Department of External Affairs

CLASSIFIED

File No. 20-3-1-6

Subject: POLITICAL AFFAIRS - TREATIES & AGREEMENTS - TREATY MAKING POWERS - LAW OF TREATIES - ILC CODIFICATION PROJECT

REPLACES FILE 5475-AX-8-40

Vol. 5
From 1 May 68
To 31 Jul 68

References to Related Files

File No.	Subject
20-5-2-2	I.L.C.

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File No. 20-3-1-6 Vol. 5

CANADA

DATED FROM 1 MAY 68 FILE No. 20-3-1-6

TO 31 JUL 68 VOLUME No. 5

CLOSED VOLUME

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CGSB 6-GP-31A PP&S CAT. No. 3607

Direction juridique/J. Demers/mb

file re Law of Treaties - ILC Codif

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À
M. D.M. Miller
M. J.S. Stanford
M. P.A. Lapointe
Mlle. J. Caskey

FROM / De
J. Demers

REFERENCE / Référence

SUBJECT / Sujet
Développements prévus à la 23e Session de l'Assemblée Générale

SECURITY / Sécurité: SANS COTE

DATE: le 31 juillet 1968

NUMBER / Numéro

FILE	DOSSIER
OTTAWA	20-3-1-6.
MISSION	32 —

ENCLOSURES / Annexes

DISTRIBUTION

La Direction des Nations-Unies est à mettre au point, comme à chaque année, un exposé sur le sujet en référence et destiné à nos observateurs parlementaires. Bien entendu, cet exposé ne doit contenir aucune information classifiée.

2. Notre Direction est invitée à reviser et mettre à date les commentaires ci-joint préparés l'an dernier pour la meme fin. On nous demande de remettre ces textes dans leur version anglaise et française d'ici une semaine. On demande également, dans tous les cas où la chose est possible, de faire état de la position ou du point de vue canadien sur le sujet traité.

3. Vous êtes prié de reviser les sujets de votre compétence traité dans le document ci-joint et de remettre le texte ainsi revisé au soussigné dans le plus bref délai possible.

J. DEMERS

J. Demers

Aide-mémoire:

Votre réponse au mémoire "Commentaires pour la 23e Session Générale des Nations-Unies du 4 juillet dernier est aussi attendu dans les plus brefs délais afin d'en permettre la coordination et la revision par monsieur Gotlieb.

002022

SIXTH COMMITTEE

Report of the International Law Commission on the Work of Its Nineteenth Session

The International Law Commission, a body of legal experts appointed and acting in their personal capacity to codify and develop international law, devoted its nineteenth session in Geneva almost exclusively to the subject of Special Missions. Its report, including some fifty articles on the subject, will be considered by the Sixth Committee, as will future work to be assigned to the Commission. However, there will probably not be an extensive debate on the Commission's report but merely a decision to inscribe Special Missions on the agenda of the twenty-third session, allowing member governments to make detailed comments on the Commission's draft articles during the interim period.

Law of Treaties

Last year, the International Law Commission produced an extensive draft on the Law of Treaties on which member governments have been asked by the Secretary-General to comment in writing. In light of these comments the Sixth Committee will arrange for a conference of plenipotentiaries to be held in Vienna some time during the period March - May, 1968. It seems possible that the Sixth Committee may discuss the Commission's draft in detail although it may prefer instead to leave this to the Vienna Conference.

Principles of International Law Concerning Friendly Relations

This item, which the Sixth Committee has been considering for several years, relates to the codification and progressive development of seven principles of international law enumerated in the Charter of the United Nations. In 1963, an intersessional Special Committee was established which met in Mexico City in 1964, in New York in 1966 and in Geneva this year. It is the Special Committee's latest report which the Sixth Committee will be considering. So far only four of the seven principles have been formulated on the basis of generally agreed texts and it seems likely therefore that the Sixth Committee will decide to reconstitute the Special Committee and to direct it to hold another meeting, possibly sometime during 1968, in order to complete its work of drafting a declaration on all the principles.

Methods of Fact-Finding

This item results from a four-year old initiative by the Netherlands for a study and examination of methods of impartial fact-finding in the peaceful settlement of international disputes. Over the years the Secretary-General has produced two comprehensive reports and member governments have had opportunities to make written comments.

Generally speaking there is little disposition to accept the Dutch suggestion that a new organ for fact-finding should be established until the examination and analysis of present methods of fact-finding is complete. In particular the Sixth Committee may decide to determine first why existing methods of fact-finding have not been resorted to more frequently and what if anything can be done to improve them.

Declaration on Territorial Asylum

The draft declaration on the Right of Asylum was prepared initially by the Commission on Human Rights and subsequently considered by the Third Committee. It was allocated to the Sixth Committee in 1965, and last year a special working group on the draft was created by the Sixth Committee. It is likely, therefore, that the Sixth Committee will discuss this report with a view to adopting the draft declaration during the twenty-second session.

Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law

This item concerns the desire by developing countries to obtain greater technical assistance on the subject of international law. A report by the Secretary-General, suggesting a programme for special assistance in this field was accepted by the Sixth Committee last year. Therefore, the debate on this item at the twenty-second session will be in the nature of a progress report on this programme.

Declaration and Treaty on the Peaceful Use of the Sea-bed and Ocean Floor beyond the Limits of Present National Jurisdiction

This is a new item proposed by Malta. If Malta wishes to stress the disarmament aspects of its proposal, this item may be assigned initially to the First Committee or to the Special Political Committee. However, it seems likely that it would eventually be considered by the Sixth Committee as it proposes the drafting of a treaty with serious implications for the law of the sea. As the item is so new it is difficult to predict what, if any, detailed consideration will be given to it by the Assembly during its twenty-second session. It seems likely that it may be debated in a preliminary fashion only and then some intersessional body created to study the proposal. The item could, however, be simply stood over for a year to give member governments time to submit written comments on it and then the Sixth Committee or some special committee given the task of drafting the proposed treaty (if this basic proposal is approved in principle). Moreover, it is also quite possible that Malta may come to New York prepared to put forward a draft declaration during the twenty-second session, although because of the legal considerations and economic aspects it seems doubtful that there would be any broad agreement on such a draft at the session and more likely, therefore, that the item will be dealt with more slowly.

OTT110

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TO GENEV 359

INFO EXTER PRMNY

REF YOURTELS 956 AND 962 JUL30

LAW OF TREATIES CONFERENCE 1ST SESSION DOCUMENTATION

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3.30.7

Bell/Ley Stanford 14/8

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The U.S.S.E.A., Ottawa, CANADA.

FROM / De: The Can. Del. to ICSC., Phnom Penh, CAMBODIA.

REFERENCE / Référence:

SUBJECT / Sujet: Vienna Conference on the Law of Treaties - Cambodian Views. 9-28

SECURITY / Sécurité: Unclassified

DATE: 29 July 1968

NUMBER / Numéro: 104

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	32 11

ENCLOSURES / Annexes

DISTRIBUTION

The Department's Legal Division will no doubt be interested in the attached copy of the report of the Cambodian Delegation to the Vienna Conference on the Law of Treaties. This report, which is a copy of the original longhand report of the Cambodian Delegation, appeared in the July issue of Le Sangkum, a political journal edited by Prince Sihanouk, the Chief of State of Cambodia. It is not unusual for reports by Cambodian representatives to be published in such journals in part or in toto.

Commissioner.

18.14.8

Ext. 407B/Bil.

COMPTE RENDU DE LA CONFERENCE DU DROIT DES TRAITES A VIENNE (AUTRICHE)

Vienne le 20 Mai 1968

Le Président de la délégation cambodgienne à la Conférence du droit des traités

A Son Altesse le Ministre des Affaires Etrangères à Phnom-Penh

Objet : Compte-rendu sur la conférence du droit des traités :

J'ai l'honneur de rendre compte à Votre Altesse des travaux de la Conférence précitée.

I. Considérations générales.

La Conférence se tient à Vienne, au Palais de HOFBURG du 26 mars au 24 mai 1968. Cent quatre Etats y sont représentés. La plupart d'entre eux ont tenu à y envoyer leurs meilleurs juristes. La Conférence compte plus de 60 professeurs de droit, de vieux routiers, spécialistes en droit international. Certains d'entre eux ont travaillé sur la question au sein de la Commission du Droit International depuis 18 ans.

Selon lui, la délégation américaine persiste dans ses tergiversations manifestement pour éluder l'examen de l'objet convenu des conversations, autrement dit de la cessation définitive et inconditionnelle par les Etats-Unis d'Amérique, des bombardements et de tous autres actes de guerre sur l'ensemble du territoire nord-vietnamien. « Il n'est pas question, dit M. Xuan Thuy, de la désescalade mutuelle, des concessions réciproques de la part de la République Démocratique du Vietnam, car les Américains sont les agresseurs que tout le monde reconnaît comme tels ; ils ont procédé à l'escalade, c'est à eux de renoncer à l'agression et de faire par conséquent la désescalade. »

Le ministre affirme en outre que la partie américaine a soulevé des problèmes de la « prétendue violation » de la neutralité khmère et lao, perpétrée par les « forces patriotes vietnamiennes ». Elle a préconisé l'engagement qui devrait être « pris conjointement par les Etats-Unis et la République Démocratique du Vietnam de respecter la neutralité et l'intégrité territoriale du Cambodge et du Laos ». « En réponse à cette proposition, dit M. Xuan Thuy, j'ai rappelé à M. Harriman l'objet précis de ma mission et lui ai indiqué pour ce qui concerne le Cambodge, que la République Démocratique du Vietnam ayant déjà souscrit formellement à la reconnaissance et au respect de la neutralité et de l'intégrité territoriale du Royaume frère voisin dans ses frontières actuelles, ne s'opposerait pas à ce que les Etats-Unis fassent de même, mais en dehors du cadre des présentes conversations ».

Cette réponse a mis M. Harriman dans une situation fort embarrassante, précise le ministre qui profite de cette occasion pour remercier, au nom de son pays, Samdech Sahachivin et le gouvernement royal d'avoir accepté la proposition nord-vietnamienne de choisir Phnom-Penh comme lieu des conversations américano-vietnamiennes. Il signale que la République Démocratique du Vietnam préfère toujours notre capitale et regrette beaucoup que les Etats-Unis l'aient refusée. Toujours au nom de son pays, il exprime sa profonde gratitude pour notre soutien constant et fraternel au peuple vietnamien et à son gouvernement dans leur lutte contre l'impérialisme américain, en soulignant combien cet appui leur est précieux et réconfortant, compte tenu de l'influence et de l'immense prestige dont jouit dans l'arène internationale notre chef d'Etat.

Le ministre évoque avec une certaine émotion le souvenir de l'audience dont Samdech Sahachivin daigna l'honorer à Genève en 1962, lors de la Conférence sur le Laos.

J'ai remercié M. Xuan Thuy des marques d'amitié dont il a témoigné à notre égard en nous mettant au courant du déroulement de ses conversations avec M.Harriman, du soutien fraternel accordé constamment par la République Démocratique du Vietnam au Cambodge, ainsi que de ses bonnes paroles à l'adresse de notre chef d'Etat et du gouvernement royal. J'ai insisté sur l'attitude de notre pays vis-à-vis du problème vietnamien et renouvelé notre ferme appui à la juste position du gouvernement de la République Démocratique du Vietnam de même que les assurances de notre solidarité agissante avec le peuple vietnamien dans sa lutte légitime pour la paix, la souveraineté et la réunification de son pays. J'ai souhaité au ministre un brillant succès de sa mission.

Le ministre m'a remercié de ce souhait et m'a signalé que sur le terrain, au Sud-Vietnam, les combattants du F.N.L. étaient en train de remporter victoire sur victoire en infligeant aux forces d'occupation des pertes de plus en plus lourdes et cuisantes, en même temps qu'au Nord-Vietnam, les forces populaires réservaient un sort humiliant à l'aviation américaine, malgré l'accroissement de ses « missions de bombardements » consécutif aux « prétendues » mesures de désescalade de Monsieur Johnson.

Il nous a rapporté ensuite une affirmation faite au cours d'une séance de conversations par M. Harriman selon laquelle ce dernier aurait déclaré que les rapports entre le Cambodge et les Etats-Unis se seraient nettement améliorés depuis un certain temps.

Nous avons fait savoir à Monsieur Xuan Thuy que nous ne savions si nous devions nous y fier et nous en réjouir, en ajoutant : « ce dont nous sommes sûrs, c'est que M. Harriman aurait choisi une mauvaise carte s'il avait misé sur la soi-disant amitié khméro-américaine pour tirer un quelconque avantage des conversations en cours ».

Cette déclaration a suscité le rire des Vietnamiens présents, de même que M. Xuan Thuy qui a tenu à indiquer qu'il avait donné lecture à l'intention de M. Harriman, en réponse à son affirmation, des textes de certaines déclarations récentes du gouvernement royal protestant contre les attaques criminelles des forces américano-sudvietnamiennes dans les régions frontalières du Cambodge, en particulier celle de Bavet à Svay-Rieng.

Le ministre a parlé enfin de sa visite à l'Elysée. Selon le général De Gaulle, dit-il, les instructions ont été données aux autorités françaises concernées pour faciliter par tous les moyens possibles, les conversations dont le gouvernement français a souhaité de tout cœur des résultats positifs. Il a relaté les paroles suivantes du général : « Pour les facilités et le confort d'ordre matériel, la France s'en charge avec la plus grande attention ; pour les conversations, elles sont votre affaire et celle du représentant américain ». Et après une petite pause, M. Xuan Thuy a poursuivi en souriant : « Notre délégation bénéficie du soutien et d'innombrables témoignages de solidarité, d'amitié et de compréhension de la part du peuple français, des hommes comme des femmes, tant de Paris que des provinces ».

* * *

Avant la fin de chaque entrevue, M. Xuan Thuy nous a chargés de présenter à Samdech chef de l'Etat et au gouvernement royal ses respectueuses salutations. Nous l'avons prié de notre côté de transmettre les nôtres au président Hô Chi Minh et au gouvernement de la République Démocratique du Vietnam.

Il est à noter que le ministre Xuan Thuy s'est adressé à nous en vietnamien. Un interprète de sa délégation a assuré la traduction de ses paroles en français.

SONN VOEUNSAI

L'objectif de cette conférence consiste à codifier le droit des conventions, c'est à dire la Convention sur les conventions internationales. L'importance de la matière explique le grand intérêt qu'y accordent la majorité des Etats.

La matière en elle-même est difficile car elle est neuve, technique et soumise à la pression des réalités internationales.

Par rapport aux autres branches du droit, le droit international est jeune. Il prend ses sources dans la pratique, la jurisprudence au contenu assez maigre, et la doctrine.

Il s'agit de codifier à partir de ces éléments dispersés. Les difficultés résident dans le caractère incertain et même douteux pour certains de ces éléments qui constituent les matériaux de base. En plus, le droit international, et surtout le droit des traités est très technique. Jusqu'ici il n'est manipulé que par un groupe assez restreint de spécialistes et de praticiens. A la complexité de la matière s'ajoutent les tiraillements qu'apporte chaque délégation qui tente d'introduire dans ce code de portée générale des règles qui répondent à ses intérêts nationaux particuliers. C'est ce qui se cache dans l'arrière-pensée des auteurs d'amendements, arrière-pensée dont il est fort difficile de connaître le contenu et la portée. Les mots sont loin de correspondre à la pensée réelle et souvent même sont utilisés à dessein pour la mieux camoufler. Chacun essaie de sauvegarder ou de réaliser ses intérêts particuliers en mettant en avant-scène les grands mots de : droit, justice, liberté, souveraineté nationale, paix, stabilité internationale etc.... Dans cette espèce de maison de jeux chinois où tout est brouillé et tout est devinette, l'atmosphère de méfiance est explicable et justifié.

Dans ce climat déjà difficile, la politique n'est pas absente. On peut même dire qu'elle est dominante. Le tableau est le suivant : les Etats Unis sont discrédités et rejetés, le Royaume Uni est au désespoir, la France essaie de remonter difficile

ment sa côté, le Tiers-Monde démuni de tout est à la recherche de grandes formules et de mots pour se cr... se met en quête d'une ombre protectrice, l'Union Soviétiq... paraît comme une superpuissance et a l'adhésion du Tiers-Monde dont elle ressent le malaise du poids qui pèse quelquefois lourdement sur ses épaules.

Notre délégation est composée de trois personnes : Son Excellence Sarin-Chhak, Chéa-Dèn et Tsong Ganthy. En présence de cette situation difficile et délicate, il nous appartenait de définir notre position. Elle est la suivante : suivre attentivement les travaux, mettre le maximum de précautions et rester assez discret. Notre objectif consistait à sauvegarder nos intérêts nationaux, et en le faisant, éviter de nous désolidariser du Tiers-Monde, d'affronter les grandes puissances, et de donner l'impression d'emboîter le pas des colonialistes. Ce n'est pas facile car quelquefois nos amis socialistes et certains de nos amis du Tiers Monde pressés par d'autres exigences se trouvent dans l'impossibilité de nous soutenir, et en pareil cas notre unique voie de salut consiste à recourir à l'appui des occidentaux et même d'anciens colonialistes. C'est ce que nous allons voir dans les lignes qui suivent, avec l'examen des principaux articles.

II. <u>Examen des principaux articles</u> - La Conférence a travaillé sur un document de base, le projet de convention établi par la Commission du Droit International, et comprenant 75 articles. Les propositions de modification de ces articles font l'objet d'amendements et de débat général. Les discussions furent longues et approfondies sont concentrées sur un certain nombre d'articles qualifiés d'articles importants ou d'articles-clés.

Le présent rapport se borne à rendre compte des travaux relatifs aux articles concernant nos intérêts et ceux revêtant une haute importance générale.

A - Articles concernant le Cambodge - Cinq articles concernent spécialement nos intérêts : les articles 42, 45, 53, 59 et 70. Tels qu'ils ont été rédigés par la Commission du Droit International, ces articles nous sont très favorables. Mais les changements qu'ont tenté d'apporter certaines délégations à ces articles risquent de nous mettre dans une situation néfaste.

A propos de l'article 42 . Dans le projet de la Commission du Droit International, cet article est libellé comme suit: "Un Etat ne peut plus invoquer une cause de nullité d'un traité, un motif d'y mettre fin, de s'en retirer ou d'en suspendre l'application en vertu des articles 43 à 47 inclus ou des articles 57 à 59 inclus si, après avoir eu connaissance des faits, cet Etat :

a) a explicitement accepté de considérer que le traité, selon le cas, est valide, reste en vigueur ou continue d'être applicable;

ou

b) doit, à raison de sa conduite, être considéré comme ayant acquiescé, selon le cas, à la validité du traité ou à son maintien en vigueur ou en application"

L'alinéa b) contient les arguments utilisés par la Cour Internationale de Justice dans l'arrêt sur l'affaire du Préah Vihéar. Ces arguments ont été inspirés d'un principe de droit interne anglais: l'"estoppel". Ils veulent dire que quand une partie invoque un grief de nullité d'un traité et que ce grief est en contradiction avec son comportement, c'est le comportement qui doit être considéré comme l'émanation de la volonté réelle et non le grief. L'inclusion dans une convention de portée générale qui deviendra un droit des traités, d'un argument utilisé dans un cas particulier constitue pour nous une situation idéale. L'arrêt de la C.I.J. sur Préah Vihéar voit ainsi sa force augmentée et consolidée. Mais cette tentative n'est pas sans

comportait pour nous des risques. Un rejet éventuel de cette disposition par la Conférence c'est à dire par la Communauté Internationale équivaudrait à une désapprobation de l'arrêt par celle-ci. Comme conséquence possible de cette désapprobation, elle permettrait aux Thaïlandais de s'appuyer sur ce motif, soit pour remettre en question l'arrêt, soit pour affaiblir sa force politique ou morale. Cette crainte sera justifiée par les événements.

La délégation du Vénézuéla, dans le but de remettre en question une sentence arbitrale de 1899 à propos de ses frontières avec la Guyane, a introduit un amendement ainsi libellé:

"1 - A la quatrième ligne de la phrase introductive, supprimer les mots: "à 47 inclus ou des articles 57 à 59"

2 - Remplacer ces mots par "à 45"

3 - Supprimer l'alinéa b)

Ainsi modifié, cet article se lirait comme suit:

"Un Etat ne peut plus invoquer une cause de nullité d'un traité, un motif d'y mettre fin, de s'en retirer ou d'en suspendre l'application en vertu des articles 43 à 45 inclus, si, après avoir eu connaissance des faits, cet Etat a explicitement accepté de considérer que le traité, selon le cas, est valide, reste en vigueur ou continue d'être applicable."

Ainsi libellé, l'amendement vénézuélien élargit les cas d'ouverture à la demande d'annulation des traités. Mais ce qui est grave pour nous c'est la suppression de l'alinéa b)

Cet amendement a réuni comme co-auteurs quelques autres pays de l'Amérique Latine (Bolivie, Colombie, Guatémala et République Dominicaine)

Comme cet amendement est aussi favorable à Cuba pour se libérer de la base américaine de Guantanamo, l'URSS et la Biélorussie, pour venir à son aide, se sont portés co-auteurs. Et comme l'Espagne y trouve aussi son intérêt

à propos de ses revendications sur Gibraltar, elle a apporté son appui.

La situation était donc dramatique pour nous. La délégation du Vénézuela a fait circuler un rapport de présentation dont le ton était nettement anti-colonialiste et ce rapport était bien accueilli par de nombreuses délégations des Tiers-Monde associés de pareil thème de propagande. Beaucoup de délégations amies nous ont dit qu'elles étaient réticentes à l'égard de l'alinéa b) qui contenait, d'après eux, une formule trop subjective. L'Amérique Latine était mobilisée par le Vénézuela. L'entité en scène de l'U.R.S.S. entraînerait dans son sillage tous les pays socialistes et plusieurs pays du Tiers-Monde. Donc tout jouait contre nous. Nous nous voyions d'avance minoritaire. Que faire ? Une action, pour être efficace, devait tendre à disperser les voix socialistes, détacher de l'U.R.S.S. les voix du Tiers-Monde, recueillir le suffrage de quelques unes d'entre elles, et nous assurer l'appui à plein de l'Occident.

Après avoir fixé ce plan, nous avons agi de la façon suivante :

1) Action auprès de l'Union Soviétique et des Pays socialistes

Après avoir câblé les difficultés au Département, en lui demandant d'intervenir auprès de l'U.R.S.S. pour obtenir sa désolidarisation avec l'amendement vénézuélien, et en prévision de la lenteur du résultat, nous avons fait sur place les démarches suivantes :

Avant l'ouverture de la séance du 29 avril au cours de laquelle l'article 42 devait être examiné, je suis allé voir les chefs des délégations de l'U.R.S.S. et de la Biélorussie. Je leur ai dit que l'amendement vénézuélien allait à l'encontre de nos intérêts et le maintien à l'article 42 de l'alinéa b) revêtait une importance vitale pour nous.

Mes interlocuteurs m'ont répondu que le désir d'aider Cuba avait poussé leurs délégations à se porter co auteurs de l'amendement vénézuélien. C'est la seule réponse qu'ils m'ont donnée. Mais leur réaction au cours de la séance nous était favorable. Le Chef de la délégation de l'U.R.S.S. demanda au Président de reporter l'examen de l'article 42, au grand mécontentement de la délégation du Vénézuéla et de quelques autres délégations de l'Amérique latine.

Ce report a permis à notre délégation de faire les démarches nécessaires.

Quelques jours après, le Chef de la délégation roumaine m'a invité à sortir de la salle de réunion, et d'aller dans le hall parler avec lui de la question. Il m'a demandé quelles étaient les raisons de notre attachement à l'alinéa b) de l'article 42. Je lui ai dit que c'était une phrase continue dans l'arrêt sur l'affaire de nos frontières avec la Thaïlande, et que la suppression de cet alinéa b) équivaudrait à une désapprobation de cet arrêt, ou du moins diminuerait sa force politique et morale. Il m'a répondu que pour ce qui est de la frontière cambodgienne, les dispositions de l'article 45 étaient déjà suffisantes, et que sa délégation se trouvait dans l'obligation d'appuyer l'amendement vénézuélien pour aider Cuba à supprimer la base américaine de Guantanamo. Je lui ai répliqué que les articles 42 et 45 étaient pour le Cambodge ce qu'un bas de soie était pour une femme. Il suffisait qu'un fil fût rompu pour que le reste fût défait. Je restai sceptique à ses efforts faits pour me convaincre, et lui dis que nous comprenions ses difficultés, mais que nous faisions confiance en lui pour nous aider.

Parallèlement, nous avons fait des démarches auprès d'autres délégations socialistes : yougoslave, roumaine,

tchèque, bulgare, hongrois, mongol et polonais. Certains nous ont répondu qu'ils s'étaient déjà engagés vis à vis de Cuba, d'autres qu'elles s'abstiendraient lors du vote. Le Chef de la délégation polonaise que j'ai vu personnellement, et à qui j'ai fait l'éloge du rôle joué par la Pologne en faveur du Cambodge (attitude favorable du juge polonais dans l'arrêt sur Préah Vihéar, participation de la Pologne à la C.I.C.) m'assura de sa compréhension et de sa sympathie pour notre cause. Quelques jours après, il est venu me communiquer que notre problème avait fait l'objet d'une discussion entre pays socialistes réunis à cet effet, et qu'à cette occasion certains de ces pays avaient bien noté notre cause juste et bien fondée, mais que tous s'étaient placés devant les difficultés dues à l'engagement vis à vis de Cuba. Il ajouta en ce qui concernait sa délégation, elle voterait abstention. Je l'ai remercié vivement de ses efforts.

2 : Action auprès du Tiers Monde - Comme je l'ai dit plus haut, la plupart des délégations du Tiers Monde étaient fascinées par le ton anti-colonialiste de l'amendement et du rapport de présentation vénézuéliens. Cette disposition était renforcée par l'influence qu'exerçait l'Union Soviétique. Notre tâche était donc très ardue. Elle était diverse en fonction des moyens que nous avions en perspective.

Nous avons utilisé

- l'argument de la cause commune : c'est le cas avec l'Algérie et le Pakistan,
- les relations personnelles : c'est le cas avec Singapour, la Malaisie, les Philippines, l'Indonésie, le Mali, le Congo-Kinshasa,
- la solidarité entre francophones : c'est le cas avec la Tunisie, la Côte d'Ivoire, le Gabon, le Dahomey, le Sénégal, la République Centrafricaine, le Madagascar, le Liban,

servi de simple appât, il n'avait plus de raison d'être dès que le but était atteint. Beaucoup de délégations amies, dont la française et la soviétique, vinrent nous féliciter de l'habileté de cette manœuvre.

Après le vote de l'alinéa b) de l'article 42, le Chef de la délégation thaïlandaise fit, sur un ton furieux, une déclaration à peu près dans dans ces termes: "Mon pays a été victime de l'application du principe de l'estoppel par la Cour Internationale de Justice. Mon Gouvernement tient à souligner qu'il ne partage absolument pas le raisonnement sur lequel la Cour a fondé sa décision, à laquelle un certain nombre de juristes éminents n'ont pas donné leur approbation. Ma délégation a évité d'influencer la Conférence en s'abstenant d'introduire des amendements ou de prendre la parole. Le présent vote nous fera réfléchir encore sur l'attitude des gouvernements vis-à-vis de cette question." Après avoir prononcé ces paroles, il quitta la salle, laissant la conférence très surprise. La délégation bulgare vint nous dire après, que la déclaration thaïlandaise lui fit comprendre davantage l'importance que nous tenions à l'article 42.

Voici la liste nominative du vote:

- Pour la suppression de l'alinéa b): Kénya, Mexique, Mongolie, Espagne, Ukraine, U.R.S.S., Vénézuéla, Bolivie, Bulgarie, Biélorussie, Colombie, Congo Brazzaville, Cuba, République Dominicaine, Equateur, Guatémala, Honduras, Hongrie, Inde, Iran.

- Contre la suppression de l'alinéa b): Japon, Koweit, Liban, Liechtenstein, Madagascar, Malaisie, Mali, Monaco, Pays-Bas, Nouvelle Zélande, Nigéria, Norvège, Pakistan, Pérou, Philippines, Portugal, République du Viet Nam, Singapour, République du Sud, Suède, Suisse, Turquie, Royaume-Uni, Tanzanie, Etats Unis d'Amérique, Algérie, Australie, Autriche, Belgique, Brésil, Cambodge,

Canada, Ceylan, Chili, Chine, Congo Kinshasa, Danemark, République Fédérale d'Allemagne, Finlande, France, Gabon, Ghana, Guyane, Irlande, Italie, côte d'Ivoire, Jamaïque.

Abstention : Libéria, Maroc, Pologne, République de Corée, Roumanie, Sénégal, Sierra Léone, Syrie, Thaïlande, Trinité et Tobago, Tunisie, République Arabe Unie, Yougoslavie, Zambie, Afghanistan, Argentine, République Centrafricaine, Chypre, Tchécoslovaquie, Dahomey, Ethiopie, Grèce, Guinée, Saint-Siège, Indonésie, Irak, Israël

Commentaire du vote : Comme on peut le voir par ce tableau, l'objectif que nous avions visé était atteint.

Dans le vote pour la suppression, on compte :

- 7 pays socialistes dont 2 co-auteurs,
- 8 pays de l'Amérique Latine dont 5 co-auteurs,
- 1 pays de l'Europe, l'Espagne dont les intérêts rejoignent ceux du Vénézuela,
- 4 pays du Tiers-Monde (Kénya, Inde, Iran, Congo Brazzaville)

Dans le vote contre la suppression, on compte :

- 21 pays occidentaux (y compris les U.S.A, Canada, Australie, Nelle Zélande, Afrique du Sud)
- 21 pays du Tiers-Monde,
- 5 pays de l'Amérique Latine.

Dans la liste des abstentions, on compte :

- 4 pays socialistes,
- 18 pays du Tiers Monde,
- 3 pays de l'Europe,
- 2 pays de l'Amérique Latine

Ce sont donc les pays de l'Occident (presque la totalité) et la majorité des pays du Tiers Monde qui nous ont sauvé. Mais il faut aussi reconnaître que les pays socialistes, bien qu'in-

à son extinction et ne prévoit pas qu'on puisse le dénoncer ou s'en retirer n'est susceptible de dénonciation ou de retrait, à moins que la nature du traité, les circonstances de sa conclusion ou une déclaration des parties n'admettent la possibilité de le dénoncer ou de s'en retirer"

Les termes: "les circonstances de sa conclusion" pourraient permettre aux Thailandais de s'en prévaloir pour remettre en cause les traités passés entre le Siam et la France au sujet de nos frontières de l'Ouest. Nos délégués aux négociations de Bangkok doivent se rappeler encore qu'à plusieurs reprises, le Prince Wan Waithayakon, Chef de la délégation thailandaise a à plusieurs reprises soutenu que les traités de 1904 et 1907 avaient été conclus sous la pression de la France, de la France colonialiste, a-t-il répété. L'amendement cubain semblait permettre à cette thèse de se prévaloir. Il permettait donc la dénonciation de ces traités, en raison des circonstances de leur conclusion. La délégation thailandaise n'a pas laissé échapper cette occasion trop belle pour son pays. Elle appuya l'amendement cubain, en disant dans ses interventions: "La délégation thailandaise est donc d'avis que la nature des traités et les circonstances de leur conclusion ne sont pas moins importantes que l'intention des parties pour déterminer la possibilité de dénoncer un traité. L'amendement cubain répond parfaitement à ce point de vue".

Il nous était pénible de prendre une position contre l'amendement de Cuba, vu les bonnes relations entre ce pays qui a reconnu nos frontières et le nôtre. Avant le vote nous étions en présence d'un cas de conscience assez difficile. Finalement, nous avons décidé de voter

contre, nos intérêts nationaux l'exigeaient. Le résultat du vote nous donna raison. Il fut suffi que nous votâmes abstention pour que l'amendement cubain fut adopté. Voici le résultat de ce vote: 34 pour, 34 ~~abstention~~ contre et 24 abstentions, l'amendement ne fut pas adopté. Devant ce résultat, nous avons tremblé de peur et de joie.

M. le Professeur Reuter a participé à notre émotion et me dit après le vote: "Ah! vous avez de justesse enlevé une épine de vos pieds!"

A propos de l'article 59. Dans le projet de la Commission du Droit International, cet article est libellé:

"1. Un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion d'un traité et qui n'a pas été envisagé par les parties ne peut pas être invoqué comme motif pour mettre fin au traité ou pour s'en retirer,

a) à moins que l'existence de ces circonstances n'ait constitué une base essentielle du consentement des parties à être liés par le traité; et

b) que ce changement n'ait pour effet de bouleverser radicalement la portée des obligations qui restent à exécuter en vertu du traité.

2. Un changement fondamental de circonstances ne peut pas être invoqué:

a) comme motif pour mettre fin à un traité établissant une frontière ou pour se retirer d'un tel traité;

b) si le changement fondamental résulte d'une violation, par la partie qui l'invoque, soit du traité, soit d'une obligation internationale différente à l'égard des autres parties au traité"

Cet article avait été inclus sur l'initiative de la délégation soviétique au sein de la Commission du

Droit International. Comme tel, il nous est favorable car il enlève aux Thaïlandais un argument pour demander la dénonciation des traités conclus entre le Siam et la France.

Or, le délégué de l'Afghanistan, dans le dessein de soulever des revendications territoriales contre le Pakistan à propos du Pouchtounistan (dans la région de Peshawar) a fait une campagne pour la suppression du paragraphe 2 alinéa a). Les Soviétiques ont eu peur et sont venus nous proposer de nous opposer à la proposition afghane. Nous nous sommes excusés très courtoisement de ne pouvoir accepter cette charge. Puisque nos intérêts se trouvent déjà bien protégés derrière la muraille expugnable de la puissante U.R.S.S. ce serait pour nous un luxe et une grave maladresse d'accepter ce rôle de bouc émissaire, qui eût pu créer pour notre pays un ennemi : l'Afghanistan.

Finalement, la proposition du Président tendant à renvoyer l'article au comité de rédaction avec un amendement d'ordre rédactionnel du Canada a reçu l'agrément de la conférence, malgré la vive protestation du délégué afghan. La proposition afghane de suppression du paragraphe 2 alinéa a) n'a pas été mise aux voix

A propos de l'article 70 - La règle générale posée par l'article 30 est que "un traité ne crée ni obligations ni droits pour un Etat tiers sans le consentement de ce dernier". Si cette règle générale devait être appliquée partout, que deviendraient les accords de Potsdam conclus entre vainqueurs pour régler le sort des vaincus de la 2e guerre mondiale, sans la participation de ces derniers qui sont dans ce cas des Tiers!. C'est pourquoi sur l'initiative du délégué soviétique au sein de la

Commission du Droit International, une réserve a été prévue dans l'article 70 ainsi libellé: "Les présents articles ne préjudicient pas aux obligations qui peuvent résulter à propos d'un licite, pour un Etat agresseur, de mesures prises conformément à la Charte des Nations Unies au sujet de l'agression commise par cet Etat"

Le délégué de la République d'Allemagne Fédérale a voulu introduire un amendement pour changer cet article mais n'a pas osé le faire. C'est le délégué du Japon qui a déposé un amendement ainsi libellé: "La présente convention ne préjudicie pas aux obligations qui peuvent résulter pour un Etat, à propos d'un licite, d'une décision obligatoire prise par le Conseil de Sécurité de l'Organisation des Nations Unies." La délégation thaïlandaise, de son côté, a introduit un amendement de teneur presque identique: "Les dispositions de la présente Convention ne préjudicient pas aux obligations qui peuvent résulter, à propos d'un licite, des mesures prises conformément à la Charte des Nations Unies"

Dans les deux amendements les termes agresseur et agression ont disparu. C'est pourquoi ils ont provoqué une violente attaque des Soviétiques qui ont accusé leurs auteurs de vouloir favoriser les agresseurs, les fauteurs de guerre, responsables de la perte de plusieurs dizaines de millions de vies humaines.

Ces deux amendements mis aux voix, ont obtenu le suffrage suivant:

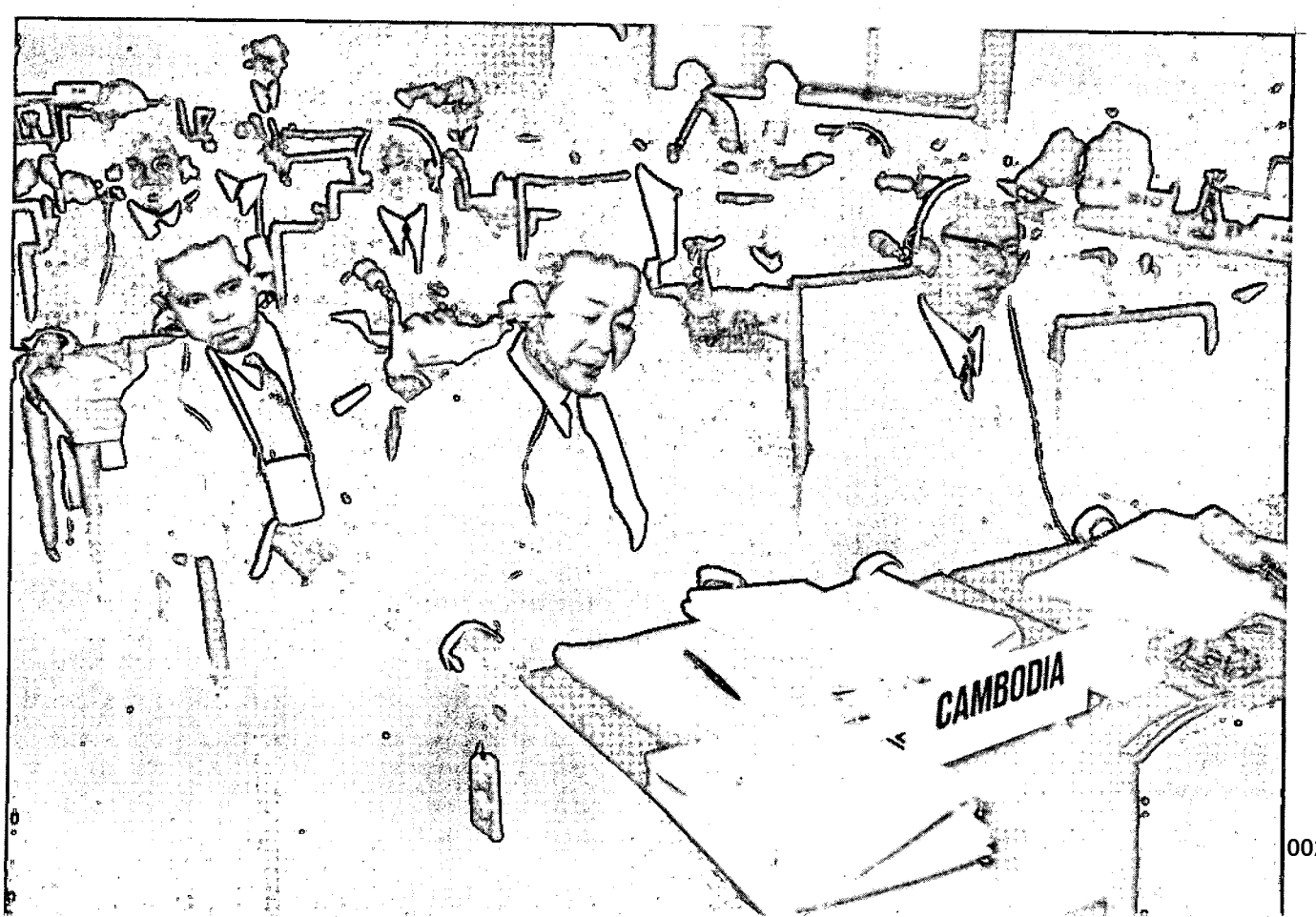
- Amendement japonais: Voté pour : 7
  Voté contre : 58,
  Abstention : 24

- Amendement thaïlandais : Voté pour : 4
Voté contre : 54
Abstention : 30

L'amendement thaïlandais nous concerne dans la mesure où son auteur visait à rejeter la validité de la décision de la Commission de Conciliation tenue à New York en 1947, décision prise par les délégués de trois Puissances (Etats Unis d'Amérique, Royaume Uni, Siam) de rétablir la situation prévalant en 1937 (ce qui équivaut à l'annulation du traité de Tokyo de mai 1941), et qui a été contesté par la Thaïlande, Etat associé aux Puissances de l'Axe. En vertu de l'article 30 cette décision ne peut donc pas créer d'obligations pour la Thaïlande, Etat tiers.

Dans le prochain rapport, je rendrai compte de la suite des travaux.

Copie à :
- Son Excellence Samdech Penn Nouth
- Son Excellence Son Sann



EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: The U.S.S.E.A.,
Ottawa, CANADA.

The Can. Del. to ICSC.,
Phnom Penh, CAMBODIA.

FROM / De:

REFERENCE / Référence:

SUBJECT / Sujet: Vienna Conference on the Law of Treaties - Cambodian Views.

SECURITY / Sécurité: Unclassified

DATE: 29 July 1968

NUMBER / Numéro: 104

FILE	DOSSIER
OTTAWA	
MISSION	

ENCLOSURES / Annexes:

DISTRIBUTION:

The Department's Legal Division will no doubt be interested in the attached copy of the report of the Cambodian Delegation to the Vienna Conference on the Law of Treaties. This report, which is a copy of the original longhand report of the Cambodian Delegation, appeared in the July issue of Le Sangkum, a political journal edited by Prince Sihanouk, the Chief of State of Cambodia. It is not unusual for reports by Cambodian representatives to be published in such journals in part or in toto.

R.V. GORHAM

Commissioner.

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LDN366

July 19/6 20-3-1-6 Kapitborne Stafford O/R

INFO ONLY

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TO GENEV 354

INFO PRMNY EXTER(LEGAL DIV)

MCKINNON DE WERSHOF

REF EXTER LET L501 JUN13 YOURTEL 728 JUN13

LAW OF TREATIES CONFERENCE FIRST SESSION-REMAINING DOCUMANTATION

I HOPE YOU CAN FIND SOMEONE IN UN GENEV WHO REALLY KNOWS WHAT IS

HAPPENING AOUT THIS DOCUMENTATION. I REFER PARTICULARLY TO

MISSING PARTS OF DRAFT RAPPORTEURS REPORT LISTED IN MYTEL

274 JUN10.

1.25.7

20-3-1-6

ACTION COPY

FM COPEN JUL 18/68 CONFD NO/NO STANDARD

TO TT EXTER 345 DE HAGUE

REF VIENN LET MAY25

LAW OF TREATIES CONFERENCE

RECEIVED COPY OF RECORD OF CDN-UK CONSULTATIONS ON UN QUESTIONS HELD IN OTT JUN10.FOLLOWING APPEARS UNDER HEADING OF PEACEFUL SETTLEMENT OF DISPUTES BEGINS:LORD CARADN NEXT REFERRED TO THE DIFFICULTIES WHICH HAD ARISEN AT THE LAW OF TREATIES CONFERENCE IN VIENN ON THE ARTICLES RELEVANT TO PEACEFUL SETTLEMENT AND HE SUGGESTED THAT INTERESTED WESTERN GOVTS MIGHT EXCHANGE VIEW BEFORE THE CONFERENCE RECONVENES NEXT YEAR.WE AGREED THAT THIS WOULD BE A GOOD IDEA BUT THERE WAS NO/NO SUBSTANTIVE DISCUSSIONS OF DETAILS.END OF EXTRACT.

2.REFLET REPORTED ON OLD COMWEL-USA DISCUSSION IN VIENN MAY24 AT CLOSE OF FIRST SESSION OF LAW OF TREATIES CONFERENCE AND IN PARA9 WE MENTIONED IDEA OF HOLDING A MTG OF THIS GROUP OF FIVE COUNTRIES IN NY OR WSHDC THIS AUTUMN PERHAPS IMMEDLY PRIOR TO OPENING ON SEP9 OF SPECIAL CTTEE ON FRIENDLY RELATIONS.

3.I VENTURE TO RPT THIS SUGGESTION ALTHOUGH I PERSONALLY HAVE NO/NO WISH TO GO TO NY OR WASHDC AT THAT TIME.THIS GROUP OF FIVE MUST SORT OUT AND HOPEFULLY COORDINATE VIEWS ON MAIN ISSUES OF SECOND SESSION OF CONFERENCE LONG BEFORE(MONTHS BEFORE)THEY PARTICIPATE IN A WEO MTG THAT MIGHT BE SET UP EARLY IN 1969.IN MY VIEW THE PROCEDURE FOLLOWED EARLY IN 1968 IS UNSATISFACTORY IE MTG OF OLD COMWEL-USA IMMEDLY PRIOR TO WEO MTG

WERSHOF

CANADIAN EMBASSY

AMBASSADE DU CANADA

Prinsesse Maries Allé 2,
1908 COPENHAGEN V, Denmark,
July 9, 1968.

CONFIDENTIAL

20-3-1-6

Dear Allan,

Re: Law of Treaties Conference - ~~Second~~ Session in Vienna April 1969 - Question of action on Article 5 para(2).

I have no doubt that Legal Division is working on this subject and has been or will be sending memoranda and suggestions to you and the Under-Secretary.

However, I thought it would do no harm to send you a personal note on the necessity, as I see it, of the Department and the Government taking a decision within the next couple of months regarding Article 5.

I shall not repeat here the text of the suggestions I sent from Vienna. Perhaps you would ask Legal Division to send over to you Vienna Letter No. 254 which I sent on April 30, 1968.

It seems to me that the first thing the Department, and presumably Ministers, have to decide is how seriously they wish to treat this question. If they wish to treat it very seriously, there appear to be two possible courses of action which could perhaps be pursued simultaneously although I am not sure that it would be a good idea to try both of them:

(1) To launch a diplomatic campaign in order to ensure that we have more than enough votes to knock out paragraph (2) of Article 5. We will also need to be certain that we have the assurance of a simple majority to obtain a separate vote on this paragraph;

(2) To negotiate with the USSR in the hope of obtaining an amendment to paragraph (2) that would take the curse off it from our view-point.

...2

Mr. Allan Gotlieb,
Legal Adviser,
Department of External Affairs,
OTTAWA.

Received
JUL 16 1968
In Legal Division
Department of External Affairs

002047

16.7.11(us)

CONFIDENTIAL

I am not optimistic about course no.(2) and, if it were up to me, would not take the initiative in negotiating with the USSR. Of course, if the Soviets were to approach us, that would be a different matter.

If the Department and the Government decide within the next couple of months to launch a diplomatic campaign, I am confident that we shall be able to defeat paragraph (2) of Article 5, and this is the course of action that I favour. We should not attack or try to amend paragraph (1) of this Article, although most Western delegates consider it unnecessary and without meaning. Many other delegations at Vienna seem to have an emotional liking for paragraph (1) and it is not worthwhile to argue with them about it.

I hope that you or Legal Division will in due course let me know what is likely to be put up to the Government on this particular problem.

Yours sincerely,

M. H. Wershof.

P.S. Ivan Head was here a few days ago and I expounded this to him, as he will presumably take an interest in it for the P.M.

M.H.W.

jul 20-3-1-6 Beesley, Stanford
7/19/6

ACTION COPY

FM COPEN JUL8/68 RESTR

TO TT EXTER 326 DE HAGUE

INFO TT PRMNY(ROBERTSON)DE HAGUE

STANFORD LEGAL DIV DE WERSHOF

20-3-1-6
32 | 32

CANDEL REPORT ON LAW OF TREATIES CONFERENCE

HAVING BEEN ABSENT FOR SOME DAYS I HAVE JUST READ ROBERTSONS NOTES ON HIS COPY OF YOUR DRAFT REPORT(WHICH RON MAILED TO ME JUN25). MOST OF HIS SUGGESTIONS ARE OF AN EDITORIAL NATURE.

2.IF YOUR FINAL REPORT HAS GONE TO PRESS DO NOT/NOT STOP IT. HOWEVER I AM SENDING YOU IN NEXT BAG RONS ANNOTATED COPY WITH MY COMMENTS.

PRIME MINISTERS MTG HE FORESAW POSSIBILITY OF INCLUDING SENTENCE IN FINAL COMMUNIQUE TO EFFECT THAT COMWEL PMS RECOGNIZED NEED FOR FURTHER STUDY OF SUBJ OF PEACEFUL SETTLEMENT OF DISPUTES.HE ADDED THAT PERHAPS REF MIGHT ALSO BE MADE TO NEED TO PROVIDE FOR CONCILIATION PROCEDURES IN CONVENTION ON LAW OF TREATIES.HE WAS INCLINED TO AGREE WITH OUR COMMENT THAT PMS MIGHT HAVE LITTLE TIME TO DISCUSS THIS SUBJ BUT HE SUGGESTED THAT SENIOR OFFICIALS ACCOMPANYING PMS SHOULD BE PREPARED TO DISCUSS PROBLEM IN MORE DETAIL.

3.WE ASKED VALLAT WHETHER HE THOUGHT AUSTRALIANS MIGHT BE INTERESTED IN RAISING THIS SUBA AT PMS MTG.HE WAS INCLINED TO THINK NOT/NOT ON GROUNDS THAT AUSTRALIANS ARE TARRED TO SOME EXTEND WITH VIETNAM BRUSH AND WERE INCLINED TO BACK AWAY FROM TAKING VERY POSITIVE POSITION ON SUBJ OF PEACEFUL SETTLEMENT OF DISPUTES AT LAW OF TREATIES CONFERENCE IN VIENA.HE ADDED HOWEVER THAT IT MIGHT BE USEFUL TO SOUND OUT SIR KENNETH BAILEY ON THIS SUBJ.IN LAW OF TREATIES CONTEXT VALLAT SAW PMS MTG FITTING INTO FOLLOWING TIME TABLE (A)FORMULATION OF WESTERN POSITION ON SETTLEMENT OF DISPUTES AT DISCUSSIONS IN NYK DURING 23RD UNGA;

(B)DISCUSSIONS AT COMWEL PMS MTG IN NOV OR JAN WITH VIEW TO QUOTE JUMPING THE COLOUR BARRIER UNQUOTE ON THIS SUBJ;

(C)WEO GROUP DISCUSSIONS IN STRASBOURG IN FEB 1969;AND,

(D)SECOND SESSION OF LAW OF TREATIES CONFERENCE IN APR.

4.WE EMPHASIZED TO VALLAT AND LAMBERT AND DE COURCY-IRELAND OF UNPOLITICAL DEPT WHO WERE ALSO PRESENT THAT WE HAD NO/NO INSTRUCTIONS ON THIS SUBJ BUT THAT WE WERE GLAD TO HAVE VALLATS PRELIMINARY VIEWS WHICH WE WOULD CONVEY TO YOU FOR CONSIDERATION.

FM LDN JUN25/68 CONFD CDN EYES ONLY

TO EXTER 3047

INFO WSHDC PRMNY ROME(MALTA)DELHI GENEP7BEESLEY)

TT CNBRA WLGTN DE OTT

BAG CLMBO NICOS ACCRA NROBI LAGOS DSLAM ISBAD KLMPR COPEN DE LDN

PSPAN GRGTN KNRTN DE OTT

REF YOURTEL V493 JUN13 AND OURTEL 2907 JUN14

COMWEL PRIMEMINISTERS MTG-PEACEFUL SETTLEMENT OF DISPUTES

WE ACCOMPANIED MUNRO DURING HIS CALL ON SIR FRANCIS VALLAT,FO LEGAL ADVISER,WHO HAD EXPRESSED WISH TO DISCUSS ABOVE SUBJ DURING MUNROS VISIT TO LDN.WE UNDERSTAND THAT LAMBERT,HEAD OF UN POLITICAL DEPT FO,HAD TOLD VALLAT THAT USSEA HAD SHOWN SOME INTEREST DURING CONSULTATIONS ON UN SUBJS ON JUN10 IN OTT WHEN LORD CARADON HAD RAISED POSSIBILITY OF SUBJ OF PEACEFUL SETTLEMENT BEING DISCUSSED AT NEXT MTG OF COMWEL PMS.

2.VALLAT SUGGESTED THAT IT WOULD BE USEFUL IF AFROASIAN MEMBERS OF COMWEL WERE ENCOURAGED TO SUPPORT UNITAR RESEARCH ON PEACEFUL SETTLEMENT GENERALLY,AND SUPPORT FOR ARBITRATION COMBINED WITH CONCILIATION PROCEDURES PARTICULARLY IN FIELD OF LAW OF TREATIES. HE CONSIDERED THAT COMWEL PMS MTG WOULDBE IDEAL FORUM IN WHICH TO FURTHER THE EDUCATIVE PROCESS AND ATTEMPT TO MOBILIZE SOME OF THE AFROASIANS.HE THOUGHT THAT THIS SUBJ COULD BE DISCUSSED UNDER AGENDA ITEM ON GENERAL REVIEW OF INTERNATL AFFAIRS.HE EXPRESSED VIEW THAT CDA OR NZ OR POSSIBLY MALAYSIA MIGHT BE APPROPRIATE COUNTRY TO INTRUDUCE SUBJ UNDER THAT AGENDA ITEM.IN RESPONSE TO OUR QUERY ABOUT WHAT HE ENVISAGED AS SPECIFIC RESULT OF ANY SUCH DISCUSSION AT

...2

FM PRMNY JUN28/68 CONFD

TO EXTER 1834 PRIORITY

INFO LDN WSHDC PARIS HAGUE RCME TT NATO DE LDN COPEN DE HAGUE

BAG MOSCO DE LDN

REF YOURTELV493 JUN13

PEACEFUL SETTLEMENT OF DISPUTES

IN ABSENCE OF CHIEF ADEBO I SPOKE TODAY TO KIRONDE ABOUT UNITARS INTENTIONS ON THIS SUBJ. I FOUND KIRONDE WHO IS RESPONSIBLE FOR SERIES OF SEMINARS FOR DIPLOS BEING HELD HERE UNDER UNITAR AUSPICES WELL-INFORMED ABOUT IT.

2. CONTRARY TO INFO I HAD RECEIVED EARLIER TO EFFECT THAT UNITARY WOULD NOT/NOT BE CONSIDERING A STUDY ON THIS UNTIL 1969 KIRONDE SAID BOARD OF TRUSTEES HAD IN FACT ALREADY AUTHORIZED UNITARY TO GO AHEAD. CHIEF ADEBO HOWEVER HAD FELT THAT HE SHOULD NOT/NOT GET STUDY UNDER WAY WITHOUT CONSULTING SECGEN. ACCORDING TO KIRONDE SECGEN HAD ADVISED CHIEF ADEBO NOT/NOT TO PROCEED WITH PROPOSED STUDY BECAUSE IT MIGHT RAISE CONTROVERSIAL ISSUES.

3. I EXPRESSED CONSIDERABLE SURPRISE TO KIRONDE SAYING THAT AN OBJECTIVE TECHNICAL STUDY OF QUESTION SEEMED TO BE EXACTLY WHAT WAS REQUIRED. WHOLE POINT OF HAVING UNITAR DO SOMETHING ALONG THESE LINES WAS THAT IN THIS WAY IT SHOULD BE POSSIBLE TO AVOID SORT OF CONTROVERSY WHICH HAD ARISEN ON TWO OCCASIONS WHEN UK HAD ATTEMPTED TO DO SOMETHING BY MEANS OF AN UNGA RESLN.

4. I ALSO POINTED OUT TO KIRONDE THAT AGAINST HIGHTLY CONTROVERSIAL BACKGROUND AND DESPITE VERY MAJOR DIFFERENCES OF VIEWPOINT IT HAD

...2

NEVERTHELESS BEEN POSSIBLE FOR WORKING GROUP OF CTIEE OF 33 RECENTLY TO AGREE ON PREPARATION BY SECRETARIAT OF A PAPER WITHIN CERTAIN LIMITS ON QUESTION OF OBSERVERS AUTHORIZED OR ESTABLISHED BY SECURITY COUNCIL. IF THIS COULD BE DONE(AND DESPITE SECRETARIAT RELUCTANCE) ON PEACEKEEPING THEN SURELY IT WAS NOT/NOT IMPOSSIBLE FOR UNITAR TO DO AT LEAST AS MUCH ON QUESTION OF PEACEFUL SETTLEMENT.

5. KIRONDE SAID THAT HE VERY MUCH WELCOMED MY COMMENTS AND THAT HE WOULD PASS THEM ON TO CHIEF ADEBO. PERSONALLY KIRONDE AGREED THAT STUDY SHOULD BE PROCEEDED WITH.

6. I TOLD KIRONDE ON LEAVING THAT I WOULD BE QUITE PREPARED TO DISCUSS THIS MATTER WITH SECGEN MYSELF AND ADEBO IF STALEMATE CONTINUED

IGNATIEFF

U.N. Div/GAH Pearson/mr

July 19/68 20-3-1-6

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: Commonwealth Division

FROM / De: United Nations Division

REFERENCE / Référence: London telegram 3047 of June 25, 1968

SUBJECT / Sujet: Commonwealth Prime Ministers' Meeting - Peaceful Settlement of Disputes

SECURITY / Sécurité: CONFIDENTIAL

DATE: July 3, 1968

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 30

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para 3

Legal Div

Permis NY

Whether or not there is to be a study by the United Nations Institute of Training and Research on this subject is open to some doubt (see telegram 1835 of June 28, Permis NY). If such a study is available before the Prime Ministers' Conference it might be useful to sound out other Commonwealth Governments whether they see any merit in having a discussion on the subject at the meeting. If UNITAR is not authorized to do such a study this is likely to mean that there is opposition within the United Nations to the project being undertaken and in this case we are not likely to get very far by discussing the subject at the Commonwealth meeting. There would, of course, be no reason why Canada should not make reference to the subject during our intervention in the general review of international affairs and we could prime one or two others to do the same. We could make special reference to the Law of Treaties Conference which is to reconvene in April next year if we wish to do so.

2. If we are to say anything on this subject at the meeting, however, we shall want to be clear about our objectives. As far as we know we have never made more than general reference to the subject in our interventions at the United Nations, either in the Assembly or in the Special Committee on the Principles of International Law. However, general references of this kind do not seem to us to be very helpful as a means of persuading other governments to take an active interest. We have commissioned a special research project this summer on past Canadian attitudes to peaceful settlement and on the basis of its conclusions we should be in a position to be more specific by the end of the summer if we want to be.

3. Without discouraging the Brisith therefore, we might wait until we see what UNITAR is likely to do and what the results are of the summer research. Legal Division might wish to comment on aspects of this subject relating to the Law of Treaties Conference.

G. A. H. PEARSON

United Nations Division

Ext. 407C/Bil.
(Admin. Services Div.)

002054

file
diary
circ.
cc: Joe Stanford(Legal Div.)

A.W. Robertson/lc

20-3-1-6
MA

CONFIDENTIAL
Received
NEW YORK, June 25, 1968
JUL 2 1968
In Legal Division
Department of External Affairs

Dear Mr. Wershof,

I now enclose a copy of the draft report of the Canadian delegation at the Law of Treaties Conference, sent to me by Joe Stanford. Joe suggested that after I had reviewed his report I send my copy on to you with any further comments that I might have.

I have not in any way attempted to rewrite what Joe has said and for the most part have merely indicated in red on my copy minor changes of an editorial nature which, in my opinion, helped make the meaning of the relevant sections more clear. One or two of my comments, particularly in Part III and at the end of Part V are more substantial.

I hope this reaches you in time for it to be of some use. It arrived here two weeks ago but as that coincided with the opening of our work on the Ad Hoc Committee on the Sea Bed I have not been free to give it as much time as I otherwise would have.

I got back to find Rachel well. And the baby (now that she is 5½ months pregnant) is beginning to show. We will probably be coming to Europe again in the latter part of July but neither time nor finances will permit us a visit to Scandinavia. I am sorry because I know Rachel would have liked to have seen Mrs. Wershof again.

With best personal wishes,

Yours sincerely,

A.W. Robertson,
First Secretary.

H.E. Mr. Max Wershof,
Canadian Embassy,
Denmark, Copenhagen.

TO: MR. STANFORD
FROM REGISTRY
JUN 27 1968
L
FILE CHARGED OUT
TO: MR. STANFORD

002055

UNITED NATIONS

GENERAL ASSEMBLY

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INTERNATIONAL LAW COMMISSION
Twentieth session
Agenda item 3

THE MOST-FAVOURED-NATION CLAUSE IN THE LAW OF TREATIES

Working paper submitted by Endre Ustor, Special Rapporteur

GE.68-11016

TABLE OF CONTENTS

I. Introduction

1. At its sixteenth session, the International Law Commission considered a proposal put forward by one of its members, Mr. Jiménez de Aréchaga, to the effect that it should include in its draft on the law of treaties a provision on the so-called "most-favoured-nation clause". The suggested provision was intended to reserve formally the clause from the operation of the articles dealing with the problem of the effect of treaties on third States (articles 30 to 33 in the 1966 draft).[1/]

2. It was urged in the support of the proposal that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties (Article 33 in the 1966 draft).

3. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.[2/] The Commission maintained this position in the course of its eighteenth session.[3/]

4. At its nineteenth session, however, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an

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1/ Yearbook of the International Law Commission, 1964, Vol.I, 752nd meeting, para. 2.

2/ Report of the International Law Commission on the work of its sixteenth session (A/5809), para.21, Yearbook of the International Law Commission, 1964, Vol.II, p.176.

3/ Report of the International Law Commission on the work of its eighteenth session (A/6309/Rev.1, Part II), para.32, Yearbook of the International Law Commission, 1966, Vol.II, p.177.

aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed a special rapporteur to deal with it.[4/]

5. The purpose of the present working paper is to give an account of the preparatory work already undertaken by the special rapporteur, to outline the possible contents of a report on the topic and to solicit advice and comments from the members of the Commission.

II. History of the clause

6. Mediaeval origins. Capitulations. Treaty of amity and commerce between the United States of America and France signed at Paris on 6 February 1778.[5/] Treaty of commerce between Great Britain and France signed at Paris on 23 January 1860, usually known as the "Cobden Treaty".[6/] Practice of the XIXth and XXth centuries. Modern developments:

(i) General Agreement on Tariffs and Trade (GATT) signed at Geneva on 30 October 1947;[7/]

(ii) treaty establishing a free-trade area and instituting the Latin American Free-Trade Association signed at Montevideo on 18 February 1960, including protocols and resolutions;[8/]

(iii) proposal submitted by the Soviet Union in 1956 on the preparation within the framework of the United Nations Economic Commission for Europe of an all-European agreement on economic co-operation.[9/] This proposal contained an unconditional and unrestricted most-favoured-nation clause.

4/ Report of the International Law Commission on the work of its nineteenth session (A/6709/Rev.1 and Corr.1), para.48, Official Records of the General Assembly, Twenty-second session, Supplement No.9.

5/ Malloy, Treaties, conventions, international acts, etc., Washington, 1910, Vol.I, p.468.

6/ British and Foreign State Papers, London, 1867, vol.L, p.13.

7/ United Nations Treaty Series, vol.55.

8/ Multilateral Economic Co-operation in Latin America, 1962, vol.I, p.57, United Nations Publication, Sales No. 62.II.G.3.

9/ E/ECE/270, parts I, II and III.

See: Suzanne Basdevant, La clause de la nation la plus favorisée in Lapradelle et Niboyet, Répertoire de Droit International, Sirey, Paris, 1929, vol.III, p.464; Georg Schwarzenberger, The most-favoured-national standard in British state practice, The British Yearbook of International Law, 1945, XXII, p.96; Arthur Nussbaum, A concise history of the law of nations. New York, 1947; Manuel A. Vieira, La clausula de la nación más favorecida y el Tratado de Montevideo, Anuario Uruguayo de Derecho Internacional, IV, 1965-66, p.189.

III. Definition of the clause and its various types

7. In the most simple form of the clause, the conceding State or promiser undertakes an obligation towards another State - the beneficiary - to treat it, its nationals, goods, etc., on a footing not inferior to the treatment it has been giving or will be giving to the most-favoured third State in pursuance of a separate treaty or otherwise.

8. A clause containing a unilateral promise is only of historical significance. It was characteristic of the capitulations and was also included in the peace treaties concluding the first and second world wars to the detriment of the defeated countries (see Versailles treaty with Germany, articles 264 to 267; Trianon treaty with Hungary, articles 203 and 211(b); Paris peace treaties with Italy, article 82 and with Hungary, article 33.[10]) Today the clause is never unilateral and the States inserting it in their treaties undertake the obligation to grant the most-favoured-nation treatment reciprocally. Thus the clause now represents a combination of as many promises as there are contracting parties: two in a bilateral treaty and as many in a multilateral treaty as the number of the participants. The reciprocal promises of most-favoured-nation treatment result directly from the common participation of the States concerned in the treaty. The reciprocity in the bilateral most-favoured-nation clause, being a "formal" and "subjective" reciprocity, does not ensure the material identity or equivalent of the give and take. This is particularly true as regards the so-called unconditional type of clause. Niboyet points out that "/la clause de la nation la plus favorisée est/ une formule de réciprocité abstraite car elle consiste dans l'affirmation d'une méthode sans garantie de ses résultats. /Avec cette clause les Etats/ se soucient moins de s'assurer la jouissance d'un droit déterminé que de n'en pas laisser jouir d'autres, s'il ne leur est pas assuré également".[11]

10/ United Nations, Treaty Series, Vols. 49 and 41.

11/ J.P. Niboyet, Traité de droit international privé français, Paris, 1938, vol.II, p.245.

9. Before the first World War, the United States interpreted the most-favoured-nation clause in a narrower sense. According to that interpretation an advantage granted to the nationals of State Y in consideration of a concession made by Y to the United States would accrue to the nationals of the most-favoured State Z only if the United States should receive from Z the same equivalent as was received from Y. The operation of this "conditional" or "reciprocal" most-favoured-nation clause raised vexing questions. Suppose the United States reduced the tariff on Y silk in consideration of a reduction in the Y tariff on American oranges; a lowering of the duties on oranges may, vis-à-vis Z, amount to much less or much more than vis-à-vis Y, not to mention the difficulty of ascertaining the true quid pro quo in the Y transaction. Hence the "conditional" most-favoured-nation clause procured for the favoured party no more than a contingent bargaining position, and not even that in the case of a free-trade country, like England at that time, which had no concession left to offer. According to Nolde: "On peut ... dire que la clause conditionnelle, pratiquement, equivandra toujours à l'absence de toute clause de la nation la plus favorisée".[12/] The American conception was probably influenced by the common law idea that a valid promise normally requires the giving of a "consideration" on the part of the promisee; in America the transfusion of this idea into the law of commercial conventions was not hampered by free-trade notions; quite the contrary, it fitted into the ever growing high protectionism of the country. In intra-European relations, however, the unconditional form and interpretation of the clause were entirely dominant, particularly in the period following the Cobden treaty.[13/]

10. In 1922 the United States made a concession to economic liberalism by turning from the conditional to the unconditional type of the most-favoured-nation clause. The reason for this departure from previous practice was explained as follows by the United States Tariff Commission: "... the use by the United States of the conditional interpretation of the most favoured nation clause has for half a century occasioned, and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries."[14/]

12/ Nolde, La clause de la nation la plus favorisée et les tarifs préférentiels, Academie de droit international, Recueil de Cours, 1932, I, vol.39, p.91.

13/ Nussbaum, A concise history of the law of nations, New York, 1947, p.202.

14/ Quoted by Charles Hyde, in International Law, 2nd edition, Boston, 1947, vol.2, p.1506, footnote 13.

IV. Literature and bibliography

11. There is a considerable literature on the subject. The greater part of it, however, deals with the economic and political rather than the legal aspects of the most-favoured-nation clauses and it is not easy to find guidance on the questions of law which arise.[15/]

V. Tables of cases

12. See the tables of cases of the Permanent Court of International Justice, the International Court of Justice and of international and national tribunals.

VI. Previous attempts at codification

13. League of Nations. Convention opened for signature by the Pan American Union on 15 July 1934.[16/] Sessions of the Institut de droit international of 1934, 1936 and 1967.

VII. Field of application of the clause and scope of the report

14. The fields in which most-favoured-nation clauses are applied are extremely varied. They may be classified as follows:

(a) International regulation of trade and payments.

(b) Treatment of foreign means of transport (ships, airplanes, trains, motor vehicles, etc.).

(c) Establishment, personal statute and professional activities of foreign physical and juridical persons.

(d) Privileges and immunities of diplomatic, consular and trade missions.

(e) Intellectual property (patents, copyrights, etc.).

(f) Recognition and execution of foreign judgments and arbitral awards.

15. The most important of these fields is international trade. Here the clause is a permanent feature of treaties regulating export and import trade in general and questions of tariffs, customs and other duties in particular. This has been implicitly recognized by the International Law Commission when in the decision mentioned above in paragraph 4 it referred to the United Nations Commission on International Trade Law.

15/ See the bibliography in Lord McNair, Law of Treaties, Oxford, 1961, p.273.

16/ Manley Hudson, International Legislation, Washington, 1937, vol.VI, p.927.

16. A thorough study of all the fields in which most-favoured-nation clauses are used would reveal many particular problems.[17] Since, however, the Commission does not intend to deal with the matter from the economic point of view, the Special Rapporteur does not propose to examine the whole spectrum of the use of the clause, notwithstanding some brief excursions in the field of commerce. The Commission may therefore wish to confine itself to the formal and legal aspects of the clause[18] without, of course, dealing with the matter out of the context of realities.

VIII. Nature and effect of the clause

17. The most-favoured-nation clause has a harmonizing and levelling effect.[19] Although until quite recently the clause appeared mostly in bilateral treaties, it now transcends the bilateralism of commercial relations and produces a tendency to multilateralism. Its effect is automatic. Since the provision ensuring favours to a third party applies automatically vis-à-vis the beneficiary, it renders the conclusion of new individual agreements superfluous.[20] It can be linked to the most diverse systems of economic policy, to free trade as well as to protectionism.[21] Embodied in commercial treaties, it creates favourable conditions for the development of mutual commercial relations between States. It consists of two main factors: the granting of favours and the elimination of discrimination.

18. The system of the most-favoured treatment which creates a situation of equal rights for the States participating in international trade does not and cannot affect the economic system of the States. A different solution could not be admitted because it would amount to an interference in the internal life of other countries.[22]

17/ Alice Piot, "La clause de la nation la plus favorisée", Revue critique de droit international privé, 1965, XLV, p.1.

18/ See the statement by Mr. Jiménez de Aréchaga summarized in para.16 of the record of the 741st meeting of the Commission, Yearbook of the International Law Commission, 1964, vol.I.

19/ George Erler, Gründprobleme des internationalen Wirtschaftrechts, Göttingen, 1956, pp.53 and 99.

20/ George Dahm, Völkerrecht, Stuttgart, 1961, vol.II, p.594.

21/ George Dahm, op.cit., p.593.

22/ D.M. Genkin, Princip naibolshevo blagopriatstvovania v torgovih dogovorah gosudarstv (The most-favoured-nation principle in the commercial treaties of States), Sovietskoye gosudarstvo i pravo (Soviet State and Law), 1958, 9, p.22. See also the meeting of experts called in Rome in February 1958 by the International Association of Legal Science.

In this connexion, it is necessary to study the interrelation of such principles as the sovereign equality of States, the duty of States to co-operate with one another in accordance with the Charter of the United Nations, equal rights and self-determination of peoples, non-discrimination and reciprocity.

19. Technically the most-favoured-nation clause is a renvoi to another treaty, whereas the national treatment clause is a renvoi to municipal law.[23] Georges Scelle analysed the clause as follows:

> "La clause de la nation la plus favorisée ... est un procédé de communication automatique du régime réglementaire de traités particuliers à des sujets de droit d'Etats non signataires ... ... les nouveaux traités ... jouent ... le rôle d'actes-condition, cependant que la clause elle-même s'analyse en un acte-règle liant ... la compétence des gouvernements signataires ...
>
> La clause agit donc tout ensemble comme une prévention de l'exclusivisme des traités, comme une extension automatique d'un ordre juridique nouveau, et spécialisé, et en définitive, comme un facteur d'unification du droit des gens." [24]

IX. Form of the clause

20. The most-favoured-nation clause is part of a treaty as this term is defined in article 2.1(a) of the 1966 draft articles on the law of treaties. By definition the clause as such cannot be part of an international agreement not concluded in written form. This does not preclude the possibility of granting the most-favoured-nation treatment orally or by tacit agreement. States may also grant such treatment by autonomous action.

21. The treaty embodying the clause must be concluded between States; it may be bilateral or multilateral. The collateral agreement - that which accords the favour or preferential treatment to a third State - need not be in written form.

X. Application of the clause to individuals

22. Although the contracting parties promising each other most-favoured-nation treatment are always States, the object of the treatment is not a State but its nationals, inhabitants, juristic persons, groups of individuals, ships, aircraft, products etc. Thus the treaty embodying a most-favoured-nation clause provides for

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23/ See the statement by Mr. Reuter summarized in para. 14 of the record of the 741st meeting of the Commission, Yearbook of the International Law Commission, 1964, vol.I.

24/ Georges Scelle, "Règles générales du droit de la paix", Academie de droit international, Recueil de cours, 1933, IV, vol.46, pp.461, 462.

rights to be performed or enjoyed by individuals. Since the International Law Commission, when codifying the law of treaties, left aside the question of the application of treaties to individuals, it is not proposed to go into this matter in connexion with the study of the clause.[25/]

XI. Scope of the rights arising out of the clause

23. Scope ratione materiae. There can be no doubt that, through the operation of a specific grant to another country, the clause can only attract, in principle, rights of the same kind or order, or belonging to the same class, as those contemplated therein. The subject matter or category of subject matters must be the same: the grant of most-favoured-nation rights relating to one subject matter or category of subject matters cannot confer a right to enjoy the treatment granted to another country in respect of a different subject matter or category of subject matters.[26/] It is essential to bear in mind the exact scope of each particular clause for most-favoured-nation treatment can be claimed only with respect to favours ejusdem generis granted by the promiser to third States. One has to examine each point of the preferential treaty in order to ascertain whether the beneficiary or the third State is more favoured. The comparison cannot take place in globo, which would have no sense, but point by point, in detail. If the new arrangement deals with tariffs, the duties paid by the beneficiary and by the third State have to be examined rubric by rubric, position by position.

24. Scope ratione personnae. The rules of diplomatic protection apply (nationality, nationality of companies, double nationality, etc.). The question arises, however, whether this matter should be dealt with in the report in view of the observations in paragraph 22 above.

25. Territorial scope. The rule of article 25 of the International Law Commission draft on the law of treaties applies.

25/ See the commentary on article 66 in the third report on the law of treaties by Sir Humphrey Waldock (Yearbook of the International Law Commission, 1964, vol.II, p.45) and paragraph 33 of the report of the Commission on the work of its eighteenth session (ibid, 1966, vol.II, p.177).

26/ Sir Gerald Fitzmaurice, The law and procedure of the International Court of Justice, 1951-1954, points of substantive law, Part II, The British Yearbook of International Law, 1955-1956, XXXII, p.84.

26. Scope ratione temporis. In cases where it is not otherwise expressly provided (e.g. clause pro futuro), the presumption militates for a general unconditional most-favoured-nation treatment.[27] The clause begins to operate when the third State becomes entitled to claim a certain treatment whether or not it actually claims the treatment.[28] The clause ceases to operate when the right of the third State to a certain treatment expires.[29]

27. Scope ratione originis beneficii. The right of the beneficiary to a most-favoured-nation treatment extends to all favours granted by the conceding State to a third State independently of the fact whether the favour granted originated in a treaty, in a mere practice of reciprocity or in the operation of the internal law of the promiser.[30] This right is created by the treaty embodying the most-favoured-nation clause and not by the treaty between the conceding State and the third State, which is a res inter alios acta for the beneficiary.[31] The operation of the clause extends also to preferential treatment granted by multilateral treaties. Some have objected to this view on the ground that multilateral treaties are results of reciprocal concessions and that it would, therefore, be unjust that the beneficiary of the clause should enjoy the preferences without having made concessions himself.[32]

27/ Schwarzenberger, op.cit., p.108; Blaise Knapp, Le système préférentiel et les Etats tiers, Genève, 1959, p.287.

28/ McNair, op.cit., pp.278-280; Knapp, op.cit., p.298.

29/ Proposal submitted by Mr. Jiménez de Aréchaga, Yearbook of the International Law Commission, 1964, vol.I, 752nd meeting, para.1; Case concerning rights of nationals of the United States in Morocco, Judgment of 27 August 1952, I.C.J. Reports 1952, pp.191-192; Genkin, op.cit., p.25. It should be noted that the situation is different in the GATT system (see articles III and XXVIII of the General Agreement).

30/ Knapp, op.cit., pp.297 and 306; McNair, op.cit., p.280; Genkin, op.cit., p.25. See also the following extract from a study dated 12 September 1936 by the Economic Committee of the League of Nations:

> "D'une manière générale, on peut dire que la clause ... implique le droit de réclamer immédiatement, de plein droit ... toutes les réductions de droit et de taxes ... accordées à la nation la plus favorisée en matière douanière, que ces réductions ... découlent de mesures autonomes ou de conventions conclues avec des Etats tiers." (League of Nations document 1936.II.B.9, p.10)

31/ Anglo-Iranian Oil Co. Case (jurisdiction), Judgment of 22 July 1952, I.C.J. Reports, 1952, p.109; Hildebrando Accioly, Traité de droit international public, Paris, 1941, tome II, p.479; Marcel Sibert, Traité de droit international public, Paris, 1951, tome II, p.255. For the opposite view see: Dissenting opinion of Judge Hackworth, I.C.J. Reports 1952, p.141; Oppenheim, International Law, 8th edition by Lauterpacht, London, 1955, para.522; Fauchille, Traité de droit international, Paris, 1926, tome I, 3ème partie, p.359.

32/ Scelle, op.cit., p.463.

But this introduces the idea of the reciprocity of concessions which, while it applies to the conditional most-favoured-nation clause, is alien to its unconditional form.[33]

XI. Customary and conventional exceptions to the operation of the clause

28. The following exceptions can be cited:

(i) customs unions

(ii) frontier traffic

(iii) interests of developing countries[34]

(iv) interests of public policy and security of the contracting parties[35]

(v) other exceptions.[36]

XII. Exceptions resulting from treaties

29. Article XXV of the General Treaty on Central American Economic Integration, signed at Managua on 13 December 1960,[37] provides that:

> "The Signatory States agree ... to maintain the 'Central American exception clause' in any trade agreements they may conclude on the basis of most-favoured-nation treatment with countries other than the Contracting Parties."

33/ Knapp, op.cit., pp.306-307.

34/ "New preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them." (General Principle 8 of the United Nations Conference on Trade and Development, United Nations Publication, 64.II.B.11, vol.I, p.20, E/CONF.46/141, vol.I)

"The traditional most-favoured-nation principle is designed to establish equality of treatment but it does not take account of the fact that there are in the world inequalities in economic structure and levels of development; to treat equally countries that are economically unequal, constitutes equality of treatment only from a formal point of view but amounts actually to inequality of treatment. Hence the necessity of granting preferences in favour of developing countries." (Trade and Development Board, Committee on Manufactures, Group of preferences, Second session, 4 July 1967, Report by the UNCTAD Secretariat, TD/B/C.2/A.C.1/7.)

35/ GATT, articles XX and XXI.

36/ Paul Guggenheim, Traité de droit international public, vol.I, p.104.

37/ United Nations Treaty Series, vol.455, p.90.

30. Paragraph 1 of article 10 of the Convention on Transit Trade of Land Locked States, signed at New York on 8 July 1965,[38] contains the following provision:

> "The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause ..."

XIII. Violations of the clause

31. Mention should be made in this connexion of indirect discrimination[39] and of the adoption of unduly specialized tariffs. A classical example of the latter is provided by the Additional Commercial Treaty of 1904 between Germany and Switzerland.[40] By this treaty, Germany conceded to Switzerland a reduced tariff for female calves "reared at 300 meters above sea level" with "at least one month of grazing at at least 800 meters above sea level". No such calves could be produced by the Netherlands and other most-favoured nations.

38/ TD/TRANSIT/9, p.8.

39/ McNair, op.cit., p.299.

40/ Recueil officiel des lois et ordonnances de la Confédération Suisse, Berne, 1906, tome XXI, Année 1905, p.428.

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Vingtième session
Point 3 de l'ordre du jour

CLAUSE DE LA NATION LA PLUS FAVORISEE DANS LE DROIT DES TRAITES

Document de travail présenté par M. Endre Ustor, Rapporteur spécial

GE.68-11017

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I. Introduction

1. A sa seizième session, la Commission du droit international a examiné une proposition présentée par l'un de ses membres, M. Jiménez de Aréchaga, tendant à ce qu'elle fasse figurer dans son projet sur le droit des traités une disposition relative à la clause dite "de la nation la plus favorisée". La disposition proposée était destinée à soustraire formellement la clause à l'application des articles traitant du problème de l'incidence des traités sur les Etats tiers (articles 30 à 33 du projet de 1966)[1/].

2. On fait valoir, à l'appui de la proposition, que les termes larges et généraux dans lesquels les articles relatifs aux Etats tiers avaient été provisoirement adoptés par la Commission risquaient d'effacer la distinction entre les dispositions en faveur d'Etats tiers et l'application de la clause de la nation la plus favorisée, problème qui pourrait revêtir une importance particulière en ce qui concerne l'article sur la révocation ou la modification d'obligations ou de droits d'Etats tiers (article 33 du projet de 1966).

3. Mais, si la Commission a reconnu qu'il importait de ne préjuger en aucune façon l'application de la clause de la nation la plus favorisée, elle n'en a pas moins estimé que ces clauses ne sont nullement mises en jeu par les articles en question et c'est pourquoi elle a décidé qu'il n'était pas nécessaire de faire figurer dans son projet une clause de sauvegarde du type proposé. En ce qui concerne plus généralement les clauses de la nation la plus favorisée, la Commission n'a pas jugé opportun d'en traiter dans la codification actuelle du droit général des traités, tout en estimant qu'il pourrait être indiqué, à l'avenir, d'en faire l'objet d'une étude spéciale[2/]. La Commission a maintenu cette attitude au cours de la dix-huitième session[3/].

1/. Annuaire de la Commission du droit international, 1964, vol.I, 75ème séance, par. 2.

2/ Rapport de la Commission du droit international sur les travaux de sa seizième session (A/5809), par. 21, Annuaire de la Commission du droit international, 1964, vol.II, p. 184.

3/ Rapport de la Commission du droit international sur les travaux de sa dix-huitième session (A/6309/Rev.1, Partie II), par. 32, Annuaire de la Commission du droit international, 1966, vol.II, p. 192.

4. Cependant, à sa dix-neuvième session, la Commission a noté qu'à la vingt et unième session de l'Assemblée générale plusieurs représentants à la Sixième Commission avaient demandé que la Commission s'occupe de la clause de la nation la plus favorisée comme d'un aspect du droit général des traités. En raison de l'intérêt exprimé au sujet du problème et du fait que l'élucidation de ses aspects juridiques pourrait être utile à la Commission des Nations Unies pour le droit commercial international (UNCITRAL), la Commission du droit international a décidé d'inscrire à son programme la question de la clause de la nation la plus favorisée dans le droit des traités et a nommé un Rapporteur spécial chargé de s'en occuper[4/].

5. Le présent document de travail a pour objet de rendre compte du travail préparatoire déjà entrepris par le Rapporteur spécial, d'indiquer les matières susceptibles de figurer dans un rapport sur la question et de solliciter les conseils et les observations des membres de la Commission.

II. Historique de la clause

6. Origines médiévales. Capitulations. Traité d'amitié et de commerce entre les Etats-Unis d'Amérique et la France, signé à Paris le 6 février 1778[5/]. Traité de commerce entre la Grande-Bretagne et la France, signé à Paris le 23 janvier 1860, connu sous le nom de "Traité Cobden"[6/]. Pratique du XIXème et du XXème siècles. Applications récentes :

i) Accord général sur les tarifs douaniers et le commerce (GATT), signé à Genève le 30 octobre 1947;[7/]

ii) Traité établissant une zone de libre échange et portant création de l'Association latino-américaine de libre échange, signé à Montevideo le 18 février 1960, y compris les protocoles et les résolutions;[8/]

4/ Rapport de la Commission du droit international sur les travaux de sa dix-neuvième session (A/6709), par. 48, Documents officiels de l'Assemblée générale, vingt-deuxième session, supplément No 9.

5/ Malloy, Treaties, conventions, international acts, etc., Washington, 1910, vol. I, p. 468.

6/ British and Foreign State Papers, Londres, 1867, vol. L, p. 13.

7/ Nations Unies - Recueil des traités, vol. 55.

8/ Multilateral Economic Co-operation in Latin America, 1962, vol. I, p. 57, Publication des Nations Unies, No de vente 62.II.G.3. (en anglais et en espagnol seulement).

iii) proposition, présentée par l'Union soviétique en 1956, concernant la préparation, dans le cadre de la Commission économique pour l'Europe, d'un accord paneuropéen de coopération économique[9]. Cette proposition renferme une clause, sans limitation ni réserve, de la nation la plus favorisée.

Voir : Suzanne Basdevant, La clause de la nation la plus favorisée dans Lapradelle et Niboyet, Répertoire de Droit International, Sirey, Paris, 1929, vol. III, p. 464; Georg Schwarzenberger, The most-favoured-national standard in British state practice, The British Yearbook of International Law, 1945, XXII, p. 96; Arthur Nussbaum, A concise history of the law of nations, New York, 1947; Manuel A. Vieira, La clausula de la nación más favorecida y el Tratado de Montevideo, Anuario Uruguayo de Derecho Internacional, IV, 1965-66, p. 189.

III. Définition de la clause et ses divers types

7. Dans la clause sous sa forme la plus simple, l'Etat qui s'engage ou promet s'oblige envers un autre Etat - ou bénéficiaire - à lui accorder, ainsi qu'à ses ressortissants, ses biens, etc., un traitement qui ne soit pas inférieur à celui dont il fait ou fera bénéficier l'Etat tiers le plus favorisé, en vertu d'un traité particulier ou de toute autre manière.

8. La clause contenant une promesse unilatérale n'a qu'un intérêt historique. Elle était caractéristique des capitulations et figurait également dans les traités de paix qui ont mis un terme à la première et à la deuxième guerre mondiale au détriment des pays vaincus (voir Traité de Versailles avec l'Allemagne, articles 264 à 267; Traité de Trianon avec la Hongrie, articles 203 et 211 b); Traités de paix, signés à Paris, avec l'Italie (article 82) et avec la Hongrie (article 33)[10]. De nos jours, la clause n'est jamais unilatérale et les Etats qui l'insèrent dans leurs traités prennent l'engagement réciproque de s'accorder le traitement de la nation la plus favorisée. Ainsi la clause représente désormais une somme de promesses égale au nombre des parties

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9/ E/ECE/270, parties I, II et III.

10/ Nations Unies, Recueil des traités, vol. 49 et 41.

contractantes : deux dans un traité bilatéral et autant que de parties dans un traité multilatéral. Les promesses réciproques d'octroi du régime de la nation la plus favorisée découlent directement du fait que les Etats intéressés sont parties communes au traité. Dans la clause bilatérale de la nation la plus favorisée, la réciprocité, étant une réciprocité "formelle" et "subjective", n'est pas la matérialisation exacte ni l'équivalent du "donnant donnant". Cela est particulièrement vrai du type de clause dite inconditionnelle. Niboyet souligne que "/la clause de la nation la plus favorisée est/ une formule de réciprocité abstraite car elle consiste dans l'affirmation d'une méthode sans garantie de ses résultats. /Avec cette clause les Etats/ se soucient moins de s'assurer la jouissance d'un droit déterminé que de n'en pas laisser jouir d'autres, s'il ne leur est pas assuré également"[11/].

9. Avant la première guerre mondiale, les Etats-Unis donnaient à la clause de la nation la plus favorisée un sens plus étroit. Conformément à cette interprétation, un avantage accordé aux ressortissants de l'Etat Y en échange d'une concession faite par Y aux Etats-Unis ne profitait aux ressortissants de l'Etat Z bénéficiaire du traitement de la nation la plus favorisée que si les Etats-Unis recevaient de Z l'équivalent de ce qu'ils avaient reçu d'Y. L'application de cette clause "conditionnelle" ou "réciproque" de la nation la plus favorisée a soulevé des questions irritantes. Si les Etats-Unis réduisaient les droits de douane sur la soie provenant d'Y, moyennant réduction des droits de douane d'Y sur les oranges américaines, la diminution des droits sur les oranges pouvait, à l'égard de Z, signifier beaucoup moins ou beaucoup plus qu'à l'égard d'Y, sans parler de la difficulté de déterminer le véritable quid pro quo dans la transaction d'Y. Par conséquent, la clause "conditionnelle" de la nation la plus favorisée n'offrait, à la partie favorisée, rien de plus qu'une position éventuellement avantageuse pour négocier et cela n'était même pas le cas pour un pays de libre-échange, comme l'Angleterre à ce moment-là, qui n'avait plus rien à offrir en contrepartie.

11/ J.P. Niboyet, Traité de droit international privé français, Paris, 1938, vol. II, p. 245.

Selon Nolde, "On peut ... dire que la clause conditionnelle, pratiquement, équivaudra toujours à l'absence de toute clause de la nation la plus favorisée"[12]. La conception américaine était probablement influencée par l'idée qui prévaut en common law qu'une promesse valable exige normalement l'octroi d'une "contrepartie" de la part du bénéficiaire de la promesse; en Amérique, les notions de libre échange n'ont pas fait obstacle à la transposition de cette idée dans le droit des conventions commerciales; bien au contraire, cette idée était tout à fait en harmonie avec le protectionnisme, toujours plus poussé, du pays. Dans les relations intra-européenne toutefois, la forme et l'interprétation inconditionnelles de la clause ont entièrement prévalu, en particulier pendant la période qui a suivi le Traité Cobden[13].

10. En 1922, les Etats-Unis ont fait une concession au libéralisme économique en passant du type conditionnel au type inconditionnel de la clause de la nation la plus favorisée. La raison pour laquelle ce pays s'est écarté de la pratique antérieure est exposée comme suit par l'United States Tariff Commission : "... l'adoption, par les Etats-Unis, de l'interprétation conditionnelle de la clause de la nation la plus favorisée a soulevé pendant un demi-siècle et, si ce pays maintient son point de vue, continuera à soulever de fréquentes controverses entre les Etats-Unis et les pays européens"[14].

IV. Publications et bibliographie

11. Les publications sur le sujet sont très nombreuses. La plupart, toutefois, portent sur les aspects économiques et politiques plutôt que juridiques des clauses de la nation la plus favorisée et il n'est pas aisé de trouver des informations sur les questions qui se posent en droit[15].

12/ Nolde, La clause de la nation la plus favorisée et les tarifs préférentiels, Académie de droit international, Recueil de Cours, 1932, I, vol. 39, p. 91.

13/ Nussbaum, A concise history of the law of nations, New York, 1947, p. 202.

14/ Cité par Charles Hyde, dans International law, 2ème édition, Boston, 1947, vol. 2, p. 1506, note 13.

15/ Voir la bibliographie dans Lord Mc Nair, Law of treaties, Oxford, 1961, p. 273.

V. Répertoires de jurisprudence

12. Voir les répertoires de jurisprudence de la Cour permanente de Justice internationale, de la Cour internationale de Justice et des tribunaux internationaux et nationaux.

VI. Essais de codification antérieurs

13. Société des Nations. Convention ouverte à la signature par l'Union panaméricaine le 15 juillet 1934[16]. Sessions de l'Institut de droit international de 1934, 1936 et 1967.

VII. Champ d'application de la clause et portée du rapport

14. Les domaines dans lesquels les clauses de la nation la plus favorisée sont appliquées sont extrêmement variés. On peut les classer comme suit :

a) Règlementation internationale du commerce et des paiements.

b) Traitement des moyens de transport étrangers (navires, aéronefs, trains, véhicules à moteur, etc.).

c) Etablissement, statut personnel et activités professionnelles des personnes physiques et juridiques étrangères,

d) Privilèges et immunités des missions diplomatiques, consulaires et commerciales.

e) Propriété intellectuelle (brevets, droit d'auteur, etc.).

f) Reconnaissance et exécution des jugements étrengers et des sentences arbitrales.

15. Le plus important de ces domaines est le commerce international. Ici, la clause est une caractéristique permanente des traités réglementant le commerce d'exportation et d'importation, en général, et les questions de tarifs douaniers, de droits de douane et autres, en particulier. Cette situation a été implicitement reconnue par la Commission du droit international lorsque, dans la décision mentionnée ci-dessus au paragraphe 4, elle s'est référée à la Commission des Nations Unies pour le droit commercial international.

16. Une étude détaillée de tous les domaines dans lesquels on utilise les clauses de la nation la plus favorisée révélerait bien des problèmes particuliers[17].

16/ Manley Hudson, International Legislation, Washington, 1937, vol. VI, p. 927.

17/ Alice Piot, "La clause de la nation la plus favorisée, "Revue critique de droit international privé, 1965, XLV, p. 1.

Toutefois, puisque la Commission n'a pas l'intention de traiter la question du point de vue économique, le Rapporteur spécial ne se propose pas, sauf de brèves incursions dans le domaine du commerce, d'examiner toute la gamme des utilisations de la clause. Par conséquent, la Commission voudra peut-être ne considérer que les aspects formels et juridiques de la clause[18], sans s'écarter, bien entendu, ce faisant, du cadre des réalités.

VIII. Nature et effet de la clause

17. La clause de la nation la plus favorisée exerce un effet d'harmonisation et d'unification[19]. Jusqu'à une date assez récente, cette clause figurait surtout dans les traités bilatéraux, mais elle dépasse maintenant le bilatéralisme des relations commerciales et montre une tendance au multilatéralisme. Son effet est automatique. Etant donné qu'une disposition accordant des avantages à une tierce partie s'applique de plein droit au bénéficiaire de la clause, celle-ci a pour effet de rendre superflue la conclusion de nouveaux accords séparés[20]. Elle peut être liée aux systèmes les plus divers de politique économique, au libre échange aussi bien qu'au protectionnisme[21]. Inscrite dans des traités de commerce, elle crée des conditions favorables au développement de relations commerciales réciproques entre les Etats. Elle comprend deux éléments principaux : l'octroi d'avantages et la suppression de la discrimination.

18. Le régime du traitement de la nation la plus favorisée, qui crée l'égalité entre Etats participant au commerce international ne porte pas atteinte au système économique des Etats et ne saurait y porter atteinte. On ne peut admettre une solution différente,

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18/Voir la déclaration de M. Jiménez de Arechaga résumée au paragraphe 16 du compte rendu de la 741e séance de la Commission, Annuaire de la Commission du droit international 1964, vol. I.

19/George Erler, Gründprobleme des internationalen Wirtschaftrechts, Göttingen, 1956, pages 53 et 99.

20/George Dahm, Völkerrecht, Stuttgart, 1961, vol. II, p. 594.

21/George Dahm, op.cit., p. 593.

car elle équivaudrait à une intervention dans la vie interne d'autres pays[22]. A ce propos, il y a lieu d'étudier l'interrelation entre des principes tels que l'égalité souveraine des Etats, le devoir des Etats de coopérer les uns avec les autres conformément à la Charte des Nations Unies, l'égalité de droits des peuples et leur droit à disposer d'eux-mêmes, la non-discrimination et la réciprocité.

19. Du point de vue technique, la clause de la nation la plus favorisée est un renvoi à un autre traité, tandis que la clause du traitement national est un renvoi au droit interne[23]. Georges Scelle analyse cette clause comme suit :

> "La clause de la nation la plus favorisée ... est un procédé de communication automatique du régime réglementaire de traités particuliers à des sujets de droit d'Etats non signataires ... ... les nouveaux traités ... jouent ... le rôle d'actes-condition, cependant que la clause elle-même s'analyse en un acte-règle liant ... la compétence des gouvernements signataires ...
>
> La clause agit donc tout ensemble comme une prévention de l'exclusivisme des traités, comme une extension automatique d'un ordre juridique nouveau et spécialisé, et en définitive, comme un facteur d'unification du droit des gens".[24]

IX. Forme de la clause

20. La clause de la nation la plus favorisée fait partie d'un traité au sens de ce terme défini au paragraphe 1, alinéa a, de l'article 2 du projet de 1966 sur le droit des traités. Par définition, la clause comme telle ne saurait faire partie d'un accord international qui ne serait pas conclu en forme écrite.

22/ D.M. Genkine, Printsip naïbolchevo blagopriatstvovania v torgovykh dogovorakh gosoudarstv (Le principe de la nation la plus favorisée dans les traités de commerce des Etats), Sovietskoïe gosoudarstvo i pravo (L'Etat soviétique et le droit), 1958, 9, p.22. Voir aussi la réunion d'experts réunie à Rome au mois de février 1968 par l'Association internationale des sciences juridiques.

23/ Voir l'intervention de M. Reuter résumée au paragraphe 14 du compte rendu de la 741ème séance de la Commission, Annuaire de la Commission du droit international 1964, vol. I.

24/ Georges Scelle, "Règles générales du droit de la paix", Académie de droit international, Recueil de cours, 1933, IV, vol. 46, pp. 461 et 462.

Ceci n'empêche pas qu'il soit possible d'accorder le traitement de la nation la plus favorisée oralement ou par accord tacite. Les Etats peuvent également accorder ce traitement par une mesure autonome.

21. Le traité où figure la clause doit nécessairement être conclu entre des Etats; il peut être bilatéral ou multilatéral. Il n'est pas nécessaire que l'accord collatéral - celui qui accorde l'avantage ou le traitement préférenteil à un Etat tiers - soit en forme écrite.

X. Application de la clause aux individus

22. Bien que les parties contractantes qui se promettent l'une à l'autre le traitement de la nation la plus favorisée soient toujours des Etats, l'objet de ce traitement n'est pas un Etat, mais ses nationaux, habitants, personnes morales, groupements de personnes physiques, navires, aéronefs, produits, etc. Ainsi, le traité contenant une clause de la nation la plus favorisée prévoit des droits dont les débiteurs seront des individus et les bénéficiaires d'autres individus. Etant donné que la Commission du droit international a laissé de côté, lorsqu'elle a codifié le droit des traités, la question de l'application des traités aux individus, on ne se propose pas d'entrer plus avant dans cette matière pour l'étude de la clause[25/].

XI. Portée des droits découlant de la clause

23. Portée ratione materiae. Il est indubitable que, du fait de l'octroi d'un avantage déterminé à un pays tiers, la clause ne peut en principe procurer à son bénéficiaire que des droits de la même nature ou du même ordre, ou appartenant à la même classe que ceux envisagés lors de cet octroi. L'objet(ou la catégorie d'objets) doit nécessairement être le même : l'octroi des droits de la nation la plus favorisée relatifs à un objet ou à une catégorie d'objets ne peut conférer le droit de jouir du traitement accordé à un autre pays relativement à un objet différent (ou à une catégorie différente d'objets[26/]. Il est indispensable de garder présente à l'esprit la portée exacte de

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25/ Voir le commentaire de l'article 66 dans le troisième rapport de Sir Humphrey Waldock sur le droit des traités (Annuaire de la Commission du droit international, 1964, vol. II, p. 45) et le paragraphe 33 du rapport de la Commission sur les travaux de sa dix-huitième session (ibid, 1966, vol. II, p. 193).

26/ Sir Gerald Fitzmaurice, The law and procedure of the International Court of Justice, 1951-1954, points of substantive law, Part II, The British Yearbook of International Law, 1955-1956, XXXII, p. 84.

chaque clause particulière, car le traitement de la nation la plus favorisée ne peut être réclamé que pour autant qu'il s'agit d'avantages du même genre accordés à des Etats tiers par l'Etat qui a promis ce traitement. On doit examiner chaque point du traité préférentiel pour déterminer qui est le plus favorisé, du bénéficiaire de la clause ou de l'Etat tiers. La comparaison ne peut être faite in globo, ce qui n'aurait pas de sens, mais point par point et en détail. Si le nouvel arrangement intervenu a trait à des tarifs douaniers, les droits payés par le bénéficiaire et par l'Etat tiers doivent être examinés rubrique par rubrique, et position par position.

24. Portée ratione personae. Les règles de la protection diplomatique s'appliquent (nationalité, nationalité des sociétés, double nationalité, etc.). La question se pose toutefois de savoir s'il convient de traiter de cette question dans le rapport, compte tenu des observations faites plus haut au paragraphe 22.

25. Portée territoriale. La règle posée à l'article 25 du projet de la Commission du droit international sur le droit des traités s'applique ici.

26. Portée ratione temporis. Sauf disposition expresse contraire (p. ex. clause pro futuro), la présomption joue en faveur du traitement général inconditionnel de la nation la plus favorisée[27]. La clause commence à porter ses effets dès que l'Etat tiers est en droit de réclamer un certain traitement, qu'il le fasse effectivement ou non[28]. La clause cesse de porter ses effets quand le droit de l'Etat tiers à un certain traitement expire[29].

27/ Schwarzenberger, op.cit, p. 108; Blaise Knapp, Le système préférentiel et les Etats tiers, Genève, 1959, p. 287.

28/ McNair, op.cit, pp. 278 à 280; Knapp, op.cit, p. 298.

29/ Proposition présentée par M. Jiménez de Aréchaga, Annuaire de la Commission relative du droit international, 1964, vol. I, 752ème séance, par. 1; Affaire relative aux droits des ressortissants des Etats-Unis d'Amérique au Maroc, Arrêt du 27 août 1952, C.I.J, Recueil 1952, pp. 191 à 192; Genkine, op.cit. p. 25. On notera que la situation est différente dans le système du GATT (voir les articles III et XXVIII de l'Accord général).

27. Portée ratione originis beneficii. Le droit du bénéficiaire au traitement de la nation la plus favorisée s'étend à tous les avantages accordés par l'Etat qui a consenti cette clause à un Etat tiers, quoi qu'il en soit du point de savoir si l'avantage accordé a son origine dans un traité, dans la simple pratique de la réciprocité ou dans l'application du droit interne de l'Etat qui a promis ce traitement[30/]. Ce droit découle du traité où est inscrite la clause de la nation la plus favorisée et non du traité entre l'Etat qui a consenti cette clause et l'Etat tiers, ce deuxième traité étant res inter alios acta à l'égard du bénéficiaire de la clause[31/]. Le champ d'application de la clause englobe également les traitements préférentiels accordés par traité multilatéral. Certains auteurs se sont élevés contre cette opinion pour ce motif que les traités multilatéraux sont le résultat de concessions réciproques et qu'il serait dont injuste que le bénéficiaire de la clause jouisse des préférences sans avoir lui-même fait de concession[32/]. Mais ceci introduit l'idée de la réciprocité des concessions qui vaut pour la clause conditionnelle de la nation la plus favorisée mais est étrangère à sa forme inconditionnelle[33/].

30/ Knapp, op.cit, pp. 297 et 306; McNair, op.cit, p. 280; Genkine, op.cit, p. 25. Voir aussi l'extrait ci-après d'une étude en date du 12 septembre 1936 du Comité économique de la Société des Nations :

> "D'une manière générale, on peut dire que la clause ... implique le droit de réclamer immédiatement, de plein droit ... toutes les réductions de droit et de taxes ... accordées à la nation la plus favorisée en matière douanière, que ces réductions ... découlent de mesures autonomes ou de conventions conclues avec des Etats tiers." (Société des Nations, document 1936.II.B.9, p. 10).

31/ Affaire de l'Anglo-Iranian Oil Co. (compétence), Arrêt du 22 juillet 1952, C.I.J. Recueil 1952, p. 109; Hildebrando Accioly, Traité de droit international public, Paris, 1941, tome II, p. 479; Marcel Sibert, Traité de droit international public, Paris, 1951, tome II, p. 255. Pour l'opinion opposée, voir : Opinion dissidente de M. Hackworth, C.I.J. Recueil 1952, p. 141; Oppenheim, International Law, 8ème édition par Lauterpacht, Londres, 1955, par. 522; Fauchille, Traité de droit international, Paris, 1926, tome I, 3ème partie, p. 359.

32/ Scelle, op.cit, p. 463.

33/ Knapp, op.cit, pp. 306 et 307.

XII. Exceptions coutumières et conventionnelles à l'application de la clause

28. On peut citer les exceptions suivantes :

i) unions douanières

ii) trafic frontalier

iii) intérêts des pays en voie de développement[34/]

iv) ordre public et sécurité des parties contractantes[35/]

v) autres exceptions[36/].

XIII. Exceptions résultant de traités

29. L'Article XXV du Traité général d'intégration économique de l'Amérique centrale, signé à Managua le 13 décembre 1960[37/], porte que :

"Les Etats signataires ... sont convenus ... d'insérer la "clause centraméricaine d'exception" dans les traités de commerce qu'ils pourront conclure sur la base du "traitement de la nation la plus favorisée" avec des pays autres que les Etats contractants."

34/ "De nouvelles préférences, tarifaires et non tarifaires, devraient être accordées à l'ensemble des pays en voie de développement, sans l'être pour autant aux pays développés. Les pays en voie de développement ne seront pas tenus d'étendre aux pays développés le traitement préférentiel qu'ils s'accordent entre-eux."
(Huitième principe général de la Conférence des Nations Unies sur le commerce et le développement, Publication des Nations Unies 64.II.B.11, vol.I, p. 22, E/CONF.46/141, vol.I)
"Le principe traditionnel de la clause de la nation la plus favorisée est conçu pour assurer une égalité de traitement ... /mais il/ ne tient pas compte du fait qu'il y a dans le monde des différences de structure économique et des degrés divers de développement; traiter de manière égale des pays qui ne sont pas économiquement égaux constitue une égalité de traitement purement formelle, qui se ramène en fait à une inégalité"; d'où la nécessité d'accorder des préférences en faveur des pays en voie de développement.
(Conseil du commerce et du développement, Commission des articles manufacturés, groupe des préférences, deuxième session, 4 juillet 1967, rapport du Secrétariat de la CNUCED, TD/B/C.2/A.C.1/7.)

35/ GATT, articles XX et XXI.

36/ Paul Guggenheim, Traité de droit international public, vol.I, p. 104.

37/ Nations Unies, Recueil des traités, vol.455, p. 91.

30. Le paragraphe 1 de l'article 10 de la Convention relative au commerce de transit des Etats sans littoral, signée à New York le 8 juillet 1965,[38] contient la disposition suivante :

> "Les Etats contractants conviennent que les facilités et droits spéciaux accordés aux termes de la présente Convention aux Etats sans littoral en raison de leur situation géographique particulière sont exclus du jeu de la clause de la nation la plus favorisée ...".

XIV. Violations de la clause

31. Il convient de mentionner à ce sujet la discrimination indirecte[39] et l'adoption de tarifs par trop spécialisés. Un exemple classique de ces derniers se trouve dans le Traité de commerce additionnel de 1904 conclu entre l'Allemagne et la Suisse[40]. Par ce traité l'Allemagne a concédé à la Suisse une réduction tarifaire pour les génisses "qui ont été élevées à une altitude de 300 m au-dessus du niveau de la mer et ont fait un estivage d'un mois au minimum, à une altitude d'au moins 800 m au-dessus du niveau de la mer". Des animaux répondant à ces conditions ne pouvaient être produits ni par les Pays-Bas, ni par d'autres pays comptant parmi les plus favorisés.

38/ TD/TRANSIT/9, p. 9.

39/ McNair, op.cit, p. 299.

40/ Recueil officiel des lois et ordonnances de la Confédération Suisse, Berne, 1906, tome XXI, Année 1905, p. 428.

Legal Advisor

OTT114

ACTION COPY

PAR111

file 14/6
20-3-1-6
32

GVE53/13

RR COP RR OTT

DE GVA

R 131456Z

FM GENEV JUN13/68

TO COPEN 728

INFO EXTER

WERSHOF FROM MCKINNON

REF YOURTEL 274 JUN10

LAW OF TREATIES CONFERENCE-COPIES OF FUTURE DOCUMENTATION

NONE OF DOCUS REQUESTED IN YOUR REFTEL AND IN PREVIOUS TELS FROM VIENN ARE AS YET AVAILABLE IN GENEV. AS SOON AS THEY ARE THEY WILL BE SENT TO YOU.

002084

13.6.12/051

CANADIAN EMBASSY

AMBASSADE DU CANADA

Prinsesse Maries Allé 2,
1908 COPENHAGEN V, Denmark,
June 17, 1968.

CONFIDENTIAL

Dear Joe,

Re: Draft Report of the Canadian Delegation to the Law of Treaties Conference.

Thank you very much for your letter of June 4 (received last week) enclosing the draft report. I think that it is very good and my suggestions for changes, set forth in the enclosure to this letter, are not of a fundamental character.

Although I did not make this suggestion when we discussed the outline of the draft report in Vienna, I wonder if it would be useful to add an Annex III entitled "Summary of Canadian Delegation Votes on Articles Adopted by the Committee of the Whole". The idea of such an Annex would be, not to show how we voted on all the amendments, but to show how we voted on each Article in the form in which it was adopted by the Committee of the Whole. Of course many articles were not put to the vote but were deemed to be approved unanimously. Other articles were not put to the vote but some delegations (in a couple of cases the Canadian) made statements to the effect that - had there been a vote - they would have voted against the Article or would have abstained. Such a listing could be very useful next year. If a delegation did not in Committee of the Whole vote against an Article or abstain and did not make any statement reserving its position, it must remember and take into account this voting record when deciding what to do in Plenary.

I would like to see your report put into final form within a reasonably short time. If Ron Robertson will be sending his comments this month, I will telegraph to you my observations on his comments. If for any reason Ron cannot produce these comments this month, I suggest you go ahead and put the report into final form.

Yours sincerely,

M. H. Wershof

P.S. When your report is produced in final form, I assume that you will be sending a copy to McKinnon as well as to me.

J.S. Stanford, Esq.,
Legal Division,
Department of External Affairs,
OTTAWA.

cc Ron Robertson

CONFIDENTIAL

June 17, 1968

SUGGESTIONS FOR CHANGES IN FIRST DRAFT OF THE REPORT OF THE CANADIAN DELEGATION TO THE LAW OF TREATIES CONFERENCE, VIENNA, APRIL-MAY, 1968

GENERAL SUGGESTION

I think that the paragraphs of the report (with a couple of exceptions) should be numbered consecutively from beginning to end - in order to make it easier for readers to refer to particular points in the report. This suggestion does not apply to the paragraphs beginning on Page 10 and ending on Page 15, dealing with particular Articles; the sub-headings of these paragraphs quote the Article number which should be clear enough without also having a paragraph number.

PAGE 1:

It might be useful to mention briefly in the first paragraph on this page that the General Assembly resolutions called for the Conference to meet in two sessions in 1968 and 1969; that the plan was that the first session should consist almost entirely of work in Committee of the Whole and that the second session should complete the work of the Committee of the Whole and then go on to deal with the Draft Articles in Plenary.

PAGE 4:

Professor Ago's first name is ROBERTO.

PAGE 5:

You mention at the bottom of this page that the Committee of the Whole took substantive decisions by majority vote. It might be worthwhile to mention in parenthesis that the Rules of Procedure require that substantive decisions in Plenary will need a 2/3 majority - in other words, each Draft Article as presented to the Plenary will have to be adopted by a 2/3 vote.

.../2

PAGE 7:

In the opening paragraph you might make it clearer that what you have called "the Rapporteur's Report" is, strictly speaking, the report of the Committee of the Whole on its work at the First Session of the Conference. You might also say that there was no time at the end of the First Session for the Draft Report prepared by the Rapporteur to be approved by the Committee of the Whole. Consequently, it is still a "Draft" Report of the Committee of the Whole, and will have to be adopted by the Committee of the Whole at the opening of the Second Session of the Conference.

I don't think that it is correct to say that Chapter III contains the "text of the Draft Convention" adopted by the Committee of the Whole although this is the wording used in the Draft Report. Even if the Committee of the Whole had disposed of all the Articles presented to it, it would not have been able to adopt the "text of the Draft Convention"; it would only have been able to adopt a partial text of the Draft Convention because the final Articles are still to come.

PAGE 9:

In the paragraphs on this page referring to resolutions, it might be made clearer that both resolutions have yet to be adopted by the Plenary and that that will be done at the Second Session. If the relevant missing portion of Chapter III of the Draft Report is available by the time this page is being retyped, it would be desirable to refer to the numbers of the pages of the Draft Report in which the texts of the resolutions are given. Even if the missing portion is not available in time, it would be desirable to say that the texts of the resolutions are published in Chapter III of the Draft Report.

As the reference here to the "coercion" resolution is very brief, it might be worthwhile to mention that an explanation of the reasons for adopting this resolution is to be found on Page 14 where you discuss what happened to Draft Article 49.

PAGE 10:

Although it is not necessary in this report to go into detail about our struggles relating to Article 5, I think that it should be made clearer that our main objective was to delete Paragraph 2 of Article 5; our desire to delete also Paragraph 1 was based on quite different reasons. It should also be mentioned that detailed reports by the Canadian Delegation on the debate on Article 5 were sent during the First Session and are available in the files of the Department of External Affairs.

...3

PAGE 11:

Still referring to Article 5, I suggest that mention be made of the fact that a 2/3 majority will be required to approve this Article in Plenary.

PAGE 13:

I suggest that the last sentence of this page should stop after the words "Cuban representative"; the explanation that follows these words is not lengthy enough to be meaningful and is not essential in this particular place.

PAGE 14:

It should be made clearer that the resolution adopted by the Committee of the Whole has still to be adopted by the Plenary in 1969.

PAGE 15:

Near the top of the page I think it is too much to say that our objective "was achieved". The definition of jus cogens adopted by the Committee of the Whole was of course an improvement on the I.L.C. draft, but is a long way from being the"clarification of the criteria" desired by the Canadian instructions.

PAGES 17 AND 18:

I would be disposed to delete the names of particular delegates (Blix and Raphagen) but to leave the references to the Swedish and Netherlands delegations.

PAGE 20:

In the second paragraph on this page, I would be inclined to use the phrase "whether Canada wishes" rather than the phrase "whether we wish".

PAGE 21:

The reference to "Part V" should perhaps be expanded to mention the numbers of the articles covered by Part V. Also, rather than speaking of "British officials", I would refer to "the United Kingdom Delegation to the Conference in Vienna". Is it correct to say that a Commonwealth Prime Ministers' Meeting is "scheduled"for 1968? My impression is that it is being talked about but that it is by no means scheduled.

...4

GE_21 cont'd:

Still on this page, I suggest that you define Annex I as "Draft Report of the Committee of the Whole on its Work at the First Session of the Conference, prepared by the Rapporteur".

M. H. Wershof

File
Diary
Div. Diary

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Permanent Mission of Canada to the U.N.
GENEVA, Switzerland

FROM / De: The Under-Secretary of State for External Affairs
OTTAWA

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties Conference - First Session Documentation

SECURITY / Sécurité: UNCLASSIFIED

DATE: June 10, 1968

NUMBER / Numéro: L-501

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	32

ENCLOSURES / Annexes

DISTRIBUTION
Copenhagen
Permis, NY

The Permanent Mission in New York informs us that the remaining documentation on the First Session will be available in Geneva only and not in New York.

2. We should be grateful, therefore, if you could arrange to send to us two copies each of the addenda to the Draft Rapporteur's Report (A/Conf.39/C.1/L.370) requested by Mr.Wershof in his telegram 274 of June 10.

3. To complete our Provisional Summary Records, we should be grateful if you could also send to us two copies of the P.S.R. of the closing meeting of the Plenary, May 24 and two copies of the P.S.R. for the 57th, 76th, 78th, 80th, 82nd and subsequent meetings of the Committee of the Whole.

J.S. STANFORD

Under-Secretary of State
for External Affairs

Ext. 407D/Bil.
[redacted]
(Admin. Services Div.)

002090

INFO ONLY

OTT024

LDN030

BRU012/10

HAG6/10

COP01/10

RR GVA RR OTT

DE COP

R 100945Z

FM COPEN JUN10/68

TO GENEV 274

INFO EXTER

MCKINNON DE WERSHOF

REF VIENN TEL MAY25(NUMBER NOT/NOT KNOWN)

LAW OF TREATIES CONFERENCE-COPIES OF XUTURE DOCUMENTATION

DRAFT RAPPORTEURS REPORT A/CONF.39/C.1/L.370 WAS ISSUED IN SECTIONS AND SOME SECTIONS WERE NOT/NOT AVAILABLE WHEN WE LEFT VIENN. I HAVE ADD 1(PART B): ADD 2: ADD 3(PARTS B AND D): ADD 4,5 AND 6. STILL TO COME ARE ADD 1(PART A): ADD 3(PARTS A AND C): AND ADDENDA IF ANY SUBSEQUENT TO ADD 6.

2. COULD YOU INQUIRE OF UN SECRETARIAT GENEV PLEASE. THERE SHOULD ALSO BE SOME PROVISIONAL SUMMARY RECORDS THAT WERE ISSUED AFTER CLOSE OF VIENN DOCU SECTION.

Legal/J.S. Stanford/zs

File
Diary
Div. Diary

20-3-1-6
32

CONFIDENTIAL

OTTAWA, June 4, 1968

Dear Mr. Wershof,

Enclosed for your comments is a first draft of the report of the Canadian Delegation on the Law of Treaties Conference.

I have also sent a copy of this draft to Ron Robertson in New York, and have asked him to forward it to you as soon as possible with his comments.

Once again many thanks for your kindness in Vienna.

Yours sincerely,

J.S. STANFORD

J. S. Stanford.

Mr. M. H. Wershof,
Ambassador,
The Canadian Embassy,
Prinsesse Maries Allé 2,
Copenhagen, Denmark.

File
Diary
Div. Diary

Legal Div./J.S.Stanford/zs

RM

20-3-1-6
32 1 —

CONFIDENTIAL

OTTAWA, June 4, 1968

Dear Ron,

Enclosed is a copy of draft report of the Canadian Delegation on the Law of Treaties Conference. I should be grateful if you could note any comments you may have on this draft and forward it to Mr.Wershof in Copenhagen. I have already sent to Mr. Wershof the original of the draft and have told him that he would receive in due course a copy of the draft with your comments.

Upon reviewing the Conference documentation received in Ottawa I find that we are missing the following documents:

Summary Record of the 57, 76, 78, 80 and subsequent meetings of the Committee of the Whole,

Closing Meeting of the Plenary.

I should be grateful if you could obtain for us two copies of each of these documents, as well as two copies of those portions of the Rapporteur's report which were not issued prior to the closing of the first session in Vienna.

Best regards.

J.S. STANFORD

J. S. Stanford.

Mr. A. W. Robertson
The Permanent Mission of Canada to the United Nations
New York, N.Y.

File
Diary
Div.Diary

[redacted]

Legal Div./J.S.Stanford/sa

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: Finance Division

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Attendance at the U.N.Conference on the Law of Treaties, VIENNA, April 26 - May 27, 1968

SECURITY / Sécurité: UNCLASSIFIED

DATE: May 29, 1968

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-16
MISSION	37

ENCLOSURES / Annexes: 5

DISTRIBUTION

-- Attached please find my travel expense claim in respect of Canadian dollar expenditures incurred in connection with my attendance at this Conference.

-- I also attach a refund cheque payable to the
-- "Receiver General of Canada" in the amount of $74.55, my air
-- ticket, the Air Canada receipt for the excess baggage charge
-- and a copy of my memorandum of April 22, 1968 to you concerning excess baggage on which is noted your approval for this charge.

J. S. STANFORD

J. S. Stanford,
Legal Division.

Ext. 407D/Bil.
[redacted]
(Admin. Services Div.)

002094

Secret

ACTION COPY

FM LDN MAY28/68 CONFD

TO EXTER 2581

INFO PRMNY GENEV TT COPEN DE HAGUE

20-3-1-6
32 | 27

LAW OF TREATIES CONFERENCE:FURTHER DETAILS ON BRIT PLANS FOR INTER-SESSIONAL CONSULTATIONS

ROBERTSON(TREATY DEL)ENROUTE FROM VIENA MET WITH SINCLAIR(LEGAL DEPT)AT FO TO HEAR FURTHER BRIT VIEWS ON INTER-SESSIONAL ACTIVITIES.(IN A NUMBERED LET FROM VIENA MAY25 WHICH WILL NOT/NOT REACH ADDRESSEES FOR SOME LITTLE WHILE YET WE REPORT AT LENGTH ON PRELIMINARY EXCHANGE OF VIEWS BETWEEN REPS OF AUSTRALIA,CDA,NZ, UK AND USA ON WHAT MIGHT BE DONE INTER-SESSIONALLY IN ORDER TO SECURE IMPROVEMENTS IN PART 5 OF DRAFT ARTICLES,AND IN PARTICULAR ARTICLE 62 BIS.)

2.SINCLAIR MADE TWO POINTS.THE FIRST WAS THAT BRITS WERE NOW SLIGHTLY MORE OPTIMISTIC THAN AT FRI MAY24 MTG OF FRIENDLY FIVE. THEY HAD LUNCH WITH ELIAS(CHAIRMAN CTTEE OF WHOLE)ON FRI AND ELIAS HAD SAID THAT HE HAD MADE CLEAR TO KLESTOV(USSR DEL)THAT EASTERN EUROPEAN GROUP WOULD BE BADLY MISTAKEN IF THEY THOUGHT THAT THEY COULD RETURN TO SECOND SESSION OF CONFERENCE INTENDING TO HOLD LINE ON PRESENT ARTICLE 62.ELIAS HAD APPARENTLY TOLD KLESTOV THAT IT WOULD BE NECESSARY FOR THEM TO GO SOME WAY TOWARD MTG WESTERN VIEWS ON 62 BIS AND THAT THIS WAS GENERAL OPINION OF AFRICANS. BRITS ARE DUBIOUS ABOUT ELIAS RELIABILITY BUT SINCE THEY SEE NO/NO REASON WHY HE SHOULD FABRICATE THIS STORY ARE INCLINED TO GIVE HIM BENEFIT OF DOUBT.

...2

3.SINCLAIRS SECOND POINT WAS TO REITERATE THAT BRITS ARE STILL OF OPINION THAT IT MAY WELL BE NECESSARY TO MAKE APPROACHES TO COMWEL AFRO-ASIANS AT PRIME MINISTERIAL LEVEL(PRESUMABLY DURING NEXT COMWEL PRIME MINISTERS CONFERENCE).EVEN IF THIS IS DONE THEY WOULD ALSO PLAN TO MAKE SELECTIVE APPROACHES IN NY NEXT AUTUMN SHORTLY AFTER OPENING OF 23RD UNGA.THESE IDEAS ARE OF COURSE AT WORKING LEVEL AND SUBJECT TO FURTHER REVIEW.

May 25, 1968

OUTLINE OF REPORT OF CANADIAN DELEGATION
TO 1ST SESSION OF LAW OF TREATIES CONFERENCE
VIENNA, APRIL-MAY 1968

PART

I Introductory Section

1. Short account of origin of Conference
2. Constitution of Canadian Delegation (Lawford's work)
3. Mention of Preparatory Meetings with Old Commonwealth and USA and WEO
4. List of Articles of particular concern
5. Officers and organization of work of Conference (role of Expert Consultant).

II What the 1st Session Did

1. Reference to structure of Rapporteur's report (to be regarded as annex to this report)
2. "Reverse List" of articles adopted by CW
   List of articles put over to 1969, with brief explanation and resolutions awaiting action by Plenary
3. Short account of what happened and why to articles of particular concern - see I.4 above.

III Comments on certain aspects of the Conference

1. Weakness of WEO
2. Afro-Asian and Communist attitudes

IV Future Action

1. Inter-sessional meetings
2. Article 5
3. Need for approaches to some governments (West Indian, Commonwealth) re Part V.

Annex

Copies of Statements made in Committee of the Whole by Canadian Delegation

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs
OTTAWA, CANADA

FROM / De: Canadian Delegation to Law of Treaties Conference
VIENNA, AUSTRIA

REFERENCE / Référence: Our telegram 469, May 22

SUBJECT / Sujet: Law of Treaties Conference - Article 62

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 25, 1968

NUMBER / Numéro: 316

FILE	DOSSIER
OTTAWA	20-3-1-L
MISSION	32

ENCLOSURES / Annexes: 1

DISTRIBUTION

Permis N.Y.

Permis Geneva

Enclosed is a memorandum by Mr. Stanford enlarging on the sad story related in our telegram 469.

Canadian Delegation

Ext. 407B/Bil.

May 25, 1968

CONFIDENTIAL

MEMORANDUM

Law of Treaties Conference, Vienna

Article 62 Discussion in Committee of the Whole

Our telegram 461 of May 20 reported the decision to postpone further debate to May 21. WEO group met Tuesday AM May 21 and received a report from Blix (Sweden) that majority support, for Swedish et al amendment L.352/Rev. 1 and for resolution L.362 by same group to postpone voting to 1969, no longer existed. Instead the situation was that the Afro-Asians and Communists were determined to force Article 62 and amendments to the vote immediately, with the intention of defeating the amendments and forcing through the adoption of the ILC draft of Article 62. In the circumstances the WEO group agreed to seek withdrawal of both the Czech resolution L.361 and the Sweden et al resolution L.362 (both of which proposed postponement of voting but with various embellishments) in favour of a simple, non-committal resolution from the floor to postpone voting on Article 62 and amendments until 1969. At WEO group request, Canada agreed to move such postponement.

2. As discussion of Article 62 was scheduled to be resumed during that morning's meeting of the Committee of the Whole, we informed the Chairman prior to the meeting of our proposed motion. After other matters on the agenda were dealt with, however, the Chairman declared the morning meeting ended and Article 62 was put over for discussion at afternoon meeting. We learned later that the Chairman (Elias of Nigeria) informed the Afro-Asians, during interval between morning and afternoon meetings, of the proposed Canadian motion. As a result, the Afro-Asians decided that immediately upon resumption of consideration of Article 62, India would move formally for immediate voting on Article 62 and amendments. The Chairman reportedly indicated he would recognize India ahead of Canada, which would effectively prevent the Canadian motion from getting to the floor.

3. The opening of the afternoon meeting was delayed more than two hours while efforts were made to reach a compromise solution. Lengthy discussion involving principally President Ago, Dr. Elias, Stavropoulos, Kearney (USA), Vallat (UK), Khlestov (USSR) and representatives of Afro-Asians and Latin Americans, resulted in the "compromise" reported in telegram 469. The basic elements were: (a) withdrawal of both Czech and Sweden resolutions to postpone voting; (b) Indian motion for immediate voting on Article 62 and

amendments; (c) Netherlands proposal that L.352/Rev. 1 be withdrawn as an amendment to Article 62 and put forward (with minor drafting changes) as a new Article 62bis, followed by Netherlands motion that consideration of and voting upon new Article 62bis be postponed for consideration by the Committee of the Whole at the 1969 session. These steps were carried out and followed by statements (which may or may not have been part of the "deal") by Japan (re L.339), USA (re L.355), Uruguay (re L.343) and Switzerland (re L.347); they said that their amendments were really amendments to what was now Article 62bis and should therefore be deferred with that Article for discussion in the Committee of the Whole in 1969. The French amendment to para 1 of Article 62, which was not connected with the compulsory settlement question, was voted upon and adopted 39 (Canada, US, UK)-31-20. The Cuban amendment L.353 was withdrawn; but the Cuban delegate accompanied the withdrawal with the completely unjustified statement that Cuba considered that Article 62 did not apply to Articles 48, 49, 50.

4. The Chairman then declared (without a vote) that Article 62 was adopted and referred to the Drafting Committee with French amendment L.342. A number of western states, including Canada, made statements to the effect that, while not insisting on a vote on Article 62, they did not consider they had approved the Article and that such approval would depend upon results of eventual consideration of the proposed Article 62bis. The end result was that the Afro-Asians and Communists succeeded in having the ILC draft of Article 62 "approved" by the Committee of the Whole, while the Western delegations had been able, by the device of 62bis, to save their amendments from the guillotine which the Afro-Asians were determined to impose on any amendments to Article 62. In the view of some, the fact that the Western proposals are still "on the table" in the Committee of the Whole and may be pursued in inter-sessional negotiations, represents the best that could be salvaged from a bad situation. In the view of the Canadian Delegation, however, solid Western insistence upon a satisfactory Article 62, even if it meant letting the existing amendments go to the vote and be defeated, would have made more credible Western statements that we, as a group, will have nothing to do with a Convention which does not have a satisfactory settlement of disputes procedure, and would thus have been more conducive to a willingness by non-Western delegations to seek a consensus at the second session in the interest of the universality of the new Convention.

5. In retrospect, the Western group made a serious error in tactics in not pressing for a vote on Article 62 during the preceding week when, according to Swedish calculations, a substantial simple majority existed in favour of Swedish et al amendment L.352. Although the group must share a certain collective responsibility for this decision, it should be noted that the decision resulted largely from U.K. insistence that the Communist bloc should not be "backed into a corner" on the settlement of disputes question. One suspects that British desire not to seek a vote on L.352 was also largely motivated by British dissatisfaction with L.352 because

of its failure to include any reference to the International Court of Justice. While the WEO group generally conceded the desirability of including a reference to the Court, most members of the group recognized that such a reference would have to be omitted if the amendment were to attract Afro-Asian support.

6. Going back one step further, it may well be that the original miscalculation took place when the U.K. permitted their long, rather involved, but carefully thought out procedure for the settlement of disputes to pass from their hands into the hands of the Swedish and Netherlands delegations, thereby losing control over future events relating to that amendment.

OTT090

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FM VIENN MAY25/68

TO PRMNY 481

PERMISGENEV

INFO EXTER

LAW OF TREATIES CONFERENCE-COPIES OF FUTURE DOCUMENTATION

THE SECRETARIAT IN VIENN CEASED ISSUING DOCUS LAST NIGHT. THERE ARE STILL A FEW DOCUS TO COME RELATING TO 1ST SESSION OF CONFERENCE INCL(A) SOME PROVISIONAL SUMMARY RECORDS AND (B) EVENTUALLY CORRECTED SUMMARY RECORDS. THESE DOCUS WILL BE ISSUED BY UN IN NY AND GENEV. WOULD PRMNY PLEASE WATCH FOR THESE AND SUPPLY OTT WOULD GENEV ALSO WATCH FOR THESE DOCUS AND SEND ONE COPY ENGLISH OF EACH TO ME IN COPEN

2. MUCH LATER ON SECRETARIAT WILL ISSUE SOME DOCUS IN NY AND GENEV IN PREPARATION FOR 2ND SESSION TO BE HELD IN 1969. ABOVE REQUEST ALSO APPLIES TO SUCH DOCUS

WERSHOF

This tel came by hand of Mr Sanford. Mag being typed and blue copies to follow

ACTION COPY

MESSAGE

	DATE	FILE/DOSSIER	SECURITY SECURITE
FM/DE VIENNA	MAY25/68	20-3-1-6 32 —	UNCLAS

20-3-1-6

	NO	PRECEDENCE
TO/A EXTERNAL OTT	1-477	ROUTINE
INFO PERMISGVA BY BAG DE VIENNA		ROUTINE
PERMISNY BY BAG DE OTT		ROUTINE

REF

SUB/SUJ LAW OF TREATIES CONFERENCE - EIGHTH AND FINAL PROGRESS SUMMARY (MAY20-24)

AS WAS TO BE EXPECTED DURING LAST WEEK OF CONFERENCE, WHEN EFFORT WAS BEING MADE TO TAKE DECISIONS ON A NUMBER OF ARTICLES ON WHICH DECISIONS HAD PREVIOUSLY BEEN POSTPONED, THE ORDER IN WHICH ARTICLES WERE DEALT WITH BY COMMITTEE OF THE WHOLE (CW) WAS SOMEWHAT CONFUSED. AS IN PAST TELS, WE SHALL DIVIDE THIS TEL INTO TWO PARTS: PART I DEALING WITH CONSIDERATION OF ARTICLES BY CW PRIOR TO THEIR REFERRAL TO DRAFTING CTTEE (DC) AND PART II DEALING WITH CONSIDERATION BY CW OF TEXTS RECOMMENDED BY DC. WITHIN EACH PART WE SHALL DEAL WITH ARTICLES IN NUMERICAL ORDER RATHER THAN IN CONFUSED CHRONOLOGICAL ORDER IN WHICH THEY WERE CONSIDERED BY CW. SOME ARTICLES WILL BE MENTIONED IN BOTH PARTS. WE ARE REPORTING IN SEPARATE TEL LIST OF ARTICLES ON WHICH CW DECISION WAS POSTPONED TO SECOND SESSION OF CONFERENCE. WE ARE ALSO REPORTING BY SEPARATE TELS ON CONCLUDING PLENARY SESSION OF CONFERENCE MAY24.

PART I

ARTICLE 39 (OURTEL 352 APR28)

VOTING ON THIS ARTICLE AND AMENDMENTS TOOK PLACE MAY22. FRENCH ORAL

.../2

DISTRIBUTION
LOCAL/LOCALE

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG Stanford/Wershof/dly			SIG M.H. Wershof

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

AMENDMENT TO REMOVE SECOND SENTENCE OF PARA1 TO ARTICLE 65 WAS ADOPTED 34(CDA, USA, UK)-29-22. SWISS AMENDMENT L.121 TO REDRAFT FIRST SENTENCE WAS DEFEATED. PERU AMENDMENT L.227 AND VIETNAM AMENDMENT L.233, BOTH OF WHICH REFERRED TO SECOND SENTENCE OF PARA1 (WHICH WAS NOW REMOVED TO ARTICLE 65) WERE DEFEATED. SINGAPORE AMENDMENT L.270 WAS DEFEATED 21(CDA, USA, UK, FRANCE)-31-31. ARTICLE WAS THEN REFERRED TO DC WITH FRENCH ORAL AMENDMENT AND AUSTRALIAN AMENDMENT L.245 WHICH CONCERNED ONLY DRAFTING.

ARTICLE 62

AS MORE FULLY REPORTED IN OURTEL 469 MAY22, CZECH RESOLUTION L.361 AND SWEDEN ET AL RESOLUTION L.362 WERE WITHDRAWN. SWEDEN ET AL AMENDMENT L.352 WAS REVISED TO BECOME PROPOSED NEW ARTICLE 62BIS, TO BE CONSIDERED NEXT YEAR. AMENDMENTS BY JAPAN (L.339), USA (L.355), URUGUAY (L.343) AND SWITZERLAND (L.347) ARE ALL TO BE REVISED AS PROPOSED AMENDMENTS TO NEW 62BIS. FRENCH AMENDMENT L.342 TO REDRAFT PARA1 WAS ADOPTED 39(CDA, USA, UK)-31-20. JAPANESE AMENDMENT L.388 WAS WITHDRAWN. ARTICLE AND FRENCH AMENDMENT WERE REFERRED TO DC.

ARTICLE 63

DESPITE EARLIER CW DECISION REPORTED OURTEL 461 MAY20 TO REFER THIS ARTICLE AND SWISS AMENDMENT L.349 TO DC, ARTICLE WAS RAISED AGAIN IN CW ~~XXX~~ MAY22 AND SWISS AMENDMENT DEFEATED 11(CDA)-43-33. ARTICLE WAS THEN REFERRED TO DC.

ARTICLE 67

DESPITE EARLIER CW DECISION REPORTED OURTEL 461 MAY20 TO REFER TO DC THIS ARTICLE ALONG WITH FINNISH AMENDMENT L.295 ON SEPARABILITY AND MEXICAN DRAFTING AMENDMENT L.356, ARTICLE WAS RAISED AGAIN IN CW MAY23. BOTH AMENDMENTS WERE WITHDRAWN AND IIC TEXT ADOPTED WITHOUT REFERENCE TO DC.

ARTICLE 71

MALAYSIAN AMENDMENT L.290/REV 1 WAS WITHDRAWN. AS DC SPECIFICALLY ASKED CHAIRMAN THAT CW VOTE ON AS MANY AMENDMENTS AS POSSIBLE IN ORDER TO REDUCE DC WORKLOAD, IN THIS AND SUBSEQUENT ARTICLES CERTAIN AMENDMENTS WERE PUT TO VOTE

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EVEN THOUGH MAINLY DRAFTING IN NATURE. RESULTS OF VOTING ON REMAINING AMENDMENTS TO ARTICLE 71 WERE AS FOLLOWS. AS PRINCIPLE IN BULGARIAN-SWEDISH AMENDMENT L.236 WAS IDENTICAL TO FINNISH L.248, THEY WERE VOTED UPON TOGETHER AND ADOPTED 77(CDA, USA, UK)-0-5. CHINESE AMENDMENT L.328 WAS DEFEATED. BULGARIAN AMENDMENT L.351 WAS DEFEATED 23-25(CDA, USA, UK)-38. MEXICAN AMENDMENT L.372 WAS ADOPTED 40(CDA, UK, FRANCE)-10-32. ARTICLE WAS SENT TO DC WITH AMENDMENTS L.236, L.248 AND L.372.

ARTICLE 72

MALAYSIAN AMENDMENT L.291 WAS WITHDRAWN. CHINESE AMENDMENT L.328 WHICH WOULD HAVE AFFECTED ARTICLE 72 AS WELL AS 71 WAS DEFEATED AS REPORTED IN PRECEDING PARA. REMAINING AMENDMENTS WERE DEALT WITH AS FOLLOWS. FINNISH AMENDMENT L.249: AMENDMENT TO PARA1(A) WAS REFERRED TO DC WITHOUT VOTE AS RAISING DRAFTING QUESTIONS ONLY; AMENDMENT TO PARA1(E) WAS ADOPTED 64(CDA, UK)-2-18. BYELORUSSIAN AMENDMENT L.364; AMENDMENT TO PARA1(D) WAS ADOPTED 32-24(CDA, USA, UK)-27; PROPOSED NEW PARA2 WAS ADOPTED 35-16-33(CDA, FRANCE). MONGOLIAN AMENDMENT L.368 WAS ADOPTED 29-28(CDA)-29. EACH ELEMENT OF USA AMENDMENT L.369 WAS VOTED UPON SEPARATELY AND ALL WERE ADOPTED BY SUBSTANTIAL MAJORITIES. MEXICAN AMENDMENT L.373 WAS REFERRED TO DC WITHOUT VOTING AS A DRAFTING MATTER. ARTICLE AND AMENDMENTS THEN REFERRED TO DC.

DURING DEBATE ON THIS ARTICLE WALDOCK CONFIRMED, IN REPLY TO WRITTEN QUESTION FROM US, THAT ILC DRAFT OF PARA1(D) WAS INTENDED TO REFLECT EXISTING DEPOSITARY PRACTICE OF UN SECGEN AS SET OUT IN PARA8 OF ILC COMMENTARY ON ARTICLES 16 AND 17. THIS EXPLANATION WAS OVERTAKEN, HOWEVER, BY ADOPTION OF BYELORUSSIAN AMENDMENT TO 1(D), WHICH WILL NOT BE WELCOMED BY SECGEN. SEE ALSO PART II OF THIS TEL.

ARTICLE 73

THIS ARTICLE, TO WHICH NO AMENDMENTS WERE TABLED, WAS ADOPTED AND REFERRED TO DC WITHOUT DISCUSSION.

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ARTICLE 74

AUSTRIAN AMENDMENT TO PARA2(A) L.8/REV 1 WAS ADOPTED 39(CDA, UK)-7-38. AUSTRIAN AMENDMENT TO PARA2(B) L.9 WAS ADOPTED 27(CDA)-7-43. USA AMENDMENT L.374 (EXCEPT FOR PROPOSED AMENDMENT TO PARA2(B) WHICH WAS OVERTAKEN BY ADOPTION OF AUSTRIAN L.9) WAS ADOPTED. CONGO (BRAZZAVILLE) AMENDMENT L.375 WAS DEFEATED 13-21(CDA, USA, UK)-48. ARTICLE AND THREE ADOPTED AMENDMENTS WERE REFERRED TO DC.

ARTICLE 75

CHINESE AMENDMENT L.329 TO REDRAFT ARTICLE IN SINGLE PARA WAS DEFEATED. BYELORUSSIAN AMENDMENT L.371 WAS ADOPTED 56-4-26(CDA). USA AMENDMENT L.376 WAS ADOPTED 61(CDA, UK, FRANCE)-0-25.

ARTICLE 76

THIS NEW ARTICLE PROPOSED BY SWITZERLAND IN L.250 IS DESIGNED TO PROVIDE FOR COMPULSORY REF TO ICJ OF ALL DISPUTES ARISING OUT OF CONVENTION OTHER THAN PART V DISPUTES. SWISS GOVT PUT W FORWARD AMENDMENT AS MATTER OF PRINCIPLE AND WITHOUT ANY EXPECTATION OF ITS BEING ADOPTED. IN INTRODUCING AMENDMENT SWISS DEL ASKED THAT IT NOT BE DISCUSSED NOW BUT BE HELD OVER FOR CONSIDERATION BY GOVTS INTERSESSIONALLY AND BY CW AT 1969 SESSION.

PART II

(FOLLOWING PORTIONS OF TEL DEAL WITH TEXTS OF ARTICLES REPORTED OUT OF DC AND CONSIDERED IN CW LAST WEEK.)

ARTICLE 35 (OURTEL 352 APR28)

TEXT REPORTED OUT OF DC IN DOCUMENT C.1/10 ADOPTED WITHOUT VOTE.

ARTICLE 39 (OURTEL 352 APR28 AND PART I THIS TEL)

TEXT OF ARTICLE REPORTED OUT OF DC IN C.1/13 ADOPTED WITHOUT VOTE.

ARTICLE 40 (OURTEL 352 APR28)

TEXT REPORTED OUT OF DC IN DOCUMENT C.1/10 ADOPTED WITHOUT VOTE.

ARTICLE 41 (OURTELS 383 MAY5 AND 461 MAY20)

TEXT WAS REPORTED OUT OF DC IN DOCUMENT C.1/12 WITHOUT DECISION HAVING BEEN

TAKEN BY DC ON FINNISH AMENDMENT L.144. ON ROLL CALL VOTE IN CW, FINNISH AMENDMENT, WHICH WAS DESIGNED TO PERMIT SEPARABILITY IN APPLICATION OF ARTICLE 50, WAS DEFEATED 27(CDA, USA, UK, FRANCE)-39-17. DC TEXT IN C.1/12 WAS ADOPTED 72-0-11(CDA, UK, FRANCE). WE ABSTAINED BECAUSE TEXT MAINTAINED REF TO ARTICLE 50 THEREBY FORBIDDING SEPARABILITY.

ARTICLE 42 (OURTELS 383 MAY5 AND 461 MAY20)

TEXT REPORTED OUT OF DC IN C.1/12 ADOPTED WITHOUT VOTE.

ARTICLES 43-49 (OURTELS 383 MAY5 AND 435 MAY11)

TEXTS REPORTED OUT OF DC IN DOCUMENT C.1/10 WERE ADOPTED WITHOUT VOTE, THOUGH THERE WERE A FEW INTERVENTIONS BY DELS. SWISS REPEATED THAT EFFECT OF 48 AND 49 SHOULD BE TO MAKE TREATY VOIDABLE NOT VOID; FRENCH SAID QUESTION OF VOID VS VOIDABLE WOULD HAVE TO BE SORTED OUT AT SOME POINT. UK REPEATED VIEW, EXPRESSED BY ALL WESTERN DELS (INCL CDA) ON SEVERAL OCCASIONS, THAT EVENTUAL ACCEPTANCE OF THESE ARTICLES WAS SUBJECT TO SATISFACTORY DISPUTES PROCEDURE BEING PROVIDED.

ARTICLES 50 (OURTELS 383 MAY5, 384 MAY5 AND 435 MAY11)

TEXT REPORTED OUT OF DC IN DOCUMENT C.1/11 (WHICH WE REGARD AS SUBSTANTIAL IMPROVEMENT OVER ILC TEXT IN THAT IT SEEKS TO LAY DOWN CRITERION FOR DETERMINING WHICH RULES ARE JUS COGENS) PROVOKED CONTROVERSY. GHANA REQUESTED SEPARATE VOTE ON PHRASE QUOTE AS A WHOLE UNQUOTE; PHRASE WAS RETAINED 57(CDA, UK, FRANCE, USA)-3-27. TURKEY REQUESTED ROLL CALL VOTE ON ARTICLE, WHICH WAS ADOPTED 72-0-18(CDA, UK, FRANCE). ABSTENTIONS WERE MOTIVATED BY VIEW THAT ARTICLE IS ACCEPTABLE ONLY IF A SATISFACTORY DISPUTES PROVISION IS ADOPTED NEXT YEAR.

ARTICLES 51 AND 52 (OURTEL 435 MAY11)

TEXTS OF THESE ARTICLES REPORTED OUT OF DC IN DOCUMENT C.1/11 ADOPTED WITHOUT VOTE.

ARTICLE 53 (OURTEL 435 MAY11)

FINNISH DEL REQUESTED A SEPARATE VOTE ON PARA1(B) OF THIS ARTICLE AS REPORTED OUT OF DC IN C.1/11. THIS WAS AN ADDITION TO ILC DRAFT BASED ON A UK

AMENDMENT ACCEPTED BY CW. PARA1(B) WAS ADOPTED. ARTICLE WAS THEN VOTED ON AS A WHOLE AND ADOPTED 73(CDA, USA, UK, FRANCE)-2-4.

ARTICLES 54 AND 56 (OURTEL 435 MAY11)

TEXTS OF THESE ARTICLES REPORTED OUT OF DC IN C.1/11 WERE ADOPTED WITHOUT VOTE.

ARTICLE 57 (OURTEL 435 MAY11)

CHAIRMAN OF DC REPORTED DC HAD MADE NO CHANGE TO ILC TEXT OF THIS ARTICLE BUT WISHED TO POINT OUT THAT ILC TEXT OF PARAS 2(A) and (C) APPEARED TO PROVIDE THAT, IN CASES CONTEMPLATED BY THOSE PARAS, THERE WAS NO NEED TO FOLLOW PROCEDURES OF ARTICLE 62 IN ORDER TO ESTABLISH BREACH BEFORE TAKING ACTION PURSUANT TO THOSE PARAS. UK, USA AND FRANCE ALL MADE STATEMENTS TO EFFECT THAT THEY CONSIDERED THIS APPARENT UNCERTAINTY IN 2(A) AND (C) TO RAISE SERIOUS MATTER OF SUBSTANCE AND RESERVED THEIR POSITION TO PROPOSE AMENDMENTS AT A LATER DATE. ILC TEXT OF ARTICLE 57 WAS THEN ADOPTED WITHOUT VOTE.

ARTICLE 58 (OURTEL 435 MAY11)

ARTICLE AS REPORTED OUT OF DC IN C.1/11 WAS ADOPTED WITHOUT VOTE.

ARTICLE 59 (OURTEL 435 MAY11)

THIS ARTICLE AS REPORTED OUT OF DC IN C.1/11 WAS ADOPTED WITHOUT VOTE. WE MADE STATEMENT THAT, AS HAD BEEN MADE CLEAR IN OUR STATEMENT PROPOSING INCLUSION OF CONCEPT OF SUSPENSION IN ARTICLE, WE HAD IN MIND POSSIBILITY THAT CIRCUMSTANCES OF FUNDAMENTAL CHANGE MIGHT BE SUCH AS TO JUSTIFY SUSPENSION ONLY RATHER THAN TERMINATION OR WITHDRAWAL, WHEREAS DC TEXT LIMITED RIGHT OF SUSPENSION TO CASES WHERE CHANGE WAS ONE WHICH WOULD JUSTIFY TERMINATION OR WITHDRAWAL. WE RESERVED RIGHT TO RAISE MATTER AGAIN IN PLENARY.

ARTICLES 60 AND 69BIS (OURTEL 435 MAY11)

TEXT OF ARTICLE 60 REPORTED OUT OF DC IN C.1/11 WAS ADOPTED WITHOUT VOTE. CHAIRMAN OF DC REPORTED THAT CHILEAN AMENDMENT L.341 PROPOSING NEW PARA DEALING WITH SEVERANCE OR ABSENCE OF DIPLOMATIC OR CONSULAR RELATIONS, DID NOT BELONG IN PART V WHICH DEALT WITH TERMINATION, AND HAD THEREFORE BEEN MADE A NEW ARTICLE

69BIS IN PART VI. CW ADOPTED DC TEXT OF 69BIS IN C.1/11 BY VOTE OF 40(CDA, USA, UK)-13-34.

ARTICLE 61 (OURTEL 461 MAY20)

DC HAD REFERRED THIS ARTICLE BACK TO CW WITHOUT TAKING DECISION ON FINNISH AMENDMENT L.294 RE SEPARABILITY. FINNS THEN WITHDREW AMENDMENT AND TEXT REPORTED OUT OF DC IN C.1/13 WAS ADOPTED WITHOUT VOTE.

ARTICLE 62 (SEE PART I THIS TEL)

TEXT REPORTED OUT OF DC IN C.1/13 WAS ADOPTED WITHOUT VOTE. UK DEL MADE STATEMENT THAT ADOPTION SHOULD NOT BE CONSIDERED DEPARTURE FROM STRONGLY HELD VIEW THAT ACCEPTABILITY OF ARTICLE DEPENDS, INTER ALIA, UPON EVENTUAL ESTABLISHMENT IN THE CONVENTION OF PRESUMPTION IN FAVOUR OF VALIDITY OF TREATY AND OF SATISFACTORY PROCEDURES FOR SETTLEMENT OF DISPUTES.

ARTICLES 63 AND 64 (SEE PART I THIS TEL)

TEXTS REPORTED OUT OF DC IN C.1/13 WERE ADOPTED WITHOUT VOTE.

ARTICLE 65

FIRST SENTENCE OF PARA1 AS REPORTED OUT OF DC IN C.1/13 PROVOKED CONSIDERABLE OPPOSITION LED BY USSR, INDIA AND GHANA. SENTENCE WAS BASED ON FRENCH AMENDMENT TO ARTICLE 39 (SEE PART I THIS TEL). OBJECTION WAS TO REF TO SPECIFIC ARTICLES. CW DECIDED BY VOTE OF 48-31(CDA, USA, UK, FRANCE)-8 TO DELETE FIRST SENTENCE OF PARA1 AND REPLACE IT BY IIC TEXT OF SECOND SENTENCE ARTICLE 39 QUOTE A TREATY THE INVALIDITY OF WHICH IS ESTABLISHED UNDER THE PRESENT ARTICLES IS VOID UNQUOTE. SUBJECT TO THIS CHANGE, TEXT REPORTED OUT OF DC IN C.1/13 WAS ADOPTED 63-2-20(CDA, USA, UK, FRANCE).

ARTICLES 68, 69, 70 (OURTEL 461 MAY20)

TEXTS REPORTED OUT OF DC IN C.1/12 WERE ADOPTED WITHOUT VOTE.

ARTICLE 71 (SEE PART I THIS TEL)

TEXT IN C.1/12 WAS REFERRED BACK TO DC FOR REDRAFTING. TEXT OF THIS ARTICLE APPEARING IN C.1/14 WAS LATER ADOPTED BY CW.

ARTICLE 72 (SEE PART I THIS TEL)

IN INTRODUCING TEXT REPORTED OUT OF DC IN C.1/12 CHAIRMAN OF DC REFERRED TO CONCERN EXPRESSED IN DC OVER NEW PARA1(A), WHICH HAD BEEN ADOPTED BY CW ON BASIS OF USA AMENDMENT. CONCERN AROSE FROM FACT THAT QUOTE PREPARING UNQUOTE COULD BE INTERPRETED AS DRAFTING, OR DOING VARIOUS LANGUAGE VERSIONS. USA OFFER TO WITHDRAW PARA1(A) WAS ACCEPTED BY CW.

PARA1(E) OF TEXT IN C.1/12 (WHICH CORRESPONDS TO PARA1(D) OF ILC TEXT) WAS BASED ON BYELORUSSIAN AMENDMENT L.364. DC HAD SUCCEEDED IN MODIFYING SOMEWHAT THE TERMINOLOGY OF BYELORUSSIAN AMENDMENT BUT DC TEXT APPEARED TO US STILL TO RESTRICT UNDULY AUTHORITY OF DEPOSITARY AS NOW EXERCISED BY SECGEN. WE ASKED REP OF SECGEN (STAVROPOULOS) TO CONFIRM OUR UNDERSTANDING THAT UNDER PRESENT PRACTICE, SECGEN WOULD REFER BACK TO STATES DOCUMENTS CONTAINING RESERVATIONS OF KIND PROHIBITED BY ARTICLE 16(A) AND (B). IN REPLY MADE FOLLOWING DAY, STAVROPOULOS CONFIRMED THAT OUR UNDERSTANDING OF SECGEN'S PRACTICE WAS CORRECT AND ADDED THAT, IN HIS VIEW, 72(E) AS ADOPTED IS CONSISTENT WITH THIS PRACTICE.

EXCEPT FOR DELETION OF PARA1(A), TEXT OF ARTICLE 72 AS REPORTED BY DC IN C.1/12 WAS ADOPTED WITHOUT VOTE.

ARTICLES 73, 74, 75 (PART I THIS TEL)

TEXTS REPORTED OUT OF DC IN C.1/12 WERE ADOPTED WITHOUT VOTE.

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A.E. GOTLIEB

File 20-3-1-6 Pt 2
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TO EXTER 482

INFO PRMNY

BAG PERMISGENEV DE VIENN

20-3-1-6

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LAW OF TREATIES CONFERENCE PROGRAM FOR 2ND SESSION 1969

AT CLOSING PLENARY SESSION MAY24 CONFERENCE ADOPTED RESLN L378 PROPOSED BY NIGERIA, CONCERNING ARRANGEMENTS FOR 2ND SESSION OF CONFERENCE.

2. OPERATIVE PARAS PROPOSE THAT 2ND SESSION TAKE PLACE IN VIENN FROM WED APR9 TO WED MAY21 AND REQUEST SECGEN TO PREPARE APPROPRIATE ADDITIONAL DOCUMENTATION. ALTHOUGH RESLN DOES NOT/NOT EXPRESSLY SAY SO, SECRETARIAT CONFIRMED THAT ADDITIONAL DOCUMENTATION THEY WILL PREPARE WILL INCLUDE DRAFT FINAL ARTS (WITH ALTERNATIVE DRAFTS IN SOME CASES). RESLN ALSO RECOMMENDS THAT STATES SEND TO 2ND SESSION SAME REPS AS ATTENDED 1ST SESSION. THIS LAST PROVISION WAS RETAINED DESPITE MBSERVATION BY CHILEAN DEL THAT IT WAS NOT/NOT APPROPRIATE FOR DELS NOW IN VIENN TO RECOMMEND TO THEIR GOVTS THAT THEY AS INDIVIDUALS BE SENT BACK TO BEAUTIFUL VIENN FOR FURTHER 6 WEEKS NEXT YEAR

WERSHOF

file 20-3-1-6 pt 78/5

A.E. GOTLIEB

20-3-1-6
35

FM VIENN MAY25/68 RESTR

TO TT EXTER 483 DE PARIS

INFO WSHDC PRMNY PERMISGENEV LDN DE PARIS

BAG PRET NICOS ANKRA ATHNS DE LDN

LAW OF TREATIES CONFERENCE CREDENTIALS DEBATE

REPORT OF CHAIRMAN OF CREDENTIALS CTTEE WAS CONSIDERED AND ADOPTED AT CONCLUDING MTG OF PLENARY ON MAY24.

2.COMMENTS IN USUAL TERMS WERE MADE BY TANZANIAN DEL ON BEHALF OF AFRICAN GROUP IN RESPECT OF SOUTHAFRICAN DEL AND BY SEVERAL COMMUNIST DELS IN RESPECT OF CHINESE SOUTHAFRICAN AND SOUTH VIETNAMESE DELS.REPLIES WERE MADE BY DELS CONCERNED.

3.A NEW ELEMENT(THOUGH WE UNDERSTAND SOMETHING SIMILAR OCCURRED AT RECENT UNCTAD IN DELHI)WAS ATTACK BY TURK REP ON CREDENTIALS OF CYPRUS DEL ON GROUND THAT IT DID NOT/NOT REPRESEN CYPRIOT TURK MINORITY.CYPRUS DEL DID NOT/NOT,AS CHINESE AND OTHERS HAD DONE,CONFINE HIS REPLY TO TERMS OF REF OF CREDENTIALS CTTEE BUT REFERRED TO SUBSTANCE OF CYPRUS PROBLEM,FACT THAT IT HAD BEEN DEALT WITH BY SECURITY COUNCIL AND FACT THAT CYPRUS AND TURK MAINTAINED DIPLO RELATIONS.TURKDEL,EXERCISING RIGHT OF REPLY,REFERRED TO FACT THAT PROVISIONS OF CYPRIOT CONSTITUTION RESPECTING TURK MINIORITY WERE NOT/NOT BEING OBSERVED.

4.GRATEFUL IF PRMNY WOULD SENT TO OTT AND WSHDC,AND IF PERMISGENEV COULD SEND TO LDN NICOS ANKRA ATHNS AND PRET FOR INFO,COPIES OF PROVISIONAL SUMMARY RECORD(WHEN ISSUED)OF MTG OF PLENARY MAY24 IN WHICH STATEMENTS MADE BY VARIOUS DELS WILL BE SUMMARIZED

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A.E. GOTLIEB

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FM VIENN MAY25/68

TO PRMNY 481

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INFO EXTER

LAW OF TREATIES CONFERENCE-COPIES OF FUTURE DOCUMENTATION

THE SECRETARIAT IN VIENN CEASED ISSUING DOCUS LAST NIGHT. THERE ARE STILL A FEW DOCUS TO COME RELATING TO 1ST SESSION OF CONFERENCE INCL(A) SOME PROVISIONAL SUMMARY RECORDS AND (B) EVENTUALLY CORRECTED SUMMARY RECORDS. THESE DOCUS WILL BE ISSUED BY UN IN NY AND GENEV. WOULD PRMNY PLEASE WATCH FOR THESE AND SUPPLY OTT WOULD GENEV ALSO WATCH FOR THESE DOCUS AND SEND ONE COPY ENGLISH OF EACH TO ME IN COPEN

2. MUCH LATER ON SECRETARIAT WILL ISSUE SOME DOCUS IN NY AND GENEV IN PREPARATION FOR 2ND SESSION TO BE HELD IN 1969. ABOVE REQUEST ALSO APPLIES TO SUCH DOCUS

WERSHOF

ACTION COPY

FM VIENN MAY25/68 RESTR

TO TT EXTER 483 DE PARIS

INFO WSHDC PRMNY PERMISGENEV LDN DE PARIS

BAG PRET NICOS ANKRA ATHNS DE LDN

20-3-1-6
32 | 27

LAW OF TREATIES CONFERENCE CREDENTIALS DEBATE

REPORT OF CHAIRMAN OF CREDENTIALS CTTEE WAS CONSIDERED AND ADOPTED AT CONCLUDING MTG OF PLENARY ON MAY24.

2.COMMENTS IN USUAL TERMS WERE MADE BY TANZANIAN DEL ON BEHALF OF AFRICAN GROUP IN RESPECT OF SOUTHAFRICAN DEL AND BY SEVERAL COMMUNIST DELS IN RESPECT OF CHINESE SOUTHAFRICAN AND SOUTH VIETNAMESE DELS.REPLIES WERE MADE BY DELS CONCERNED.

3.A NEW ELEMENT(THOUGH WE UNDERSTAND SOMETHING SIMILAR OCCURRED AT RECENT UNCTAD IN DELHI)WAS ATTACK BY TURK REP ON CREDENTIALS OF CYPRUS DEL ON GROUND THAT IT DID NOT/NOT REPRESEN CYPRIOT TURK MINORITY.CYPRUS DEL DID NOT/NOT,AS CHINESE AND OTHERS HAD DONE,CONF-INE HIS REPLY TO TERMS OF REF OF CREDENTIALS CTTEE BUT REFERRED TO SUBSTANCE OF CYPRUS PROBLEM,FACT THAT IT HAD BEEN DEALT WITH BY SECURITY COUNCIL AND FACT THAT CYPRUS AND TURK MAINTAINED DIPLO RELATIONS.TURKDEL,EXERCISING RIGHT OF REPLY,REFERRED TO FACT THAT PROVISIONS OF CYPRIOT CONSTITUTION RESPECTING TURK MINIORITY WERE NOT/NOT BEING OBSERVED.

4.GRATEFUL IF PRMNY WOULD SENT TO OTT AND WSHDC,AND IF PERMISGENEV COULD SEND TO LDN NICOS ANKRA ATHNS AND PRET FOR INFO,COPIES OF PROVISIONAL SUMMARY RECORD(WHEN ISSUED)OF MTG OF PLENARY MAY24 IN WHICH STATEMENTS MADE BY VARIOUS DELS WILL BE SUMMARIZED

WERSHOF

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs
OTTAWA, CANADA

FROM / De: Canadian Delegation to Conference on Law of Treaties
VIENNA, AUSTRIA

REFERENCE / Référence: Our letter 312 of May 24

SUBJECT / Sujet: Law of Treaties Conference - Preliminary Exchange of Views among "Friendly Five" regarding Inter-sessional Consultations

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 25, 1968

NUMBER / Numéro: 315

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	32 71

ENCLOSURES / Annexes

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In para 7 of our letter under reference we said that we would report to you on a preliminary exchange of views between the Delegations of Australia, Canada, New Zealand, the U.K., and the U.S.A. as to what should be the next steps to take with respect to the draft articles and, especially, Part V. Representatives of these delegations met on Friday morning, May 24th, to discuss these matters for about an hour. The subjects reviewed were of a policy and of a strategic nature. No definite plans were formulated but it was agreed that the meeting, which had been requested by Canada, had been a useful one.

2. Canada began by expressing our particular interest in Article 62 (62bis) relating to settlement of disputes under Part V of the draft Convention. We sought to learn the groups' views on whether they considered there was any chance that a 62bis, based on the 13 power text L.352/Rev. 2 of May 21, could be successfully negotiated and carried in 1969. We asked what plans the British and Americans had for inter-sessional negotiations with the other side (and particularly the USSR and India). We also asked what they thought of the chances, referred to in your telegram L451 of May 21, of providing in the Convention for the possibility of reservations excluding the application of Part V other than to states prepared to sign either an effective 62bis or an optional protocol (which would provide 3rd party settlement).

3. U.K. (Sinclair) stressed the British view that, unless there was a great deal of hard inter-sessional lobbying on the part of interested Western states, there was next to no chance of securing a tolerable settlement of disputes procedures. He foresaw a need for very high level approaches (perhaps even at P.M. level) to selected Commonwealth Governments in Africa, Asia and the West Indies, which to be effective would have to be made before the Afro-Asian Legal Consultative Committee next meets in December of 1968. He considered it would be helpful if the Afro-Asians could be pursuaded to put forward constructive proposals of their own but was not optimistic. As to methodology, they had not yet had time properly to assess the comparative merits, in default of a good 62bis, of the alternative fall-backs of (1) a reservation to Part V or (2) of an optional protocol, or of possible combinations thereof. Sinclair expressed doubts to the acceptability of the very concept of allowing states to enter reservations in respect to the application of the jus cogens articles (50 and 61). The point here is that, once the Convention proclaims the principle of jus cogens, it seems irrational

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to permit a signatory State to say in a reservation that it does not accept this principle in respect of certain other signatory states. He also referred to a proposal of President Ago's which was bruited about last week but which never came officially to light, for a compulsory conciliation procedure with an option to convert to binding arbitration.

4. The United States representatives were junior (Ambassador Kearney was ill and unable to attend). While they too foresaw the need for much inter-sessional work, it had not yet been decided what form it should take. They wondered, moreover, what leverage the West might be able to bring to bear in future negotiations, aside from the possibility of a blocking third to prevent the adoption of some articles in Part V.

5. Australia (Ralph Harry) had not had time to consider the possibility of permitting Part V reservations, or of an optional protocol, but stressed that it was essential that WEO group as a whole (if such were possible) should be perfectly clear on what they would try to sell to Afro-Asians. Given the current versions of the rest of Part V already approved by the Committee of the Whole, he was uncertain whether even the provision of compulsory arbitration would recommend the Convention to the Australian Government.

6. New Zealand expressed strong reservations about the acceptability of mere conciliation procedures, even if these should be compulsory, in place of compulsory 3rd party settlement.

7. Turning to other subjects, the group first considered, rather vaguely in the circumstances, whether many of their own existing treaties would be open to attack under Part V and concluded that with certain obvious exceptions such as Guantanamo, the Panama Canal Zone, Cyprus, etc., there were not all that many. (Of course it is expected that the Convention will not, as a Convention, apply to treaties that came into force prior to the Convention. On the other hand, most states are likely to assert that Part V is declaratory of international law and therefore, in that sense, applicable to pre-existing treaties.). They agreed moreover that, at least in regard to future bilateral and restricted multilateral treaties, they would of course still be free to try to incorporate acceptable settlement of disputes provisions in these on an ad hoc basis (in the light of the present Article 62, para 4). Here, however, the Americans made the interesting point, which had not occurred to us, that though this was true, it was not really enough. They believed that one of the dangerous consequences of Article 62 would be in its effect on the direct treaty relations between non-Western states. Unless adequate, compulsory and binding settlement of disputes procedures were generally accepted, they foresaw frequent threats to international peace and security arising out of arbitrarily induced and unresolvable treaty disputes between the developing nations inter se, disputes which in certain cases could in due course also involve the great powers or the U.N. or both.

Gibraltar,

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8. Australia and Canada then introduced the subject of what should be the Western attitude to the Convention should there be, in the end, only the present Article 62 which is of course inadequate. In the light of recent discussions between representatives of the "old Commonwealth" and the U.S.A. in New York and Washington on legal/political UNGA resolutions, and given the probability that at least the Afro-Asians (though conceivably also the Eastern Europeans) will tend to regard the Convention as creating general norms of international law, it seems desirable that consideration be given to the possibility of a solid bloc of states, dissatisfied with the terms of the Convention, registering its inacceptability not only by not becoming parties to it but possibly even by voting against it as a whole at the close of the 1969 Conference and by refusing to sign it. It was agreed that this should be further examined, but it is known that many members of WEO have no intention of holding out to this extent. Australia, the U.K. and the U.S.A. indicated that, if nothing better were to come out of Part V next year, it was most unlikely that they would become parties to the Convention. It was, however, also generally believed that not many other Western states would be prepared to take such drastic action.

9. Finally, turning to the question of future consultations of the "five", those present felt that time was needed in which to digest and reflect further on the present session prior to another meeting. It was agreed, at least tentatively, that there should be a further meeting of the five in New York (or Washington) next autumn. preferably early in September immediately prior to the next session of the Special Committee on Friendly Relations which is due to start on September 9. Those present said that they would recommend this to their superiors.

Canadian Delegation

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INFO PRMNY

BAG PERMISGENEV DE VIENN

LAW OF TREATIES CONFERENCE PROGRAM FOR 2ND SESSION 1969

AT CLOSING PLENARY SESSION MAY24 CONFERENCE ADOPTED RESLN L378 PROPOSED BY NIGERIA, CONCERNING ARRANGEMENTS FOR 2ND SESSION OF CONFERENCE.

2. OPERATIVE PARAS PROPOSE THAT 2ND SESSION TAKE PLACE IN VIENN FROM WED APR9 TO WED MAY21 AND REQUEST SECGEN TO PREPARE APPROPRIATE ADDITIONAL DOCUMENTATION. ALTHOUGH RESLN DOES NOT/NOT EXPRESSLY SAY SO, SECRETARIAT CONFIRMED THAT ADDITIONAL DOCUMENTATION THEY WILL PREPARE WILL INCLUDE DRAFT FINAL ARTS(WITH ALTERNATIVE DRAFTS IN SOME CASES). RESLN ALSO RECOMMENDS THAT STATES SEND TO 2ND SESSION SAME REPS AS ATTENDED 1ST SESSION. THIS LAST PROVISION WAS RETAINED DESPITE MBSERVATION BY CHILEAN DEL THAT IT WAS NOT/NOT APPROPRIATE FOR DELS NOW IN VIENN TO RECOMMEND TO THEIR GOVTS THAT THEY AS INDIVIDUALS BE SENT BACK TO BEAUTIFUL VIENN FOR FURTHER 6 WEEKS NEXT YEAR

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FM VIENN MAY25/68 RESTR

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ACTION COPY

LAW OF TREATIES CONFERENCE 8TH AND FINAL PROGRESS SUMMARY

SUMMARY IS IN OURTEL 477 MAY25.IN VIEW OF ITS LENGTH IT IS NOT/NOT BEING TRANSMITTED BY TEL.INSTEAD STANFORD WILL DELIVER COPY TO OTT.HE LEAVES FOR OTT EARLY MAY27.

2.WE ARE NOT/NOT MARKING THAT TEL FOR WLGTN AS CONFERENCE HAS ENDED AND NZDEL CAN BRING HIS DEPT UP TO DATE

WERSHOF

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FM VIENN MAY25/68 RESTR

TO EXTER 479

INFO TT WLGTN DE OTT

BAG PERMISGENEVA DE VIENN PRMNY DE OTT

LAW OF TREATIES CONFERENCE ARTS DEFERRED TO 2ND SESSION 1969

DECISION BY CTTEE OF THE WHOLE(CW)ON FOLLOWING ARTS WAS PUT OVER TO CW 2ND SESSION.

2.ART 2(DEFINITIONS)WAS PUT OVER PENDING DECISION OF SUBSTANCE,TO BE TAKEN BY CW AT 2ND SESSION,ON QUESTIONS OF GENERAL MULTILATERAL TREATIES INTRODUCED BY COMMUNIST BLOC AND RESTR MULTILATERAL TREATIES INTRODUCED BY FRANCE.FAILURE OF CW TO TAKE DECISIONS ON THESE ISSUES ALSO PREVENTED DC FROM ADOPTING TEXTS ON ARTS 8 12 17 26 36 37 55 AND 66.

3.DEBATE AND DECISION ON PROPOSED ART 5BIS(ALL STATES QUESTION)WAS ALSO DEFERRED TO 1969,AS WAS CONSIDERATION OF NEW ART 62BIS ON COMPULSORY SETTLEMENT OF DISPUTES(OURTEL 469 MAY22 REFERS)

WERSHOF

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FM VIENN MAY25/68 CONFD

TO EXTER 480

INFO BAG PRMNY DE OTT

REF YOURTEL L451 MAY21

20-3-1-6
32 | 27

LAW OF TREATIES ART 62 PEACEFUL SETTLEMENTS PROCEDURES

YOURTEL CROSSED OURTEL 469 MAY22 REPORTING THE DEFEAT WEO SUFFERED ON MAY21 IN CTTEE OF WHOLE. IDEA DISCUSSED IN YOURTEL(IE RESERVATION WITH RESPECT TO PART V VIS A VIS STATES NOT/NOT ACCEPTING SOME FORM OF COMPULSORY 3RD PARTY SETTLEMENT)WAS NOT/NOT SERIOUSLY DISCUSSED IN WEO MTGS ALTHOUGH IT WAS OCCASSIONALLY MENTIONED. AMONG REASONS WHY THIS PROPOSAL WAS NOT/NOT EXPLORED WERE(A)FACT THAT UNTIL LAST MOMENT WEO BELIEVED THAT A SIMPLE MAJORITY EXISTED IN FAVOR OF COMPULSORY ARBITRATION(L352)IF VOTING ON SUBSTANCE WAS TO TAKE PLACE AND(B)FACT THAT FROM MAY15 UNTIL DEBACLE WEO BELIEVED THAT AN OVERWHELMING MAJORITY WANTED ALL SUBSTANTIVE VOTES POSTPONED UNTIL 1969. BY TIME WEO REALIZED ON MORNING OF MAY21 THAT THESE BELIEFS WERE NO/NO LONGER CORRECT IT WAS TOO LATE TO CONSIDER OR INTRODUCE NEW SUBSTANTIVE IDEAS.

2. SCHEME IN YOURTEL SHOULD OF COURSE BE STUDIED AND DISCUSSED FROM NOW ON. WE STARTED PROCESS BY GETTING TOGETHER YESTERDAY A SHORT MTG OF OLD COMWEL PLUS USA AND WE ARE REPORTING BY LET ON THAT MTG

WERSHOF

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs
OTTAWA, CANADA

FROM / De: Canadian Delegation to Law of Treaties Conference
VIENNA, AUSTRIA

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties: French Attitude to Article 62 and to Part V in General

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 24, 1968

NUMBER / Numéro: 312

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	38

ENCLOSURES / Annexes

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(McKinnon)
Mr. Wershof

One of the things which has not been clear to us, concerning Part V of the draft articles on the Law of Treaties (and in particular Article 62), is the attitude of the French Delegation. Its leader, de Bresson, is undoubtedly one of the shrewdest and most competent of the delegates at the conference. However, he has not been as forthcoming about his or his Government's longer term views as we might have wished. We have now been given a better indication of what the French attitude may be. The purpose of this letter is to record such information as we have been able to gather.

2. At the WEO meetings in France earlier this year the French had made clear at least one thing: that they considered unacceptable Part V of the draft articles, and especially articles 50 and 61 dealing with jus cogens. Whether their objections were of a temporary nature which might be resolved in favour of the articles, should there be an acceptable Article 62, or whether they were absolute, was not clarified in public. However, in a private conversation with Wershof (at the Paris WEO meeting), de Bresson had indicated that France would not be prepared to accept Articles 50 and 61 (in the ILC version) even if an acceptable version of Article 62 (providing for compulsory 3rd party settlement of disputes) were to be attained in Vienna. In the discussions on Article 62 which took place at Vienna in the WEO group France was singularly uncommunicative, although in the tactical manoeuvres which followed (and on which we reported at length in our telegram 469 of May 22nd) France was active in seeking to hold the western line and seemed to share the views of Canada and Australia on the inadvisability of the continual compromises which other western group members (including sometimes the United States and the United Kingdom) were making.

3. At a reception on May 22 (immediately following a lengthy session of the Drafting Committee on which de Bresson serves) Houben (Netherlands), who was concerned by criticism of the Swedish-Netherlands actions with respect to Article 62, and Robertson (Canadian Delegation) spoke with de Bresson for some time about Article 62. He was surprisingly forthcoming, perhaps because he was tired and therefore less guarded than usual. Even so, he approached the subject with reserve, posing a series of rhetorical questions, the sometimes unformulated answers to which were indicative of French views.

Ext. 407B/Bil.

4. First he put forward the idea that the West might not in fact find itself in future as well off, even under an acceptable Article 62, as was generally believed. This might particularly be the case with respect to a possible Article 62 which included the obligatory reference of some disputes to the International Court of Justice. He suggested that in the not too distant future the composition of the Court will have further shifted in favour of the Afro-Asians and that it would then in itself have become an unreliable body insofar as traditional western approaches to international law are concerned.

5. With respect to the attitude of the eastern European states towards mechanisms for the compulsory settlement of disputes, de Bresson suggested that the USSR might conceivably, because of its general views on the desirability of stable treaty relationships, be prepared to adopt a slightly more forthcoming attitude than at present. It was his view, however, that the other eastern European states are unlikely to opt for anything other than an open-ended Article 62 in the ILC sense. That is because they may well want in the future to be able to challenge unequal treaties which they have entered into with the Soviet Union itself (sic) but would not want any such disputes to go either to the Court or to arbitration. Thus, in his view, the Communist States other than the USSR will be adamantly opposed to anything other than Article 62 in its present form.

6. de Bresson is in favour of inter-sessional western group consultations on Article 62, with the purpose of elucidating what the real longer term interests of the West are in relation to this Article. Although his views on this particular matter were still difficult to pin down, his own thinking seems to be that an open-ended Article 62 is in fact preferable (because, we infer, that it would give France an easy excuse not to accept Part V of the Convention). If we have correctly interpreted this somewhat Machiavellian attitude, and if indeed it is the French intention, irrespective of what comes out of the proposed Article 62bis next year, not to become a party to the Convention (or at least to Part V), then it would seem to follow that France's longer term aims will be different than those of the United States and the United Kingdom Governments. We believe that the latter two countries are sincerely interested in securing, if at all possible, the inclusion in Part V of an acceptable mechanism for the compulsory settlement of disputes. We believe that, if such a mechanism is included, they would be prepared to become parties to the treaty and that they will therefore try very hard during any inter-group inter-sessional negotiations on Article 62bis to achieve that end. Since Canada presumably shares this view, and since France may not, it will be necessary to keep a close watch for further indications of the real French attitude and perhaps, if it is as suggested above, to consult on what to do about it. (In speculating on the intentions of the United States, we mean the Administration; it may be that the U.S. Senate will in the end be more hostile than the Administration to the provisions of Part V.).

CONFIDENTIAL

7. In a separate letter we will report on a talk held on May 24 with the "old Commonwealth" and the U.S.

Canadian Delegation

ACTION COPY

FM VIENN MAY22/68 CONFD

TO EXTER 469 PRIORITY

INFO PRMNY DE OTT GENEV DE VIENN

REF OURTEL 452 MAY17

20-3-1-6

LAW OF TREATIES-ARTICLE 62-SETTLEMENT OF PART V DISPUTES

WEO SUFFERED A HUMILIATING(BUT NOT/NOT FINAL)DEFEAT WHEN ARTICLE 62 WAS RESUMED YESTERDAY.

2.FOR REASONS NOT/NOT FULLY CLEAR TO US AT PRESENT THE MAJORITY SUPPORT THAT HAD EXISTED,BOTH FOR SUBSTANCE OF AMENDMENT L.352 (THE SWEDISH-LED 13-POWER PROPOSAL FOR ULTIMATE COMPULSORY ARBITRATION)AND FOR PROCEDURAL PROPOSAL TO POSTPONE VOTING ON ARTICLE 62 UNTIL 1969,FELL AWAY DURING THE LAST FEW DAYS.AFRO-ASIANS SPARKED BY GHANA AND INDIA BECAME FIERCELY DETERMINED TO GET ARTICLE 62 (ILC TEXT)ADOPTED NOW AND EVEN THOSE AFRO-ASIANS WHO HAD EXPRESSED PUBLIC SUPPORT FOR L.352(INCLUDING SOME OF ITS SPONSORS)MOSTLY CHANGED THEIR MINDS.COMMUNISTS (WHO LAST WEEK WERE PLEADING WITH WEO LEADERS NOT/NOT TO BRING ARTICLE 62 AND A PRESUMABLY VICTORIOUS L.352 TO A VOTE THIS YEAR)NATURALLY JUMPED ON THE AFRO-ASIAN BANDWAGON.PROF AGO(ITALY,PRESIDENT OF CONFERENCE)THREW HIS INFLUENCE ON SIDE OF DEAL DESCRIBED BELOW.

3.WEO WERE INCAPABLE OF ADHERING TO A CONSISTENT LINE AND IN END ITS LEADERS(USA,UK AND FRANCE)ACQUIESCED YESTERDAY IN THE FOLLOWING DEAL WHICH WENT THROUGH CTTEE OF THE WHOLE(CW)YESTERDAY AFTERNOON: (A)TWO RESLNS(L.361 AND L.362)WERE WITHDRAWN.(B)NETHERLANDS ON BEHALF OF 13 SPONSORS OF AMENDMENT L.352/REV.1 WITHDREW IT BUT SAID

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THAT IT WILL BE REINTRODUCED AS A NEW RPT NEW PROPOSED ARTICLE 62BIS ON UNDERSTANDING THAT CONSIDERATION OF THIS 62BIS BY CW WILL BE POSTPONED UNTIL 1969.(NEW 62BIS LATER TABLED AS L.352/REV.2.) (C)THE OTHER SUBSTANTIVE SCHEMES(JPN L.339;USA L.355;URUGUAY L.343; SWITZERLAND L.347)WERE LIKEWISE WITHDRAWN AND WILL BE REINTRODUCED AS AMENDMENTS TO PROPOSED NEW 62BIS AND WILL NOT/NOT BE DISCUSSED AGAIN BY CW UNTIL 1969.(D)FRANCE DRAFTING AMENDMENT L.342 WAS ADOPTED.CUBAN L.353 WAS WITHDRAWN AS WAS JPN DRAFTING AMENDMENT L.338. (E)CHAIRMAN THEN DECLARED ARTICLE 62(ILC TEXT)ADOPTED(WITHOUT A VOTE) AND SENT IT TO DRAFTING CTTEE ALONG WITH FRENCH L.342.

4.SEVERAL WESTERN DELS INCLUDING CDA THEN RESERVED THEIR FUTURE POSITIONS ON ARTICLE 62 PENDING ACTION NEXT YEAR ON PROPOSED 62BIS.

5.UK AND USA BELIEVE(BUT I DISAGREE)THAT THIS DEAL WAS BETTER THAN ALTERNATIVE OF GOING DOWN FIGHTING.AT MOMENT CREDIBILITY OF UK-USA-FRANCE DECLARATIONS (THAT THEIR ULTIMATE ACCEPTANCE OF CONVENTION DEPENDS ON 1969 SESSION ACCEPTING AN ADEQUATE SETTLEMENT OF DISPUTES PROCEDURE FOR PART V)IS NOT/NOT GREAT.

6.IN RETROSPECT I THINK ONE OF MISTAKES MADE ON WESTERN SIDE WAS UK DECISION (REPORTED OURTEL 424 MAY10)TO LET SWEDEN AND NETHERLANDS TAKE OVER FROM UK TASK OF SPONSORING (WITH ASSORTED COSPONSORS WHO PROVED TO BE UNRELIABLE)WHAT WAS ESSENTIALLY THE UK PLAN FOR SETTLEMENT OF PART V DISPUTES.PROSPECT OF A QUOTE NON-IMPERIALIST UNQUOTE SPONSORSHIP GROUP LOOKED GOOD TO UK BUT IN END IT MEANT THAT UK HAD NO/NO CONTROL OVER 13 SPONSORS AND WAS NOT/NOT EVEN FULLY AND PROMPTLY INFORMED OF CHANGING THOUGHTS OF THIS GROUP

WERSHOF'''

Reesley

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FM VIENN MAY20/68 RESTR

TO EXTER 461

INFO TT WLGTN DE OTT

BAG PRMNY DE OTT PRMGVA DE VIENN

REF OURTEL 435 MAY11

LAW OF TREATIES CONFERENCE-SEVENTH PROGRESS SUMMARY-MAY13-17

ARTICLE 41(OURTEL 383 MAY5):

CTTEE OF WHOLE(CW)RESUMED CONSIDERATION OF THIS ARTICLE MAY13.
USA SPOKE ON ITS AMENDMENT L.350,INTENDED TO INTRODUCE ELEMENT OF PROPORTIONALITY,WHICH HAD BEEN TABLED AFTER EARLIER DEBATE ON THIS ARTICLE.FINLAND WITHDREW THE FIRST HALF OF ITS AMENDMENT L.144 BUT MAINTAINED THAT PORTION OF AMENDMENT WHICH SOUGHT TO DELETE REF TO ARTICLE 50 FROM ARTICLE 41(5).INDIAN AMENDMENT L.253 WITHDRAWN.UK SAID ITS AMENDMENT L.257 DEALT WITH DRAFTING MATTERS EXCEPT TO THE EXTENT THAT IT PROPOSED DELETION OF PRESENT PARA5 OF ARTICLE 41;UK WITHDREW THIS LATTER PORTION OF ITS AMENDMENT AND SAID IT WOULD REST ITS POSITION ON REMAINING SECOND HALF OF FINNISH AMENDMENT L.144 WHICH PROPOSED DELETION FROM 41(5)OF REF TO ARTICLE 50.
ARGENTINA WITHDREW PARA3 OF AMENDMENT L.244 AND ASKED THAT PARAS 1 AND 2 BE CONSIDERED AS RAISING ONLY DRAFTING QUESTIONS.
USA AMENDMENT L.260 ADOPTED 57(CDA)-14-45.USA AMENDMENT L.350 WAS VOTED UPON IN TWO PARTS AND REJECTED.FOLLOWING THESE VOTES ARTICLE 41 WAS REFERRED TO DRAFTING CTTEE(DC)WITH FOLLOWING AMENDMENTS:
PARAS1 AND 2 OF ARGENTINA L.244;HUNGARIAN L.246;PARAS1 TO 4 OF UK L.257;AND SECOND ELEMENT OF FINNISH L.144(TO DELETE FROM PARA5 REF

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TO ARTICLE 50).ALTHOUGH THIS LAST ITEM WAS A SUBSTANTIVE AND NOT/NOT DRAFTING MATTER,FINLAND AND UK ACQUIESCED IN ITS REF TO DC WITHOUT VOTE FOR FEAR THAT CW VOTE AT THIS TIME WOULD DEFEAT PROPOSAL;THEY WILL SEEK TO NEGOTIATE MATTER IN DC.CHAIRMAN CONFIRMED THAT CW WILL HAVE TO CONFIRM OR REJECT WHATEVER DC MAY RECOMMEND ON THIS POINT,IE,WHETHER ARTICLE 50 IS OR IS NOT/NOT TO BE ELIGIBLE FOR SEPARABILITY.

ARTICLE 42(OURTEL 383):

THIS ARTICLE WAS DISCUSSED BY CW MAY13 WITH FOLLOWING RESULTS. FINNISH AMENDMENT L.247 TO DELETE REF TO ARTICLE 58 WAS ADOPTED 42-13-36(CDA).ON BOLIVIAN ET AL AMENDMENT L.251(INSPIRED BY VENEZUELA WITH PARTICULAR BUT UNSPOKEN REF TO GUYANA BOUNDARY),SPONSORS WITHDREW PARAS1 AND 2 OF AMENDMENT;PARA3 PROPOSING DELETION OF 42-(B)WAS DEFEATED 20-47(CDA,USA,UK,FRANCE)-27.GUYANA DEL GAVE EMOTIONAL SPEECH ON FOREGOING.USA AMENDMENT L.267 PROPOSING PRINCIPLE OF STATUTE OF LIMITATIONS PERIOD FOR ARTICLES 43-47 WAS DEFEATED 21(-CDA,UK)-42-26.PARA1 OF SPANISH AMENDMENT L.272 WITHDRAWN;PARA2 DEFEATED 25-40(CDA,USA,UK)-25.CAMBODIAN AMENDMENT L.273 WITHDRAWN. SWISS AMENDMENT L.340 TO INCLUDE ARTICLES 48 AND 49 IN SCOPE OF ARTICLE 42 WAS DEFEATED 12(CDA,FRANCE)-63-16.AUSTRALIAN AMENDMENT L.354 REQUIRING A PARTY TO ACT WITHIN ONE YEAR OF LEARNING OF GROUNDS FOR INVALIDATING A TREATY WAS DEFEATED 23(CDA,USA,UK)-44-24. ARTICLE WAS THEN REFERRED TO DC WITH GUYANESE AMENDMENT L.268 WHICH IS MERELY DRAFTING MATTER.

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ARTICLE 61:

FOLLOWING EXTENSIVE DEBATE ON JUS COGENS WHICH TOOK PLACE ON ARTICLE 50,DEBATE ON ARTICLE 61 WAS BRIEF.ARTICLE WAS DECLARED BY CHAIRMAN TO BE ADOPTED IN PRINCIPLE AND WAS REFERRED TO DC ALONG WITH FINNISH AMENDMENT L.294.

ARTICLE 62(OURTEL 452 MAY17):

CDA SPOKE IN THIS DEBATE WHICH LASTED SEVERAL MTGS AND WAS ACCOMPANIED BY CONSIDERABLE CORRIDOR DISCUSSIONS THAT PRODUCED RESLNS BY CZECHOSLOVAKIA(L.361)AND SWEDEN ET AL(L.362).BOTH RESLNS PROPOSE IN EFFECT POSTPONING DECISIONS ON ARTICLE 62 UNTIL 1969 SESSION. AT ONE POINT SWEDEN HAD INFORMED WEO GROUP THAT THERE WAS SUBSTANTIAL(POSSIBLY EVEN TWO-THIRDS)MAJORITY READY TO SUPPORT AMENDMENT L.352/REV1(WHICH PROVIDES FOR COMPULSORY ARBITRATION).LATER IT SEEMED THAT THIS AMENDMENT COULD GAIN ONLY A SIMPLE MAJORITY WITH MANY ABSTENTIONS.FOR VARIETY OF REASONS(INCLUDING DISSENSION ON TIMING AND TACTICS WITHIN GROUP OF SPONSORS OF L.352 AND ALSO WITHIN WEO) THE SPONSORS DECIDED TO PROPOSE(IN RESLN L.362)POSTPONEMENT UNTIL 1969 OF DECISIONS ON ARTICLE 62.DEBATE ON ARTICLE 62 WAS ADJOURNED UNTIL MAY21 WHEN PRESUMABLY BOTH RESLNS WILL BE INTRODUCED UNLESS A COMPROMISE RESLN APPEARS.

ARTICLE 63:

DEBATE WAS BRIEF.WE QUERIED NEED FOR FULL POWERS TO WHICH WALDOCK REPLIED THAT ILC WISHED TO INTRODUCE SOME DEGREE OF FORMALITY TO TERMINATION PROCEDURES.UK DEL RAISED POINT REFERRED TO IN PARA

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63.04 OF COMMENTARY;WALDOCK REPLIED THAT IN CASES WHERE TREATY PROVIDES SPECIFIC DETAILS FOR NOTIFICATION TREATY PROVISIONS WOULD OF COURSE PREVAIL AND IN THAT SENSE IT MIGHT BE DESIRABLE TO ADD WORDS QUOTE UNLESS THE TREATY OTHERWISE PROVIDES UNQUOTE.IN USING PHRASE QUOTE PURSUANT TO THE PROVISIONS OF THE TREATY UNQUOTE ILC HAD IN MIND TREATY PROVISION WHICH REQUIRES NOTIFICATION WITHOUT SPECIFYING HOW NOTIFICATION IS TO BE EFFECTED.WALDOCK ALSO EXPLAINED REF TO ARTICLE 62(2)AND (3)IN ARTICLE 63(1)BY SAYING THAT ACT REFERRED TO IN 63(1)WAS NOT/NOT PRIOR NOTIFICATION REQUIRED BY 62(1) BUT FINAL ACT OF TERMINATION MADE UNDER 62(2)AND CONCEIVABLY UNDER 62(3)AS WELL.ARTICLE AND SWISS AMENDMENT L.349 WERE REFERRED TO DC TO BE HELD PENDING FINAL DECISION ON TEXT OF ARTICLE 62.

ARTICLE 64:

THIS ARTICLE,TO WHICH NO/NO AMENDMENTS WERE SUBMITTED,WAS REFERRED TO DC WITHOUT DEBATE.

ARTICLE 65:

FRENCH AMENDMENT L.48 WAS LITHDRAWN.ARTICLE WAS REFERRED TO DC ALONG WITH BULGARIAN-POLISH AMENDMENT L.278,AUSTRALIAN AMENDMENT L.297,PARA1 OF SWISS AMENDMENT L.358,PARA1 OF USA AMENDMENT L.360 AND FRENCH AMENDMENT L.363 WHICH WERE ALL CONSIDERED TO RAISE ONLY DRAFTING QUESTIONS.PARA2 OF USA AMENDMENT L.360(TO DELETE PARA2(A) OF ARTICLE 65)WAS DEFEATED 28(CDA,UK,FRANCE)-39-20.PROPOSAL IN USA AMENDMENT AND SECOND HALF OF SWISS AMENDMENT L.358 TO DELETE PARA3 OF ILC TEXT WAS DEFEATED 24(CDA,UK,FRANCE)-46-17.WALDOCK SAID

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ILC INTENDED ARTICLE 65 TO APPLY TO ALL TYPES OF INVALIDITY AND VOIDNESS IN PART V.

ARTICLE 66(OURTEL 423 MAY10 REFERS):

THIS ARTICLE WAS APPROVED AND REFERRED TO DC TOGETHER WITH SUGGESTIONS,MADE ORALLY DURING BRIEF DISCUSSION OF ARTICLE,CONCERNING POSSIBILITY OF MENTIONING EFFECTS OF SEPARABILITY.FRENCH AMENDMENT L.49(LIKE NUMEROUS SIMILAR FRENCH AMENDMENTS TO OTHER ARTICLES) WILL BE HELD IN DC PENDING A DECISION BY CW ON QUESTION OF REFERRING IN THE CONVENTION TO CONCEPT OF RESTR MULTILATERAL TREATIES.IN ABSENCE OF REPLY TO OURTEL 423 MAY10 WE DID NOT/NOT PUT QUESTION PROPOSED THEREIN TO WALDOCK.

ARTICLE 67:

THIS ARTICLE WAS ADOPTED IN PRINCIPLE AND REFERRED TO DC WITH FINNISH AMENDMENT L.295 AND MEXICAN AMENDMENT L.356.FINNISH AMENDMENT SEEKS TO INTRODUCE MENTION OF SEPARABILITY IN CASES COVERED BY ARTICLES 50 AND 61.CONSEQUENTLY,TREATMENT TO BE ACCORDED TO L.295 IN DC WILL DEPEND UPON EVENTUAL DISPOSITION BY CW OF FINNISH AMENDMENT TO DELETE FROM ARTICLE 41 REF TO ARTICLE 50(SEE OPENING PORTION OF THIS TEL).

ARTICLE 68:

ARTICLE ADOPTED AND REFERRED TO DC WITH MEXICAN AMENDMENT L.357.

ARTICLE 69:

JPNSE AMENDMENT L.365 PROPOSING TO REMOVE THIS ARTICLE TO PREAMBLE AND TO CAST IT IN MORE GENERAL TERMS WAS DEALT WITH IN TWO PARTS. PROPOSAL TO TRANSFER TO PREAMBLE WAS DEFEATED 4-64-20(CDA,USA).

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WE WERE NOT/NOT CONVINCED OF USEFULNESS OF THIS PROPOSAL,WHICH ILC HAD REJECTED.ARTICLE 69 WAS THEN REFERRED TO DC.

ARTICLE 70:

DISCUSSION OF THIS ARTICLE WAS ACRIMONIOUS.NO/NO AMENDMENTS HAD BEEN TABLED PRIOR TO AFTERNOON OF MAY17 WHEN ARTICLE WAS DISCUSSED BUT EASTERN EUROPEANS APPEAR TO HAVE PREPARED THEMSELVES WITH EMOTIONAL SPEECHES TO REBUFF EXPECTED ATTEMPT TO DELETE ARTICLE 70.INSTEAD JPN AND THAILAND TABLED AMENDMENTS (L.366 AND L.367)AT LAST MINUTE SEEKIMG TO REDRAFT ARTICLE TO DELETE ANY REF TO AGRESSORS OR AGG-RESSION.STATEMENTS BY UKRAINE AND USSR DELS WERE RICH IN REFS TO HORRORS OF SECOND WORLD WAR AND IMPUTED DISHONOURABLE MOTIVES TO PROPOSERS OF AMENDMENTS.SOME LEFT-WING AFRICAN STATES ROSE TO OCCASION AND DELIVERED EMOTIONAL AND IRRATIONAL SPEECHES ON SAME THEME.ONLY GERMANY CLEARLY SUPPORTED AMENDMENTS,ALTHOUGH USA DID SO IN VERY MILD WAY.WE INTERVENED TO SAY THAT,WHILE DOUBTING NECESSITY OF INCLUSION OF ARTICLE 70,WE WERE PREPARED TO ACCEPT IT AS DRAFTED BY ILC;THAT WHILE AMENDMENTS PROPOSED APPEARED REASONABLE WE WOULD ABSTAIN IN ANY VOTE UPON THEM IN VIEW OF STRONG OPPOSITION.WE DEP-LORED EXTREME AND UNREASONABLE CRITICISM OF AMENDMENTS,ESPECIALLY BY UKRAINIAN REP WHOSE STATEMENT WAS BY FAR THE MOST INFLAMMATORY (JPNSE AND FGR DELS BOTH CAME TO US AT CLOSE OF MTG TO EXPRESS APPRECIATION FOR OUR INTERVENTION).JPNSE AMENDMENT L.366 WAS DEF-EATED 7-58-27(CDA,UK,FRANCE).THAI AMENDMENT L.367 DEFEATED 4-54-30-(CDA,USA,UK,FRANCE).ARTICLE WAS ADOPTED AND REFERRED TO DC TOGETHER WITH LIBERIAN DRAFTING PROPOSAL MADE ORALLY DURING DEBATE.IT WAS

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FOOLISH OF JPN TO INTRODUCE AMENDMENT AND ESPECIALLY TO DO SO AT LAST MOMENT WHEN THERE WAS NO/NO POSSIBILITY OF THEIR LOBBYING FOR SUPPORT.I UNDERSTAND JPNSE MEMBER OF ILC HAD FOUGHT SAME BATTLE IN ILC WITH TUNKIN(USSR),.

(FOLLOWING PORTIONS OF TEL DEAL WITH TEXTS OF ARTICLES RECOMMENDED BY DC AND CONSIDERED IN CW LAST WEEK).

ARTICLE 16(OURTEL 319 APR21 REFERS):

TEXT REPORTED BY DC IN DOCU C.1/8 WHICH VARIES SLIGHTLY FROM ILC TEXT,WAS ADOPTED WITHOUT VOTE.

ARTICLE 17(97453) 319 APR21):

THIS IS ONE OF ARTICLES BEING HELD IN COLD STORAGE IN DC PENDING RESLN IN CW OF QUESTIONS WHETHER TO INCLUDE IN CONVENTION CONCEPTS OF RESTR AND GEN MULTILATERAL TREATIES.A PROVISIONAL TEXT(L.344) OF ARTICLE 17 WAS BROUGHT BY DC BEFORE CW FOR RESLN OF A SEPARATE PROBLEM CREATED BY USA AMENDMENT L.127(WHICH HAD EARLIER BEEN ADOPTED BY CW)TO ADD TO PARA3 OF ILC TEXT WORDS QUOTE BUT SUCH ACCEPTANCE SHALL NOT/NOT PRECLUDE ANY CONTRACTING STATE FROM OBJECTING TO THE RESERVATION UNQUOTE.CHAIRMAN OF DC SAID THIS AMENDMENT WAS SO CLOSELY RELATED TO TREATY RELATIONSHIPS BETWEEN STATES AND INTERNATL ORGANIZATIONS THAT DC RECOMMENDED IT BE WITHDRAWN AND REFERRED FOR STUDY BY ILC PURSUANT TO RESLN ALREADY ADOPTED BY CW(OURTEL 259 APR7 REFERS)ASKING THAT ILC STUDY QUESTION OF TREATIES CONCLUDED WITH INTERNATL ORGANIZATIONS.USA CONSENTED AND CW THEREFORE CANCELLED ITS APPROVAL OF THIS AMENDMENT.

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ARTICLE 17 RETURNS TO COLD STORAGE.

YOU WILL HAVE NOTED THAT TEXTS OF ARTICLE 16 IN C.1/8 ADOPTED BY CW AND PRELIMINARY TEXT OF ARTICLE 17 APPEARING IN L.344 CONTAIN NO/NO PROVISIONS RESOLVING APPARENT CONFLICT BETWEEN ARTICLES 16(C) AND 17(4)(C)(REFERRED TO IN PARA 1(A) OF YOUR INSTRUCTIONS) DESPITE SEVERAL AMENDMENTS FOR THIS PURPOSE WHICH HAD BEEN REFERRED TO DC. CLARIFICATION OF PROBLEM THEREFORE RESTS ON STATEMENT BY WALDOCK APPEARING IN SUMMARY RECORDS OF 24TH MTG OF CW THAT WHILE 16(C) IS INTENDED TO STATE AN OBJECTIVE RULE, ACTUAL APPLICATION OF SYSTEM WILL BE SUBJECTIVE IN ACCORDANCE WITH 17(4)(C). IT IS ASSUMED THAT NO/NO STATE WILL ACCEPT A RESERVATION WHICH IT CONSIDERS TO BE INCOMPATIBLE. PRACTICAL RESULT APPEARS TO BE THAT AN ACCEPTANCE BY ONE STATE UNDER 17(4)(C) OF A RESERVATION WHICH APPEARS TO OTHERS TO BE INCOMPATIBLE WILL NEVERTHELESS SERVE TO MAKE EFFECTIVE THE INSTRUMENT OF RATIFICATION ETC CONTAINING THAT RESERVATION.

ARTICLES 18-19-20 (OURTEL 319 APR 21):

TESTS OF THESE ARTICLES REPORTED OUT OF DC IN DOCU C.1/8, WHICH CONTAIN ONLY MINOR DEPARTURES FROM ILC TEXT, WERE ADOPTED WITHOUT VOTE. HOWEVER, CHAIRMANS PRACTICE (ON WHICH WE HAVE COMMENTED UNFAVOURABLY IN EARLIER TELS) OF REFERRING SUBSTANTIVE AMENDMENTS TO DC WITHOUT FIRST CALLING FOR A VOTE HAD REPERCUSSIONS WHEN AUSTRIAN DEL OBJECTED IN STRONG TERMS TO FAILURE OF DC TO TAKE ACCOUNT OF THEIR SUBSTANTIVE AMENDMENT L.4 TO ARTICLE 19. THIS AMENDMENT HAD BEEN REFERRED TO DC WITHOUT VOTE, A STEP WHICH AUSTRIANS WRONGLY INTERPRETED

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TO IMPLY CW APPROVAL OF SUBSTANCE OF THEIR AMENDMENT.

ARTICLE 21(OURTEL 319 APR21):

TEXT REPORTED OUT OF DC IN DOCU C.1/8 WAS ADOPTED BY CW WITHOUT VOTE BUT WITH MINOR AMENDMENT.CONCLUDING WORDS OF PARA4 WERE AMENDED TO READ QUOTE FROM THE TIME OF THE ADOPTION OF ITS TEXT UNQUOTE.

ARTICLES 22,23.23BIS,24 AND 25(OURTEL 319 APR21):

TEXTS REPORTED OUT OF DC IN DOCU C.1/8 WERE ADOPTED BY CW WITHOUT VOTE.PLEASE NOTE THAT ARTICLE 22 NOW CONTAINS NEW PARA2 PROVIDING FOR TERMINATION OF TREATIES PROVISIONALLY IN FORCE.RE ARTICLE 23, TEXT RETAINS REF TO QUOTE TREATY IN FORCE UNQUOTE RATHER THAN QUOTE VALID TREATY UNQUOTE AS DESIRED BY COMMUNISTS.PAK AMENDMENT TO ARTICLE 22(L.181)CONCERNING INTERNAL LAW WAS MADE INTO SEPARATE ARTICLE 23BIS;THIS AMENDMENT HAD BEEN ACCEPTED BY CW LAST MONTH.

ARTICLE 26(OURTEL 319 APR21):

THIS ARTICLE HAS NOT/NOT BEEN REPORTED OUT OF DC PENDING DISPOSITION OF QUESTION OF RESTR MULTILATERAL TREATIES.

ARTICLES 27-34(OURTEL 352 APR28 REFERS):

TEXTS OF ALL THESE ARTICLES REPORTED OUT OF DC IN DOCUS C.1/8 AND C.1/9 WERE ADOPTED BY CW WITHOUT VOTE.IN NO/NO CASE WAS THERE ANY SIGNIFICANT DEPARTURE FROM ILC TEXTS

WERSHOF ***

ACTION COPY

FM VIENN MAY17/68 RESTR

TO EXTER 452 PRIORITY

INFO BAG PRMNY DE OTT GENEV DE VIENN

REF OURTEL 442 MAY14

20-3-1-6
32 | 32

LAW OF TREATIES ART 62

AFTER LENGTHY DEBATE IN WHICH CDA TOOK PART,FURTHER ACTION ON ART 62 WAS ADJOURNED UNTIL TUE NEXT.BLIX AND OTHER SPONSORES OF L352 HAVE GIVEN UP IDEA OF BRINGING IT TO A VOTE AT PRESENT SESSION. MOST DELS OF ALL GROUPS WANT TO POSTPONE VOTING ON ART 62(AND ALL AMENDMENTS) UNTIL 1969 SESSION.NEGOTIATIONS ON TEXT OF RESLN FOR THAT PURPOSE ARE GOING ON.

2.THERE APPEARS AT PRESENT TO BE SIMPLE MAJORITY(BUT WITH MANY ABSTENTIONS)FOR INSERTING IN ART 62 A PROVISION FOR COMPULSORY ARBITRATION WHEN ALL OTHER PROCEDURES HAVE FAILED.USSR HAS HOWEVER PRACTICALLY THREATENED THAT IT WILL NOT/NOT SIGN CONVENTION IF SUCH PROVISION IS INCLUDED.IT IS DIFFICULT TO SEE HOW INTERSESSIONAL CONSULTATIONS CAN PROVIDE SOLUTION BUT IT IS WORTH TRYING

WERSHOF

Legal/J.A.Beesley/jf

EXTERNAL AFFAIRS **AFFAIRES EXTÉRIEURES**

TO / À: Mr. ~~Gotlieb~~ Cadieux

FROM / De: Legal Division

REFERENCE / *Référence*:

SECURITY / *Sécurité*: RESTRICTED

DATE: May 17, 1968

NUMBER / *Numéro*:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	38

SUBJECT / *Sujet*: Law of Treaties: Article 62 - Peaceful Settlements Procedures

ENCLOSURES / *Annexes*:

DISTRIBUTION

As you know, there have been a series of proposals for peaceful settlements procedures, some of which are extremely complex. Thus far none seems likely to prove generally acceptable. One possible way around the difficulties which Western states feel in accepting part V of the draft convention (on grounds for claiming invalidity, termination, withdrawal from or suspension of the operation of a treaty) might be to have written into the convention the right for states to make a reservation with respect to the whole of Part V viv-à-vis those countries not accepting compulsory settlement procedures. We had been looking on such a possible proposal as a fallback position, but it may be worth advancing at this stage of the debate as a warning to the Eastern Europeans and their supporters as to how seriously Western countries take this issue. I am, therefore, attaching for your signature, if you agree, a telegram to our delegation in Vienna proposing that they give consideration to such a procedure.

J.A. Beesley
Legal Division

See the Instructions on Reservations on the last page of the Commentary (Yoggel).

Mr. Caldwell.

I agree with the attached tel. As it is important, I am submitting for your approval, A.L.-

Tel signed May 21

21.5.41105)

Ext. 407A/Bil

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY17/68	26-3-1-6	RESTR
	32	

FM/DE EXT OTT

TO/A	NO	PRECEDENCE
VIENNA	L-451	IMMED
INFO		

REF YOUR TELS 452 MAY17; AND 461 MAY 20 AND YOUR LET MAY11

SUB/SUJ LAW OF TREATIES: ART 62 - PEACEFUL SETTLEMENTS PROCEDURES

WE HAVE BEEN FOLLOWING THE DEVELOPMENTS ON ART 62 THROUGH YOUR VERY HELPFUL REPORTS WITH CONSIDERABLE INTEREST. IT IS NOT SURPRISING THAT IT HAS NOT YET BEEN POSSIBLE TO REACH AGREEMENT ON A SUBJECT SO CONTROVERSIAL, GIVEN THE LONGSTANDING USSR OPPOSITION TO COMPULSORY SETTLEMENT OF DISPUTES. AT THE SAME TIME, HOWEVER, THE USSR UNDOUBTEDLY ATTACHES GREAT IMPORTANCE TO ACHIEVING AGREEMENT ON A LAW OF TREATIES CONVENTION, TO THE POINT PERHAPS OF DEPARTING SLIGHTLY FROM ITS LONGSTANDING POSITION ON COMPULSORY SETTLEMENT, AT LEAST IN THE LAW OF TREATIES CONTEXT, WHERE CERTAINTY OF THE LAW IS SO IMPORTANT TO THE STABILITY OF TREATY RELATIONSHIPS, AND, INDEED TO THE DEVELOPMENT OF A WORLD ORDER. WE WONDER WHETHER THE APPROACH SUGGESTED IN YOUR INSTRUCTIONS MIGHT NOT BE ATTEMPTED, NAMELY, A RESERVATION BY ALL WESTERN STATES AND OTHER STATES HOLDING SIMILAR VIEWS) WITH RESPECT TO THE WHOLE OF PART V VIS-A-VIS ALL STATES NOT ACCEPTING SOME FORM OF COMPULSORY THIRD PARTY SETTLEMENT. THIS WOULD BE FAR LESS SATISFACTORY THAN A COMPULSORY SETTLEMENT PROCEDURE

....2

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LOCAL/LOCALE NO STD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A.BEESLEY/JF	LEGAL	2-2728	SIG M. CADIEUX

OF GENERAL APPLICATION, BUT IT WOULD AT LEAST PROTECT THE WEST FROM UNILATERAL SUBJECTIVE INTERPRETATIONS OF THE ARTS CONTAINED IN PART V AND WOULD PREVENT THE USSR FROM FORCING ITS VIEWS ON THE CONFERENCE (AS IT SEEMS TO HAVE BEEN ABLE TO DO, FOR EXAMPLE, IN THE CASE OF ART 5). IN ANY EVENT WHETHER OR NOT THE WEST WERE TO PROCEED WITH SUCH A PROPOSAL, THE THREAT OF THEIR WILLINGNESS TO DO SO MIGHT INFLUENCE OTHER DELEGATIONS IN THEIR ATTITUDES TOWARDS THE PEACEFUL SETTLEMENTS ISSUE. IT IS EVEN CONCEIVABLE THAT THE EASTERN EUROPEANS AND CERTAIN OTHER COUNTRIES WITH SPECIAL INTERESTS TO PROTECT MIGHT BECOME ISOLATED, IF A LARGE NUMBER OF DELS WERE PREPARED TO MAKE SUCH A RESERVATION. THE USUAL "OPTIONAL PROTOCOL" WOULD NOT IN OUR VIEW SUFFICE UNLESS LINKED TO THE POSSIBILITY OF SUCH A RESERVATION AS OF RIGHT. WE HAD BEEN LOOKING ON SUCH A PROPOSAL AS A POSSIBLE FALLBACK POSITION BUT IT MAY BE USEFUL AT THIS STAGE FOR YOU TO DISCUSS IT AT LEAST WITH OTHER WESTERN DELS AND, IF YOU CONSIDER IT DESIRABLE, TO PUT IT FORWARD FORMALLY. WE SHOULD BE INTERESTED IN YOUR VIEWS. Cadieux

EXTERNAL AFFAIRS / AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, OTTAWA, CANADA

FROM / De: Canadian Delegation to the Law of Treaties Conference, VIENNA

REFERENCE / Référence: Our telegram 435, May 11

SUBJECT / Sujet: Conference on the Law of Treaties - Article 59; Canada - U.S.A. Boundary Waters Treaty

SECURITY / Sécurité: UNCLASSIFIED

DATE: May 16, 1968

NUMBER / Numéro: 292

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	32 32

ENCLOSURES / Annexes: 1

DISTRIBUTION

We enclose for your information a copy of the U.S.A. statement made on May 10 in the Committee of the Whole of the U.N. Conference on the Law of Treaties during the debate on Article 59, which deals with the effect of fundamental change of circumstances on the continuation of a treaty.

2. Paragraph 2(a) of the International Law Commission's Draft Article 59 provides that

> "2. A fundamental change of circumstances may not be invoked;
>
> (a) as a ground for terminating or withdrawing from a treaty establishing a boundary;"

3. The United States proposed an amendment (L.335) to reword sub-paragraph (a) of paragraph 2 as follows:

> "(a) as a ground for terminating or withdrawing from a treaty drawing a boundary or otherwise establishing territorial status;"

4. We are sending you the U.S.A. Delegate's statement, which was made in introducing the amendment referred to in the preceeding paragraph, because of the reference made in pp. 3-4 of the statement to Canada - U.S.A. boundary waters arrangements. In commenting upon the U.S.A. amendment towards the end of the debate, Sir Humphrey Waldock (Special Rapporteur for the I.L.C. on the Law of Treaties, who is present at the Conference as Expert Consultant) said that, while he sympathized with the U.S.A. proposal and had himself raised the matter in the I.L.C., the Commission had been unable to find a form of words which would not unduly enlarge the exceptions and therefore had come down firmly for the text of paragraph 2(a) in its present form.

5. When the U.S.A. amendment was put to a vote on May 11 it was defeated by a vote of 14 - 43 - 28 (Canada). We abstained on the vote

.../2

Ext. 407B/Bil.

002141

because the amendment was circulated less than 48 hours before the vote, leaving insufficient time for us to refer it to you for consideration and instructions. We made an explanation of our vote referring simply to the fact that there was insufficient time "to study the potentially important significance of the amendment."

Canadian Delegation

P.S. You may wish to send copies of this to interested Departments and to Washington.

M.H.W.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs
OTTAWA, CANADA

FROM / De: Canadian Delegation to the Law of Treaties Conference
VIENNA

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ENCLOSURES / Annexes: 1

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M. H. Wershof

Canadian Delegation

P.S. You may wish to send copies of this to interested Departments and to Washington.

MHW

M.H.W.

USA

Statement by the United States Delegate

Article 59
May 10, 1968

The purpose of the amendment proposed by the United States in L.335 is to clarify the principle expressed by the International Law Commission in paragraph 2(a) of Article 59. We support that principle. If the doctrine of rebus sic stantibus is to be a part of the convention on treaties, we must be sure there are safeguards against misuse of the doctrine. This view was emphatically expressed by representatives of a number of States in the last session of the Sixth Committee. Among those specifically favoring the principle in this subparagraph was the distinguished representative of Thailand, Mr. Sucharitkul, who at the 976th meeting observed that paragraph 2(a) had been added for protection of Asian and African states. The United States would go beyond Mr. Sucharitkul's observation and state that it has been added for the protection of states in all parts of the world. The international community as a whole benefits from any rule, the effect of which is substantially to reduce the means of reopening territorial questions settled by treaty. Territorial disputes constitute the most dangerous source of threats to the peace. Great care should be taken therefore that the language used in paragraph 2(a) of Article 59 is worded as not to exclude any treaties which were intended to settle such disputes.

The United States believes that the phrasing of paragraph 2(a) in terms of treaties "establishing a boundary" is too restricted.

Oppenheim defines boundaries as "imaginary lines on the surface of the earth which separate the territory of one State from that of another or from unappropriated territory, or from the open sea." Paragraph 11 of the Commission's Commentary clearly indicates that the Commission intended the exclusion in paragraph 2(a) to

extend beyond boundary treaties. The Commentary indicates that the Commission intended that the subparagraph "would embrace treaties of cession as well as delimitation treaties".

As the distinguished Rapporteur, Sir Humphrey Waldock, pointed out at the 835th meeting of the Commission, it is difficult to define what treaties should be covered by the exception in paragraph 2(a). At his suggestion, the Commission discarded the phrase "to fix a boundary" and adopted the expression "establishing a boundary".

The United States regrets to say that despite the improvement in the final text adopted by the Commission, the draft article does not appear clear on the scope of the exclusion in paragraph 2, subparagraph (a). There are treaties such as condominium agreements which, while not establishing boundaries, do establish territorial status and which have settled territorial disputes. Such treaties should, we think, be excluded from paragraph 1. The United States and the United Kingdom, for example, are parties to a treaty establishing condominium status for Canton and Enderbury Islands. This treaty settled a long standing dispute over the islands and, in our view, neither party should be in a position to raise rebus sic stantibus with regard to this treaty. But this treaty certainly didn't establish a boundary. It established a territorial status for these islands. Another common type of treaty which is used to settle territorial disputes is the one in which neither party renounces its existing claims, but agrees not to press the claims in view of various concessions made on each side which can relate to such varied matters as treatment of minority groups, customs concessions or joint development of

resources. It is highly doubtful that these treaties can be said to establish a boundary. What they do is to recognize a"status quo" or to create an agreed regime which takes the place of establishing a boundary. Again, excluding treaties which establish this type of territorial status will be an invaluable safeguard against the reopening of boundary disputes. Perhaps the most prominent example of this species of arrangement is the Antarctica Treaty. I recognize that the Antarctica Treaty has special features which might well prevent the doctrine of rebus sic stantibus from ever becoming applicable. But it is a classic example of the type of treaty arrangement which the words "establishing a boundary" obviously do not cover.

Another problem is the settlement of disputes regarding islands. When a state withdraws in a treaty its claim to an island, does this establish a boundary? It is at least arguable that it does not and unless the point is clarified we can be certain that sooner or later some state will claim that rebus sic stantibus applies to such a territorial settlement.

Yet another class of treaties relating to boundary disputes are those which do not establish boundaries but which are concerned with ensuring that problems relating to boundaries are worked out in a spirit of cooperation and friendship. The United States has treaties of this character with both of its great neighbors--Canada and Mexico. On both of our borders we have joint commissions which are charged with jurisdiction over a very wide range of territorial problems whose major purpose is to ensure that these territorial problems do not become territorial disputes. I believe

that the Delegates of both Canada and Mexico will agree with me that the territorial regimes established by these treaties have been highly successful. But in order to be successful, joint operations of this kind must be set up for a long period in order to ensure that there is ample time to make the problem settling procedures the accepted way in both countries for avoiding disputes. The United States-Canadian Boundary Waters Treaty of 1909, for example, had an initial fifty-years duration. If the rule of rebus sic stantibus were to be applied to such treaties, it would defeat the essential purpose of the treaties. It is precisely in cases of fundamental change that joint commissions are of greatest value, because it is in such cases that the sharpest conflicts arise. Again, these are certainly not treaties establishing a boundary but they are treaties which should be excluded from the operation of paragraph 1 of Article 59.

The United States does not suggest that the wording it proposes for Article 59, paragraph 2(a) is the ideal one. It believes, however, that it represents an improvement over the International Law Commission's language and earnestly hopes that the Committee will find its proposed amendment a contribution to formulating a text which will insure the exclusion of treaties drawing boundaries or otherwise establishing territorial status from the application of the rule contained in paragraph 1.

Mr. Chairman, every student of international law knows that wars resulting from territorial disputes have been frequent, bloody and prolonged.

Our fundamental purpose here is to provide rules and procedures which will reduce the frequency and severity of quarrels between states. The International Law Commission recognized that treaties relating to territorial questions required an exception from the rebus sic stantibus principle because attempts to overthrow these treaties could easily give rise to threats to the peace. But the International Law Commission exception, as I have shown, failed to include, or to include clearly, a range of treaties whose maintenance is of great importance. I urge that this Committee, in the interests of the maintenance of peaceful relations among states, broaden the International Law Commission definition to include all treaties designed to settle or to prevent territorial disputes.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, Ottawa

FROM / De: Canadian Delegation to the Law of Treaties Conference, Vienna

REFERENCE / Référence: Our Telegram 398 of May 8, 1968

SUBJECT / Sujet: Status of GATT under draft Convention on the Law of Treaties

SECURITY / Sécurité: UNCLASSIFIED

DATE: May 14, 1968

NUMBER / Numéro: 285

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 4

ENCLOSURES / Annexes

DISTRIBUTION

Permis, Gva,

-- Enclosed is a copy of a letter of May 9 from the Director-General of GATT and a copy of our reply.

Canadian Delegation

Ext. 407B/Bil.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs, Ottawa

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MISSION	

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Canadian Delegation

002151

Ext. 407C/Bil.
(Admin. Services Div.)

ACCORD GÉNÉRAL
SUR LES TARIFS DOUANIERS
ET LE COMMERCE

GENERAL AGREEMENT
ON TARIFFS AND TRADE

TELEGRAMMES : GATT, GENÈVE
TELEPHONE : 34 60 11 32 44 00 32 20 00 32 10 00

Villa le Bocage - Palais des Nations
CH-1211 GENÈVE 10

REFERENCE : CO/101

9 MAY 1968

Dear Sir,

Mr. Mc Kinnon, a member of your delegation, has informed me about the letter which you addressed on 3 April to the Secretary of the Drafting Committee of the Conference on the Law of Treaties. In your letter you have raised a point concerning Article 4 which I perceive to be of great importance to the CONTRACTING PARTIES and I have written to the Executive Secretary of the Conference regarding this point. I attach a copy of my letter and would greatly appreciate any further assistance you may be able to give in safeguarding the position of the GATT in this connexion.

Yours faithfully,

O. Long
Director-General

Mr. M.H. Wershof,
Head of the Canadian Delegation,
United Nations Conference on the
Law of Treaties,
Neue Hofburg,
Vienna 1

ABLE ADDRESS : GATT, GENÈVE
TELEPHONE : 33 10 00 33 20 00 33 40 00

TÉLÉGRAMMES : GATT, GENÈVE

GENERAL AGREEMENT
ON TARIFFS AND TRADE

ACCORD GÉNÉRAL
SUR LES TARIFS DOUANIERS
ET LE COMMERCE

Villa le Bocage - Palais des Nations
GENÈVE

CO/101

- 8 MAI 1968

REFERENCE :

Dear Sir,

In examining the Draft Articles, now under consideration by the Conference on the Law of Treaties, I have observed that the terms of Article 4, when read in conjunction with Article 2(1), gives rise to a question which could be of great significance for the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade.

Since the General Agreement became effective in 1948 the CONTRACTING PARTIES have drawn up more than a hundred instruments amending, rectifying, modifying or supplementing the Agreement. In some respects the procedures and practices adopted by the CONTRACTING PARTIES constitute lex specialis and, although they appear to be substantially in accord with the spirit of the Draft Articles, they may not be fully in line with all of their provisions. However, the CONTRACTING PARTIES are not, strictly speaking, an intergovernmental organization and, therefore, it is essential that the term "international organization" in Article 2(1) should be defined or interpreted to include the CONTRACTING PARTIES so that the application of the Articles of the Law of Treaties to instruments of the GATT will be subject to the rules of the CONTRACTING PARTIES. Alternatively, the case might be sufficiently covered by a statement of understanding in the report of the Conference.

I should be grateful if you would bring this matter to the notice of the President of the Conference and of the Chairman of the Drafting Committee.

Yours faithfully,

O. Long
Director-General

The Executive Secretary,
United Nations Conference on
the Law of Treaties,
Neue Hofburg,
Vienna 1

ACTION COPY

FM VIENN MAY14/68 CONFD

TO EXTER 442 PRIORITY

INFO BAG PRMNY DE OTT GENEV DE VIENN

REF OURTEL 436 MAY11

LAW OF TREATIES ART 62

20-3-1-6
32 | 32

THERE SEEMS TO BE ENDLESS SUPPLY OF SCHEMES TO REWRITE ART 62.USA HAVE NOW TABLED L355(COPY MAILED)WHICH DIFFERS FROM L352 IN SEVERAL RESPECTS BUT LIKE L352 ENDS IN COMPULSORY ARBITRATION.ART 62 DEBATE STARTS TODAY.

2.WE ASKED BLIX OF SWEDEN(WHO IS A LEADER OF THE L352 SPONSORING GROUP)WHY HE HAD DELETED EVEN A MENTION OF EXISTENCE OF ICJ.HE SAID HE HAD TO DO IT IN ORDER TO GET BABON AND CENTRALAFRICAN REPUBLIC TO MERGE THEIR L345 WITH HIS L346(COLOMBIA SWEDEN ETC); L352 WAS THE MERGER PRODUCT.HE ARGUES CORRECTLY(BUT RATHER APOLOGETICALLY)THAT DELETION OF REF TKGJCJ DID NOT/NOT CHANGE THE LEGAL SITUATION SO FAR AS CONCERNS POSSIBILITY OF AGREEMENT BETWEEN 2 DISPUTANTS TO GO TO ICJ.

3.BLIX THINKS NOW THERE IS A CHANCE L352 COULD GET A SIMPLE MAJORITY VOTE AT PRESENT SESSION AND HE IS TENTATIVELY ADVOCATING THAT A VOTE BE SOUGHT IF SUCH VICTORY SHOULD APPEAR LIKELY.SUCH A PROCEDURE WOULD INVOLVE REVERSAL OF WEO THINKING UP TO NW-WHICH WAS AGAINST VOTING ON ART 62 AND AMENDMENTS THERETO AT PRESENT SESSION AND IN FAVOR OF TRYING TO SEND PROBLEM TO AN INTERSESSIONAL WORKING GROUP OF SOME KIND.I AM NOT/NOT AT ALL SURE THAT BLIXS IDEA IS A GOOD ONE

WERSHOF

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
LIMITED

A/CONF.39/C.1/L.352
11 May 1968

ENGLISH
Original: FRENCH

UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Colombia, Finland, Gabon, Lebanon, Madagascar, Netherlands, Peru, Central African Republic, Sweden and Tunisia: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Insert a new paragraph 3 bis reading as follows:

"3 bis If the parties have been unable to agree upon any means of reaching a solution within four months following the date on which the objection was raised, either party may request the Secretary-General of the United Nations to set in motion the procedures specified in annex 1 to the present Convention."

Annex I (1) A permanent list of conciliators consisting of qualified jurists representing the various legal systems of the world shall be drawn up by the Secretary-General of the United Nations. To this end every State Member of the United Nations and every party to the present Convention shall be invited to nominate two conciliators for a period of 5 years, which may be renewed.

(2) In the event of a dispute, each party shall appoint:

(a) one conciliator of its own nationality chosen either from the list referred to in paragraph 1 above or from outside that list;

(b) one conciliator not of its own nationality chosen from the list.

The Commission thus constituted shall appoint a Chairman chosen from the list.

VI.68-3005

The conciliators chosen by the parties shall be appointed within a period of sixty days after the opening of the conciliation procedure by the party requesting it.

The conciliators shall appoint their Chairman within sixty days after their own appointment.

If the appointment of the conciliators or of the Chairman has not been made within the above mentioned period, it shall be made by the Secretary-General of the United Nations.

(3) The Commission thus constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly settlement of the dispute. The Commission shall establish its own procedure. Decisions of the Commission shall be taken by a majority vote. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

(4) The Commission shall be required to report within twelve months of its constitution. Its reports shall be transmitted to the Secretary-General and to the parties.

(5) In the event of failure of the conciliation procedure and if the parties have not agreed on a means of judicial settlement within three months from the date when it is established that the conciliation procedure has failed, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal for settlement.

The arbitral tribunal shall consist of two arbitrators, one appointed by each party, and a Chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months from the date when it is established that the conciliation procedure has failed.

The Chairman shall also be appointed within a period of six months from the date of the appointment of the arbitrators by the parties.

If the Chairman or arbitrators are not appointed within the above mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

(6) The Secretary-General shall provide the arbitral tribunal with such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

FM VIENN MAY14/68 RESTR

TO EXTER 448

INFO TT PRMNY DE OTT

BAG GENEV DE VIENN

REF OURTEL 425 MAY9

20-3-1-6
32 | 27

LAW OF TREATIES DEBATE ON ART 49 FRIENDLY RELATIONS

DEBATE WHICH TOOK PLACE IN LAW OF TREATIES CONFERENCE ON ART 49 (COERCION OF A STATE BY THREAT OR USE OF FORCE)HAS IMPLICATIONS (IN TERMS OF PROBABLE EASTERNEUROPEAN TACTICS)FOR FUTURE DISCUSSIONS IN SPECIAL CTTEE ON FRIENDLY RELATIONS.

2.IN THIS CONNECTION WE DRAW TO YOUR ATTN SUMMARY RECORDS OF 48-51 MTGS OF CTTEE OF WHOLE,AND IN PARTICULAR TO FOLLOWING STATEMENTS:48TH MTG(SR/48)INDIA AT PAGE 6;CZECHOSLOVAKIA AT PAGE 10

49TH MTG(SR/49)UAR AT PAGE 3,CUBA AT PAGE 5;MONGOLIA AT PAGE 12

50TH MTG(SR/50)UKRAINE AT PAGE 2;POLAND AT PAGE 4;HUNGARY AT PAGE 8;ROMANIA AT PAGE 14:YUGOSLAVIA AT PAGE19;BYELORUSSIA AT PAGE 22

51ST MTG(SR/51)USSR AT PAGE 4;AFGHANISTAN AT PAGE 17.

For Legal Division
from Abraham
May 14

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
LIMITED

A/CONF.39/C.1/L.355
13 May 1968

Original: ENGLISH

UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

20-3-1-6
32

Committee of the Whole

Article 62

United States of America: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Proposed amendment:

1. Amend paragraph 2 to read as follows:

"2. (a) If after the expiry of a period which, except in cases of special urgency shall not be less than three months after receipt of the notification, the party making the notification has not received an objection from any other party and, in the case of a multilateral treaty, has ascertained that no other party has communicated any objection to the depositary, it may carry out in the manner provided in Article 63 the measure which it has proposed.

(b) In cases of special urgency the time period shall, in every case, be sufficient to allow the other parties to make an objection."

2. Insert as a new paragraph 3 *bis* the following text:

"3 *bis*. If the parties have been unable to agree upon any means of reaching a solution within three months following the raising of the objection, or if they have agreed upon any means of settlement (other than adjudication or arbitration) which has not led to a solution within 12 months after such agreement, either party may refer the dispute to the Commission on Treaty Disputes for settlement in accordance with the procedures indicated in Annex I to the present Convention."

VI.68-3033

3. Renumber paragraphs 4 and 5 of the ILC text as paragraphs 6 and 7 and insert new paragraphs 4 and 5 to read as follows:

"4. Except as provided in paragraph 5, when an objection has been raised, the party claiming the invalidity of a treaty or alleging a ground for termination, suspension or withdrawal from a treaty may not carry out the measure proposed in its notification until the matter is resolved unless: (a) the parties agree that such measure may be taken; or, (b) any international tribunal to which the parties have submitted the dispute or, if they have not submitted the dispute to such a tribunal, the Commission on Treaty Disputes established in Annex I to the present Convention, shall have issued an order laying down provisional measures to be taken to preserve the respective rights of either party.

"5. A party alleging material breach of a treaty may, upon the expiry of the applicable period provided in paragraph 2 of this article, suspend operation wholly if effect of the alleged breach would be to frustrate the object and purpose of the treaty; otherwise, operation may be suspended of those provisions which were allegedly breached or the performance of which is directly related to or dependent upon performance of the provision allegedly breached. In the event of a dispute as to the materiality of the breach or the appropriateness of the suspension an objecting party may apply to any competent international tribunal to which the parties have submitted the dispute or, if they have not submitted the dispute to such a tribunal, to the Commission on Treaty Disputes for the issuance of an interlocutory order requiring modification of action taken under this paragraph."

ANNEX

Article 1

(1) A Commission on Treaty Disputes shall be established consisting of 25 highly qualified jurists representing the principal legal systems of the world. The Commission shall reflect a wide geographical distribution.

(2) Members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the States parties to this Convention. They shall serve for nine years and may be re-elected.

(3) Subject to the approval of the General Assembly, the Commission shall be constituted as an organ of the United Nations and authorized to request advisory opinions from the International Court of Justice under the conditions set forth in Article 4 below.

Article 2

(1) When a dispute is referred to the Commission on Treaty Disputes, and unless the parties agree that the full Commission shall consider the dispute, a sub-commission shall be appointed within 60 days consisting of one member appointed by each party to the dispute from among the members of the Commission who do not possess its nationality, one member appointed by each party who possesses its nationality (from outside the membership of the Commission where necessary) and a chairman (not possessing the nationality of either party) appointed by the other members of the sub-commission from among the members of the Commission. If any appointment is not made within the period of 60 days, the appointment shall be made by the Secretary-General of the United Nations or in the case of the chairman, by the Commission as a whole.

(2) An application for provisional measures or for review of the action taken in respect of an alleged breach shall be considered by a sub-commission if one has been selected; otherwise the application shall be considered by the Commission as a whole.

Article 3

(1) The Commission or any sub-commission constituted under Article 2 shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly solution of the question. The Commission or a sub-commission shall have the power to order provisional measures to preserve the rights of the parties.

(2) Decisions of the Commission and of the sub-commission shall be taken by majority vote. Subject to the foregoing, the Commission shall establish its own procedures.

(3) The Secretary-General shall provide to the Commission or the sub-commission such assistance and facilities as it may require.

Article 4

If the proposals made to the parties by the Commission or sub-commission are not accepted within three months of being made and there remain unresolved legal questions, or at any time with the consent of the parties, the Commission or sub-commission may request an advisory opinion from the International Court of Justice. If the parties agree, the Commission shall request the Court to form a chamber under Article 26 of its Statute to deal with the questions.

Article 5

(1) The Commission or the sub-commission, as the case may be, shall be obliged to report within 12 months after the dispute has been referred to it unless at the end of that time there is outstanding a request for an advisory opinion. In such case, the Commission or sub-commission may delay its report until 3 months after receipt of the opinion.

(2) The report shall be transmitted to the Secretary-General and the parties. If the Commission or the sub-commission has succeeded in effecting a friendly solution, the report shall be confined to a brief statement of the facts and the solution reached. If the Commission or the sub-commission has not succeeded in effecting a friendly solution, its report shall deal fully with the factual and legal elements of the disputes.

Article 6

(1) If no solution has been effected by the Commission or sub-commission, the parties may agree to submit any question relating to the interpretation or application of any of the articles contained in Part V of the present Convention to the International Court of Justice.

(2) If within two months after issuance of the Commission or sub-commission report, no agreement for submission to the International Court of Justice has been reached, any such question shall be submitted, at the request of either party, to an arbitral tribunal for decision.

(3) The arbitral tribunal shall consist of one member appointed by each party to the dispute and a chairman appointed by common agreement between the parties. If any of these appointments has not been made within a period of 3 months from the request for arbitration, it shall be made from the list of members of the Permanent Court of Arbitration by the President of the International Court of Justice.

(4) The Secretary-General shall provide the arbitration tribunal such assistance and facilities as it may require.

Article 7

If the parties agree the arbitral tribunal may be (a) the sub-commission of the Commission on Treaty Disputes which has been seized of the dispute, or (b) another sub-commission constituted in the same manner as provided in Article 2, or (c) the full Commission.

UNITED NATIONS

GENERAL ASSEMBLY

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UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Insert a new paragraph 3 bis reading as follows:

"3 bis If the parties have been unable to agree upon any means of reaching a solution within four months following the date on which the objection was raised, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within twelve months after such agreement, either party may request the Secretary-General of the United Nations to set in motion the procedures specified in annex 1 to the present Convention."

Annex I (1) A permanent list of conciliators consisting of qualified jurists representing the various legal systems of the world shall be drawn up by the Secretary-General of the United Nations. To this end every State Member of the United Nations and every party to the present Convention shall be invited to nominate two conciliators for a period of 5 years, which may be renewed.

(2) In the event of a dispute, each party shall appoint:

(a) one conciliator of its own nationality chosen either from the list referred to in paragraph 1 above or from outside that list;

(b) one conciliator not of its own nationality chosen from the list.

The Commission thus constituted shall appoint a Chairman chosen from the list.

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The conciliators chosen by the parties shall be appointed within a period of sixty days after the opening of the conciliation procedure by the party requesting it.

The conciliators shall appoint their Chairman within sixty days after their own appointment.

If the appointment of the conciliators or of the Chairman has not been made within the above mentioned periods, it shall be made by the Secretary-General of the United Nations.

(3) The Commission thus constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly settlement of the dispute. The Commission shall establish its own procedure. Decisions of the Commission shall be taken by a majority vote. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

(4) The Commission shall be required to report within twelve months of its constitution. Its reports shall be transmitted to the Secretary-General and to the parties.

(5) In the event of failure of the conciliation procedure and if the parties have not agreed on a means of judicial settlement within three months from the date when it is established that the conciliation procedure has failed, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal for settlement.

The arbitral tribunal shall consist of two arbitrators, one appointed by each party, and a Chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months from the date when it is established that the conciliation procedure has failed.

The Chairman shall also be appointed within a period of six months from the date of the appointment of the arbitrators by the parties.

If the Chairman or arbitrators are not appointed within the above mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

(6) The Secretary- General shall provide the arbitral tribunal with such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Under-Secretary of State for External Affairs - OTTAWA

FROM / De: Canadian Delegation to the Law of Treaties Conference - VIENNA

REFERENCE / Référence:

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 13, 1968

NUMBER / Numéro: 286

FILE / DOSSIER
OTTAWA: 20-3-1-6
MISSION: 32

SUBJECT / Sujet: Law of Treaties Conference: Article 62 - Consultations with Romanians

ENCLOSURES / Annexes:

DISTRIBUTION:

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Belgrade

At the evening meeting of the Committee of the Whole, on May 9th, we were approached by the Romanian Delegation and asked if we would be interested in exchanging views with them on how Article 62 of the draft articles on the Law of Treaties might be handled when it comes before the Committee of the Whole (probably towards the middle of this week). This was interesting, in our view, since it followed closely upon a similar Czech approach to the British concerning the work of the U.N. Special Committee on Friendly Relations (referred to in our telegram 425 of May 9). Article 62 is of course that article in the draft Convention on the Law of Treaties which provides a procedure for the settlement of disputes arising from Part V of the Convention. In its present form Article 62 is unacceptable to the Western European Group because it contains no provisions for ultimate compulsory and binding adjudication or arbitration.

2. The Canadian Delegation met with the Romanian Delegation for more than an hour later on May 9 at the Canadian hotel suite. The Romanians asked that we keep the meeting confidential and that we refrain from discussing the views they put forward with other Western delegations.

3. Mr. Wershof opened the discussions by explaining that though the views he would put forward were in part his own, they closely reflected the Canadian Government's policies and attitudes as he saw them. He also emphasized that on the settlement of disputes procedures which we hoped could be embodied in Article 62, our views closely coincided in most respects with those of the WEO Group as a whole. He then went on to analyse those articles, particularly in Part V, which we regard as being likely to be a source of future disputes and, while doing so, he also countered those arguments which the Eastern Europeans normally put forward to support their own view that provisions for the compulsory and binding settlement of disputes are unacceptable to them (i.e. that such procedures are somehow contrary to the concept of good faith in inter-state relations and, moreover, infringe on the principle of sovereign equality of States and derogate from individual State sovereignty). Mr. Wershof then outlined the sort of settlement of disputes procedures which Canada would hope to see in Article 62. To sum up, these were:

(i) Preferably they would have application to any disputes arising out of the Treaty, but in any event should apply to the more controversial articles in Part V;

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(ii) The settlement mechanism should have two phases of which the first would be a procedure for conciliation and (should that not be successful in resolving a given dispute), the second would entail either compulsory and binding arbitration or compulsory and binding reference to the International Court of Justice;

(iii) The conciliation procedure should be related in some manner to the United Nations and would be based on parity, with each side equally represented and with a neutral chairman. Under the arbitration or judicial phase, it would be clearly agreed in advance by the parties that they would be bound by the outcome.

4. The acting head of the Romanian Delegation, Mr. Saulescu, then spoke; he is a senior official from the Foreign Ministry in Bucharest. After thanking us for the extremely frank and forthcoming manner in which we had set out our views, he put forward the Romanian position. He explained first of all that it is based essentially on a matter of principle, which Romania shares with many other states and not only the Eastern Europeans. They are against the inclusion in Article 62 (or elsewhere in other treaties) of any compulsory recourse to either the International Court of Justice or arbitration. It is the compulsory character of such provisions that they disagree with (for the reasons which Mr. Wershof had already indicated we were well aware of) even though they could favour such recourse ad hoc, provided that, in the case of each individual dispute, the parties were able to agree to it.

5. Mr. Saulescu stated that he doubted whether Romania would ever want to use Part V to seek to invalidate a treaty. It was their view that if there were to be any abuses under Part V, these would more likely be due to the big powers seeking to use its provisions against the smaller ones. (To this we later countered that, in the first place, the larger Western powers were afraid that quite the reverse would happen and that, if there were any abuses under Part V, these would probably be by the smaller and new states seeking to evade treaty responsibilities. Secondly, we considered that, insofar as it is a fact of international life that some states are more powerful than others, recourse to impartial and compulsory settlement of disputes would surely favour the smaller states, who could thereby be assured of equal treatment which might not be the case if they were obliged to negotiate settlement of disputes directly with the larger states without the possibility of ultimate recourse to compulsory adjudication.

6. The Romanians went on to state that they clearly recognized that the application of Part V of the Convention on the Law of Treaties will pose very complex problems and that negotiation of an acceptable Article 62, in particular, will therefore be a source of considerable disagreement at the Conference. He stated that the Romanians therefore are of the view that, since every delegation would have its own instructions and since, moreover, those instructions could probably not be changed (even if delegates might wish to do so) sufficiently quickly, in terms of the short time remaining for the 1968 session of the Conference, it would be very difficult to reach any consensus on the Article this year. Since they recognize that, particularly with respect to Article 62, such a consensus is highly desirable, they therefore believe that the Committee of the Whole would probably be best advised not to try to adopt a text on Article 62 this year. It would be sufficient, in their view,

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if, after states have expressed their opinions, the Committee could agree that the Article and proposed amendments should not be voted upon but should be taken up again next year at the second and final session (thereby allowing states adequate time to re-examine their positions in the light of the debate).

7. While Mr. Saulescu stressed that these were his personal views, it is clear that they reflect his government's thinking. In our view they thus imply at least a possibility of a more flexible approach from Romania on this subject.

8. Mr. Secarin of the Romanian delegation then put forward additional views. In these he stressed the importance of Article 33 of the United Nations Charter as reflecting the current state of international agreement on settlement of disputes procedures. The text of Article 62 recommended by the International Law Commission, he argued, would allow states with a dispute full freedom of choice while at the same time it respected state sovereignty. In this connection he referred to the work of the Special Committee on Friendly Relations on this problem. He closed by stating that he was not convinced that the inclusion in the draft Convention of procedures for the compulsory settlement of disputes would in fact assist conventional inter-state relations and might instead only exacerbate them.

9. Concluding the meeting, Mr. Wershof first of all expressed agreement in principle with the need to reach a consensus on Article 62 if that were possible and, therefore, on the desirability of not forcing it to a vote this year. For this reason the Romanian suggestion that a decision be delayed was welcomed by Canada.

10. We ended by expressing to the Romanians in frank terms our view that it /the simply was not realistic to rely on/good faith of states in respect of dispute procedures. The very fact that the draft Convention contained provisions relating to the invalidation of treaties obtained by fraud or coercion showed that there was not a universal assumption that good faith was always exercised. We explained that, as far as concerns Article 33 of the Charter, it was our view that while it was acceptable as a list of methods by which inter-state disputes ought to be resolved, it had in our opinion little practical value in cases where genuine and serious disputes existed precisely because it did not bind states to submit to impartial adjudication or arbitration.

11. The significance of this discussion, in our view, lies in the indication that at least some of the Eastern Europeans are apparently prepared not to push for a vote on Article 62 this year. It is likely that, if a vote were taken this year, the present I.L.C. text would secure a majority and that, if that happened, some important Western states might well decide in the long run not to become parties to the treaty. Accordingly the attitude of the Romanians suggests that some Eastern Europeans are anxious to secure a broadly based participation in the eventual Treaty. They may even share some of our misgivings as to the potential for abuse (without a good Article 62) which Part V provides.

M. H. Wershof

Canadian Delegation

P.S. (1) If you think any other Posts would find this interesting, please distribute it from Ottawa.

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P.S.(cont'd):

(2) Since writing the above, and particularly para.11, we have heard the following from Mr. Blix of Sweden (who is the chief promoter of the Article 62 scheme proposed in L.352). There is now a fair chance that a simple majority might be lined up for L.352 at the present session; if this seemed likely, Blix and some other WEO members might favour pressing it to a vote instead of leaving Article 62 to inter-sessional consultations. Developments on this will be reported by telegram, probably before this letter reaches you.

M.H.W.

ACTION COPY

FM VIENN MAY11/68 RESTR

TO EXTER 435

INFO TT WLGTN DE OTT

BAG PRMNY DE OTT GENEV DE VIENN

REF OURTEL 383 MAY5

LAW OF TREATIES CONFERENCE 6TH PROGRESS SUMMARY MAY6-11 ART 49

(REFTEL AND OURTELS 388MAY7 AND 406 MAY9 REFER)

CONSIDERATION OF ART 49 WAS RESUMED IN CTTEE OF WHOLE(CW).NETHER-LANDS DRAFT RESLN L323 ADOPTED WITHOUT VOTE.AFGHANISTAN AMENDMENT L67/REV1 WAS NOT/NOT FORMALLY WITHDRAWN BUT WAS NOT/NOT MENTIONED AND WAS GENERALLY CONSIDERED AS WITHDRAWN.PERUVIAN AMENDMENT L230 WHICH SOUGHT TO REFER TO QUOTE RELEVANT NORMS UNQUOTE OF CHARTER WAS DEFEATED 11-36-40(CDA UK).BULGARIAN AMENDMENT L289 REFERING TO QUOTE PRINCIPLES OF INTERNATL LAW EMBODIED IN THE CHARTER UN-QUOTE WAS ADOPTED ON ROLL CALL VOTE 49-10-33(CDA USA FRANCE).AUST-RALIAN AMENDMENT L296 WAS WITHDRAWN.JPNSE AMENDMENT L298 DEFEATED 2-55-27(CDA USA UK FRANCE).THE 2 PARAS OF CHINESE AMENDMENT L301 WERE VOTED UPON SEPARATELY AND DEFEATED.ART AND BULGARIAN AMEND-MENT WERE THEN REFERRED TO DRAFTING CTTEE(DC).ART 50(REFTEL AND OURTEL 384 MAY5 REFER):FURTHER DEBATE ON MAY7 AND CDA MADE A STATEMENT.VOTING TOOK PLACE MAY7 AMIDST PROTRACTED PROCEDURAL HAGGLE.AMENDMENTS BY INDIA L254 MXICO L266 FINLAND L293 AND UK L312 WERE WITHDRAWN.USA SUPPORTED BY UK AND FRANCE MOVED THAT ART AND 3 REMAINING AMENDMENTS BE REFERRED TO DC WITHOUT VOTE.GHANA SUPPORTED BY INDIA,MOVED THAT VOTING ON ART AND AMENDMENTS TAKE

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PLACE IMMEDLY.CZECH PROPOSAL THAT USA MOTION BE DIVIDED INTO 2 PARTS,(A)WHETHER TO REFER USA AMENDMENT L302 TO DC WITHOUT VOTE, AND(B)WHETHER TO REFER DRAFT ART AND 2 OTHER AMENDMENTS TO DC WITHOUT VOTE WAS CARRIED AGAINST WESTERN OPPOSITION.THERE FOLLOWED A LENGTHY DEBATE ON THE INTENTION AND EFFECT OF CZECH PROPOSAL WHICH CW HAD ADOPTED.AT END OF THIS DISCUSSION,USA PROPOSAL TO REFER ART AND ALL 3 REMAINING AMENDMENTS TO DC WITHOUT VOTE WAS LOST ON TIE ROLL CALL VOTE 42(CDA UK FRANCE)-42-7.VOTING THEN BEGAN ON ART AMD AMENDMENTS.USA AMENDMENT L302 WAS DIVIDED INTO 2 PARTS.PROPOSAL TO ADD THE WORDS QUOTE AT THE TIME OF ITS CONCLUSION UNQUOTE WAS ADOPTED 43(CDA UK FRANCE)-27-12.THE REMAINDER OF L302 WAS DEFEATED 24(CDA UK FRANCE)-57-7.URUGUAY THEN PROPOSED THAT ART 50 WITH AMENDMENTS L258/CORR 1 BY ROMANIA,L306 BY GREECE AND APPROVED PORTION OF USA AMENDMENT L302 BE REFERRED TO DC.THIS PROPOSAL WAS CARRIED 66(CDA USA UK)-2-8.THERE ENSUED A CONFUSED DISCUSSION ON WHETHER THIS ACTION BY CW CONSTITUTED QUOTE ADOPTION UNQUOTE OF ART 50.DEBATE ON THIS POINT WAS CONCLUDED BY RULING FROM CHAIRMAN THAT CW HAD APPROVED THE PRINCIPLE OF JUS COGENS BUT NOT/NOT ART 50 ITSELF.AS INDICATED IN EARLIER TELS CHAIRMAN DOES NOT/NOT SHINE IN PROCEDURAL FIELD.

ART 52:-ART AND UK AMENDMENT L310 WERE REFERRED TO DC WITHOUT VOTE.

ART 53:-CUBAN AMENDMENT L160 TO REPHRASE ART WAS DEFEATED ON TIE VOTE 34-34(CDA USA)-24.PERU AMENDMENT L303 TO PROVIDE THAT CHARACTER

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OF TREATY AND INTENTION OF PARTIES BOTH TOGETHER BE RELEVANT DEFEATED 5-41(CDA UK)-43.SPANISH AMENDMENT L307 TO CAST ART IN THE AFFIRMATIVE WAS DEFEATED 10-55(CDA USA UK FRANCE)-21.UK AMENDMENT L311 PROVIDING THAT INTENTION OF PARTIES OR RPT OR CHARACTER OF TREATY COULD PERMIT DENUNCIATION WAS ADOPTED 26(CDA)-25-37.GREEK AMENDMENT L315 WAS WITHDRAWN.ART AND UK AMENDMENT WERE REFERRED TO DC.

ART 54:-ART WAS ADOPTED WITHOUT VOTE AND,WITH ITS 2 AMENDMENTS (PERU L334 AND GREECE L316),WAS REFERRED TO DC.

ART 55:-AMENDMENT L47 BY FRANCE WAS HELD IN SUSPENSE PENDING DECISION OF THE SUBSTANTIVE QUESTION WHETHER TO INCLUDE IN THE CONVENTION THE CONCEPT OF A RESTR MULTILATERAL TREATY PROPOSED SEVERAL WEEKS AGO BY FRANCE.GREEK AMENDMENT L317 TO INCORPORATE SEPARABILITY DEFEATED 13(CDA USA)-25-49 AFTER SPECIAL RAPPORTEUR EXPLAINED THAT RIGHT TO SUSPEND WHOLE TREATY BY CONSENT NECESSARILY IMPLIED RIGHT TO SUSPEND PART OF TREATY BY CONSENT.AMENDMENT L321 SPONSORED BY CDA ETAL(OURTEL 396 MAY8 REFERS-YUGOSLAVIA BECAME AN ADDITIONAL COSPONSOR)ADOPTED 82-0-6;THIS IS LARGEST FAVORABLE VOTE RECEIVED TO DATE BY ANY AMENDMENT IN THIS CONFERENCE. ART AND CDN AMENDMENT REFERRED TO DC WITHOUT FURTHER VOTE,ALONG WITH PERU AMENDMENT L305 AND AUSTRALIA AMENDMENT L324.

ART 56:-WE WITHDREW PARA B OF CDN AMENDMENT L285 AFTER DEBATE SHOWED THAT IT HAD NO/NO CHANCE.ART WAS THEN REFERRED WITHOUT VOTE TO DC ALONG WITH PARA A OF L285 AND AMENDMENTS BY AUSTRIA L7,BELORUSSIA

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L292,ROMANIA L308 AND CHINA L327,ALL OF WHICH RAISED ONLY DRAFTING POINTS.

ART 57:-FINISH AMENDMENT L309 DEFEATED 14-33(CDA UK FRANCE)-41. VENEZUELA AMENDMENT L318 WHICH WOULD REDRAFT WHOLE ART,WAS VOTED ON BY PARA;PARA1 DEFEATED 4-52(CDA USA UK FRANCE)-34;PARA2 DEFEATED 3-51(CDA USA UK FRANCE)-38.PARA3 WAS DEFEATED 5-48(CDA USA UK FRANCE)-35.PARA4 WAS NOT/NOT VOTED UPON AS IT WAS IDENTICAL TO ILC TEXT.USA AMENDMENT L325 TO INTRODUCE CONCEPT OF PROPORTIONALITY OF RESPONSE WAS WITHHELD FOR FURTHER CONSIDERATION WHEN DISCUSSION OF ART 41 RESUMES.SPANISH AMENDMENT L326 WAS VOTED UPON IN 2 PARTS; AMENDMENT TO PARA3(B)WAS DEFEATED 10-56(CDA USA UK FRANCE)-27; AMENDMENT TO PARA3(C)DEFEATED 6-63(CDA USA UK FRANCE)-20.ART WAS REFERRED TO DC TOGETHER WITH SWISS SUGGESTION,MADE ORALLY DURING DEBATE,THAT A NEW PARA BE ADDED LIMITING APPLICATION OF THE ART IN CASES OF QUOTE HUMANITARIAN UNQUOTE TREATIES SUCH AS 1949 GENEV CONVENTIONS.

ART 58:-MXICAN AMENDMENT L330 AND ECUADOR AMENDMENT L332/REV1 WERE WITHDRAWN AFTER DEBATE.NETHERLANDS AMENDMENT L331 WAS DEALT WITH IN 2 PARTS;THE PROPOSAL TO ALTER THE WORDING IN LINE 2 WAS REFERRED TO DC AS A DRAFTING MATTER;REMAINDER OF NETHERLANDS AMENDMENT WAS ADOPTED 30-10-40(CDA FRANCE).ART AND NETHERLANDS AMENDMENT WERE REFERRED TO DC.WE ABSTAINED BECAUSE WE DOUBTED VALUE OF NETHERLANDS AMENDMENT.

ART 59:-VIETNAM AMENDMENT L299 REFERRING TO A QUOTE NEGOTIATED

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POLITICAL SETTLEMENT UNQUOTE AND BREACH OR PROVOCATION BY THE OTHER PARTY WAS DEALT WITH IN 2 PARTS;AMENDMENT TO PARA2(A)WAS DEFEATED 1-64-13(CDA USA);AMENDMENT TO PARA2(B)WAS DEFEATED 2-50-24(CDA). AMENDMENT WAS OBVIOUSLY RELATED TO VIETNAM WAR AND WE ABSTAINED BECAUSE OF CDAS POSITION ON ICC.CDN AMENDMENT L320 TO ADD THE CONCEPT OF SUSPENSION WAS ADOPTED 31(USA UK FRANCE)-26-28.FINLAND WITHDREW THE QUESTION OF SEPARABILITY FROM THEIR AMENDMENT L333 WHICH WAS THEN JOINED TO OURS FOR VOTING PURPOSES.JPN AMENDMENT L336 REQUIRING THAT THE CHANGE OF CIRCUMSTANCES BE QUOTE TO A SERIOUS DISADVANTAGE UNQUOTE OF THE PARTY INVOKING THE ART WAS DEFEATED 6-41-35(CDA);ALTHOUGH WE THOUGHT THE AMENDMENT UNWISE WE ABSTAINED OUT OF COURTESY FOR PAST AND FUTURE JPNSE ASSISTANCE.VENEZUELA AMENDMENT L319 WITHDRAWN AFTER DEBATE.USA AMENDMENT L335 WAS DEFEATED 14(UK)-43-28(CDA).THIS WOULD HAVE ADDED IN PARA2(A)DEALING WITH TREATIES ESTABLISHING BOUNDARIES ALSO TREATIES QUOTE OTHERWISE ESTABLISHING TERRITORIAL STATUS UNQUOTE.USA CITED ANTARCTICA TREATY AND USA/CDA BOUNDARY WATERS TREATY AS EGS.WE THOUGHT IT UNWISE TO VOTE FOR OR AGAINST THIS POTENTIALLY IMPORTANT AMENDMENT WITHOUT CONSULTING YOU AND THERE WAS NO/NO TIME FOR THAT.LET WILL FOLLOW RE THIS AMENDMENT.ART 59 WITH CDN AMENDMENT WAS THEN REFERRED TO DC. ART 60:-ITALIAN-SWISS AMENDMENT L322 ADOPTED 62(CDA USA FRANCE UK) -0-25.HUNGARY AMENDMENT L334 ADOPTED 79(CDA USA FRANCE UK)-0-11. CHILEAN AMENDMENT L341 WAS DEALT WITH IN 2 PARTS AND ADOPTED;CDA AND UK VOTED FOR IT.IN REFERRING ART AND AMENDMENT TO DC,CW EXPRESSLY

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REQUESTED THAT DRAFTING OF ITALIAN AND HUNGARIAN AMENDMENTS BE IMPROVED.DC WAS ALSO ASKED TO CONSIDER PROPER PLACE IN CONVENTION FOR NEW PARA PROPOSED IN CHILEAN AMENDMENT AS WELL AS PLAKE OF ART 60 ITSELF(SEE JPN AMENDMENT L337).

ART 9(OURTEL 259 APR7 REFERS):-TEXT REPORTED OUT OF DC IN DOCU C1/5,UNCHANGED FROM ILC DRAFT,ADOPTED WITHOUT VOTE BY CW.

ART 9 BIS(OURTEL 259 APR7):-TEXT REPORTEC OUT OF DC IN DOCU C1/5 ADOPTED WITHOUT VOTE.

ART 10(OURTEL 295 APR15 REFERS TO THIS AND FOLLOWING PARAS):-TEXT REPORTED OUT OF DC IN DOCU C1/5 ADOPTED WITHOUT VOTE.

ART 10 BIS:-TEXT REPORTED OUT OF DC IN DOCU C1/6 LED TO CONSIDERABLE DEBATE,REFLECTING DIFFERENCE OF VIEWS IN DC.MAIN ISSUE WAS THAT POLISH AMENDMENT L89,WHICH CW HAD APPROVED AND REFERRED TO DC, ESTABLISHED A RESIDUAL RULE WHEREAS DC TEXT WAS DIFFERENT AND ESTABLISHED NO/NO RESIDUAL RULE.AFTER CONSIDERABLE DISCUSSION DC TEXT WAS ADOPTED,BY A VOTE OF 69-1-18(CDA).

ART 11:-TEXT REPORTED OUT OF DC IN DOCU C1/6 WAS ADOPTED WITHOUT VOTE.IT IS ALMOST SAME AS ILC TEXT.

ART 12:-ACTION POSTPONED ON DC TEXT IN C1/6.

ART 12 BIS:-DC RECOMMENDED AGAINST INCLUSION OF THIS ART IN CONVENTION AND RECOMMENDATION WAS ACQUIESCED IN BY CW.

ART 13:-TEXT REPORTED OUT OF DC IN DOCU C1/6 ADOPTED WITHOUT VOTE. CHAIRMAN OF DC EXPLAINED THAT CDN PROPOSAL TO ADD THE WORDS QUOTE OR INSTRUMENT UNQUOTE HAD NOT/NOT BEEN ATTEMPTED BECAUSE DC DID NOT/NOT

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CONSIDER EXISTING TEXT RESTR IN ANY WAY RIGHT OF STATE TO SPECIFY IN ITS INSTRUMENT OF RATIFICATION ETC THAT ITS CONSENT TO BE BOUND WOULD TAKE EFFECT ON A DATE OTHER THAN DATE OF DELIVERY OF INSTRUMENT.

ART 14:-TEXT REPORTED OUT OF DC IN DOCU C1/7,UNCHANGED FROM ILC DRAFT,ADOPTED WITHOUT VOTE.

ART 15:-TEXT REPORTED OUT OF DC IN DOCU C1/6 ADOPTED WITHOUT VOTE.

GENERAL AND FRIVOLOUS COMMENTS:-CONFERENCE SCHEDULE CONTINUES HEAVY. IT HAS SAT MORNING AND AFTERNOON MON-FRI SINCE BEGINNING AND DURING LAST 2 WEEKS ALSO 2 EVENINGS PER WEEK AND SAT MORNINGS.WHEN ONE ADDS FREQUENT WEO MTGS AND DAILY CANDEL MTGS IT SHOULD BE CLEAR THAT YOUR DEL HAS LITTLE TIME FOR MISCHIEF.HOWEVER,WE ARE ALL ENJOYING THE CONFERENCE AND HAE NO/NO COMPLAINTS.WITH 11 WORKING DAYS LEFT OF CONFERENCE THERE IS FAIR CHANCE THAT ALL 75 ARTS WILL AT LEAST HAVE BEEN DEBATED.WEO HOPES OF COURSE THAT NOT/NOT ALL WILL HAVE BEEN ADOPTED BY CW AND THAT AT LEAST ART 62 DECISION WILL NOT/NOT BE TAKEN THIS SESSION(SEPARATE TEL BEING SENT O N THIS). WE REALIZE THAT THESE LENGTHY WEEKLY SUMMARIES CANNOT/NOT BE FULLY UTILIZED BY LEGAL DIV WHILE DESK OFFICER STANFORD IS HERE IN VIENN. HOWEVER,IT IS BEST WAY FOR US TO RECORD DEVELOPMENTS SYSTEMATICALLY

WERSHOF

CANADIAN EMBASSY

AMBASSADE DU CANADA

Vienna, Austria,
May 11, 1968

J-21 | 20-3-1-6
32 | 2

Dear Sirs,

Law of Treaties Conference
- Article 62

Enclosed is an advance set of 4 important amendments circulated today, on which we may comment by telegram in a few days -

L. 343 - Uruguay

L. 345 - Gabon and Central African Republic

L. 346 - Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia

L. 347 - Switzerland.

Yours truly,

Canadian Delegation

Legal Division,
Department of External Affairs,
OTTAWA, Canada

UNITED NATIONS

GENERAL ASSEMBLY

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10 May 1968
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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Uruguay: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Amend the present text of the article to read as follows:

1. A party which alleges a material breach of a treaty as a ground for terminating the treaty or suspending its operation, pursuant to article 57, may unilaterally suspend the execution of the treaty, in whole or in part.

2. A party which claims that a treaty is invalid, under articles 43, 44, 45, 46, 47, 48, 49 or 50, or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under articles 53, 56, 59 or 61, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefore.

3. If, after the expiry of a period which, except in the cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

4. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Articles 33, 35 and 36 of the Charter of the United Nations. The same obligation will arise in case any party raises an objection as to the existence of any of the grounds provided for in articles 51, 54, 55, 57 or 58 for the suspension or termination of a treaty.

5. The rights referred to in the preceding paragraphs may not be invoked or validly exercised by a party which has not accepted in advance, for the purposes of the dispute arising under paragraph 4 above, the obligations of pacific settlement provided in the Charter of the United Nations, or by a party which

refuses to accept the resolution of the competent organ of the United Nations recommending, among the procedures enumerated in Article 33 (1) of the Charter of the United Nations, the most appropriate method for the peaceful settlement of the dispute which has arisen.

6. States parties to the present Convention engage themselves to act, individually and within the international organizations in which they are members, in such a way as to facilitate and encourage the settlement of disputes arising under the present Convention, by peaceful means and in accordance with the provisions of the Charter of the United Nations.

7. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Gabon and the Central African Republic: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph 3

Replace paragraph 3 of the article by the following:

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations upon the conditions laid down in annex A to the present Convention."

Annex to article 62, paragraph 3

1. Except as otherwise provided in a treaty or constituent instrument of a regional organization, and within the framework of Article 33 of the Charter of the United Nations, disputes arising from the application or interpretation of the provisions of Part V of the present Convention shall be brought before a conciliation commission, and, if the conciliation fails, before an arbitral tribunal.

2. A permanent list of experts representing the principal legal systems of the world on an equitable geographical basis shall be drawn up.

Such experts shall be appointed, on the proposal of States, by the Secretary-General of the United Nations for a period of three years, and shall be eligible for re-appointment.

3. In the event of a dispute, each party shall appoint:

(a) a commissioner of its own nationality, chosen either from the list referred to in paragraph 2 or from outside that list;

(b) a commissioner not of its nationality, chosen from that list.

The commission thus constituted shall appoint a chairman chosen from the list.

VI.68-2958

The commissioners chosen by the parties shall be appointed within a period of sixty days after the opening of the conciliation procedure by the party requesting it.

The appointment of the chairman by the commissioners shall be made within sixty days after their own appointment.

If the appointment of the commissioners or of the chairman has not been made within the above-mentioned period, it shall be made by the Secretary-General of the United Nations.

4. In the event of failure of the conciliation procedure, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal for settlement.

The arbitral tribunal for each dispute shall consist of three arbitrators, one appointed by each party, and a chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months after the date when it is established that the conciliation procedure has failed.

The chairman also shall be appointed within a period of six months after the date of the appointment of the arbitrators by the parties.

If the chairman or arbitrators are not appointed within the above-mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

5. A permanent secretariat, the cost of whose activities shall be borne by the United Nations, shall be responsible for receiving complaints and preparing the files concerning disputes submitted to conciliation or arbitration.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Insert as a new paragraph 3 bis the following text:

(3 bis) If the parties have been unable to agree upon any means of reaching a solution within three months following the raising of the objection, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within 12 months after such agreement, either party may request the Secretary-General of the United Nations to set in motion the procedures indicated in Annex I to the present Convention.

Annex I (1) A Conciliation Commission shall be established consisting of 25 highly qualified jurists representing the various legal systems of the world and selected having due regard to the importance of as wide a geographical distribution as possible. Members of the Commission shall be appointed by the Secretary-General, on the nomination of States, for 5 years and may be re-appointed.

(2) Where a dispute is referred to the Secretary-General for settlement, and unless the parties agree that the full Commission shall consider the dispute, a sub-commission shall be appointed within 60 days consisting of one member appointed by each party to the dispute from among the members of the Commission who do not possess its nationality, one member appointed by each party who possesses its nationality (from outside the membership of the Commission where necessary) and a chairman (not possessing the nationality of either party) appointed.

by the other members of the sub-commission from among the members of the Commission. If any appointment is not made within the period of 60 days the appointment shall be made by the Secretary-General of the United Nations.

(3) The Commission and any sub-commission so constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly solution of the question. The Commission shall establish its own procedure. Decisions of the Commission and of the sub-commission shall be taken by majority vote. The Secretary-General shall provide to the Commission or the sub-commission such assistance and facilities as it may require. The expenses of the Commission and of the sub-commission shall be borne by the United Nations.

(4) The Commission or the sub-commission, as the case may be, shall be obliged to report within 12 months of its constitution. Reports shall be transmitted to the Secretary-General and the parties. If the Commission or the sub-commission has succeeded in effecting a friendly solution, the report shall be confined to a brief statement of the facts and the solution reached. If the Commission or the sub-commission has not succeeded in effecting a friendly solution, its report shall deal fully with the factual and legal elements of the dispute.

(5) If no solution has been reached by the Commission or a sub-commission any question relating to the interpretation or application of any of the Articles contained in Part V of the present Convention may be submitted, by agreement between the parties, to arbitration or to the International Court of Justice. Failing such agreement within a period of three months these questions shall be submitted, at the request of either party, to an arbitral tribunal for decision. The arbitral tribunal shall consist of one member appointed by each party to the dispute and a chairman appointed by common agreement between

the parties. If any of these appointments has not been made within a period of 6 months from the request for arbitration, it shall be made by the Secretary-General of the United Nations.

(6) The Secretary-General shall provide the arbitration tribunal such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Switzerland: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Word the title and the article as follows:

"Procedure to be followed for claiming the invalidity of, terminating, withdrawing from, or suspending the operation of, a treaty

1. A party which intends to claim the invalidity, terminate, withdraw from or suspend the operation of a treaty, under the provisions of the present articles, shall notify the other parties of its intention. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may, in the manner provided in article 63:

(a) if it intends to claim the invalidity of a treaty, notify the other parties of the date on which the treaty will terminate so far as it is concerned;

(b) if it intends to terminate, withdraw from or suspend the operation of the treaty, take the measure proposed.

3. If an objection is raised by any other party, the parties to the dispute may agree within a period of three months after the objection, to adopt a procedure for the settlement of the dispute.

VI.68-2972

4. If the parties fail to reach agreement within the period laid down in paragraph 3 above, the party which has made the notification may, not more than six months after the objection referred to in paragraph 3, bring the dispute before the International Court of Justice by simple application, or before a committee of arbitration in conformity with the provisions of paragraph 5.

5. Unless the parties otherwise agree, the arbitration procedure shall be as follows:

(a) The Committee of arbitration shall be composed of five members. Each of the parties shall appoint one member. The other three arbitrators shall be appointed by agreement of the parties from nationals of third States. They shall be of different nationalities, shall not have their usual place of residence in the territory of the parties and shall not be in the service of the parties.

(b) The Chairman of the Committee of arbitration shall be appointed by the parties from among the arbitrators appointed by agreement of the parties.

(c) If within a period of three months, the parties have been unable to reach agreement on the appointment of the arbitrators to be appointed jointly, the President of the International Court of Justice shall make the appointment. If within a period of three months one of the parties has not appointed the arbitrator he is responsible for appointing, the President of the International Court of Justice shall make the appointment.

(d) If the President of the International Court of Justice is unable to do so, or is of the same nationality as one of the parties, the Vice-President of the International Court of Justice shall make the necessary appointments. If the Vice-President of the International Court of Justice is unable to do so, or is of the same nationality as one of the parties, he shall be replaced by the most senior member of the Court whose nationality is not the same as that of any of the parties.

(e) Unless the parties otherwise agree, the Committee of arbitration shall decide its own procedure. Failing that, the provisions of chapter III of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply.

(f) The Committee of arbitration shall decide all questions submitted to it by simple majority vote, and its decisions shall be binding on the parties.

6. Throughout the duration of the dispute, in the absence of any agreement to the contrary between the parties or of provisional measures ordered by the court of jurisdiction, the treaty shall remain in operation between the parties to the dispute.

7. If the party which has made the notification does not within the prescribed period of six months have recourse to one of the tribunals referred to in paragraph 4, it shall be deemed to have renounced its claim of invalidity or the measure proposed."

Beesley

ACTION COPY

Dear
Please watch for
these amendments
& bring them to my
attention forthwith
JB

L

FM VIENN MAY11/68 CONFD

TO EXTER 436

INFO TT PRMNY DE OTT

BAG GENEV DE VIENN

REF OURTEL 424 MAY10

LAW OF TREATIES, ARTICLE 62

20-3-1-6
32 | 32

WE ARE MAILING DIRECT TO LEGAL DIV COPIES OF 4 IMPORTANT PROPOSALS CIRCULATED TODAY:URUGUAY L.343;GABON AND CENTRAL AFRICAN REPUBLIC L.345,COLOMBIA,SWEDEN,ETC L.346;SWITZERLAND L.347.

2.URUGUAY PLAN IS INTERESTING BUT STOPS SHORT OF ASSURING COMPULSORY ADJUDICATION OR ARBITRATION AT THE END OF THE ROAD;IT WOULD IN EFFECT EMPOWER SECURITY COUNCIL OR UNGA TO ORDER SUCH COMPULSION WHICH DOES NOT/NOT SEEM VERY LIKELY PROSPECT.

3.GABON SCHEME MUST HAVE BEEN STIMULATED BY FRANCE.IT ENDS UP WITH COMPULSORY ARBITRATION.COLOMBIA PLAN IS MOSTLY DERIVED FROM UK DETAILED SCHEME-SEE PARA3 REFTEL.WE HEARD LATER TODAY THAT GABON AND CENTRAL AFRICAN REPUBLIC MAY MERGE THEIR PROPOSAL WITH COLOMBIA ETC L.346.

4.SWISS L.347 IS ONE REFERRED TO IN 2ND SENTENCE PARA3 OURTEL 382 MAY5.

5.USA AND UK ARE NOT/NOT HOPEFUL THAT WORKING GROUP WILL BE ESTABLISHED BY CTTEE OF WHOLE(CW)TO STUDY ARTICLE 62 OR ANYTHING ELSE. THEY ARE HOPEFUL HOWEVER THAT CW WILL DECIDE NOT/NOT TO VOTE ON ARTICLE 62 WHEN IT COMES UP IN FEW DAYS,LEAVING IT TO BE DISCUSSED THROUGH INFORMAL MACHINERY BETWEEN THE SESSIONS.UK WONDERS WHETHER SUCH INFORMAL TALKS MIGHT BE ARRANGED IN CONTEXT OF FRIENDLY

...2

RELATIONS CTTEE MTG IN NY THIS SEP.

POSTCRIPT:SINCE WRITING ABOVE L.345 AND L.346 HAVE BEEN MERGED IN L.352(COPY BEING AIRMAILED TO LEGAL DIV).L.352 IS CLOSER TO GABON L.345 THAN TO WESTERN L.346.L.352 ENDS IN COMPULSORY ARBITRATION BUT DOES NOT/NOT EVEN MENTION BY NAME POSSIBILITY OF PARTIES AGREEING TO GO TO ICJ

'ERSHOF'''

UNITED NATIONS

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Uruguay: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Amend the present text of the article to read as follows:

1. A party which alleges a material breach of a treaty as a ground for terminating the treaty or suspending its operation, pursuant to article 57, may unilaterally suspend the execution of the treaty, in whole or in part.

2. A party which claims that a treaty is invalid, under articles 43, 44, 45, 46, 47, 48, 49 or 50, or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under articles 53, 56, 59 or 61, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefore.

3. If, after the expiry of a period which, except in the cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

4. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Articles 33, 35 and 36 of the Charter of the United Nations. The same obligation will arise in case any party raises an objection as to the existence of any of the grounds provided for in articles 51, 54, 55, 57 or 58 for the suspension or termination of a treaty.

5. The rights referred to in the preceding paragraphs may not be invoked or validly exercised by a party which has not accepted in advance, for the purposes of the dispute arising under paragraph 4 above, the obligations of pacific settlement provided in the Charter of the United Nations, or by a party which

refuses to accept the resolution of the competent organ of the United Nations recommending, among the procedures enumerated in Article 33 (1) of the Charter of the United Nations, the most appropriate method for the peaceful settlement of the dispute which has arisen.

6. States parties to the present Convention engage themselves to act, individually and within the international organizations in which they are members, in such a way as to facilitate and encourage the settlement of disputes arising under the present Convention, by peaceful means and in accordance with the provisions of the Charter of the United Nations.

7. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Gabon and the Central African Republic: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph 3

Replace paragraph 3 of the article by the following:

"3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations upon the conditions laid down in annex A to the present Convention."

Annex to article 62, paragraph 3

1. Except as otherwise provided in a treaty or constituent instrument of a regional organization, and within the framework of Article 33 of the Charter of the United Nations, disputes arising from the application or interpretation of the provisions of Part V of the present Convention shall be brought before a conciliation commission, and, if the conciliation fails, before an arbitral tribunal.

2. A permanent list of experts representing the principal legal systems of the world on an equitable geographical basis shall be drawn up.

Such experts shall be appointed, on the proposal of States, by the Secretary-General of the United Nations for a period of three years, and shall be eligible for re-appointment.

3. In the event of a dispute, each party shall appoint:

(a) a commissioner of its own nationality, chosen either from the list referred to in paragraph 2 or from outside that list;

(b) a commissioner not of its nationality, chosen from that list.

The commission thus constituted shall appoint a chairman chosen from the list.

The commissioners chosen by the parties shall be appointed within a period of sixty days after the opening of the conciliation procedure by the party requesting it.

The appointment of the chairman by the commissioners shall be made within sixty days after their own appointment.

If the appointment of the commissioners or of the chairman has not been made within the above-mentioned period, it shall be made by the Secretary-General of the United Nations.

4. In the event of failure of the conciliation procedure, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal for settlement.

The arbitral tribunal for each dispute shall consist of three arbitrators, one appointed by each party, and a chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months after the date when it is established that the conciliation procedure has failed.

The chairman also shall be appointed within a period of six months after the date of the appointment of the arbitrators by the parties.

If the chairman or arbitrators are not appointed within the above-mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

5. A permanent secretariat, the cost of whose activities shall be borne by the United Nations, shall be responsible for receiving complaints and preparing the files concerning disputes submitted to conciliation or arbitration.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Insert as a new paragraph 3 bis the following text:

(3 bis) If the parties have been unable to agree upon any means of reaching a solution within three months following the raising of the objection, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within 12 months after such agreement, either party may request the Secretary-General of the United Nations to set in motion the procedures indicated in Annex I to the present Convention.

Annex I (1) A Conciliation Commission shall be established consisting of 25 highly qualified jurists representing the various legal systems of the world and selected having due regard to the importance of as wide a geographical distribution as possible. Members of the Commission shall be appointed by the Secretary-General, on the nomination of States, for 5 years and may be re-appointed.

(2) Where a dispute is referred to the Secretary-General for settlement, and unless the parties agree that the full Commission shall consider the dispute, a sub-commission shall be appointed within 60 days consisting of one member appointed by each party to the dispute from among the members of the Commission who do not possess its nationality, one member appointed by each party who possesses its nationality (from outside the membership of the Commission where necessary) and a chairman (not possessing the nationality of either party) appointed

by the other members of the sub-commission from among the members of the Commission. If any appointment is not made within the period of 60 days the appointment shall be made by the Secretary-General of the United Nations.

(3) The Commission and any sub-commission so constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly solution of the question. The Commission shall establish its own procedure. Decisions of the Commission and of the sub-commission shall be taken by majority vote. The Secretary-General shall provide to the Commission or the sub-commission such assistance and facilities as it may require. The expenses of the Commission and of the sub-commission shall be borne by the United Nations.

(4) The Commission or the sub-commission, as the case may be, shall be obliged to report within 12 months of its constitution. Reports shall be transmitted to the Secretary-General and the parties. If the Commission or the sub-commission has succeeded in effecting a friendly solution, the report shall be confined to a brief statement of the facts and the solution reached. If the Commission or the sub-commission has not succeeded in effecting a friendly solution, its report shall deal fully with the factual and legal elements of the dispute.

(5) If no solution has been reached by the Commission or a sub-commission any question relating to the interpretation or application of any of the Articles con ained in Part V of the present Convention may be submitted, by agreement between the parties, to arbitration or to the International Court of Justice. Failing such agreement within a period of three months these questions shall be submitted, at the request of either party, to an arbitral tribunal for decision. The arbitral tribunal shall consist of one member appointed by each party to the dispute and a chairman appointed by common agreement between

the parties. If any of these appointments has not been made within a period of 6 months from the request for arbitration, it shall be made by the Secretary-General of the United Nations.

(6) The Secretary-General shall provide the arbitration tribunal such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

Committee of the Whole

Article 62

Switzerland: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Word the title and the article as follows:

"Procedure to be followed for claiming the invalidity of, terminating, withdrawing from, or suspending the operation of, a treaty

1. A party which intends to claim the invalidity, terminate, withdraw from or suspend the operation of a treaty, under the provisions of the present articles, shall notify the other parties of its intention. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

2. If, after the expiry of a period which shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may, in the manner provided in article 63:

(a) if it intends to claim the invalidity of a treaty, notify the other parties of the date on which the treaty will terminate so far as it is concerned;

(b) if it intends to terminate, withdraw from or suspend the operation of the treaty, take the measure proposed.

3. If an objection is raised by any other party, the parties to the dispute may agree within a period of three months after the objection, to adopt a procedure for the settlement of the dispute.

VI.68-2972

4. If the parties fail to reach agreement within the period laid down in paragraph 3 above, the party which has made the notification may, not more than six months after the objection referred to in paragraph 3, bring the dispute before the International Court of Justice by simple application, or before a committee of arbitration in conformity with the provisions of paragraph 5.

5. Unless the parties otherwise agree, the arbitration procedure shall be as follows:

(a) The Committee of arbitration shall be composed of five members. Each of the parties shall appoint one member. The other three arbitrators shall be appointed by agreement of the parties from nationals of third States. They shall be of different nationalities, shall not have their usual place of residence in the territory of the parties and shall not be in the service of the parties.

(b) The Chairman of the Committee of arbitration shall be appointed by the parties from among the arbitrators appointed by agreement of the parties.

(c) If within a period of three months, the parties have been unable to reach agreement on the appointment of the arbitrators to be appointed jointly, the President of the International Court of Justice shall make the appointment. If within a period of three months one of the parties has not appointed the arbitrator he is responsible for appointing, the President of the International Court of Justice shall make the appointment.

(d) If the President of the International Court of Justice is unable to do so, or is of the same nationality as one of the parties, the Vice-President of the International Court of Justice shall make the necessary appointments. If the Vice-President of the International Court of Justice is unable to do so, or is of the same nationality as one of the parties, he shall be replaced by the most senior member of the Court whose nationality is not the same as that of any of the parties.

(e) Unless the parties otherwise agree, the Committee of arbitration shall decide its own procedure. Failing that, the provisions of chapter III of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply.

(f) The Committee of arbitration shall decide all questions submitted to it by simple majority vote, and its decisions shall be binding on the parties.

6. Throughout the duration of the dispute, in the absence of any agreement to the contrary between the parties or of provisional measures ordered by the court of jurisdiction, the treaty shall remain in operation between the parties to the dispute.

7. If the party which has made the notification does not within the prescribed period of six months have recourse to one of the tribunals referred to in paragraph 4, it shall be deemed to have renounced its claim of invalidity or the measure proposed."

M Bissley

ACTION COPY

FM VIENN MAY10/68 CONFD

TO EXTER 424

INFO BAG PRMNY DE OTT GENEV DE VIENN

REF OURTEL 382 MAY5

20-3-1-6
32 | 27

LAW OF TREATIES/WEO GROUP ART 62

WEO GROUP MET AGAIN WED,MAY8 TO CONTINUE CONSULTATIONS ON ART 62, PARTICULARLY IN LIGHT OF A PAPER(PREPARED BY DE BRESSON,FRANCE) WHICH SET OUT IN WRITTEN FORM ESSENTIAL CHARACTERISTICS OF A SYSTEM OF COMPULSORY SETTLEMENT PROCEDURES WHICH HAD BEEN DISCUSSED AT EARLIER MTG ON FRI,MAY3 AND WHICH WAS OUTLINED IN REFTEL.

2.GROUP FIRST AGREED THAT PAPER ACCURATELY REFLECTED CONSENSUS OF WEO VIEWS.BRIT THEN SUGGESTED THAT,IN LIGHT OF RECENT EVENTS IN CTTEE OF WHOLE(CW)(ESPECIALLY WITH REGARD TO WHAT HAD HAPPENED ON ART 50)THERE WAS SOME DANGER IN WITHHOLDING DRAFT AMENDMENTS ON ANY GIVEN ART UNTIL CW WAS ACTIVELY ENGAGED IN DEBATE ON THAT ART. THEREFORE,ALTHOUGH GROUP HAD EARLIER AGREED THAT ONLY SWISS AND JPNSE(L338 AND L339)AMENDMENTS TO ART 62 SHOULD BE TABLED IN ADVANCE OF DEBATE,BRIT PREFERRED ALSO TO TABLE AS SOON AS POSSIBLE THEIR MORE COMPLEX SETTLEMENT SCHEME.GROUP AGREED TO THIS THOUGH FRENCH REITERATED THEIR OPPOSITION TO STRUCTURE OF PROPOSED CONCILIATION COMMISSION AND ASKED BRIT TO RECONSIDER MATTER CAREFULLY BEFORE THEY FORMULATED FINAL TEXT.

3.IT WAS GROUPS UNDERSTANDING THAT BRIT WOULD PROBABLY TABLE MAY10. HOWEVER,THEY HAVE NOW ARRANGED WITH SWEDEN(BLIX)AND NETHERLANDS (RIPHAGEN)THAT THESE 2 COUNTRIES SHOULD TAKE OVER TASK OF PRESENT-

...2

ATION OF A MODIFIED VERSION OF BRIT FORMULATION.WE HAVE NOT/NOT YET SEEN LATEST TEXT BUT UNDERSTAND THAT REFS TO ICJ HAS BEEN SUBSTANTIALLY MODIFIED

WERSHOF

UNITED NATIONS

GENERAL
ASSEMBLY

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Committee of the Whole

20-3-1-6
32

Article 62

Colombia, Finland, Gabon, Lebanon, Madagascar, Netherlands, Peru, Central African Republic, Sweden and Tunisia: Amendment to article 62

(Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Insert a new paragraph 3 bis reading as follows:

"3 bis If the parties have been unable to agree upon any means of reaching a solution within four months following the date on which the objection was raised, either party may request the Secretary-General of the United Nations to set in motion the procedures specified in annex 1 to the present Convention."

Annex I (1) A permanent list of conciliators consisting of qualified jurists representing the various legal systems of the world shall be drawn up by the Secretary-General of the United Nations. To this end every State Member of the United Nations and every party to the present Convention shall be invited to nominate two conciliators for a period of 5 years, which may be renewed.

(2) In the event of a dispute, each party shall appoint:

(a) one conciliator of its own nationality chosen either from the list referred to in paragraph 1 above or from outside that list;

(b) one conciliator not of its own nationality chosen from the list.

The Commission thus constituted shall appoint a Chairman chosen from the list.

VI.68-3005

The conciliators chosen by the parties shall be appointed within a period of sixty days after the opening of the conciliation procedure by the party requesting it.

The conciliators shall appoint their Chairman within sixty days after their own appointment.

If the appointment of the conciliators or of the Chairman has not been made within the above mentioned period, it shall be made by the Secretary-General of the United Nations.

(3) The Commission thus constituted shall establish the facts and shall make proposals to the parties with a view to arriving at a friendly settlement of the dispute. The Commission shall establish its own procedure. Decisions of the Commission shall be taken by a majority vote. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

(4) The Commission shall be required to report within twelve months of its constitution. Its reports shall be transmitted to the Secretary-General and to the parties.

(5) In the event of failure of the conciliation procedure and if the parties have not agreed on a means of judicial settlement within three months from the date when it is established that the conciliation procedure has failed, the dispute shall, at the request of either party to it, be brought before an arbitral tribunal for settlement.

The arbitral tribunal shall consist of two arbitrators, one appointed by each party, and a Chairman appointed by agreement between the arbitrators.

The arbitrators shall be appointed within a period of six months from the date when it is established that the conciliation procedure has failed.

The Chairman shall also be appointed within a period of six months from the date of the appointment of the arbitrators by the parties.

If the Chairman or arbitrators are not appointed within the above mentioned period, the appointment shall be made by the Secretary-General of the United Nations.

(6) The Secretary-General shall provide the arbitral tribunal with such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

Beesley

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FM VIENN MAY10/68 CONFD

TO EXTER 423 IMMED

FOR ATTN LEGAL DIV FRI

20-3-1-6
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LAW OF TREATIES ART 66

WE HAVE DISCUSSED WITH WALDOCK AND ROSENNE THE POINT RAISED IN COMMENTARY AND INSTRS ON ART 66. BOTH SAY THAT PARA1(B)APPLIES ONLY TO FULLY EXECUTED PROVISIONS OF A TREATY(EG PAYMENT OF A SUM OF MONEY)AND CANNOT/NOT PROPERLY BE INTERPRETED IN THE WAY SUGGESTED IN THE COMMENTARY. WALDOCK SAID HE WOULD REPLY IN THIS SENSE IF A QUESTION ON THIS POINT WERE PUT TO HIM DURING THE DEBATE ON ART 66.

2. GIVEN THE TENDENCY OF THE CONFERENCE TO FAVOR THE ILC DRAFT ON QUESTIONS WHICH ARE DOUBTFUL(OR WHICH THE DELS DO NOT/NOT UNDERSTAND)AND THE COMPLEX NATURE OF OUR POINT, AN AMENDMENT OF THE KIND MENTIONED IN PARA2 OF THE COMMENTARY WOULD SEEM TO US TO HAVE NO/NO CHANCE OF ADOPTION. IF YOU WISH US TO PURSUE MATTER FURTHER, WE RECOMMEND IT BE BY PUTTING A QUESTION TO WALDOCK DURING DEBATE AND OBTAINING HIS ANSWER FOR THE RECORD.

OIC

3. PROPOSED QUESTION WOULD BE ALONG FOLLOWING LINES: BEGINS: COULD THE EXPERT CONSULTANT COMMENT UPON THE WORDS QUOTE RIGHT, OBLIGATION OR LEGAL SITUATION OF THE PARTIES CREATED THROUGH THE EXECUTION OF THE TREATY PRIOR TO ITS TERMINATION UNQUOTE WHICH APPEAR IN PARA1(B)OF ART 66. OUR QUESTION IS WHETHER THESE WORDS ARE INTENDED TO REFER ONLY TO RIGHTS, OBLIGATIONS AND LEGAL SITUATIONS WHICH ARISE FROM ACTS FULLY COMPLETED PRIOR TO THE

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TERMINATION OF THE TREATY, OR DO THEY REFER ALSO TO RIGHTS, OBLIGATIONS AND LEGAL SITUATIONS WHICH DEPEND FOR THEIR IMPLEMENTATION UPON ACTS CARRIED OUT BY THE STATES PARTY THROUGHOUT THE LIFE OF THE TREATY?

TO GIVE A SPECIFIC EG, A TREATY BETWEEN STATES A AND B PROVIDES A RIGHT OF NAVIGATION FOR SHIPS OF STATE A UPON A RIVER OF STATE B, WHICH RIGHT STATE A EXERCISES THROUGHOUT THE DURATION OF THE TREATY. IF STATE B WERE LAWFULLY TO TERMINATE THE TREATY, WOULD THE RIGHT OF NAVIGATION CREATED BY THE TREATY FOR SHIPS OF STATE A CEASE, OR COULD STATE A PROPERLY MAINTAIN THAT THE TREATY HAD CREATED A RIGHT, OBLIGATION OR LEGAL SITUATION, WITHIN THE MEANING OF PARA1(B), WITH RESPECT TO SUCH NAVIGATION, WHICH COULD NOT/NOT BE AFFECTED BY THE TERMINATION. END OF QUESTION.

4. IN CONSIDERING WHETHER WE SHOULD PUT THIS QUESTION, YOU VMAY WISH TO TAKE INTO ACCOUNT THE FACT THAT NO/NO MATTER HOW THEORETICALLY THE QUESTION IS PHRASED, IT WILL BE OBVIOUS TO ALL INTERESTED PARTIES THAT ITS RELEVANCE FROM CDN VIEWPOINT RELATES DIRECTLY TO OUR TREATIES WITH USA.

5. PERHAPS YOU COULD FORMULATE THE QUESTION IN A BETTER WAY. AS WE MAY REACH ART 66 BY MIDDLE NEXT WEEK, AND AS WE WISH TO SHOW WALDOCK PROPOSED QUESTION IN ADVANCE, PLEASE TRY TO HAVE YOUR INSTRS REACH US BY TUE, AM

WERSHOF

ACTION COPY

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FM VIENN MAY9/68 RESTR

TO EXTER 406 PRIORITY

INFO TT PRMNY(GOTLIEB)DE OTT

REF YOURTEL L415 MAY7

LAW OF TREATIES ART 49

THANKS FOR PROMPT REFTEL.UNEXPECTEDLY ART 49 AND DRAFT RESLN QUOTED IN OURTEL 389(INTRODUCED AS L323)WERE CALLED UP FOR DECISION TUE NIGHT MAY7.(ONE OF OUR PROBLEMS HERE IS ERRATIC MANNER IN WHICH CHAIRMAN AND SECRETARIAT FORCE CTTEE OF WHOLE TO DEAL WITH MATTERS PREMATURELY.MANY DELS HAD NOT/NOT EVEN SEEN RESLN BEFORE TUE NIGHT).

2.RESLN WAS ADOPTED WITHOUT A VOTE.AFGHANISTAN AMENDMENT L67/REV1 WAS NOT/NOT FORMALLY WITHDRAWN BUT WAS NOT/NOT MENTIONED AND WAS PRESUMED BY ALL TO BE WITHDRAWN.ALL OTHER AMENDMENTS WERE EITHER DEFEATED OR WITHDRAWN EXCEPT BULAGARIAN L289 WHICH WAS ADOPTED 49-10-33(CDA USA FRANCE);THIS AMENDMENT CHANGED PHRASE QUOTE PRINCIPLES OF THE CHARTER UNQUOTE TO READ QUOTE PRINCIPLES OF INTERNATL LAW EMBODIED IN THE CHARTER UNQUOTE. ART 49 AS THUS AMENDED WAS THEN SENT TO DRAFTING CTTEE

WERSHOF

Hotel Bristol,
Karntnerring No. 1,
1015 VIENNA, Austria,
May 8, 1968

PERSONAL AND
CONFIDENTIAL

Dear Larry,

Greetings from gay Vienna! I have been here for just over a week now and, in the light of some of the recent events which have transpired, I thought that I should drop you a line. I suppose that, by the time this reaches you, you will have already learned from your own delegation what happened with respect of Article 50 of the I.L.C. draft when it was discussed at the Treaties Conference on the evening of May 7.

The particular reason why I am writing is because there is one aspect of our work here which your own delegation may not have been in a position to comment upon. As you know, it consists of a number of very skilled lawyers, as well as the Head of your Treaty Section. Unfortunately, however, it does not include any one with broad experience in U.N. lobbying tactics. I think this is unfortunate. Last night, for instance, after a great deal of complex procedural haggling, the Committee of the Whole finally divided on what had originally been a United States proposal to refer Article 50 on jus cogens to the drafting committee, together with all the amendments thereto, without voting taking place on either the article or the amendments and on the understanding that the language in the amendments would not be regarded as sacrosanct. This would have been a very useful development, had it succeeded. Dadzie of Ghana (although I and a number of other people had earlier tried to talk him out of it) insisted on pushing this question to a vote instead of allowing it to go forward by consensus. There were many complicated procedural issues involved, including the division of your motion, but what happened in the end was that the procedural vote on whether or not to defer voting on Article 50 resulted in a 42 to 42 tie. Because the Chairman had phrased the issue on which we were then voting in terms of who was in favour of deferment (instead of the alternative possibility of in terms of who was in favour of the Ghanian motion that there should be voting), under Rule 46 of our provisional rules of procedure, since the vote was equally divided, the American proposal lost. Aside from the fact that it

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Mr. Lawrence Hargrove,
Permanent Mission of the United States of America
to the United Nations,
NEW YORK, N.Y.
U.S.A.

might have been possible (and certainly would seem to have been better advised, tactically) to have pressed for a vote on the Ghanian proposal, I am pretty sure that, if your delegation had included someone like yourself or Pete Thatcher, experienced in lobbying and the wicked ways of the Sixth Committee, you might well have been able to muster sufficient extra votes (there were 7 abstentions and a number of other delegates were having coffee next door) to have succeeded. It seems to me that, although it is probably too late to do anything about the situation this year, and although I certainly would not wish to try to teach Uncle Sam how to suck eggs, that your Department would be well advised next year to include on your delegation at least one officer from Permis or with considerable Sixth Committee experience. I might add that there is a good number of Sixth Committee representatives here and that, among the more important delegations, yours is one of the few that seems lacking in that respect. The British have Ian Sinclair; the French have both de Bresson and Hadot; the Russians have Khlestov; the Czechs have Smejkal; the Norwegians have Solheim; the Australians have Brazil; the Canadians have Wershof and Robertson, etc.,etc. Enough of the foregoing, but in all seriousness I thought that you (and Herbert and Carl) should know the views of at least one member of another WEO delegation on this matter.

Boy.

Aside from the fact that our work-load here is, if anything, even heavier than in New York (since we have not only to meet all day, but usually three nights a week as well) our stay here is interesting and enjoyable. Hope to see you at the end of May.

With best wishes,

Yours sincerely,

A. W. Robertson

cc: Mr. David Miller,
Legal Division,
Dept. of External Affairs,
Ottawa.

OK.

Dear David,

You might wish to show this to the two Allans as well.

R.

A.W.R.

PRESS RELEASE L/1815
UNITED NATIONS, N.Y.

CONFERENCE BEGINS CONSIDERATION OF ARTICLES ON VALIDITY OR TERMINATION OF A TREATY OR WITHDRAWAL OF A PARTY

(THE FOLLOWING WEEKLY ROUND-UP, COVERING THE PERIOD FROM 26 APRIL TO 2 MAY, WAS RECEIVED FROM A UNITED NATIONS INFORMATION OFFICER WITH THE CONFERENCE ON THE LAW OF TREATIES, VIENNA.)

THE UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES THIS WEEK -- THE SIXTH OF A NINE-WEEK SESSION -- BEGAN CONSIDERATION OF PART V OF THE DRAFT CONVENTION ON THE LAW OF TREATIES. THIS SECTION DEALS WITH A SERIES OF GROUNDS ON WHICH THE QUESTION OF THE VALIDITY OR TERMINATION OF A TREATY, OR OF WITHDRAWAL OF A PARTY FROM A TREATY OR THE SUSPENSION OF ITS OPERATION, MAY BE RAISED.

MANY SPEAKERS, COMMENTING IN GENERAL ON THE RELEVANT ARTICLES OF PART V (ARTICLES 39 THROUGH 68) AS PREPARED BY THE INTERNATIONAL LAW COMMISSION, AGREED THAT THEY REPRESENTED THE MOST IMPORTANT AND PERHAPS THE MOST DIFFICULT SECTION OF THE DRAFT CONVENTION.

SITTING AS THE COMMITTEE OF THE WHOLE, THE CONFERENCE DEALT SPECIFICALLY THIS WEEK WITH ARTICLES 39 THROUGH 48. FOLLOWING DETAILED DEBATE AND, IN SEVERAL CASES, THE ADOPTION OF SUBSTANTIVE AMENDMENTS, MOST OF THESE ARTICLES WERE REFERRED TO THE CONFERENCE DRAFTING COMMITTEE. THE ARTICLES COVER GENERAL PROVISIONS ON INVALIDITY; TERMINATION AND SUSPENSION OF TREATIES; AND SPECIFIC PROVISIONS FOR INVALIDITY, INCLUDING INTERNAL LAW, RESTRICTIONS ON AUTHORITY TO EXPRESS CONSENT OF THE STATE, ERROR, FRAUD, CORRUPTION OF A REPRESENTATIVE OF A STATE AND COERCION OF A REPRESENTATIVE OF A STATE BY THREAT OR USE OF FORCE.

THE COMMITTEE AGREED THAT SEVERAL ARTICLES IN THIS SECTION OF THE DRAFT, INCLUDING ARTICLES 39, 41 AND 42 (GENERAL PROVISIONS) SHOULD BE SET ASIDE UNTIL OTHER RELATED ARTICLES ARE CONSIDERED.

BEFORE PASSING THEM ON TO THE DRAFTING COMMITTEE FOR POSSIBLE MINOR DRAFTING CHANGES, THE COMMITTEE REJECTED, IN A SERIES OF VOTES, ALL AMENDMENTS TO ARTICLES 45, 46, 47 AND 48, THEREBY APPROVING THE ORIGINAL TEXT AS PROPOSED BY THE INTERNATIONAL LAW COMMISSION.

MORE

THUS, THESE ARTICLES WILL READ SUBSTANTIALLY AS FOLLOWS:

ARTICLE 45 (ERROR)

"1. A STATE MAY INVOKE AN ERROR IN A TREATY AS INVALIDATING ITS CONSENT TO BE BOUND BY THE TREATY IF THE ERROR RELATES TO A FACT OR SITUATION WHICH WAS ASSUMED BY THAT STATE TO EXIST AT THE TIME WHEN THE TREATY WAS CONCLUDED AND FORMED AN ESSENTIAL BASIS OF ITS CONSENT TO BE BOUND BY THE TREATY.

"2. PARAGRAPH 1 SHALL NOT APPLY IF THE STATE IN QUESTION CONTRIBUTED BY ITS OWN CONDUCT TO THE ERROR, OR IF THE CIRCUMSTANCES WERE SUCH AS TO PUT THAT STATE ON NOTICE OF A POSSIBLE ERROR.

"3. AN ERROR RELATING ONLY TO THE WORDING OF THE TEXT OF A TREATY DOES NOT AFFECT ITS VALIDITY; ARTICLE 74 THEN APPLIES."

ARTICLE 46 (FRAUD)

"A STATE WHICH HAS BEEN INDUCED TO CONCLUDE A TREATY BY THE FRAUDULENT CONDUCT OF ANOTHER NEGOTIATING STATE MAY INVOKE THE FRAUD AS INVALIDATING ITS CONSENT TO BE BOUND BY THE TREATY."

ARTICLE 47 (CORRUPTION OF A REPRESENTATIVE OF THE STATE)

"IF THE EXPRESSION OF A STATES CONSENT TO BE BOUND BY A TREATY HAS BEEN PROCURED THROUGH THE CORRUPTION OF ITS REPRESENTATIVE DIRECTLY OR INDIRECTLY BY ANOTHER NEGOTIATING STATE, THE STATE MAY INVOKE SUCH CORRUPTION AS INVALIDATING ITS CONSENT TO BE BOUND BY THE TREATY."

ARTICLE 48 (COERCION OF A REPRESENTATIVE OF THE STATE)

"THE EXPRESSION OF A STATES CONSENT TO BE BOUND BY A TREATY WHICH HAS BEEN PROCURED BY THE COERCION OF ITS REPRESENTATIVE THROUGH ACTS OR THREATS DIRECTED AGAINST HIM PERSONALLY SHALL BE WITHOUT ANY LEGAL EFFECT."

AT THE WEEKS END, DISCUSSION WAS BEGUN ON ARTICLE 49 RELATING TO COERCION OF A STATE BY THE THREAT OR USE OF FORCE.

DURING THE PRESENT SESSION, THE CONFERENCE WILL CONTINUE TO MEET AS THE COMMITTEE OF THE WHOLE TO COMPLETE THE REVIEW OF THE 75-ARTICLE DRAFT AS PRESENTED BY THE INTERNATIONAL LAW COMMISSION.

A PLENARY SESSION OF THE CONFERENCE IS SCHEDULED TO CONVENE EARLY IN 1969 TO GIVE FINAL APPROVAL TO THE CONVENTION.

BM 419P 3 MAY 68

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ACTION COPY

FM VIENN MAY8/68 RESTR

TO TT EXTER 398 DE PARIS

INFO TT GENEV(MCKINNON)DE PARIS

REF OURTEL 319 APR21 LAST PARA

LAW OF TREATIES CONFERENCE STATUS OF GATT AS INTERNATL ORGANIZATION GATT REP WAS PRESENT BRIEFLY AT CONFERENCE SUBSEQUENT TO APR21 AND WE TOLD HER OF OUR WORRY.FOLLOWING HER RETURN TO GENEV AND MCKINNONS RETURN THERE,GATT OFFICIALS ASKED HIM TO MEET WITH THEM.THEY THANKED HIM FOR ACTION OF CANDEL AND SAID THEY WOULD WRITE TO CHAIRMAN OF DRAFTING CTTEE OF CONFERENCE TO URGE THAT MEANS BE FOUND BY DC OF MAKING CLEAR THAT GATT IS ON SAME FOOTING AS OTHER INTERNATL ORGANIZATIONS SO FAR AS DRAFT CONVENTION IS CONCERNED.WE WILL WATCH DEVELOPMENTS HERE

WERSHOF

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20-3-1-6

FM VIENN MAY8/68 CONFD

TO EXTER 396

REF OURTEL 366 APR30

LAW OF TREATIES ART 55 CDN AMENDMENT L286

ROMANIA SUGGESTED A HELPFUL REARRANGEMENT OF WORDS IN OUR AMENDMENT AND EXPRESSED DESIRE TO COSPONSOR IT.AT SAME TIME THEY SUGGESTED THAT WE SHOULD UNITE OUR AMENDMENT WITH ANOTHER AMENDMENT L6 SPONSORED BY AUSTRIA FINLAND AND POLAND.NET RESULT IS THAT THESE 2 AMENDMENTS HAVE BEEN REPLACED BY L321(TEXT IN SEPARATE TEL)SPONSORED BY 5 COUNTRIES MENTIONED.

2.AS L6 AND L286 WERE NOT/NOT POLITICAL BUT MERELY DESIGNED TO BRING ART 55 INTO LINE WITH ART 37 CANDEL SAW NO/NO REASON TO REJECT ROMANIAN DESIRE TO BE OUR PARTNERS

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TO EXTER EOU 396

REF OURTEL 396 MAY8

LAW OF TREATIES ART 55

FOLLOWING IS TEXT OF REVISED AMENDMENT L321 COSPONSORED BY CDA, BEGINS: QUOTEREVISE ART 55 TO READ AS FOLLOWS: QUOTE(1). TWO OR MORE PARTIES TO A MULTILATERAL TREATY MAY CONCLUDE AN AGREEMENT TO SUSPEND THE OPERATION OF PROVISIONS OF THE TREATY TEMPORARILY AND AS BETWEEN THEMSELVES ALONE IF SUCH SUSPENSION IS NOT/NOT PROHIBITED BY THE TREATY AND: (A) DOES NOT/NOT AFFECT THE ENJOYMENT BY OTHER PARTIES OF THEIR RIGHTS UNDER THE TREATY OR THE PERFORMANCE OF THEIR OBLIGATIONS; AND (B) IS NOT/NOT INCOMPATIBLE WITH THE EFFECTIVE EXECUTION OF THE OBJECT AND PURPOSE OF THE TREATY AS A WHOLE. (2). THE PARTIES IN QUESTION SHALL NOTIFY THE OTHER PARTIES OF THOSE PROVISIONS OF THE TREATY WHOSE OPERATION THEY INTEND TO SUSPEND UNQUOTE. ENDS. UNQUOTE.

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY7/68	20-3-1-6	
	32	RESTR

FM/DE EXT OTT

NO	PRECEDENCE
L-415	IMMED

TO/A VIENNA

INFO PERMISNY (FOR GOTLIEB)

REF YOUR TELS 388 AND 389 MAY7

SUB/SUJ LAW OF TREATIES ART 49

THIS WILL CONFIRM YOU SHOULD VOTE FOR RESLN EVEN IF ONLY A MINORITY NUMBER OF WEO DELS ARE PREPARED TO VOTE FOR IT. OUR REASON FOR BEING MORE WILLING THAN PERHAPS SOME OTHER WESTERN DELS TO SUPPORT THE RESLN IS RELATED IN PART TO CDN POSITION ON AGGRESSION. (FOR YOUR OWN INFO ONLY WE ARE CONSIDERING SUPPORTING A DEFINITION OF AGGRESSION WHICH WOULD NOT NECESSARILY BE LIMITED TO THREAT OR USE OF FORCE).

2. MAJOR DIFFICULTY WE SEE IN AFGHANISTAN AMENDMENT IS THAT IT EQUATES ECONOMIC OR POLITICAL PRESSURE WITH FORCE OR THREAT OF FORCE; AND RESULT IS TANTAMOUNT TO UNACCEPTABLE AMENDMENT TO THE CHARTER. DRAFT RESLN, HOWEVER, MERELY CONDEMNS THE THREAT OR USE OF PRESSURE IN ANY FORM IN ORDER TO COERCE ANOTHER STATE TO CONCLUDE A TREATY. THIS IS CONSISTENT WITH POSITION TAKEN BY WESTERN GROUP IN FRIENDLY RELATIONS DISCUSSION LAST YEAR IN GENEVA ON NON-INTERVENTION ISSUE, AS SET OUT IN DRAFT DECLARATION (INCLUDED IN IMMEDIATELY SUCCEEDING TEL) SUBMITTED BY UK AND SUPPORTED BY WESTERN DELS, ALTHOUGH NOT ADOPTED. AS YOU WILL NOTE, THE DECLARATION INCLUDES THE 2

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			M. CADIEUX

EXT 18/BIL (REV 8/64)
(COMMUNICATIONS DIV)

ASSERTION THAT "INTERVENTION IN ORDER TO COERCE ANOTHER STATE, WHETHER INVOLVING MEASURES OF AN ECONOMIC, POLITICAL OR OTHER CHARACTER, IS A VIOLATION OF INTERNATIONAL LAW OF THE CHARTER. THE ENCOURAGEMENT OF SUCH COERCIVE MEASURES BY ANOTHER STATE IS LIKEWISE ILLEGAL".

3. ONE POSSIBLE PROBLEM WE SEE IN CONNECTION WITH THE PROPOSED RESLN IS THAT IT MAY OPEN THE DOOR TO A NEW ARTICLE MODELLED ON THE RESLN, WHICH WOULD BE DIFFICULT TO RESIST. SINCE, HOWEVER, THE ALTERNATIVE WOULD BE AN UNACCEPTABLE ART 49, THIS RISK APPEARS TO BE WORTH TAKING.

CADIEUX

Article 49

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.

Commentary

49.01 As in the case of Article 48, the I.L.C.'s antipathy to force has produced an article of doubtful benefit to the victim of the force. Unlike other causes of invalidity, which give a State the option of repudiating or affirming the treaty, their cause renders the treaty a nullity. Since it is entirely possible that the balance of advantages under a treaty may alter with time, the effect of Article 48 may be to enable an oppressor to evade obligations by asserting his own fault.

Instructions

The difficulty of identifying "the principles of the Charter of the United Nations", the inability of the U.N. to agree on a definition of aggression and the tendency of certain States to include economic coercion and "unequal treaties" within the scope of this Article raise considerable apprehension about the way in which this Article may be applied. The delegation should consult closely with the W.E.O. group in an effort to find a formula for this Article which will satisfy the legitimate concerns of the newer States without inviting the abuses referred to above.

Proposed amendment tabled by Afghanistan:

insert after "use of force":

"including economic or political pressure".

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FM VIENN MAY7/68

TO EXTER 389 IMMED

FOR IMMED CONSIDERATION IN LEGAL DIV

REF OKRTEL 388 MAY7

LAW OF TREATIES ART 49

FOLLOWING IS TEXT OF DRAFT RESLN: BEGINS: THE CTTEE OF THE WHOLE RECOMMENDS TO THE PLENARY CONFERENCE THE ADOPTION OF THE FOLLOWING RESLN: DRAFT DECLARATION ON THE PROHIBITION OF THE THREAT OR USE OF ECONOMIC OR POLITICAL COERCION IN CONCLUDING A TREATY.

UN CONFERENCE ON THE LAW OF TREATIES UPHOLDING-THE PRINCIPLE THAT EVERY TREATY IN FORCE IS BINDING UPON THE PARTIES TO IT AND MUST BE PERFORMED BY THEM IN GOOD FAITH;

REAFFIRMING-THE PRINCIPLE OF SOVEREIGN EQUALITY OF STATES;

CONVINCED-THAT STATES MUST HAVE COMPLETE FREEDOM IN PERFORMING ANY ACT RELATING TO THE CONCLUSION OF A TREATY;

MINDFUL-OF THE FACT THAT IN THE PAST INSTANCES HAVE OCCURRED, WHERE STATES HAVE BEEN FORCED TO CONCLUDE TREATIES UNDER PRESSURES IN VARIOUS FORMS EXERCISED BY OTHER STATES;

DEPRECATING-THE SAME;

EXPRESSING ITS CONCERN-AT THE EXERCISE OF SUCH PRESSURE AND ANXIOUS TO ENSURE THAT NO/NO SUCH PRESSURES IN ANY FORM ARE EXERCISED BY ANY STATE WHATEVER IN THE MATTER OF CONCLUSION OF TREATIES;

1. SOLEMNLY CONDEMS-THE THREAT OR USE OF PRESSURE IN ANY FORM, MILITARY, POLITICAL, OR ECONOMIC, BY ANY STATE, IN ORDER TO COERCE

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ANOTHER STATE TO PERFORM ANY ACT RELATING TO THE CONCLUSION OF A TREATY IN VIOLATION OF THE PRINCIPLES OF SOVEHEIGN EQUALITY OF STATES AND FREEDOM OF CONSENT;

2. DECIDES THAT THE PRESENT DECLARATION SHALL FORM PART OF THE FINAL ACT OF THE CONFERENCE ON THE LAW OF TREATIES. ENDS.

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Tels 388 + 389 delivered by Comaintel to Sotteel, N.Y. May 7

M. Beesley

L file

FM VIENN MAY7/68 RESTR

TO EXTER 388 IMMED

FOR IMMED CONSIDERATION IN LEGAL DIV

LAW OF TREATIES ART 49 AFGHANISTAN AMENDMENT L67/REV1

IMMEDLY FOLLOWING TEL CONTAINS TEXT OF DRAFT RESLN PREPARED BY PIPHAGEN ON BEHALF OF MOST WEO MEMBERS IN HOPE THAT AFROASIANS WILL ACCEPT IT AS A SUBSTITUTE FOR L67/REV1 WHICH WOULD BE WITHDRAWN IN RETURN FOR RESLN.AFROASIANS WILL MEET TODAY AND IF RPT IF THEY AGREE IT IS EXPECTED THAT RESLN AND ART 49 GENERALLY WILL BE DEALT WITH TOMORROW.

2.UNLESS WE HEAR TO CONTRARY BY TOMORROW AM WE WILL VOTE FOR RESLN IN COMPANY WITH USA AND UK

WERSHOF

TRANSMITTAL SLIP

UNCLASSIFIED

AIRMAIL

TO: Legal Division,
Department of External Affairs,
OTTAWA, Ontario

From: Canadian Delegation to U.N. Conference on the Law of Treaties - VIENNA

May 6, 1968

Authority: J. Stanford/kt

20-3-1-6
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1 copy of UK May 1, 1968 Draft which was circulated to WEO Group referred to in Our Telegram 382 of May , 1968.

TO: MR STANFORD
FROM REGISTRY
MAY 9 1968
FILE CHARGED OUT
TO: MR STANFIRD

Received
MAY 10 1968
In Legal Division
Department of External Affairs

(Not yet published) CR 1971/68 draft circulated by WEO

Law of Treaties Conference

SETTLEMENT OF DISPUTES (Part V)

The following is an outline of possible machinery for settlement of Part V disputes:

(a) Objections to Article 62 notifications shall be communicated to the parties to the treaty and also to the Secretary-General of the United Nations.

(b) The parties shall thereupon seek a solution through the means indicated in Article 33 of the Charter.

(c) If the parties have been unable to agree upon any means of reaching a solution within two months following the raising of the objection, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within six months after such agreement, either party may refer the dispute to the Secretary-General of the United Nations for settlement in accordance with the procedures indicated in the following paragraphs. (These procedures might be set out in an Annex to the Law of Treaties Convention.)

(d) A Conciliation Commission shall be established consisting of 15-25 highly qualified jurists representing the principal legal systems of the world and also selected so as to have regard to the need for equitable geographical distribution. Members of the Commission shall be appointed by the Secretary-General, on the nomination of States, for fixed, but renewable, terms. Subject to the approval of the General Assembly the Commission should be constituted as an organ of the United Nations and authorised to request advisory opinions from the I.C.J.

(e) Where a dispute is referred to the Secretary-General for

/settlement,

settlement, and unless the parties agree that the full Commission shall consider the dispute, a sub-commission shall be appointed within 60 days consisting of one member appointed by each party to the dispute from among the members of the Commission who do not possess its nationality, one member appointed by each party who possesses its nationality (from outside the membership of the Commission where necessary) and a chairman (not possessing the nationality of either party) appointed by the other members of the sub-Commission from among the members of the Commission. If any appointment is not made within the period of 60 days the appointment should be made by the Secretary-General of the United Nations or in the case of the Chairman by the Commission as a whole.

(f) The Commission and / any sub-commission so constituted shall establish its own procedure. Decisions of the Commission and of the sub-commission shall be taken by majority vote. The Secretary-General shall provide to the Commission or the sub-commission such assistance and facilities as it may require.

(g) The Commission or the sub-commission, as the case may be, shall be obliged to report within [6/9] months of its appointment. Reports should be transmitted to the Secretary-General and the parties. If the Commission or the sub-commission has succeeded in effecting a friendly solution, the report should be confined to a brief statement of the facts and the solution reached. If the Commission or the sub-commission has not succeeded in effecting a friendly solution, its report shall deal fully with the factual and legal elements of the dispute.

(h) If no solution has been reached within the [6/9] month time

/limit

from the giving of an Article 62 notification, suspend the operation of the treaty wholly if the effect of the alleged breach is to frustrate the object and purpose of the treaty; otherwise it may suspend the operation only of the provisions allegedly breached or of other provisions the performance of which is directly related to or dependent upon the performance of the provisions allegedly breached.

(1) A saving clause (based on paragraph 4 of Article 62) would be required to preserve the rights and obligations of the parties under any provisions in force binding them with regard to the settlement of disputes.

Art 49: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations"

~~the Secretary~~

ACTION COPY

FM VIENN MAY5/68 RESTR

TO EXTER 383

INFO TT WLGTN PRMNY DE OTT

BAG GENEV DE VIENN

REF OURTEL 352 APR28

20-3-1-6
3 | 27

LAW OF TREATIES CONFERENCE 5TH PROGRESS SUMMARY APR29-MAY4 ARTS 41 AND 42:-

AT CONCLUSION OF DEBATE ON ART 41,CTTEE OF WHOLE(CW)DECIDED BY ROLL CALL VOTE 51(CDA)-22-20 TO DEFER VOTING ON AMENDMENTS TO ART 41 PENDING OUTCOME OF DISCUSSIONS ON ARTS 46-50.CHAIRMEN THEN PROPOSED THAT BOTH DISCUSSION AND VOTING ON ART 42 BE SIMILARLY DEFERRED;THIS PROPOSAL WAS APPROVED.

TITLES OF PART V AND SECTION 2 OF PART V

SWISS AMENDMENT L120 WAS REFERRED TO DRAFTING CTTEE(DC).

ART 43:-

IN DEBATE ON THIS ART NO/NO DEL SOUGHT TO RELATE IT TO ART 5(2)AND WE THEREFORE REFRAINED FROM COMMENTING.PAK-JPN AMENDMENT L184 TO DELETE REF TO QUOTE MANIFEST UNQUOTE WAS DEFEATED 25-56(CDA)-7. AUSTRALIAN AMENDMENT L271/REV1 TO FIX TIME LIMIT WAS DEFEATED 20(CDA USA UK)-44-27.PERU-UKRAINE AMENDMENT L228 ADDING QUOTE OF FUNDAMENTAL IMPORTANCE UNQUOTE WAS ADOPTED 45(CDA USA UK)-15-30.UK AMENDMENT L274 DESIGNED TO CLARIFY QUOTE MANIFEST UNQUOTE WAS ADOPTED 41(CDA USA)-13-39.AMENDMENTS BY PHILIPPINES L239,VENEZUELA L252 AND IRAN L280 WERE WITHDRAWN.ART WAS THEN REFERRED TO DC.

ART 44:-

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CANDEL DISCUSSED QUESTION(RAISED IN YOUR INSTRS)OF RESTRICTIONS IN FULL POWERS DELIVERED TO A CONFERENCE SECRETARIAT WITH WATTLES OF UN SECRETARIAT WHO EXPRESSED VIEW THAT IN RECEIVING FULL POWERS (AS OPPOSED TO CREDENTIALS)SECRETARIAT WAS IN FACT ACTING AS(OR IN ANTICIPATION OF ITS ROLE AS)DEPOSITARY.MEXICAN AMENDMENT L265 TO INCLUDE NOTIFICATIONS TO DEPOSITARY,AMENDED ORALLY BY ISRAEL TO ADD AFTER QUOTE DEPOSITARY UNQUOTE THE WORDS QUOTE OF THE TREATY UNQUOTE WAS ADOPTED 53(CDA)-3-35.AMENDMENTS BY JPN L269 AND SPAIN L288 WERE VOTED UPON TOGETHER AND ADOPTED 30(CDA USA UK)-23-35. UKRAINE AMENDMENT L287 WAS DEFEATED 16-46(CDA USA UK)-30.ART AND SPANISH AMENDMENT WERE REFERRED TO DC.

ART 45:-

WE MADE BRIEF STATEMENT IN SUPPORT OF USA AMENDMENT L275.USA DELETED FROM ITS AMENDMENT PROPOSAL TO DELETE QUOTE IN A TREATY UNQUOTE FROM OPENING SENTENCE OF PARA1.BALANCE OF USA AMENDMENT WAS VOTED ON IN 3 STAGES.PROPOSAL TO INSERT WORDS QUOTE OR THE PERFORMANCE OF A TREATY UNQUOTE WAS DEFEATED 12(CDA)-45-30.REMAINDER OF L275 PARA1 WAS DEFEATED 20(CDA)-38-31.PARA2 OF L275 WAS DEFEATED 25(CDA)-45-20.AUSTRALIAN AMENDMENT L281 TO FIX TIME LIMIT WAS DEFEATED 23(CDA)40-27.CUBA THEN PROPOSED ORALLY DELETION OF LAST HALF OF PARA2 OF ILC DRAFT,BEGINNING WITH THE WORDS QUOTE OR IF THE CIRCUMSTANCES UNQUOTE.THIS PROPOSAL WAS DEFEATED 8-69(CDA) -7.ART WAS THEN REFERRED TO DC.

ARTS 46 AND 47:-

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THESE 2 ARTS WERE DISCUSSED TOGETHER.VOTING ON ART 46 WAS AS FOLLOWS.CHILE-MALAYSIA PROPOSAL L263 TO DELETE ART WAS DEFEATED 8-74-8(CDA).VENEZUELA AMENDMENT L259 TO MAKE TREATY VOID WAS DEFEATED 22-51(CDA USA UK)-16.USA AMENDMENT L276(ALTERED SLIGHTLY IN COURSE OF DEBATE)WAS DEFEATED 18(CDA)-46-27.AUSTRALIAN AMENDMENT TO FIX TIME LIMIT WAS DEFEATED 18(CDA)-43-32.VIETNAM AMENDMENT L234/REV1 WAS DEFEATED 1-52-32(CDA).VOTING ON ART 47 WAS AS FOLLOWS: CHILE-MXICO PROPOSAL L264 TO DELETE ART WAS DEFEATED ON ROLL CALL VOTE 28(CDA USA UK FRANCE)-61-4.VENEZUELA PROPOSAL L261 TO MAKE TREATY VOID WAS DEFEATED 23-54(CDA)-16.PERU AMENDMENT L229 WAS DEFEATED 10(CDA USA UK)-54-27.AUSTRALIA AMENDMENT TO FIX TIME LIMIT WAS DEFEATED 20(CDA USA UK)-41-31.BOTH ARTS WERE THEN REFERRED TO DC.

ART 48:-

AUSTRALIA AMENDMENT L284 WAS FURTHER AMENDED ORALLY BY AUSTRALIANS BY DELETING WORDS QUOTE AND AT THE LATEST WITHIN 12 MONTHS UNQUOTE AND BY ADDING QUOTE UNREASONABLE UNQUOTE BEFORE QUOTE DELAY UNQUOTE. THIS AMENDMENT WAS DEFEATED 17(CDA UK FRANCE)-44-18.FRENCH AMENDMENT L300 WAS ALSO DEFEATED 33(CDA USA UK)-42-10.ART WAS THEN REFERRED TO DC.

ART 49:-

DEBATE ON THIS ART BEGAN THUR AND LASTED THROUGH FRI.AMENDMENT L67 BY AFGHANISTAN AND 19 OTHERS HAS BEEN REVISED(L67/REV1)TO INSERT QUOTE INCLUDING ECONOMIC OR POLITICAL PRESSURE UNQUOTE.OUR STATE-

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MENT(MADE PRIOR TO RECEIPT OF YOURTEL L399 MAY2)MADE 4 MAJOR POINTS.FIRST,THAT QUOTE THREAT OF USE OF FORCE UNQUOTE IN ART 2(4) OF CHARTER MEANS MILITARY FORCE AND NOTHING ELSE.SECOND,THAT THE WORDS ECONOMIC AND POLITICAL PRESSURE ARE DANGEROUSLY VAGUE AND POTENTIALLY DESTRUCTIVE OF THE DOCTRINE PACTASUNT SERVANDA.THIRD, THAT VOTING ON ART SHOULD BE POSTPONED TO PERMIT DISCUSSION BY A CONCILIATION GROUP,BECAUSE IF THE CONTROVERSIAL PROVISIONS OF PART V ARE ADOPTED EVEN BY A 2/3 MAJORITY NEXT YEAR AGAINST THE FIRM OPP-OSITION OF AN IMPORTANT MINORITY,NEW CONVENTION WILL NOT/NOT EXPRESS ACCEPTED DOCTRINES OF INTERNATL LAW.FOURTH,THAT OUR AFFIRMATIVE VOTE FOR ANY VERSION OF THIS ART WOULD BE SUBJ TO LATER ACCEPTANCE OF A SATISFACTORY DISPUTES PROVISION.WE HAD MADE THIS LAST POINT EARLIER IN RELATION TO OTHER SUBSTANTIVE ARTS ON PART V BUT THOUGHT IT WISE TO UNDERLINE THIS POSITION IN RELATION TO THIS ART. IT APPEARED CLEAR FROM COMMENTS OF NUMEROUS DELS WHICH SPOKE ON THIS ART THAT AFGHANISTAN AMENDMENT,IF PUT TO VOTE ON MAY3,WOULD BE ADOPTED BY WIDE MARGIN.HOWEVER,AT CONCLUSION OF DEBATE ON ART 49, WHICH COINCIDED WITH END OF MAY3 AFTERNOON SESSION,NETHERLANDS REP MOVED THAT NO/NO VOTE BE TAKEN IMMEDLY ON AMENDMENTS TO ART 49,PUT THAT INFORMAL CONSULTATIONS TAKE PLACE AMONG REPS OF VARIOUS GROUPS TO SEEK AGREEMENT ON TEXT OF RESLN WHICH MIGHT ACCOMPANY DRAFT ART AND FACILITATE GENERAL ACCEPTANCE OF ART.RESULTS OF THESE CONSULT-ATIONS ARE TO BE REPORTED TO CW NOT /NOT LATER THAN MON MAY6;CHAIR-MAN DECLARED THIS MOTION ADOPTED WITHOUT VOTE.CW MAY REVERT MAY6

PAGE FIVE 383 RESTR

AFTERNOON TO ART 49.

ART 50:-

DEBATE ON THIS ART BEGAN SAT MORNING,MAY4 AND WILL LIKELY LAST THOURGH MON,MAY6.WE ARE REPORTING IN SEPARATE TEL ON UNSATISFACT-ORY WEO TACTICAL SITUATION WITH RESPECT TO ART

WERSHOF

COPY TO LEGAL MAN ONLY

Mr Beesley

FM VIENN MAY5/68 CONFD

TO EXTER 382

BAG PRMNY DE OTT GENEV DE VIENN

REF OURTEL 266 APR8

20-3-1-6
35 | 2

LAW OF TREATIES WEO GROUP ART 62

WORKING PARTY REFERRED TO IN PARA2 REFTEL REPORTED TO WEO GROUP ON MAY1. RESULT WAS OUTLINE OF SETTLEMENTS PROCEDURE BASED LARGELY ON UK DRAFT REPORTED TO YOU EARLIER. FULL TEXT FOLLOWS BY AIR, BUT FOLLOWING ARE MAIN POINTS: (1) COMMUNICATE ART 62 OBJECTIONS TO OTHER PARTIES AND UN SECGEN; (2) SEEK SOLUTION THROUGH MEANS IN ART 33 OF CHARTER; (3) FAILING AGREED SOLUTION, COMPULSORY REF TO SECGEN FOR SETTLEMENT UNDER FOLLOWING PROCEDURES; (4) REF TO CONCILIATION COMMISSION REPRESENTING PRINCIPAL WORLD LEGAL SYSTEMS. MEMBERS TO BE APPOINTED BY SECGEN. COMMISSION TO BE ORGAN OF UN AND AUTHORIZED TO REQUEST ADVISORY OPINIONS FROM ICJ; (5) COMMISSION TO REPORT TO SECGEN WITHIN 6-9 MONTHS; (6) IF THERE IS STILL NO/NO SETTLEMENT EITHER PARTY MAY REFER DISPUTE TO ARBITRAL TRIBUNAL FOR DECISION ON ANY QUESTION RELATING TO APPLICATION OF PART V WITH DECISION OF TRIBUNAL TO BIND PARTIES; (7) PENDING SETTLEMENT, TREATY REMAINS IN FORCE EXCEPT AS AGREED BY PARTIES OR ORDERED BY ARBITRAL TRIBUNAL. THIS LATTER HOWEVER SUBJ TO FOLLOWING POINT; (8) WHERE PARTY ALLEGES MATERIAL BREACH FRUSTRATING TREATY IT MAY SUSPEND TREATY IN WHOLE OR IN PART 3 MONTHS AFTER ART 62 NOTIFICATION; (9) SAVING CLAUSE SIMILAR TO ART 62(4).

2. WORKING PARTYS PROPOSALS HAD GENERALLY FAVORABLE RECEPTION THOUGH

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THERE WAS MUCH DISCUSSION ON INDIVIDUAL POINTS. IT WAS AGREED, HOWEVER, THAT THIS SHOULD BE EVENTUAL COMPROMISE OBJECTIVE AND NOT/NOT AN INITIAL WESTERN PROPOSAL. AT CONCLUSION OF MAY1 MTG WEO GROUP ASKED WORKING PARTY TO IDENTIFY ESSENTIAL ELEMENTS WHICH SHOULD BE EMBODIED IN ANY EVENTUAL ACCEPTABLE SETTLEMENTS PROCEDURE. THESE ELEMENTS AS REPORTED TO MAY3 MTG, WERE FIRST-THAT SUBMISSION TO SETTLEMENT OF DISPUTES PROCEDURE MUST, IN THE LAST RESORT, BE OBLIGATORY AND APPLY PREFERABLY TO WHOLE OF PART V BUT AT LEAST WITH RESPECT TO THE APPLICATION OF THE MORE IMPORTANT SUBSTANTIVE PROVISIONS OF PART V. SECOND ELEMENT WAS THAT PROCEDURE SHOULD FIRST INVOLVE CONCILIATION AND THEN JURIDICAL SETTLEMENT IF NECESSARY. THE MECHANICS OF CONCILIATION (WHICH WOULD INCLUDE FACT-FINDING) SHOULD BE AS ORIGINAL AS POSSIBLE TO AVOID NON-ALIGNED CRITICISM OF CLASSIC CONCILIATION PROCEDURE WHICH THEY REGARD AS TAINTED. IN ADDITION, CONCILIATION PROCEDURE SHOULD BE RELATED IN SOME WAY TO UN. COMPOSITION OF ANY CONCILIATION BODY SHOULD BE ON SAME BASIS OF EQUAL REPRESENTZTION OF THE PARTIES TO DISPUTE AS IS FOUND IN CLASSIC ARBITRATION PROCEDURE. JURDICAL SETTLEMENT SHOULD INVOLVE COMPULSORY REF TO EITHER ICJ OR JRBITRAL TRIBUNAL.

3. SWISS HAVE ALREADY TABLED PROPOSED NEW ART 76(L250) PROVIDING FOR COMPULSORY REF TO ICJ IN THE ABSENCE OF AGREEMENT BETWEEN THE PARTIES ON AN ALTERNATE PROCEDURE; THIS ART APPLIES TO WHOLE CONVENTION. THEY PROPOSE, AT APPROPRIATE TIME, TO PUT FORWARD AN AMENDMENT TO ART 62 WHICH WOULD REQUIRE COMPULSORY REF OF DISPUTES TO ICJ OR ARBITRATION

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TRIBUNAL. THIS ART WOULD APPLY TO PART V DISPUTES ONLY AND SWISS WOULD THEN AMEND THEIR PROPOSED ART 76 TO PROVIDE THAT IT APPLIES ONLY TO DISPUTES ARISING FROM APPLICATION OF ARTS OTHER THAN THOSE IN PART V.

4. JPN ALSO PLANS TO PUT FORWARD AMENDMENT TO ART 62 TO PROVIDE FOR COMPULSORY REF TO ICJ OF DISPUTES OVER APPLICATION OF ARTS 50 AND 61(JUS COGENS)AND, IN ALL OTHER CASES, COMPULSORY ARBITRATION IF NO/NO SETTLEMENT IS REAC ED BY MEANS REFERRED TO IN ART 33 OF CHARTER. JPN AMENDMENT ALSO PROVIDES FOR SUSPENSION OF TREATY,(PENDING DETERMINATION OF ISSUE BY ICJ OR ARBITRATION TRIBUNAL)BY DECISION OF THE COURT OR TRIBUNAL.

5. IN MGTS OF MAY1 AND 3 IT WAS AGREED THAT, AS A MATTER OF TACTICS, SINCE JPNSE AND SECOND SWISS PROPOSALS REPRESENT NEAR-IDEAL(BUT NOT/NOT ATTAINABLE)SOLUTIONS FROM WESTERN VIEW POINT, THEY WOULD BE TABLED AFTER CONCLUSION OF DEBATE ON ART 50.(THEY WILL NOT/NOT BE TABLED BEFORE THAT TIME TO AVOID DEFLECTING ATTN FROM WESTERN POSITION ON SUBSTANCE OF ARTS 49 AND 50). WORKING PARTY PROPOSAL REFERRED TO IN PARA1 ABOVE WOULD NOT/NOT BE TABLED BUT HELD FOR USE IN HOPED-FOR CONSULTATIONS WITH NON-ALGINED AND EASTERNEUROPEAN DELS ON SETTLEMENTS PROCEDURE

WERSHOF

M Beasley

ACTION COPY

FM VIENN MAY5/68 CONFD

TO EXTER 384

INFO TT PRMNY DE OTT

BAG GENEV DE VIENN

REF OURTEL 372 MAY3

20-3-1-6

LAW OF TREATIES WEO GROUP ART 50

WEO GROUP TOOK ADVANTAGE OF CANCELLATION OF CTTEE OF WHOLE(CW)MTGS IN OBSERVANCE OF MAY1 HOLIDAY TO MEET TWICE TO DISCUSS SUBSTANCE AND TACTICS ON ARTS 50 AND 62.THIS TEL REPORTS ON ART 50 DISCUSSIONS.

2.FOLLOWING AN EARLIER WEO MTG A RESTR GROUP(USA UK FRANCE AND AUSTRALIA)HAD BEEN ASKED TO FORMULATE AMENDMENT TO ART 50.AS A RESULT,FOLLOWING TEXT,BASED LARGELY ON USA PROPOSAL,WAS PUT BEFORE MAY1 MTG QUOTE A TREATY IS(VOID)(VOIDABLE)IF,AT THE TIME OF ITS CONCLUSION,IT CONFLICTS WITH A PEREMPTORY NORM OF INTERNATL LAW RECOGNIZED BY THE PRINCIPAL LEGAL AND POLITICAL SYSTEMS OF THE WORLD AS A NORM FROM WHICH NO/NO DEROGATION IS PERMITTED AND WHICH CAN BE MODIFIED ONLY BY A SUBSEQUENT NORM OF INTERNATL LAW OF THE SAME CHARACTER.UNQUOTE.

3.USADEL OPENED DISCUSSION WITH A STRONG PLEA FOR UNITED WEO FRONT ON ISSUES RAISED BY ARTS 49,50 AND 62.HE URGED MEMBERS OF GROUP TO LOBBY STRONGLY AMONG NON-ALIGNED DELS TO EMPHASIZE THAT UNLESS CRITICAL ARTS WERE ADOPTED IN ACCEPTABLE FORM CONVENTION AS A WHOLE WOULD NOT/NOT HAVE WESTERN SUPPORT.

4.ALTHOUGH USA STATEMENT RELATED PRIMARILY TO TACTICS,DISCUSSION QUICKLY TURNED TO SUBSTANCE AND DRAFTING.IT WAS AGREED THAT THE OPERATIVE WORD WOULD HAVE TO BE QUOTE VOID UNQUOTE,BUT LITTLE

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ELSE WAS AGREED UPON AND LENGTHY AND INCONCLUSIVE DISCUSSION OCCUPIED BALANCE OF MORNING MTG.THIS WAS DUE IN PART TO GENUINE DIFFERENCE OF VIEWS BETWEEN THOSE(ESPECIALLY SWEDEN AND DENMARK) WHO BELIEVE ILC DRAFT ART 50 IS ACCEPTABLE SUBJ ONLY TO EVENTUAL SATISFACTORY DISPUTES PROCEDURE AND THOSE WHO BELIEVE THAT,QUITE APART FROM DISPUTES PROCEDURE,IT IS NECESSARY TO AMEND ART 50 TO SPECIFY OR AT LEAST SUGGEST CRITERIA FOR DETERMINING RULES OF JUS COGENS.THIS WAS OBJECT OF TEXT QUOTED IN PARA2 ABOVE.AT OPENING OF LATE AFTERNOON MTG KEARNEY(USA)RENEWED PLEA FOR FORCEFUL AND UNITED WEO ACTION ON ARTS 49 50 AND 62.HE SPOKE IN STRONG TERMS WHICH BETRAYED CONSIDERABLE FRUSTRATION AND IRRITATION OVER INABILITY OF WEO GROUP TO FUNCTION AS COHESIVE UNIT.HE STRESSED THAT TIME HAD PASSED FOR DISCUSSION OF MERE DRAFTING AND IT WAS NOW NECESSARY TO DECIDE WHETHER TO SUPPORT FORCEFULLY AND IN UNITED WAY PRINCIPLES AT ISSUE IN ARTS 49 50 AND 62.AS HE HAD ALREADY BEEN INFORMED THAT OLD COMWEL WERE PREPARED TO COSPONSOR DRAFT(SUBJ,AT LEAST IN CASE OF CDA,TO ITS ACCEPTABILITY TO FRANCE) HE ASKED WHETHER ANY NON-ENGLISH SPEAKING STATES WOULD COSPONSOR AMENDMENT ALONG LINES QUOTED ABOVE.WHEN NO/NO OFFERS WERE RECEIVED, KEARNEY EXPRESSED VIEW THAT THERE APPEARED TO BE LITTLE PURPOSE IN FURTHER DISCUSSION IN WEO GROUP OF EITHER ART 50 OR 62.HE LEFT MTG SHORTLY AFTER BEGINNING OF DISCUSSION OF ART 62,LEAVING BEHIND A JUNIOR OFFICER OF USADEL WHO DID NOT/NOT PARTICIPATE IN FURTHER DISCUSSION.

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5.FAILURE OF FRANCE TO OFFER COSPONSOR AMENDMENT WHICH IT HAD HELPED DRAFT AND DID IN FACT FAVOR IS PUZZLING.FRENCH DELS PRIVATE EXPLANATION(THEY DID NOT/NOT EXPLAIN TO WEO GROUP)WAS THAT AMENDMENT SHOULD NOT/NOT APPEAR TO BE WESTERN GREAT POWER ATTACK ON ART 50,BUT USA DOUBTS THIS IS REAL REASON(THEY DID NOT/NOT VOLUNTEER ALTERNATIVE EXPLANATION).IN ANY CASE FRENCH EXPRESSED DISAPPOINTMENT AT FAILURE OF AGREED DRAFT TO OBTAIN SPONSORS AMONG SMALLER AND NEUTRAL WEO MEMBERS.THEY ATTEMPTED OVERNIGHT MAY1-2 TO PERSUADE 1 OF FRENCHAFRICAN DELS TO SPONSOR AMENDMENT BUT NONE(NOT/NOT EVEN GABON)WOULD ACCEPT.IN THE MEANTIME,UKDEL HAD RECEIVED INSTRS TO PROPOSE SUBADMENDMENT IN REFTEL(WHICH IN TURN EFFECTIVELY PRECLUDED EVEN A JOINT COMMON-LAW SPONSORED MAIN AMENDMENT BEING TABLED).IN THE RESULT,USA TABLED THUR IN ITS OWN NAME ONLY,AMENDMENT L302 MODIFIED SLIGHTLY FROM TEXT QUOTEE ABOVE. UK SUBAMENDMENT IS NOW L312.

6.THERE IS LITTLE DOUBT EXTREMELY PASSIVE ROLE PLAYED BY FRANCE WAS A MAJOR FACTOR IN FAILURE OF WEO TO ACT COHESIVELY ON THIS ISSUE.FRENCH PASSIVITY IS PARTICULARLY CURIOUS IN VIEW OF FRENCH DOUBT,EXPRESSED SO STRONGLY AT PARIS,OVER VERY EXISTENCE OF CONCEPT OF JUS COGENS.IT REMAINS TO BE SEEN WHETHER WEO GROUP WILL FUNCTION MORE EFFECTIVELY ON QUESTION OF ADJUDICATION.WE SHALL BE REPORTING SEPARATELY ON ART 62 DISCUSSIONS IN GROUP

WERSHOF

File

2

MESSAGE

released by Mr Gottlieb

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY3/68	20-3-1-6	
	33	

FM/DE ~~EXT OTT~~

TO/A ~~A VIENNA~~

INFO

NO	PRECEDENCE
L-408	~~IMMED~~

REF
YOUR TEL 372 MAY3
SUB/SUJ
LAW OF TREATIES - ART 50

WE CONCUR WITH YOUR PROPOSAL TO VOTE IN FAVOUR OF USA TEXT L-302 ASSUMING MOST DEGUEO ALSO DO SO.

2. WE ARE ATTRACTED BY THE UK PROPOSAL BUT ARE DOUBTFUL THAT IT WILL OBTAIN SUPPORT. SHOULD A SIGNIFICANT WESTERN CONSENSUS EMERGE IN FAVOUR OF THE PROPOSAL YOU MAY VOTE IN FAVOUR OF IT. FAILING SUCH SUPPORT WE CONCUR IN YOUR INTENTION TO ABSTAIN.

3. WE HOPE TO BE ABLE TO PROVIDE YOU SHORTLY WITH FURTHER COMMENTS IN REPLY TO YOUR TEL 356 APR 28 ON ART 43.

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EXT 18/BIL (REV 5/64)
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m Beesley

Note: Reply released by Mr Goldie JB

ACTION COPY

FM VIENN MAY3/68 CONFD

TO EXTER 372 IMMED

INFO TT PRMNY DE OTT

LAW OF TREATIES ART 50

20-3-1-6
32 | 27

WEO GROUP DISCUSSION ON ART 50, ABOUT WHICH WE SHALL REPORT IN GREATER DETAIL IN SUBSEQUENT TEL, FAILED TO PRODUCE CONSENSUS ON SUBSTANCE OR TACTICS OF AMENDMENT TO THIS ART. OBJECT OF THIS TEL IS TO PROVIDE YOU WITH OPPORTUNITY TO SEND INSTRS CONCERNING AMENDMENTS (SPECIFICALLY UK AMENDMENT REFERRED TO IN PARA3 BELOW) WHICH MIGHT BE PUT TO VOTE ON MON, MAY6.

2. UPON FAILURE OF WEO TO REACH CONSENSUS, USA PROPOSED (L302) FOLLOWING REVISED TEXT OF ART 50 QUOTE A TREATY IS VOID IF, AT THE TIME OF ITS CONCLUSION, IT CONFLICTS WITH A PEREMPTORY RULE OF GENERAL INTERNATL LAW WHICH IS RECOGNIZED IN COMMON BY THE NATL AND REGIONAL LEGAL SYSTEMS OF THE WORLD AND FROM WHICH NO/NO DEROGATION IS PERMITTED UNQUOTE. IF THIS AMENDMENT IS PUT TO VOTE WE PROPOSE TO VOTE IN FAVOR OF IT IN ACCORDANCE WITH LAST PARA YOUR INSTRS. MOST WEO WILL VOTE FOR IT.

3. UK DEL IS AT PRESENT UNDER SPECIFIC INSTRS FROM VALLAT IN LDN (WHICH WE UNDERSTAND DEL HERE RESISTED) TO PROPOSE ADDITION TO ART 50 (WHETHER IN ILC TEXT OR IN USA VERSION). TEXT IS NOT/NOT YET AVAILABLE BUT SUBSTANCE OF PROPOSED ADDITION IS AS FOLLOWS. TO THE EXTEND THAT NORMS OF JUS COGENS ARE NOT/NOT SPECIFIED IN THIS PART (REF HERE IS TO ART 49, THE ONLY ART WHICH UK CONSIDERS TO BE JUS COGENS) THEY SHALL CONSIST ONLY OF THOSE RULES OF INTERNATL LAW

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WHICH MAY BE DETERMINED FROM TIME TO TIME, BY PROTOCOL TO THE PRESENT CONVENTION, TO BE NORMS OF JUS COGENS.

4. AT PRESENT UK PROPOSAL ENJOYS NO/NO SUPPORT OF WHICH WE ARE AWARE AND, UNLESS YOU INSTRUCT US TO THE CONTRARY, WE WILL ABSTAIN IN ANY VOTE ON UK PROPOSAL EXCEPT IN THE UNLIKELY EVENT THAT, BETWEEN NOW AND THE TIME OF VOTE, A SIGNIFICANT WESTERN CONSENSUS EMERGES IN FAVOR OF UK PROPOSAL.

5. WEO STILL HOPES THAT ART 50 AND AMENDMENTS WILL NOT/NOT BE VOTED UPON BUT WILL BE SENT TO A WORKING OR CONCILIATION GROUP. HOWEVER THERE IS NO/NO ASSURANCE THIS WILL HAPPEN

WERSHOF

Div
Diary
File
Tel File

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 2/68	20-3-1-6 32	RESTR

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
VIENNA	L-399	PRIORITY

INFO IT PARMY DE OTT

REF YOURTEL 353 OF APRIL 28

SUB/SUJ LAW OF TREATIES, ART 49

YOU WILL RECALL THAT IN 1966 FRIENDLY RELATIONS COMMITTEE AUSTRALIA, CANADA, U.K. AND U.S.A. MADE A PROPOSAL (A/AC.125/L22) BASED ON 1964 DRAFTING COMMITTEE'S PAPER NO. I WHICH CAREFULLY REFRAINED FROM PLACING ANY INTERPRETATION ON TERM FORCE OTHER THAN ALREADY INCLUDED IN UN CHARTER. HOWEVER CZECH DRAFT DECLARATION (L.16 PARA 4) SPOKE OF "DUTY TO REFRAIN FROM ECONOMIC, POLITICAL OR OTHER FORMS OF PRESSURE AIMED AGAINST THE POLITICAL INDEPENDENCE OR TERRITORIAL INTEGRITY OF ANY STATE" AND IN SIMILAR VEIN NON-ALIGNED TEXT (L.22, PARA 2(b)) DEFINED FORCE AS "ALL FORMS OF PRESSURE INCLUDING THOSE OF A POLITICAL AND ECONOMIC CHARACTER, WHICH HAVE THE EFFECT OF THREATENING THE TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF ANY STATE". A PROPOSAL BY CHILE (L.23(d)) ALSO REFERRED TO "ALL FORMS OF POLITICAL, ECONOMIC OR OTHER PRESSURE". NOT SURPRISINGLY THEREFORE COMMITTEE FAILED TO AGREE ON WHAT EXACTLY SHOULD BE INCLUDED IN CONSENSUS FORMULATION FOR CHARTER PRINCIPLE ON FORCE.

2. IN 1967 COMMITEE U.K. DRAFT DECLARATION (L.44 PART I) AGAIN

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EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

002239

REFLECTED WESTERN DETERMINATION NOT RPT NOT TO ATTEMPT ANY WIDER DEFINITION OF FORCE THAN ARMED FORCE. THE NON-ALIGNED REINTRODUCED THEIR 1966 PROPOSAL AS PART OF A DRAFT DECLARATION BUT ARGENTINA, CHILE, GUATEMALA, MEXICO AND VENEZUELA (L.49/REV.1) DID NOT RPT NOT REPEAT THE EARLIER CHILEAN FORMULATION. IN FACT IN 1967 LATINS WERE MORE SYMPATHETIC TO WESTERN ATTITUDES. NEVERTHELESS COMMITTEE REACHED NO RPT NO CONCLUSION ON A LEGAL FORMULATION OTHER THAN DRAFTING COMMITTEE AGREEMENT THAT CHARTER PROVISIONS SHOULD BE REPEATED, THAT FORCE SHOULD NEVER BE USED IN SETTLING INTERNATIONAL ISSUES, THAT AGGRESSIVE WARS ARE CRIMES AGAINST PEACE AND THAT STATES HAD A DUTY TO REFRAIN FROM USING OR THREATENING FORCE TO VIOLATE BOUNDARIES OR TO ENGAGE IN REPRISALS ETC. NO RPT NO AGREEMENT WAS REACHED ON WHETHER THIS DUTY INCLUDED REFRAINING FROM ECONOMIC, POLITICAL OR ANY OTHER FORM OF PRESSURE AGAINST THE POLITICAL INDEPENDENCE OR TERRITORIAL INTEGRITY OF A STATE AND HENCE THEREFORE NO RPT NO AGREEMENT ON WHETHER A DEFINITION OF TERM FORCE SHOULD BE INCLUDED IN COMMITTEE'S FORMULATION OF THIS LEGAL PRINCIPLE.

3. CONSEQUENTLY FORCE TOGETHER WITH SELF-DETERMINATION AND PERHAPS NON-INTERVENTION WILL BE SUBJECT TO DISCUSSION IN 1968 COMMITTEE IN NEW YORK IN SEPT. IF POSSIBLE THEREFORE AND IN COMPANY WITH OTHER WESTERNERS YOUR EFFORTS SHOULD BE DIRECTED TOWARDS PREVENTING THE SUCCESS OF ANY ATTEMPT TO WIDEN EFFECTIVELY THE DEFINITION OF FORCE BEYOND ARMED FORCE AT LEAST BEFORE FRIENDLY RELATIONS COMMITTEE HAS CONCLUDED ITS WORK. IN FRIENDLY RELATIONS CONTEXT CANADA HAS ALWAYS FIRMLY RESISTED ANY SUGGESTION OF A WIDER DEFINITION FOR FORCE THAN CAN BE REASONABLY CONSTRUED FROM CHARTER LANGUAGE. AS A GUIDE FOR YOUR POSSIBLE USE THE FOLLOWING IS PART OF STATEMENT BY CDN REP. (MILLER) IN 1967 FRIENDLY RELATIONS COMMITTEE.

4. TEXT BEGINS QUOTE WITHOUT A DOUBT, THE PRINCIPLE PROHIBITING THE THREAT OR USE OF FORCE DERIVES DIRECTLY FROM ARTICLE 2 OF THE CHARTER. AS SUCH, IT EMBRACES ALL THE VARIOUS INTERPRETATIONS WHICH MAY BE JUSTIFIABLY ASCRIBED TO THAT CHARTER ARTICLE, INCLUDING A DEFINITION OF THE TERM QUOTE FORCE UNQUOTE ITSELF. IN STUDYING THIS MATTER CLOSELY OVER THE YEARS AND IN REFERRING FOR GUIDANCE TO MANY OF THE LEGAL AUTHORITIES WHO HAVE ALREADY BEEN QUOTED IN THIS DEBATE, MY DELEGATION IS PERSUADED THAT THE TERM QUOTE FORCE UNQUOTE, AS USED IN THE CHARTER, NOT ONLY IN THE ISOLATION OF ARTICLE 2(4) BUT THROUGHOUT THE CHARTER, MUST BE READ TO MEAN ARMED OR AT BEST PHYSICAL FORCE. TO ARGUE OTHERWISE IS IN EFFECT TO SEEK TO AMEND CHARTER LANGUAGE AS USED BY THE FRAMERS BY RESORT TO INTERPRETATIONS NOT BORNE OUT OR SUBSTANTIATED EITHER BY THE WORDS USED IN THE CONTEXT IN WHICH THEY ARE TO BE FOUND IN THE CHARTER OR BY THE OVERWHELMING EVIDENCE OF HISTORY AND THE PREPONDERANCE OF INTERNATIONAL LEGAL OPINION.

AN ACCEPTANCE OF THIS FACT DOES NOT LEAD ONE TO CONCLUDE, HOWEVER, THAT ALL OTHER FORMS OF FORCE OR COERCION ARE CONDONED BY THE CHARTER. FAR FROM IT. THE RESORT TO PRESSURE OF AN ECONOMIC, AND I MIGHT EMPHASIZE POLITICAL AND CULTURAL, CHARACTER MAY MORE PROPERLY BE DESCRIBED AS INTERVENTIONS WHEN THEY ARE CONDUCTED BY ONE STATE, AND ITS LEADERS, AGAINST ANOTHER STATE. AS INTERVENTIONS THEY SHOULD AND CAN BE CONDEMNED AND PREVENTED WHENEVER AND WHEREVER THEY OCCUR. BUT, MR. CHAIRMAN, THEY SHOULD NOT, NOR CANNOT, IN THE OPINION OF MY DEL., BE GIVEN MORE NARROW DESCRIPTION OF FORCE, ESPECIALLY AS TO DO SO WOULD OF LOGICAL NECESSITY REQUIRE GIVING A CORRESPONDING WIDER AND PERFORCE LOOSER AND JUST AS UNACCEPTABLE DEFINITION TO THE RIGHTS OF A STATE OR A GROUP OF STATES TO LEGALLY COUNTERACT THE THREAT OR USE OF SUCH FORCE IN THE NAME OF SELF DEFENCE.

CANADA IS NOT INSENSITIVE TO THE LEGITIMATE CONCERN OF THOSE WHO FEAR ECONOMIC, POLITICAL OR OTHER DOMINATION BY OTHERS. OUR GEOGRAPHICAL AND GEOPOLITICAL SITUATION BETWEEN THE TWO MOST POWERFUL COUNTRIES ON EARTH SERVE AS A CONSTANT REMINDER TO BE ON GUARD AGAINST ANY FORM OF INTERVENTION WHICH THREATENS OUR POLITICAL INDEPENDENCE AND TERRITORIAL INTEGRITY. BUT WE, CANADIANS, ARE ALSO DEEPLY CONSCIOUS OF THE NECESSITY OF BEING CAREFUL IN DEFINING THE CHARTER NOT TO UNDERMINE ITS VERY FOUNDATIONS BY, SAY IN THIS INSTANCE, LAYING AT THE ALTAR OF PROGRESSIVE INTERNATIONAL LAW, LEGAL OFFERINGS OF DOUBTFUL ANCESTRY AND VALIDITY AND OF LESS THAN GENERAL ACCEPTANCE. IT IS THE CONSIDERED OPINION OF MY DELEGATION, THEREFORE, THAT ANY DEFINITION OF THE TYPE OF PRESSURES I HAVE BEEN REFERRING TO SHOULD BE BETTER LEFT TO THE PRINCIPLE ON NON-INTERVENTION. UNQUCTE. TEXT ENDS.

J.S.S. U.K. 2 May 1/68

SETTLEMENT OF DISPUTES

The following is an outline of possible machinery for settlement of Part V disputes:

(a) Objections to Article 62 notifications shall be communicated to the parties to the treaty and also to the Secretary-General of the United Nations.

(b) The parties shall thereupon seek a solution through the means indicated in Article 33 of the Charter.

(c) If the parties have been unable to agree upon any means of reaching a solution within two months following the raising of the objection, or if they have agreed upon any means of settlement other than adjudication or arbitration and that means of settlement has not led to a solution within six months after such agreement, either party may refer the dispute to the Secretary-General of the United Nations for settlement in accordance with the procedures indicated in the following paragraphs. (These procedures might be set out in an Annex to the Law of Treaties Convention.)

(d) A Conciliation Commission shall be established consisting of 15-25 highly qualified jurists representing the principal legal systems of the world and also selected so as to have regard to the need for equitable geographical distribution. Members of the Commission shall be appointed by the Secretary-General, on the nomination of States, for fixed, but renewable, terms. Subject to the approval of the General Assembly the Commission should be constituted as an organ of the United Nations and authorised to request advisory opinions from the I.C.J.

(e) Where a dispute is referred to the Secretary-General for

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settlement, and unless the parties agree that the full Commission shall consider the dispute, a sub-commission shall be appointed within 60 days consisting of one member appointed by each party to the dispute from among the members of the Commission who do not possess its nationality, one member appointed by each party who possesses its nationality (from outside the membership of the Commission where necessary) and a chairman (not possessing the nationality of either party) appointed by the other members of the sub-Commission from among the members of the Commission. If any appointment is not made within the period of 60 days the appointment should be made by the Secretary-General of the United Nations or in the case of the Chairman by the Commission as a whole.

(f) The Commission and any sub-commission so constituted shall establish its own procedure. Decisions of the Commission and of the sub-commission shall be taken by majority vote. The Secretary-General shall provide to the Commission or the sub-commission such assistance and facilities as it may require.

(g) The Commission or the sub-commission, as the case may be, shall be obliged to report within [6/9] months of its appointment. Reports should be transmitted to the Secretary-General and the parties. If the Commission or the sub-commission has succeeded in effecting a friendly solution, the report should be confined to a brief statement of the facts and the solution reached. If the Commission or the sub-commission has not succeeded in effecting a friendly solution, its report shall deal fully with the factual and legal elements of the dispute.

(h) If no solution has been reached within the [6/9] month time

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limit the Commission may, unless a party to the dispute objects thereto, request an advisory opinion from the I.C.J. on any legal question relating to the interpretation or application of any of the Articles contained in Part V of the present Convention which may have arisen in the course of their consideration of the dispute.

(i) If the Commission does not request an advisory opinion, or if it requests an advisory opinion and that opinion does not result in a friendly solution being reached between the parties within [3] months of the opinion being given, either party may submit to an arbitral tribunal for decision any question relating to the interpretation or application of any of the Articles contained in Part V of the present Convention which has remained unresolved. The arbitral tribunal should consist of one member appointed by each party to the dispute and a chairman chosen by common agreement between the parties or, in default of common agreement, by the President of the I.C.J. The decision of the tribunal will be binding upon the parties.

(j) It should be made clear in Article 62 that pending settlement of the dispute, and subject to any provisional measures agreed to by the parties or ordered by the arbitral tribunal, the party claiming that a treaty is void or alleging a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty should not take any measure contrary to the provisions of the treaty.

(k) As an exception to (j), it should be provided that a party alleging material breach may, on the expiry of three months

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from the giving of an Article 62 notification, suspend the operation of the treaty wholly if the effect of the alleged breach is to frustrate the object and purpose of the treaty; otherwise it may suspend the operation only of the provisions allegedly breached or of other provisions the performance of which is directly related to or dependent upon the performance of the provisions allegedly breached.

(l) A saving clause (based on paragraph 4 of Article 62) would be required to preserve the rights and obligations of the parties under any provisions in force binding them with regard to the settlement of disputes.