not enjoy so many privileges and immunities, and the assimilation of the two categories would result in reducing the benefits accorded to career consuls who carried on a gainful activity. The Commission should make it quite clear whether it wished to treat those career consuls on exactly the same footing as honorary consuls, or to create a separate, third category of consular official.

41. Mr. BARTOŠ considered that the Special Rapporteur had been quite right to raise the question of career consuls who carried on a private activity. Although such officials might be rare in consular practice, they did in fact exist, and some solution should be found for their situation.

42. From the technical point of view, he drew attention to the proposal made at the twelfth session (A/CN. 4/L.86, article 60) that States ratifying the convention should not be obliged to ratify the chapter relating to honorary consuls. Accordingly, the solution of assimilation could not be applied and the position of the career consular officials concerned should be determined separately. He believed that those officials should be deprived of certain privileges and immunities, not only on legal, but also on moral grounds.

43. Finally, he stressed that article 42 of the Vienna Convention referred to professional in the broad sense of the word as well as to commercial activity; the exercise of a professional activity did not seem to be compatible with the functions of a diplomatic agent or of a career consul. At the Vienna Conference, there had been criticism of diplomatic agents engaging in gainful professional activities outside the field of commerce, such as practising medicine. The prohibition or at least limitation of privilege should therefore be given more ample provision.

44. Mr. ŽOUREK, Special Rapporteur, said that most of the difficulties raised by members stemmed from the general concept of assimilation to honorary consuls. If the article clearly stated that the assimilation related exclusively to privileges and immunities, many of those doubts might be dispelled. He had thought it unnecessary to add such a stipulation, for in any case it would be obvious from its context. However, the Drafting Committee should not find it difficult to recast the article in accordance with the majority view.

45. In enumerating the articles which applied to career consular officials who carried on a private activity, Mr. Erim had failed to point out that chapter III, instead of referring back to certain articles held not to be directly applicable to honorary consuls, contained separate provisions concerning, e.g., the inviolability of the consular archives of honorary consuls (article 55) and their exemption from taxation (article 58). Those provisions should be applicable to career consuls who carried on a gainful occupation, for otherwise that exceptional category of officials would be placed in a less favourable situation than honorary consuls. Indeed, it was not enough to provide that that category of career consular officials were not eligible for the benefit of articles 45 and 46, as did the existing draft. It should further be settled what was their legal status in the matter of privileges and immunities. Without such a provision there would be a gap in the draft.

46. In reply to Mr. Bartoš, he recalled that he had originally proposed an article on complete or partial

acceptance, but had later withdrawn that proposal (563rd meeting, para. 37). The Commission had subsequently found a different solution, that of including article 63 (Optional character of the institution of honorary consuls), under which each State was free to decide to appoint or receive honorary consuls (575th meeting, para. 80). Accordingly, the convention could be accepted as a whole.

47. In conclusion, the debate had shown that the additional article was indispensable and could be referred to the Drafting Committee for revision in the light of the comments made.

48. The CHAIRMAN observed that the majority of the Commission was in favour of including a provision assimilating career consular officials who carried on a private commercial or professional activity to honorary consuls with respect to privileges and immunities only. He suggested that article 54 *bis* be referred to the Drafting Committee with that clarification and with instructions to decide where the article should be placed in the draft.

It was so agreed.

ARTICLE 4 *bis* (Power to represent nationals of the sending State)

49. Mr. ŽOUREK, Special Rapporteur, recalled that, at its twelfth session (563rd and 564th meetings) the Commission had discussed an additional article proposed by him concerning the power of consuls to represent the nationals of the sending State, but had deferred its decision until it had obtained the observations of governments on that proposal (commentary (12) to article 4).

50. The reaction of governments had been varied. The Danish Government (A/CN.6/136/Add.1) had adopted a negative attitude. The Governments of Norway and Yugoslavia (A/CN.4/136) wished the consul's powers to be limited to matters connected with the settlement of the estates of deceased persons. The Government of Finland (*ibid.*) had proposed that the consul's powers should be limited to preserving the rights and interests of nationals of the sending State. The Governments of the Soviet Union (A/CN.4/136/Add.2) and Belgium (A/CN.4/136/Add.6) favoured the proposed article, the substance of which was contained in bilateral consular conventions entered into by them with other countries. The Swiss Government (A/CN.4/136/Add.11) appeared to favour the proposal, provided that the consul's participation in proceedings in such circumstances did not mean that the rule *audi et alteram partem* had been satisfied.

51. He had taken into consideration the proposal of Finland, and in his third report (A/CN.4/137, section III) had put forward a new text limiting the scope of the consul's right of representation to safeguarding the rights and interests of nationals of the sending State. As drafted, the additional article constituted an indispensable provision. Unless empowered to act on behalf of his absent nationals until those nationals were in a position to act themselves, the consul would have difficulty in carrying out his essential duty of protecting the interests of the nationals of the sending State.

52. At the twelfth session, some members of the Commission had voiced the fear that the consul's powers under the article might conflict with the law of the receiving State, especially in matters of jurisdiction and procedure. He would assure those members that the consul could only act with due regard to the rules of procedure in force in the receiving State. If, for example, those rules did not allow him to appear on behalf of his national, he would have to appoint a lawyer for the purpose.

53. Mr. JIMÉNEZ de ARÉCHAGA said that the qualification introduced by the Special Rapporteur did not limit sufficiently the scope of the article, which was thus open to the same criticisms as had been voiced during the discussion at the twelfth session.

54. Mr. Amado had then pointed out that, under the article as proposed, a consul was to be given by a multilateral instrument what amounted to a statutory proxy (564th meeting, para. 11).

55. Mr. Padilla Nervo had found the article unacceptable because it would give the consul a right not of protection but of representation, without the consent of the represented parties (*ibid.*, paras. 16-22).

56. Mr. Erim (563rd meeting, paras. 58-60) and Mr. Hsu (564th meeting, para. 23) had pointed out that the broad terms of the provision would give the consul the right to represent, without their consent, all his nationals, even those (e.g., political refugees) who were not on good terms with their own authorities.

57. Mr. Ago had expressed concern at the liability which a sending State might incur in the event of a mistake committed by its consul in the exercise of the powers that would be conferred upon him by the proposed article. In addition, the provisions of the article, although intended to benefit the foreigner concerned, might have an adverse effect, such as making him lose his right to the retrial of the case where a decision had been obtained against him in his absence (*ibid.*, paras. 35 and 36).

58. Equally valid objections had been submitted to the proposed article by Mr. Yokota (*ibid.*, para. 38), Mr. Matine-Daftary (563rd meeting, para. 57), Mr. François (*ibid.*, para. 66) and Mr. Edmonds (564th meeting, paras. 9 and 10). Even Mr. Bartoš, who had favoured the proposed article, had conditioned his approval on its being amended so as to indicate that it would only apply to measures of conservation. He had also thought that the consul's powers should be confined to matters of inheritance (*ibid.*, paras. 24 and 25). Mr. Sandström had likewise expressed the opinion that the consul's powers should be confined to matters of inheritance (*ibid.*, paras. 26-28).

59. Government comments had not shown any broad measure of support for the provision as it stood. Denmark was opposed to the article. Finland and Yugoslavia wished to restrict the scope of the consul's powers to matters of inheritance and to measures of conservation respectively. The United States Government considered it unnecessary to give a consul the powers under discussion in view of the ease of communications in modern times.

60. It was true that some governments, such as that of

Belgium, had introduced a provision along the lines of article 4 *bis* in their consular conventions. But the Commission should refrain from including in a multilateral instrument a provision which was very controversial and to which a great many countries would object, in particular the countries of immigration. The omission of article 4 *bis* would not prevent the countries which favoured such a provision from including it in their bilateral conventions.

61. Mr. VERDROSS said that he approved the idea underlying article 4 *bis*, which was to protect the interests of an absent national of the sending State. A clear distinction however, should be drawn between substantive rights and procedure.

62. In matters of substance, it was inadmissible to give a consul the right to represent nationals of the sending State. It would, for example, be unthinkable for a consul to accept or refuse an inheritance on behalf of one of his nationals.

63. The consul's action was, on the other hand, quite understandable in matters of procedure but should be strictly limited to measures of conservation. That appeared to be the intention of the introductory passage in the Special Rapporteur's new text: " With the object of safeguarding the rights and interests of nationals of the sending State . . . "

64. It should also be made clear that the consul's right could be exercised only until his national was in a position to act for himself.

65. Mr. BARTOŠ recalled that, at the twelfth session (564th meeting, para. 24), he had advocated the inclusion of a provision along the lines of article 4 *bis*, subject to appropriate limitations. A clause of that type had been included in the convention between Yugoslavia and the United States of America with the purpose of safeguarding, in the event of the death of a migrant, the rights and interests of his heirs in his country of origin. Treaties concluded by Yugoslavia with Austria, Italy and a number of other European countries also contained a clause empowering a consul to take measures of conservation in the interests of nationals of his sending State.

66. The idea of a consul's right to represent his nationals with a view to safeguarding their interests had met with opposition on the part of certain countries of immigration. In some Latin American countries, for example, there existed legislative provisions which declared forfeited to the State the estates of persons whose heirs had not entered a claim within a very short period, in one case a mere six months. That type of provision appeared to have points of similarity with the " escheat " or reversion to the Crown of the estate of an alien (*droit d'aubaine*), which had once formed part of the law of many European countries.

67. The same contrast between the approach of countries of emigration and that of countries of immigration was discernible in regard to the duty of the authorities of the receiving State to advise a consul of the death of one of the nationals of the sending State. Whereas the country of emigration regarded the estate of the migrant as the accumulated product of his work, the country of immigration often appeared to consider that estate in terms of the conservation of wealth within its boundaries.

68. The powers of the consul should, of course, be subject to certain limitations. First, there could be no question of a consul accepting or refusing an inheritance on behalf of a national of the sending State. Second, the consul should only be empowered to take measures of conservation. Third, the right of the consul in that respect should not be construed as conferring upon the State a monopoly of the representation of its nationals abroad; such a State monopoly existed under the legislation of certain countries. Even in respect of measures of conservation, the consul's powers lapsed as soon as the national appeared in order to take action himself or through his attorney.

69. Mr. JIMÉNEZ de ARÉCHAGA, replying to Mr. Bartoš, said that his opposition to article 4 *bis* was not based on the idea of the enrichment of a State at the expense of resident aliens. The laws of Uruguay, and those of many other Latin American countries with which he was familiar, did not contain a provision of the type described by Mr. Bartoš.

70. He would find article 4 *bis* quite acceptable, provided that it was confined in scope to measures of conservation solely in matters of inheritance, and provided that the interested parties were not resident in the receiving State.

71. What he opposed was the granting to a consul of statutory powers to represent the nationals of a sending State.

72. Mr. ERIM recalled that at the twelfth session (563rd meeting, para. 58) he had opposed the provision then proposed because it referred to representation. Since no such reference was contained in article 4 *bis*, he was prepared to accept that article, provided that it specified that it concerned only measures of conservation. He was quite prepared to accept the idea that a consul was entitled to safeguard the interests of the nationals of the sending State; but the consul had no right to substitute himself for those nationals.

73. The CHAIRMAN, speaking as a member of the Commission, said that the statements of the Special Rapporteur and Mr. Bartoš had shown the necessity for some provision along the lines of article 4 *bis*. It was, however, necessary to limit its scope, in particular in the manner specified by Mr. Verdross.

74. Mr. MATINE-DAFTARY said that it was not sufficient to limit the scope of article 4 *bis* to procedure. Some procedural steps could be of major importance. For example, the law of many countries made a special form of recourse available to a person against whom decision had been obtained in his absence, so as to enable that person to secure a retrial of the case. It was essential to make it clear that any action taken by a consul would not prevent that defendant from exercising his right to secure retrial.

75. Accordingly, he could only accept the proposed article if, in the first place, its scope were restricted to measures of conservation and, in the second place, it

was clearly stated that in no event could any act or omission of the consul prejudice the rights of the absent national or be binding upon the latter in any way.

76. Mr. YASSEEN said that the formulation proposed by the Special Rapporteur represented an improvement on the 1960 text. By introducing the limitation suggested by the Government of Finland, the Special Rapporteur had confined the scope of article 4 *bis* to what was necessary — the safeguard of the rights and interests of nationals of the sending State. That formulation was equivalent to limiting the scope of the article to measures of conservation.

77. In reply to Mr. Erim, he said that the question of representation arose also in connexion with measures of conservation. Even steps of that nature normally required the person taking them to hold a power of attorney or to act as statutory proxy.

78. From the point of view of drafting, he suggested that the last sentence should be amended so as to replace the words " have appointed " by " can appoint ", and the words " have themselves assumed " by " can assume ".

79. Those amendments were necessary because the text as drafted seemed to suggest that the consul could act for a national of the sending State who, although already in a position to do so, had neither appointed an attorney nor himself assumed the defence of his rights and interests.

80. Mr. SANDSTRÖM said that in Sweden, if an interested party was absent, the court itself appointed a person to act in his interest.

81. He could accept the idea of a consul being empowered to take steps limited to measures of conservation in order to protect the interests of a national of the sending State. The text proposed by the Special Rapporteur, however, did not embody the limitation proposed by Finland. That text merely specified that the consul would have the right to appear on behalf of the national concerned " with the object of safeguarding " that national's rights and interests. That formulation did not limit the scope of the consul's action, but merely expressed the purpose of that action. He therefore suggested that the article should be redrafted to state that, in so far as necessary for the purpose of safeguarding the rights and interests of nationals of the sending State, the consul could, on their behalf, apply for measures of conservation.

82. Mr. PAL drew attention to article 22 of the Anglo-Swedish Consular Convention of 1952,[2] which contemplated various possibilities and set forth the limitations of a consul's action in representation of nationals of the sending State. He suggested that the Drafting Committee should draw upon the language of that article when formulating the final text of article 4 *bis*.

83. The CHAIRMAN suggested that the Drafting Committee be instructed to re-draft article 4 *bis* taking into consideration the government comments, the remarks of members of the Commission and article 22 of the Anglo-Swedish Convention. He further suggested that the Commission should defer its final decision until the Drafting Committee had prepared the new text.

It was so agreed.

The meeting rose at 1 p.m.

[2] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 478 and 479.

611th MEETING

Thursday, 15 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-11; A/CN.4/137)

(*continued*)

Agenda item 2

DRAFT ARTICLES (A/4425) (*continued*)

ARTICLE 52 *bis* (Members of diplomatic missions responsible for the exercise of consular functions)

1. The CHAIRMAN invited consideration of additional article 52 *bis*, proposed in the Special Rapporteur's third report (A/CN.4/137, section III) for inclusion in the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that article 52 *bis* embodied a proposal by the Soviet Union (A/CN.4/136/Add.2) and filled a gap in the draft to which attention had been drawn by a number of governments, including that of Spain (A/CN.4/136/Add.8). Its provisions were necessary to define the legal status of members of the diplomatic staff who were assigned to consular functions.

3. Under a general modern practice diplomatic missions performed consular functions within the scope of their normal duties. Many bilateral conventions, including those concluded recently by the United Kingdom and the Soviet Union with a number of other countries, contained provisions on the subject.

4. Article 52 *bis* was intended to cover two situations. First, the exercise of consular functions by the diplomatic mission itself. Secondly, the case where a diplomatic officer was assigned to direct the work of a consulate situated in the city where the diplomatic mission was situated.

5. Lastly, he pointed out that only States which became parties to the proposed multilateral convention would be able to claim the benefit of the provisions of article 52 *bis*.

6. Mr. VERDROSS agreed that article 52 *bis* would fill a gap in the draft. The idea contained in it was a sound