20-3-1-6 [PT.1.2]

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REFERENCE: LE 130 (1-2)

19 April 1965

Sir,

I have the honour to acknowledge the receipt of your letter of 7 April 1965, transmitting the observations of Canada on Part II of the Draft Articles on the Law of Treaties prepared by the International Law Commission. These observations have been sent to the Commission's Special Rapporteur on the Law of Treaties, and will be published in an addendum to the document (A/CN.4/175) containing the comments of other Governments.

Accept, Sir, the assurances of my highest consideration.

Constantin A. Stavropoulos
Under-Secretary
Legal Counsel

Mr. M. Cadieux
Under-Secretary of State
for External Affairs
Department of External Affairs
East Block
Ottawa, Ont., Canada

Legal/A.W.J.Robertson/lmj

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: Memorandum to the File

FROM / De: Treaties Section, Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties - 4th Report of Sir Humphrey Waldock

SECURITY / Sécurité: Unclassified

DATE: April 9, 1965

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6 ~~23-1-6~~
MISSION	21 —

ENCLOSURES / Annexes:

DISTRIBUTION

I spoke to Miss McPherson in New York concerning Sir Humphrey Waldock's 4th Report (ACN.4/177 and Add 1 of March 19/65).

2. Miss McPherson, after consultation with the Secretariat, informed me that it is expected that Sir Humphrey will submit comments on Part II of the Draft Law of Treaties either late in May or in June, and that these will be printed by the United Nations office in Geneva.

A. W. J. Robertson

000224

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

NINETEETH SESSION
SIXTH COMMITTEE
PROVISIONAL AGENDA
ITEM 79

CHAPTER VI - 3

CONFIDENTIAL

GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS: REPORT OF THE SECRETARY-GENERAL

Background References

General Assembly Resolution 1903 (XVIII) of November 18, 1963.

Issues Facing the Session

In its commentary on the first series of draft articles on the law of treaties, the International Law Commission drew attention to the problem of accession of new states "to general multilateral treaties concluded in the past, whose participation clauses were limited to specific categories of states". In the Sixth Committee at the seventeenth session, a resolution was introduced which in summary authorized the Secretary-General to receive instruments of acceptance to such treaties, if a majority of parties to any given treaty had not objected to it being opened, from any member state of the United Nations or of a specialized agency. It also recommended that the parties recognize the legal effect of such instruments of acceptance. Certain reservations to this procedure were expressed in the Committee, primarily on the grounds that what was involved was an amendment of the treaties and that for reasons of international and constitutional law, consent to such an act could not be given informally, tacitly, or by mere failure to object. Some representatives therefore suggested another procedure, used on a number of previous occasions, of drawing up protocols of amendment. The Committee then decided to refer the matter to the International Law Commission for study and report.

The Commission concluded from its study of the question that both procedures, i.e. that set out in the draft resolution and the protocol of amendment, had advantages and disadvantages, and the Commission did not feel called upon to express a preference between them from the point of view of domestic law. The Commission noted however, that in 21 of the 26 treaties concerned (participation in the other five was limited to states invited to the conferences which drew up the treaties) the participation clauses were so formulated as to open the treaty to participation by any member of the League, and any additional states to which the Council of the League transmitted a copy of the treaty for that purpose. As a third alternative, the Commission accordingly suggested that, in the light of the arrangements made on the occasion of the dissolution of the League and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly could designate the Secretary-General to assume the powers which under the participation clauses of the treaties in question were formerly exercisable by the Council of the League. This proposal, the Commission felt, would provide "a simplified and expeditious procedure

for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League". The Commission also suggested that many of the treaties in question might no longer hold any interest for states. It further suggested that the General Assembly should initiate an examination of the treaties in question with a view to determining what action might be necessary to adapt them to contemporary conditions.

When this item was discussed at the eighteenth session, a bitter controversy arose over the issue of which states should be invited to accede to the treaties in question and, as a result, the relevant resolution which emanated from the Committee failed to rally unanimous support. It was adopted by 79 votes to none with 22 abstentions.

In the subsequent debate in plenary on November 18, 1963, the "all states versus member states" controversy developed into a test of strength and prestige in anticipation of the main item, Friendly Relations. The Soviet Bloc made a very strong bid to gain acceptance of the all-states formula which would have permitted accession by such entities as East Germany and Communist China, and in doing so they invoked in particular the need for universality, Article 8 of the draft Law of Treaties prepared by the International Law Commission, and the accession clause used in the 1963 Limited Nuclear Test Ban Treaty. The Secretary-General himself intervened in the debate, stating that it would not be administratively possible for him to operate on the basis of the "all-states" formula, and in the end a majority was secured for Resolution 1903 (XVIII) which incorporated the so-called "Vienna" formula, restricting participation in such treaties, in addition to member states, to any non-member states to which an invitation is addressed by the General Assembly.

In this same resolution the Secretary-General was asked inter-alia, to bring the treaties in question to the notice of those states which would be eligible to accede to them, to look into the question whether any of the treaties in question had ceased to be in force, were superseded or would no longer be of interest, and to report on these matters to the forthcoming session.

The Sixth Committee will therefore have before it the Secretary-General's report on this subject, which has not yet been released.

Likely Courses of Action and Attitudes of Interested Parties

It is not possible to anticipate the Secretary-General's Report in detail but it is unlikely that there will be anything in it of a controversial nature. The Soviet Bloc may, however, make a new bid for the acceptance of the all-states formula, depending on the evolution of the question of representation of China.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: MEMORANDUM TO THE UNDER-SECRETARY (through Mr. M. H. Wershof)

FROM / De: LEGAL DIVISION

REFERENCE / Référence: Our Memo of March 4, 1965

SUBJECT / Sujet: Canadian Commentary on Part II of the I.L.C. Draft Law of Treaties

SECURITY / Sécurité: RESTRICTED

DATE: April 2, 1965

NUMBER / Numéro:

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

ENCLOSURES / Annexes: 4

DISTRIBUTION

Since other countries did not comment on a number of matters connected with Part II of the Draft Law of Treaties, we think we should do so. Due both to the changeover in the personnel of our treaty section last summer and to the fact that a letter of July 3, 1964 from the Legal Counsel of the United Nations asking for comments on Part II of the Draft Law of Treaties, which had been b.f.'d for early autumn, was misfiled, we did not (as you are aware) prepare written comments on this second part for submission to the United Nations prior to the December 31, 1964 deadline. However, our comments on Part I of the Draft Law of Treaties were themselves submitted some two months in arrears, and we have been given to understand that Mr. Stavropoulos would welcome our comments at this stage.

-- 2. We therefore attach for your consideration a draft letter to Mr. Stavropoulos together with a set of draft comments which, in our opinion, cover those points in Part II which seem to be worth bringing to the attention of the Commission, and which have not been dealt with in the comments submitted by other countries and set out in A/CN.4/175 and add 1 of 23 II.65.
-- We also attach the Report of the I.L.C. on the work of its 15th Session and a copy of the documents referred to.

3. As was the case last time these comments have been drawn up on the assumption that, since the task of codifying the Law of Treaties is not one in which national interests play a major role (except insofar as the project may be used by the Communist Bloc members to advance special objectives) it would be inappropriate for states to enter into a doctrinal dispute with the Commission unless clear national interests were involved. Because, in addition, the draft articles covered by Part II were the result of considerable give and take at the 15th Session of the International Law Commission and were, in almost every case, arrived at either unanimously or with only one vote against them or one abstension, these draft observations have been kept to a minimum. Canada's interest, it would

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

6.4.1(s)

seem, continues to be that the Law of Treaties should, as far as possible, be certain and readily discernable. The Commission's study is clearly fulfilling these objectives since the International Law Commission project has provided both an opportunity to compile a most useful body of material on existing law and practice, and an opportunity to develop the law along progressive lines to reflect changing postwar practices. Our chief intention in preparing these comments, which have been drawn up after a study both of the original material, that prepared for and considered by the Legal Planning Committee in April, 1963 (prior to the 15th Session of the I.L.C.), your report on that Sessioh, and other comments submitted to date, is to assist the Commission in its work by seeking to avoid any lacunae or inconsistencies in the Law of Treaties.

4. In the attached comments, which you will note relate only to three articles, we have in each case referred to the particular article in question and followed this by the commeht which we would propose to make. We have also included for your own consideration (but not for reproduction in the comments we would propose to submit) an explanatory section setting out our reasons for proposing the comment in question.

R P Gotlieb

Legal Division

Policy Considerations Involved for Canada

It is in Canada's interest to continue to support the policy set out in paragraph 1 of Resolution 1903 (XVIII) - the traditional U.N. formula on the question of participation in treaties or multilateral conferences - and to try to ensure that it is not eroded.

Instructions

The Canadian Delegation should accordingly try to ensure that, in any further discussion about what states may accede to the treaties in question, the status quo remains unchanged.

Canadian Comments on Draft Articles
Drawn up by the International Law
Commission at its 15th Session

Article 40: Termination or suspension of the Operation of Treaties by Agreement.

Comment: In Clause 2 of this Article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in Article 9, it be from the date of adoption, (i.e. that it be from the time the Treaty in question has been opened for signature).

It is to be noted that in Article 9 of Part I of the Draft Law of Treaties, drawn up at the 14th Session of the International Law Commission, in Clause 1(a) and Clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on Clause 2 of Article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years (A/CN.4/156/add 1 of April 10, 1963, p.30). This would seem a reasonable choice.

Article 42: Termination or Suspension of the Operation of a Treaty as a consequence of its breach.

Comment: Article 42, in its present version, does not provide for a right, where there is a material breach of a treaty, of another party unilaterally (and not merely by common and perhaps even unanimous agreement with the other parties) to withdraw from the Treaty in question. Instead it would appear, from the Commission's commentary on the provision in question, that the members considered that a right of suspension provided adequate protection to a state directly affected by such a breach.

The implication of the present draft rule, set out in Article 42.2(a), as regards multilateral treaties of a sort under which the states party agree to refrain from some action or other, is that in the case of a flagrant violation by one party no other party would have any recourse on its own. That is because it could not suspend its obligations vis-à-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties.

Since it would appear desirable that the provisions of the draft Law of Treaties be of such a nature that they not only attract the widest possible support but are also as widely observed as possible, consideration might be given to amending Article 42 in such a way that, where there has been a violation of a Treaty of the sort discussed above, the legitimate right of suspension of an individual party need not depend on a consensus but may be exercised ergo omnes.

...2/

Both the present Rapporteur, Sir Humphrey Waldock, and the previous Rapporteur, Sir Gerald Fitzmaurice, in their draft articles on this matter, provided that in the case where one party were to commit a general breach of such a treaty it would be open to individual states unilaterally to withdraw from it. Sir Gerald Fitzmaurice, recommended that "if a party commits a general breach of the entire treaty in such a way as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation" (1)

Sir Humphrey Waldock, in his commentary on his draft article 20.4(b) mentioned that its intention was to cover "cases such as these where the defaulting of a key state or a number of states go far to undermine the whole treaty regime...it seems desirable that individual parties should also have the right, not merely of terminating their treaty relation with the defaulting state, but withdrawing altogether from the treaty". (2)

In the draft amendment which Mr. Erik Castrén proposed to the present Rapporteur's draft of this Article, at the 15th Session of the I.L.C., he too provided for a right of unilateral withdrawal, under certain circumstances, on the following terms:

> "2(b) in the relations between itself and the other parties, withdrawalfrom the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty".

Article 44: Rebus sic stantibus
Fundamental change of circumstances.

Comment: The exclusion establ shed under Section 3(a) of this Article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formulated without the I.L.C. having taken into consideration such treaties (if any) under which a boundary has been established by reference to a thalweg. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could indeed radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that Article 44, 3(a), should be modified to cover such a case.

The modification might be along the following lines:

> To a treaty fixing a boundary, except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurrence; or".

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(1) ILC Year Book, p.31, Vol. II, Draft Article 19.1(iii)

(2) A/CN.4/156 add 1, p.48.

Diary
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File

Copy for Permis Evans
done 8/4/65 m.t.

20-3-1-6
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RETURN TO LEGAL DIV. DCO

April 7, 1965.

Sir:

I have the honour to refer to your letter LE130(1-2) dated July 3, 1964 concerning any observations which my Government might wish to make on Part II of the Draft Articles on the Law of Treaties prepared by the International Law Commission at its 15th Session in 1963. I regret the delay in answering your letter.

As requested I am enclosing the comments of the Canadian Government on this part of the draft. These comments have been limited to matters not dealt with in those comments published in A/CN.4/156 of 23.II.65.

Accept, Sir, the renewed assurances of my highest consideration.

M. CADIEUX

Under-Secretary of State
for External Affairs

Constantin A. Stavropoulos, Esq.,
Legal Counsel of the United Nations,
New York.

7.4.74(us)

M. Wershof
diary
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EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

MEMORANDUM TO THE UNDER-SECRETARY
(through Mr. M. H. Wershof)

TO / À: LEGAL DIVISION

FROM / De:

REFERENCE / Référence: Our Memo of March 4, 1965

SUBJECT / Sujet: Canadian Commentary on Part II of the I.L.C. Draft Law of Treaties

SECURITY / Sécurité: RESTRICTED

DATE: April 2, 1965

NUMBER / Numéro:

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

ENCLOSURES / Annexes: 4

DISTRIBUTION

Copy to Pomis, Geneva, pls
Done CWR 8/4/65

Since other countries did not comment on a number of matters connected with Part II of the Draft Law of Treaties, we think we should do so. Due both to the changeover in the personnel of our treaty section last summer and to the fact that a letter of July 3, 1964 from the Legal Counsel of the United Nations asking for comments on Part II of the Draft Law of Treaties, which had been b.f.'d for early autumn, was misfiled, we did not (as you are aware) prepare written comments on this second part for submission to the United Nations prior to the December 31, 1964 deadline. However, our comments on Part I of the Draft Law of Treaties were themselves submitted some two months in arrears, and we have been given to understand that Mr. Stavropoulos would welcome our comments at this stage.

2. We therefore attach for your consideration a draft letter to Mr. Stavropoulos together with a set of draft comments which, in our opinion, cover those points in Part II which seem to be worth bringing to the attention of the Commission, and which have not been dealt with in the comments submitted by other countries and set out in A/CN.4/175 and add 1 of 23 II.65. We also attach the Report of the I.L.C. on the work of its 15th Session and a copy of the documents referred to.

3. As was the case last time these comments have been drawn up on the assumption that, since the task of codifying the Law of Treaties is not one in which national interests play a major role (except insofar as the project may be used by the Communist Bloc members to advance special objectives) it would be inappropriate for states to enter into a doctrinal dispute with the Commission unless clear national interests were involved. Because, in addition, the draft articles covered by Part II were the result of considerable give and take at the 15th Session of the International Law Commission and were, in almost every case, arrived at either unanimously or with only one vote against them or one abstension, these draft observations have been kept to a minimum. Canada's interest, it would

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

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4. In the attached comments, which you will note relate only to three articles, we have in each case referred to the particular article in question and followed this by the comment which we would propose to make. We have also included for your own consideration (but not for reproduction in the comments we would propose to submit) an explanatory section setting out our reasons for proposing the comment in question.

A. E. GOTLIEB

Legal Division

Legal/A.W.J.Robertson/ts/lmj

DRAFT

Ottawa, April 2, 1965

Sir:

I have the honour to refer to your letter LE130(1-2) dated July 3, 1964 concerning any observations which my Government might wish to make on Part II of the Draft Articles on the Law of Treaties prepared by the International Law Commission at its 15th Session in 1963. I regret the delay in answering your letter.

As requested I am enclosing the comments of the Canadian Government on this part of the draft. These comments have been limited to matters not dealt with in those comments published in A/CN.4/IFS of 23.II.65.

Accept, Sir, the renewed assurances of my highest consideration.

Yours sincerely

Under-Secretary of State
for External Affairs.

Constantin A. Stavropoulos, Esq.,
Legal Counsel of the United Nations
New York

D R A F T

Canadian Comments on Draft Articles
Drawn Up By The International Law
Commission at its 15th Session

Article 40: Termination or Suspension of the Operation of Treaties by Agreement

(1). A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) In an instrument drawn up in whatever form the parties shall decide;
(b) In communications made by the parties to the depository or to each other.

(2). The termination of a multilateral treaty unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two-thirds of all the States which drew up the treaty; however, after expiry of ..... years the agreement only of the States parties to the treaty shall be necessary.

(3). The foregoing paragraphs also apply to the suspension of the operation of treaties."

Comment In clause 2 of this article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in article 9, it be from the date of adoption, (i.e. that it be from the time the treaty in question has been opened for signature).

It is to be noted that in Article 9 of Part I of the Draft Law of Treaties, drawn up at the 14th Session of the International Law Commission, in clause 1(a) and clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on clause 2 of Article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years (A/CN.4/156/add 1 of 10th April, 1963, p. 30). This would seem a reasonable choice.

- - - -

/Explanation for Mr. Cadieux- Article 9.1(a) refers inter alia to the opening of a multilateral treaty to the participation of additional states by the subsequent consent of two-thirds of the parties to it, provided that a certain (so far unspecified) number of years have elapsed since the date of its adoption. Article 9.2 refers to participation in a more limited type of multilateral treaty under similar conditions. Since

both these articles and article 40 are concerned with a lapse of time beyond which only states party to a treaty would have the right to be consulted on changes to the treaty regime, it would seem logical that the same period of time be used in each case. Whether the ten years proposed by Sir Humphrey Waldock is acceptable, or whether a shorter period (of 5 years) would be preferable could presumably remain open for discussion. It can be argued objectively that the shorter period would be more appropriate. The fact of a state having participated in the drawing up of a treaty ought not to enable it to object, for more than a reasonable period, to states which have in fact become parties taking decisions regarding the status of the agreement. A reasonable time would be that length of time which would in the normal course be required to fulfill domestic preconditions for ratification or accession. In our own case this could be long drawn out so that a ten year period might suit our particular interests. Australia, in its comments on this article (ACN 4/175, page 11) suggested twenty-five years, but the concensus would seem to favour between five and ten. Canada did not comment on this aspect of Article 9 last year.7

- - - -

"Article 42: Termination or Suspension of the Operation of a Treaty as a Condequence of its breach

(1). A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

(2). A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
(b) The other parties by common agreement either:
  (i) To apply to the defaulting State the suspension provided for in subparagraph (a) above; or
  (ii) To terminate the treaty or to suspend its operation in whole or in part.

(3). For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or
(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

... 3

(4). The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

(5). The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach."

Comment Article 42, in its present version, does not provide for a right, where there is a material breach of a treaty, of another party unilaterally (and not merely by common and perhaps even unanimous agreement with the other parties) to withdraw from the treaty in question. Instead it would appear, from the Commission's commentary on the provision in question, that the members considered that a right of suspension provided adequate protection to a state directly affected by such a breach.

The implication of the present draft rule, set out in article 42.2(a), as regards multilateral treaties of a sort under which the states party agree to refrain from some action or other, is that in the case of a flagrant violation by one party no other party would have any recourse on its own. That is because it could not suspend its obligations vis-a-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties.

Since it would appear desirable that the provisions of the draft Law of Treaties be of such a nature that they not only attract the widest possible support but are also as widely observed as possible, consideration might be given to amending article 42 in such a way that, where there has been a violation of a treaty of the sort discussed above, the legitimate right of suspension of an individual party need not depend on a consensus but may be exercised ergo omnes.

Both the present Rapporteur, Sir Humphrey Waldock, and the previous Rapporteur, Sir Gerald Fitzmaurice, in their draft articles on this matter, provided that in the case where one party were to commit a general breach of such a treaty it would be open to individual states unilaterally to withdraw from it. Sir Gerald Fitzmaurice recommended that "if a party commits a general breach of the entire treaty in such a way as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation." (1)

Sir Humphrey Waldock, in his commentary on his draft article 20.4(b), mentioned that its intention was to cover "cases such as these where the defaulting of a key state or a number of states go far to

... 4

(1) ILC Year Book, p. 31, Vol. II, Draft article 19.1(iii).

undermine the whole treaty regime .... it seems desirable that individual parties should also have the right, not merely of terminating their treaty relation with the defaulting state, but withdrawing altogether from the treaty." (2)

In the draft amendment which Mr. Erik Castrein proposed to the present rapporteur's draft of this article, at the 15th Session of the I.L.C., he too provided for a right of unilateral withdrawal, under certain circumstances, on the following terms:

> "2(b) in the relations between itself and the other parties, withdrawn from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty".

- - - -

/Explanation Under article 42 in its present form, if there were to be a violation of a disarmament treaty or the partial Nuclear Test Ban Treaty (i.e. in that a given state were to resume testing) it would appear that any other nuclear power would be entitled only to suspend the performance of its obligations vis-a-vis the violator but, unless there were to be a unanimous agreement among all the parties to the treaty to terminate or suspend it, that it would continue to be bound by the prohibition in the treaty vis-a-vis all the other parties. It is apparent that a violation of such treaties by one member (if a major power) would almost certainly lead to further violations by other major powers if they felt their national interests threatened. (3) In order to preserve the stability of treaty law it would therefore seem desirable to provide for a right of legal withdrawal from such treaties that would not be dependent upon unanimity.

In this respect the previous Special Rapporteur, Sir Gerald Fitzmaurice, treated the question of the termination or suspension of the operation of a treaty (as a consequence of its breach) in a somewhat different fashion than did Sir Humphrey Waldock. In his approach he distinguished between multilateral treaties involving absolute or independent objectives (i.e. those of a general law-making character) and other multilateral treaties involving objectives which are essentially of a reciprocal character (i.e. disarmament treaties). In instances

... 5

(2) A/CN-4/156/add 1, p. 48.

(3) Cf. Sir Gerald Fitzmaurice, Second Report on Law Treaties (A/CN/4, 107, March 15, 1957); ILC Year Book 1957, Vol. II, p. 54:
"The obligation of each party to disarm nor not to exceed a certain level of armaments or not to possess certain types of weapons is necessarily dependent on a corresponding performance of the same thing by all the other parties since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others".

where a treaty was essentially reciprocal in character, even though multilateral in form, Sir Gerald would have allowed a party to withdraw from it if any other party had committed a general breach. (4)

Although he approached the matter somewhat differently, Sir Humphrey Waldock would seem to have agreed with Sir Gerald on this particular point. "Good sense and equity rebel at the idea of a state being held to the performance of its obligation under a treaty which the other contracting party is refusing to accept". (5)

He therefore provided for this in his draft article 20, 4(b) which read as follows:

> "the other parties to the treaty, by an agreement arrived at in accordance with the provisions of Article 18 of this Part, may collectively either
> (i) terminate the treaty or suspend its application; or
> (ii) terminate or suspend the application only of the particular provision which has been broken.
> Provided that, if a material breach of a treaty by one or more parties is of such a kind as to frustrate the object and purpose of the treaty also in the relations between the other parties not involved in the breach, any such other party may, if it thinks fit, withdraw from the treaty." (6)

From the summary records of the 15th Session (7) it is clear that Article 42 (which was discussed at the 691st, 692nd, 693rd, 709th and 717th meetings of the Commission) caused more difficulties than almost any other article in the second part of the draft; and further, that individual members of the commission altered their attitudes to this matter as the various drafts were developed. Not even on the article in its present form, on which there were originally five abstentions, was there much of a consensus.

As it appears clear from your own comments on this article (page 21 of your Report on the 15th Session) that the suspension or termination of the whole treaty, in the case of such a violation, under article 42, was intended only to be by unanimous decision, and that there was to be no right of unilateral withdrawal, it would seem that this aspect of the matter should be clearly pointed out.

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(4) Cf. ILC Year Book 1957, Vol. 2, p. 31.

(5) Second Report A/CN/4/156 add. 1, April 10, 1963, p. 37.

(6) A/CN.4/156/add. 1, page 36, Article 20(b).

(7) 1963 ILC Yearbook, Vol. I.

However, at the 18th Session of the General Assembly, when the 6th Committee discussed the draft Law of Treaties, hardly any members referred to Article 42, even en passant. Mr. Plimpton, the United States representative, did propose an amendment to part two of the article, which he prefaced by remarking that while

> "The principle laid down in draft article 42, paragraph 1, was sound and should be crystallized as a rule of conventional law, paragraph 2, however, appeared to some extent to disregard the varied nature of multilateral treaties. It could be applied to a law-making treaty on such a subject as disarmament, whose observance by all parties was essential to its effectiveness, but his delegation doubted that the paragraph should apply equally to a multilateral treaty like the Vienna Convention oh Consular Relations, which was essentially bilateral in application. It was to be hoped that the Commission and Governments would give the question careful study. The termination or suspension of multilateral treaties should be governed by the rule applicable to bilateral treaties: an injured party should not be required to continue to accord rights illegally denied to it by the offending party." (8)

Taken from the summary record, his amendment read as follows:

> "2(a) Any other party, <u>whose rights or obligations</u> are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;" and the opening words of sub-paragraph 2(b) should be amended to read:
>
> "(b) The other parties <u>whose rights or obligations are adversely affected by the breach</u>, either:" (8)

The significance of the amendment proposed by the U.S. is not clear to us, though it would in any event appear at least to limit the need for a consensus to those states "whose rights or obligations are adversely affected" by any particular breach. It does not, however, seem to provide for unilateral withdrawal. Nor has any other state offered comments directly on this point to date.

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<u>"Article 44</u>: Rebus sic stantibus
Fundamental change of circumstances.

(1). A change in the circumstances existing at the time when the treaty

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(8) A/C.6/SR. 784 (English) page 10.

was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

(2). Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and
(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

(3). Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or
(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

(4). Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only."

Comment The exclusion established under section 3(a) of this article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formulated without the ILC having taken into consideration such treaties (if any) under which a boundary has been established by reference to a thalweg. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could, indeed, radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that article 44, 3(a), should be modified to cover such a case.

The modification might be along the following lines:

"To a treaty fixing a boundary, except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurence; or".

Explanation Although this is perhaps a minor and somewhat academic point to make, nevertheless we thought we should bring it to the attention of the Commission.

Legal/A.W.J. Robertson/eg

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

20-3-1-6
25-1

TO / À: MEMORANDUM TO FILE: 20-3-1-6

SECURITY / Sécurité: CONFIDENTIAL

DATE: February 26, 1965.

FROM / De: Legal Division

NUMBER / Numéro:

REFERENCE / Référence:

SUBJECT / Sujet: ILC Draft Law of Treaties: Comments on Member-States.

FILE	DOSSIER
OTTAWA	20-3-~~40~~-1-6
MISSION	

ENCLOSURES / Annexes:

DISTRIBUTION:

I spoke to Miss MacPherson in New York today in order to ascertain whether the Secretariat had yet published any of the comments which they might have received from member states on Part II of the draft Law of Treaties.

Miss MacPherson informed me that the comments received so far are at present being printed, and that it is hoped they will be distributed towards the end of next week under Document No. A/CN4/175. Our own comments which would be welcomed at any time, could be issued as an addendum.

Miss MacPherson asked that we send three copies of our comments -- one of which the Mission would retain and two of which they would forward to the Legal Counsel.

A.W.J. Robertson
Treaty Section.

000243

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

UNITED NATIONS

SECURITY COUNCIL

GENERAL

S/PV.1096
19 February 1964

ENGLISH

pocket of 20-3-1-64

VERBATIM RECORD OF THE ONE THOUSAND AND NINETY-SIXTH MEETING

Held at Headquarters, New York,
on Wednesday, 19 February 1964, at 3 p.m.

President:	Mr. BERNARDES	Brazil
Members:	Bolivia	Mr. CASTRILLO JUSTINIANO
	China	Mr. C. LIU
	Czechoslovakia	Mr. HAJEK
	France	Mr. SEYDOUX
	Ivory Coast	Mr. USHER
	Morocco	Mr. BENHIMA
	Norway	Mr. NIELSEN
	Union of Soviet Socialist Republics	Mr. FEDORENKO
	United Kingdom of Great Britain and Northern Ireland	Sir Patrick DEAN
	United States of America	Mr. STEVENSON

This record contains original speeches and interpretations. The final text, containing translations, will be distributed as soon as possible.

Corrections should be submitted to original speeches only. They should be sent in duplicate, within two working days, to the Chief, Meetings Service, Office of Conference Services, Room 1104, incorporated in mimeographed copies of the record.

AS THIS RECORD WAS DISTRIBUTED ON 20 FEBRUARY 1964,
THE TIME-LIMIT FOR CORRECTIONS WILL BE 25 FEBRUARY 1964.

Publication of the final printed records being subject to a rigid schedule, the co-operation of delegations in strictly observing this time-limit would be greatly appreciated.

64-03675

ADOPTION OF THE AGENDA

The agenda was adopted.

LETTER DATED 26 DECEMBER 1963 FROM THE PERMANENT REPRESENTATIVE OF CYPRUS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL (S/5488):

(a) LETTER DATED 15 FEBRUARY 1964 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED KINGDOM ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL (S/5543)

(b) LETTER DATED 15 FEBRUARY 1964 FROM THE PERMANENT REPRESENTATIVE OF CYPRUS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL (S/5545) (continued)

The PRESIDENT: In accordance with previous decisions taken by the Security Council, I shall invite the representatives of Cyprus, Turkey and Greece to participate in our consideration of the question.

At the invitation of the President, Mr. Kyprianou, representative of Cyprus, Mr. Menemencioglu, representative of Turkey, and Mr. Bitsios, representative of Greece, took places at the Security Council table.

The PRESIDENT: The Council will now proceed to consider the question on its agenda. The first speaker inscribed on my list for this meeting is the representative of the Soviet Union, on whom I now call.

Mr. FEDORENKO (Union of Soviet Socialist Republics)(interpretation from Russian): The Security Council today is continuing consideration of the item dealing with the tense situation around Cyprus, which has been renewed as a result of a new and more serious series of events in that region. At the present time we are dealing with a direct threat of military agression against Cyprus, a direct infringement upon the freedom and independence and territorial integrity of the Republic of Cyprus, a Member of the United Nations. There is concentrated in the region of Cyprus a considerable number of armed forces of the Powers of the military bloc of NATO, and the purposes of that concentration are, of course, all too clear to all.

(Mr. Fedorenko, USSR)

In a letter from the Permanent Representative of Cyprus to the President of the Security Council, dated 15 February, the following is stated:

"The increasing threat from war preparations on the coast of Turkey opposite Cyprus coupled with the declared intentions of the Turkish Government to interfere by force in Cyprus has made the danger of the invasion of the Island both obvious and imminent." (S/5545, para. 1)

In his statement in the Council yesterday afternoon, the Minister of Foreign Affairs of the Republic of Cyprus, Mr. Kypriancu, referred to the fact that opposite Cyprus a powerful Turkish force has been concentrated -- consisting of thirty-five warships, not to mention any other forces -- and at the same time he made public certain new official statements by members of the Turkish Government.

At the same time, in the letter from the Permanent Representative of the United Kingdom to the President of the Security Council, document S/5543, there is an attempt to utilize article 4 of the so-called Treaty of Guarantee to justify direct military interference in the domestic affairs of Cyprus by the United Kingdom.

In yesterday's statement in the Security Council by the representative of the United Kingdom, we heard nothing at all that resembled an assurance that military force would not be used against Cyprus. That question was also ignored by the representative of Turkey in his statement to the Council. Yet, the Security Council is within its rights in expecting a direct and unequivocal answer to that question. It is typical that everything we heard yesterday, on the contrary, only confirms the full validity of the fears felt by Cyprus. We are faced with a clear attempt by certain Powers of NATO, in contravention of the principles of the Charter of the United Nations and of universally recognized norms of international law, to force their will upon the people and Government of Cyprus.

The representative of the United Kingdom tried to create the impression that President Makarios of Cyprus is not interested in restoring peace in his country. That is an unnatural assertion, and it was quite rightly rejected by the Minister

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of Foreign Affairs of Cyprus, Mr. Kyprianou. Who, indeed, if not the Government of Cyprus itself, is interested in the elimination of the tension that has been created around Cyprus? Who knows better than the President of Cyprus, Archbishop Makarios, what is and what is not in conformity with the national interests of Cyprus?

As we see it, the inadmissible lecturing addressed to Cyprus may be explained by the fact that certain persons have not yet lost the habit of thinking in certain ancient ways. Quite typical in this regard is a sentence pronounced before the Council yesterday by our colleague from the United Kingdom, who said:

"Representatives here will be well aware that until 16 August 1960 Cyprus was a British Crown Colony."
(1095th meeting, p. 22)

But today it is appropriate to lay stress not upon what was, what has gone into the past, but upon what exists in fact. Today, Cyprus -- just like the United Kingdom itself -- is an independent sovereign State, a Member of the United Nations.

In the disquieting circumstances that have been created, the genuine reasons for the tension around Cyprus become all too clear. It was probably not by accident that the representative of the United Kingdom stated in the Council yesterday that he does not wish to "seek out the root causes", as he put it (1095th meeting, page 41), of the events that are taking place today. As was quite correctly pointed out yesterday by the Minister of Foreign Affairs of Cyprus, Mr. Kyprianou, the substance of the matter lies precisely in the fact that the present complications are simply symptoms of more deep-rooted causes and are their direct result. That is why it would be more correct to ascertain the causes of the disease, if I may put it that way, before suggesting methods of treatment.

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The real reason for the tension that has been created -- a reason which some are carefully trying to conceal -- is that the discord between the two communities in Cyprus that has been fomented from outside is being used as an excuse for unmasked interference by certain specific Powers in the internal affairs of the Republic of Cyprus. They are trying to force upon the people and Government of Cyprus a solution of the problem that is suitable to them and the countries of NATO, whereas solving the problem is in fact within the province of the Cypriots themselves.

In recent weeks the world has seen these Powers taking actions, one after the other, which constitute interference in the domestic affairs of Cyprus. This has provoked the legitimate indignation of the Republic of Cyprus and has been rejected by it. The legitimate indignation of the smaller countries is quite understandable, because the people of Cyprus, and only the people of Cyprus, have the right to decide how to solve their own domestic problems. There can be no doubt that the Cypriots are quite capable of managing their domestic affairs independently. This has been stated on several occasions by the Government of the Republic of Cyprus. The people of Cyprus are quite capable of finding a solution of their problem which would be most in conformity with their national interests.

Only yesterday, 18 February, the President of Cyprus, Archbishop Makarios, confirmed in an interview with a correspondent of the news agency, United Press International, that he is prepared to discuss with Turkish Cypriots all possible methods for guaranteeing their rights as a minority, subject to one condition -- namely, that the basis of a single, effectively functioning Cypriot Government is not undermined.

The truth is that if there had been no foreign interference in the domestic affairs of Cyprus, if the actions of certain specific Powers had not constituted a threat to the freedom, integrity and independence of Cyprus, there would have been no need for the Security Council to discuss the present question; that question would never have arisen.

We should also point out that the primary source of the present complications in the region of Cyprus lies in agreements which were not based on a foundation of equality and which were forced on that small country. This was very clearly stated in the letter of 1 January 1964 which the President of Cyprus,

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Archbishop Makarios, addressed to Heads of State and Government of the world. In that letter he stated that these unwelcome agreements are the source of the present abnormal situation in Cyprus. It is well known that the Cypriots themselves were not even allowed to participate in the Zurich and London talks in 1959 when the Constitution of Cyprus was drafted by foreigners and when foreigners laid the foundation of these unequal agreements, which were subsequently submitted to Cyprus in the form of an ultimatum. It is quite clear, therefore, as is pointed out in the above-mentioned letter of President Makarios, that these agreements were forced upon the people of Cyprus.

As is known, as a result of these unequal agreements there are at present on the territory of Cyprus military forces of three foreign Powers members of the NATO bloc and there are British foreign bases. The unprecedented infringement upon the sovereignty of Cyprus which has resulted in the maintenance of foreign military bases on its territory and the deployment on that island of thousands of soldiers, belonging to the armed forces of members of the NATO military bloc, has from the outset been aimed, and is still aimed, not at guaranteeing the independence of Cyprus, but at fulfilling purposes diametrically opposed to that. The dangerous actions of the NATO Powers in Cyprus are cynically and candidly aimed at destroying the independence of Cyprus, tying Cyprus to NATO and converting it into a NATO military bridgehead.

Recently matters reached a stage in which the foreign troops on Cyprus were redeployed, occupied military positions, entered into combat with each other, ignored the sovereign rights of Cyprus in various ways and in general behaved as though they were at a military station of NATO. All these flagrant violations of the independence of the Republic of Cyprus have been covered up by references to certain "rights" flowing from the unequal agreements which these Powers forced upon Cyprus earlier. But is it possible to interpret the sovereignty of a country as giving rights only to those who have greater strength and force? Is genuine independence the privilege of those who have great military strength? Is not the unconditional sovereignty of all countries one of the very bases of our Charter? The right to freedom and independence is a sacred right of all peoples and all States, large and small. No one has been given the right to act in the role of an international policeman and to direct troops to other countries for the purpose of interfering in their internal affairs as these troops see fit.

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All other attempts to justify such interference in one way or another are equally inconsistent. As members of the Council will recall, the representative of Turkey, for instance, tried some time ago to justify in the Security Council the violation of the air space of Cyprus by units of the Turkish air force; he said that this action had been taken by the Government of Turkey in order to ensure respect for the cease-fire agreement on Cyprus.

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Yesterday, as we heard, another Turkish representative gave a new explanation of this action and stated that the Turkish aircraft were simply making peaceful overflights above Cyprus, "urging the cessation of bloodshed on the island"; that, according to him, there was an "attempt to make a big story out of this". But is it permissible in general under any pretext whatsoever to permit penetration of the air space of another country? It is typical that when matters involve Turkey's own interests, it realizes full well the inadmissibility of the arrival of foreign aircraft of one country over the air space and over the country for any purpose whatsoever.

As was pointed out in the Press on 29 December of last year -- in other words, exactly two days after the representative of Turkey had justified the legality in the Security Council of the flight of Turkish aircraft over Cyprus -- the Minister of Foreign Affairs of Turkey had hastily called for explanations from the representative or Ambassador of the United Kingdom as a result of the fact that on that occasion United Kingdom Royal Air Force aircraft flew over the shores of Turkey itself. According to information from the Press, the Minister of Foreign Affairs of Turkey "demanded that an end be put to such flights by the aircraft of the Royal Air Force". Therefore, why is it possible to have an exception made in regard to Cyprus? On the basis of what right is a violation of its air space and of its sovereignty permitted?

In recent weeks, under the pretext of the need to restore order in Cyprus, new military forces were sent to that island in addition to those -- British, Turkish and Greek troops -- which were already present on the island and based there. An attempt was being made somewhere to create the impression that these troops were almost invited willingly to that island by the Government of Cyprus itself. But that version was soon unmasked.

The President of Cyprus, Archbishop Makarios, in a talk with a correspondent of the newspaper Le Monde, said:

> "Do you really think in this connexion that we had appealed for foreign troops? In fact, three Powers had placed us before a fait accompli. Their leaders had taken that decision and they had demanded from us that we invite them to interfere; we had no choice."

(Mr. Fedorenko, USSR)

Thus, the transfer to Cyprus of new military forces is in fact a new and flagrant infringement of the sovereignty of Cyprus. During that same interview that was published in Le Monde on 10 January of this year, President Makarios gave an equally clear evaluation of the prospects and genuine significance of the rather notorious London Conference. I quote him:

> "I am again being placed before a fait accompli," Archbishop Makarios said when he referred to that conference. "I shall probably be told that I have to agree or not and at the same time I shall be made to understand that denial on my part would result in further complications for Cyprus and at the same time intervention on the part of Turkey."

These fears of Cyprus were fully justified. Some NATO Powers decided to consider the question before us precisely for this reason, and behind closed doors at that. They expected that by replacing the Charter of the United Nations with lawlessness they would succeed in crushing the resistance of a small country, the Republic of Cyprus, through flagrant and gross pressure.

The Minister of Foreign Affairs of Cyprus, Mr. Kyprianou, told us here yesterday how at that conference his country was constantly being threatened in no uncertain fashion. Mr. Kyprianou said:

> "On more than one occasion we were given to understand that if we did not give way on a particular point the talks might break down, with a Turkish invasion of Cyprus as the result." (1095th meeting, page 56)

It was precisely at this London Conference that all these well-known Powers tried to force their armed forces upon Cyprus. The situation was represented in such a fashion that the solution of the internal problem could be effected in Cyprus only if it were to be accomplished by foreign bayonnets. The Minister of Foreign Affairs of Cyprus pointed out in his statement in the Security Council:

> "If you have hanging over Cyprus this tension and these threats of outside aggression, you can have a half-million troops in Cyprus and yet you will have no peace." (Ibid., page 71)

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The Minister of Foreign Affairs also expressed legitimate surprise as to why in general certain Powers were attributing so much importance to the question of international forces for Cyprus but which at the same time do not attribute any significance to the basic element in this whole issue, namely, the protection of the territorial integrity and independence of the Republic of Cyprus.

The President of Cyprus, Archbishop Makarios, as is known, stated yesterday, in the interview that we have already mentioned, to a correspondent of United Press International that in order to ensure the safety and territorial integrity of Cyprus, the guarantees that could be supplied by the Security Council would be perfectly adequate. It is no secret to anyone that all of these variants of the dispatch of foreign troops to Cyprus have pursued and continue to pursue but one purpose: the actual occupation by the military forces of NATO of the Republic of Cyprus, which is trying to pursue a policy of non-merger with any military blocs, and the actual subordination of this small neutral State to a Member of the United Nations, to the military control of NATO.

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Thus, under the pretext of maintaining order on Cyprus, actions are carried out which threaten the independence and freedom of that island, actions which are in flagrant violation of the spirit and letter of our Charter. In those circumstances, is it an accident that in the lengthy statement which the United Kingdom representative made yesterday in the Security Council no room was left at all for saying that the United Kingdom, for its part, will be guided in its position in relation to the tense situation in the region of Cyprus by the provisions of the United Nations Charter.

The representative of Turkey, in his statement yesterday, said, "In short the United Nations is the cornerstone of Turkish foreign policy." (1095th meeting, page 83). But, in this connexion, is it not strange, to say the least, that in the course of the last two months, as long as they relied upon the success of their policy of pressure applied upon Cyprus, corresponding Powers have not referred to or recalled the existence of the United Nations? More than that, they have exhausted all the means in their power to exclude discussion of the Cyprus question in the Security Council. However, everything falls into place and becomes perfectly understandable when we see the position which is now being taken by those Powers, which have, after all, in the ultimate analysis been obliged to come before this principal organ of the United Nations.

When it became clear that it would be impossible to avoid discussion of the matter in the Security Council, then, as the Council was able to realize at yesterday's meeting, those Powers had decided to go ahead of everyone else, including the representatives of Cyprus themselves. This undisguised manoeuvring brings to mind the old legend connected with the emergence of the zodiac in calculating time. That legend has it that, in time of trial, God had called before Him the ambassador of the animal kingdom. The call was heeded, and the first to come to the heavenly gates as the ambassador was the ox. Quite justly it had to be given the right to be first. But, to everyone's surprise, ahead of the ox there was a mouse which, from the beginning of the journey, had hidden unnoticed on the tail of the larger animal, and suddenly jumped over the head of the ox right at the very gates of heaven, thus succeeding in acquiring the undeserved honour of being first.

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While, through pressures brought upon Cyprus, the NATO Powers have during the last few months done everything to ensure that the problem of the situation in the Cyprus region should not be discussed in the Security Council, today we see that certain among them are expecting to obtain some sort of indulgence from the Council for earlier unlawful actions with regard to Cyprus and a certain mandate for the continuation of this unceremonious interference in the domestic affairs of that country. The representative of the United Kingdom made it clear in his statement in the Security Council yesterday that he had taken the liberty of prejudging, on a unilateral basis, the decisions which in his opinion are the only decisions that can be adopted by the Council on the subject under discussion. What he called upon us to do would in fact have led to a confirmation by the Security Council of the unequal treaties forced upon Cyprus. It is characteristic that it should be precisely at a time when these fictitious bases are being produced for further interference in the domestic affairs of Cyprus that reference is being made precisely to these so-called treaties of guarantee, but it is known that Article 103 of the United Nations Charter states:

> "In the event of a conflict betwen the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

And the United Nations Charter categorically prohibits interference in the domestic affairs of other States on any pretext whatsoever. Under the Charter all Member States of the United Nations are obliged to refrain from the threat of force or the use of force against the territorial integrity or political independence of any country. The line of policy pursued in certain countries to the effect that small States such as Cyprus belong to a kind of second category -- that they are second-class States -- and that therefore the sovereignties and rights of smaller countries in the United Nations can be disregarded and overlooked is, in fact, a flagrant violation of the Charter.

May I, in this connexion, draw attention to a letter of the Chairman of the Council of Ministers of the USSR, Mr. N.S. Khrushchev, dated 7 February 1964, in which, with regard to such a way of thinking, the following is stated:

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"If the Governments of the major Powers, and especially of the permanent members of the Security Council, were guided by them in their international relations, such views could pose a serious threat to world peace and become a source of international complications fraught with grave consequences for all peoples." (S/5534, page 3)

The events around the Republic of Cyprus and the threat of aggression that hangs over that fledgling State are not the business of the Cypriots alone. They touch upon the interests of all peace-loving countries, and upon basic problems of international relations. The international significance of the events connected with Cyprus is stressed also by the fact that the President of that country, Archbishop Makarios, has, as is known, addressed himself by special letter to the Heads of States and Governments of the world, while the Parliament of the Republic of Cyprus, similarly, has addressed a letter to the Parliaments of all the States of the world requesting them to grant assistance to the Cypriots in their just fight for the freedom and the territorial integrity of their country. Furthermore, no room is left for doubt about the character of principle of the questions that arise in connexion with the unilateral actions by the members of NATO with regard to the small country of Cyprus. We can well visualize what events would be if countries decided, according to their own lights, to send their armed forces into other countries where internal conflicts arose.

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This might have brought about only the exacerbation of tensions and might have threatened the cause of international peace and security. The Soviet Union, for its part, cannot remain indifferent to the situation which is now developing in the Mediterranean region also because this region is after all not so far removed from the southern borders of the Soviet Union, especially if one takes into account how the concept of distance has changed with present technology. The interests of peace and security and the interests of the people of Cyprus require that in the present situation an end be put to the dangerous developments in the region of Cyprus and that an end be put to any interference in the domestic affairs of that sovereign State.

The Soviet Union has genuine sympathy for the peace-loving people of Cyprus who, headed by their Government and their President, Archbishop Makarios, gallantly and firmly defend the sovereignty and independence of their Republic.

Taking into account all the circumstances that have been created in connexion with the organization of the military intervention against the Republic of Cyprus, the Chairman of the Council of Ministers of the USSR went on to say in his letter:

"... I should like to state that the Soviet Government condemns these plans, just as it condemns any resort to such methods in international relations. The Soviet Government urges all the States concerned, especially the permanent members of the Security Council, which bear responsibility for the maintenance of international peace and security -- including the United States and the United Kingdom -- to exercise restraint, to consider realistically and fully all the possible consequences of an armed invasion of Cyprus, and to respect the sovereignty and independence of the Republic of Cyprus.

"...

"If that is the case, it seems to me that the leaders of the Soviet Union, the United States, the United Kingdom and France, as well as those of Turkey and Greece, which are neighbours of Cyprus, should now exert all their weight, all their international authority and influence to prevent further aggravation of the situation relating to Cyprus, to

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extinguish the passions which are being stirred from outside and which have already had such an adverse effect on the situation, and to help thereby to strengthen peace in this important area."

This position of the Soviet Union, which supports the desire of the people of Cyprus to ensure their own independent sovereignty and territorial integrity in the face of the threat of military aggression, flows from the position of principle of the Soviet Government and State, which systematically and firmly support peoples who have liberated themselves from colonial domination and who have embarked upon independent State development.

The Security Council must ensure the maintenance of peace in Cyprus and in the eastern part of the Mediterranean region. But it is not possible to ensure peace in Cyprus without ending the interference from outside. The people of Cyprus must have the opportunity of returning to a peaceful and quiet life, which recently has been so tragically disrupted. No people can live without peace. Outside pressures of hatred can only lead to conflict and bloodshed. This is precisely what has happened in Cyprus as a result of outside activities.

The Security Council has already heard the principal party concerned, at whose request this question is being considered, namely the Republic of Cyprus, which is represented here by its Minister for Foreign Affairs, Mr. Kyprianou. The position and the substance of the question addressed to the Security Council are clear and understandable. As the Minister for Foreign Affairs has stated:

"I must, however, make it quite clear that the territorial integrity, the unity, the sovereignty and the complete independence of our country are not negotiable. These are the very things we call upon the Security Council to safeguard and protect. We are an equal Member of the United Nations, and we feel that we are entitled to this protection. We are confident that the Security Council will not fail us." (S/PV.1095, page 71)

The Minister for Foreign Affairs of Cyprus also stated:

"... the Security Council should, primarily, and without waiting for any other action, take the necessary measures to protect the territorial integrity and the independence of the Republic of Cyprus. That would be the greatest contribution both towards keeping international peace in that area of the world and towards restoring internal peace in the island of Cyprus." (ibid.)

(Mr. Fedorenko, USSR)

The Security Council, which is the principal organ of the United Nations bearing responsibility for the maintenance of international peace and security, must in the present serious situation call upon all States to refrain from taking any steps which might lead to a further deterioration of the dangerous and tense situation in Cyprus. All threats to Cyprus must be stopped. The United Nations cannot permit a small country to be under the threat of force. Under Article 2, paragraph 4 of the United Nations Charter, Cyprus has the full right to ask for protection from the Security Council in view of the dire threat that looms over it and is directed against its territorial integrity and independence. No treaty can deprive Cyprus of that right. Under that Article of the Charter it is the obligation of every Member of the United Nations to respect the independence and territorial integrity of other Member States, and in the present case this means Cyprus, and to refrain from the use or threat of force against it. This obligation cannot be annulled as a result of any treaty or agreement whatsoever. It continues to be the absolute obligation of each Member of the United Nations. This clearly follows from Article 103 of the Charter.

Therefore, the Security Council must take immediate steps so as to protect the Republic of Cyprus from aggression and to put an end to any foreign intervention in the domestic affairs of that small Member State. It is the duty of the Security Council to ensure and safeguard the territorial integrity, unity and independence of the Republic of Cyprus, in accordance with the purposes and basic provisions of the Charter of the United Nations.

The PRESIDENT: The representative of the United Kingdom has indicated that he desires to address the Council briefly. I understand that the next speaker, who is the only one inscribed on my list, has no objection, and I shall therefore ask the representative of the United Kingdom to proceed.

Sir Patrick DEAN (United Kingdom): Thank you, Mr. President; I shall be extremely brief.

The representative of the Soviet Union has complained that I gave no undertaking in my speech yesterday that my country would not commit aggression against Cyprus. May I give him this answer: British troops have been operating in the Republic of Cyprus since 28 December 1963, by invitation of the Government of Cyprus, in order to keep the peace between the Greek Cypriot and Turkish Cypriot communities and to restore tranquillity and normal conditions of life for all -- I repeat: all -- the inhabitants of Cyprus. Over a period of nearly two months, British troops have interposed themselves on a number of occasions between the two warring communities, often at great risk to themselves. They have saved numerous lives, stopped many fights, and secured the release of a large number of prisoners and hostages on both sides. The Government of Cyprus and both communities have publicly acknowledged their debt to these British troops and thanked them for their efforts. Without them, the present situation -- bad though it is -- would by now be infinitely worse. I repeat: all this has been done at the invitation of the Government of Cyprus, including both communities.

What is more -- and what is without parallel, so far as I know, in such circumstances -- is that all this has been done without a single casualty being caused by British troops among either the Greek Cypriots or the Turkish Cypriots. Not a single casualty, I repeat, has been caused.

My country is proud of this record, and in the circumstances I am content to let the facts of our actions in the Republic of Cyprus over the last seven weeks speak for themselves and constitute a categorical refutation of the insinuation against my Government implied in the words used by the representative of the Soviet Union.

As to the suggestion by the representative of the Soviet Union that I omitted any reference to the Charter of the United Nations, I am content to rely on the verbatim record of yesterday's proceedings, which he apparently has not yet had time to read with his usual attention.

The PRESIDENT: The representative of the Soviet Union has asked to speak. As there are no objections, I now call on him.

Mr. FEDORENKO (Union of Soviet Socialist Republics) (interpretation from Russian): I have listened with great care to the statement just made by the United Kingdom representative. However, it is well known that one does not throw stones at a barren tree.

I reserve my right to reply to the United Kingdom representative at the first opportunity. At the present time, I do not wish to delay in any way the statement of the United States representative, who, I understand, is next on the list of speakers.

Mr. STEVENSON (United States of America): During the nineteen fifties, the political problems of Cyprus were the subject of bitter dispute in the General Assembly of the United Nations year after year. Finally, however, a carefully balanced settlement was reached, with the agreement of all of the parties: Greece, Turkey, the two communities in Cyprus itself and the United Kingdom. I think we all breathed a sigh of relief at that time and allowed ourselves to hope that, with the conclusion of the Zurich Agreements and the establishment of the Republic of Cyprus, the peace which was so longed for and so needed by the people of that historic island had finally been achieved.

We were therefore deeply distressed when new fighting broke out last December which resulted in hundreds of deaths and has now threatened to rupture the whole fabric of peace in the eastern Mediterranean.

All members of the Council are familiar with the melancholy events of the past several weeks to which Sir Patrick Dean has just referred. Tension between the two communities reached a flashpoint on 21 December, and violence and bloodshed erupted on a serious scale. When it became clear that additional help was needed, President Makarios, on behalf of the Greek community, and Vice President Kutchuk, on behalf of the Turkish community, invited the United Kingdom, in co-operation with the Governments of Greece and Turkey, to undertake to restore stability and preserve peace.

(Mr. Stevenson, United States)

Since 26 December a British force has sought to keep the peace on the island. Today, the United Kingdom has despatched further troops to troubled Cyprus. I believe that all of us here, and most particularly the representatives of Cyprus, owe a debt of gratitude to the United Kingdom for undertaking this unenviable task.

Political efforts to resolve the problems were also promptly started. A conference of the parties was, as we know, convened in London in an effort to work out a solution of the political issues which divided the two communities on the island. But that conference, alas, was unable to produce an agreement. Despite the determined efforts of British forces on Cyprus, violent incidents multiplied and bloodshed continued. With the Government of Cyprus and the leaders of the Cypriot communities unable or unwilling to control the passions which had been unleashed, it became clear that the restoration of public order, so imperative before the long-range political problems could be attacked anew, would require a considerably larger number of troops.

The United Kingdom told the Government of Cyprus that it could not continue to shoulder alone the responsibility for peace on the island. The conclusion was obvious that a larger and more broadly based peace-keeping force was required to augment the British forces if order were to be re-established and maintained throughout the island. The Government of the United Kingdom then proceeded to consult with the Governments of Greece and Turkey, which are also parties to the international agreements that led to the establishment of the Republic of Cyprus in 1960. It also consulted with my Government. A plan for the establishment of such a force, including provision for an impartial mediator to help settle the dispute, was agreed to by Greece and Turkey, and by the Cypriot Vice President, Dr. Kutchuk. Archbishop Makarios, however, raised a number of objections.

The other parties made a new effort to meet these objections, and a revised plan within the framework of the United Nations and agreed to by Greece, Turkey and the United Kingdom and by my Government, was put before Archbishop Makarios on 12 February. On the following day, he informed representatives of the United Kingdom and of my Government that this revised proposal was also unacceptable, although he agreed in principle to the need for an international

(Mr. Stevenson, United States)

peace-keeping force. We are frank to say that we deeply regret that the President of Cyprus was not able to agree to the latter proposal -- a proposal which represented a solid recommendation of the Governments of all the guarantor Powers -- The United Kingdom, Greece and Turkey -- and also of the United States.

A tragic loss of life and property occurs daily in Cyprus; international complications increase; and a solution daily becomes more difficult. The recommendations of the guarantors would, we believe, have helped to avoid all of this.

I think we all know that the Treaty of Guarantee forms an integral part of the organic arrangements that created the Republic of Cyprus. In fact, it is a so-called basic article of the Constitution of Cyprus.

(Mr. Stevenson, United States)

That Treaty assures the independence, territorial integrity and security of the Republic, as well as respect for its Constitution. It assigns to the Guarantor Powers certain responsibilities regarding the maintenance of the Constitution and of the Treaty itself, including the carefully negotiated balance and protection of the two Cypriot communities. It was signed after literally years of soul-searching negotiation and approved by all of the parties. This Treaty or any international treaty cannot be abrogated, cannot be nullified, cannot be modified either in fact or in effect by the Security Council of the United Nations. The Treaty can be abrogated or altered only by agreement of all of the signatories themselves or in accordance with its terms.

No one is threatening to take the territory of Cyprus, no one is threatening its independence -- Turkey or Greece or anyone else. What is possible is -- and I quote the language of the Treaty:

> "action expressly authorized by article 4 of the Treaty with the sole aim of re-establishing the state of affairs created by the Treaty".

Time is wasting. While we talk people are dying, and any moment violence and bloodshed may erupt again on a large scale, with predictable and grave consequences. The important, the imperative, the urgent thing to do is to restore order and communal tranquillity and do it quickly before new violence breaks out, before the atmosphere is further poisoned, before the positions of the parties on the political issues that divide them become more inflexible and, indeed, before peace in the Eastern Mediterranean is endangered.

I repeat that the urgent business before the Council and the responsibility of the Government of Cyprus is to restore communal peace and order and to stop the bloodshed. The sooner that we in the Security Council turn our attention to this, the better it will be for all. I respectfully urge that the Security Council not be deflected from this purpose. Once we have met this problem and communal peace is restored, no question of any action under the Treaty of Guarantees would arise.

(Mr. Stevenson, United States)

The United States has no position as to the form or the shape of a final settlement of the Cyprus problem. The leaders of the two communities must work out their differences together. But in the present climate this is patently impossible. The two communities are holding each other at gun point. To serve any helpful purpose in this inflammable case, the Security Council must make an effective contribution to the re-establishment of conditions in which a long-term political solution can be sought with due regard to the interests, the rights and the responsibilities of all parties concerned. We have made it clear at all times that the United States is prepared to participate in a peace-keeping force but only on the request of all of the parties. We have made this unequivocally clear to Archbishop Makarios, and I can assure the representative of the Soviet Union that the United States, while prepared to help, will be delighted if it does not have to be involved in keeping the peace between Greeks and Turks in Cyprus. And it must be equally clear that neither the United States nor any of the Western Powers are seeking to impose their will on the Government of Cyprus.

I shall not dwell at this time upon the assertions of the representative of the Soviet Union that the anxiety most of us feel that peace be restored to Cyprus is some sort of a NATO plot. No one is even proposing that the international force be comprised just of NATO military units. The parties will have to agree upon the participants in any such force.

I have outlined why the United States supported the proposals developed for a peace-keeping force in Cyprus. I have said that the United States is deeply concerned with this grave situation and the imperative need to keep the peace in the Mediterranean area. Peace on that island today is as precarious as it is precious, and we do not know what new violence tomorrow may bring. The need for such a peace-keeping force is, I repeat, critically urgent. Clandestine arms shipments have recently increased the dangers. The world cannot stand by as an idle and silent witness to the fire that is consuming Cyprus and which could spread so rapidly.

(Mr. Stevenson, United States)

We must ask ourselves what the Council can and should do in these circumstances. That is clear. We should go straight to the point at which we can really be most helpful. I suggest that we must bring about a prompt agreement on an international peace-keeping force for Cyprus, the need for which has been recognized by all, including President Makarios. This may require that we introduce into these consultations an expert in the peace-keeping field of recognized impartiality and stature. No one better fills such a requirement than the Secretary-General of the United Nations. We therefore recommend that the Council appeal to the parties concerned, in consultation with the Secretary-General, to move ahead quickly in working out such arrangements. Other States can make a contribution toward the establishment of a peace-keeping force. Those that can do so should co-operate freely and generously in this endeavour.

Strenuous efforts will also be required to bring about agreement between the two parties on a political settlement which will permit them to live in peace with each other. Therefore, we would also strongly urge that the Government of Cyprus and the Guarantor Powers, in consultation with the Secretary-General, be asked to designate an impartial mediator to assist in achieving a settlement. Let us address ourselves to these two priorities and let us, I beg leave to say, do so quickly.

In conclusion, let me say how much the United States values the spirit of co-operation which Greece and Turkey have shown in these dangerous weeks. They have demonstrated great restraint at a difficult moment in history. Both Governments, I believe, are to be commended for approaching Cyprus' problem, which has such sensitive implications for both of them, with a sense of responsibility not only to the respective communities in Cyprus but also, more importantly, to the entire world community. We should be grateful to both of them.

The PRESIDENT: The representative of Greece has indicated his desire to address the Council, and I now call upon him.

Mr. BITSIOS (Greece) (interpretation from French): In the statement which we have just heard the representative of the United States deemed it necessary to mention the position of my country, of my Government, in the delicate negotiations which have been going on in recent weeks. He deemed it necessary also to do so in a manner which would imply that we should place upon Archbishop Makarios, the President of the Republic of Cyprus, all the responsibility for, I will call it, the non-success of those negotiations, and he added, if I rightly understood his phrase, that no one was threatening the independence of Cyprus.

This Council has granted me the advantage of being present here for the purpose of explaining to it, in my capacity as representative of Greece, the position of my country, and I endeavoured to do that yesterday. Perhaps I may be allowed to reiterate what I said on the subject in the following passage from my statement then:

> "Basing itself on those principles, it (the Greek Government) has also insisted that any arrangements in this regard, as well as the modalities of the political negotiations, must have the consent of the parties principally concerned, above all that of the Government of the Republic of Cyprus.
>
> "It has been on the basis of this express condition that my Government has given its agreement in principle to the proposals that have been made at various stages of the negotiations." (1095th meeting,p.103)

I added:

> "If these proposals, formulated by statesmen motivated by the desire to contribute to pacification, have failed, it is because they have not been capable of giving sufficient assurances to a State which feels that its very existence and the independence which it gained at such a high cost are threatened." (ibid.)

(Mr. Bitsios, Greece)

I cherish the hope that in my statement yesterday I spoke with moderation and conciliation. It is not easy for a representative of Greece to set aside his emotions when he speaks of Cyprus, but I tried to set an example. I shall conclude by expressing the hope that the other speakers will follow that example at this very critical time.

The PRESIDENT: I have no other speakers on my list for this afternoon's meeting, and I have no speakers for tomorrow. Would any member of the Council like to address the Council tomorrow? Since there is none, I should like to suggest that the Council reconvene to continue the discussion of the present agenda item on Friday, 21 February, at 3 p.m. Since I hear no objection, I assume that the Council agrees to that suggestion, and it is therefore so decided.

The meeting rose at 6.10 p.m.

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Item 43

Final Report

Participation in General Multilateral Treaties Concluded under the Auspices of the League of Nations

Summary

Resolution 1903 of the eighteenth session of the General Assembly, the result of preliminary work in the International Law Commission, requested the Secretary General to consult with member-states and with "United Nations organs and Specialized Agencies" as to whether general multilateral treaties concluded under the auspices of the United Nations "have ceased to be in force, have been superseded by later treaties, have ceased to be of interest for accession by additional states, or require action to adapt them to contemporary conditions." The Secretary-General interpreted the phrase "United Nations organs" in this resolution to include ECOSOC. The Council as such had no specific views to offer on the nineteen treaties the Secretary General presented for comment. No resolution was passed. The Council simply noted the Secretary-General's request for the views of governments and specialized agencies.

Background and Debate

General Assembly Resolution 1903 (XVIII), concerning twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations, was the outgrowth of discussions in the International Law Commission (A/5509).

In the ILC, the problem was discussed of the accession of new states to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of states. The Commission suggested that an expeditious procedure for obtaining the necessary consents of the states entitled to a voice in the matter might be for the General Assembly to adopt a resolution by which each member state agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new states.

It was pointed out, however, that quite a number of these treaties might have been overtaken by modern treaties concluded during the period of the United Nations, while some others might have lost much of their interest for states with the lapse of time. It was further pointed out that no re-examination of the treaties appeared to have been undertaken with a view to ascertaining whether, quite apart from their participation clauses, they might require any changes of substance in order to adapt them to contemporary conditions. Of the twenty-six treaties in force, twenty-one were considered to be open-ended, the participation clause being so worded as to allow the participation of any state not represented at the conference which had concluded the treaty, to which a copy thereof might have been communicated for that purpose by the Council of the League. Of these twenty-one, two were clearly still fully operative and no consultation was considered necessary.

After the defeat of an attempt to postpone issuing invitations to participate in the treaties, voting took place in the Sixth Committee of the General Assembly on the question of what states should be included in the invitation. The "all States" formula was rejected and the compromise "Vienna Convention" formula (which permits

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[redacted] adherence by States Members of the UN, States Members of any of the Specialized Agencies, and Parties to the Statute of the International Court of Justice) was adopted.

The Secretary-General placed the subject of the general multilateral treaties before the thirty-seventh session of ECOSOC (E/3853) because the Council "appears to be the appropriate organ of the United Nations to be consulted in this matter." The Secretary-General pointed out that Resolution 1903 had requested that a report from him be placed before the nineteenth session of the General Assembly.

When confronted with a request for comments by the Secretary-General, the Council seemed uncertain how to respond. The item was disposed of in a few minutes by the President of the Council suggesting that ECOSOC should "note the Secretary-General's request to all concerned to indicate their views." The Czechoslovak Delegate made a brief statement in favour of the treaties being opened to "all states" but no other comments were offered by delegations except to say that governments should transmit their views to the Secretary-General so that he might prepare his report for the nineteenth session of the General Assembly.

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II. DRAFT ARTICLES ON THE LAW OF TREATIES

PART I

CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

SECTION I: GENERAL PROVISIONS

ARTICLE I

DEFINITIONS

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

(b) "Treaty in simplified form" means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

(c) "General multilateral treaty" means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.

(d) "Signature","Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty. Signature however also means according to the context an act whereby a State authenticates the text of a treaty without establishing its consent to be bound.

(e) "Full powers" means a formal instrument issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) "Reservation" means a unilateral statement made by a State when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.

(g) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the treaty and of all instruments relating to the treaty.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

ARTICLE 2

Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

ARTICLE 3

Capacity to conclude treaties

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

SECTION II: CONCLUSION OF TREATIES BY STATES

ARTICLE 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate or sign a treaty on behalf of their State.

2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their State and the State to which they are accredited.

(b) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.

3. Any other representative of a State shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his State.

4. (a) Subject to the provisions of paragraph 1 above, a representative of a State shall be required to furnish evidence of his authority to sign (whether in full or ad referendum) a treaty on behalf of his

State by producing an instrument of full powers.

(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other negotiating State.

5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority.

6. (a) The instrument of full powers, where required, may either be one restricted to the performance of the particular act in question or a grant of full powers which covers the performance of that act.

(b) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(c) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2(b) above.

ARTICLE 5

Negotiation and drawing up of a treaty

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.

ARTICLE 6

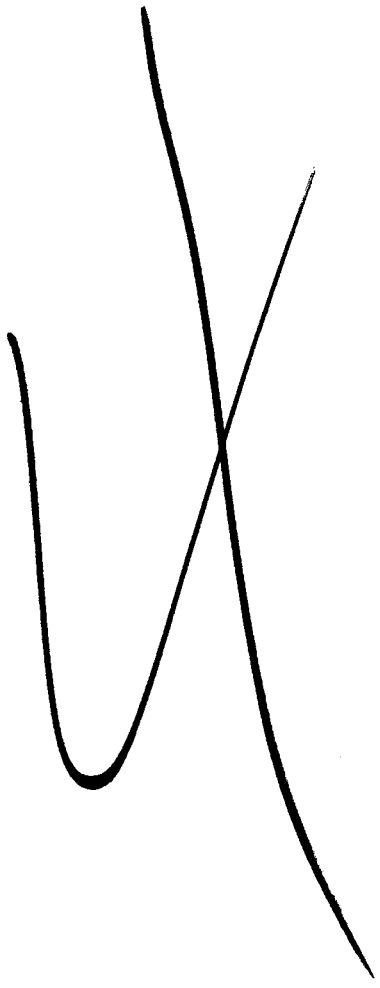
Adoption of the text of a treaty

The adoption of the text of a treaty takes place:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned or by an international organization, by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(b) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(c) In other cases, by the mutual agreement of the States participating in the negotiations.



ARTICLE 7

Authentication of the text

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

(a) Initialling of the text by the representatives of the States concerned;

(b) Incorporation of the text in the final act of the Conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature ad referendum, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

ARTICLE 8

Participation in a treaty

1. In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty:

(a) Which took part in the adoption of its text, or

(b) To which the treaty is expressly made open by its terms, or

(c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

ARTICLE 9

The opening of a treaty to the participation of additional States

1. A multilateral treaty may be opened to the participation of States other than those to which it was originally open:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned, by the subsequent consent of two-thirds of the States which drew up the treaty, provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

(b) In the case of a treaty drawn up either in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

2. Participation in a treaty concluded between a small group of States may be opened to States other than those mentioned in article 8 by the subsequent agreement of all the States which adopted the treaty, provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the agreement only of the parties to the treaties shall be necessary.

3. (a) When the depositary of a treaty receives a formal request from a State desiring to be admitted to participation in the treaty under the provisions of paragraphs 1 and 2 above, the depositary:

(i) In a case falling under paragraph 1 (a) and paragraph 2, shall communicate the request to the States whose consent to such participation is specified in paragraph 1 (a) as being material;

(ii) In a case falling under paragraph 1 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

(b) The consent of a State to which a request has been communicated under paragraph 3(a) (i) above shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

4. When a State is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more States, an objecting State may, if it thinks fit, notify the State in question that the treaty shall not come into force between the two States.

ARTICLE 10

Signature and initialling of the treaty

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed ad referendum to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(b) Signature ad referendum, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature ad referendum, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature ad referendum was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

ARTICLE 11

Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory State to be bound by the treaty; and

(b) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

ARTICLE 12

Ratification

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory State where:

(a) The treaty itself provides that it shall come into force upon signature;

(b) The credentials, full powers or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(d) The treaty is one in simplified form.

3. However, even in cases falling under paragraphs 2 (a) and 2(d) above, ratification is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) The representative of the State in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing "subject to ratification".

ARTICLE 13

Accession

A state may become a party to a treaty by accession in conformity with the provisions of articles 8 and 9 when:

(a) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The treaty has become open to accession by the State in question under the provisions of article 9.

ARTICLE 14

Acceptance or approval

A State may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 8 and 9 when:

(a) The treaty provides that it shall be open to signature subject to acceptance or approval and the State in question has so signed the treaty; or

(b) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

ARTICLE 15

The procedure of ratification, accession, acceptance and approval

1. (a) Ratification, accession, acceptance or approval shall be carried out by means of a written instrument.

(b) Unless the treaty itself expressly contemplates that the participating States may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(c) If a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory States, the instrument shall become operative:

(a) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the States carrying out the exchange;

(b) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2(b) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

ARTICLE 16

Legal effects of ratification, accession, acceptance and approval

The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 13:

(a) Establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the treaty; and

(b) If the treaty is not yet in force, brings into operation the applicable provisions of article 17, paragraph 2.

ARTICLE 17

The rights and obligations of States prior to the entry into force of the treaty

1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

SECTION III. RESERVATIONS

ARTICLE 18

Formulation of reservations

1. A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession acceptance or approval, either in the instrument itself or in a procès-verbal or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

ARTICLE 19

Acceptance of and objection to reservations

1. Acceptance of a reservation not provided for by the treaty itself may be expressed or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving State and every other State entitled to become a party to the treaty.

3. A reservation shall be regarded as having been accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

5. An objection to a reservation shall be formulated in writing and shall be notified:

(a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

ARTICLE 20

The effect of reservations

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty, which has been concluded between a small group of States, shall be conditional upon its acceptance by all the States concerned unless:

(a) The treaty otherwise provides; or

(b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

ARTICLE 21

The application of reservations

1. A reservation established in accordance with the provisions of article 20 operates:

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the

reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty inter se.

ARTICLE 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

SECTION IV. ENTRY INTO FORCE AND REGISTRATION

ARTICLE 23

Entry into force of treaties

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (a) Where a treaty, without specifying the date upon which it is to come into force,fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the exchange or deposit of the instruments in question shall have taken place.

(b) The same rule applies mutatis mutandis where a treaty, which is not subject to ratification, acceptance or approval, fixes a date by which signature is to take place.

(c) However, where the treaty specifies that its entry into force is conditional upon a given number or a given category of States having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the States which took part in the adoption of the text.

4. The rights and obligations contained in a treaty become effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

ARTICLE 24

Provisional entry into force

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In

that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.

ARTICLE 25

The registration and publication of treaties

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

ARTICLE 26

The correction of errors in the texts of treaties for which there is no depositary

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error either:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By executing a separate protocol, a procès-verbal, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provisions of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

ARTICLE 27

The correction of errors in the texts of treaties for which there is a depositary

1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to tho attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a procès-verbal of the rectification of the text and transmit a copy of the procès-verbal to each of the States which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a procès-verbal specifying both the error and the correct version of the text, and shall transmit a copy of the procès-verbal to all the States mentioned in paragraph 1 (b) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depository shall notify the objection to all the States concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the States concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

ARTICLE 28

The depositary of multilateral treaties

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

ARTICLE 29

The functions of a depositary

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all States parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty:

(a) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(b) To prepare certified copies of the original text or texts and transmit such copies to the States mentioned in paragraph 1 above;

(c) To receive in deposit all instruments and ratifications relating to the treaty and to execute a procès-verbal of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(d) To furnish to the State concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other States mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall

have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.

6. On receiving a request from a State desiring to accede to a treaty under the provisions of article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(a) Promptly to inform all the States mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a procès-verbal of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a State and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

PART II

INVALIDITY AND TERMINATION OF TREATIES

SECTION I: GENERAL PROVISION

ARTICLE 30

Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles.

SECTION II: INVALIDITY OF TREATIES

ARTICLE 31

Provisions of internal law regarding competence to enter into treaties

When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

ARTICLE 32

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought

to the notice of the other contracting States.

ARTICLE 33

Fraud

1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

2. Under the conditions specified in article 46, the State in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates.

ARTICLE 34

Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

3. Under the conditions specified in article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

ARTICLE 35

Personal coercion of representatives of States

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in article 46, the State whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates.

ARTICLE 36

Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat

or use of force in violation of the principles of the Charter of the United Nations shall be void.

ARTICLE 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION III: TERMINATION OF TREATIES

ARTICLE 38

Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

(a) On such date or on the expiry of such period as may be fixed in the treaty;

(b) On the taking effect of a resolutory condition laid down in the treaty;

(c) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

ARTICLE 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the

other parties or to the depositary not less than twelve months notice to that effect.

ARTICLE 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) In an instrument drawn up in whatever form the parties shall decide;

(b) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of ..... years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

ARTICLE 41

Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty.

ARTICLE 42

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

(i) To apply to the defaulting State the suspension provided for in subparagraph (a) above; or

(ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or

(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

ARTICLE 43

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only.

ARTICLE 44

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as a ground for terminating or withdrawing from a treaty under the conditions set out in the present arti

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.

ARTICLE 45

Emergence of a new prereemptory norm of general international law

1. A treaty becomes void and terminates when a new prereemptory norm of general international law of the kind referred to in article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void.

SECTION IV: PARTICULAR RULES RELATING TO THE APPLICATION OF SECTIONS II AND III

ARTICLE 46

Separability of treaty provisions for the purposes of the operation of the present articles

1. Except as provided in the treaty itself or in articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(b) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treat000295 as a whole.

ARTICLE 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

(a) Waived the right; or

(b) So conducted itself as to be debarred from denying that it has elected in the case of articles 32 to 35 to consider itself bound by the treaty, or in the case of articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred.

ARTICLE 48

Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of part II, section III, shall be subject to the established rules of the organization concerned.

SECTION V: PROCEDURE

ARTICLE 49

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in article 4 relating to evidence of authority to conclude a treaty also apply, mutatis mutandis, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation.

ARTICLE 50

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

ARTICLE 51

Procedure in other cases

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

4. 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.

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

ARTICLE 52

Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

ARTICLE 53

Legal consequences of the termination of a treaty

1. Subject to paragraph 2 below and unless the treaty otherwise

provides, the lawful termination of a treaty:

(a) Shall release the parties from any further application of a treaty;

(b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(a) That State shall be released from any further application of the treaty;

(b) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subject under any other rule of international law.

ARTICLE 54

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(a) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(b) Shall not otherwise affect the legal relations between the parties established by the treaty;

(c) In particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.

B. DRAFT ARTICLES ON THE LAW OF TREATIES

PART III

APPLICATION, EFFECTS, MODIFICATION AND INTERPRETATION OF TREATIES

SECTION I. THE APPLICATION AND EFFECTS OF TREATIES

ARTICLE 55

Pacta sunt servanda

A treaty in force is binding upon the parties to it and must be performed by them in good faith.

ARTICLE 56

Application of a treaty in point of time

1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty.

2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

ARTICLE 57

The territorial scope of a treaty

The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.

ARTICLE 58

General rule limiting the effects of treaties to the parties

A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not party to it without its consent.

ARTICLE 59

Treaties providing for obligations for third States

An obligation may arise for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

ARTICLE 60

Treaties providing for rights for third States

1. A right may arise for a State from a provision of a treaty to which it is not a party if (a) the parties intend the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

ARTICLE 61

Revocation or amendment of provisions regarding obligations or rights of third States

When an obligation or a right has arisen under article 59 or 60 for a State from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that State, unless it appears from the treaty that the provision was intended to be revocable.

ARTICLE 62

Rules in a treaty becoming generally binding through international custom

Nothing in articles 58 to 60 precludes rules set forth in a treaty from being binding upon States not parties to that treaty if they have become customary rules of international law.

ARTICLE 63

Application of treaties having incompatible provisions

1. Subject to Article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

3. When all the parties to a treaty enter into a later treaty relating to the same subject matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States parties to both treaties, the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies;

(c) As between a State party to both Treaties and a State party only to the later treaty, the later treaty applies.

5. Paragraph 4 is without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

ARTICLE 64

The effect of severance of diplomatic relations on the application of treaties

1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.

3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only.

SECTION II. MODIFICATION OF TREATIES

ARTICLE 65

Procedure for amending treaties

A treaty may be amended by agreement between the parties. If it is in writing, the rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide.

ARTICLE 66

Amendment of multilateral treaties

1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right to have the proposal communicated to it, and, subject to the provisions of the treaty or the established rules of an international organization:

(a) To take part in the decision as to the action, if any, to be taken in regard to it;

(b) To take part in the conclusion of any agreement for the amendment of the treaty.

2. Unless otherwise provided by the treaty or by the established rules of an international organization:

(a) An agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

(b) The effect of the amending agreement is governed by article 63.

3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or has otherwise clearly indicated that it did not oppose the amendment.

ARTICLE 67

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the treaty as between themselves alone if:

(a) The possibility of such agreements is provided for by the treaty; or

(b) The modification in question:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

(iii) Is not prohibited by the treaty.

2. Except in a case falling under paragraph 1 (a), the conclusion of any such agreement shall be notified to the other parties to the treaty.

ARTICLE 68

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

The operation of a treaty may also be modified:

(a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(b) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

SECTION III. INTERPRETATION OF TREATIES

ARTICLE 69

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

(a) In the context of the treaty and in the light of its objects and purposes; and

(b) In the light of the rules of general international law in force at the time of its conclusion.

2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion.

3. There shall also be taken into account, together with the context:

(a) Any agreement between the parties regarding the interpretation of the treaty;

(b) Any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation

ARTICLE 70

Further means of interpretation

Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty.

ARTICLE 71

Terms having a special meaning

Notwithstanding the provisions of paragraph 1 of article 69,

a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.

ARTICLE 72

Treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.

2. A version drawn up in a language other than one of those in which the text of the treaty was authenticated shall also be authoritative and be considered as an authentic text if:

(a) The parties so agree; or

(b) The established rules of an international organization so provide.

ARTICLE 73

Interpretation of treaties having two or more texts

1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.

2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of article 69-72, a meaning which so far as possible reconciles the different texts shall be adopted.

NINETEENTH SESSION
SIXTH COMMITTEE
PROVISIONAL AGENDA
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CHAPTER VI - 2

CONFIDENTIAL

20-5-1-6
Orig. 20-5-2-2

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTEENTH SESSION

Background Documents

- A/CN.4/173 of July 30, 1964.
- Report by Mr. Cadieux on work of ILC's Sixteenth Session, with Annexes.

The sixteenth session of the ILC took place in Geneva from May 11 to July 24, 1964. The Under-Secretary of State for External Affairs, Mr. Cadieux, was able to attend the opening week of the Session; a Canadian observer was present throughout. During this Session, aside from attending to merely formal matters, the Commission took two major substantive decisions: it adopted the Third Part of the series of draft articles on the law of treaties and it adopted 16 draft articles on the despatch of temporary envoys on special missions.

1. The Law of Treaties

(a) As it has in the past, the Commission devoted a good deal of its time at its sixteenth session to a further consideration of the law of treaties. On this occasion it provisionally adopted the final third of a series of draft articles on this subject, now numbered 53 to 73. In accordance with the Commission's plan of work, this group of articles, dealing with the application and effects of treaties (Articles 55 - 64), with the modification of treaties (Articles 65 - 68), and with the interpretation of treaties (Articles 69 - 73), will now be referred to governments for observations and will then be reconsidered by the Commission, in the light of the observations received, at its eighteenth session, scheduled to begin in May 1966. The draft articles drawn up last year, at the Commission's fifteenth session, which dealt with the invalidity and the termination of treaties are now before governments for observation. If it is able to complete the law of treaties in accordance with its planned schedule, the revised draft of the articles should therefore be available for the Commission's 1966 session, for submission to the General Assembly that autumn.

(b) When the Sixth Committee considered the report of the Commission on its work at its fifteenth session (1963) it had been the hope of the Canadian Delegation that contentious treaty questions would not be raised by the Soviet bloc and uncommitted countries. In the event, there were some discussions of substantive questions, though not of a profound nature. In the debate, Soviet bloc representatives, along with such delegates as the Indonesian and Ghanaian, used the ILC findings as a plank for denouncing as void metropolitan treaties inherited by newly independent countries.

However, they had trouble reconciling this extreme line with their more conservative approach to other principles such as that of pacta sunt servanda.

(c) The Canadian Delegation joined in co-sponsoring draft Resolution A/C.6/1,529 of October 4, 1963 expressing the General Assembly's appreciation of the work accomplished by the Commission at its fifteenth session, especially with regard to the law of treaties, approving the proposed programme of work for the 1964 session, and recommending the continuation of "the work of codification and progressive development of the law of treaties, taking into account the views expressed at the eighteenth session of the General Assembly and the comments which may be submitted by governments, in order that the law of treaties may be placed upon the widest and most secure foundations".

Instructions

In view of the generally more harmonious proceedings in the Commission during the past three years, and of the fact that the Commission's decisions at its sixteenth session, after a conscientious effort by its members to reach a consensus whenever possible, were adopted either unanimously or by large majorities, it would seem unlikely that the Commission's conclusions will give rise to controversy in the Sixth Committee at the nineteenth session. Even should this not prove to be the case, however, detailed substantive discussion in the Committee on the Commission's work on the law of treaties should be resisted on the grounds that such consideration is premature until the Commission has received the observations of governments and has submitted its final report. Should any particular questions of treaty law be raised, instructions should be sought as to the position to be adopted.

At some point during its reference to the work of the ILC on the law of treaties, it would be appropriate for the Canadian Delegation to express its satisfaction with the harmonious way in which the Commission was able to reach a decision on matters both complex and open to genuine differences of opinion. It could also refer favourably to the work of the Special Rapporteur, Sir Humphrey Waldock, both in respect of the drafts which he prepared and in respect of his further efforts in finding common ground in instances of disagreement. It would also be appropriate for the Delegation to point out that, now that the preliminary drafts have been presented to governments for their observations, and the end of the Commission's task with regard to the law of treaties is at last in sight, at some point Canada would hope, once the Commission has completed its revision of the matter, that there could be a full discussion by the Sixth Committee of the draft law of treaties as a whole. In addition the Canadian Delegation, after consultation with friendly delegations, might suggest that it would be appropriate in due course for the Sixth Committee to serve as a forum for considering and adopting the Commission's articles in convention form.

NINETEETH SESSION
SIXTH COMMITTEE
PROVISIONAL AGENDA
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CHAPTER VI - 3

CONFIDENTIAL

GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS: REPORT OF THE SECRETARY-GENERAL

Background References

General Assembly Resolution 1903 (XVIII) of November 18, 1963.

Issues Facing the Session

In its commentary on the first series of draft articles on the law of treaties, the International Law Commission drew attention to the problem of accession of new states "to general multilateral treaties concluded in the past, whose participation clauses were limited to specific categories of states". In the Sixth Committee at the seventeenth session, a resolution was introduced which in summary authorized the Secretary-General to receive instruments of acceptance to such treaties, if a majority of parties to any given treaty had not objected to it being opened, from any member state of the United Nations or of a specialized agency. It also recommended that the parties recognize the legal effect of such instruments of acceptance. Certain reservations to this procedure were expressed in the Committee, primarily on the grounds that what was involved was an amendment of the treaties and that for reasons of international and constitutional law, consent to such an act could not be given informally, tacitly, or by mere failure to object. Some representatives therefore suggested another procedure, used on a number of previous occasions, of drawing up protocols of amendment. The Committee then decided to refer the matter to the International Law Commission for study and report.

The Commission concluded from its study of the question that both procedures, i.e. that set out in the draft resolution and the protocol of amendment, had advantages and disadvantages, and the Commission did not feel called upon to express a preference between them from the point of view of domestic law. The Commission noted however, that in 21 of the 26 treaties concerned (participation in the other five was limited to states invited to the conferences which drew up the treaties) the participation clauses were so formulated as to open the treaty to participation by any member of the League, and any additional states to which the Council of the League transmitted a copy of the treaty for that purpose. As a third alternative, the Commission accordingly suggested that, in the light of the arrangements made on the occasion of the dissolution of the League and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly could designate the Secretary-General to assume the powers which under the participation clauses of the treaties in question were formerly exercisable by the Council of the League. This proposal, the Commission felt, would provide "a simplified and expeditious procedure

for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League". The Commission also suggested that many of the treaties in question might no longer hold any interest for states. It further suggested that the General Assembly should initiate an examination of the treaties in question with a view to determining what action might be necessary to adapt them to contemporary conditions.

When this item was discussed at the eighteenth session, a bitter controversy arose over the issue of which states should be invited to accede to the treaties in question and, as a result, the relevant resolution which emanated from the Committee failed to rally unanimous support. It was adopted by 79 votes to none with 22 abstentions.

In the subsequent debate in plenary on November 18, 1963, the "all states versus member states" controversy developed into a test of strength and prestige in anticipation of the main item, Friendly Relations. The Soviet Bloc made a very strong bid to gain acceptance of the all-states formula which would have permitted accession by such entities as East Germany and Communist China, and in doing so they invoked in particular the need for universality, Article 8 of the draft Law of Treaties prepared by the International Law Commission, and the accession clause used in the 1963 Limited Nuclear Test Ban Treaty. The Secretary-General himself intervened in the debate, stating that it would not be administratively possible for him to operate on the basis of the "all-states" formula, and in the end a majority was secured for Resolution 1903 (XVIII) which incorporated the so-called "Vienna" formula, restricting participation in such treaties, in addition to member states, to any non-member states to which an invitation is addressed by the General Assembly.

In this same resolution the Secretary-General was asked inter-alia, to bring the treaties in question to the notice of those states which would be eligible to accede to them, to look into the question whether any of the treaties in question had ceased to be in force, were superseded or would no longer be of interest, and to report on these matters to the forthcoming session.

The Sixth Committee will therefore have before it the Secretary-General's report on this subject, which has not yet been released.

Likely Courses of Action and Attitudes of Interested Parties

It is not possible to anticipate the Secretary-General's Report in detail but it is unlikely that there will be anything in it of a controversial nature. The Soviet Bloc may, however, make a new bid for the acceptance of the all-states formula, depending on the evolution of the question of representation of China.

Policy Considerations Involved for Canada

It is in Canada's interest to continue to support the policy set out in paragraph 1 of Resolution 1903 (XVIII) - the traditional U.N. formula on the question of participation in treaties or multilateral conferences - and to try to ensure that it is not eroded.

Instructions

The Canadian Delegation should accordingly try to ensure that, in any further discussion about what states may accede to the treaties in question, the status quo remains unchanged.

20-3-1-6

What Final on 20-5-2-2

Chapter VI - 1

19th Session
Sixth Committee
Provisional Agenda Item No. 78

CONFIDENTIAL

Nov. 26/64

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTEENTH SESSION

Background Documents:

- A/CN.4/173 of July 30, 1964.
- Report by Mr. Cadieux on work of ILC's 16th session with annexes.

The 16th Session of the ILC took place in Geneva from May 11 to July 24, 1964. The Under-Secretary of State for External Affairs, Mr. Cadieux, was able to attend the opening week of the Session; a Canadian observer was present throughout. During this Session, aside from attending to merely formal matters, the Commission took two major substantive decisions: it adopted the Third Part of the series of draft articles on the law of treaties and it adopted 16 draft articles on the despatch of temporary envoys on special missions.

1. The Law of Treaties

(a) As it has in the past, the Commission devoted a good deal of its time at its 16th Session to a further consideration of the law of treaties. On this occasion it provisionally adopted the final third of a series of draft articles on this subject, now numbered 53 to 73. In accordance with the Commission's plan of work, this group of articles, dealing with the application of effects and treaties (articles 55 - 64), with the modification of treaties (articles 65 - 68), and with the interpretation of treaties (articles 69 - 73), will now be referred to governments for observations and will then be reconsidered by the Commission, in the light of the observations received, at its 18th session, scheduled to begin in May 1966. The draft

articles drawn up last year, at the Commission's 15th session, which dealt with the invalidity and the termination of treaties, are now before governments for observations. If it is able to deal with the law of treaties in accordance with its planned schedule, the final revised draft of the articles should therefore be available by the end of the Committees 1966 Session, for submission to the General Assembly that autumn.

(b) When the Sixth Committee considered the report of the Commission on its work at its 15th session (1963) it had become the hope of the Canadian delegation that contentious treaty questions would not be raised ~~by the Soviet~~ by the Soviet bloc and uncommitted countries. In the event, there were some discussions of substantive questions, though not of a profound nature. In the debate Soviet bloc representatives, along with such delegates as the Indonesian and Ghanain, used the ILC findings as a plank for denouncing as void metropolitan treaties inherited by newly independent countries. However, they had trouble reconciling this extreme line with their conservative approach to other principles such as that of pacta sunt servanda.

(c) The Canadian delegation joined in co-sponsoring draft resolution A/C.6/1.529 of October 4, 1963 expressing the General Assembly's appreciation of the work accomplished by the Commission at its 15th session, especially with regard to the law of treaties, approving the proposed programme of work for the 1964 Session, and recommending the continuation of "the work of codification and progressive development of the law of treaties, taking into account the views expressed at the 18th session of the General Assembly and the comments which may be submitted by governments, in order that the law of treaties may be placed upon the widest and most secure foundations".

Instructions

In view of the generally more harmonious proceedings in the

Commission during the past three years, and of the fact that the Commission's decisions at its 16th session, after a conscientious effort by its members to reach a consensus whenever possible, were adopted either unanimously or by large majorities, it would seem unlikely that the Commission's conclusions will give rise to controversy in the Sixth Committee at the 19th Session. Even should this not prove the case, however, detailed substantive discussions at the Committee on the Commission's work on the law of treaties should be resisted on the grounds that such consideration is premature until the Commission has received the observations of governments and has submitted its final report. Should any particular questions of treaty law be raised, instructions should be sought as to the position to be adopted.

At some point during its reference to the work of the ILC on the law of treaties it would be appropriate for the Canadian Delegation to express its satisfaction with the generally harmonious way in which the Commission was able to reach agreed positions on matters both complex and open to genuine differences of opinion. It could also refer favourably to the work of the special rapporteur, Sir Humphrey Waldock, both in respect of the drafts which he prepared and in respect of his further efforts in finding common ground in instances of disagreement. It would also be appropriate for the delegation to point out that, now that the preliminary drafts have been presented to Governments for their observations, and the end of the Commission's task with regard to the law of treaties is at last in sight, at some point Canada would hope, once the Commission has completed its revision of the matter, that there could be a full discussion by the 6th Committee of the draft law of treaties as a whole. In addition the Canadian Delegation, after consultation with friendly delegations might suggest that it would be appro-

in due course for the 6th Committee to serve as a forum for considering and adopting the Commission's articles in conventional form

Draft Articles on the Law of Treaties,

as discussed and adopted at its Sixteenth Session

Nov. 15/64

General Comments

Waldock's draft articles were substantially revised by the Commission, partly because, as in the case of Parts I and II, his articles tended to be too lengthy and detailed (presumably in order to present the Commission with a comprehensive formulation), partly because they were not (at least in the view of some of the members of the Commission) up to the standard of those of the two previous parts, and partly because of the need to reflect in the draft articles the varying points of view in the Commission on the complex questions. The success of the Commission in working out agreed solutions, however, was due in large measure to Waldock's flexibility, scholarship and hard work, and he deserves much of the credit for the satisfactory results achieved on this difficult topic on the Commission's third try.

2. For the reasons outlined in paragraph 12 of this Report, the draft articles of the third part of the Law of Treaties, as they emerged from the Commission were somewhat less liberal in approach than those originally drafted by Waldock, and in at least some cases (see the comments under "Decisions on Treaty questions" on objective regimes and on rights and obligations for individuals) the Commission may have been overly cautious. It is of relevance that as appears below several members abstained on votes on some articles.

Decisions on Treaty Questions

3. The following decisions should be noted:

(a) the request that governments' comments on the third part be available before the commencement of the 18th Session of the I.L.C. in 1966;

(b) not to deal with the question of the legal liability arising from a failure to perform a treaty obligation (raised in the original formulation of Article 55). Such questions, for instance, as the general principles governing reparation to be made for a breach of a treaty and the grounds that may be invoked in justification for the non-performance of a treaty (also touched on in the original article 55) were left aside to be included in the separate study of state responsibility. (See however Article 63 and commentary on it.) While these decisions seem consistent with the nature and scope of the topic, see Treaty Section's commentary of May 1 (page 2) on the desirability of supporting duty to refrain from acts calculated to frustrate the objects of a treaty.

(c) The question of the succession of States and governments which arose in connection with the territorial scope of a treaty (former article 58) and effects of treaties on third States (former article 61), was also left aside for separate study of state succession. As noted in the discussion of article 57, the question of territorial scope provoked political debate on the colonial clauses. Similarly, the question of the effects of the treaties on the third State brought out doctrinal differences not unrelated to the political attitudes.

(d) Not to include provisions dealing with the possibility of the extension of a treaty to the territory of a third State with its authorization (former article 59). The

... 2

grounds of the decision was rareness of practice, but the question also provided opportunity for further low-key expressions of anti-colonial sentiments.

(e) To postpone the question of the making of treaties by one State on behalf of another or by an international organization on behalf of a member State (former article 60). While it is arguable that such arrangements as the Belgo-Luxemburg Customs Union and the Switzerland-Lichtenstein relationship should be provided for, El-Erian, Yasseen, Elias, Lachs and Tunkin all treated the question as touching on the principle of equality and independence of States. (Waldock referred in the course of the discussion to the treaty-making arrangements between the USSR on one part and Byelorussian SSR and Ukrainian SSR on the other; Tunkin referred in turn to British protectorates.) Discussion of this question could therefore raise difficulties.

(f) To withdraw former article 66 providing for the rights and obligations to be performed or enjoyed by individuals. Although a number of members (Rosenne, Yasseen, Bartos, Liu, Ruda and Reuter) thought the question should have been covered, Tunkin, Lachs, Elias, El-Erian, Arechaga, Briggs and Ago opposed the inclusion of the topic, and Castren, Amado, de Luna and Verdross doubted its need. Some thought should perhaps be given in consultation with friends to whether this decision should be reopened in the light of Canadian interest in the work of the Human Rights Commission.

(g) Not to include an article providing for the creation of objective regimes (former article 63). The decision on this question, considered by some members of the Commission as also evoking overtones of colonialism, should perhaps be examined from the point of view of Canadian interests. (See May 1 memorandum, page 2, concluding Waldock's formulation on objective regimes should be regarded as a notable contribution, though not free from difficulty, and page 2, pointing out that this concept could affect Canada on international rivers.)

(h) Not to include the article on the most-favoured nation clause. Arechaga presented an interesting rationale for inclusion of the clause, but the Commission's decision that there was no need to include a saving clause of the kind proposed seems sensible. Most members of the Commission, however, said they would not oppose such a clause, and it might be advisable to determine the position we would take in the event of suggestion being reiterated in the Sixth Committee.

Comments on Articles

SECTION I: The Application and Effects of Treaties

Article 55 (Pacta Sunt Servanda)

4. This article, the cornerstone of the whole of the Law of Treaties, raised a number of questions as originally drafted. Because of the importance of this article, the original formulation, as well as its ultimate form, is given below:

... 3

Original Draft

1. A treaty in force is binding upon the parties and must be applied by them in good faith in accordance with its terms and in the light of the general rules of international law governing the interpretation of treaties.

2. Good faith, inter alia, requires that a party to a treaty shall refrain from any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects.

3. The obligations in paragraphs 1 and 2 apply also -

(a) to any State to the territory of which a treaty extends under article 59; and

(b) to any State to which the provisions of a treaty may be applicable under articles 62 and 63, to the extent of such provisions.

4. The failure of any State to comply with its obligations under the preceding paragraphs engages its international responsibility, unless such failure is justifiable or excusable under the general rules of international law regarding State responsibility.

The foregoing formulation (and the commentary on it) pointed up the concept of pacta sunt servanda as a moral as well as a legal obligation of the maxim. Sub-paragraph 2, for instance, raised the question of whether intent is a necessary element in the breach of good faith and, in consequence, the question whether international law is to prevail over local law irrespective of the subject matter and whether or not it purported to relate specifically to the treaty or to the class of matter covered by the treaty. (This question is of some importance for Canada because of the possibility of provincial legislatures enacting legislation having the effect of frustrating the operation of treaties implemented by Parliament pursuant to Section 21 of the B.N.A. Act, and the possible undesirable consequences of raising in the draft convention the question of action which frustrates treatics being excusable under international law. Sub-paragraph 4 raised the question of justifiable or excusable default.) The article as drafted therefore seemed to raise as many questions as it answered by its overly detailed and too specific approach.

5. Briggs, who was the first to intervene on the paragraph, stated frankly that, while agreeing with the purpose of each of the four paragraphs, he considered that the pacta sunt servanda principle was so important that it should be formulated in its stark simplicity, without adding too many qualifications which might weaken it. This is essentially the view which the Commission came to adopt. He suggested also the deletion of the words "in force" and the introduction of the word "illegally" before the word "binding", and the deletion the concluding phrase in paragraph 1 "in accordance with its terms..." He criticized the qualification of justifiable or excusable breaches on the grounds that failure to comply which justifiable or excusable created no obligations at law. This too was the view adopted by most members of the Commission. Castren had no basic quarrel with the article but preferred the deltion of paragraphs 2, 3 and 4 for reasons similar to those of Briggs. Verdross felt that paragraph 2 was already included in the first paragraph, that paragraph 3 could be simplified, and paragraph 4 deleted. Paredes suggested a provision making binding those elements necessary for the fulfilment of the purpose of a treaty but not expressly stipulated in it on the basis of the rebu sic stantibus. Bartos welcomed the introduction of the notion of good faith but expressed reservations about paragraphs 3 and 4. Rosenne suggested that paragraphs 1 and 2 be combined, 3 omitted and 4 turned

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into a separate paragraph. Reuter suggested only a few minor drafting changes. Yasseen disagreed with the suggestion to delete paragraphs 2, 3 and 4 but considered it undesirable to attempt to spell out the meaning of good faith. Pal did not disagree with paragraphs 2, 3 and 4. Tabibi suggested the amalgamation of paragraphs 1 and 2. Tunkin was very close to Briggs in his opinion that the rule pacta sunt servanda should be concise and in precise terms and he, therefore, advocated the deletion of paragraphs 2, 3 and 4. (In support of his argument he referred to the Czech draft resolution on the principles of international law concerning friendly relations and cooperation among states in accordance with the Charter.) He criticized the phrase "in accordance with its terms" as self-evident and serving no useful purpose. Like several other speakers he queried the concluding sentence of paragraph 1 of the commentary reading: "on the other hand, and commenting upon the rule (pacta sunt servanda) it may be desirable to underline a little that the obligation to observe treaties is one of good faith and not stricte juris." Tsuruoka supported the suggestion to delete paragraphs 2, 3 and 4 for reasons similar to those given by Briggs and Tunkin. Ago, while reserving his position on paragraph 2, agreed that paragraphs 3 and 4 might be better deleted. De Luna concurred in the deletion of paragraph 4 only. El-Erian did not express himself on the question of deletion. A good deal of discussion occurred also on the need for the words "in force"; some speakers preferring their inclusion and others opposing it. At the conclusion of the discussion the article was referred to the Drafting Committee for consideration in the light of the comments made in the Commission.

6. The Drafting Committee subsequently presented the following text:

> A treaty in force is binding upon the parties to it and must be performed by them in good faith. [Every party shall abstain from every act incompatible with the object and purposes of the treaty.]

The Chairman of the Drafting Committee explained that agreement has been reached unanimously on the first sentence but opinions had been divided on whether the sentence in square brackets should be retained. Paredes opposed the whole of the article on the grounds of the inclusion of the phrase "in good faith". On the question of deleting the second sentence Rosenne, Tsuruoka, Lachs, de Luna, Tunkin, Yasseen, Ago and Verdross recommended its deletion, whereas, Bartos, Castren, El-Erian, Briggs and the Special Rapporteur were in favour of retaining it. De Luna took issue with Paredes on the question of "good faith". It was agreed without a vote that the second sentence be deleted.

7. The Commission adopted article 55 as amended by 16 votes to none, with two abstentions. Paredes explained that his abstention had been based on the reference to "good faith". Bartos explained his abstention as being based on the deletion of the second sentence of the earlier draft. Castren and El-Erian explained that their position was similar to that of Bartos but they had nevertheless voted for the article.

8. The deletion of the provision attempting to define "good faith", of the reference to the territorial application, and of the notion of the justifiable or excusable failure to comply with treaty obligations leaves only the basic treaty principle pacta sunt servanda, which is presumably acceptable to Soviet, Western and less-developed countries' jurists alike. The phrase "in force", while criticized by Briggs and some others as tending to weaken the rule, was considered as explanatory by the majority. While the criteria of good faith is seemingly a subjective one, only Paredes expressed strong reservations about its inclusion as a legal principle forming an integral part of the fundamental rule; the concept may be expected to find general acceptance as a progressive element consistent with contemporary international law, and the article as a whole should prove generally acceptable in the Sixth Committee.

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Article 56 (Inter-temporal law)

9. As originally formulated, the article provided:

1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.

2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied.

10. In introducing the article, the Special Rapporteur stated that the application of the Inter-temporal Law might arise more frequently in the realm of interpretation than in that of application. As drafted, the article contained the two complementary aspects of the rule, paragraph 1 providing that a treaty is to be interpreted in the light of the law in force when the treaty was drawn up and paragraph 2 laying down that the application of a treaty shall be governed by the rules of international law in force when the treaty is applied. The Special Rapporteur drew attention in his commentary and in his oral comments to the difficulties the second provision might create arising from the uncertain relationship between the two branches of Inter-temporal law.

11. The members of the Commission found considerable difficulty with this article. Verdross doubted if it was possible to draw a distinction between the interpretation of a treaty and its application, for when a treaty had been correctly interpreted it had to be applied in conformity with that interpretation. He inquired also whether the position was the same in the case of a law-making treaty, for such treaties took on a life of their own indpendent of the intentions of the party. De Arechaga also voiced doubts about the workability of paragraph 1, and saw problems arising out of paragraph 2 because of the difficulty in discerning the dividing line between interpretation and application. Paredes found no particular difficulty with the Article. Castren suggested that, while the two rules stated in the article were correct in themselves, their juxtaposition gave the impression of being contradictory. He preferred that the article begin with paragraph 2. Pal, on the other hand, considered that paragraph 2 was not acceptable, and did not reflect accurately the Inter-temporal Law. Tabibi also voiced concern about the seeming contradiction between the two paragraphs, but he wished paragraph 2 to be retained. Reuter made one of the most effective interventions on this question, pointing out the relationship between article 45, which settled the question of a conflict between any earlier treaty and a supervening jus cogens rule. Article 65, dealing with the relationship between the two treaties concluded at different times, and Articles 53 and 64, which alluded to the question of the relationship between an earlier treaty and a custom formed subsequently . He felt the Commission had the choice of attempting to draft a cautious formulation of the rule or of undertaking the delicate task of drafting new texts covering the relationship between treaty rules and non-treaty rules in the light of all possible contingencies. Rosenne found little difficulty with the article; Elias voiced misgivings and suggested that further consideration of the article be deferred until the articles on the principle of interpretation being drafted by the Special Rapporteur were ready. Bartos approved the formulation of the article as drafted, pointing out that normative rules were dynamic and evolved with time, as did the whole system of positive international law. Tsuruoka approved the article as he interpreted it; de Luna also approved it but considered it preferable that paragraph 1 be included in the section on interpretation of treaties and that paragraph 2 be left to the problem of the transportation and duration of treaty rules. Yasseen felt the article raised serious problems of interpretation and considered that the title was a misnomer. Briggs found the article acceptable, subject to drafting changes. Tunkin considered that the article had many

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complex implications and felt that paragraph 1 should be discussed in the context of interpretation, whereas paragraph 2 involved the problem of the relationship between the treaty and subsequent rules of international law, both conventional and customary. He suggested postponement of further discussion of the article. Amado felt that paragraph 2 went further than was justified by the cases; El-Erian found it correct as a statement of the law but preferred that its further consideration be deferred. Ago found difficulties arising out of the juxtaposition of the two paragraphs and considered it better that the first one be included in the general rules of interpretation. Lachs agreed that paragraph 1 should be considered with the articles on interpretation but preferred to have paragraph 2 remain where it was.

12. The Special Rapporteur conceded that the majority of the Commission appeared to want paragraph 1 placed with the articles on interpretation but pointed out that many other articles also dealt with interpretation. He concurred in Reuter's analysis of the relationship between this article and the others mentioned, particularly article 65. The Chairman, in summarizing the discussion suggested that the Commission postpone further consideration of the article and that the Special Rapporteur be asked to reconsider it.

13. The Drafting Committee subsequently presented the following redraft:

> A treaty applies to a party only in relation to facts or situations existing while the treaty is in force with respect to that party, unless a contrary intention appears from the treaty or the circumstances of its conclusion.

Ago, Reuter and Yasseen found the new wording unclear; Briggs also expressed misgivings and Tsuruoka suggested that it be referred back to the Drafting Committee, primarily because of difficulties over the phrase "facts or situations", and proposed an alternative formulation. Reuter and Lachs concurred in the suggestion that articles 56 and 57 should be considered together. Article 56 was then referred back to the Special Rapporteur for reconsideration in the light of the discussion.

14. After further consideration it was decided to delete the article on the Inter-temporal law as such and to include a reformulation of the first branch of the Inter-temporal law (paragraph 1 of former article 56). This was eventually embodied in paragraph 1(b) of article 69. The second branch of the Inter-temporal Law was reformulated in the second paragraph of article 68C. (See the further comments on article 68 below)

(New) Article 56 (Application of a treaty in point of time)

15. The article, which was adopted unanimously, was based on former article 57 and provides:

> 1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that part, unless the contrary appears from the treaty.
>
> 2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

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This article as originally drafted set forth the principle that unless a treaty expressly or impliably provides otherwise its provisions apply only with respect to facts or matters arising while the treaty is in force. The second paragraph of the article, stating that the termination of a treaty does not put an end to the rights and obligations of the parties under the treaty with respect to facts or matters which arose while it is in force, raised the question as worded whether the parties are free, other than by consent, to undo, after the treaty has been terminated, those things they did while the treaty was in effect. In introducing the article the Special Rapporteur explained that paragraph 1 dealt with the substantive rule while paragraph 2 stated a reservation making clear that acceptance of the rule in paragraph 1 did not mean that a state was thereby freed from responsibility for what it might have done during the currency of the treaty.

16. This article also gave the Commission some difficulty. Yasseen considered the problems dealt with in the article of great importance and accepted the principles stated in it subject to drafting changes. Reuter suggested the amalgamation of articles 56 and 57, both of which dealt with the "Inter-temporal" law. He considered it desirable to draft very general and somewhat vague provisions. Briggs accepted the intent of article 57 and the principles contained in it but suggested drafting changes. Rosenne also affirmed the statement of the law as contained in the article but suggested a drafting change. De Luna took a similar approach and suggested linking paragraph 2 to articles 52, 53 and 54 relating to termination of treaties. Paredes felt the two principles stated were not fully applicable in all cases (in contradistinction to Rosenne's view that they were). Bartos supported Reuter's view that it would be unwise to draft a detailed article. He pointed to the difficulties between the retroactive effect of a treaty and the retroactive application intended by the parties with regard to facts and matters already existing at the time the treaty was concluded. Ago considered that the article gave too much prominence to jurisdictional clauses instead of fundamental obligations but considered it sound. Lachs approved the statement of the general rule in paragraph 1 but did not feel that in paragraph 2 suspension should be assimilated to termination and considered that this paragraph needed radical reshaping. Tsuruoka and Castren both advocated extremely flexible wording and Castren suggested the deletion of paragraph 2. Tunkin was inclined to support Castren's proposal for deletion whereas Yasseen thought it should be retained. The Special Rapporteur considered Castren's proposal to delete paragraph 2 justified since article 53, paragraph 2, expressly covered the case of treaties terminating or becoming void on the emergence of a new jus cogens. He defended his formulation of the general rule in paragraph 1 but was prepared to remodel it in the light of the suggestions made. Ago did not agree with the proposal to delete paragraph 2. The Special Rapporteur concurred in the suggestion of Rosenne that article 53 might also need modification. It was agreed that the article be referred to the Drafting Committee.

17. The Special Rapporteur in introducing the redraft of the article (given above) explained that the Drafting Committee had had considerable difficulty in reaching the final formulation. Paredes said he would support the article but maintained a reservation concerning the problem of treaties which were null and void and the case where one of the parties failed to perform its undertakings under a treaty. De Luna said he could accept the article notwithstanding its reference to "facts". The article was then adopted unanimously.

Article 57 (The territorial scope of a treaty)

18. The article, (which was former article 58) was adopted 16 votes to none, with one abstention, and provides:

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> The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty.

This article as originally drafted was intended to modify the rule that a treaty applies with respect to all the territory for which a party is internationally responsible unless a contrary intention is manifested. Waldock deliberately chose wording intended to head off political difficulties over a "colonial" clause by using language acceptable in the past to opponents of the colonial clause, but his efforts were misunderstood, by El-Erian, suprisingly, who provoked a discussion of colonialism in an impassioned statement. Pal had stated his full agreement, subject to certain drafting points, with the article. El-Erian, after pointing to the merger of Syria and Egypt as a good example of the well established rule that a treaty could apply either to the territory of a state as a whole or to a part of that territory, went on to criticize the Special Rapporteur's text on the grounds that it included a variation of the colonial clause by the words "for which the parties are internationally responsible". He objected to the formula on principle on the grounds that the colonial system was fast disappearing, that the U.N. Charter laid down the application of developed self-government and that it would be inappropriate to regulate exceptional cases running counter to the trend. Sir Humphrey Waldock explained that he had used the expression in question because it had been accepted by opponents to the colonial clause in recently concluded multilateral treaties who had objected to other formula. Lachs, Tunkin, Bartos, Elias, Yasseen, Amado and Tabibi all supported El-Erian's criticisms of the article. Rosenne, Castren and Briggs took the position that it would be undesirable to use language which might give rise to misunderstandings on the colonial issue and Ago defended the intent behind the provision. Arechaga made a reasoned statement suggesting, like Rosenne, that the notion of territories over which a state has jurisdiction be referred to. Sir Humphrey Waldock defended again his intention in including the clause. It was agreed that the article be referred to the Drafting Committee.

19. The Chairman subsequently introduced the final formulation proposed by the Drafting Committee. The Special Rapporteur said he was uneasy about the use of the expression "the entire territory". Rosenne shared his uneasiness. Bartos said he would be compelled to abstain on the article because of its vagueness. Ago explained that the territorial reference did not relate to the kind of situation dealt with in the amendment recently adopted by the I.L.O. Conference. Briggs stated the meaning of the article was that a treaty applied to the whole of a state's territory unless other wise indicated. Pessou said he was fully satisfied with the article. Paredes stated he would have to abstain on it because in his view the article still contained the idea "territories for which the parties are internationally responsible". Yasseen stated the view that the article was now entirely different on this point. De Luna stated that in his view the purpose of the article was quite contrary to the I.L.O. amendment and he did not share the misgivings of Paredes. Tsuruoka stated that he accepted the article as drafted but wished to make the following reservation: if a state found it impossible in law or in fact to apply a treaty in a region which it regarded as an integral part of its territory, the rules set forth should not have the effect that the state in question was regarded as responsible for the non-application of the treaty in that region. Rosenne stated he would vote in favour of the article although he was not altogether satisfied about the reply to his question. El-Erian found the article acceptable as a precise general formulation of the rule. The Special Rapporteur pointed out that in certain treaties concluded by the United Kingdom, the exclusion of the Channel Isles resulted only from the preamble of the treaty. With regard to certain treaties signed by the Byelorussian SSR and Ukrainian SSR, the exclusion of these states from the USSR signature was implicit; otherwise the situation would be that

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signatories contracted on behalf of one in the same territory. Tunkin stated that he had previously explained the position of the Ukrainian SSR and the Byelorussian SSR. The article was then adopted by 16 votes to none, with one abstention (Paredes).

Article 58 (Treaties create neither obligations nor rights for third States)

20. The article, which was former article 61, was originally drafted as follows:

> 1. Except as provided in articles 62 and 63, a treaty applies only between the parties and does not
>
> (a) impose any legal obligations upon States not parties to the treaty nor modify in any way their legal rights;
>
> (b) confer any legal rights upon States not parties to the treaty.
>
> 2. Paragraph 1 is without prejudice to any obligations and rights which may attach to a State with respect to a treaty under Part I of these articles prior to its having become a party.

This article as originally drafted incorporated the rule of pacta tertiis nec nocent prosunt, whereby agreements neither impose obligations nor confer benefits upon third parties.

21. De Luna, Elias, Rosenne, Castren, Tsuruoka, Bartos and Tunkin all expressed agreement with the principle stated but suggested various drafting changes. Lachs raised the question referred to in the commentary of the basis of the rule (whether it was contractual or a matter of sovereignty or independence of States) Yasseen, Ago and Bartos stressed the sovereignty of the State as the basis for the rule. Elias advocated that the question of the basis of the rule be left aside and the matter be treated as a practical problem. The article was then referred to the Drafting Committee.

22. Briggs subsequently introduced the following new text for this article proposed by the Drafting Committee:

> A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon States not parties to it.

He noted that the reference to third states had been dropped from the title, and from those of the two succeeding redrafts. Briggs explained that the Drafting Committee had been at pains to resolve the doctrinal controversy which had arisen in the Commission as to whether a treaty could actually create rights for third states or only provide a faculty of a right which could be accepted or declined. The suggested wording was an attempted compromise.

23. Reuter found the titles and wording of the three articles inconsistent inter se; the Special Rapporteur thought it possible to work out a wording. Castren found the wording generally satisfactory, although concurring with Reuter concerning the inconsistency of the titles and contents of the third article. Verdross considered that the article should consist solely of the words "A treaty applies only between the parties", since it was inaccurate to suggest that there might not be treaties providing for obligations and rights for States not parties. Ago found the

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article satisfactory and reiterated his view that a treaty did not as such impose obligations or confer rights on a non-party State without that State's consent. De Luna supported the position taken by Lachs and Verdross but considered that article 62 could be so worded to take both views into account, namely, the proposition that a right was an offer that had been accepted and the proposition that subjective rights could be conferred on a non-party State without any need for his acceptance; (he personally took the latter view). Lachs said he could subscribe to the article, but feared if it were read in isolation instead of in the context of the three succeeding articles, it might give the impression of regulating the whole matter, whereas the several articles were complementary. Some further discussion occurred concerning the title of the article. Yasseen found the article well drafted and it stated the existing rule of positive law that treaties could not be imposed on third States. The succeeding articles did not provide for exceptional situations, but embodied the rule that neither rights nor obligations existed until the third State had given its consent, perhaps tacitly. Rosenne considered that the article was a precise statement of the law as it stood, both in its positive and negative aspects and should be left unchanged. The Chairman suggested that the Commission consider articles 62, 62 (A) and 62(B) at its next session before coming to a definite conclusion on this article. Following the discussion of the succeeding three articles, Briggs suggested that articles 61 and 62 be combined. Rosenne expressed misgivings about the Briggs proposal, since the principle embodied in article 61 was a very fundamental one. The Chairman concurred with Rosenne, as did Elias; Castren supported Brigg's proposal. Yasseen felt the article could stand as drafted. Arechaga, Pal, Tunkin, Reuter and Tabibi supported the article subject to drafting changes suggested by Tunkin, concurred in by Reuter and Ago. After further discussion it was agreed that the article be referred back to the Drafting Committee.

24. The Chairman introduced the Drafting Committee's reformulation for the article reading:

> A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon a State not a party to it /without its consent/.

Verdross said that the language should conform to that used in article 55 and should read "a treaty in force is binding only upon the parties". The Special Rapporteur said these words had been used in article 55 for a special purpose which did not apply to this article. Castren and Tsuruoka approved the article including the part in square brackets. Yasseen, El-Erian, Rosenne and Tabibi approved the article but not the part in square brackets. Briggs accepted the article without the part in square brackets. Rosenne and de Luna said that they would abstain if the part in square brackets were retained. Tunkin said he would accept the words in square brackets. Amado took the opposite view. A preliminary vote was, therefore, taken on the text up to the square brackets, on which there 16 votes in favour, none against and 3 abstentions. A preliminary vote was then taken on the part in square brackets, on which there were 8 in favour, 3 against and 7 abstentions. The Chairman then put to the vote formally the words in square brackets, which were adopted by 10 to 5, with 4 abstentions. The article as a whole was then adopted 14 votes to none, with 5 abstentions.

Article 59 (Extension of a treaty to the territory of a State with its authorization)(Deleted)

25. The application of a treaty extends to the territory of a State which is not itself a contracting part if -

(a) the State authorized one of the parties to bind its territories by concluding the treaty;

(b) the other parties were aware that the party in question was so authorized; and

(c) the party in question intended to bind the territory of that State by concluding the treaty.

This article as drafted embodied the principle that when a party to a treaty, whether a state or an organization, is duly authorized by another state to bind its territory and the other parties are aware of the authorization, the treaty applies to the territory of the third state. The article was drafted with the kind of situation in mind, such as that pertaining between Switzerland and Lichtenstein. The article as drafted also, however, raised the question whether a treaty made by an international organization is binding upon the constituent members of the organization. The article provoked considerable discussion given its relative unimportance. A number of speakers queried the phrase "to bind its territory" in paragraph (a) suggesting that the state rather an the territory is bound. Most speakers suggested that the article was unnecessary (Lachs, Briggs, Rosenne, Elias, Paredes, Arechaga, de Luna, Pessou, Tunkin, Amado, Reuter and El-Erian), but for somewhat differing reasons. The colonialism argument on article 58 carried over to some extent on this article with Lachs suggesting that the question of international identity might be an issue, Paredes going further and suggesting that the wording implied a kind of protectorate relationship which should not be sanctioned. Several other speakers (including Tunkin, El-Erian, and suprisingly Reuter) argued that the article raised questions of colonialism and neo-colonialism. Some discussion occurred also on the question of international organizations concluding treaties. Arechaga made a well reasoned statement disagreeing with the other speakers who had suggested that the Luxemburg-Belgian or Switzerland-Lichtenstein relationship was likely to become rare. He considered that the practice whereby a small and economically-developing state could secure a better bargaining position by allowing another state to act on its state might increase. Tunkin intervened again to disagree with the suggestion that representation of one state by another in the conclusion of treaties was a normal practice. He disagreed also with Ago who had expressed the view that article 2 as drafted did not conflict with the earlier decision of the Commission not to deal with treaties concluded by inter-governmental organizations. In Tunkin's view where an international organization entered into a treaty there would always be the problem of the binding force of the treaty with regard to the organization and to the member state. The Commission should not, therefore, take a decision on the problem at this stage. Briggs subsequently associated himself with the views of Arechaga. Pal and Elias suggested that paragraph 1 be transferred to Part I on the Law of Treaties. De Luna agreed with Rosenne and Ago concerning paragraph 2 of article 60. The Special Rapporteur summing up the discussion said that there seemed to be general agreement not to retain article 59 because it applied to a very special case.

Additional Article for Part I (Former Article 60)

(Authorization to act on behalf of another State in the Conclusion of a treaty)

26. The Special Rapporteur, in introducing the article recalled that the Commission had decided that with respect to his drafts of Article 59 (Extension of a treaty to the territory of a State with its authorization) and Article 60 (Application of a treaty concluded by one State on behalf of another)it decided to omit article 59, and to invite the Drafting Committee to examine article 60, and consider whether the right context for the subject matter of that article was Part I (concerning the conclusion entering into force and registration of treaties). The Drafting Committee had concluded the article belonged to Part I and had

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prepared the following tentative draft article:

1. When a State, duly authorized by another State to do so, concludes a treaty on behalf and in the name of the other State, the treaty applies to that other State in the capacity of a party to the treaty. It follows that the rights and obligations provided for in the treaty may be invoked by or against the other State in its own name.

2. Similarly, when an international organization, duly authorized by its constituent instrument or by its established rules, with a non-member State concludes a treaty in the name both of the organization and of its member states, the rights and obligations provided for in the treaty may be invoked by or against each member State.

27. Verdross proposed that the proviso be deleted since other States could not refuse to recognize that one State was authorized to conclude international treaties on behalf of another. Pessou, Castren and Reuter supported Verdross's proposal. Bartos approved the text, provided the arrangement was revocable and would not, therefore, jeopardize the independence of States or condone protectorates. Arechaga, commenting on Verdross's proposal, pointed out that the article embodied two ideas; firstly, that one State could authorize another to perform on its behalf any acts necessary for the conclusion of the treaty, and secondly, that such an authorization could only be exercised with the consent of the other States concerned. Rosenne agreed with Arechaga. The question was not one of recognition, but was a matter of knowing with whom one was contracting. Castren supported Verdross's proposal and suggested that notification only be required. The special rapporteur accepted Castren's suggestion. Ago wondered whether the wording meant that a State could conclude a treaty on behalf of another, since ratification, for instance, was not possible. The Special Rapporteur concurred with the proposition that other States had to be made aware of the authorization. Tunkin considered that it was hardly possible for one State to authorize another to ratify a treaty on its behalf, although the wording did not exclude exceptional cases where everything short of that might be done. Ago thought that an agency relationship existed for the purpose of concluding a treaty. The Special Rapporteur drew attention to various quasi-federal relationships and economic unions, and mentioned the case of the Byelorussian SSR and the Yugoslavian SSR which were subjects of international law but for which the U.S.S.R. acted with regard to international treaties. Pal supported Verdross's proposal. Verdross supported Yasseen's suggestion that notification be stipulated. Verdross preferred the proviso to be retained to cover such cases as the exclusion of Italy and Yugoslavia from representation in the case of the free territory of Trieste. De Luna did not agree with Yasseen's suggestion that notification be made a condition. El-Erian supported Yasseen's proposal.

28. Tunkin considered there was general agreement regarding the first part of the article, but the discussion on the second part made him wonder if the article was necessary. The situation provided for was exceptional, although there were still a few cases of small British protectorates. He supported Yasseen's proposal to provide for authorization. Yasseen suggested a form of words incorporating his suggestion, de Luna another and Amada a third version, with Elias proposing a compromise formula. Pal thought it not very material whether the proviso was retained or deleted. Tunkin supported the Elias suggestion. The Special Rapporteur suggested a new formulation providing for notice. The Chairman considered that the members of the Commission were agreed on the substance that, if a State negotiates on behalf of another State, the other party should

have notice of the agency relationship; they could not refuse to recognize an authorization given by one State to another, but they were free to decline to negotiate in such circumstances. It was for the Drafting Committee to find an appropriate wording. Reuter stated that he would have to oppose any text that would allow a State to refuse to agree with the representing State in a case such as the Customs Union. The article was then referred to the Drafting Committee for modification in the light of the discussion.

29. The Special Rapporteur subsequently recalled that article 60 in his report had dealt with the application of a treaty concluded by one State on behalf of another. The case envisaged had been a special sort of case involving representation by one State of another in the conclusion of a treaty. After some discussion, the Commission had referred article 60 to the Drafting Committee which was to consider whether the substance of article 60 should form part of a new article to be included in Part I, since the contents of the article seemed more related to that part of the draft articles than to Part III. The Drafting Committee had been unable to reach agreement on a text for the proposed new article, and the Commission could not, at that stage, make even a tentative proposal on the subject. He suggested that the report should include an explanation of the circumstances in which it had been decided not to include the article in question. The Chairman said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur. It was so agreed.

(New)Article 59 (Treaties providing for obligations or rights of third States)

30. This article as originally drafted sought to lay down the general conditions under which a State may become subject to an obligation or entitled to a right under a treaty to which it is not a party, and deals with some of the exceptions to the principle stated in the previous article. Paragraph 1 dealt with the imposition of obligations with the consent of the third State, whereby the granting of the consent is regarded as creating a collateral agreement, the juridical basis of the third State's obligation being not the treaty but the collateral agreement. Paragraph 2 provided that a treaty may confer an enforceable right on a State not a party to it. Waldock's formulation required that the parties to the treaty should have had a specific intention to confer an actual right, as distinct from a mere benefit, but did not stipulate that the treaty must designate the beneficiary State by name nor that there must be a specific act of acceptance by the third State.

31. This article was substantially modified at the hands of the Commission. The lengthy discussion of the article, lasting through most of five meetings, revealed differences of views as to the source of the right of the third state, with a number of speakers, notably Arechaga, Verdross, Lachs, Waldock and Rosenne holding that the right of the third State derived strictly from the treaty as such and was available to the third State as soon as the treaty entered into force, while others, principally Ago, Reuter, Yasseen and Elias considered the right to be based on the second additional (collateral) agreement entered into between the original parties to the treaty and the third state. Arechaga pointed out, however, that there was no reason for the theoretical differences between the members of the Commission to prevent agreement on the wording of an article since there was general agreement on two elements reflecting the practice of states, namely the need for consent of the third state and that such consent need not take the form of a second collateral agreement but could be expressed in any form in which the real consent of states was manifested in international practice.

32. Pessou considered that the principle contained in the article was

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contrary to the one developed in the earlier article, and he was accordingly reluctant to accept the wording of paragraph 1. Bartos, while approving the manner in which the Special Rapporteur had managed to compress into a single article the substance of several articles in a previous attempt at codification, considered that the pacta tertiis rule had become obsolete both in practice and in doctrine. He saw contradictions in laying down on one hand that a treaty provision created an obligation for a third State if that State had expressly or implicitly consented to that provision, while providing on the other hand that the parties to the treaty were free to amend it at any time without the consent of the third State, if the parties to the treaty had not entered into a specific agreement with that State. Paredes agreed with Bartos's view that the rule was historically obsolete and created contradictions. Ago pointed to the political problem involved in the traditional struggle of the small States against the great powers. The Special Rapporteur reminded the Commission of the many safeguards in the draft against the kind of practice of concern to Bartos, where a State was compelled to do something under a treaty to which it was not a party. It must be made clear that there can be no imposition of obligation on a third State. Arechaga agreed with the article and its formulation, although suggesting some drafting changes. He drew attention to article 2, paragraph 6 of the Charter as representing a universal norm. Verdross approved the principle and pursued the reference to the Charter raised by Arechaga. He stated that in creating a world-wide organization the Charter had provided that the obligations restricting member States from the use or threat of force should be binding also on all non-member States. It is of interest that Sir Humphrey Waldock expressed reservations about the proposition that the Charter as a treaty was binding on third States. Yasseen, Amado approved the rule but considered drafting changes necessary. De Luna considered that a treaty could never impose obligations on third States and that the Commission should not concern itself with the Charter. Lachs recommended the deletion of the reference to implied consent since in his view consent should always be obtained specifically. Yasseen concurred in this view.

33. Tunkin's intervention is of particular interest because of its reference to Soviet legal theory. He stated that the basis of all rules of international law, whether conventional or customary, was the agreement of States, (a proposition he had seemed to have backed away slightly from the previous session). It was, therefore, not correct to say that obligations of a third State could have their origin in a treaty to which that State was not a party. The treaty as such was never a source of obligations for a third party. The agreement of that party was essential. There must in every case be first an offer by the parties to the treaty to the third State concerned to accept the obligations, and, second, the third State should give its consent. The commentary should mention also the problem raised by Bartos of States not invited to negotiations to a treaty having the treaty imposed on them. It was clear that article 2, paragraph 6, of the Charter did not impose any obligations on third States, but merely incorporated already accepted principles of general international law and required member States to take action when a non-member State acted contrary to the Charter. Briggs supported Tunkin's suggestion that the term "expressly or impliedly" be deleted, and suggested other drafting changes. Reuter disagreed with Tunkin about the Charter which in his view confers rights on an organization which had not previously existed. Ago concurred in the proposal to delete the words "expressly or impliedly". (It is of interest that Elias stated his agreement with Reuter, and not with Tunkin, on the effect of Article 2, paragraph 6, of the Charter.)

34. Pal agreed that the words "or impliedly" should be dropped, and also with Tunkin's view as to the legal basis for Article 2, paragraph 6, of the U.N. Charter. He was not satisfied that the requirement of consent removed the possibility of the imposition of an obligation and, therefore,

could not accept paragraph 1. Tabibi and El-Erian agreed that the article should not be based upon obsolete analogies and practice. Tsuruoka considered paragraph 1 less important from the practical point of view than from the point of view of the draft's balance. He stressed that the source of the obligation was always consent and supported the proposal to delete the words "or impliedly". The discussion then touched on jus cogens and the question whether new States were born into a system of treaty relationships or were bound only by general explicit norms. Some discussion also occurred on the question of peace treaties being imposed on aggressor states and on treaties to which aggressor states had not been invited to participate, on conclusion of which it was agreed that paragraph 1 be referred to the Drafting Committee. The discussion of paragraph 2 ranged over a wide area of questions based on possible situations in which implicit agreement to treaty rights might arise, and there was considerable discussion of the theoretical basis of the right. Tunkin expressed alarm at what he termed excessive emphasis being placed not only on Judgments of the International Court of Justice and of the Permanent Court of International Justice but also on the individual opinions of judges, to the detriment of state practices. He further ventilated Soviet legal theory in stating that he did not accept the view put forth by Kelsen that state practice as such could be taken as a rule of international law, since article 38 of the Statute of the International Court referred to practice "accepted as law" and not practice as such. More prominence, however, should be given to state practice. The basic principle, in his view, was the equality of states, by virtue of which no state or group of states could create rules of international law binding upon other states. In his view the Commission had already accepted that principle in article 61, and should adopt the same approach in this article.

35. In replying to points made by a number of speakers, the Special Rapporteur emphasized that decisions of the International Court were themselves based on what the Court regarded as state practice accepted as law. Tunkin intervened again to say that his remarks regarding judgments of the International Court had merely been intended to indicate his disagreement with the opinion of the late Sir Hersh Lauterpacht that what the International Court of Justice stated constituted the law; proof that the view was not generally held was provided by the fact that only some forty states had accepted the compulsory jurisdiction of the Court. The Special Rapporteur undertook to redraft paragraphs 2 and 3 of the article.

36. The Chairman later introduced the Drafting Committee's redraft reading:

> An obligation may arise for a state from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing that obligation and the state in question has expressly agreed to be so bound.

Tunkin stated that the assent of the non-party state was not sufficient; it was necessary to state that the parties to the treaty intended the provision to be the means of establishing the obligation. Some discussion then occurred concerning a number of minor drafting changes after which the article was approved subject to a review of the wording by the Drafting Committee.

37. The Chairman of the Drafting Committee subsequently introduced the following text for the article:

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> A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

The Special Rapporteur suggested that the opening words be modified to read "An obligation may arise for a State from a provision of a treaty..." The article was approved in the form suggested by the Special Rapporteur.

38. This article is a condensation of paragraphs 1(a) and (b) of former article 62, and states the essential rule in simpler language; it should be noted that the former provisions permitted implied consent to obligations, whereas this is not permitted by the present version.

Article 60 (Treaties providing for rights for third States)

39. The Chairman of the Drafting Committee introduced the following text for this article, which was former article 62A:

> 1. A State may exercise a right provided for in a treaty to which it is not a party if (a) the parties to the treaty intended the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.
>
> 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in, or in conformity with, the treaty for the exercise of the right.

Verdross approved the language up to clause (b), but wondered if clause (b) should be dropped because of the reference to consent being implied, in order to take into account the point of view of those who hold that the exercise of a right was equivalent to implicit consent. Some further discussion then occurred over the doctrinal issue, with Yasseen, Ago and Briggs supporting the suggestion that clause (b) be dropped, and Arechaga, the Special Rapporteur, and Rosenne pointing out that the text was a compromise. Both the Special Rapporteur and Yasseen suggested drafting changes, which gave rise to further discussion; it was therefore agreed that paragraph 2 of the article be referred back to the Drafting Committee

40. The Chairman of the Drafting Committee subsequently introduced the redraft reading as follows:

> 1. A right may arise for a State from a provision of a treaty to which it is not a party if (a) the parties intend the provision to accord that right either to the State in question or to a group of states to which it belongs or to all states, and (b) the State expressly or impliedly assents thereto.
>
> 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

De Luna stated that the Drafting Committee's text represented a compromise and he would abstain in the vote if that text was replaced by language that was not genuinely neutral. The Chairman and Tunkin both stated their

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view that the text was neutral. Bartos stated that -- perhaps because he came from a small country -- he disliked the words "to accord". Paragraph 1 of the article was then adopted by 18 votes to none with 1 abstention. Verdross explained that he had abstained in the vote because he could not accept the proposition that the consent of the non-party stated was required to bring the right conferred into existence. Paragraph 2 of the article was adopted by 17 votes to none with 2 abstentions. Bartos and Ruda explained that they had not been able to support the paragraph because in creating the rights in question the parties to a treaties sometimes laid down conditions that went beyond what objective international law entitled them to prescribe. The article as a whole was then adopted by 15 votes to none with 3 abstentions. Bartos explained that he had voted for the article as a whole because it was the practice in the United Nations to vote for the text as a whole if one had voted for one part of it and abstained on another. Ruda stated that his vote was explained in the same way.

41. It should be noted that the conditions for the exercise of the right may be "established in conformity with a treaty", a provision not contained in the earlier formulation. While the article is an attempt to use neutral language, the formulation seems unduly restrictive (see Legal Division's memorandum of May 1 recommending support for stipulations pour autri) and may therefore provoke doctrinal (and hence, political) differences in the Sixth Committee.

Article 61 (Revocation or amendment of provisions regarding obligations or rights of third States)

42. The Chairman of the Drafting Committee introduced the following text for this article, which was former article 62B:

> When in accordance with article 62 or 62A a State is subject to an obligation or entitled to exercise a right under a provision of a treaty to which it is not a party, the provision may only be terminated or amended with the consent of that State, unless it appears from the treaty or the circumstances of its conclusion that the obligation or right was intended to be revocable.

The Special Rapporteur suggested a drafting change, Yasseen suggested another, while Bartos, Arechaga, Tunkin and Ago found the text generally acceptable. Some further discussion then occurred with the Special Rapporteur, Verdross, Arechaga and de Luna taking the position that nothing existed in the nature of a right until the assent of the third party was given. The Special Rapporteur considered that all members were in agreement, regardless of doctrinal differences, that the right of the non-party State should be revocable until that State has accepted it or exercised it. After some further discussion the article was referred back to the Drafting Committee.

43. The Chairman subsequently introduced the Drafting Committee's redraft reading:

> When an obligation or a right has arisen under article 62 or 62A for a state from a provision of a treaty to which it is not a party, the provision may be revoked or amended only with the consent of that state, unless it appears from the treaty that the provision was intended to be revocable.

Bartos, de Luna and Paredes said that they could accept the article on the

understanding expressed by Bartos that the passage "unless it appears from the treaty that the provision was intended to be revocable" corresponded to positive international law and on condition that the states which had stipulated the revocability of the provision had been entitled to do so. They could not revoke a right which already belonged ex jure to the state.

44. The article was then adopted by 14 votes to none with 3 abstentions. El-Erian then reiterated his reservation concerning the revocation of rights having their source outside the treaty. It will be noted that this article, while based on paragraph 3 of former article 62, embodies the converse of the notion contained in the earlier version, which stipulated that provisions regarding the obligations or the rights of third states may be amended or revoked without the consent of the state concerned unless the contrary was provided; the present version, providing for revocation or amendment only with the consent of the state concerned unless the treaty provides otherwise, seems more likely to prove generally acceptable than the earlier version.

Article 63 (Deleted) (Treaties providing for objective regimes)

45. The article provided:

1. A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject matter of the treaty, or that any such State has consented to the provision in question.

2(A) A State not a party to the treaty, which expressly or impliedly consents to the creation or to the application of an objective regime, shall be considered to have

(B) A State not a party to the treaty, which does not protest against, or otherwise manifest its opposition to the regime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the regime.

3. A State which has accepted a regime of the kind referred to in paragraph 1 shall be -

(A) bound by any general obligations which it contains; and

(B) entitled to invoke the provisions of the regime and to exercise any general right which it may confer, subject to the terms and conditions of the treaty.

4. Unless the treaty otherwise provides, a regime of the kind referred to in paragraph 1 may be amended or revoked by the parties to the treaty only with the concurrence of those States which have expressly or impliedly accepted the regime and have a substantial interest in its functioning.

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46. This article dealt with the problem of treaties alleged by their very nature to have "objective" effects, that is, effects erga omnes such as those creating international regimes for the use of a waterway or a piece of land or attach a special regime to a particular territory or locality. In the commentary, Waldock expressed doubts on the desirability of attempting to formulate an article on this complex question and raised the question whether to leave it aside as being essentially a case of custom or recognition not falling within the purview of the law of treaties. He introduced the notion of tacit consent in his formulation so as to provide that there exists a special category of treaties which, in the absence of timely opposition from other states, will be considered to have objective effects with regard to them. (It should be noted that in the previous session Tunkin and Lachs had made clear that in their view certain treaties, such as the Austrian State Treaty and the Declaration on the Neutrality of Laos, are to be regarded as jus cogens.)

47. In introducing the article, the Special Rapporteur stated that he had prepared a very full commentary on this highly controversial subject, concerning which the authorities were very much divided. The possibility of treaties creating objective regimes was one of considerable delicacy, touching on the sphere of international legislation, whereby instruments concluded by a majority could be held to have binding force for the minority. He pointed out that Rousseau and McNair, neither of whom was prepared to accept the notion of a stipulation on behalf of another State in international law, seemed inclined to admit the possibility of treaties creating objective regimes. Personally, he had felt great hesitation in the matter and shared the view of the previous Special Rapporteur that States were unlikely to agree that treaties could, of their own force, create such regimes. His own opinion was that only treaties of a particular character could be said to establish an objective regime, and that an essential requirement must be that the parties had some special competence in the matter. Possibly recognition of such regimes was a process analogous to the growth of customary law.

48. Paredes suggested that the title of the article be changed to "Treaties providing for a general regime of rights in rem". Elias suggested that the article be deleted, since the subject matter could be covered adequately in articles 62 and 64. El-Erian said that the main difficulty in article 63 arose from the attempt to deal, within the framework of the Law of Treaties, with a number of complex questions touching on other branches of international law. The Commission would be entering into an extremely controversial field by including in its draft an article like article 63. The Court had not pronounced itself on the question of objective regimes in the cases of mandates and trusteeships. On the question of inter-oceanic canals, he must reserve his position, as also in the cases of the Suez, Panama and Kiel canals. Attempts to claim that there existed a difference in regime between one inter-oceanic canal and another, when all served the same purpose, must be rejected on the basis of the principle of sovereign equality of states. He agreed with Elias that it would be advisable to drop article 63 altogether.

49. The Special Rapporteur, in reply, said that he never intended to draw any distinction between one canal and another, and he had not branched into questions outside the scope of the Law of Treaties. Verdross approved, in principle, the text of article 63, which was so worded as to avoid the difficulties inherent in the theory of rights in rem. The principle was not in any way revolutionary, since it was entirely based on the notion of consent. De Luna also approved the principle underlying article 63, but suggested that the Commission should consider what kind of reception its draft was likely to meet. He would only accept the article if a large majority of the Commission did so. Ruda agreed with El-Erian that the

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subject matter of the article was intimately connected with a number of other questions of International Law, and supported the proposal for its deletion. Tsuruoka, having first thought the article of little value, had concluded that it would be worthwhile for the Commission to try to work out a formula which might be acceptable to the majority of the states members of the United Nations which would not have retroactive effects but would look to the future. Arechaga shared the misgivings of others concerning the article, and felt it should be dropped,in part, since the situation was covered by articles 62 and 64, and, in part, because of the heavy onus it would place on States to review every treaty and place on record disapproval of those falling within the category described in paragraph 1 under the extremely severe penalty or being bound by it if they failed to do so. The need to make formal protest was invidious, Yasseen, however, considered that the idea underlying article 63 was not incompatible with the recognized principle of international law, although he found the proposal envisaged by the article questionable since its effects could be secured through article 62. Article 63 should, therefore, be omitted. Castren, while considering the idea of objective regimes defensible, questioned the desirability of including an article on it, and concurred in the suggestion that the article be dropped for the reasons given by Tsuruoka and Yasseen. Amado concurred in the proposal that it be deleted, and Tunkin considered that the article created more difficulties than advantages. Ago defended the Special Rapporteur's purpose in setting forth the formulation but suggested that it could be reshaped in the form of a broad generalization to the effect that the State could enjoy the benefits of objective regimes initiated by a treaty to which it was not a party if it expressly, or by its conduct, indicated acceptance of the objective regimes. Bartos pointed out that during consideration of article 62, he had expressed the view that, owing to the existence of the pacta tertiis rule, rights or obligations could not be imposed on third states, but that an exception could be made in the case of law-making treaties. He could not, however, accept article 63 as it stood, for it perpetuated a practice abandoned by the international community. One matter on which article 63 might refer to, however, was objective regimes applicable to particular rivers which, when agreed to by the riparian States, were binding on third parties. Rosenne expressed reservations about the desirability of rejecting the article, which he thought legally useful, and a necessary consequence of the concept of law-making treaties. He reserved his position as to the regimes governing certain canals. Tabibi supported the majority view in favour of deleting the article. The Special Rapporteur suggested, in reply, that some of the criticisms levelled against article 63 had been a little exaggerated, as there could be no question of the treaties in question imposing obligations without the consent of the states concerned. That the question is topical is indicated by the objective legal regime established for Antarctica. However, should the Commission drop article 63, the gap would be to some extent filled by article 62.

50. Liu supported the proposal to delete the article, whereas Tsuruoka suggested that the Special Rapporteur attempt to redraft article 63 in the light of the views expressed. The Special Rapporteur expressed the view that the discussion in the Commission indicated that the majority of members recognized the phenomenon considered in the article, but were not prepared to include in the draft articles a provision embodying the concept of an objective regime being generated by a treaty itself. Ago stated that in his views treaties could not of themselves create an objective regime, since they merely laid down the conditions necessary to enable a situation to come into existence. On the question of new-born states, the Commission had acknowledged that a treaty could not create obligations for a third State without a State's consent, and therefore the question arose whether the State about to be born was bound to observe a stipulation which was the very condition of its birth.

51. Tunkin stated that article 63 was intended to cover a variety of situations which differed greatly as regards both factual background and legal character. Referring to the Antarctic Treaty of 1959, his recollection was that the intention had been to create a regime which could become universally accepted, but there had been no intention to create a universally binding regime; such an attempt would have been illegal. In his view the article should be dropped. Arechaga expressed the view that a special article should be devoted to the case of the State in statu nascendi, since it was a case that could not be covered by article 62 on the stipulation of rights in favour of third States, as the State concerned did not yet exist and could not therefore benefit from or accept the stipulation. He did not favour the suggestion made by Tunkin that a special article be included on the aggressor State. Yasseen expressed the view that article 63 could be dropped since all the conceivable situations could be covered by article 62. Tabibi felt that articles 63 and 64 should be covered jointly. Lachs agreed with Tunkin that article 63 attempted to cover a number of essentially different situation but did not cover the important question of neutralization of States in peacetime. Treaties so providing laid down both rights and obligations for third parties, since States not signatory to the treaty obtained certain benefits gained from the exclusion of foreign bases and military alliances, while the signatories to the treaty accepted the dual obligation to observe the status of the neutral State and to see that other States also respected it. The only duty for the third States which acquiesced in that status was to refrain from violating it. He supported also the inclusion of a provision on the question of the ex-aggressor States. Elias reiterated the view that article could be dropped, and considered that neutralized and demilitarized zones could also be covered by articles 62 and 64. The Special Rapporteur expressed regret that the article should be deleted; it had served a purpose and had a progressive concept. It was agreed, at Tunkin's suggestion, that members reflect on the desirability of including an article on the aggressor State. It was then agreed that article 63 be deleted on the understanding that the problem of the new-born state would be covered in a redrafting of article 62.

Article 62 (Rules in a treaty becoming generally binding through international custom)

52. The article as originally drafted provided:

> Nothing in articles 61 to 63 is to be understood as precluding principles of law laid down in a treaty from becoming applicable to States not parties thereto in consequence of the formation of an international custom embodying those principles.

The article as presented by the Special Rapporteur was a brief article providing that nothing in the three preceding articles was to be understood as precluding principles of law laid down in a treaty from becoming applicable to states not parties thereto in consequence of the formation of an international custom embodying these principles. The article embodied the notion that in addition to law-making treaties intended as such, the operation of purely contractual treaties may be extended by custom to third states, although this is not, in Waldeck's view, a true case of the legal effects of treaties on third states.

53. In introducing the article the Special Rapporteur referred to it as merely a reservation of the question of custom, drafted in negative form in the light of the provisions contained in the three preceding articles. The article was not intended to cover the concept of objective regimes, which had been contained in article 63.

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54. Verdross supported the concept contained in article 64, particularly if article 63 were deleted. Yasseen considered that it expressed a generally accepted rule. Reuter thought it might reassure those who regretted that article 63 had been dropped. Arechaga supported it, pointing out that article 63 had been dropped on the understanding that its omission would be partly offset by this article. Lachs supported the article, but did not consider its scope should be extended to treaties confirming existing principles of customary law, but should be confined to treaties creating new principles. Rosenne approved the article but thought it should be redrafted in a more affirmative manner, and perhaps given a more independent position. Tunkin agreed with Rosenne that the article did not belong to the group concerned with effects of treaties on third states, since it dealt with the separate issue of the relationship between conventional and customary norms of international law. He approved the article as drafted and did not wish to see it broadened so as to refer to any rules of international law. Ago, Castren, Pal, Elias, de Luna, Ruda, Liu all supported the article, although differing on its placement. Bartos considered it useful from a practical point of view, although on grounds of doctrine he might find it unacceptable.

55. The Special Rapporteur recommended, in response to previous comments, that the article not be broadened so as to deal more generally with the relationship between international custom and treaties, but should be confined as at present to the question of the application of the rules of a treaty to a non-party state by reason of an international custom. He did not favour amending the article to cover the case of general multilateral "law-making" treaties. The article was intended primarily as a corrective to article 61 (later renumbered 58). Arechaga suggested the inclusion of articles on the most-favoured nation clause, and the Special Rapporteur explained in reply that since the effect of the most-favoured nation clause was merely to incorporate in a treaty the provisions of another treaty by agreement, it did not appear to add much to the general rule of treaty making. Briggs supported Arechaga's suggestion, while Reuter and Ago agreed with the Special Rapporteur's view. The article was then referred to the Drafting Committee.

56. The Special Rapporteur subsequently introduced the following text proposed by the Drafting Committee: "Nothing in articles 61 to 62A preclude rules set forth in a treaty from becoming binding upon states not parties to that treaty in consequence of the formation of the customary rules of international law." After a brief discussion during which some drafting changes were suggested by Ago and Verdross, the article was adopted in the form:

> Nothing in articles 61-62A precludes rules set forth in a treaty from being binding upon states not parties to that treaty if they have become rules of customary international law.

Article 62 was so amended and adopted unanimously.

57. It will be noted that this article is a more restrictive version of former article 64 and tends to lean toward Tunkin's view that only binding rules of international law (which can, in his view, become such only by consent) can cause provisions in a treaty to become binding on states not parties to it. The earlier version permitted principles of law (rather than rules) to become applicable to states not parties thereto in consequence of the formation of an international custom embodying these principles. The difference may, however, be one of emphasis, and the article seems acceptable.

Article 63 (Priority of conflicting treaty provisions)

58. This article was former article 65. The question of treatment

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of conflicting treaty provisions had been discussed at the 15th Session of the Commission in the context of the validity of treaties but, at the suggestion of the Special Rapporteur, the Commission had decided to consider the subject in the context of application of treaties at the 16th Session. The majority of the Commission had expressed the view shared by the Special Rapporteur that, except in the case of treaties conflicting with jus cogens, the incompatibility of a treaty with an earlier treaty does not deprive the later treaty of validity. Lachs had expressed doubts as to the validity of a treaty conflicting with a prior treaty, neutralizing or demilitarizing a territory such as those on Laos or Austria or embodying a political settlement of great importance. The same views were advanced during the discussion of this article at the present session.

59. In introducing the article the Special Rapporteur explained that, in accordance with the view of the majority of the Commission, the matter had been treated essentially as one of priority rather than invalidity. Because of the importance of the provision it is set out in full below:

> 1. Subject to article 103 of the Charter of the United Nations, the obligations of a State which is a party to two treaties whose provisions are in conflict shall be determined as follows:
>
> 2. Whenever it appears from the terms of a treaty, the circumstances of its conclusion or the statements of the parties that their intention was that its provisions should be subject to their obligations under another treaty, the first-mentioned treaty shall be applied so far as possible in a manner compatible with the provisions of the other treaty. In the event of a conflict, the other treaty shall prevail.
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> 3. (a) Where all the parties to a treaty, either with or without the addition of other States, enter into a further treaty which conflicts with it, article 41 of these articles applies.
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> (b) If in such a case the earlier treaty is not to be considered as having been terminated or suspended under the provisions of article 41, the earlier treaty shall continue to apply as between the parties thereto, but only to the extent that its provisions are not in conflict with those of the later treaty.
>
> 4. When two treaties are in conflict and the parties to the later treaty do not include all the parties to the earlier treaty -
>
> (a) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty prevails;
>
> (b) as between States parties to both treaties, the later treaty prevails;
>
> (c) as between a State party to both treaties and a State party only to the later treaty, the later treaty prevails, unless the second State was aware of the existence of the earlier treaty and that it was still in force with respect to the first State.

60. Castren, de Luna, Yasseen, Elias, Briggs, Rosenne, Ruda, Ago, Tsuruoka supported the article, as did Verdross, subject to some reservations

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concerning the wording of paragraph 4. Tunkin stated that the article raised two problems of the utmost importance, firstly, would the Commission in adopting the article be giving its own interpretation of article 103 of the United Nations Charter. If the wording was intended to lay down that if a treaty conflicted with article 103 of the Charter, the validity of the treaty is not put in question but the Charter would simply prevail, he doubted whether such an interpretation was progressive and felt that it might weaken the scope of article 103. Alternatively, the article might be interpreted to mean that treaties whose terms conflict with those of the Charter were not as valid as an interpretation which tended to strengthen the Charter. Arechaga supported the article and in commenting on Tunkin's point suggested that, except in the case of jus cogens, all instances of conflicting provisions should be treated as issues of priority. Ago criticized the term "conflict". Lachs developed Tunkin's argument on article 103 of the Charter which, being in the nature of a rule of jus cogens, was of the greatest importance, he doubted whether any state could plead ignorance of its provisions. Elias drew attention to the Convention and Statute concluded at the NIAMEY Conference to regulate the regime of the Niger River, in which care had been taken not to declare the treaty of Berlin null and void as some of the participants of the Conference would have wished. Some further discussion occurred concerning paragraph 4, with several speakers proposing that the final proviso beginning with the word "unless" be deleted, turning on the question whether state responsibility should be engaged due to prior knowledge, Tunkin reiterated the arguments made in the 15th Session that treaties such as those provided for the neutrality of Laos which he termed "integral" must prevail over later treaties conflicting with them. Further discussion occurred concerning article 103 of the Charter. El-Erian stated that it could not be viewed merely as a treaty but must be regarded as the supreme law of mankind. Rosenne supported his general position and considered article 103 generally applicable to the whole of the law of treaties and not only to article 65. Most of the members of the Commission found difficulty with the idea that more knowledge of an earlier treaty would fix responsibility on a state concluding a later incompataible treaty. In summing up the discussion the Special Rapporteur agreed that paragraph 1 should remain where it stood. Paragraph 3A was probably unnecessary and could be dropped, and paragraph 4(B) could be incorporated in the modified version of paragraph 4. The article was then referred to the Drafting Committee.

61. A redraft of the article was subsequently submitted by the Chairman of the Drafting Committee, reading as follows:

Application of incompatible treaty provisions

1. Subject to article 103 of the Charter of the United Nations, the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs.

2. When a treaty provides that it is subject to, or is not inconsistent with, an earlier or a later treaty, the provisions of that other treaty shall prevail.

3. When all the parties to a treaty enter into a later treaty relating to the same subject matter, but the earlier treaty is not terminated under article 41 of these articles, the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.

4. When the provisions of two treaties are incompatible and the parties to the later treaty do not include all the parties to the earlier one -

(a) as between States parties to both treaties, the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty applies;

(c) as between a State party to both treaties and a State party only to the later treaty, the later treaty applies.

5. Paragraph 4 is without prejudice to any responsibility which a State may incur by concluding or applying a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

After a brief discussion the redraft of the article was adopted by 16 votes to none, with three abstentions.

Article 64 (The effect of severance of diplomatic relations on the application of treaties) (Former 65A)

62. The Special Rapporteur in introducing the article explained that he had drafted it in the light of the discussion at the 15th Session on the effects of a breach of diplomatic relations, in line with the Commission's policy. He had left aside the question of the effect of hostilities on treaties and also the consequences of non-recognition which was a matter which belonged to the topic of state succession. Thus the proposed article dealt with the effects of the severance of diplomatic relations and with the withdrawal of diplomatic missions in the strict sense. The cardinal rule embodied in the article was that the legal relations established by the treaty would not be affected as would also be true of customary rules of international law. Ago supported the article in general, but pointed out that in the case of some treaties, such as one providing for peaceful settlement of disputes and stipulating for the exhaustion of diplomatic remedies, that the severance of diplomatic relations made it materially impossible to apply to treaty provisions. Arechaga agreed with the rule in the article but not its presentation and suggested an alternative draft. Bartos fully supported the wording proposed by the Special Rapporteur. Verdross thought it was going too far to say that the severance of diplomatic relations had no effect on the treaty relations between the states concerned. Rosenne found the article acceptable but wondered, like Arechaga, if making the operation of the article subject to article 43 might introduce unforeseen complications. De Luna considered that the Special Rapporteur had adopted the right approach. Tunkin expressed the view that, although article 65A was likely to be generally acceptable, the Drafting Committee would doubtless need guidance on some points and in particular on the release of article 43. Yasseen suggested that the draft provide that in certain cases, and where certain types of treaty were concerned, severance of diplomatic relations led to the suspension of the treaty but did not terminate or invalidate it. Castren supported the article but queried the reference to article 43. Ago considered that the Commission was agreed on two points, first, that in general the severance of diplomatic relations did not terminate a treaty, and, secondly, that there were certain treaties which became impossible to apply in the event of the severance of diplomatic relations. Verdross and Tunkin considered that Arechaga's text expressed more clearly the notion on which members of the Commission had reached agreement. Briggs suggested that no reference to article 43 be made. Ruda concurred in Arechaga's formulation amended along the lines suggested by Verdross.

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Pal preferred the Special Rapporteur's draft as did Castren and Rosenne. Tunkin thought a part of Arechaga's text could be used. Arechaga suggested that the question be left with the Drafting Committee. Liu agreed with the article but wondered if it should be subject to article 44 as well as article 43. Ago pointed out that Arechaga's text would establish the suspension of the treaty rather than merely give the right to one of the parties to invoke the argument that the treaty was impossible to perform. The Special Rapporteur's text was, therefore, more prudent. The Special Rapporteur suggested that his article, together with Arechaga's text and Verdross's comments, be referred to the Drafting Committee, and it was so decided.

63. The Special Rapporteur subsequently introduced a redraft proposed by the Drafting Committee. He recalled that in his previous and much shorter draft the question with which the article was concerned had been covered by means of a cross reference to article 43 on supervening possibility of performance. The Drafting Committee had considered, however, that article 43 was not adapted for dealing with the particular point and that it would be/at best least in the present state to spell out the rule. Ago pointed out that the article did not cover the case where the application of the treaty was impossible because of the atmosphere created by the severance of diplomatic relations. Yasseen said that it did not cover the situation where the abnormal state of relations between two countries was reflected in the severance of diplomatic relations. A number of minor drafting amendments were suggested after which the article, with those amendments, was adopted unanimously in the following form:

1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.

3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only.

64. Yasseen said he had voted for article 64 because, although containing a gap, it nevertheless dealt with one part of the subject and he hoped the conference to which Commission's draft would be submitted would fill the gap.

65. It will be noted that, as originally drafted, the article provided very simply that the severance of diplomatic relations between parties to a treaty does not affect the legal relation between them established by the treaty, and in particular their obligation under article 55. This formulation is essentially retained in paragraph 1 of the present 64. The provisions contained in paragraphs 2 and 3 of this article create exceptions, however, in providing that severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty in certain circumstances are new, and are of some importance both from legal and political points of view. The new notions were suggested initially by Yasseen, although it does not go as far as he would have wished, and were supported by Ago, Verdross and Arechaga. While paragraphs 2 and 3 reflect actual problems encountered in practice, which no doubt should be provided for, they also may raise a danger of the severance of diplomatic relations being provoked with view to invoking the severance of justification of non-performance of treaty obligations. Consideration should perhaps be given to consultation with other countries on this article.

Article 66 (Application of Treaties to Individuals) (Deleted)

66. The article provided as follows:

> Where a treaty provides for obligations or rights which are to be performed or enjoyed by individuals, juristic persons, or groups of individuals, such obligations or rights are applicable to the individuals, juristics persons, or groups of individuals in question:
>
> (a) through the Contracting States by their national systems of law;
>
> (b) through such international organs and procedures as may be specifically provided for in the treaty or in any other treaties or instruments in force.

67. This article as drafted set out the general rule that treaties are applied to individuals through the contracting state and through the instrumentality of the respective national legal system, and also provides for the exception whereby they may be applied through international organs specifically provided for in treaties or other instruments. In introducing the article the Special Rapporteur explained that he had endeavoured to avoid any pronouncement on the theoretical issues involved and had attempted to reflect the existing situation in regard to the application of treaties to individuals. Verdross considered that there was no need to draft a rule concerning treaties under which a state was bound to grant certain rights to or impose certain obligations on individuals. As for the second kind of treaty which directly created rights or obligations for individuals, states were entirely free to make such a treaty but he wondered whether a Commission need devote an article to the question. Castren, Amado and de Luna supported the views of Verdross. Yasseen considered that in spite of the doctrinal controversies the Commission should include an article recognizing that a treaty could be invoked directly for and against individuals in keeping with the recent trend in the development of international law. Paredes thought it impossible to decide on the inclusion of the article without first considering the theoretical question where individuals could be subjects of international law. Rosenne felt that the article was necessary but he had reservations about the approach adopted and the drafting suggestions. Bartos specifically raised the question whether individuals could be regarded as subjects of international law and considered that the article had the merit of reflecting the idea gradually gaining ground that they could. While supporting this position, however, he felt the Commission should not take sides on the controversy but should adopt a cautious formulation. Ago recommended dropping article 66 so as to avoid prejudging in a positive sense at this stage in the development of international law the international personality of the individual. Elias, Briggs, Arechaga, Tunkin and El-Erian all supported the suggestion to drop the article. Liu spoke in support of it. The Special Rapporteur in explaining his position on the article raised the question whether the right of self-determination belonged to individuals, groups of individuals or embryonic states and whether it could be the subject of an international claim. Ago in attempting to head off a political discussion said that it had been decided that the article was withdrawn. Bartos, Yasseen, Tsuruoka, Ruda and Reuter all promptly requested that it be noted in the summary record that they were in favour of the idea expressed in the article and recorded the article's withdrawal. Lachs stated his agreement with the decision to drop the article and Rosenne requested that a paragraph explaining the Commission's decision be inserted in its report.

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SECTION II: MODIFICATION OF TREATIES

Article 65 (Proposals for amending or revising a treaty)

68. The article, which was formerly article 67, provides:

Subject to the provisions of the treaty -

(a) a party may at any time notify the other parties, either directly or through the depository, of a proposal for its amendment;

(b) the other parties are bound to consider in good faith, and in consultation with the party concerned, what action, if any, should be taken in regard to the proposal.

69. This article was produced by the Special Rapporteur during the early part of the session in response to the decision of the Commission to consider the amendment and revision of treaties. In introducing the article, the Special Rapporteur pointed out that the section on the amendment and revision of treaties to some extent broke new ground, since no very comprehensive attempt had previously been made to formulate basic rules on the subject, many authorities having regarded amendment and revision mainly as a political matter. He pointed to the possible distinction between the terms "amendment" and "revision", both of which terms he had used, and raised the question whether a party had the right to be consulted on revision.

70. Verdross approved the ideas underlying the rules stated in Section II but queried whether with respect to this article the party might "at any time" propose amendments. Lachs considered that the section provided a useful basis for discussion, advocated that the Commission concern itself with the legal aspects of the question, and gave support to the unanimity rule requiring consent of all original parties to any revision. He warned also of the danger of states, under the guise of revision, attempting to do away with existing treaties. Castren considered it useful to include rules on the revision of treaties. Liang expressed doubts as to whether a party had a right to notify other parties of a proposal for amendment. Ago found that the article raised problems for him. Rosenne shared Ago's doubts, and for similar reasons, but suggested also that if a rule of unanimity was to be contemplated it was important to ensure that it did not operate in too rigid a fashion like a veto. De Luna approved the three articles subject to drafting changes. In response to discussion about the use of the words "amendment" or "revision" the Special Rapporteur agreed to drop the word "revision". Amado stated flatly that he thought the article should be dropped. Elias concurred, on the grounds mentioned by some previous speakers, that the article as drafted included the words "at any time" and raised also the question of the obligation of the depository; the concept of an obligation to negotiate also gave difficulties, as did the expression "in good faith", because of the problems raised by the question of an obligation to consult.

71. The Special Rapporteur suggested that there were two alternatives - to delete the article or to include the idea embodied in sub-paragraph (a) in the following article. Briggs expressed surprise at the opposition to the article, which seemed acceptable to him, subject to drafting changes. Tunkin queried whether a party had a right to make a proposal for amendment and considered that, while the provisions of sub-paragraph (a) might be deleted, the idea contained in sub-paragraph (b) should be retained in some form, perhaps by ~~him~~ inclusion in the following article. Lachs then stated that he had doubts about the usefulness of the article and supported the suggestion that it be deleted and an essential idea included in the following article. Bartos disagreed

with Tunkin and Lachs, both about the usefulness of the article and on the question of the right to propose amendments. In his view, to propose but not, of course, to impose amendment was a true right and this, together with the corresponding obligation from the other parties to consider the proposal seriously, should be confirmed by the Commission. Tunkin intervened again to say that to define the situation described in sub-paragraph (a) as a matter of right represented an unduly rigid attitude to a very flexible situation in international relations. He then referred again to Soviet legal theory stating that, while some claimed that actions of human beings or states resulted from rights or obligations, the theory was the wrong one, as had been demonstrated by Karl Marx. Society is not based on law but rather law is considered as a system of rules for the regulation of social relations.

72. Pal considered that there was little objection to the substance of the article but the question of its placement should be considered. He, and subsequently Rosenne, concurred in the suggestion by Elias that the article be deleted and its central idea introduced into the following article. Ago drew attention to the real and practical difficulties arising out of the disagreement over the use of the term "right". If it was considered that the question was not one of rights but rather of a faculty the problem still remained of determining whether a faculty should be unlimited. Bartos intervened again to argue that present practice showed that certain states needed to be able to request the amendment of a treaty without being ipso facto suspected of trying to avoid their obligations. Ruda shared the fears expressed by others concerning the postulation of an obligation to consider in good faith and agreed that the article might be deleted and article 68 expanded to include a part of it. Tunkin suggested that the Commission treat revision the way it had treated termination and require agreement by all the parties. Paredes suggested that a faculty could give rise to a right in the event of its exercise being impeded in any way. Castren stated that he found both the substance and form of the article acceptable, and concurred with Bartos in pointing to the distinction between denunciation of a treaty and a mere proposal to amend it. Briggs stated again that he favoured the retention of the article. Yasseen differed with Tunkin on the question of rights, since in his view it was certain that any party to a treaty had the right or the faculty to propose an amendment to it. That right or faculty was part of jus cogens. El-Erian agreed in general with Yasseen and with the way the article had been drafted. Tunkin had intervened again to say that where a treaty contained a revision clause, the clause would apply but where it had no such clause then a rule for amendment similar to that laid down in article 40 for termination was obviously appropriate. Article 40, required in addition to the agreement of all the parties, the consent of not less than two-thirds of the states who had drawn up the treaty. Where a treaty was silent, it was better, therefore, to adhere to the unanimity rule and to require the consent of all the states parties for convening the Conference. (Without referring to the Lacs Conference, Tunkin no doubt had this situation in mind.) De Luna pointed out that the problem involved was that of reconciling the requirement of treaty stability with the dynamic needs of international relations. He could not agree with the opening proviso of the article embodying the notion of an obligation to consult, but would see no objection to the next article including the right of consultation. Rosenne stated that after further reflection he had concluded that, subject to drafting changes, the article would serve a useful purpose. Verdross was willing to see the opening passage of the article dropped, but not for the reason given by Bartos that it would be contrary to jus cogens. He shared Ago's doubts also as to whether an obligation such as that contained in paragraph (b) of the article existed. Arechaga agreed to the deletion of the article because of the difficulties it raised. Reuter agreed with the general idea expressed in it though not its drafting, and considered that the article and the next succeeding one should be amalgamated into a single article. He pointed out

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that the problem of revision was connected with that of reservations, and doubted if the Commission could go so far as to propose quasi law-making clauses such as those suggested by Tunkin and Lachs applicable to all situations. Tsuruoka expressed the need for stability of the legal order. He was not opposed to the Commission drawing up provisions describing a technique for the amendment of treaties providing the unanimity principle or its corollary, consent of all parties to the earlier treaty, was respected.

73. The Special Rapporteur pointed out that the article was intended to be introductory and he would be prepared to withdraw sub-paragraph (a) of the article, but thought that the provisions of sub-paragraph (b) should be retained in some form in the following article. He did not think parties to the original treaty should be given a right of veto over the calling of a conference for its amendments and the Commission should probably not go beyond a statement of the right to be consulted. He undertook to prepare a revised version of the article and also the prededing and following ones. Ago pressed again for deletion of the suggestion which he felt was contained in sub-paragraph (b) of the article imposing an obligation of good faith in receiving a proposal for amendment if the proposing party was also not obliged to act in good faith. Liu then stated that in his view the article fulfilled a useful purpose, and should be retained as a separate article. After some further discussion it was agreed that the Commission accept the Special Rapporteur's offer to redraft the three articles in question.

74. The Chairman subsequently submitted the following redraft of the article proposed by the Drafting Committee:

> A treaty may be amended by agreement between the parties. The rules laid down in Part I apply to such agreement except insofar as the treaty or the established rules of an international organization may otherwise provide.

Ago suggested that the phrase "rules laid down in Part I apply to such agreement" seemed to imply that the agreement would have to be in written form. The Special Rapporteur confirmed Ago's understanding. Tunkin considered that the second sentence could be deleted without loss. The Special Rapporteur explained that the second sentence was intended to safeguard special clauses concerning revision. Briggs, Rosenne, Yassoen and Verdross suggested drafting changes. The Special Rapporteur proposed that at the beginning of the second sentence the words "if such agreement is in writing" be inserted. The Drafting Committee's redraft of the article, amended as proposed by the Special Rapporteur, was adopted unanimously in the following form:

> A treaty may be amended by agreement between the parties. If it is in writing, the rules laid down in Part I apply to such agreement except insofar as the treaty or the established rules of an international organization may otherwise provide.

75. It will be noted that the article is a substantial redraft of Waldock's draft article 67 on which it is based. Much of the discussion turned on the question of treating revisions like termination, but the Commission declined to impose the unanimity rule, advocated only by Tunkin and Lachs. The present formulation is not as flexible as might be desired, and in treating amendments like new treaties may reflect unduly the desire of some members to avoid any encroachment on the principle pacta sunt servanda. (The debate in the Sixth Committee may indicate that strict rules on revision and amendments do not create problems for those who accept the notion of invalidity of unequal treaties.)

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Article 66 (New)(Right of a Party to be consulted in regard to the amendment or revision of a treaty)

76. The article, which was former article 68, provides:

1. Every party has the right to be notified of any proposal to amend or revise the treaty and to be consulted with regard to the conclusion of any instrument designed to amend or revise it.

2. Paragraph 1 does not apply to an amendment by which certain of the parties propose to modify the application of the treaty as between themselves alone, if such amendment of the treaty as between the parties in question -

(a) does not affect the enjoyment by the other parties of their rights under the treaty;

(b) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

(c) is not prohibited by the treaty.

3. Except insofar as the treaty may otherwise provide, the rules laid down in Part I of these articles apply to the conclusion and entry into force of any instrument designed to amend or revise a treaty.

77. In introducing the article, which was discussed simultaneously with former articles 67 and 69, the Special Rapporteur explained that articles 68 and 69 (as formerly numbered) pose the important problem of unanimity in the special context of revision. The fundamental rule expressed in article 69 was that an amending or a revising instrument would not be binding on states who had not become parties to it. He wished the Commission's views on his approach, which was of a tentative character, and pointed to the alternative of treating revision of a somewhat analogous determination which required the agreement of all parties under article 40. Briggs thought article 68 should consist of paragraph 1 alone and that paragraph 2 should be dropped. Yasseen also expressed reservations about paragraph 2 of the article. Tunkin considered that article 68 (and 69) did not deal with amendment or revision of treaties but with the conclusion of a new treaty, a problem outside the present discussion. De Luna favoured the stipulation in paragraph 1 of article 68 of a right of consultation. Pal considered that paragraph 2 should be retained. Rosenne supported, in lieu of an absolute unanimity rule, the absolute right of all parties to be notified of a proposed amendment and, therefore, to article 68 paragraphs 1 and 3, subject to drafting changes. Ruda set out the two alternative approaches previously referred to by the Special Rapporteur, Tunkin and Rosenne but did not commit himself. Arechaga considered that Tunkin and Briggs differed less on substance than in their approach on the three articles and suggested three separate articles; firstly, a statement of the possibility of concluding inter se agreements (embodied in paragraph 2 of article 68); secondly, a provision dealing with the effects of such agreements as in paragraph 3(b) of article 69; and, thirdly, the rule of estoppel in event of prior notification embodied in paragraph 2 of article 69. Reuter considered that article 68 dealt with a much broader right than that to be consulted, which was the right to participate in a negotiation if entered into freely. He, therefore, favoured paragraph 1 of article 68 being amalgamated with article 67 in paragraph 3 of article 68 and becoming a separate article. Tunkin stated that so long as it was made clear that

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an inter se agreement did not constitute a revision of the earlier treaty but was in effect a separate treaty, he could generally agree to the substance of paragraph 2 of article 68. The Special Rapporteur stated that his purpose had not been to lay down a code of techniques for treaty revision, the whole subject of techniques was largely a political one which he had endeavoured to avoid. His whole purpose had been to analyse the existing practice in order to ascertain whether there were any elements deserving or needing formalization; one such element was a very important point of law embodied in paragraph 1 of article 68, the right of all parties to a treaty to be consulted concerning any transaction relating to its provisions. Its purpose was to deal with a case where some of the parties might supplement or vary the provisions of a treaty as between themselves alone.

78. The Special Rapporteur in introducing the following redraft pointed out that it constituted an essential complement to the preceding article, primarily on the question of unanimity of the parties.

Amendment of multilateral treaties

1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

   (a) to be notified of any proposal to amend it and to a voice in the decision of the parties as to the action, if any, to be taken in regard to the proposal;

   (b) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

3. The effect of an amending instrument on the obligations and rights of the parties to the treaty is governed by articles 41 and 65.

4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-a-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42.

He explained that the provisions of the redraft were based on the original texts of former articles 68 and 69, and on the discussion in the Commission. Paragraph 1 of the new text set forth the right of every party to a multilateral treaty to be notified of any proposal for its amendment and to participate in the negotiations. The redraft took into account the view held by some members that the article should specify the right of every party not merely to be consulted and to participate in the negotiations but also to have a voice in the decision to be taken subject to the proviso contained in the paragraph. Some of the texts of the new article 68 were taken from the text of the original draft of

article 69. Paragraph 5 of the redraft of article 68 reproduced the substance of paragraph 3(b) of the original article 69 subject to some drafting changes. He pointed out in response to comment by Ruda that the new article 69 covered the situation where two or more parties to a multilateral treaty decide to modify its application as between themselves alone and deliberately set out to make an inter se agreement without contemplating that the other party to the original treaty would agree to the same amendment. Paragraphs 2, 4 and 5 of the redraft of the article dealt with the not uncommon situation where the parties set out to modify the treaty for all of them but the new treaty or amending instrument was not ratified or accepted by some of them. Verdross considered that the new article stated some important rules that had not been clear in the past but thought sub-paragraph (a) could be deleted. Briggs considered the article could be improved by including in it some element of the redraft of the next article (69) considered in conjunction with it. The Special Rapporteur expressed the view that Briggs suggestion would destroy the purpose of paragraph 4 of the article, which was to impose a complete estoppel in the case of inter se agreements that were not intended as such but came into being as a result of some parties staying out of the amending process. Tunkin considered paragraph 4 too categorical. He suggested the deletion of paragraph 5 of the article as it was essentially already covered in article 42, paragraph 1. Arechaga concurred in Tunkin's suggestion. Some discussion then occurred concerning the deletion of paragraph 4 with Arechaga and the Special Rapporteur opposing its deletion, while Yasseen favoured it. Some discussion then occurred on the phrase "or otherwise consented to" in paragraph 4, which the Special Rapporteur explained, in reply to a question from Ago, might include a vote in favour of a text. Lachs and Bartos expressed strong reservations about votes at conferences being taken as indications of acceptance. Reuter, who supported the Special Rapporteur on paragraph 4, agreed with Ago that paragraph 2 should be deleted. The Special Rapporteur expressed surprise to learn that there was no way of discovering which states had voted for the adoption of a text of an instrument. Ago, Elias, Tsuruoka and Tunkin thought that paragraph 4 could be deleted but Castren and Bartos wished it to be retained. A number of drafting suggestions were made concerning paragraph 4. After some further discussion it was agreed that the two articles 68 and 69 (as formerly numbered) be referred back to the Drafting Committee.

79. The Chairman subsequently introduced the following redraft of article 68:

1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right, subject to the provisions of the treaty or the established rules of an international organization,

   (a) to be notified of the proposal and to take part in the decision as to the action, if any, to be taken in regard to it;

   (b) to take part in the conclusion of any agreement for the amendment of the treaty.

2. Unless otherwise provided by the treaty or by the established rules of an international organization -

   (a) an agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

   (b) the effect of the amending agreement is governed by article 65.

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3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or clearly indicated that it did not oppose the amendment.

80. The Special Rapporteur explained that in the redrafts of the two articles (68 and 69 as then numbered) a more clearcut distinction had been drawn between amendments originally designed to apply to all the parties and those intended to apply to a restricted group only. At the suggestion of Ago it was agreed that the words "as between" should be substituted for the words "in relation to". Bartos did not understand the reservation in paragraph 1, beginning with the words "subject to" since the established rules of an international organization could not deprive states of the right to be notified of a proposal to amend the treaty. To so suggest would be to sanction the inequality of states. Ago explained that when the Constitution of the ILO, for example, was amended, notification was made to all the members of the ILO. Moreover, in the case of WHO, the organs of that organization were empowered within certain limits to amend treaties without any notification or negotiation and that authority was accepted in advance by the members. Bartos pointed out that even in WHO the States had to be duly informed and could raise objection. Yasseen, Tunkin, Paredes and de Luna all shared the concern of Bartos. Briggs, Rosenne, Ago and Amado supported the text drafted. Bartos suggested a drafting change, requiring notification. The Special Rapporteur said he could accept the insertion of the words "to have the proposal communicated to it and" after the words "every party has the right". Paragraph 1 as so amended was approved unanimously, and paragraph 2 was then approved unanimously. Some further discussion then ensued concerning paragraph 3 over the question of the implication of the phrase "that it did not oppose the amendment", Tsuruoka stating that a vote in favour of a proposed amendment was not a promise of ratification, and Bartos pointing out that ratification was indispensable. Tunkin stated that neither a vote nor the signature of the text could be regarded as a definitive state's attitude. After some further discussion, paragraph 3, with the insertion of the word "otherwise" before the words "clearly indicated", was adopted by 13 votes to none, with 5 abstentions. The article as a whole, as amended, was adopted unanimously, as follows:

Amendment of multilateral treaties

1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right to have the proposal communicated to it, and, subject to the provisions of the treaty or the established rules of an international organization,

(a) to take part in the decision as to the action, if any, to be taken in regard to it;

(b) to take part in the conclusion of any agreement for the amendment of the treaty.

2. Unless otherwise provided by the treaty or by the established rules of an international organization -

(a) an agreement amending a treaty does not bind any party to the treaty which does not become a party to such agreement;

(b) the effect of the amending agreement is governed by article 63.

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3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or has otherwise clearly indicated that it did not oppose the amendment.

81. This article, as now drafted, covers the situation where it is originally intended that all parties concur in the proposed amendments but it subsequently transpires that some do not. It should, therefore, be differentiated from situations covered in the next article of inter se agreements intended as such ab initio. It should be noted that paragraph 2(b) as now drafted is stricter than Waldock's original formulation in that it treats amending instruments (by reference back to article 63) as a subsequent treaty. This incorporates once again the view of Tunkin and Lachs that inter se agreements are not essentially revisions of treaties but new treaties, and hence the problem is one of conflicts of treaties(i.e. treaties having incompatible provisions), rather than revision. Paragraph 3 is a reformulation of the provisions of former paragraph 2 of article 69 providing for estoppel, but leaves less latitude in providing that only parties which sign the text of amending agreements or have otherwise clearly indicated that they did not oppose the amendment are estopped from invoking the application of the amending agreement as a breach of the original treaty. The earlier formulation used looser language, providing merely for notification and consultation, taking part in the adoption and making no objection to amendments. The article as now drafted probably represents progressive development rather than codification, and lays down stricter rules than may be desirable if inter se agreements are to provide a necessary element of flexibility in treaty relations.

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Article 67 (Agreements to modify multilateral treaties between certain of the parties only)

82. Article 67 which was former article 69 (considered in conjunction with the two preceding articles) was introduced by the Special Rapporteur as embodying the fundamental rule that amending or revising instruments would not be binding on states that had not become parties to it. The discussion of the article largely parallelled that of the preceding articles. Tunkin stated again that he considered that the same principle should be applied to amendment of treaties as it had been applied to termination. Lachs concurred. Rosenne felt that no party should have the right of veto and no amendment would become binding on states which had not consented to it. Ruda supported the view of Tunkin and Lachs that inter se treaties did not really constitute amendments, although he was not opposed to inter se treaties. Arechaga agreed with Tunkin that the problem of inter se agreements was different from revision, but did not consider it justified the deletion of provisions on the subject, since inter se agreements had become in practice a necessary safety valve for the adjustment of treaties to the dynamic needs of international society. Part of the preceding article might better be combined with this. Arechaga felt that the Commission should not lay down the general rule that the minority would be obliged to surrender the benefit of participating in a treaty revision. Tunkin intervened again to emphasize that inter se treaties should be treated as distinct from revision since they constituted in effect a separate treaty. The Special Rapporteur stated that while he would be prepared to accept a greater separation between the provisions on inter se agreements and those on revision, he would strongly oppose the exclusion of inter se agreements, which constituted the crux of the whole problem, and without a reference to this procedure the three articles on the question would become meaningless. El-Erian supported the idea of treating inter se agreements as a separate case in a separate article. DeLuna pointed out that the inter se procedure constituted the most commonly used process for the revision of treaties.

83. The Special Rapporteur stated that it seemed somewhat unreal to try and draw a distinction between an amending treaty and a new treaty. Ago thought that it would be dangerous to say only that an inter se agreement violating the treaty vis-à-vis other parties would give those other parties the right to terminate the earlier treaty. The Commission should add that those parties would also be able to make a claim based on state responsibility. The Special Rapporteur pointed out that a party which had participated in a revision could not afterwards maintain that its rights had been violated by the revision or that the original treaty applied as between itself and the parties to the new agreement, which was a form of estoppel. He offered to redraft the article together with the two preceding articles, and it was so decided.

84. The Special Rapporteur subsequently introduced a substantial reformulation of the article. After some further discussion, turning chiefly at the right to be notified, the article was referred back to the Drafting Committee.

85. The Drafting Committee subsequently proposed a redraft of the Article, which left the provisions of the article practically unchanged except for some drafting improvements.

86. After further discussion, the Article was adopted by 16 votes to 1 with 1 abstention, (Bartos), in the following form:

"1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify the treaty as between themselves alone if -

(a) the possibility of such agreements is provided for by the treaty; or

(b) the modification in question -

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

(iii) is not prohibited by the treaty.

2. Except in a case falling under paragraph 1 (a), the conclusion of any such agreement shall be notified to the other parties to the treaty.

This article as drafted covers amending inter se agreements intended from the beginning to be such. While it is based on former article 69 (A/CN. 4/167/Add 1), it will be noted that it is a substantial reformulation. The article probably represents a compromise between Tunkin's view that inter se agreements should not be covered in the draft articles at all (since they are separate treaties) and the views of those such as de Luna and Yasseen who felt that inter se agreements provide useful device for reflecting changes in treaty relations. It should be noted that while article (1) was adopted unanimously, paragraph (2) was adopted by 13 votes to 1, with 4 abstentions - (Rosenne, Castren, Bartos and Lachs); the flexibility missing from article 66 may to some extent be taken care of by the provision at the beginning of paragraph 2. Some thought should perhaps be given to whether the compromise embodied in this article should be left alone or reconsidered in conjunction with article 66.

Article 68 (Modification of a Treaty by a subsequent Treaty, by subsequent practice or by Customary Law.

87. This article which was adopted unanimously, provides: "The operation of a treaty may also be modified -

(A) by a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(B) by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(C) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties."

This article is based on former article 73 (Document A/CN. 4/167Add 3 Fascicle 1) which in turn incorporated the second branch of the inter-temporal law, which had been dealt with in paragraph 2 of original article 56.

88. The inclusion of the article in the section on modification of treaties rather than in the section on application was in itself a substantive decision. (The complexity of the question is to some extent indicated by the fact that, as previously noted, this element of former article 56 was originally treated by Waldock as a question of application of treaties; was subsequently treated by him, on instructions of the Commission, under interpretation of treaties; and ultimately found its place in the section on modification.) It will be recalled that/the first branch of the inter-temporal law -- the principle that the terms of a treaty are to be interpreted in the light of the rules of international law and of the linguistic usage current at the time of its conclusion, (former article 70 paragraph 1 (B), document A/CN.4/167 Add 3 Fascicle 1), was eventually embodied in paragraph 1 (B) of article 69. The second branch of the inter-temporal law -- the principle that the legal effects of a treaty, as of any other legal act, are influenced by the evolution of the law - is embodied in paragraph (C) of this article. It may be observed that whereas the first branch of the inter-temporal law clearly concerns the interpretation of treaties, the second can be regarded either as a question of interpretation of treaties or of the application of the rules of international law to it. By comparison with the original article 56 (2), article 68 is more conservative; article 56 (2) had stated simply that the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied, whereas article 68 (C) provides that the operation of a treaty may be modified by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties. The article also, of course, includes in paragraphs (A) and (B) provisions for modification by subsequent treaty and by subsequent practice, under strictly regulated conditions. Given the controversial nature of the questions dealt with in the article, it would seem to represent an acceptable compromise between the points of view of those desiring to provide for the need for change and those wishing to ensure stability in the law. The possible implications of paragraph (C) for the Canadian position on Law of the Sea should also be borne in mind.

Section III- Interpretation of Treaties.

89. A number of members of the Commission had expressed doubts as to the possibility of developing articles on this question, and the production of articles on this topic represents a considerable achievement by Waldock and by the Commission.

Article 69 (General rule of interpretation)

90. This article, which was adopted unanimously, provides:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term

(a) in the contect of the treaty and in the light of its objects and purposes, and

(b) in the light of the rules of general international law in force at the time of its conclusion.

2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble and annexes, any agreement or instrument related to the treaty and reached or drawn up in connection with its conclusion.

3. There shall also be taken into account, together with the context,

(a) any agreement between the parties regarding the interpretation of the treaty;

(b) any subsequent practice in the application of the treaty which clearly established the understanding of all the parties regarding its interpretation.".

91. It will be noted that this article embodies elements originally contained in articles 70 and 71 (A/CN.4/167/Add 3 Fascicle 1). The paragraph 1 is simply the former article 70 (1) with the change that the objects and purposes of the treaty are now stressed in paragraph 1 (A) in lieu of the phrase "in the context of the treaty as a whole." This was done mainly at the urging of Tunkin and Lachs. (Paragraph 1 was adopted by 12 votes to none, with 3 abstentions). It is worth noting, however, that paragraph 1 (B) of article 69 remains almost identical to paragraph 1 (B) of original article 70, although Tunkin pressed strongly for the deletion of the words "in force at the time of its conclusion." Paragraph (2) of article 69, (adopted unanimously), incorporates paragraph 1 of former article 70, while paragraph 3 of article 69 is based in part on paragraph 2 of article 71. The significance of the changes made is mainly that in the descending order of sources of interpretation laid down in the article, preparatory work is not referred to all as a primary source, largely as a result of the views of Tunkin and Lachs, but some other members shared their views, and while subsequent practice is included, it is de-emphasized. The importance of the article is essentially that it could bring about uniformity of practice in interpretation, and this purpose seems adequately served by the article, whatever doctrinal differences it may provoke. (Possible relevance of article to interpretations of such terms as bays or territorial waters should, however, be borne in mind.)

Article 70 (Further means of interpretation)

92. This article, adopted by 13 votes to none, with 2 abstentions (Ruda and Yasseen) provides:

93. "Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 69, or to determine the meaning when the interpretation according to article 69 -

(A) leaves the meaning ambiguous or obscure; or

(B) leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty."

94. The article is based in part on former article 71 paragraph 2 (A/CN.4/167 Add 3 Fascicle 1), and lays down the various subsidiary means of interpretation which may be resorted to when the primary sources and rules provided for in article 69 have proven inadequate. The controversial question of the value of preparatory work and circumstances of conclusion of the treaty is settled by the provision making recourse to them permissible as means of interpretation only to verify or confirm the meaning resulting from the prior application of article 69 or to determine the meaning when the application of article 69 leaves the meaning ambiguous or obscure or leads to a result manifestly absurd or unreasonable in the light of the objects and purposes of the treaty. The views in the Commission varied from those of Ruda, who did not want preparatory work referred to at all, to Yasseen, who thought it should be emphasized more, with most of Commission somewhere in between. Rosenne and Ago, in particular, thought it unrealistic to attempt to prevent recourse to travaux préparatoires. While the article reflects the majority view of the Commission, it may raise doctrinal disputes in the 6th Committee.

Article 71 (Terms having a special meaning)

95. This article, adopted 14 votes to none, with one abstention (Paredes), provides: "Notwithstanding the provisions of paragraph 1 of article 69, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning." The article is based on former article 72 (A/CN.4/167/Add 3 Fascicle 1), but in order to reflect criticism made by Ago and some others that interpretations intended to give the fullest weight and effect to a treaty would necessarily embody an extensive approach, the article refers to terms having a special meaning instead of laying down the more commonly accepted view, that the natural and ordinary meaning of a treaty be given effect. The usefulness of article is somewhat doubtful, but it could have some importance in determining on whom the burden of proof falls, and it is backed by considerable jurisprudence. Moreover it helps fill the general need for uniformity of practice in interpretationsof treaties, and seems acceptable as such.

Article 72 (Treaties drawn up in two or more languages)

96. This article, adopted unanimously, provides:

"1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two or more languages, the text is authoritative in each language, except in so far as a different rule may be agreed upon by the parties.

2. A version drawn up in a language other than one of those in which the text of the treaty was authenticated shall also be authoritative and be considered as an authentic text if -

(A) the parties so agree; or

(B) the established rules of an international organization so provide."

97. The article incorporates, with only slight changes, the substance of former article 74 (A/CN.4/167/Add 3 Fascicle 2), and seems acceptable.

Article 73 (Interpretation of treaties having two or more texts)

98. This article, which was adopted unanimously, provides:

1. The different authentic texts of a treaty are equally authoritative in each language, unless the treaty itself provides that, in the event of divergence, a particular text shall prevail.

2. The terms of a treaty are presumed to have the same meaning in each text. Except in the case referred to in paragraph 1, when a comparison between two or more authentic texts discloses a difference in the expression of a term and any resulting ambiguity or obscurity is not removed by the application of articles 69-72, a meaning which so far as possible reconciles the different texts shall be adopted.

99. The article is an abbreviated version of former article 75 but it also deletes the clause for providing that where the meaning of one text is clear and the other is not clear, the former would be adopted. (This is now left to interpretation) The provision contained in paragraph 5 of the original version concerning possible use of non-authentic texts when all other methods of interpretation have failed to yield a meaning was also dropped on the grounds that it might be dangerous. The article should prove generally acceptable in its present form.

PERMANENT MISSION OF CANADA TO THE
EUROPEAN OFFICE OF THE UNITED NATIONS

MISSION PERMANENTE DU CANADA AUPRÈS
DE L'OFFICE EUROPÉEN DES NATIONS UNIES

16, Parc du Château Banquet
Geneva, November 13, 1964

PERSONAL AND CONFIDENTIAL

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Dear Mr. Cadieux,

I am pleased to be able to say that the commentary on the International Law Commission is going forward by today's bag. It follows the same general format as in previous years, but the commentaries on the articles are longer, since summaries of the discussions have been included in order to make up for the fact that you were unable to be present during part of the session.

We have been busy here this week, with the ILO Governing Body delegation, the Quebec Superior Labour Council, and Gauvin all with us at the same time. As for the first group, we are working in several committees and I am finding it quite interesting. With respect to the second delegation, they made a very favourable impression, particularly M. Fortin, who is not only competent, but extremely likeable. As one of the Canadian ILO officials put it, he and the other members of the delegation somehow left behind a good name, not only for Quebec but for Canada. (The extremely good relations between our Department of Labour people in Ottawa and those in Quebec could well provide a basis for extending their close federal-provincial cooperation into other fields).

I did not see much of Gauvin, (who was called away from our reception for the Quebec delegation by an emergency telegram instructing him to leave sooner than was intended) but Charles Stone took care of him very efficiently. We will be attending a "confidential" meeting in the office of the International Red Cross High Commissionner on Monday afternoon. (Apparently the subject is of importance, as they had asked for the Ambassador or, in his absence, the Deputy Head of Mission; Sakellaropoulo and I have agreed that I attend with Stone). The news this morning about Kenyatta is a little more encouraging, and we will be reporting on the results of the meeting on Monday.

My fond Regards,

Jean Beesley

Mr. Marcel Cadieux,
Under-Secretary of State
for External Affairs,
Ottawa, Ontario
Canada.

16.11.38(US)

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FM COMCENTRE GENEVA OCT30/64 CONFD

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REF OURTEL 1405 OCT29

PLEASE MAKE FOLLOWING AMENDMENTS:

PAGE1,PARA1,LINE 4 QUOTE COMPREHENSIVE FORMULATION),PARTLY BECAUSE THEY WERE UNQUOTE.

PAGE4,PARA4,LINE 6,QUOTE GOOD FAITH,OF REF TO TERRITORIAL APPLICATION,AND OF NOTION OF UNQUOTE.

PAGE4,PENULTIMATE LINE QUOTE ITS DELETION.WHILE CRITERIA OF A UNQUOTE.

PAGE5,PARA5,LINE 12,QUOTE OTHERWISE PROVIDES UNQUOTE.THIS ART WAS ACCEPTED BY UNQUOTE.

LINE 17,QUOTE VOID AND CASE WHERE ONE OF PARTIES FAILED UNQUOTE.

PAGE6,LINE 5,QUOTE A FORM OF COLONIAL CLAUSE,IN SPITE OF UNQUOTE.

LINE 7,QUOTE OPPONENTS OF COLONIAL CLAUSES.YASSEEN UNQUOTE.

LINE 13,QUOTE ON THIS POINT),CONSIDERABLE UNQUOTE.

PAGE7,LINE 5,QUOTE EL-ERIAN AND ROSENNE),AND MAY PROVOKE SOME UNQUOTE.

LINE 6,QUOTE DISCUSSION IN 6TH CTTEE.WHILE ART IS UNQUOTE.

PAGE8,LINE 17,QUOTE UNQUOTE,A PROVISION NOT RPT NOT UNQUOTE.

LINE 20,QUOTE POUR AUTRI RPT AUTRI)AND MAY UNQUOTE.

PAGE21,LINE 12,QUOTE DE-RPT DE-EMPHASIZED.THE IMPORTANCE UNQUOTE.

PAGE22,LINE 18 QUOTE SIZED MORE,WITH MOST OF THE COMMISSION UNQUOTE.

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TO: Mr. Wuth.
OCT 30 19[illegible]
REGISTRY

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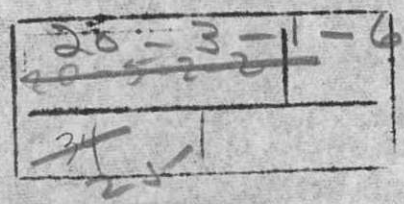

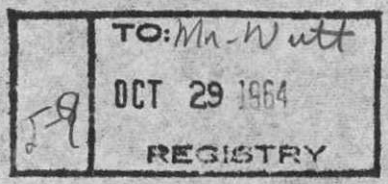

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ORIGINATOR REQUESTS FOLLOWING CCN BE INSERTED PAGE FOUR1401 BETWEEN LINE ENDING 1966.) AND LINE COMMENCING COMMISSIONS DECISION ETC.

QUOTE: FOREGOING DECISIONS WERE TAKEN HAVING PARTICULAR REGARD TO FACT THAT TERM OF OFFICE OF PRESENT MEMBERS OF COMMISSION EXPIRES AT END OF 1966 AND THAT IT WOULD BE DESIRABLE TO COMPLETE BEFORE THEN STUDY OF LAW OF TREATY AND SPECIAL MISSIONS. SINCE THESE DECISIONS FOLLOW PREVIOUS DIRECTIVES OF ASSEMBLY, THEY SHOULD NOT RPT NOT GIVE RISE TO CONTROVERSY IN 6TH CTTEE.

7. COOPERATION WITH OTHER BODIES UNQUOTE

COMMISIONS DECISION ETC ETC

Referred to
Mr. Cadieux
Mr. Wershof
Mr. Ritchie
Mr. Charpentier
Mr. Robertson
Mr. Gotlieb

ACTION COPY

20-3-6
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TO: Mr. Watt
OCT 29 1964
REGISTRY

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Gotlieb

FM GENEVA OCT29/64 CONFD

TO EXTERNAL 1405 IMMED

REF YOURTEL L325 OCT20 AND OURTELS 1401 AND 1402 OCT28

ILC REPORT--LAW OF TREATIES

GENERAL COMMENT: WALDOCKS DRAFT ARTS WERE SUBSTANTIALLY REVISED BY COMMISSION, PARTLY BECAUSE, AS IN CASE OF PARTS I AND II, HIS ARTS TENDED TO BE TOO LENGTHY AND DETAILED(PRESUMABLY IN ORDER TO PRESENT COMMISSION WITH COMPREHENSIVE FORMULATION). PARTLY BECAUSE THEY WERE NOT RPT NOT(AT LEAST IN VIEW OF SOME MEMBERS OF COMMISSION) UP TO STAN DARD OF THOSE OF TWO PREVIOUS PARTS, AND PARTLY BECAUSE OF NEED TO REFLECT IN DRAFT ARTS VARYING POINTS OF VIEW IN COMMISSION ON COMPLEX QUESTIONS. SUCCESS OF COMMISSION IN WORKING OUT AGREED SOLUTIONS HOW- EVER WAS DUE IN LARGE MEASURE TO WALDOCKS FLEXIBILITY, SCHOLARSHIP AND HARD WORK AND HE DESERVES MUCH OF CREDIT FOR SATISFACTORY RESULTS ACHIEVED ON THIS DIFFICULT TOPIC ON COMMISSIONS THIRD TRY.

2. FOR REASONS OUTLINED REFERRED TO IN PARA 2 OURTEL 1401, DRAFT ARTS OF THIRD PART OF LAW OF TREATIES, AS THEY EMERGED FROM COMMISSION WERE SOMEWHAT LESS LIBERAL IN APPROACH THAN THOSE ORIGINALLY DRAFTED BY WALDOCK AND IN AT LEAST SOME CASES(SEE COMMENTS BELOW ON OBJECTIVE REGIMES AND ON RIGHTS AND OBLIGATIONS FOR INDIVIDUALS) COMMISSION MAY HAVE BEEN OVERLY CAUTIOUS. IT IS OF RELEVANCE THAT AS APPEARS BELOW SEVERAL MEMBERS ABSTAINED ON VOTES ON SOME ARTS.

3. FOLLOWING DECISIONS SHOULD BE NOTED:

(A) REQUEST THAT GOVTS COMMENTS ON THIRD PART BE AVAILABLE BEFORE COMMENCEMENT OF 18TH SESSION OF ILC IN 1966.

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(B)NOT RPT NOT TO DEAL WITH QUESTION OF LEGAL LIABILITY ARISING FROM A FAILURE TO PERFORM A TREATY OBLIGATION(RAISED IN ORIGINAL FORMULATION OF ART 55). SUCH QUESTIONS FOR INSTANCE AS GENERAL PRINCIPLES GOVERNING REPARATION TO BE MADE FOR A BREACH OF A TREATY AND GROUNDS THAT MAY BE INVOKED IN JUSTIFICATION FOR NONPERFORMANCE OF A TREATY (ALSO TOUCHED ON IN ORIGINAL ART 55) WERE LEFT ASIDE TO BE INCLUDED IN SEPARATE STUDY OF STATE RESPONSIBILITY.(SEE HOWEVER ART 63 AND COMMENTARY ON IT.)WHILE THESE DECISIONS SEEM CONSISTENT WITH NATURE AND SCOPE OF TOPIC SEE TREATY SECTS COMMENTARY OF MAY1(PAGE 2)ON DESIRABILITY OF SUPPORTING DUTY TO REFRAIN FROM ACTS CALCULATED TO FRUSTRATE OBJECTS OF TREATY.

(C)QUESTION OF SUCCESSION OF STATE AND GOVTS WHICH AROSE IN CONNECTION WITH TERRITORIAL SCOPE OF A TREATY(FORMER ART 58)AND EFFECTS OF TREATIES ON THIRD STATES(FORMER ART 61),WAS ALSO LEFT ASIDE FOR SEPARATE STUDY OF STATE SUCCESSION. AS NOTED BELOW IN DISCUSSION OF ART 57 QUESTION OF TERRITORIAL SCOPE PROVOKED POLITICAL DEBATE ON COLONIAL CLAUSES. SIMILARLY QUESTION OF EFFECTS OF TREATIES ON THIRD STATE BROUGHT OUT DOCTRINAL DIFFERENCES NOT RPT NOT UNRELATED TO POLITICAL ATTITUDES.

(D)NOT RPT NOT TO INCLUDE PROVISIONS DEALING WITH POSSIBILITY OF EXTENSION OF A TREATY TO TERRITORY OF A THIRD STATE WITH ITS AUTHORIZATION(FORMER ART 59). GROUNDS OF DECISION WAS RARENESS OF PRACTICE, BUT QUESTION ALSO PROVIDED OPPORTUNITY FOR FURTHER LOWKEY EXPRESSIONS OF ANTICOLONIAL SENTIMENTS.

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(E)TO POSTPONE QUESTION OF MAKING OF TREATIES BY ONE STATE ON BEHALF OF ANOTHER OR BY AN INTERNATIONAL ORGANIZATION ON BEHALF OF A MEMBER STATE(FORM ART 60).WHILE IT IS ARGUABLE THAT SUCH ARRANGEMENTS AS BELGOLUXEMBURG CUSTOMS UNION AND SWITZERLAND LICHTENSTEIN RELATIONSHIP SHOULD BE PROVIDED FOR EL-ERIAN YASSEEN ELIAS LACHS AND TUNKIN ALL TREATED QUESTION AS TOUCHING ON PRINCIPLE OF EQUALITY AND INDEPENDENCE OF STATES.(WALDOCK REFERRED IN COURSE OF DISCUSSION TO TREATY-MAKING ARRANGEMENTS BETWEEN USSR ON ONE PART AND BYELORUSSIAN SSR AND UKRAINIAN-SSR ON OTHER;TUNKIN REFERRED IN TURN TO BRIT PROTECTORATES)DISCUSSION OF THIS QUESTION COULD THEREFORE RAISE DIFFICULTIES.

(F)TO WITHDRAW FORMER ART 66 PROVIDING FOR RIGHTS AND OBLIGATIONS TO BE PERFORMED OR ENJOYED BY INDIVIDUALS.ALTHOUGH A NUMBER OF MEMBERS (ROSENNE YASSEEN BARTOS LIU RUDA AND REUTER)THOUGHT QUESTION SHOULD HAVE BEEN COVERED,TUNKIN LACHS ELIAS EL-ERIAN ARECHEGA BRIGGS AND AGO OPPOSED INCLUSION OF TOPIC,AND CASTREN AMADO DE LUNA AND VERDROSS DOUBTED ITS NEED.SOME THOUGHT SHOULD PERHAPS BE GIVEN IN CONSULTATION WITH FRIENDS TO WHETHER THIS DECISION SHOULD BE REOPENED IN LIGHT OF CDN INTEREST IN WORK OF HUMAN RIGHTS COMMISSION.

(G)NOT RPT NOT TO INCLUDE AN ART PROVIDING FOR CREATION OF OBJECTIVE REGIMES(FORMER ART 63).DECISION ON THIS QUESTION(CONSIDERED BY SOME MEMBERS OF COMMISSION AS ALSO EVOKING OVERTONES OF COLONIALISM)SHOULD PERHAPS BE EXAMINED FROM POINT OF VIEW OF CDN INTERESTS.(SEE MAY1 MEMO PAGE 2 CONCLUDING WALDOCKS FORMULATION ON OBJECTIVE REGIMES SHOULD BE REGARDED AS NOTABLE CONTRIBUTION,THOUGH NOT RPT NOT FREE FROM DIFFICULTY,AND PAGE 16 POINTING OUT THIS CONCEPT COULD AFFECT CPA

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ON INTERNATIONAL RIVERS.)

(H)NOT RPT NOT TO INCLUDE ART ON MOST FAVOURED NATION CLAUSE.ARECHAGA PRESENTED INTERESTING RATIONALE FOR INCLUSION OF CLAUSE,BUT COMMISSION DECISION THAT THERE WAS NO RPT NO NEED TO INCLUDE A SAVING CLAUSE OF KIND PROPOSED SEEMS SENSIBLE.MOST MEMBERS OF COMMISSION HOWEVER, SAID THEY WOULD NOT RPT NOT OPPOSE SUCH A CLAUSE,AND IT MIGHT BE ADVISABLE TO DETERMINE POSITION WE WOULD TAKE IN EVENT OF SUGGESTION BEING REITERATED IN 6TH CTTEE.

4.SECT I:APPLICATION AND EFFECTS OF TREATIES:ART 55(ADOPTED 16 VOTES TO NONE 2 ABSTENTIONS PAREDES AND BARTOS),PERHAPS MOST FUNDAMENTAL OF ALL COMMISSIONS ARTS ON TREATIES PROVIDES SIMPLY QUOTE A TREATY IN FORCE IS BINDING UPONS PARTIES TO IT AND MUST BE PERFORMED BY THEM IN GOOD FAITH UNQUOTE.DELETION OF PROVISION ATTEMPTING TO DEFINE GOOD FAITH,REF TO TERRITORIAL APPLICATION,AND NOTION OF JUSTIFIABLE OR EXCUSABLE FAILURE TO COMPLY WITH TREATY OBLIGATIONS LEAVES ONLY BASIC TREATY PRINCIPLE PACTA SUNT SERVANDA WHICH IS PRESUMABLY ACCEPTABLE TO SOVIET WESTERN AND LDC JURISTS ALIKE.(TUNKIN QUOTED CZECH FRIENDLY RELATIONS RESLN IN SUPPORT OF ART).PHRASE QUOTE IN FORCE UNQUOTE WHILE CRITICIZED BY BRIGGS AND SOME OTHERS AS TENDING TO WEAKEN THE RULE,WAS CONSIDERED AS EXPLANATORY BY MAJORITY.MAJORITY SUPPORTED DELETION OF SENTENCE INCLUDED IN BRACKETS IN DRAFTING CTTEE FORMULATION QUOTE EVERY PARTY SHALL ABSTAIN FROM ANY ACT INCOMPATIBLE WITH OBJECT AND PURPOSE OF TREATY UNQUOTE BUT BARTOS ELERIAN CASTREN WALDOCK BRIGGS AND REUTER OPPOSED ITS DELETION WHILE CRITERIA OF A GOOD FAITH IS SEEMINGLY A SUBJECTIVE ONE,ONLY PAREDES EXPRESSED

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STRONG RESERVATIONS ABOUT ITS INCLUSION AS A LEGAL PRINCIPLE FORMING AN INTEGRAL PART OF FUNDAMENTAL RULE;CONCEPT MAY BE EXPECTED TO FIND GENERAL ACCEPTANCE AS A PROGRESSIVE ELEMENT CONSISTENT WITH CONTEMPORARY INTERNATIONAL LAW AND ART AS A WHOLE SHOULD PROVE GENERALLY ACCEPTABLE IN 6TH CTTEE.

5.FORMER ART 56(INTER-TEMPORAL LAW)WAS DELETED AND A REFORMULATION OF A PART OF IT INCLUDED AS ART 68 IN SECT ON MODIFICATION,(DISCUSSED BELOW).PRESENT ART 56(APPLICATION OF A TREATY IN POINT OF TIME),ADOPTED UNANIMOUSLY,BASED ON FORMER ART 57,PROVIDES AS FOLLOWS:QUOTE(1) PROVISIONS OF A TREATY DO NOT RPT NOT APPLY TO A PARTY IN RELATION TO ANY FACT OR ACT WHICH TOOK PLACE OR ANY SITUATION WHICH CEASED TO EXIST BEFORE DATE OF ENTRY INTO FORCE OF TREATY WITH RESPECT TO THAT PARTY UNLESS CONTRARY APPEARS FROM TREATY.(2)SUBJECT TO ART 53,PROVISIONS OF A TREATY DO NOT RPT NOT APPLY TO A PARTY IN RELATION TO ANY FACT OR ACT WHICH TAKES PLACE OR ANY SITUATION WHICH EXISTS AFTER TREATY HAS CEASED TO BE IN FORCE WITH RESPECT TO THAT PARTY UNLESS TREATY OTHERWISE PROVIDES.UNQUOTE THIS ART WAS ACCEPTED BY COMMISSION AFTER RELATIVELY MINOR DRAFTING CHANGES.SEVERAL MEMBERS QUERIED ORIGINAL REF TO QUOTE FACTS OR MATTERS UNQUOTE AND A REF IN A LATER VERSION TO QUOTE FACTS AND SITUATIONS UNQUOTE.ALTHOUGH ART WAS ADOPTED UNANIMOUSLY PAREDES MAINTAINED A RESERVATION CONCERNING PROBLEM OF TREATIES WHICH WERE NULL AND VOID AND CASE WHERE ON OF PARTIES FAILED TO PERFORM ITS UNDERTAKINGS UNDER A TREATY.ART SHOULD BE GENERALLY ACCEPTABLE AS DRAFTED.

6.ART 57(TERRITORIAL SCOPE OF A TREATY)ADOPTED 16 VOTES TO NONE, ONE ABSTENTION(PAREDES)PROVIDES:QUOTE SCOPE OF APPLICATION

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OF A TREATY EXTENDS TO ENTIRE TERRITORY OF EACH PARTY,UNLESS CONTRARY APPEARS FROM TREATY UNQUOTE.THIS ART IS A MODIFIED VERSION OF FORMER ART 58.PHRASE QUOTE TERRITORIES FOR WHICH PARTIES ARE INTERNATIONALLY RESPONSIBLE UNQUOTE CONTAINED IN ORIGINAL VERSION WAS ATTACKED BY EL-ERIAN AS A FORM OF COLONIAL CLAUSE.IN SPITE OF EXPLANATION BY SPECIAL RAPPORTEUR THAT HE HAD USED A FORM OF WORDS ACCEPTED IN OTHER INSTRUMENTS BY OPPONENTS OF COLONIAL CLAUSES.YASSEEN ELIAS TUNKIN BARTOS AND LACHS VIGOROUSLY OPPOSED PROVISION,AND MOST OTHER MEMBERS OF COMMISSION CONCURRED IN ITS DELETION TO AVOID ANY POSSIBLE MISUNDERSTANDINGS.SHOULD WESTERN REPS RAISE QUESTION OF NEED FOR SOME PROVISION SIMILAR TO ONE DELETED,(SEE LEGAL DIVS MEMO MAY1 PAGE 8 CONCLUDING THAT IT SEEMS MOST DESIRABLE THAT LAW BE CERTAIN ON THIS POINT).CONSIDERABLE OPPOSITION COULD BE EXPECTED FROM LDCS AND SOVIET BLOC.

7.ART 58(GENERAL RULE LIMITING EFFECTS OF TREATIES TO PARTIES),ADOPTED 14 VOTES TO NONE,5 ABSTENTIONS,PROVIDES QUOTE TREATY APPLIES ONLY BETWEEN PARTIES AND NEITHER IMPOSES ANY OBLIGATIONS NOR CONFERS ANY RIGHTS UPON A STATE NOT RPT NOT PARTY TO IT--SQUARE BRACKETS BEGIN--WITHOUT ITS CONSENT--SQUARE BRACKETS END--UNQUOTE.PRELIMINARY VOTE ON ART UP TO APRT IN SQUARE BRACKETS WAS 16 FOR TO NONE AGAINST 3 ABSTENTIONS.PRELIMINARY VOTE ON PART IN SQUARE BRACKETS WAS 8 FOR, 3 AGAINST,7 ABSTENTIONS.(SEE ATTACHED NOTE).BEGINS:-ART IS A MUCH SHORTENED VERSION OF FORMER ART 61 AND REPRESENT ATTEMPT AT COMPROMISE BETWEEN VIEW THAT TREATY CAN CREATE RIGHTS FOR THIRD STATES AND VIEW

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THAT IT CAN ONLY PROVIDE INCHOATE RIGHT WHICH CAN BE ACCEPTED OR DECLINED,AND SHOULD BE READ IN CONJUNTION WITH SUCEEDING TWO ARTS.QUESTION OF INCLUSION OR DELETION OF PHRASE QUOTE WITHOUT ITS CONSENT UNQUOTE PART IN SQUARE BRACKETS WAS FORMALLY ADOPTED 10 VOTES TO 5 WITH 4 ABSTENTIONS,(YASSEEN TABIBI EL-ERIAN AND ROSENNE.)MAY PROVOKE SOME DISCUSION IN 6TH CTTEE WHILE ART IS SOMEWHAT INFLEXIBLE BY COMPARISON WITH VERSION PROPOSED BY WALDOCK,IT SEEMS UNOBJECTIONABLE FROM A POLITICAL OR LEGAL POINT OF VIEW,EMBODYING AS IT DOES ACCEPTED RULE PACTATERTIIS NEC NOCENT NEC PROSUNT.

8.ART 59(TREATIES PROVIDING FOR OBLIGATION OF THIRD STATES),ADOPTED UNANIMOUSLY,PROVIDES QUOTE AN OBLIGATION MAY ARISE FOR A STATE FROM A PROVISION OF A TREATY TO WHICH IT IS NOT RPT NOT A PARTY IF PARTIES INTENDS PROVISION TO BE MEANS OF ESTABLISHING THAT OBLIGATION AND STATE IN QUESTION HAS EXPRESSLY AGREED TO BE SO BOUND UNQUOTE.THIS ART IS A CONDENSATION OF PARAS 1(A)AND(B)OF FORMER ART 62,AND STATES ESSENTIAL RULE IN SIMPLER LANGUAGE.IT SHOULD BE NOTED HOWEVER THAT FORMER PROVISION PERMITTED IMPLIED CONSENT TO OBLIGATIONS,WHEREAS THIS IS NOT RPT NOT PERMITTED BY PRESENT VERSION.IT IS WORTH NOTING TUNKINS INTERVENTIONS STRESSING AGREEMENT OF STATES AS BASIS OF CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW.DISCUSSION OF JUS COGENS AND WHETHER STATES COULD BE BORN INTO SYSTEM OF TREATY RELATIONSHIP COULD FORESHADOW TREATMENT OF CYPRUS QUESTION IN ASSEMBLY.

9.ART 60(TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES),ADOPTED BY 15 VOTES TO NONE WITH 3 ABSTENTIONS(VERDROSS DE LUNA AND PAREDES),

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PROVIDES:QUOTE(1)A RIGHT MAY ARISE FOR A STATE FROM A PROVISION OF A TREATY TO WHICH IT IS NOT RPT NOT A PARTY IF(A) PARTIES INTEND PROVISION TO ACCORD THAT RIGHT EITHER TO STATE IN QUESTION OR TO A GROUP OF STATES TO WHICH IT BELONGS OR TO ALL STATES,AND(B)STATE EXPRESSLY OR IMPLIEDLY ASSENTS THERETO.(2)A STATE EXERCISING A RIGHT IN ACCORDANCE WITH PARA(1)SHALL COMPLY WITH CONDITIONS FOR ITS EXERCISE PROVIDED FOR IN TREATY OR ESTABLISHED IN CONFORMITY WITH TREATY.UNQUOTE PARA 1 OF THIS ART IS A CONDENSATION OF PARAS2(A)AND(B)OF FORMER ART 62(REFORMULATED AS ART 62-A)(PARA 1 WAS ADOPTED 18 VOTES TO NONE,ONE ABSTENTION,(VERDROSS).PARA 2 WAS ADOPTED 17 VOTES TO NONE,TWO ABSTENTIONS(BARTOS AND RUDA)).ART PROVOKED DOCTRINAL DIFFERENCES,ARECHEGA VERDROSS WALDOCK AND ROSENNE HOLDING RIOHTS OF THIRD STATES COULD IVBERIVE DIRECTLY FROM TREATY AS SUCH WHILE AGO REUTER YASSEEN AND ELIAS CONSIDERED IT AS ARISING OUT OF SUBSEQUENT COLLATERAL AGREEMENT BETWEEN PARTIES AND THIRD STATE.IT SHOULD BE NOTED THAT CONDITIONS FOR EXERCISE OF RIGHT MAY BE QUOTE ESTABLISHED IN CONFORMITY WITH TREATY UNQUOTE.A PROVISION NOT RPT NOT CONTAINED IN EARLIER FORMULATION.WHILE ART IS ATTEMPT TO USE NEUTRAL LANGUAGE,FORMULATION SEEMS UNDULY RESTRICTIVE(SEE LEGAL DIVS MEMO MAY1 RECOMMENDING SUPPORT FOR STIPULATION POUR AUTRE)AND MAY THEREFORE PROVOKE DOCTRINAL(AND HENCE, POLITICAL)DIFFERENCES IN 6TH CTTEE.

10.ART 61(REVOCATION OR AMENDMENT OF PROVISIONS REGARDING OBLIGATIONS OR RIGHTS OF THIRD STATES),ADOPTED 14 VOTES TO NONE,3 ABSTENTIONS, (BARTOS DE LUNA PAREDES),PROVIDES:QUOTE WHERE AN OBLIGATION OR A RIGHT HAS ARISEN IN ART 59 OR ART 60 FOR A STATE FROM A PROVISION

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OF A TREATY TO WHICH IT IS NOT RPT NOT A PARTY,PROVISIONS MAY BE REVOKED OR AMENDED ONLY WITH CONSENT OF THAT STATE,UNLESS IT APPEARS FROM TREATY THAT PROVISION WAS INTENDED TO BE REVOCABLE UNQUOTE.THIS ART WHILE BASED ON PARA 3 OF FORMER ART 62 EMBODIES CONVERSE OF NOTION CONTAINED IN EARLIER VERSION,WHICH STIPULATED THAT PROVISIONS WITHOUT CONSENT OF STATE CONCERNED UNLESS CONTRARY WAS PROVIDED; PRESENT VERSION PROVIDING FOR REVOCATION OR AMENDMENT ONLY WITH CONSENT OF STATE CONCERNED UNLESS TREATY PROVIDES OTHERWISE SEEMS MORE LIKELY TO PROVE GENERALLY ACCEPTABLE THAN EARLIER VERSION.

11.ART 62(RULES IN A TREATY BECOMING GENERALLY BINDING THROUGH INTERNATIONAL CUSTOM),ADOPTED UNANIMOUSLY PROVIDES QUOTE NOTHING IN ART 58 TO 60 PRECLUDES RULES SET FORTH IN A TREATY FROM BEING BINDING UPON STATES NOT RPT NOT PARTIES TO THAT TREATY IF THEY HAVE BECOME CUSTOMARY RULES OF INTERNATIONAL LAW.UNQUOTE THIS ART IS A SLIGHTLY MORE RESTRICTIVE VERSION OF FORMER ART 64 AND WHILE INTENDED TO REASSURE THOSE REGRETTING DELETION OF ART ON OBJECTIVE REGIMES,TENDS TO LEAN TOWARDS TUNKINS VIEW THAT ONLY BINDING RULES OF INTERNATIONAL LAW (WHICH CAN,IN HIS VIEW BECOME SUCH ONLY BY CONSENT)CAN CAUSE PROVISIONS IN A TREATY TO BECOME BINDING ON STATES NOT RPT NOT PARTIES TO IT.EARLIER VERSION PERMITTED PRINCIPLES OF LAW(RATHER THAN RULES)TO BECOME APPLICABLE TO STATES NOT RPT NOT PARTIES THERETO IN CONSEQUENCE OF FORMATION OF AN INTERNATIONAL CUSTOM EMBODYING THESE PRINCIPLES. DIFFERENCE MAY HOWEVER,BE ONE OF EMPHASIS,AND ART SEEMS ACCEPTABLE.

12.ART 63(APPLICATION OF TREATIES HAVING INCOMPATIBLE PROVISIONS),

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ADOPTED 16 VOTES TO NONE,3 ABSTENTIONS PROVIDES:QUOTE(1)SUBJECT TO ART 103 OF CHARTER OF UN OBLIGATIONS OF STATES PARTIES TO TREATIES, PROVISIONS OF WHICH ARE INCOMPATIBLE SHALL BE DETERMINED IN ACCORDANCE WITH FOLLOWING PARAS.(2)WHEN A TREATY PROVIDES THAT IT IS SUBJECT TO,OR IS NOT RPT NOT INCONSISTENT WITH,AND EARLIER OR A LATER TREATY,PROVISIONS OF THAT OTHER TREATY SHALL PREVAIL.(3)WHEN ALL PARTIES TO A TREATY ENTER INTO A LATER TREATY RELATING TO SAME SUBJECT MATTER,BUT EARLIER TREATY IS NOT RPT NOT TERMINATED UNDER ART 41 OF THESE ARTS,EARLIER TREATY APPLIES ONLY TO EXTENT THAT ITS PROVISIONS ARE NOT RPT NOT INCOMPATIBLE WITH THOSE OF LATER TREATY. (4)WHEN PROVISIONS OF TWO TREATIES ARE INCOMPATIBLE AND PARTIES TO LATER TREATY DO NOT RPT NOT INCLUDE ALL PARTIES TO EARLIER ONE--(A) AS BETWEEN STATES PARTIES TO BOTH TREATIES,SAME RULE APPLIES AS IN PARA 3;(B)AS BETWEEN A STATE PARTY TO BOTH TREATIES AND A STATE PARTY ONLY TO EARLIER TREATY,EARLIER TREATY APPLIES;(C)AS BETWEEN A STATE PARTY TO BOTH TREATIES AND A STATE PARTY ONLY TO LATER TREATY LATER TREATY APPLIES.

(5)PARA(4)IS WITHOUT PREJUDICE TO ANY RESPONSIBILITY WHICH A STATE MAY INCUR BY CONCLUDING OR APPLYING A TREATY THE PROVISIONS OF WHICH ARE INCOMPATIBLE WITH GOVTS OBLIGATIONS TOWARDS ANOTHER STATE UNDER ANOTHER TREATY.UNQUOTE.THIS ART IS A REFORMULATION OF FORMER ART 65 ON PRIORITY OF CONFLICTING TREATY PROVISIONS,BUT IS LESS FLEXIBLE THAN WALDOCKS VERSION.PARA 1 REMAINS SUBSTANTIALLY UNALTERED FROM FORM IN WHICH IT WAS ORIGINALLY PRESENTED,ALTHOUGH TERM QUOTE INCOM-

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PATIBLE UNQUOTE HAS BEEN SUBSTITUTED (AT AGOS SUGGESTION) FOR PHRASE QUOTE IN CONFLICT UNQUOTE. PARA 2 PAYS DOWN THAT EARLIER TREATY SHALL PREVAIL ONLY WHEN SECOND TREATY SO PROVIDES WHEREAS EARLIER VERSION PERMITTED THIS TO OCCUR WHEN INTENTION APPEARED FROM TERMS OF A TREATY THE CIRCUMSTANCES OF ITS CONCLUSION OR STATEMENTS OF PARTIES. THERE WAS A SHIFT OF EMPHASIS ALSO IN PROVIDING (IN PARA 2 OF PRESENT VERSION) THAT EARLIER TREATY PREVAILS, WHEREAS FORMER VERSION PROVIDED THAT IT PREVAILED IN SO FAR AS POSSIBLE IN A MANNER COMPATIBLE WITH PROVISIONS OF SECOND TREATY. PARA 3 IS A BRIEFER VERSION OF PARA 3 OF ART 65 AND CONTAINS NO RPT NO SUSBSTANTIVE CHANGES. PARA 4 REARRANGES AND ALTERS PROVISIONS OF PARA 4 ART 65: INSTEAD OF LATER TREATY PREVAILING AS BETWEEN STATE PARTIES TO BOTH TREATIES, WHEN TWO TREATIES ARE IN CONFLICT, AND PARTIES TO LATER TREATY DO NOT RPT NOT INCLUDE ALL PARTIES TO EARLIER TREATY, (AS STIPULATED IN ART 65(4)(B), PRESENT VERSION PROVIDES THAT EARLIER TREATY APPLIES TO EXTENT THAT ITS PROVISIONS ARE NOT RPT NOT INCOMPATIBLE WITH THOSE OF LATER TREATY. THIS CHANGE SEEMS TO BE AN IMPROVEMENT AND SHOULD NOT RPT NOT RUN INTO OPPOSITION. ANOTHER CHANGE IN PARA IS THAT 4(C) IS SOMEWHAT STRICTER THAN 4(C) OF ART 65 IN THAT PROVISION MAKING IT NECESSARY ONLY THAT SECOND STATE BE AWARE OF EXISTENCE OF EARLIER TREATY HAS BEEN DELETED. IT SHOULD BE NOTED THAT PARA 5 IS A NEW PROVISION, INCLUDED AT URGING OF AGO AND OTHER WHO CONSIDERED THAT IT IS NOT RPT NOT ENOUGH TO MERELY LAY DOWN WHICH TREATY PREVAILS, SINCE THIS MIGHT BE TAKEN AS IMPLYING THAT NO RPT NO STATE RESPONSIBILITY WAS THEREBY

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ENGAGED.TUNKIN AND LACHS AGAIN TOOK STAND THAT TREATIES SUCH AS THOSE PROVIDING FOR NEUTRALITY OF AUSTRIA AND LAOS MUST PREVAIL OVER LATER CONFLICTING TREATIES,AND REF TO ART 103 OF CHARTER REVEALED DIFFERENCES OF VIEWS ON CHARTER AS LAW-MAKING TREATY,SO ART MAY PROVOKE DISCUSSION IN 6TH CTTEE.

13.ART 64(EFFECT OF SEVERANCE OF DIPLO RELATIONS ON APPLICATION OF TREATIES),ADOPTED UNANIMOUSLY,PROVIDES QUOTE(1)SEVERANCE OF DIPLO RELATIONS BETWEEN PARTIES TO A TREATY DOES NOT RPT NOT AFFECT LEGAL RELATIONS BETWEEN THEM ESTABLISHED BY TREATY.(2)HOWEVER SUCH SEVERANCE OF DIPLO RELATIONS MAY BE INVOKED AS A GROUND FOR SUSPENDING OPERATION OF TREATY IF IT RESULTS IN DISAPPEARANCE OF MEANS NECESSARY FOR APPLICATION OF TREATY.(3)UNDER CONDITIONS SPECIFIED IN ART 46 IF DISAPPEARANCE OF SUCH MEANS RELATES TO PARTICULAR CLAUSES OF TREATY SEVERANCE OF DIPLO RELATIONS MAY BE INVOKED AS A GROUND FOR SUSPENDING OPERATION OF THOSE CLAUSES ONLY.UNQUOTE THIS ART,SUGGESTED BY ROSENNE,WAS INTRODUCED BY WALDOCK AS ART 65A(SEE DOCU A/CN.4/167/ADD.2 JUN 12)IN LIGHT OF DISCUSSION AT 15TH SESSION ON SUBJECT.AS ORIGINALLY DRAFTED ART PROVIDED VERY SIMPLY THAT SEVERANCE OF DIPLO RELATIONS BETWEEN PARTIES TO A TREATY DOES NOT RPT NOT AFFECT LEGAL RELATION BETWEEN THEM ESTABLISHED BY TREATY,AND IN PARTICULAR THEIR OBLIGATION UNDER ART 55.THIS FORMULATION IS ESSENTIALLY RETAINED IN PARA 1 OF PRESENT ART 64.PROVISIONS CONTAINED IN PARAS 2 AND 3 ART 64 CREATE EXCEPTIONS HOWEVER IN PROVIDING THAT SEVERANCE OF DIPLO RELATIONS MAY BE INVOKED AS A GROUND FOR SUSPENDING OPERATION OF

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TREATY IN CERTAIN CIRCUMSTANCES ARE NEW, AND ARE OF SOME IMPORTANCE BOTH FROM LEGAL AND POLITICAL POINTS OF VIEW. NEW MOTIONS WERE SUGGESTED INITIALLY BY YASSEEN, (ALTHOUGH IT DOES NOT RPT NOT GO AS FAR AS HE WOULD HAVE WISHED) AND WERE SUPPORTED BY AGO, VERDROSS AND ARECHAGA. WHILE PARAS 2 AND 3 REFLECT ACTUAL PROBLEMS ENCOUNTERED IN PRACTICE, WHICH NO RPT NO DOUBT SHOULD BE PROVIDED FOR, THEY ALSO MAY RAISE DANGER OF SEVERANCE OF DIPLO RELATIONS BEING PROVOKED WITH VIEW TO INVOKING SEVERANCE OF JUSTIFICATION OF NON-PERFORMANCE OF TREATY OBLIGATIONS CONSIDERATION SHOULD PERHAPS BE GIVEN TO CONSULT-ATION WITH OTHER COUNTRIES ON THIS ART.

14. SECTION II MODIFICATION OF TREATIES: ART 65 (PROCEDURE FOR AMENDING TREATIES), ADOPTED UNANIMOUSLY, PROVIDES: QUOTE A TREATY MAY BE AMENDED BY AGREEMENT BETWEEN THE PARTIES. IF IT IS IN WRITING, THE RULES LAID DOWN IN PART I APPLY TO SUCH AGREEMENT EXCEPT IN SO FAR AS THE TREATY OR THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION MAY OTHERWISE PROVIDE. UNQUOTE. THIS ART IS A SUBSTANTIAL REDRAFT OF WALDOCKS DRAFT ART 65 (DOCU A/CN.4/167 ADD 1) ON WHICH IT IS BASED. YASSEN, BARTOS CASTREN AND EL-ERIAN DISAGREED FLATLY WITH TUNKIN AND LACHS OVER THE EXISTENCE OF A RIGHT TO PROPOSE AN AMENDMENT (EMBODIED IN PARA A OF ORIGINAL ART 67), TUNKIN QUOTING MARX TO EXPLAIN HIS OPPOSITION TO THE NOTION OF SUCH A RIGHT. RUDA VERDROSS AND ELIAS EX-PRESSED RESERVATIONS ABOUT THE EXISTENCE OF A DUTY TO CONSIDER PROPOSED AMENDMENTS IN GOOD FAITH (PARA 2 OF FORMER ART 67). BOTH NOTIONS WERE ELIMINATED FROM THE ART IN THE FORM IT WAS ACCEPTED BY

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COMMISSION.MUCH OF DISCUSSION TURNED ON THE QUESTION OF TREATING REVISIONS LIKE TERMINATION.THE COMMISSION DECLINED TO IMPOSE THE UNANIMITY RULE,ADVOCATED ONLY BY TUNKIN AND LACHS,BUT PRESENT FORMULATION IS NOT RPT NOT AS FLEXIBLE AS MIGHT BE DESIRED,AND IN TREATING AMENDMENTS LIKE NEW TREATIES MAY REFLECT UNDULY DESIRE OF SOME MEMBERS TO AVOID ANY ENCROACHMENT ON THE PRINCIPLE PACTA SUNT SERVANDA.(DEBATE IN 6TH CTTEE MAY INDICATE THAT STRICT RULES ON REVISION AND AMENDMENTS DO NOT RPT NOT CREATE PROBLEMS FOR THOSE WHO ACCEPT NOTION OF INVALIDITY OF UNEQUAL TREATIES).

15.ART 66(AMENDMENT OF MULTILATERAL TREATIES),ADOPTED UNANIMOUSLY, PROVIDES:QUOTE(1)WHENEVER IT IS PROPOSED THAT A MULTILATERAL TREATY SHOULD BE AMENDED IN RELATIONS TO ALL PARTIES,EVERY PARTY HAS THE RIGHT TO HAVE THE PROPOSAL COMMUNICATED TO IT,AND,SUBJECT TO THE PROVISIONS OF THE TREATY OR THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION,(A)TO TAKE PART IN THE DECISION AS TO THE ACTION,IF ANY,TO BE TAKEN IN REGARD TO IT;(B)TO TAKE PART IN THE CONCLUSION OF ANY AGREEMENT FOR THE AMENDMENT OF THE TREATY.(2)UNLESS OTHERWISE PROVIDED BY THE TREATY OR BY THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION-

(A)AN AGREEMENT AMENDING A TREATY DOES NOT RPT NOT BIND ANY PARTY TO THE TREATY WHICH DOES NOT RPT NOT BECOME A PARTY TO SUCH AGREEMENT;

(B)THE EFFECT OF THE AMENDING AGREEMENT IS GOVERNED BY ART 63.

(C)THE APPLICATION OF AN AMENDING AGREEMENT AS BETWEEN THE STATES WHICH BECOME PARTIES THERETO MAY NOT RPT NOT BE INVOKED BY ANY OTHER

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PARTY TO THE TREATY AS A BREACH OF THE TREATY IF SUCH PARTY SIGNED THE TEXT OF THE AMENDING AGREEMENT OR HAS OTHERWISE CLEARLY INDICATED THAT IT DID NOT RPT NOT OPPOSE THE AMENDMENT.UNQUOTE.THIS ART COVERS THE SITUATION WHERE IT IS ORIGINALLY INTENDED THAT ALL PARTIES CONCUR IN PROPOSED AMENDMENTS BUT IT SUBSEQUENTLY TRANSPIRES THAT SOME DO NOT RPT NOT.IT SHOULD THEREFORE BE DIFFERENTIATED FROM SITUATIONS COVERED IN NEXT ART OF INTER SE AGREEMENTS INTENDED AS SUCH AB INITIO.THIS ART EMBODIES ELEMENTS OF BOTH FORMER ART 68 AND FORMER ART 69(DOCU A/CN.4/167/ADD.1).PARA1 CORRESPONDS FAIRLY CLOSELY TO THE PROVISIONS OF PARA 1 OF FORMER ART 68,IN PROVIDING FOR NOTIFICATION TO EVERY PARTY TO A MULTILATERAL TREATY OF PROPOSED AMENDMENTS,BUT ADDS THE EXCEPTION COVERING PROVISIONS IN THE TREATY OR THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION.PARAS 1(A)AND 1(B)ARE SUBSTANTIALLY A REFORMULATION OF THE PROVISIONS OF FORMER ART 69 PARA 2.INSTEAD OF PROVIDING THAT AN AMENDING OR REVISING INSTRUMENT THE PARTIES MAY NOT RPT NOT BE CONSIDERED BY A NON-PARTY(TO THE AMENDMENTS)AS A VIOLATION OF ITS RIGHTS IF IT TOOK PART IN THE AMENDMENT,OR IF IT MADE NO RPT NO OBJECTION TO IT,IT PROVIDES INSTEAD THAT EVERY PARTY HAS A RIGHT TO TAKE PART IN SUCH DECISIONS AND IN THE CONCLUSION OF ANY AGREEMENT FOR AMENDMENT.(THIS DIFFERENCE SEEMS TO BE MORE THAN ONE OF EMPHASIS).PARA 2 OF ART 66 EMBODIES ELEMENTS CONTAINED IN PARA 1 OF FORMER ART 69(THE DIFFERENCES IN THIS CASE BEING ESSENTIALLY MATTERS OF EMPHASIS).IT SHOULD BE NOTED THAT PARA 2(B)AS NOW DRAFTED IS STRICTER THAN WALDOCKS ORIGINAL

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FORMULATION IN THAT IT TREATS AMENDING INSTRUMENTS(BY REF BACK TO ART 63)AS A SUBSEQUENT TREATY.THIS INCORPORATES ONCE AGAIN THE VIEW OF TUNKIN AND LACHS THAT INTER SE AGREEMENTS ARE NOT RPT NOT ESSENTIALLY REVISIONS OF TREATIES BUT NEW TREATIES,AND HENCE PROBLEM IS ONE OF CONFLICTS OF TREATIES,RATHER THAN REVISION.(IE TREATIES HAVING INCOMPATIBLE PROVISIONS).PARA3 IS A REFORMULATION OF THE PROVISIONS OF FORMER PARA 2 OF ART 69 PROVIDING FOR ESTOPPEL, BUT LEAVES LESS LATITUDE IN PROVIDING THAT ONLY PARTIES WHICH SIGN THE TEXT OF AMENDING AGREEMENTS OR HAVE OTHERWISE CLEARLY INDICATED THAT THEY DID NOT RPT NOT OPPOSE THE AMENDMENT ARE ESTOPPED FROM INVOKING THE APPLICATION OF THE AMENDING AGREEMENT AS A BREACH OF THE ORIGINAL TREATY.THE EARLIER FORMULATION USED LOOSER LANGUAGE, PROVIDING MERELY FOR NOTIFICATION AND CONSULTATION,TAKING PART IN THE ADOPTION AND MAKING NO RPT NO OBJECTION TO AMENDMENTS.THE ART AS NOW DRAFTED PROBABLY REPRESENTS PROGRESSIVE DEVELOPMENT RATHER THAN CODIFICATION,AND LAYS DOWN STRICTER RULES THAN MAY BE DESIRABLE IF INTER SE AGREEMENTS ARE TO PROVIDE A NECESSARY ELEMENT OF FLEXIBILITY IN TREATY RELATIONS.

16.ART 67(AGREEMENTS TO MODIFY MULTILATERAL TREATIES BETWEEN CERTAIN OF THE PARTIES ONLY),ADOPTED BY 16 VOTES TO 1,WITH 1 ABSTENTION (BARTOS)PROVIDES:QUOTE(1)TWO OR MORE OF THE PARTIES TO A MULTILATERAL TREATY MAY INTER INTO AN AGREEMENT TO MODIFY THE TREATY AS BETWEEN THEMSELVES ALONE IF(A)THE POSSIBILITY OF SUCH AGREEMENTS IS PROVIDED FOR BY THE TREATY;OR(B)THE MODIFICATION IN QUESTION(I)DOES NOT RPT

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NOT AFFECT THE ENJOYMENT BY THE OTHER PARTIES OF THEIR RIGHTS UNDER THE TREATY OR THE PERFORMANCE OF THEIR OBLIGATIONS;(II)DOES NOT RPT NOT RELATE TO A PROVISION DEROGATION FROM WHICH IS INCOMPATIBLE WITH THE EFFECTIVE EXECUTION OF THE OBJECTS AND PURPOSES OF THE TREATY AS A WHOLE;AND(III)IS NOT RPT NOT PROHIBITED BY THE TREATY.(2) EXCEPT IN A CASE FALLING UNDER PARA 1(A),THE CONCLUSION OF ANY SUCH AGREEMENT SHALL BE NOTIFIED TO THE OTHER PARTIES TO THE TREATY UN-QUOTE.THIS ART COVERS AMENDING INTER SE AGREEMENTS INTENDED FROM THE BEGINNING TO BE SUCH.IT IS BASED ON FORMER ART 69(A/CN.4/167/AD.1) BUT IS A SUBSTANTIAL REFORMULATION.THE ART REPRESENTS A COMPROMISE BETWEEN TUNKINS VIEW THAT INTER SE AGREEMENTS SHOULD NOT RPT NOT BE COVERED IN THE DRAFT ARTS AT ALL(SINCE THEY ARE SEPARATE TREATIES) AND VIEWS OF THOSE SUCH AS DE LUNA AND YASSEEN WHO FELT THAT INTER SE AGREEMENTS PROVIDE USEFUL DEVICE FOR REFLECTING CHANGES IN TREATY RELATIONS.PROVISO AT(GRP CORRUPT)OF ART(2)CREATED DIFFERENCES OF VIEW WS ON WHETHER NOTIFICATION OF PROPOSED AMENDMENTS SHOULD ALWAYS BE GIVEN TO ALL PARTIES,(IT SHOULD BE NOTED THAT WHILE ART(1)WAS ADOPTED UNANIMOUSLY,PARA(2)WAS ADOPTED BY 13 VOTES TO 1,WITH 4 ABSTENTIONS-ROSENNE CASTREN BARTOS LACHS),AND THE FLEXIBILITY MISSING FROM ART 66 MAY TO SOME EXTENT BE TAKEN CARE OF BY THE PROVISO AT BEGINNING OF PARA(2).WHILE THE TWO ARTS PROVIDE FOR DIFFERENT SITUATIONS, WALDOCK SUGGESTED THAT IF PARA 2 OF ART 67 WERE TO LAY DOWN TOO RIGID A RULE,(BY ELIMINATING THE PROVISO)THE WHOLE ART MIGHT NOT RPT NOT BE ACCEPTABLE TO STATES,AND THAT IN ORDER TO OBTAIN ACCEPT-

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ANCE FOR THE FAIRLY STRICT RULE LAID DOWN IN ART 66,THE PROVISIONS OF ART 67 SHOULD BE LESS STRICT.SOME THOUGHT SHOULD PERHAPS BE GIVEN TO WHETHER THE COMPROMISE EMBODIED IN THIS ART SHOULD BE LEFT ALONE OR RECONSIDERED IN CONJUNCTION WITH ART 66.

17.ART 68(MODIFICATION OF A TREATY BY A SUBSEQUENT TREATY,BY SUBSEQUENT PRACTICE OR BY CUSTOMARY LAW),ADOPTED UNANIMOUSLY,PROVIDES, QUOTE THE OPERATION OF A TREATY MAY ALSO BE MODIFIED(A)BY A SUBSEQUENT TREATY BETWEEN THE PARTIES RELATING TO THE SAME SUBJECT MATTER TO THE EXTENT THAT THEIR PROVISIONS ARE INCOMPATIBLE;(B)BY SUBSEQUENT PRACTICE OF THE PARTIES IN THE APPLICATION OF THE TREATY ESTABLISHING THEIR AGREEMENT TO AN ALTERATION OR EXTENSION OF ITS PROVISIONS; OR(C)BY THE SUBSEQUENT EMERGENCE OF A NEW RULE OF CUSTOMARY LAW RELATING TO MATTERS DEALT WITH IN THE TREATY AND BINDING UPON ALL THE PARTIES.UNQUOTE.THIS ART IS BASED ON FORMER ART 73(DOCU A/CN.-4/167/ADD3 FASCICLE 1)WHICH IN TURN INCORPORATED THE SECOND BRANCH OF THE INTER-TEMPORAL LAW,WHICH HAD BEEN DEALT WITH IN PARA 2 OF ORIGINAL ART 56.THE INCLUSION OF THE ART IN THE SECT ON MODIFICATION OF TREATIES RATHER THAN IN THE SECT ON APPLICATION WAS IN ITSELF A SUBSTANTIVE DECISION.(THE COMPLEXITY OF THE QUESTION IS TO SOME EXTENT INDICATED BY THE FACT THAT THIS ELEMENT OF FORMER ART 56 WAS ORIGINALLY TREATED BY WALDOCK AS A QUESTION OF APPLICATION OF TREATIES,WAS SUBSEQUENTLY TREATED BY HIM,ON INSTRUCTIONS OF THE COMMISSION,UNDER INTERPRETATION OF TREATIES,AND ULTIMATELY FOUND ITS PLACE IN THE SECT ON MODIFICATION).THE FIRST BRANCH OF THE INTER-TEMPORAL LAW-

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(CORRUPT)PRINCIPLE THAT THE TERMS OF A TREATY ARE TO BE INTERPRETED IN THE LIGHT OF THE RULES OF INTERNATIONAL LAW AND OF THE LINGUISTIC USAGE CURRENT AT TIME OF ITS CONCLUSION(FORMER ART 70 PARA 1(B), DOCU A/CN.4/167/ADD3 FASCICLE 1)WAS EVENTUALLY EMBODIED IN PARA 1(B)OF ART 69.THE SECOND BRANCH OF THE INTER-TEMPORAL LAW--THE PRINCIPLE THAT THE LEGAL EFFECTS OF A TREATY,AS OF ANY OTHER LEGAL ACT,ARE INFLUENCED BY THE EVOLUTION OF THE LAW-IS EMBODIED IN PARA(C) OF THIS ART.IT MAY BE OBSERVED THAT WHEREAS THE FIRST BRANCH OF THE INTER-TEMPORAL LAW CLEARLY CONCERNS THE INTERPRETATION OF TREATIES, THE SECOND CAN BE REGARDED EITHER AS A QUESTION OF INTERPRETATION OF TREATIES OR OF THE APPLICATION OF THE RULES OF INTERNATIONAL LAW TO IT.BY COMPARISON WITH ORIGINAL ART 56(2)ART 68 IS MORE CONSERV-ATIVE;ART 56(2)HAD STATED SIMPLY THAT THE APPLICATION OF A TREATY SHALL BE GOVERNED BY THE RULES OF INTERNATIONAL LAW IN FORCE AT THE TIME WHEN THE TREATY IS APPLIED,WHEREAS ART 68(C)PROVIDES THAT THE OPERATION OF A TREATY MAY BE MODIFIED BY THE SUBSEQUENT EMERGENCE OF A NEW RULE OF CUSTOMARY LAW RELATING TO MATTERS DEALT WITH IN THE TREATY AND BINDING UPON ALL PARTIES.THE ART ALSO OF COURSE INCLUDES IN PARAS(A)AND(B)PROVISIONS PROVIDING FOR MODIFICATION BY SUBSEQUENT TREATY AND BY SUBSEQUENT PRACTICE,UNDER STRICTLY REGULATED CONDI-TIONS.GIVEN THE CONTROVERSIAL NATURE OF THE QUESTIONS DEALT WITH IN THE ART,IT WOULD SEEM TO REPRESENT AN ACCEPTABLE COMPROMISE BETWEEN THE POINTS OF VIEW OF THOSE DESIRING TO PROVIDE FOR THE NEED FOR CHANGE AND THOSE WISHING TO ENSURE STABILITY IN THE LAW.POSSIBLE

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IMPLICATIONS OF PARA(C)FOR CDN POSITION ON LAW OF THE SEA SHOULD ALSO BE BORNE IN MIND.

18.SECT II INTERPRETATION OF TREATIES:THE PRODUCTION OF ARTS ON THIS QUESTION REPRESENTS A CONSIDERABLE ACHIEVEMENT BY WALDOCK AND BY THE COMMISSION.ART 69(GENERAL RULE OF INTERPRETATION),ADOPTED UNANIMOUSLY,PROVIDES:QUOTE(1)A TREATY SHALL BE INTERPRETED IN GOOD FAITH IN ACCORDANCE WITH THE ORDINARY MEANING TO BE GIVEN TO EACH TERM(A)IN THE CONTEXT OF THE TREATY AND IN THE LIGHT OF ITS OBJECTS AND PURPOSES,AND(B)IN THE LIGHT OF THE RULES OF GENERAL INTERNATIONAL LAW IN FORCE AT TIME OF ITS CONCLUSION.(2)THE CONTEXT OF THE TREATY, FOR THE PURPOSES OF ITS INTERPRETATION,SHALL BE UNDERSTOOD AS COMPRISING IN ADDITION TO THE THREATY,INCLUDING ITS PREAMBLE AND ANNEXES,ANY AGREEMENT OR INSTRUMENT RELATED TO THE TREATY AND REACHED OR DRAWN UP IN CONNECTION WITH ITS CONCLUSION.(3)THERE SHALL ALSO BE TAKEN INTO ACCOUNT,TOGETHER WITH THE CONTEXT,(A)ANY AGREEMENT BETWEEN THE PARTIES REGARDING THE INTERPRETATION OF THE TREATY; (B)ANY SUBSEQUENT PRACTICE IN THE APPLICATION OF THE TREATY WHICH CLEARLY ESTABLISHED THE UNDERSTANDING OF ALL THE PARTIES REGARDING ITS INTERPRETATION.UNQUOTE.THIS ART EMBODIES ELEMENTS ORIGINALLY CONTAINED IN ARTS 70 AND 71(A/CN.4/167/ADD3 FASCICLE 1).PARA 1 IS SIMPLY FORMER ART 70(1)WITH THE CHANGE THAT THE OBJECTS AND PURPOSES OF THE TREATY ARE NOW STRESSED IN PARA 1(A)IN LIEU OF THE PHRASE QUOTE IN THE CONTEXT OF THE TREATY AS A WHOLE UNQUOTE,AT THE URGING OF TUNKIN AND LACHS.(PARA 1 WAS ADOPTED BY 12 VOTES TO

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NONE,WITH 3 ABSTENTIONS).IT IS WORTH NOTING HOWEVER THAT PARA 1(B) OF ART 69 REMAINS ALMOST IDENTICAL TO PARA 1(B)OF ORIGINAL ART 70, ALTHOUGH TUNKIN PRESSED STRONGLY FOR THE DELETION OF THE WORDS QUOTE IN FORCE AT TIME OF ITS CONCLUSION UNQUOTE.PARA(2) OF ART 69, (ADOPTED UNANIMOUSLY),INCORPORATES PARA 1 OF FORMER ART 70,WHILE PARA 3 OF ART 69 IS BASED IN PART ON PARA 2 OF ART 71.THE SIGNIFICANCE OF THE CHANGES MADE IS MAINLY THAT IN THE DESCENDING ORDER OF SOURCES OF INTERPRETATION LAID DOWN IN THE ART,PREPARATORY WORK IS NOT RPT NOT REFERRED TO AT ALL AS A PRIMARY SOURCE,LARGELY AS A RESULT OF THE VIEWS OF TUNKIN AND LACHS,BUT SOME OTHER MEMBERS SHARED THEIR VIEWS,AND WHILE SUBSEQUENT PRACTICE IS INCLUDED,IT IS RE-EMPHASIZED.THE IMPORTANCE OF THE ART IS ESSENTIALLY THAT IT COULD BRING ABOUT UNIFORMITY OF PRACTICE IN INTERPRETATION,AND THIS PURPOSE SEEMS ADEQUATELY SERVED BY THE ART,WHATEVER DOCTRINAL DIFFERENCES IT MAY PROVOKE.(POSSIBLE RELEVANCE OF ART TO INTERPRETATIONS OF SUCH TERMS AS BAYS OR TERRITORIAL WATERS SHOULD,HOWEVER,BE BORNE IN MIND.)

19.ART 70(FURTHER MEANS OF INTERPRETATION),ADOPTED 13 VOTES TO NONE, WITH 2 ABSTENTIONS(RUDA AND YASSEEN)PROVIDES:QUOTE RECOURSE MAY BE HAD TO FURTHER MEANS OF INTERPRETATION,INCLUDING THE PREPARATORY WORK OF THE TREATY AND THE CIRCUMSTANCES OF ITS CONCLUSION,IN ORDER TO VERIFY OR CONFIRM THE MEANING RESULTING FROM THE APPLICATION OF

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ART 69,OR TO DETERMINE THE MEANING WHEN THE INTERPRETATION ACCORDING TO ART 69-(A)LEAVES THE MEANING AMBIGUOUS OR OBSCURE;OR(B) LEADS TO A RESULT WHICH IS MANIFESTLY ABSURD OR UNREASONABLE IN THE LIGHT OF THE OBJECTS AND PURPOSES OF THE TREATY UNQUOTE.THE ART IS BASED IN PART ON FORMER ART 71 PARA 2(A/CN.4/167 ADD 3 FASCICLE 1). THIS ART LAYS DOWN THE SUBSIDIARY MEANS OF INTERPRETATION WHICH MAY BE RESORTED TO WHEN THE PRIMARY SOUCES AND RULES LAID DOWN IN ART 69 HAVE PROVEN INADEQUATE.THE CONTROVERSIAL QUESTION OF THE VALUE OF PREPARATORY WORK AND CIRCUMSTANCES OF CONCLUSION OF THE TREATY IS SETTLED BY THE PROVISION MAKING RECOURSE TO THEM PERMISSIBLE AS MEANS OF INTERPRETATION ONLY TO VERIFY OR CONFIRM THE MEANING RESULTING FROM THE PRIOR APPLICATION OF ART 69 OR TO DETERMINE THE MEANING WHEN THE APPLICATION OF ART 69 LEAVES THE MEANING AMBIGUOUS OR OBSCURE OR LEADS TO A RESULT MANIFESTLY ABSURD OR UNREASONABLE IN THE LIGHT OF THE OBJECTS AND PURPOSES OF THE TREATY.VIEWS IN COMMISSION VARIED FROM THAT OF RUDA,WHO DID NOT RPT NOT WANT PREPARATORY WORK REFERRED TO AT ALL,TO YASSEEN,WHO THOUGHT IT SHOULD BE EMPHASIZED MORE WITH MOST OF COMMISSION IN BETWEEN.ROSENNE AND AGO IN PARTICULAR THOUGHT IT UNREALISTIC TO ATTEMPT TO PREVENT RECOURSE TO TRAVAUX PREPARATOIRES.THE ART REFLECTS MAJORITY VIEW OF COMMISSION, BUT IT MAY RAISE DOCTRINAL DISPUTES IN 6TH CTTEE.

20.ART 71(TERMS HAVING A SPECIAL MEANING),ADOPTED 14 VOTES TO NONE, WITH ONE ABSTENTION(PAREDES),PROVIDES:QUOTE NOTWITHSTANDING THE PRO-

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VISIONS OF PARA 1 OF ART 69, A MEANING OTHER THAN ITS ORDINARY MEANING MAY BE GIVEN TO A TERM IF IT IS ESTABLISHED CONCLUSIVELY THAT THE PARTIES INTENDED THE TERM TO HAVE THAT SPECIAL MEANING. UNQUOTE. THIS ART IS BASED ON FORMER ART 72(A/CN.4/167/AD.3 FACICLE1) BUT IN ORDER TO REFLECT CRITICISMS BY AGO AND SOME OTHERS THAN INTERPRETATIONS INTENDED TO GIVE FULLEST WEIGHT AND EFFECT TO A TREATY WOULD NECESSARILY EMBODY AN EXTENSIVE APPROACH, THE ART REFERS TO TERMS HAVING A SPECIAL MEANING INSTEAD OF LAYING DOWN THE MORE COMMONLY ACCEPTED VIEW, THAT THE NATURAL AND ORDINARY MEANING OF A TREATY BE GIVEN EFFECT. USEFULNESS OF ART IS DOUBTFUL, BUT IT COULD HAVE IMPORTANCE IN DETERMINING ON WHOM BURDEN OF PROOF FALLS, AND IT IS BACKED BY CONSIDERABLE JURISPRUDENCE. MOREOVER IT HELPS FILL GENERAL NEED FOR UNIFORMITY OF PRACTICE IN INTERPRETATION OF TREATIES, AND SEEMS ACCEPTABLE AS SUCH.

21. ART 72(TREATIES DRAWN UP IN TWO OR MORE LANGUAGES), ADOPTED UNANIMOUSLY, PROVIDES: QUOTE(1) WHEN THE TEXT OF A TREATY HAS BEEN AUTHENTICATED IN ACCORDANCE WITH THE PROVISIONS OF ART 7 IN TWO OR MORE LANGUAGES, THE TEXT IS AUTHORITATIVE IN EACH LANGUAGE, EXCEPT IN SO FAR AS A DIFFERENT RULE MAY BE AGREED UPON BY THE PARTIES. (2) A VERSION DRAWN UP IN A LANGUAGE OTHER THAN ONE OF THOSE IN WHICH THE TEXT OF THE TREATY WAS AUTHENTICATED SHALL ALSO BE AUTHORITATIVE AND BE CONSIDERED AS AN AUTHENTIC TEXT IF-(A) THE PARTIES SO AGREE; OR(B) THE ESTABLISHED RULES OF AN INTERNATIONAL ORGANIZATION SO PROVIDE UNQUOTE. THIS ART INCORPORATES WITH ONLY SLIGHT CHANGES FORMER ART

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74(A/CN.4/167/AD.3(FASCICLE 2), AND SEEMS ACCEPTABLE.

22. ART 73(INTERPRETATION OF TREATIES HAVING TWO OR MORE TEXTS), ADOPTED UNANIMOUSLY, PROVIDES: QUOTE(1) THE DIFFERENT AUTHENTIC TEXTS OF A TREATY ARE EQUALLY AUTHORITATIVE IN EACH LANGUAGE, UNLESS THE TREATY ITSELF PROVIDES THAT, IN THE EVENT OF DIVERGENCE, A PARTICULAR TEXT SHALL PREVAIL.(2) THE TERMS OF A TREATY ARE PRESUMED TO HAVE THE SAME MEANING IN EACH TEXT. EXCEPT IN THE CASE REFERRED TO IN PARA 1, WHEN A COMPARISON BETWEEN TWO OR MORE AUTHENTIC TEXTS DISCLOSES A DIFFERENCE IN THE EXPRESSION OF A TERM AND ANY RESULTING AMBIGUITY OR OBSCURITY IS NOT RPT NOT REMOVED BY THE APPLICATION OF ARTS 69-72, A MEANING WHICH SO FAR AS POSSIBLE RECONCILES THE DIFFERENT TEXTS SHALL BE ADOPTED. UNQUOTE. THIS ART IS AN ABBREVIATED VERSION OF FORMER ART 75(A/CN/4/167/AD.3 FASCICLE 2), BUT IT ALSO DELETES THE CLAUSE PROVIDING THAT WHERE THE MEANING OF ONE TEXT IS CLEAR AND THE OTHER IS NOT RPT NOT CLEAR THE FORMER WOULD BE ADOPTED.(THIS IS NOW LEFT TO INTERPRETATION). THE PROVISION CONTAINED IN PARA 5 OF ORIGINAL VERSION CONCERNING POSSIBLE USE OF NON AUTHENTIC TEXTS WHEN ALL OTHER METHODS OF INTERPRETATION HAVE FAILED TO YIELD A MEANING WAS ALSO DROPPED ON THE GROUNDS THAT IT MIGHT BE DANGEROUS. ART SHOULD BE GENERALLY ACCEPTABLE IN PRESENT FORM.

TRANSMITTAL SLIP

Legal Div.

TO: Mr. Marcel Cadieux, USSEA,
Ottawa.

FROM: Permanent Mission of Canada to the U.N.
Geneva, Switzerland

Security: UNCLASSIFIED

Date: July 28, 1964

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INTERNATIONAL LAW COMMISSION

SIXTEENTH SESSION

PROVISIONAL SUMMARY RECORD OF THE SEVEN HUNDRED AND SEVENTY-SECOND MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 22 July 1964, at 10 a.m.

CONTENTS:

N.B. Participants who wish to have corrections to this provisional summary record incorporated in the final summary record of the meeting are requested to submit such corrections as soon as possible in writing, preferably on a copy of the record itself, to the Languages Division, Room C.422, Palais des Nations, Geneva.

A/CN.4/SR.772
GE.64-9397

Present:

Chairman:	Mr. AGO
Members:	Mr. BARTOŠ
	Mr. BRIGGS
	Mr. de LUNA
	Mr. PAL
	Mr. PAREDES
	Mr. PESSOU
	Mr. ROSENNE
	Mr. RUDA
	Mr. TABIBI
	Mr. TSURUOKA
	Mr. TUNKIN
	Mr. VERDROSS
	Sir Humphrey WALDOCK
	Mr. YASSEEN

Secretariat:

Mr. LIANG	Secretary to the Commission

DRAFT REPORT OF THE COMMISSION ON THE WORK OF ITS SIXTEENTH SESSION (A/CN.4/L.106 and Addenda) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II (law of treaties) of its draft report.

Commentary on article 55 (Pacta sunt servanda) (A/CN.4/L.106/Add.3).

Paragraph (1)

2. Mr. VERDROSS said that the Commission should explain that by "good faith" it meant that a treaty should be applied in accordance with its spirit rather than too strictly according to the letter: "Scire leges non hoc est verba earum tenere, sed vim ac potestatem".

3. The CHAIRMAN, speaking as a member of the Commission, said that the first sentence might be taken to mean that the principle pacta sunt servanda dated only from the signing of the Charter.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that in drafting the paragraph he had had in mind the kind of reader to which it was addressed. It was stated that the obligation to perform in good faith was a fundamental principle of the law of treaties, but the concept of good faith, being difficult to express, had better be left undefined. The word "moreover" should be deleted from the second sentence.

5. Mr. BRIGGS said that the Chairman's point might be met by inserting a full stop after the word "treaties" in the first sentence and by amending what would then become the second sentence to read "Its importance is emphasized etc." He agreed with the Special Rapporteur that it would be undesirable to attempt a definition of good faith even for insertion in a commentary.

It was so agreed.

6. The CHAIRMAN, speaking as a member of the Commission, thought that the rulings of the International Court cited in paragraph (2) of the commentary should to some extent suffice to explain what was meant by "good faith".

Paragraph (1) was adopted as amended.

Paragraphs (2) and (3) were adopted.

Paragraph (4)

7. The CHAIRMAN suggested that, in the first sentence ("... advantage in also stating the negative aspect of the rule, namely, that a party ..."), the reference to the "negative aspect" should be omitted.

It was so agreed.

Paragraph (4) was adopted as amended.

Commentary on article 57 (Application of treaty provisions ratione temporis)

Paragraphs (1) and (2) were adopted without comment

Paragraph (3)

8. Mr. ROSENNE said that as drafted paragraph (3) was not acceptable because the extract from the Permanent Court's finding in the Mavrommatis Palestine Concessions case only substantiated the proposition in the first sentence and did not relate to jurisdictional clauses attached to substantive clauses of a treaty as a means of securing their application. The paragraph in fact dealt with the definition of disputes and it should not touch upon the jurisdiction of courts ratione temporis. If the paragraph could not be omitted altogether only the first sentence should be retained with the text of the two sentences in footnote 1.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the paragraph dealt with a particularly difficult problem and might perhaps be shortened, but the extract from the Mavrommatis Palestine Concessions case certainly helped to elucidate the provisions of the article which had been drafted with considerable care.

10. Mr. BRIGGS agreed that the paragraph would lose in clarity if the quotation were removed.

11. Mr. PAL said that there was no disagreement on the question of the principle of non-retroactivity and thought that the quotation should be retained.

12. Mr. ROSENNE suggested the deletion of the full stop at the end of the first sentence and of the words "When the treaty is purely and simply a treaty of arbitration or judicial settlement, the jurisdictional clause will normally". The word "providing" should then be substituted for the word "provide".

13. The sentence opening with the words "The reason is that the 'disputes' with which the clause is concerned" should also be eliminated, as there could be other reasons.

Those changes were accepted.

It was also agreed to delete the words "Thus, being called upon to determine the effect of Article 26 of the Palestine Mandate", the words "On the other hand" and the words "found not in a treaty of arbitration or judicial settlement but".

Paragraph (3) was adopted as amended

Paragraph (4)

14. Mr. ROSENNE proposed the deletion of the last sentence as the Commission had not considered the problem of extradition in any great detail.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be glad to delete the sentence particularly as he had some misgivings about the substance.

16. Mr. BRIGGS said that as the member responsible for having brought up the question of extradition in the discussion, he would have no objection to the deletion of that sentence.

Paragraph (4) was adopted subject to the omission of the sentence in question

Paragraph (5)

17. The CHAIRMAN said that there was some ambiguity in the references to "facts or acts which are completed" and to "situations which have ceased when the treaty comes into force". He therefore suggested the following wording: "In other words, the treaty will not apply either to facts or acts which have been completed before the treaty comes into force or to situations which have ceased (and do not recur) when the treaty comes into force".

It was so agreed.

Paragraph (5) was adopted as amended.

Paragraphs (6) and (7) were adopted without comment.

Commentary on article 65A (The effect of breach of diplomatic relations on the application of treaties)

Paragraph (1)

18. Mr. VERDROSS asked for the deletion of the sentence reading: "Similarly, the problems arising in the sphere of treaties from the absence or withdrawal of recognition do not appear to be such as should be covered in a statement of the general law of treaties". He could not see how it was possible to refuse to recognize a State which actually existed and, in any case, he did not think one could speak of the withdrawal of recognition. The only possible case was that of the severance of diplomatic relations. The Commission should not give the impression that it accepted such a paradoxical situation.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that in referring to recognition, he had had in mind the recognition of governments, not that of States. He suggested that the sentence in question should be redrafted in a more non-committal way e.g. "Similarly, any problems that may arise, etc.".

20. Mr. TUNKIN proposed the deletion of the words "or withdrawal" and the insertion of the words "of a government" after the word "recognition" in the third sentence.

The changes suggested by Sir Humphrey Waldock and Mr. Tunkin were accepted.

Paragraph (1) was adopted as amended.

Paragraph (2)

21. Mr. ROSENNE proposed as a matter of drafting the substitution of the word "severance" for the word "breach" in the second sentence.

It was so agreed.

Paragraph (2) was adopted as amended.

Paragraph (3)

Paragraph (3) was adopted without comment.

Paragraph (4)

22. Mr. YASSEEN thought that it was going too far to talk of a "decisive criterion" said to be inherent in the nature of the treaty. The machinery of the treaty itself might lead to suspension.

23. The CHAIRMAN accepted Mr. Yasseen's view and suggested that the word "decisive" be deleted.

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted without comment.

Commentary on article 58 (the territorial scope of a treaty) (A/CN.4/L.106/Add.5)

Paragraph (1)

24. Mr. TUNKIN said that there seemed to be no logical connexion between the third and fourth sentences.

25. He proposed in addition that the seventh sentence should be omitted.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that in the third sentence he had sought to provide examples of the territorial scope of a treaty. In the light of Mr. Tunkin's remark, he suggested that the seventh sentence should be dropped, as should the phrase in the fourth sentence reading "or the circumstances of its conclusion" and the word "thus" at the beginning of the fifth sentence.

It was so agreed.

27. The CHAIRMAN suggested that the reference to the boundary treaty between Italy and Yugoslavia might be dropped, so that the examples cited would be of a general nature.

It was so agreed.

Paragraph (1) was adopted as amended.

Paragraph (2)

Paragraph (2) was adopted without comment

Paragraph (3)

At Mr. Tunkin's suggestion, the last sentence was deleted.

Paragraph (3) was adopted as amended.

Paragraph 4

28. Mr. ROSENNE proposed the deletion of the last part of the paragraph from the words "until it was in possession".

29. Sir Humphrey WALDOCK proposed that the last part of the paragraph from the word "aside" be replaced by the words "to be examined in connexion with its study on the topic of succession of States and governments."

It was so agreed.

Commentary on article 61 (General rule limiting the effects of treaties to the parties)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

30. Mr. VERDROSS said that the German Interests in Polish Upper Silesia case did not substantiate the provision in the article itself, according to which a treaty could not create rights in favour of third States. Nor did the other two cases mentioned in paragraph (3) offer convincing support of that provision, for they had only yielded the finding that normally rights could not be created in favour of third States and in neither had it been laid down that such rights could never be created.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the cases mentioned were relevant to situations where there was a doubt as to whether rights had been created and had arisen out of claims by non-party States to rights under treaties in which the parties had not included provisions conferring rights on others.

32. Mr. ROSENNE proposed that the first part of the quotation from the Permanent Court's finding reading "A treaty only creates law as between the States which are parties to it" be transferred to paragraph (1) of the commentary on article 61. The second part of the quotation should be dropped.

It was so agreed.

Paragraph (3) was adopted as amended.

Paragraph (4) was adopted without comment.

Commentary on article 62 (Treaties providing for obligations for States not parties)

Paragraph (1)

It was agreed that in the English text of the commentary and titles of the articles concerned (though not in the articles themselves) the expression "third State" should be used instead of "non-party".

Paragraph (2) was adopted without comment.

Paragraph (3)

33. Mr. BRIGGS said that paragraph (3) could be omitted as the discussion on the subject could be found in the summary records.

34. Mr. TUNKIN believed that that course would be contrary to the Commission's decision to mention in the commentary an important issue and one that was acquiring growing significance in the modern world.

35. The CHAIRMAN suggested that the second and third sentence should be redrafted to read "The Commission recognized that they would fall outside the principle laid down in the present article and would concern the question of the sanctions for violations of international law."

It was so agreed.

36. Mr. ROSENNE said that the Commission had consistently refrained from interpreting the Charter of the United Nations and accordingly the words "constitute a violation of the principles of the Charter and would not therefore" should be deleted in the last sentence.

It was so agreed.

Paragraph (3) was adopted as amended.

Commentary on article 62A (Treaties providing for rights for States not parties)

The commentary was adopted.

Chapter III: Special missions

37. The CHAIRMAN invited the Commission to consider chapter III of its draft report, relating to the topic of special missions.

Introduction (A/CN.4/L.106/Add.6)

Paragraph 1

38. Mr. BARTOŠ, Special Rapporteur, said that footnote 1 should be omitted.

39. The CHAIRMAN suggested that, to avoid the use of the word "mission" in the sense of "task" the phrase "questions relating to special missions entrusted with tasks for specific purposes" should be substituted for the phrase "questions

relating to special missions, that is to say, to temporary envoys entrusted with special missions for specific purposes".

It was so agreed.

Paragraph 1, as amended, was adopted.

Paragraph 2

40. The CHAIRMAN asked that the expression "it was based on the idea that ... should be applied" should be substituted for "it took the view that ... should be applied".

41. To avoid repetition, the words in the fourth sentence, "based on the idea of applying the general rules by analogy" should be deleted and the sentence might read simply: "The Commission expressed the opinion that this brief draft should be transmitted ...".

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 10 were adopted subject to drafting changes.

Paragraph 11

42. The CHAIRMAN suggested that the word "provisionally" should be added before the word "adopted" in the third sentence.

It was so agreed.

43. Mr. ROSENNE suggested the addition of a passage stating that the articles on special missions provisionally adopted at the current session were included in the report for information only. A passage of that type had been included in the report on similar occasions in the past, to show that the draft articles in question were not submitted for Government comments and that no action on them was called for.

44. Mr. BARTOŠ, Special Rapporteur, suggested that the sentence: "They are reproduced in the draft below for the information of the General Assembly" should be added.

It was so agreed.

Paragraph 11, as amended, was adopted.

Commentary on article 1 (The sending of special missions)

Paragraph 1 was adopted without comment.

Paragraph 2 (a)

45. Mr. TUNKIN said that it was unnecessary to say that a State was a subject of international law.

46. The CHAIRMAN suggested that the first sentence should read: "it must be sent by a State to another State".

47. At the end of the next sentence the word "such" should be inserted before "a movement".

48. He asked the Special Rapporteur what precise meaning and weight he attached to the use of the word "provisional" in connexion with the recognition of political movements as subjects of international law.

49. Mr. BARTOŠ, Special Rapporteur, replied that such recognition was very often provisional or subject to conditions. He had no objection, however, to the deletion of the word "provisionally".

Paragraph (2) (a), as amended, was adopted.

Paragraph (2) (b)

50. The CHAIRMAN said that the word "precisely" was unnecessary at the end of the first sentence. In the second sentence the word "examination" might be substituted for "review".

51. Mr. TSURUOKA said that it would be preferable to use the adverb "narrowly" rather than "severely" in the second sentence.

52. Mr. ROSENNE suggested that the last two sentences of paragraph (2) (b) should be merged.

53. The CHAIRMAN suggested that the two sentences might be simplified to read: "In the Commission's view, the specified task of a special mission should be to represent the sending State in political matters and also in technical matters".

Paragraph (2) (b) was adopted as amended and subject to drafting changes.

Paragraph (2) (c)

54. The CHAIRMAN said that the text might be simplified to read: "but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission".

55. In reply to a remark by Mr. ROSENNE he suggested that the last sentence might be amended to read: "In practice recourse is generally had to an informal agreement and, less frequently, to a formal treaty providing that a specific problem will be entrusted to a special mission ...".

Paragraph (2) (c), as amended, was adopted.

Paragraph (2) (d)

56. The CHAIRMAN said that the phrase "the term fixed for the duration of the mission" was inappropriate. He also thought that the words "its being given a specific assignment" should be dropped. He therefore suggested that the second

sentence should read: "Its temporary nature may be established either by the term fixed for the mission or by its being entrusted with a specific task and it is usually terminated either on the expiry of its term ...".

Paragraph (2) (d), as amended, was adopted.

Paragraph (3)

57. Mr. ROSENNE suggested the deletion from the fourth sentence of the concluding passage, which stated that certain writers had alleged that special missions could be exchanged only by States that maintained diplomatic or consular relations with each other. Preferably the Commission should not engage in polemics with individual authors.

58. In addition he suggested that the last sentence of paragraph (3) should be reworded, since its meaning was not clear.

It was so agreed.

Paragraph (3) was adopted as amended and subject to drafting changes.

Paragraph (4)

59. Mr. PESSOU considered the expression "there are a number of ways of achieving this end" inappropriate.

60. Mr. TSURUOKA suggested that the words "with specific assignments" in sub-paragraph (a) should be omitted; it would be sufficient to refer to a special mission, without mentioning its assignment.

61. Mr. BARTOŠ, Special Rapporteur, accepted Mr. Tsuruoka's suggestion; the necessary explanations regarding the characteristics of special missions had already been given.

62. Mr. ROSENNE thought that, in sub-paragraph (b), it would be preferable to refer to "questions ... settled by a special mission" rather than to "questions ... settled through the sending of a special mission".

63. Mr. BARTOŠ, Special Rapporteur, said that he preferred the expression "by means of a special mission", for, in that context, it was necessary to convey a very precise shade of meaning. It was not the special mission which would settle the questions; rather the procedure of sending a special mission was used to settle them.

Paragraph (4) was adopted as amended and subject to drafting changes.

Paragraph (5)

64. The CHAIRMAN suggested that the opening passage should be amended to read "Where regular diplomatic relations have been broken off or armed hostilities are in progress between the States".

65. He asked the Special Rapporteur whether it would not be possible to omit the words "or for the settlement of preliminary questions on which the establishment of such relations depends" at the end of the paragraph. To some extent those words seemed to be repetitive.

65. Mr. BARTOŠ, Special Rapporteur, said that he had wished to emphasize that two different stages were involved. In the first, the special mission was used as a kind of mission of enquiry, whereas in the second it was used for the immediate object of establishing diplomatic relations. In any case the object was always the establishment of diplomatic relations. Accordingly, he had no objection to the amendment suggested by the Chairman.

Paragraph (5) was adopted as amended.

Paragraph (6)

66. Mr. de LUNA said that the text of paragraph (6) was somewhat cumbersome. In practice, negotiations with a special mission sent by one State to another could be conducted either by a delegation expressly appointed for that purpose by the receiving State or directly with the Ministry of Foreign Affairs or some other appropriate authority. There was therefore no need to speak of "appointing a particular delegation as a special mission".

67. Mr. ROSENNE said that he had no quarrel with the contents of paragraph 6 as such, but considered that it belonged more properly to the general introduction than to the commentary on article 1. The contents of paragraph (6) of the commentary did not relate to any of the provisions in article 1.

68. Mr. BARTOŠ, Special Rapporteur, said that the article was of an introductory nature. In practice, certain Ministries of Foreign Affairs considered it indispensable to appoint special delegations when a special mission was sent by another State. It would therefore be desirable to indicate in the text that that practice did not necessarily have to be followed. There was no need for the two negotiating bodies to have the same status.

69. The CHAIRMAN thought that Mr. Rosenne's comment might well apply to paragraph (7) also.

It was agreed that paragraph (6) would be amended in the light of the foregoing remarks.

Paragraph (7) was adopted without comment.

Commentary on article 2 (The task of a special mission)

Paragraph (1) was adopted.

Paragraph (2)

70. Mr. YASSEEN suggested that the words "such consent" in the second sentence should be replaced by the words "such mutual consent". In the third sentence the words "the instrument by which the sending and reception of special missions is agreed on" should read "the instrument relating to the sending and reception".

It was so agreed.

Paragraph (2) was adopted as amended and subject to drafting changes.

Paragraph (3)

71. Mr. de LUNA suggested that the word "some" should be inserted before the word "importance" in the last sentence.

It was so agreed.

72. The CHAIRMAN suggested that, in the third sentence, the words "propitious atmosphere" should be replaced by the words "propitious circumstances" and that the word "beneficial" in the phrase "certain beneficial treaties" should be dropped.

It was so agreed.

73. Mr. ROSENNE pointed out that, in cases like these mentioned in the second sentence special missions had been known not only to enter into treaties but to perform other acts such as making binding statements.

74. Mr. BARTOS, Special Rapporteur, said that Satow in his "Guide to Diplomatic Practice" mentioned that treaties had been concluded by delegations which had come to convey their condolences on the occasion of the death of a King of England.

75. The CHAIRMAN suggested that the passage in question should read: "... propitious circumstances to conduct negotiations on other subjects". The next sentence would be omitted.

It was so agreed.

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Paragraph (3) was adopted as amended and subject to drafting changes.

Paragraph (4)

76. Mr. YASSEEN suggested that the word "treaties" in the first sentence should be in the singular.

77. Mr. BARTOS, Special Rapporteur, suggested that, in the same sentence, the words "or by the agreement concerning the sending and acceptance of the special mission" might be deleted. In the third sentence the word "permanent" should be deleted.

It was so agreed.

Paragraph (4) was adopted as amended and subject to drafting changes.

Paragraph (5)

78. Mr. de LUNA said that the text of paragraph (5) should be toned down. There was no need to dwell so much on possible disputes between special missions and permanent diplomatic missions. He had in mind more especially the second and third sentences, where there was a reference to the intervention by permanent missions in the negotiations and to the fact that they consider themselves entitled to override the special mission.

79. Mr. TUNKIN suggested that the opening words of the paragraph should be amended to read "A question which also arises...".

It was so agreed.

80. The CHAIRMAN suggested that in the light of Mr. de Luna's criticism the two sentences relating to intervention by regular diplomatic mission in the work of the special mission should be omitted.

It was so agreed.

81. Mr. TSURUOKA thought that in the penultimate sentence, the words "In practice the guiding principle has been" should be amended to read "Certain members of the Commission held that".

It was so agreed.

82. Mr. TUNKIN said that it seemed to him to be an exaggeration to refer in the last sentence to the importance of the point for the safeguarding of juridical relations between States. It would be better to say simply "The Commission decided to draw the attention of governments to this point and to ask them...".

83. Mr. BARTOŠ (Special Rapporteur) said that, although he accepted Mr. Tunkin's suggestion, he did so with reluctance, for in practice the question was one of the greatest importance.

Paragraph (5) was adopted as amended and subject to drafting changes.

Paragraph (6)

Paragraph (6) was adopted subject to drafting changes.

84. Mr. TUNKIN said that he would have preferred the paragraph to be omitted altogether, in order to avoid placing too much emphasis on the disputes that might arise between the two missions.

COMMUNICATION FROM THE INTERNATIONAL LAW ASSOCIATION

85. The CHAIRMAN read to the Commission a letter he had just received from the President of the International Law Association inviting the Commission to send a representative to its session to be held at Tokyo in August.

86. The letter raised a question of principle: should the Commission send an official representative to meetings of bodies such as the International Law Association? The Commission had never done so in the past.

87. In any event, for various reasons, and in particular for financial reasons, it did not seem possible to send a representative.

88. Mr. BARTOŠ said that Mr. Liang had attended the Brussels meeting of the International Law Association not as a representative of the Commission but as a member of the Secretariat. It would be advisable to keep in contact with such bodies, but it would probably be enough to send a message.

89. The CHAIRMAN suggested that Mr. Bartos should be asked to convey orally the Commission's best wishes for the success of the meeting of the International Law Association.

It was so agreed.

The meeting rose at 1.10 p.m.

Legal Div. 40

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INTERNATIONAL LAW COMMISSION

SIXTEENTH SESSION

PROVISIONAL SUMMARY RECORD OF THE SEVEN HUNDRED AND SEVENTY-THIRD MEETING

held at the Palais des Nations, Geneva,
on Thursday, 23 July 1964, at 10 a.m.

CONTENTS:

N.B. Participants who wish to have corrections to this provisional summary record incorporated in the final summary record of the meeting are requested to submit such corrections as soon as possible in writing, preferably on a copy of the record itself, to the Languages Division, Room C.422, Palais des Nations, Geneva.

A/CN.4/SR.773
GE.64-9498

Present:

Chairman:	Mr. AGO
Members:	Mr. BARTOS
	Mr. BRIGGS
	Mr. EL-ERIAN
	Mr. de LUNA
	Mr. PAREDES
	Mr. PESSOU
	Mr. ROSENNE
	Mr. RUDA
	Mr. TABIBI
	Mr. TSURUOKA
	Sir Humphrey WALDOCK
	Mr. YASSEEN
Secretariat:	
Mr. LIANG	Secretary to the Commission

DRAFT REPORT OF THE COMMISSION ON THE WORK OF ITS SIXTEENTH SESSION (A/CN.4/L.106 and Addenda) (continued)

Chapter II - Law of Treaties (A/CN.4/L.106/Add.7 and 10)

1. The CHAIRMAN invited the Commission to continue consideration of chapter II of the Draft of its report. He suggested that the Secretariat should be authorized to make any necessary corrections to the versions of the report in the different languages.

It was so agreed.

Commentary to article 62 B (Revocation or amendment of provisions regarding obligations or rights of States not parties) (A/CN.4/L.106/Add.7)

The commentary to article 62 B was approved without comment

Title of article 64 (Rules in a treaty becoming binding through international custom)

2. The CHAIRMAN proposed that the title of article 64 should be amended so as to make it clear that it referred to the rules in a treaty that became binding for third States through international custom; the omission of all reference to third States from the title would make it difficult to understand the meaning.

3. Mr. ROSENNE said that it would not be appropriate to introduce the words "for third States" after "binding". Article 64 dealt with the case where a treaty created or reflected international custom binding for all States and not just for third States.

4. Mr. de LUNA pointed out that the matter was explained in paragraph (2) of the commentary.

5. Mr. BRIGGS proposed that the question should be dealt with by introducing the word "generally" before "binding".

The title of article 62 B was adopted with that amendment

Commentary to article 64

Paragraph (1)

6. Mr. ROSENNE said that the language of the second sentence of paragraph (1) would have to be adjusted: it was not correct to say that a treaty could "formulate" a territorial, fluvial or maritime régime. He therefore proposed that after the word

"or" and before the words "a territorial, fluvial or maritime régime" the words "may establish" should be inserted.

Paragraph (1) was adopted with that amendment.

Paragraph (2)

7. The CHAIRMAN suggested that, in the concluding portion of the second sentence, the words "other States accept rules ..." should be replaced by "other States recognize rules".

Paragraph (2) was adopted with that amendment.

Paragraph (3)

8. The CHAIRMAN suggested that in the penultimate sentence the passage "together with the process mentioned in the present article of the expansion of the ambit of treaties through custom" should be omitted.

Paragraph (3) was adopted with that amendment.

The commentary to article 64 was adopted as a whole as amended.

Title of article 65 (Application of incompatible treaty provisions)

9. The CHAIRMAN suggested that the title of article 65 should be amended to read: "Treaties having incompatible provisions".

It was so agreed.

Commentary to article 65

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

10. The CHAIRMAN suggested that the first sentence should be amended, in line with the new title, so as to refer to "treaties having incompatible provisions" instead of to incompatible treaties. In addition, in that same sentence, he suggested that the word "revision" should be replaced by "modification".

Paragraph (3) was adopted with those amendments.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted without comment.

Paragraph (6)

11. Mr. ROSENNE suggested that the words "Many former treaties" used at the beginning of the sixth sentence should be replaced by "Many older treaties".

Paragraph (6) was adopted with that amendment.

Paragraph (7)

Paragraph (7) was adopted without comment.

Paragraphs (8) and (9)

12. The CHAIRMAN suggested that in the French text the verb "to override" used in the first sentence of each of the two paragraphs should be rendered by "l'emporte sur".

Paragraphs (8) and (9) were adopted with that amendment.

Paragraph (10)

13. Mr. de LUNA said that he could not accept the concluding portion of the last sentence, reading "and that their relevance is that, by specifying that the prior treaty does not permit contracting out, they conclude the question whether the later agreement is or is not compatible with the prior treaty."

14. That passage could be misconstrued to mean that the article disposed of the question of the compatibility of the two treaties.

15. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the passage in question should be omitted.

Paragraph (10) was adopted with that amdndment.

Paragraph (11)

16. Mr. ROSENNE proposed that the reference to paragraphs (5) to (9) should be replaced by a reference to paragraphs (5) to (10).

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the concluding passage of paragraph (11) had been taken from the report of the previous Special Rapporteur; he proposed to include a footnote to clarify the matter.

18. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt paragraph (11) with the changes proposed by Mr. Rosenne and the Special Rapporteur.

It was so agreed.

Paragraph (12)

19. Mr. ROSENNE suggested that in the first sentence the words "from a different angle" should be added after the words "covers the same ground".

Paragraph (12) was adopted with that amendment.

Paragraph (13)

20. The CHAIRMAN pointed out that, in the penultimate sentence, the expression "in principle" had been mistranslated in the French version.

Subject to the correction of the French text, paragraph (13) was adopted.

Paragraph (14)

21. Mr. ROSENNE said that, in the last sentence of paragraph (14), the word "consideration" should be replaced by "considerations".

Paragraph (14) was adopted with that amendment.

Paragraphs (15) to (20)

22. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that paragraphs (15) to (20) were quoted from his second report, included in the Commission's report for purposes of information as indicated in paragraph (14).

Paragraphs (15) to (20) were adopted without comment.

Paragraph (21)

23. Mr. BARTOŠ suggested that the title of the Hague Conventions mentioned in the penultimate sentence of paragraph (21) should be given in full.

Paragraph (21) was adopted with that amendment.

Paragraph (22)

24. The CHAIRMAN criticized, from the point of view of substance, the opening sentence of paragraph (22) reading "To attach the sanction of nullity to an agreement is to deny that the parties possessed any competence under international law to conclude it". The sanction of nullity could arise from causes other than the lack of competence to conclude the treaty.

25. He suggested that the sentence in question should be reworded along the following lines: "The nullity of an agreement may result from the lack of competence of the parties to conclude it".

26. Mr. ROSENNE suggested that, in the eighth sentence, the word "revision" should be replaced by "modification".

27. The CHAIRMAN criticized the expression "legal responsibility" used in the last sentence of paragraph 22. It would be sufficient to refer to "responsibility".

28. Mr. BARTOS pointed out that the Security Council of the United Nations had drawn a distinction between the political responsibility of States, their legal responsibility and their moral responsibility.

29. The CHAIRMAN suggested that the expression "legal responsibility" should be replaced by "State responsibility".

30. He said that, if there was no objection, he would consider that the Commission agreed to adopt paragraph 22 with the two changes proposed by him and the change proposed by Mr. Rosenne.

It was so agreed.

Paragraph (23)

31. Mr. ROSENNE said that it was not altogether accurate to say, as did the first sentence of paragraph (23), that "the article does not provide for any exceptions to the rules stated in paragraph 4, other than the general exceptions...". Article 65 did not deal with the two general exceptions mentioned in the concluding part of that first sentence; those exceptions were provided for in other articles of the draft.

32. The CHAIRMAN suggested that the first sentence should be amended to read "Accordingly, no other exceptions to the rules stated in paragraph 4 are provided for, other than the general exceptions...".

Paragraph (23) was adopted with that amendment.

The Commentary to article 65 was adopted as a whole as amended.

Commentary on article 67 (Procedure for amending treaties) and on article 68 (Amendment of multilateral treaties) (A/CN.4/L.106/Add.10)

33. In reply to a question by the CHAIRMAN, Sir Humphrey WALDOCK, Special Rapporteur, confirmed that the words "amending" and "amendment" were being used in the titles of articles 67 and 68 but the word "modification" was used in the text of the articles and in the commentary. An explanation of the terminology chosen was given in paragraph (5) of the commentary.

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

34. Mr. YASSEEN suggested that the word "almost" should be added before the word "dead-letter" in the penultimate sentence; in the opinion of many authors Article 19 of the Covenant of the League of Nations had provided a means for revising the Treaty of Lausanne.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of Article 19 had never been applied successfully, but he was prepared to change the passage in question to read "Article 19 was practically a 'dead-letter'".

It was agreed that the passage should be so amended.

36. Mr. ROSENNE said that during the discussion on the modification of treaties Mr. Lachs had suggested, and he had supported the suggestion, that the Commission should in its report draw the attention of the General Assembly to the need for a general review of the older multilateral treaties.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that, although he entirely agreed with the proposition, the defects in the procedure for the amendment of treaties might well have the consequence that amending instruments would be ratified by fewer parties than had ratified the original treaties. No real progress would be achieved unless there was a real will on the part of States to extend participation in existing conventions; perhaps the matter should be left to them.

38. Mr. BARTOS said that the Commission's view on the subject had been set forth in chapter III of its report on its 15th session (A/5509). He suggested that a footnote reference would suffice in the present context.

It was agreed to make a reference to Mr. Lachs's suggestion in a footnote.

Paragraph (3) was adopted as amended.

Paragraph (4)

Paragraph (4) was adopted without comment.

Paragraph (5)

39. Mr. de LUNA said that he doubted whether transactions varying or supplementing a treaty were in fact covered by the term "modification", as was implied in the last sentence of the paragraph.

It was agreed to delete from the last sentence the words "or supplement" and the words "without amending the treaty as such".

Paragraph (5) was adopted as amended.

Paragraphs (6) to (9)

Paragraphs (6) to (9) were adopted without comment.

Paragraph (10)

At Mr. Rosenne's suggestion it was agreed to delete the second sentence ("This is a matter upon which it seems important that the Commission should take a clear position").

Paragraph (10) was adopted as amended.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted without comment.

Paragraph (13)

It was agreed to replace the words "the principle of 'preclusion'" by the words "the general principle 'nemo potest venire contra factum proprium'".

Paragraph (13) was adopted as amended.

Commentary on article 69 (Agreements to modify multilateral treaties between certain of the parties only)

Paragraph (1)

At the Chairman's suggestion it was agreed to delete the words "modifications of a treaty by an" in the fourth sentence.

Paragraph (1) was adopted as amended.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted without comment.

40. The CHAIRMAN invited the Commission to resume consideration of the commentary on the draft articles concerning special missions (A/CN.4/L.106/Add.8).

Commentary on article 3 (Appointment of the head and members of the special mission)

Paragraph (1)

41. Mr. ROSENNE suggested that the text should be amended so as to convey the idea that a prior agrément was necessary.

It was so agreed.

Paragraph (1) was adopted as amended.

Paragraph (2)

42. Mr. YASSEEN suggested that the phrase "acceptance of its head, members or staff" should be substituted for "consent to ...".

43. Mr. BARTOS, Special Rapporteur, said that he could not accept that amendment for it affected substance. Consent was granted once and for all. According to Mr. Sandström, such consent applied to the head of the mission too.

Paragraph (2) was adopted subject to drafting changes.

Paragraph (3)

44. In response to a suggestion by Mr. YASSEEN, Mr. BARTOS, Special Rapporteur, proposed that the words "or the interests" be inserted after "sovereign rights" in the first sentence.

It was so agreed.

Paragraph (3) was adopted as amended.

Paragraph (4)

45. Mr. YASSEEN asked the Special Rapporteur whether the concept of prior agreement dominated the whole paragraph.

46. Mr. BARTOS, Special Rapporteur, said that it did, for prior agreement constituted an indirect curb on the freedom of appointment, which was the general principle.

Paragraph (4) was adopted subject to drafting changes.

Paragraph (5)

47. Mr. BRIGGS said that the word "politicians" at the end of paragraph (5) was not particularly appropriate in the English text.

Paragraph (5) was adopted subject to drafting changes.

Paragraph (6)

Paragraph (6) was adopted subject to drafting changes.

Paragraph (7)

48. Mr. ROSENNE suggested that the phrase "or other official persons" be substituted for "or heads of other departments".

It was so agreed.

49. In reply to Mr. de LUNA and Mr. BRIGGS, who had remarked on the terminology employed, the CHAIRMAN said that the appropriate services of the Secretariat would check the terminology and quotations and make any necessary editorial changes.

Subject to such changes, paragraph (7) was adopted as amended.

Paragraph (8)

Paragraph (8) was adopted without comment.

Commentary on article 4 (Persons declared persona non grata or not acceptable)

Paragraphs (1), (2), (3) and (4)

Paragraphs (1) to (4) were adopted, subject to drafting changes.

Paragraph (5)

50. Replying to a suggestion by the CHAIRMAN, Mr. BARTOŠ, Special Rapporteur, said that in French "qualification" would be wrong in the context, because it signified not only personal competence but also rank and function.

51. The CHAIRMAN suggested that the word "qualités" should be changed to the singular "qualité".

It was so agreed.

Paragraph (5) was adopted as amended.

Commentary on article 5 (Appointment of a special mission to more than one State)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

At Mr. Rosenne's suggestion it was agreed to delete the words "rightly, in the view of the Commission" in paragraph 3(b).

As so amended paragraph (3) was adopted subject to drafting changes.

Paragraph (4)

Paragraph (4) was adopted without comment.

Paragraph (5)

52. The CHAIRMAN suggested that the third sentence should be reworded to read "... to decide in advance whether they are prepared to receive the proposed special mission". In the next sentence, the word "receivability of the special mission" should be replaced by the words "the question".

Paragraph (5) was adopted as amended.

Commentary on article 6 (Composition of the special mission)

Paragraph (1)

Paragraph (1) was adopted without comment.

Paragraph (2)

At the Chairman's suggestion it was agreed to delete the words "and if both are members of the special mission (and not of its staff)" in the third sentence.

It was so agreed.

Paragraph (2) was adopted as amended.

Paragraph (3)

53. The CHAIRMAN asked for an explanation concerning the meaning of the second sentence, relating to the order of precedence among delegates within the sending State, the language of which seemed to him far from clear.

54. Mr. de LUNA suggested that the reference should be to the order of precedence established under the regulations of the State sending the delegation.

55. Mr. BARTOŠ, Special Rapporteur, said that he accepted that suggestion in principle. The sentence would then read "Neither the rank of the delegates under the internal regulations of the sending State nor the title or function ...".

Paragraph (3) was adopted as amended.

Paragraph (4)

Paragraph (4) was adopted without comment.

Paragraph (5)

At Mr. de Luna's suggestion it was agreed to insert the words "of the Vienna Convention" after the words "set out in article 1(c)" in the second sentence of paragraph (5).

Paragraph (5) was adopted as amended.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted without comment.

Commentary on article 8 (Notification)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

It was agreed that the reference to notification "in two stages" should be replaced by a reference to "two kinds of notification".

Paragraph (3) was adopted as amended and subject to consequential drafting changes.

Paragraph (4)

56. Mr. ROSENNE said that the last sentence of paragraph (4) should be toned down so as to remove the criticism of the Commission implied in the passage "The Commission failed to take this fact into account...".

Paragraph (4), was adopted subject to a drafting change on the lines suggested by Mr. Rosenne.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted subject to drafting changes.

Paragraph (7)

57. Mr. ROSENNE said that there was non sequitur in the third sentence of paragraph (7); the words "did not discuss this problem but" should be deleted.

It was so agreed.

Paragraph (7) was adopted as amended.

Paragraph (8)

Paragraph (8) was adopted without comment.

Commentary on article 9 (General rules on precedence)

Paragraph (1)

58. The CHAIRMAN suggested that the order of the first two sentences should be reversed and that the beginning of the second sentence should read "The question of the rank of heads of special missions arises etc". In addition, he suggested that the words "or on arrival" should be added in the last sentence.

Paragraph (1) was adopted as so amended.

Paragraph (2)

At Mr. Rosenne's suggestion it was agreed to delete the word "special" qualifying the words "rules of courtesy".

Paragraph (3)

59. The CHAIRMAN said that the last sentence implied that the Vienna Convention on Diplomatic Relations was inconsistent with the principle of the sovereign equality of States. Accordingly, he suggested that the sentence in question be deleted.

It was so agreed.

Paragraph (3) was adopted as amended.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted without comment.

Paragraph (6)

60. Mr. ROSENNE said that the last sentence in paragraph (6)("Except in matters of personal courtesy, the diplomatic title of the head of a special mission is of no official significance") was misleading and should be dropped.

It was so agreed.

Paragraph (6) was adopted as amended.

Paragraph (7)

61. The CHAIRMAN suggested that the words "at all" in the first sentence should be omitted.

It was so agreed.

Paragraph (7) was adopted as amended.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted without comment.

Paragraph (10)

At Mr. de Luna's suggestion the date "1815" was inserted after the words "the Vienna Regulations"

Paragraph (10) was adopted as amended.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted, subject to the deletion of the word "diplomatic" in the penultimate sentence of paragraph (12).

Paragraph (16)

At Mr. Rosenne's suggestion it was agreed to substitute the words "of the opinion" for the word "convinced" in the first sentence and to substitute the word "applicable" for the words "in force" in the second sentence.

Paragraph (16) was adopted as so amended.

Paragraph (17)

62. The CHAIRMAN said that the penultimate sentence seemed far from clear: notifications relating to a special mission were not always made by the permanent diplomatic mission. He suggested that the words "which notifies arrivals and subsequent changes" should be deleted.

It was so agreed.

Paragraph (17) was adopted as amended.

Paragraphs (18) to (21)

Paragraphs (18) to (21) were adopted without comment.

Commentary to article 10 (Precedence among special ceremonial and formal missions)

63. Mr. de LUNA suggested that in paragraph (3) (e) the word "status" should be replaced by "function".

The commentary was adopted subject to that change and to drafting changes.

Commentary on article 7 (Authority to act on behalf of the special mission) (A/CN.4/L.106/Add.9)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted without comment.

Paragraph (3)

64. Mr. ROSENNE said that implied criticism of the Commission in the fourth sentence should be attenuated by substituting the words "did not deal" for the words "failed to deal".

It was so agreed.

Paragraph (3) was adopted as amended.

Paragraph (4)

65. Mr. de LUNA said that the word tantum in the first sentence should read juris tantum.

66. The CHAIRMAN pointed out that part of the text seemed to repeat paragraph (3) (h) of the commentary on article 10 (Precedence among special ceremonial and formal missions). He suggested that the passage beginning with the words "Some States hold" and ending

"is a manifestation of the common outlook and the equal standing of the members of the delegation" should be deleted.

67. Mr. BARTOS, Special Rapporteur, accepted that suggestion.

68. The CHAIRMAN suggested that the words "see sub-paragraph (h) of the commentary on article 10" should be placed in brackets at the end of paragraph (4).

It was so agreed.

Paragraph (4) was adopted as amended.

Paragraph (5)

69. The CHAIRMAN said that it was inappropriate to use the expression "collective authority" when speaking of members of the special mission.

70. Mr. BARTOS, Special Rapporteur, suggested that the word "authority" should be replaced by the words "full powers".

It was so agreed.

Paragraph (5) was adopted as amended.

Paragraph (6)

71. The CHAIRMAN suggested that, for the sake of consistency, the expression "extent of the authority" should be substituted for "limits of the authority".

Paragraph (6) was adopted as so amended.

Paragraph (7)

72. The CHAIRMAN thought it inaccurate to speak of the substitut of a head of a special mission.

Mr. BARTOS, Special Rapporteur, said that suppléant would be preferable.

Paragraph (7) was adopted as amended.

Paragraph (8)

73. The CHAIRMAN suggested that the passage in the last sentence dealing with the status of alternate and deputy head should be replaced by the words "the Commission placed the two kinds of deputy on the same footing".

It was so agreed.

Paragraph (8) was adopted as amended.

Paragraph (10)

74. The CHAIRMAN suggested that the words "acting deputy" in the last sentence should be replaced by the words "deputy administrator".

Paragraph (10), as amended, was adopted.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted without comment.

The meeting rose at 1 p.m.

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

Security: Unclassified

No:

Date: July 7, 1964

Enclosures: 1 x 3 -

Air or Surface Mail: Air

Post File No: 81-14

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: Permanent Mission of Canada to the United Nations, New York.

Reference:

Subject: Law of Treaties

TO: Mr Robertson
JUL 13 1964
REGISTRY

Ottawa File No. 20-3-1-6

References

We attach a copy of note no. LE 130(1-2) of July 3, 1964 from the Legal Counsel of the United Nations. This note reminds us that comments on part II of the draft articles on the law of treaties, prepared by the International Law Commission, are required by December 31, 1964.

W.H. Barton
Permanent Mission

Internal Circulation

Distribution to Posts

000418

Ext. 182A (Rev. 2/52)

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FILE NO.: LE 130(1-2)

3 July 1964

Sir,

I am directed by the Secretary-General to refer you to his circular letters LE 130(1-2) and LE 130(1-2-1) of 23 October 1962 and 10 October 1963, in which he requested you kindly to communicate to him, as soon as possible, any observations that your Government might wish to make on parts I and II of the draft articles on the law of treaties, prepared by the International Law Commission at its fourteenth and fifteenth sessions in 1962 and 1963.

The latest dates specified for the submission of observations were 1 October 1963 in the case of part I and 1 September 1964 in the case of part II. The intention is to transmit the observations to the Special Rapporteur on the law of treaties and to the other members of the Commission in order that they may take them into account when reconsidering the articles. The Commission will prepare a final text of the draft articles, for submission to the General Assembly, after studying the observations of Governments.

The Secretary of State for External Affairs
Department of External Affairs
Ottawa
Canada

As the Commission has formally decided at its sixteenth session, now being held, to review parts I and II of its draft at its seventeenth session, which will begin in May 1965, it is essential that your Government, if it wishes to submit observations on parts I and II and has not already done so, should submit them as soon as possible and not later than 31 December 1964, in order that they may be transmitted in good time and may prove of use to the Commission.

Parts I and II of the draft articles on the law of treaties were published in the Commission's reports covering the work of its fourteenth and fifteenth sessions, as Supplement No. 9 to the official records of the seventeenth and eighteenth sessions of the General Assembly (A/5209 and A/5509). These reports are not enclosed with this letter, as they were circulated to Member States upon publication.

Accept, Sir, the assurances of my highest consideration.

Constantin A. Stavropoulos
Under-Secretary
Legal Counsel

UNITED NATIONS NATIONS UNIES

NEW YORK

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REFERENCE LE 130(1-2)

Le 3 juillet 1964

Monsieur le Secrétaire d'Etat,

Le Secrétaire général me charge de vous rappeler ses lettres circulaires LE 130(1-2) et LE 130(1-2-1) du 23 octobre 1962 et du 10 octobre 1963 par lesquelles il vous demandait de bien vouloir lui communiquer, dès que possible, toutes observations que votre Gouvernement désirerait présenter au sujet des première et seconde parties du Projet d'articles sur le droit des traités préparées par la Commission du droit international à ses quatorzième et quinzième sessions, en 1962 et 1963.

Les dates limites pour présenter les observations avaient été fixées au 1er octobre 1963 pour la première partie et au 1er septembre 1964 pour la seconde partie. Ces observations sont destinées à être transmises au Rapporteur spécial pour le droit des traités et aux autres membres de la Commission afin qu'ils puissent en tenir compte lors du nouvel examen des articles. C'est en effet après avoir pris connaissance des observations des gouvernements que la Commission établira un texte définitif du projet qui sera présenté à l'Assemblée générale.

COPIE

La Commission ayant décidé formellement à sa seizième session, tenue actuellement, de revoir les première et seconde parties de son projet à sa dix-septième session, qui doit s'ouvrir en mai 1965, il est nécessaire que votre Gouvernement, s'il désire présenter des observations sur ces parties et s'il ne l'a pas déjà fait, le fasse dès que possible et au plus tard le 31 décembre 1964 afin qu'elles puissent être transmises à temps et être utiles à la Commission.

Les première et seconde parties du Projet d'articles sur le droit des traités ont été publiées dans les rapports de la Commission sur les travaux de ses quatorzième et quinzième sessions, comme Supplément No 9 aux documents officiels des dix-septième et dix-huitième sessions de l'Assemblée générale (A/5209 et A/5509). Ayant été distribués aux Etats Membres lors de leur parution, ces rapports ne vous sont pas transmis avec la présente lettre.

Veuillez agréer, Monsieur le Secrétaire d'Etat, les assurances de ma très haute considération.

Le Sous-Secrétaire
Conseiller juridique

Constantin A. Stavropoulos

20-3-1-6

PROVISIONAL: FOR PARTICIPANTS ONLY

Distr.
RESTRICTED

25 June 1964

ENGLISH
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INTERNATIONAL LAW COMMISSION

SIXTEENTH SESSION

PROVISIONAL SUMMARY RECORD OF THE SEVEN HUNDRED AND FIFTY-FIRST MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 24 June 1964, at 10 a.m.

CONTENTS:

N.B. Participants who wish to have corrections to this provisional summary record incorporated in the final record of the meeting are requested to submit such corrections in writing, on a copy of the record itself, to the Languages Division, Room C.422, Palais des Nations, Geneva, within three working days of receiving the provisional record in their working language.

A/CN.4/SR.751

GE.64-7751

Present:

Chairman:	Mr. AGO
Members:	Mr. AMADO
	Mr. BARTOS
	Mr. BRIGGS
	Mr. CASTREN
	Mr. EL-ERIAN
	Mr. ELIAS
	Mr. JIMÉNEZ de ARÉCHAGA
	Mr. LACHS
	Mr. LIU
	Mr. de LUNA
	Mr. PAL
	Mr. PAREDES
	Mr. PESSOU
	Mr. REUTER
	Mr. ROSENNE
	Mr. RUDA
	Mr. TABIBI
	Mr. TUNKIN
	Mr. VERDROSS
	Sir Humphrey WALDOCK
	Mr. YASSEEN

Also present:

Observer for the Asian-African Legal Consultative Committee	Mr. SABEK

Secretariat:

Mr. LIANG	Secretary to the Commission

LAW OF TREATIES (item 3 of the agenda)(continued)

Articles proposed by the Drafting Committee

1. The CHAIRMAN said the Commission seemed to be agreed to discuss the group of four articles relating to the effects of treaties on States not parties to them in the order suggested at the previous meeting. Accordingly, he invited debate on the Drafting Committee's proposals for articles 62, 62A, 62B and 61 (in that order).

Article 62 (Treaties providing for obligations for States not parties)

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 62:

"Treaties providing for obligations for States not parties

"A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound."

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the French text of article 62 did not exactly correspond to the English.

4. Mr. REUTER, agreeing that the verb "être" did not fully convey the idea present in the English verb "to become", said that a literal translation would not be good French.

5. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the opening words of article 62 should be modified to read "An obligation may arise for a State from a provision of a treaty ...".

6. Mr. LIU said that probably the phrase "A State may become bound" had been used in order to establish the link between articles 62 and 61 but if in fact they were ultimately to be fused into one it would suffice to say "A State may be bound".

7. He believed the language in all the articles should be made uniform. Article 61 spoke of "imposing" obligations and "conferring" rights whereas the succeeding articles referred to "establishing" obligations and "according" rights.

8. The CHAIRMAN said that the different phraseology had been used advisedly in order to stress that the rights and obligations to become effective must receive the assent of the third State.

Article 62 was approved in the form suggested by the Special Rapporteur.

Article 62A (Treaties providing for rights for States not parties)

9. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following title and text for article 62A:

"Treaties providing for rights of States not parties

"1. A State may exercise a right provided for in a treaty to which it is not a party if (a) the parties to the treaty intended the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (b) the State expressly or impliedly assents thereto.

"2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in, or in conformity with, the treaty for the exercise of the right".

10. Mr. VERDROSS said that he approved the language of paragraph 1 as far as clause (b). The words "a State may exercise" were acceptable to those who held that actual rights could be created for third States, whether they used them or not. But in that case those who supported the opposite view might be prepared to drop clause (b), where it was stated that assent could be implied, since they held that the exercise of a right was equivalent to implicit consent.

11. The CHAIRMAN said that, if clause (b) was omitted the whole idea of consent would be removed. By merely saying that a State might exercise a right, the Commission would give the impression that, in its view, that right existed independently of the consent.

12. Mr. JIMÉNEZ de ARÉCHAGA said that although on theoretical grounds he had some sympathy for Mr. Verdross's view, it should be pointed out that clause (b) was intended as a compromise to bridge the difference of opinion between those who believed that the right derived directly from the treaty and those who considered that the express assent of the third State was necessary before the right could come into existence.

13. Mr. ROSENNE agreed with the previous speaker.

14. Mr. YASSEEN said that, while he supported the concept of the supplementary agreement, he was doubtful whether clause (b) should be retained; the exercise of a right meant acceptance of the right. He could only agree to the deletion of clause (b) if the text was redrafted, for instance by replacing the words "exercise a right" by the words "expressly or impliedly accept a right".

15. Mr. JIMÉNEZ de ARÉCHAGA said that the compromise solution should be maintained.

16. The CHAIRMAN, speaking as a member of the Commission, said that he was inclined to favour Mr. Yasseen's suggestion, for the logic in clause (b) was not flawless. To say that a State could exercise a right if it had assented thereto conveyed the idea that the expression of the consent should precede the exercise of the right, whereas what happened in reality was that, at the time when the State decided to exercise the right, it thereby gave its implicit consent.

17. Mr. JIMÉNEZ de ARÉCHAGA pointed out that what should be made clear was that the State concerned could "exercise" the right provided for it.

18. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Jiménez de Aréchaga. Possibly the difficulty mentioned by Mr. Verdross would be eliminated if the opening words of the article were redrafted to read "A right may arise for a State from a provision in a treaty ...".

19. Mr. de LUNA said that the Commission seemed to have decided to use a neutral formula. The Special Rapporteur's text, however, favoured one side of the argument and gave support to those who held that a right provided in a treaty for a non-party State amounted to an offer open to acceptance by that State.

20. Mr. ROSENNE said that the wording suggested by the Special Rapporteur would be acceptable. He was not sure whether perfect symmetry in the language used in the various articles was either necessary or desirable. Any changes would in any case need to be reviewed again by the Drafting Committee.

21. Mr. JIMÉNEZ de ARÉCHAGA said that the Special Rapporteur's suggestion would offer a way out.

22. Mr. BRIGGS said that the wording suggested by Mr. Yasseen was both clearer and neater and would not prejudge the question whether the treaty created the right or provided a means for the parties to offer a right to non-party States.

23. The CHAIRMAN, speaking as a member of the Commission, suggested that paragraph 1 should begin with the words "A State may expressly or tacitly assent to a right ..."

24. Mr. TUNKIN said that if redrafted in the manner suggested by Mr. Yasseen the provision would be virtually meaningless and would say nothing on the main question whether a right for non-party States could arise from a treaty.

25. The CHAIRMAN said that, on further reflection, he considered the Special Rapporteur's wording preferable.

26. Mr. RUDA pointed out that a right was never accepted or assented to: it was exercised.

27. Mr. LIU believed that the titles of both articles 62 and 62A should be dropped as it was undesirable to give the impression that they offered a classification of certain types of treaties.

28. The CHAIRMAN pointed out that the titles of the articles in question referred to treaties "providing for", not "creating", /rights or obligations/.

29. Mr. BRIGGS said that the titles of all the articles would have to be reconsidered by the Drafting Committee.

30. Mr. REUTER suggested that the present tense should be used instead of the past in the French text, entendaient being replaced by entendent and a donné by donne.

31. Mr. VERDROSS supported the change suggested by Mr. Reuter.

32. He added that the commentary should explain that if, in the circumstances contemplated by article 62A, a State exercised a right arising for it from a treaty to which it was not a party, that State should be deemed to have consented implicitly to accept the right.

33. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Reuter that it would be preferable to use the present tense.

The wording suggested by the Special Rapporteur for paragraph 1 was approved, and it was agreed that the text should be in the present tense.

34. Mr. RUDA and Mr. JIMENEZ de ARECHAGA said that the Spanish text of article 62A, paragraph 2 did not correspond with the English and should be altered.

35. The CHAIRMAN said that the French text also needed alteration. It was not clear to him what was meant by the words "or in conformity with, the treaty".

36. Mr. LACHS asked if the phrase "or in confirmity with" in paragraph 2 was intended to refer to conditions laid down outside the treaty itself.

37. Sir Humphrey WALDOCK, Special Rapporteur, replied in the affirmative and said that an example of such conditions would be those laid down by a territorial State concerning the rights of passage by waterway through its territory, which it was entitled to promulgate in conformity with the treaty but not necessarily by virtue of the treaty. Such regulations would naturally have to be observed by all States exercising rights under the treaty.

38. Mr. LACHS asked what would then be the relationship between such an instrument and the original treaty.

39. Mr. ROSENNE said he could not see why the phrase should cause any difficulties.

40. Mr. LACHS pointed out that the case could arise where a treaty was signed and entered into force after prior consultation with non-parties interested in exercising rights under the treaty and where the parties themselves subsequently agreed on additional conditions limiting the enjoyment of the rights in question.

41. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Lachs wished an express reference to be added to related instruments.

42. Mr. TUNKIN said that the meaning of the phrase "or in conformity with" was perfectly clear and was consistent with practice. For example, certain navigation rules quite separate from but in conformity with the Convention concerning the Regime of Navigation on the Danube of 1948 and with general rules of international law were accepted by the parties. He was unable to see why the phrase in question should cause any problem.

43. Mr. BRIGGS said that presumably the phrase was meant to refer to conditions not actually laid down but provided for in the treaty; for example, the treaty might contain a clause enabling the territorial State to enact certain regulations.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs's example was not exactly a case in point; in such circumstances, the conditions existed by virtue of the treaty.

45. The CHAIRMAN suggested, in the light of Mr. Lachs's remarks, that the paragraph might be amended to read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions for the exercise of the right laid down by the parties in the treaty or in conformity with it in other instruments".

46. Sir Humphrey WALDOCK, Special Rapporteur, said that the conditions might not necessarily be laid down by one of the parties.

47. Mr. ROSENNE suggested that the difficulty could be overcome by substituting the word "by" for the word "in" after the words "conditions laid down" and by striking out the two commas.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that such a solution would be acceptable.

49. Mr. JIMÉNEZ de ARÉCHAGA said that he agreed with Mr. Tunkin as to the substantive issue but considered it unnecessary for the Commission to enter into the question of the competence to establish conditions outside the treaty. The present drafting of paragraph 2 was perhaps awkward and might be modified to read: "A State exercising ... conditions laid down in the treaty or established in conformity with it".

50. Mr. LACHS said that if additional conditions should be stipulated by the parties it would be necessary to determine the relationship between the original treaty and those conditions. He therefore suggested that the sentence should read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in the treaty or in related instruments in conformity with it".

51. The CHAIRMAN said that the exercise of the right should be linked with the conditions, for otherwise the provision became meaningless.

52. Mr. de LUNA agreed with Mr. Lachs. The problem was of great importance, especially if two agreements were involved - the principal treaty and a related instrument. Above all, the Commission should not draft the provision in terms that admitted the possibility that obligations could be imposed on a non-party State without its consent. A State which accepted a right should realize what it was doing and what corresponding commitments it was entering into.

53. Mr. REUTER said that the problem had given rise to serious international disputes such as those involving the right of transit through Indian territory, passage through the Corfu Channel, and navigation in the North Atlantic. He would prefer a wording that did not raise the problem, such as "the conditions laid down by a treaty for the exercise of the right referred to in paragraph 1 shall be binding on a State which intends to exercise that right". The question of doctrine would then be left open.

54. Mr. YASSEEN said that in such a case the non-party State could not have more than the treaty had meant to offer. Logically, therefore, those who wished to take advantage of the right would have to comply with the conditions laid down in, or in conformity with, the treaty. The text of the paragraph was entirely satisfactory since it met every requirement.

55. Mr. TUNKIN believed that the discussion and particularly Mr. Reuter's contribution had demonstrated that it might be wiser if the Commission drafted paragraph 2 in such a way that it would speak only of the provisions of the treaty itself; the regulations enacted outside the treaty (for example, by a territorial State) were usually accepted by the parties by virtue of some provision in the treaty whether express or implied.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that there was some value in retaining the phrase "or in conformity with" because conditions existing outside the treaty might have to be observed.

57. The CHAIRMAN, speaking as a member of the Commission, observed that a party might effectively lay down certain rules because it was empowered to do so under the treaty. If those rules were in conformity with the treaty, they would have to be respected by the non-party State; if they were not, the non-party State would not be bound by them.

58. Mr. BARTOS said that he found the wording of paragraph 2 satisfactory. It should be clearly understood, however, that the conditions referred to in that paragraph would have to be in conformity with the rules of international law.

59. Mr. JIMÉNEZ de ARÉCHAGA said that the text would be incomplete if it referred solely to the conditions laid down in the treaty.

60. Mr. LACHS expressed a strong preference for the Chairman's text as he was firmly convinced of the need to drop the reference to conditions outside the treaty.

61. Mr. ROSENNE said that the omission of the phrase "or in conformity with" would open the way to misunderstanding. After all, certain conditions might be laid down outside the treaty, as in the purely hypothetical case of a treaty concerning the freedom of navigation through the Corinth Canal which made no mention of detailed regulations governing the carriage of explosives to be drawn up by the territorial State.

62. Mr. RUDA said that he agreed with Mr. Rosenne. The conditions in question were laid down in two different kinds of instrument - the treaty itself, and the national legislation on the subject, which had to be in conformity with the treaty. If the words "or in conformity with the treaty" were left out, there would be no reference to one part of the conditions laid down.

63. Mr. de LUNA said that, since a State could not be bound by an obligation to which it had not assented, it seemed to him that the obligation must necessarily be an obligation laid down in a rule of international law or in a treaty and consequently one that the third State had accepted either under international law or in accepting the treaty.

64. The CHAIRMAN pointed out that the provision was concerned not with obligations but with the conditions governing the exercise of a right. That right could only be accepted by the non-party State in the form in which it was offered, and that offer was accompanied by certain conditions governing its exercise which were either expressly laid down in the treaty or else would be determined by the party concerned pursuant to the treaty.

65. He gathered that the majority of the members of the Commission thought that the provision should refer to additional restrictions. Accordingly, he suggested that paragraph 2 should be referred back to the Drafting Committee with the request that it should give particular consideration to the formula "the conditions governing the exercise of that right provided for by the treaty or established in conformity with it" and that it should make any other changes in the paragraph that were consequential on the redrafting of paragraph 1.

It was so agreed.

Article 62 B (Termination or amendment of provisions regarding rights or obligations of States not parties)

66. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following text for article 62 B:

"Termination or amendment of provisions regarding rights or obligations of States not parties

"When in accordance with article 62 or 62 A a State is subject to an obligation or entitled to exercise a right under a provision of a treaty to which it is not party, the provision may only be terminated or amended with the consent of that State, unless it appears from the treaty or the circumstances of its conclusion that the obligation or right was intended to be revocable."

67. Sir Humphrey WALDOCK, Special Rapporteur, said that it would be desirable to reserve the words "or the circumstances of its conclusion" in view of the discussion to which those words had given rise.

68. Mr. VERDROSS said that in general he approved of the wording of the article, which he took to mean, by a process of a contrario reasoning, that so long as the non-party State had not exercised the right in question, the right could be amended or revoked by the parties.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the provision as originally drafted by him in his report (A/CN.4/167, article 62, para.3) had embodied two limitations, one of which was that mentioned by Mr. Verdross. The limitation in question, however, was covered by implication in the Drafting Committee's text; by a process of a contrario reasoning, it could be deduced from that language that, until a State became subject to an obligation or became entitled to exercise a right under a provision of the treaty, it was possible to terminate the obligation or right in question.

70. Mr. ROSENNE said that he had accepted the text of article 62 B in the Drafting Committee but he now had misgivings on two points. The first was the use of the verb "terminate", which he had himself suggested should be replaced by "revoke". On careful consideration, he would prefer reverting to a term such as "revoke" because an examination of the articles in part II (concerning the invalidity and termination of treaties) showed that there were many methods of termination. The intention in article 62 B was to refer to the case where the parties agreed to amend or put an end to a treaty provision and not to that where a party had a right to call for the termination of the treaty in accordance with one of the provisions of part II.

71. The second point which caused him concern was the need to cover the case of the suspension of the operation of a treaty by agreement among the parties.

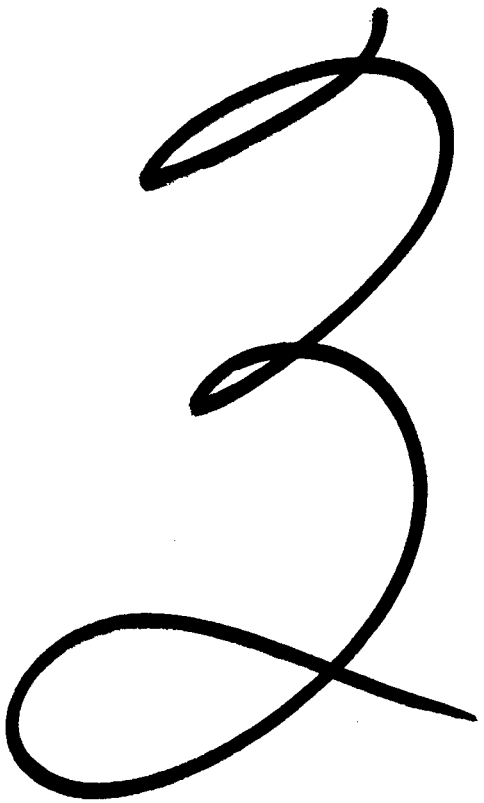
72. He thought that the language of article 62 B should be adjusted so as to refer to an agreement to revoke or amend the provision in question, and so as to apply both to the suspension and the termination of the treaty.

73. Mr. YASSEEN said he could accept the wording of the article as a whole, but it might be preferable to express its meaning in positive terms, perhaps by the formula "... the provision may be terminated or amended with the consent of that State...", so that it would not prejudge the possible termination of the provision under other rules already adopted by the Commission.

74. Moreover, he suggested that the final passage should be drafted to read: "unless it appears from the treaty that the provision was revocable"; in that way, the contraversial phrase "or the circumstances of its conclusion" would disappear and the end of the sentence would be symmetrical with the beginning, which spoke of a "provision", not of an obligation or right.

75. Mr. BARTOS said that he was satisfied with the text as a whole. If a State had declined the proposal made to it in the treaty, its consent was not necessary for the amendment or deletion of the provision containing that proposal. That interpretation was wholly in conformity with clause (b) of article 62A, paragraph 1. But there was a period during which the option was open, and the question was whether the terms of a treaty could be amended before that period had elapsed. The third State might have entertained an expectation that it would be in a position to exercise the right or assume the obligation and might have taken steps to do so and, if so, it would not be fair that the parties to the treaty should be able to withdraw their proposal unilaterally. The Commission should make provision for such cases, which might occur very commonly in practice.

76. Mr. JIMÉNEZ DE ARÉCHAGA said that he was prepared to accept article 62 B as drafted. However, he stressed that the language of that article reversed the presumption established in the ruling of the Permanent Court of International Justice in the Free Zones case. In that case, the court had proceeded on the assumption that any provision in favour of a third State could be revoked by the



parties to the treaty unless the treaty itself or the circumstances of the case showed an intention to provide for irrevocability. Article 62 B, on the other hand, was based on the assumption that the right of the third State was irrevocable except where a contrary intention appeared from the treaty or the circumstances of its conclusion. He had no objection to thus reversing the Court ruling but thought it would be going too far to drop the reference to the circumstances of the conclusion of the treaty. Without that reference, article 62 B would in effect state that the right was irrevocable unless the parties to the treaty took care to insert an explicit contrary provision in the treaty. He did not believe that such a formulation constituted a progressive development, or that it would encourage the use of the method contemplated in the article under discussion.

77. Mr. TUNKIN favoured the retention of the text of article 62; although he had had some doubts on the point, he would prefer to keep the reference to "the circumstances of its conclusion".

78. In view of the close links between article 62 B and articles 62 and 62 A, he suggested that the Drafting Committee should consider bringing the language of article 62 B into line with that of the other two articles.

79. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he found the text acceptable. However, the expression "under a provision of a treaty" ("en vertu d'une disposition d'un traité") might give the impression that the right or obligation had been established directly by the treaty, an interpretation incompatible with the previous articles. It might perhaps be better to use some such expression as "arising from a treaty" ("découlant d'un traité").

80. To his mind, it would not be enough to refer to the terms of the treaty in the final passage; and the expression "or the circumstances of its conclusion" was itself too restrictive, as the revocability might be the consequence of an event subsequent to the conclusion of the treaty, as for instance from diplomatic conversations with the non-party State concerned. It would perhaps be better to use the phrase "or the circumstances", which was both more concise and also broader in scope.

81. The adjective "revocable" was no doubt appropriate in referring to a right, but less so in referring to an obligation.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficulty could be overcome by redrafting the "unless" clause - on the lines suggested by Mr. Yasseen - to read "unless the provision was intended to be revocable".

83. Mr. de LUNA said that notwithstanding the commendable efforts made, the attempt to steer a middle course between two different doctrinal positions had produced an eclectic text that was neither elegant nor clear.

84. To his mind, it was obvious that without the consent of the non-party State, no obligation could arise for that State. As far as rights were concerned, it would be normal for those members who accepted the doctrine of offer and acceptance to regard the offer as a unilateral legal instrument. For those who, like himself, considered that the right already existed by virtue of the treaty even before it was exercised, irrevocability would be the rule by virtue of the autonomy of the will of the parties.

85. The CHAIRMAN, speaking as a member of the Commission, observed that since article 62B referred back to article 62 and 62A, it was obvious that the right came into existence only when the non-party State had given its consent, either explicitly, or implicitly, by exercising it. Until it did so, the right was revocable.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's remark went a little too far. Members like Mr. Verdross, Mr. Jiménez de Aréchaga, Mr. de Luna and himself did not admit that nothing existed in the nature of a right until the assent of the third State was given. The purpose of the formula in article 62B was to leave the doctrinal question open. All the members of the Commission were agreed that (except where there was a contrary intention of the parties) a perfect and irrevocable right existed in principle only when the consent of the non-party State was given. The use of the present tense in article 62B made it possible to keep open the doctrinal question.

87. Regardless of doctrinal differences, all members of the Commission agreed that, in practice, the right of the non-party State should be revocable until that State had accepted it or exercised it.

88. The CHAIRMAN said that that idea could be expressed by stating that, as soon as a right or an obligation arose, it would cease to be revocable.

89. Mr. CASTREN said that he could accept the article as a whole, with the drafting changes proposed.

90. At the 738th meeting he had proposed a text under which the only criterion for determining the question of revocability would have been the terms of the treaty. The non-party State would be put in a difficult position if it was obliged to examine not only the text of the treaty, but also other factors, which might even perhaps have arisen after the conclusion of a treaty. That State might have taken steps and made economic sacrifices in order to exercise its right; it should not be deprived of that right without its consent unless it appeared from the terms of the treaty that the right was revocable. Accordingly he proposed the deletion of the words "or the circumstances of its conclusion". In his opinion, the Permanent Court of International Justice had not decided that question, and his opinion was supported by the Special Rapporteur's commentary on the original draft article 62 (A/CN.4/167).

91. Sir Humphrey WALDOCK, Special Rapporteur, said that the Permanent Court had not in fact ruled on that question. The ruling to which Mr. Jiménez de Aréchega had referred was contained in the separate opinion by Judges Hurst and Altamira. As far as the Court was concerned, it had rather assumed that the provision in favour of the third party was irrevocable in the particular case because of the special circumstances.

92. The difficulty in article 62 B arose to a large extent from the attempt to deal concurrently with obligations and rights, when the position in respect of the two was slightly different. With regard to obligations, it was the possibility of the amendment of the relevant treaty provision that was important to the non-party State; the termination of an obligation, and in most cases its suspension, would not be a matter of concern for that State. With regard to rights, the third State was the beneficiary and it would be appropriate to lay down a more strict rule.

93. The CHAIRMAN said that a case could arise in which the treaty itself did not contain any provisions on the subject but the parties, in a communication to the non-party State, stipulated the irrevocability of the right and that State accepted that irrevocability.

94. Mr. YASSEEN said that the parties could amend the treaty after its conclusion, but before acceptance by the non-party State. However, that later inter se agreement should be brought to the notice of the non-party State concerned, just as the original treaty should have been brought to its notice.

95. The CHAIRMAN suggested that article 62B should be referred back to the Drafting Committee.

It was so agreed.

Article 61 (Treaties create neither obligations nor rights for States not parties) (resumed from the previous meeting)*

96. The CHAIRMAN invited the Commission to resume its consideration of Article 61.

97. With regard to the title, he recalled that Mr. Rosenne had agreed to the use, in the title, of the Latin maxim pacta tertiis nec nocent nec prosunt. The use of that maxim would avoid the glaring discrepancy between the title "Treaties create neither obligations nor rights for States not parties" and those of the following articles, which specifically referred to treaties that provided precisely for rights or obligations for such States.

98. Mr. BRIGGS said that the main idea of the Drafting Committee, in its formulation of articles 61, 62, 62A and 62B, had been to differentiate between rights and obligations. In keeping with that idea, he suggested that articles 61 and 62 should be combined, any reference to rights being omitted from article 61. The combined article would then read:

"1. A treaty applies only between the parties and imposes no obligations upon States not parties to it.

"2. A State may become bound by an obligation..." (as in the article 62 proposed by the Drafting Committee).

99. In that manner, it would be possible to overcome the difficulty arising from the fact that, according to one school of thought, the treaty itself conferred rights or created obligations for the non-party State, whereas according to the other school, the process constituted an offer which needed acceptance for its completion.

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* For the text of article 61 as proposed by the Drafting Committee, see the summary record of the 750th meeting.

100. Mr. ROSENNE said that he had grave misgivings regarding the proposal made by Mr. Briggs. The principle embodied in article 61 was a very fundamental one: that expressed in the adage res inter alios acta aliis nee prodest nec nocet. The language proposed by Mr. Briggs could have much more far-reaching effects than would at first appear.

101. Mr. BRIGGS pointed out that the essential statement - that a treaty applied only between the parties - would remain.

102. The CHAIRMAN said that the formula was nevertheless an extremely dangerous one. The article would refer only to obligations and say nothing about rights.

103. Mr. CASTREN said that he supported Mr. Briggs' proposal; it would be a way of avoiding many difficulties. The Commission had always tried to keep rights and obligations separate, but the article dealt with both together.

104. Mr. ELIAS said that it was undesirable to alter the contents of article 61 in the manner suggested by Mr. Briggs; that article expressed an autonomous and fundamental principle which should be given due prominence.

105. He recalled that he had suggested at the previous meeting that the four articles 61, 62, 62A and 62B should be grouped together so as to emphasize their inter-connexion. In that process, the titles could be dropped and replaced by a new comprehensive title along the following lines:

"Effects of a treaty on States not parties to it"

106. The CHAIRMAN said that the suggestion by Mr. Elias should be discussed after the Commission had decided whether to maintain the article as proposed by the Drafting Committee or to amend it in the manner suggested by Mr. Briggs.

107. Mr. YASSEEN said that in his opinion the article should stand as proposed by the Drafting Committee. To say that a treaty applied only between the parties was to state a principle from which followed two consequences, similar in kind and equal in force: a treaty did not impose any obligation and it did not confer any right on non-party States. Those two consequences should be stated immediately after the general principle.

108. Mr. VERDROSS said that for practical reasons, especially for making voting easier, it would be better to deal with rights and obligations in two separate clauses. There was no need to state immediately in article 61 what would be said in the following articles. The first phrase should, however, be retained.

109. Mr. AMADO said that the starting point of the discussion was the fact that there was a glaring contradiction, beginning with the titles themselves, between article 61 and the next two articles. That inconsistency should be removed, but he did not think that Mr. Briggs's proposal offered a solution. The Commission should be logical and discern the continuity from a principle to its consequences.

110. Mr. EL-ERIAN said that he favoured the retention of article 61, which constituted a useful general statement of a general principle.

111. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. El-Erian's remark. Personally, he would have liked the provisions on rights to be separated from those on obligations but, in the case of the principle embodied in article 61, he thought that it should be maintained as it stood. However, he also favoured adding a proviso such as that suggested by the Chairman at the previous meeting, which would make the principle in article 61 subject to the provisions of article 62.

112. Mr. TUNKIN said that he was in favour of keeping article 61 for the reasons already stated.

113. To add a proviso such as "subject to the following articles" would be going too far, for such a clause would imply that the following articles stated exceptions - which they did not.

114. He proposed that, as Mr. Ruda had suggested at the previous meeting, the words "without their consent" be added at the end of the Drafting Committee's version of article 61. There would thus be a logical sequence between article 61 and the articles that followed.

115. Mr. RUDA said that he agreed with Mr. Tunkin. He realized that the proposal he had made at the previous meeting (adding the phrase "without their consent" to article 61 and deleting the following articles) had been rather too drastic. On reflection, he thought that the following articles might be kept if

article 61 was drafted in the manner just proposed by Mr. Tunkin. In that way, article 61 would state the principle and the following articles would indicate the ways in which it was to be applied. However, should the Commission be unwilling to accept the amendment, it would still be necessary to remedy the contradiction between article 61 and the following articles.

116. Mr. CASTREN observed that the result of Mr. Briggs's proposal would not be to eliminate the statement of principle; it was merely a way of dividing it into two parts and placing one in one article and the other in the next.

117. The CHAIRMAN, speaking as a member of the Commission, said that he was increasingly inclined to accept the solution proposed by Mr. Ruda and Mr. Briggs.

118. Mr. PAL said that he favoured the retention of article 61 as proposed by the Drafting Committee. He did not believe that the phrase suggested by Mr. Ruda would remove all difficulties; consent was not the only requirement specified in articles 62, 62 A and 62 B. He suggested that the problem could perhaps be solved by amending article 61 so as to state that a treaty applied only between the parties and "in itself" neither imposed any obligations nor conferred any rights upon States not parties to it.

119. The CHAIRMAN said that that type of language had already been considered unsuccessfully.

120. Mr. TABIBI supported article 61 as the expression of the fundamental rule in the matter of the effects of treaties on non-party States. However, he was not altogether satisfied with the title of the article.

121. Mr. de LUNA stressed that all the difficulties arose from the fact that the Commission was not taking a stand on either of the two legal doctrines in the matter. Article 61 as drafted presented difficulties for those members of the Commission who favoured the doctrine of offer and acceptance. Other members considered that a treaty could not impose obligations upon non-party States, but that it could confer rights upon such States.

122. He said that he would be prepared to accept the traditional rule embodied in article 61 in the context of the series of articles now under consideration.

123. Mr. AMADO said that none of the versions suggested satisfied him. He therefore proposed that the Commission should approve the articles as they stood without worrying any further about the contradiction between article 61 and the following articles. The future would show how those articles were to be interpreted.

124. Mr. RUDA said that his doctrinal position was the same as that of Mr. de Luna, Mr. Jiménez de Aréchaga and Mr. Verdross. Without entering into the question of substance, however, he wished to stress that, from the point of view of form, there was an obvious contradiction between article 61 and the following articles.

125. He did not believe that the provisions which had been put forward were completely neutral as between the two doctrines sustained during the discussion; in particular, article 62 A inclined in the direction of the doctrine favoured by him.

126. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept either of the two solutions which had been put forward. Article 61 expressed the general rule but should, of course, be read in conjunction with the other articles of the draft. There was nothing very strange in the fact that articles 62 A and 62 B qualified the general rule laid down in article 61; there was perhaps some element of inelegance because of the absence in article 61 of some anticipatory reference to the subsequent articles. From the legal point of view, however, no difficulty arose so long as the qualifications were stated in the draft articles. It was probably desirable to amend the title so as to show that article 61 stated the general rule regarding the effect of treaties on non-party States.

127. Nevertheless, he would have no objection to the addition of the words suggested by Mr. Ruda, particularly since the term "consent" was used; that term was wider than "agreement" and committed the Commission no further than it had already committed itself in articles 62 and 62 A.

128. The CHAIRMAN, speaking as a member of the Commission, said that he had definitely come round to Mr. Ruda's suggestion, although he had initially opposed it at the previous meeting. Article 61 as so amended would then be less categorical and would herald what followed.

129. The first passage would perhaps be improved if amended to read: "A treaty produces legal effects only for the parties".

130. Mr. REUTER objected that that wording would give even greater weight to Mr. Jiménez de Aréchaga's remarks on the need for a reference to the most-favoured nation clause in that part of the draft.

131. The CHAIRMAN suggested that article 61 be referred back to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

Legal/M.D.Copithorne/ts.

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Our file: ~~20-3-6-1~~

Ottawa, May 5, 1964.

Dear Alan,

At Mr. Cadieux's request, I attach a copy of my paper on Waldock's Third Report on the Law of Treaties. It contains nothing in the way of original thought but may nevertheless be useful in your preparation for the debate in the Commission.

M. D. COPITHORNE

Maurice Copithorne

Mr. Alan Beesley,
Permanent Mission of Canada
to the United Nations,
Geneva, Switzerland.

Acting Under-Secretary

through Mr. Wershof

Legal Division

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CONFIDENTIAL

May 1st, 1964.

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Commentary on Waldock's Third Report on the Law of Treaties.

We attach a Commentary on Waldock's Third Report on the law of treaties. While we have so far only received the first of three sections of this Report, this first section seems to cover all the topics that are likely to be the significent and controversial.

2. If you agree, we shall forward a copy of this memorandum to Mr. Beesley in Geneva.

Legal Division

CONFIDENTIAL

May 1st, 1964.

Commentary on Waldock's Third Report on the Law of Treaties

INTRODUCTION

In this Third and last report, the special rapporteur proposes to cover (a) the application and effect of treaties (including conflicts) (b) the revision of treaties, and (c) the interpretation of treaties. Waldock notes that the application of treaties overlaps with state responsibility and, as responsibility for the breach of a treaty obligation does not appear to be materially different from the breach of any other form of international obligation, he has excluded provisions relating to the principles of responsibility, and specifically of reparation for failure to perform treaty obligations. Accordingly, unlike Fitzmaurice is his earlier work, Waldock has not gone into the difficult areas of legitimate reprisals and legitimate self defence. In addition, Waldock has omitted from his study of the effects of treaties on third states, any examination of how far successor states may constitute exceptions to the pacta tertiis rule, leaving this area for consideration in the context of state succession. It is on this basis presumably, that he excludes the topic of the unity and continuity of the state.

Waldock's draft is not nearly as detailed as Fitzmaurice's earlier work in the same area. In part, this probably reflects the change in form from an expository code to a convention and in part, the deliberate non involvement in certain overlapping areas as mentioned above. Furthermore, Waldock has not enunciated - at least in that

section of his report we have received to date-certain of Fitzmaurice's "fundamental principles governing treaty obligations" such as the supremacy of international law over domestic law (although this particular subject may yet appear in the third section of Waldock's report covering the interpretation of treaties), and the relationship of obligations to rights. This latter proposition seems a superfluous statement of the obvious and its deletion therefore unlamented.

The important doctrinal questions arising in this section of Waldock's report appear to be the following:

(a) The duty to refrain from acts calculated to frustrate the object of the treaty, and the supremacy of international over domestic law (Article 55). It is concluded that support should given to the principle of supremacy of international law over domestic law in this context and elsewhere should it appear in the latter and as yet unpublished sections of Waldock's Third report.

(b) Pacta teritiis and its admissable exceptions (Articles 61-63).

It is concluded that Waldock's espousal of the stipulation pour autri should be supported, and that his formulation concerning objective régimes should be regarded as a notable contribution in a difficult area but one that is not free from difficulty especially with regard to the concept of tacit consent.

(c) Conflicting Treaty Obligations (Article 65).

It is concluded that support should be given to Waldock's formulation that the concept of relative priority rather than nullity should govern conflicts of treaty obligations.

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Section I - The application and Effects of Treaties

Article 55 - Pacta Sunt Servanda (pages 7-10)

Some two thirds of the way through his draft articles, the rapporteur has now ennunciated the primordial rule of treaty law - pacta sunt servanda. It is open to question whether this provision should not in due course be moved up to the beginning of the Articles. Waldock points up the fact that the concept of pacta is ultimately not a legal obligation but one of good faith and he refers to numerous instances where international tribunals have insisted upon good faith in the interpretation and application of treaties.

Paragraph 2 of the Article provides that a party must refrain from "Any acts calculated to prevent the due execution of the treaty or otherwise to frustrate its objects". The key word is "calculated" which suggests that to run afoul of this paragraph, a party must intend to frustrate the execution of the treaty. This mens rea may be a difficult to establish. Waldock's formulation also raises the problem of acts that are not colourable but clearly have the effect of frustrating the execution of the treaty. Should a party be able to act in such a way as to effectively frustrate the treaty whether the act was calculated with this purpose in mind or not? Such was the question face by the International Court in the Guardianship of Infant's Case (I.C.J. 1958, p. 55). Fitzmaurice discussed the Guardianship case under the principle of the supremacy of international law over domestic law. The question raised by the Guardianship case can be stated as follows: a treaty between two states is concerned with subject matter A. However, there is a law in one of the states on subject matter B which although technically distinct, may if applied, result in consequences

contrary to those apparently contemplated by the treaty. Fitzmaurice, while doubting that the Court intended to question the principle of the supremacy of international law over domestic law, notes with approval the remark of Judge Lauterpacht, who dissented on this point, that a state is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty. Fitzmaurice accordingly included a subparagraph in his draft stating that international law was to prevail over any local law irrespective of the particular subject matter, and whether or not it purported to relate specifically to the treaty or to the class of matter covered by the treaty.

The majority opinion of the Court in the Guardianship Case held that inspite of points of contact and of encroachments, the Convention did not include within its scope the subject matter of the domestic law in question. Accordingly there was no failure to perform the obligations of the Convention. However, much weight was placed on the recognized existence of l'ordre public as an implied condition of treaties dealing with questions of private international law and conflic of law. In Judge Lauterpacht's view, the concept of l'ordre public must be regarded as a general principle of law in the field of private international law. Fitzmaurice noted these remarks favourably and provided in his Articles as one of the conditions justifying non performance, that parties were not obliged to implement a treaty relating to topics of private international law, where to do so would be contrary to the juridical concepts of l'ordre public as applied by their courts. Waldoc has no so far mentioned this concept but it may arise in his last sectio on the interpretation of treaties.

As has been pointed out, the relationship of international law to domestic law is particularly relevant to Canada where the provincial legislatures could enact legislation which had the effect of frustrating the operation of treaties implemented by Parliament pursuant to Section 91 of the B.N.A. Act. While the reasoning employed by the majority of the Court in the Guardianship case might provide a convenient excuse for Canada in such cases, its extensive use would throw Canadian treaty relations into a most uncertain state, causing the federal government embarrassment vis-à-vis foreign states and political difficulties vis-à-vis the provinces. It seems clearly preferable in this context that the provinces should not be encouraged to believe that actions by them to frustrate treaties implemented by the federal government under section 91 are excusable at international law, and accordingly, that we should support the absolute supremacy of international law over domestic law.

Such a course would be consistent with the position taken when the Commission earlier discussed the effect of internal law concerning the competence of a state to enter treaties (Article 31).

Paragraph 4 of the Article 55 states that failure to carry out the obligations of a treaty engages a state's international responsibility. It is perhaps open to question whether this paragraph can be construed as creating a basis of obligation separate from that of the treaty. If a state's ~~is~~ default of an obligation under a treaty is condoned by the other party, is the defaulting state excused of its responsibility under this paragraph? Probably such a case would fall within Waldock's qualification referring to a failure which is justifiable or excusable under the general rules of international law.

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Article 56 The Inter Temporal Law (pages 11-14)

In the Island of Palmas arbitration, Judge Huber stated that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at a time when a dispute in regard to it arises or falls to be settled". This has become known as "the intemporal law" and has been incorporated by Waldock in Article 56, viz: a treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. In paragraph 2 Waldock postulates the compliment of this rule; subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied. However, Waldock draws attention to the difficulty the second provision may create arising from the uncertain relationship between the two branches of inter temporal law. He points out that in the light of the evolution that has been taking place in the law regarding coastal waters and the continental shelf, this problem cannot be dismissed as academic. A question arising from the North Atlantic Fisheries Arbitration is whether the parties to an old treaty in using the word "bay", intended it to mean bays as then understood, and delimited in international law (assuming hypothetically that there had been a legal concept of a bay at the time), or did they mean any waters then or in the future that might be considered by international law to be bays under the sovereignty of a coastal state? While this type of problem may be likely to arise in a law of the sea context, it surely is a fairly classical question of interpretation. For example, an agreement might concern "dwellings", and after execution, the accepted definition of "dwellings" might be broadened to include garages; did the agreement cover garages? or in

Waldock's words, did the parties mean dwellings then, or did they mean any structure which in future might come to be considered by law to be dwellings? The Treaty of Washington provided for the entry of fish products into the U.S. from the "Dominion of Canada". Subsequent to the Treaty, British Columbia joined Confederation and the question then arose as to whether the Dominion of Canada meant the territory of Canada in 1871, or the territory that was included in Canada at the time of application of the treaty in 1875. The law officers of the Crown ruled that the expression "Dominion of Canada" was to be governed by the state of the parties as at the date of signature and "cannot now receive a wider construction from the fact that additional territory has since been added to the Dominion" (O'Connell, "The Law of State Succession", finds this case hard to reconcile with British practice concerning the extension of treaties to newly acquired territories).

Article 57 Application of Treaty Provisions Ratione Temporis

Waldock has here postulated the accepted principle that unless a treaty expressly or impliedly provides otherwise, its provisions apply only with respect to facts or matters arising while the treaty is in force. Perhaps the most useful part of this Article is the clear statement in paragraph 2 of the Commentary that the parties are capable of giving retroactive effect to a treaty. Occasions on which it is desired to give retroactive effect to Canadian treaties are not infrequent, but up to now there has been no clear authority for this proposition. The second paragraph of the Article states that the termination of a treaty does not put an end to the rights and obligations of the parties under the treaty with respect to facts or matters which arose while it is in force. We are not certain that

this provision means what Waldock presumably intended it to mean; namely, that the parties, other than by consent, are not free to undo after the treaty has been terminated, those things they did while the treaty was in effect. The wording of the special rapporteur might be interpreted as going rather further and, for example, supporting the proposition that rights in rem created by treaty continue notwithstanding the termination of the treaty. While this is undoubtedly true with regard to certain exceptional types of agreements such as treaties of cession, it is not these exceptional cases that Waldock seems to have in kind. Perhaps Waldock should be asked to elaborate on this paragraph of Article 57.

Article 58 - Application of a Treaty to the Territories of a Contracting State (pages 21-28)

A treaty applies with respect to all the territory for which a party is internationally responsible unless a contrary intention is manifested. As Waldock states, such a rule seems essential if contracting states are to have any certainty and security as to the territorial scope of each other's undertakings. The question most frequently arises with regard to colonies or "non-metropolitan" territories. Up to the present time, there has been scope to argue that non-metropolitan territories are not automatically bound by a treaty binding the metropolitan power, although Waldock alleges that state practice does not appear to justify the conclusion. It seems most desirable that the law be certain on this point and Waldock proposes the adoption of the logically more attractive rule.

If this rule were to have retroactive effect, which we assume is not the case, it would of course be relevant to any deter-

mination of whether British treaties concluded prior to say 1931, are binding on Canada and thus continue to be binding on this country. Generally, we have started from the premise that such treaties do continue to bind Canada unless it can be demonstrated that they had no relevance to Canada at the time they were concluded. Australia and New Zealand seem to have taken a similar position. Waldock notes the use of federal state clauses as evidence of his general proposition that states are presumed to enter into engagements with respect to all their territory. He notes in passing that proposals for the introduction of federal state clauses drawn up within or under the auspices of the United Nations have not with opposition in recent years.

Article 59 Extension of a Treaty to the Territory of a State with its Authorization (pages 29-32)

This Article lays down that when a party to a treaty-either a state or an organization - is duly authorized by another State to bind its territory, and the other parties are aware of the authorization, the treaty applies to the territory of the third state provided that such was the intention of the parties. The Article looks primarily to the situation such as Switzerland and Liechtenstein, where the larger state sometimes includes the smaller in its treaty relations. However, Roxburgh points out in his monograph "International Conventions and Third States", that such rights and duties as the third state may incur by virtue of its special legal relationship to one of the contracting parties, as well as by virtue of agency (see Article 60), do not result merely from the operation of the treaty but arise by virtue of the law of status and agency, and therefore like state succession, belong not to the present discussion but to discussions of

those branches of the law. This reasoning has much appeal and Waldock could be asked perhaps why he distinguishes in treatment state succession which he excludes from his study, and the situations envisaged in Article 59 and 60.

Article 59 raises the question of whether a treaty made by an international organization is binding upon the constituent members of the organization. Waldock does not take a stand on this issue which probably does not need to be resolved in this context. However, it occurs to us that as a practical measure, more care should be taken in drafting such instruments so that the intention of the parties on this question is clearly manifested. From the Canadian point of view, more attention should probably be paid to treaties being concluded by international organizations of which this country is a member. As a strictly ~~policy~~ practical matter, we would think that if Waldock's proposal is to be the rule, members of organizations will want to ensure that they have an opportunity to comment on the treaties at the drafting stage. With this in mind, we might wish to raise this point in NATO and OECD Councils after the Commission has finished its work.

Article 60 - Application of a Treaty concluded by one State on behalf of Another (pages 32-35)

Waldock has drawn a distinction between a treaty that is made applicable to a third state (the previous article) and the situation where the third state through the agency of one of the parties becomes itself a party to the treaty. The distinction perhaps does not warrant separate articles and it is suggested that the subject be compressed into two paragraphs of the same article. In this Article Waldock again discusses the question of international organizations.

He points out that especially in the economic sphere, an organization may wish to conclude a treaty on behalf of its member states in such a manner as to place them individually in the position of parties to the treaty. Waldock refers to the International Court decision in the Southwest Africa Case and in which there were sharp divisions in the Court as to the legal basis of the mandate, some considering it a treaty and some a legislative act by the Council of the League. In the Northern Camerons case, which went off on another ground, there were references by members of the Court which left open the questions of the true juridical nature of the relationship of members of the United Nations to the trust agreement.

However, as the agreements in these two cases were made with members of the Organization, they raise special problems which Waldock leaves to the Commission's study on the Relations between States and Inter-Government Organization. In paragraph 2 of the Article, the rapporteur provides for the general case and declares that an international organization duly authorized by its constituent instrument or by its established rules may conclude a treaty in the name both of the organization and its member states.

Article 61 - Treaties Create Neither Obligations nor rights for Third States (pages 35-40)

This sets out the well known rule of pacta tertiis - agreements neither impose obligations nor confer benefits upon third states - which has achieved the status of an independent rule of customary international law. Differences of opinion arise however, as to how far the rule admits of exceptions and this is the subject of the next two Articles.

Article 62 - Treaties Providing for Obligations or Rights of Third States (pages 41-59)

This Article seeks to lay down the general conditions under which a state may become subject to an obligation or entitled to a right under a treaty to which it is not a party. It does not cover the question of whether certain kinds of treaties are to be regarded as having "objective" effects. In his commentary, Waldock refers to the private law analogies of trust and the "stipulation pour autri" which have had an influence on the thinking of jurists, but concludes that it is by no means clear that the admission of exceptions to the rule of pacta tertiis in State practice or in international jurisprudence, has been directly based on such analogies rather than on the consent of states and the "requirements of international law".

Paragraph 1 deals with the imposition of obligations by the consent of the third state. The granting of this consent is regarded as creating a collateral agreement, and the true juridical basis of the third state's obligation is not the treaty but this collateral agreement.

Paragraph 2 deals with the creation of rights in favour of third states. Some writers (especially Rousseau and McNair) believe that while a treaty can certainly confer, either by design or by its incidental effects, a benefit on a third state, the latter can only acquire an actual right through some form of collateral agreement between it and the parties to the treaty. Waldock sides with the opposing view that a treaty may confer an enforceable right on a state not a party to it - a view he believes recent practice and the jurisprudence of international tribunals justifies. He proceeds to

examine with considerable thoroughness recent jurisprudence touching on the question and comes to the conclusion that there is nothing in international law to prevent two or more states from effectively creating a right in favour of another country. Waldock's formulation makes the creation of the third party right dependent upon the condition that the parties to the treaty should have had a specific intention to confer an actual right as distinct from a mere benefit. So long as the particular provision remains in force, the third state possesses the right of which it may or may not avail itself. In so stating the rule, Waldock rejects the conditions sometimes advanced that the treaty must designate the beneficiary stateby name, and that there must be a specific act of acceptance by the third state. Finally, Waldock suggests that the stipulation pour autri is subject to amendment or termination at the will of the parties to a treaty unless there is evidence of intention to confer an irrevocable right on the third state or there is a specific collateral agreement.

Much of the controversy surrounding the stipulation pour autri is concerned with the intention of the parties. Whether the parties have adequately manifested their intention will always be a potential source of argument, but Waldock recommends the Commission take the notable step of establishing unequivocably the competence of treaty partners to create stipulations pour autri.

Article 63 - Treaties Providing for Objective Régimes (pages 60-80)

Waldock next moves to a more difficult area, namely those treaties which are alleged by their very nature to have "objective" effects, that is, effects erga omnes. This class is made up of the treaties either creating international régimes for the use of a waterway

or a piece of land, or attaching a special régime to a particular territory or locality, including treaties of cession and boundary treaties. The essential question is whether this objective character derives from a general duty to recognize and respect situations of law or of fact established under a valid and lawful treaty, or from the particular nature of the treaty, or from the subsequent recognition or acquiescence of other states, or indeed from a combination of these elements. It is Fitzmaurice's view that these apparent exceptions can mostly be accounted for on some independent legal basis that does not involve postulating that the third state is or becomes directly obliged or entitled by the treaty itself. He admits nevertheless, that these qualifications or "quasi-exceptions" constitute in the aggregate a considerable gloss on the pacta tertiis rule.

Waldock analyzes a number of situations including the Antarctic Treaty, the Berlin Act of 1885 establishing a régime for the Congo, The Suez Convention of 1888, the rights of passage in the Kiel Canal established by the Treaty of Versailles (The Wimbledon Case), the permanent neutralization of Switzerland in 1815 by the Congress of Vienna, the Aaland Islands Convention of 1856, and, mandates and trusteeships. From these several categories of treaties, Waldock draws the common thread of an intention by the parties, in the general interest, to create a *régime* of general obligations and rights for a territory or locality which is subject to the treaty making competence in one or more of the parties. In Waldock's view, the significent fact is that one or more of the parties has a particular competence with respect to the subject matter of the treaty.

A case of a different kind is that of international organizations. Waldock notes that in the Reparation for Injuries Opinion,

the International Court appears to have found that a general international organization is a special form of international settlement, and that a vast majority of the numbers of the international community have the necessary competence to give such an objective personality to such an organization. Waldock then turns to treaties ceding territory, boundary treaties etc. and points out that it is the dispositive effect of the treaty rather than the treaty itself which produces objective effects. Fitzmaurice includes such cases under what he calls the duty to respect valid international acts not infringing the legal rights of third states.

Writers are divided on whether a treaty can have objective effects upon third states as they are on the stipulation pour autri. Waldock is himself not without doubts, and suggests that the Commission could decide to limit its proposals to the statement of pacta tertiis in Article 61 and to the stipulation pour autri exceptions formulated in Article 62, and to leave aside all other cases as being essentially cases of custom or recognition not falling within the purview of the law of treaties. Alternatively, Waldock suggests that there may be a case for attributing special effects to treaties where the parties both have territorial competence with respect to the subject matter of the treaty, and have the intention to create a general régime in the general interest. Waldock proposes the introduction of the principle of tacit consent, and formulates his rule to declare that there exists a special category of treaties which, in the absence of timely opposition from other states, will be considered to have objective effects with regard to them. In limiting his rule to cases where the territorial power participates in or consents to the creation of the régime Waldock intentionally excludes general law making treaties such as the Geneva law of the sea conventions and the Nuclear Test Ban Treaty, which

feels belong to a separate category.

Roxburgh has pointed out that "tacit consent" can mean either the acceptance, by conduct implying consent, of an offer of contractual relationship, or the acceptance of a rule of international law which has arisen from the consent of "the family of nations" tacitly given. He argues that the concept of tacit consent in the second sense is an important source of the rules of international law. As there is no legislature to create or amend the body of international law, every single rule of international law must be proved solely by reference to the consent of the community, and the device of implied consent is of great assistance in establishing this consent. Thus, a rule which was originally introduced by express agreement between certain parties may, in the process of time be extended by the consent of the contracting states and of third states into a rule of international law, binding upon those states which have tacitly consented to it. The rights and duties so acquired by third states are not contractual rights and obligations, but rights and obligations which owe their origin to the fact that the treaty supplied the basis for the growth of a customary rule of law (see Commentary on Article 64 below).

One of the areas in which this type of argument is likely to affect Canada is with regard to international rivers. While there is probably no customary rule whereby all states are entitled to free navigation on international rivers, it might be possible to argue that third states have acquired rights by the tacit consent of the parties to navigation treaties, or in other words, that rules of customary law have arisen from treaties.

The device of tacit consent in the first sense mentioned by Roxburgh (that of an implied acceptance of an offer of a contrac-

tual relationship) was opposed in the 6th Committee at the 17th Session of the General Assembly by Italy and certain Latin American states on such grounds as that some states could constitutionally only assume international obligations that had been approved by their legislatures, and the consent for such states could therefore never be tacit. Notwithstanding this argument, the Commission at is 15th Session accepted the limited application of the tacit consent device for the purpose only of determining whether the Secretary General should be authorized to receive in deposit instruments of acceptance from members of the United Nations or the specialized agencies.

The Communists have already made it clear that in their view certain treaties such as the Austrian State Treaty and the Declaration on the Neutrality of Laos, are to be regarded as jus cogens, which seems to amount to a recognition that norms can be binding in international law irrespective of consent. Accordingly, the Communists can probably be counted on to support the concept of tacit consent as a juridical device to bring their support for jus cogens into line with the consensual theory of international legal obligation.

In paragraph 4 of his draft, Waldock also touches on the question of the competence of the parties to modify or terminate the régime and concludes that following the general opinion of states during the Suez crisis in 1956, those states which are substantially interested in the functioning of the régime should be allowed a voice in its amendment or termination.

Article 64 Principles of a Treaty extended to
Third States by Formation of International Custom (page 80)

Waldock suggests that in addition to law-making treaties, the operation of purely contractual treaties may be extended by cu

to third states which he does not however, regard as a true case of the legal effects of treaties on third states. This Article therefore merely preserves this possibility. Waldock's inclusion of a reference to custom appears to be a concession to those writers who argue that while the pacta teritiis rule is to be applied rather strictly, a treaty can become the basis of a rule of customary law, if the states which are concerned with its stipulations come to conform habitually with them, under the conviction that they are legally bound to do so. In this case, third states acquire rights and incur obligations which were originally conferred and imposed by treaty but have come to be conferred and imposed by rule of law.

Article 65 Priority of Conflicting Treaty Provisions (pages 81-105)

This subject was discussed at the 15th Session of the Commission in the context of the validity of treaties. However, at the suggestion of Waldock the Commission decided to consider the subject further in the context of the application of treaties and therefore stood the subject over to the present Session. The majority of the Commission shared Waldock's view that leaving aside the case of conflict with jus cogens, the fact that a treaty is incompatible with the provisions of an earlier treaty, does not deprive the latter treaty of validity. Some members however, (particularly the Communists) expressed doubts as to the validity of a treaty which conflicts with a prior treaty neutralizing or demilitarizing a territory (e.g. Laos and Austria), or embodying a political settlement of great importance.

Before the core problem of treaty conflict is reached, Waldock discusses and disposes of a number of cases which apart from

Article 103 of the Charter, do not in his view, require special mention in this Article:

1. Where conflict with rules of jus cogens is involved, it is resolved by an independent principle set out in Articles 37 and 45:

2. Where there is conflict between two treaties with all the parties to the earlier treaty also parties to the latter treaty, the question is one of amendment or termination of the earlier treaty.

3. The International Court, viewing the Charter simply as a treaty, has held that Article 103 is not binding upon non-members. As a result, doubt and differences of view exist as to the effect of Article 103 where the treaty is between a member of the United Nations and a non member. Relevant considerations are the near unversability of United Nations membership which reduces the scope of the doubt; and the fact that some of the Charter provisions embody rules of jus cogens. The problem remains however and Waldock has decided that the best solution is merely to provide that the rules laid down in this Article are subject to Article 103.

4. Some treaties contain clauses which purport to determine the relation of their provisions to other treaties entered into by the contracting states. (eg. Convention on the Liability of Operators of Nuclear Ships).

(a) The only limitation on the effectiveness of such provisions relating to earlier treaties is that parties to a treaty containing a clause purporting to override an earlier treaty which does not include all the parties of the earlier agreement, clearly cannot effectively deprive a state which is not a party, of its rights under the earlier treaty.

(b) A more difficult problem arises with regard to clauses which purport to override future treaties inconsistent with it, where the parties to the first are not the same as the parties to the second. (If the same parties are involved, the clause is of no significence for the parties are clearly capable of modifying their own agreement). In Waldock's view, the chief legal relevance of such a clause appears to be in making explicit the intention of the parties to create an "integral" or "interdependent" treaty régime not open to contracting out. Waldock argues that any treaty laying down "integral" or "interdependant" obligations not open to contracting out (eg. the Kellog-Briand Pact, the Genocide Convention and the Nuclear Test Ban Treaty), must be regarded as containing an implied undertaking not to enter into subsequent treaties which conflict with these obligations and thus that in case of conflict, a tacit agreement that the earlier treaty shall prevail.

The core problem of conflicting treaty obligations is now reached; some but not all the parties to a treaty participate in the conclusion of a new treaty which conflicts with their obligations under the earlier treaty. In such cases the pacta tertiis rule precludes the later treaty from depriving the other parties to the earlier treaty of their rights under that treaty. Waldock continues to view the question as one of priority of obligation and quotes some pages of his last report in support of this conclusion. He comments that in the present condition of international law, the matter is likely to be

best resolved on the plane of the legal responsibility and not of the competence of the offending state. The burden of Waldocks formulation then is again that the concept of relative priority rather than nullity should govern conflicts of treaty obligations.

In the light of trends at recent meetings of the Commission however, it is doubtful whether any view will be adopted that is inconsistent with Tunkin's position. The Communist made it clear at the last Session that they were unwilling to agree to a general rule which would allow states the right to enter into treaties inconsistent with earlier ones (subject only to the engaging of international responsibility). While it may therefore not prove possible to secure the adoption of Waldock's views in this field, it is to be hoped that the Commission can at least avoid taking the retrogressive step of espousing the position of the Communists (and in earlier years Lauterpacht) that treaties which conflict with earlier treaties falling within an unspecified class, are void. In addition to the case of conflict with jus cogens which is the subject of a separate article, there are already the possibilities of nullity because of a lack of capacity, and violation of the principle of good faith.

In this limited area, the facts and the consequent nullity of the offending treaty are likely to be easily ascertainable and thus amenable to consideration by a political forum. Beyond this however, controversy is almost inevitable and until a judicial procedure for the resolution of disputes is agreed to, the extension of the rule of nullity is likely to aggrevate rather than ease political differences. At the very least however, the Communists should be obliged to provide a precise definition of this new class of treaties to which they would extend the rule of nullity.

A minor exception in Waldock's formulation is that parties to the later treaty are not entitled to invoke the treaty against a state party to both earlier and later treaty, if the former is aware that in concluding the later treaty, the offending state is violating its obligations under the earlier one. Waldock has failed to mention the obvious difficulties of this type of provisions; how is knowledge of the earlier treaty established? Is registration with the United Nations sufficient? If so, all member states are presumably on notice of the treaty relationships of all the members of the United Nations and seemingly obliged to review its negotiating partner's treaty relationships to ascertain the limits on its freedom to bind itself. While logically attractive, this provision places a heavy onus on contracting states that is quite unrealistic for most states in practice will be unable or unwilling to carry out the review required if they wish to be certain that they will be entitled to invoke the treaty.

Article 66 Application of Treaties to Individuals (Pages 106-109)

As a general rule, treaties are applied to individuals through the contracting states and through the instrumentality of their respective national legal systems. There are, however, a number of treaties which have provided special international tribunals or procedures for applying to individuals, rights or obligations arising under treaties (eg. Article 304 of the Treaty of Versailles establishing Mixed Arbitual Tribunals). Article 66 sets out the general rule and this exception.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Acting Under-Secretary

through Mr. Wershof

FROM: Legal Division

REFERENCE:

Security CONFIDENTIAL

Date May 1st, 1964.

File No. 20-3-6-1

SUBJECT: Commentary on Waldock's Third Report on the Law of Treaties.

We attach a Commentary on Waldock's Third Report on the law of treaties. While we have so far only received the first of three sections of this Report, this first section seems to cover all the topics that are likely to be the significent and controversial.

2. If you agree, we shall forward a copy of this memorandum to Mr. Beesley in Geneva.

Legal Division

P.S. I have not as yet had opportunity to read.

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA. *(FILE COPY)*

NUMBERED LETTER

TO: THE PERMANENT MISSION OF CANADA TO THE UNITED NATIONS, NEW YORK.

FROM: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

Reference: Your telegram 257 dated Feb. 21, 1964.

Subject: Soviet Views on the Sanctity of Treaties.

Security: CONFIDENTIAL

No: L-96

Date: March 18, 1964.

Enclosures:

Air or Surface Mail:

Post File No:

Ottawa File No.
20-3-1-6
71 | 71

References

Your telegram under reference draws our attention to a statement by the Soviet representative in the Security Council on February 19 in the course of the debate on Cyprus, in which he referred to conflicting treaty obligations.

> "... reference is being made precisely to these so-called treaties of guarantee, but it is known that Article 103 of the United Nations Charter, states:
>
> "In the event of conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".
>
> And the United Nations Charter categorically prohibits interference in the domestic affairs of other States on any pretext whatsoever".

You has asked whether this statement is a new position or whether it can be reconciled with the traditional Soviet views on the sanctity of treaties by the assertion that the charter is itself a treaty.

2. Quite clearly the Charter is a treaty and as far as we know the Soviets have never suggested to the contrary. In addition, the obligations contained in the Charter may also constitute peremptory norms of general international law (jus cogens). One of the characteristics of such norms is that they cannot be derogated from except by the creation of other norms of general international law. In either event, it was clearly the intention of the parties as expressed in Article 103, that in case of conflict between the Charter and other treaty obligations, the former was to prevail.

3. The Soviet representative has argued that there is a prohibition in the Charter concerning interference in the domestic affairs of other states and that this is a superior obligation to any duty Britain may have under the treaty of guarantee to intervene in Cypriot affairs. While the Soviet argument is tenable as a means of resolving conflicting treaty obligations, its use in the present case:

... 2

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(a) begs the question of whether the British position does entail interference in the internal affairs of Cyprus, and

(b) overlooks the fact that the obligation to refrain from interference in the domestic affairs of a member state is upon the United Nations rather than upon member states; (although it may be arguable that the former obligation includes the latter.)

4. In conclusion, we believe that it is generally accepted both among communist and non-communist states that the United Nations charter is a treaty, and that by Article 103 the parties have agreed that the Charter is to prevail in case of conflict between it and other treaty obligations. The views of the Soviet delegate do not therefore seem to reflect any departure from traditional Soviet views in this field.

M. CADIEUX

Acting Under-Secretary of State for External Affairs.

43	43

TO: MR. COLTHORNE
FEB 26 1964
REGISTRY

file

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FM PERMISNY FEB25/64 CONFD

TO EXTERNAL 276

REF YOURTEL L74 FEB25 AND OURTEL 257 FEB21

SOVIET VIEWS ON SANCTITY OF TREATIES

AMEND REFTEL TO READ FEB19.

.....

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DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

42

DATE	FILE		SECURITY
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FM: EXTERNAL OTT

	NUMBER	PRECEDENCE
TO: PERMIS N.Y.	L-74	ROUTINE
INFO:		

Ref.: YOURTEL No. 257 DATED FEB.21/64.

Subject: SOVIET VIEWS ON SANCTITY OF TREATIES.

PLEASE CONFIRM DATE OF SOVIET STATEMENT IN SECURITY COUNCIL. DATE GIVEN IN REFTEL IS FEB.26 WHICH WE ASSUME IS A CORRUPTION.

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71

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TO EXTERNAL 257

GENEVA

S/PV. 19

SOVIET VIEWS ON SANCTITY OF TREATIES

LEGAL DIV MIGHT BE INTERESTED TO READ VERBATIM TEXT OF SOVIET STATEMENT AT SECURITY COUNCIL MTG ON FEB26. IN VIEW OF TRADITIONAL SOVIET VIEW ON SANCTITY OF TREATIES, IS THIS A NEW POSITION OR CAN IT BE RECONCILED WITH TRADITIONAL SOVIET VIEW BY ASSERTION THAT CHARTER IS ITSELF A TREATY?°