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THIRTY-FIRST MEETING

Friday, 19 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 25 (Application of treaties to territory) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 25 of the International Law Commission's draft.[1]

2. Mr. REGALA (Philippines) said that on the whole he was satisfied with the wording of article 25 as submitted by the Commission. However, as pointed out by a German jurist in an article published in October 1957, it raised a number of questions such as what was the meaning of the phrase " or is otherwise established " ? That phrase might seem to open the door to a party to the treaty evading its obligations. The same writer had also pointed out that the phrase " entire territory " was not defined; did it include, for example, air space ? Perhaps a clause ought to be added in the article to the effect that, unless a different intention of the parties was established, the application of the treaty extended to the entire territory under the jurisdiction of the State.

3. The CHAIRMAN suggested that article 25 together with the Ukrainian amendment (A/CONF.39/C.1/L.164) be referred to the Drafting Committee, and that the Committee pass on to consider article 26.

It was so agreed.[2]

Article 26 (Application of successive treaties relating to the same subject-matter) [3]

4. Mr. DE BRESSON (France) said that the French amendment (A/CONF.39/C.1/L.44) was consequential to some French amendments to earlier articles concerning restricted multilateral treaties. It was important to ensure that all parties to such treaties would apply their provisions *in toto*. The amendment need not be put to the vote but could be referred direct to the Drafting Committee.

5. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the purpose of the Soviet Union's amendment (A/CONF.39/C.1/L.202) was to link article 26 and article 23 and to ensure that the principle of *pacta sunt servanda* was applied. If the parties to successive treaties were the same, no great problem arose, but the situation might be more difficult when the parties were not the same and when the provisions of the two treaties were liable to conflict. It was a generally recognized principle of law that Governments must honour their treaty obligations and it was therefore important that later treaties should be consistent with the terms of earlier ones. If they were not consistent, the provisions of the earlier treaty prevailed. Of course, if a State assumed conflicting treaty obligations, that might give rise to State responsibility. The joint Romanian and Swedish amendment (A/CONF.39/C.1/L.204) was acceptable and resulted in a simpler version of pagagraph 4.

6. Mr. BLIX (Sweden) said that the joint amendment submitted by Romania and Sweden sought to shorten the draft by amalgamating sub-paragraphs (*b*) and (*c*). It would not change the substance.

7. Mr. FUJISAKI (Japan) said that the case of a treaty that was not to be considered as inconsistent with an earlier treaty was different from the case of a treaty being subject to another. In the former case, the question of one treaty prevailing over the other should not arise. With that consideration in mind his delegation had submitted an amendment (A/CONF.39/C.1/L.207) and he suggested that the Drafting Committee should take up the point.

8. Mr. SARIN CHHAK (Cambodia) said that his delegation's amendment (A/CONF.39/C.1/L.208) dealt with the cases covered in article 26, paragraph 4 (*b*) and (*c*). If there were two successive treaties that were not incompatible with each other, the first governed the rights and obligations between the parties. In cases when two treaties were in conflict, then the earlier treaty prevailed over the later one, because it had priority in time and because the parties to the second treaty must be presumed to have acted in bad faith.

9. Mr. RUEGGER (Switzerland) said that in view of the nature of his country's international status, he had prepared a statement concerning Article 103 of the Charter, which he would ask should be included in the Committee's final report. Naturally, the International Law Commission had wished to take account of that important article in the Charter, which was binding on the great majority of the States attending the present Conference, though not for all of them. Switzerland was not a member of the United Nations, though it took an active part in much of the work being done by United Nations bodies in economic, social, cultural and humanitarian matters. And as it was not bound by the Charter, its signature of the convention being prepared would have to be made subject to a reservation concerning Article 103.

10. Mr. LADOR (Israel) said that article 26 did not cover the case when States were parties to different treaties in a successive chain of treaties, but none were party to the same ones. The United International Bureaux for the Protection of Intellectual Property (BIRPI) had submitted some relevant information in its written statement (A/CONF.39/7, part B, section 5), paragraph 3 of which stated that, between two States which were not parties to the same treaties, there could, of course, be no legal relations under the general principles of international law arising out of those treaties. A special situation existed in international unions like those administered by BIRPI, which provided for the possibility of a State acceding to both treaties, or only to the later treaty, thus becoming a member of the union and tacitly assuming obligations towards all member

[1] The only amendment before the Committee was that submitted by the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.164).

[2] For resumption of discussion, see 72nd meeting.

[3] The following amendments had been submitted: France, A/CONF.39/C.1/L.44; Union of Soviet Socialist Republics, A/CONF.39/C.1/L.202; Romania and Sweden, A/CONF.39/C.1/L.204; Japan, A/CONF.39/C.1/L.207; Cambodia, A/CONF.39/C.1/L.208.

countries. But while that practice was covered by article 4 of the draft, matters falling within the range of article 26 required an appropriate solution within that framework.

11. The Drafting Committee would need to examine the relationship between articles 26 and 36. His own delegation preferred the simpler variant of paragraph 5, when it had formed part of article 63 of the Commission's penultimate draft.

12. Mr. SEPULVEDA AMOR (Mexico) said that article 26 governed the relationship between successive treaties, but it should leave the door open for other systems.

13. Mr. SINCLAIR (United Kingdom) said that he was not satisfied that the Commission's text would prove adequate in practice. There were doubts about the meaning of the phrase " the same subject-matter ". Did the United Nations Covenants on Human Rights relate to the same subject-matter as the European Convention on Human Rights or the ILO and UNESCO Conventions on certain specific aspects of human rights? Also it might sometimes be difficult to determine which was the earlier and which the later treaty. Supposing that convention A was signed in 1964 and came into force in 1966, whereas convention B was signed and entered into force in 1965, which of them would be the earlier? If convention B were regarded as the earlier on the grounds that the date of entry into force was decisive, would the answer be different if convention A had entered into force provisionally in 1964? To take a different example, supposing a multilateral convention was opened for signature in 1960, State A ratified it in 1961, and the convention entered into force in 1962. Then State A and State B concluded a bilateral treaty on the same subject in 1963 which entered into force in 1964, after which State B acceded to the multilateral convention in 1965. Which of the treaties was the earlier and which was the later? In State A's view, the multilateral convention was the earlier but in State B's view it was the later.

14. There was no need to subdivide multilateral conventions into various categories; the provisions of paragraph 4 would, he believed, fully protect the parties to restricted multilateral treaties, which in any case could always modify the terms of a treaty by unanimous consent.

15. He had not had the time fully to study the Japanese amendment (A/CONF.39/C.1/L.207) but considered that there was force in the Japanese representative's argument. The other amendments were of a drafting character and could be referred to the Drafting Committee.

16. Mr. VOICU (Romania) said that the aim of the joint amendment submitted by Romania and Sweden (A/CONF.39/C.1/L.204) was to make the text as concise as possible. Given the existence of numerous treaties on the same subject, article 26 was particularly important, and the International Law Commission's text, which took existing practice only into account, was well balanced. He would support all amendments that did not radically alter the substance of that text.

17. Mr. WOODLEY (Observer for the United International Bureaux for the Protection of Intellectual Property—BIRPI), speaking at the invitation of the Chairman, said that the principle underlying article 26, especially paragraph 4, was that, in the case of successive treaties on the same subject matter, there were no treaty relations between two States which were not parties to the same treaty. However, a special situation existed in international Unions such as those administered by BIRPI, which included the Unions instituted by the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. Those Conventions had been revised on several occasions but each revision was merely a different version of the original Convention which continued to exist. There was only one Union constituted by each original Convention.

18. Technically, each original Convention and its revising Acts were separate and successive treaties each calling for ratification. A State, however, sometimes acceded to the most recent Act of a Union, without declaring that its accession was valid for the previous Acts. In its relations with States parties to the most recent Act, no problem arose. In its relations with States members of the Union but not parties to the most recent Act, on the other hand, the acceding State was understood to have tacitly accepted all the previous texts, so that its relations with the States parties only to the earlier texts was governed by those earlier texts.[4] The legal position was arguable, but the system was the only practicable one. The Union was more important than the Convention which had set it up. Without that tacit acceptance system, the State acceding to the latest text would have no relations with half the membership of the Union.

19. Bearing in mind that Unions were a special case in that respect, article 26, with or without the proposed amendments, was acceptable to BIRPI. Article 4, as it had emerged from the Drafting Committee,[5] took into account, to some extent, the practices of Unions. Perhaps the Drafting Committee would wish to consider the insertion in Part VI (Miscellaneous Provisions) of a clause to make it clear that the established practices of Unions of States, in the relations between the States parties to them, were not prejudiced by the draft convention. A safeguarding clause of that type was necessary in relation not only to article 26, but also to such other provisions as those of article 8 on voting, as already pointed out by BIRPI at the 9th meeting.[6]

20. Mr. DENIS (Belgium) asked whether the French amendment (A/CONF.39/C.1/L.44) purported to reverse the rule in paragraph 3 of article 26, where a " restricted " multilateral treaty was concerned.

21. Mr. BEVANS (United States of America) said he opposed the French amendment (A/CONF.39/C.1/L.44), which would greatly restrict the ability of less than all the parties to a multilateral treaty dealing with regional matters, or matters of concern to a few States, to alter their treaty relations, unless all the parties to the original treaty agreed. Any one party could thus thwart the efforts of all the others and thereby retard the continued

[4] See document A/CONF.39/7, part B, section 5, para. 7.

[5] See 28th meeting, para. 14.

[6] Paras. 25-27.

evolution of regional affairs, or the progressive development of international law. Moreover, the French amendment was unnecessary. The rights of a State party to the earlier treaty that chose not to become a party to the later one were fully protected under paragraph 4(*b*) of article 26 as it stood.

22. He was not in favour of referring the French amendment to the Drafting Committee to await a decision on the French proposal to include in article 2 (Use of terms) a reference to " restricted multilateral treaty " (A/CONF.39/C.1/L.24). The concept embodied in the present amendment (A/CONF.39/C.1/L.44) was quite independent of the use of the words " restricted multilateral treaty ", and it was to that concept that the United States delegation was opposed.

23. With regard to the USSR amendment (A/CONF.39/C.1/L.202), he questioned the advisability of introducing in paragraph 4 a reference to article 23 *(Pacta sunt servanda)*. He failed to see why such a reference should be introduced only in that paragraph and not elsewhere in the draft articles. An isolated reference of that kind to article 23 might be misconstrued as indicating that the *pacta sunt servanda* rule did not govern other provisions of the draft where it was not specifically mentioned.

24. Mr. DE BRESSON (France) said that his amendment (A/CONF.39/C.1/L.44) was intended to deal with a case that was not covered by the provisions of paragraph 4(*b*) of article 26. Where the earlier treaty was a restricted multilateral treaty, and a second treaty was concluded between some of its parties only, it was the provisions of the earlier treaty which should prevail, in the interests of the integrity of the treaty; that integrity was essential to the very existence of that type of treaty.

25. The objections raised by the United States representative would not apply if a definition of the term " restricted multilateral treaty " were included in article 2, paragraph 1, as proposed by France (A/CONF.39/C.1/L.24).

26. Mr. WERSHOF (Canada) said that he had serious doubts with regard to the suggestion by the French delegation that its amendment (A/CONF.39/C.1/L.44) should be referred to the Drafting Committee. The amendment involved a point of substance, and a controversial one at that; some expression of opinion on it by the Committee of the Whole was therefore necessary. Moreover, the Committee of the Whole would sooner or later have to take a decision on whether or not to include in the draft convention the concepts of " general multilateral treaty " and " restricted multilateral treaty ".

27. The CHAIRMAN said that the question of the possible inclusion of provisions on both " restricted " and " general " multilateral treaties had been reserved and the Drafting Committee had been asked to report on it.[7] The Committee of the Whole would take a decision on the issues involved later. Meanwhile, since the French delegation had not requested a vote on its amendment to article 26 (A/CONF.39/C.1/L.44), which was connected with one of those issues, it would seem appropriate to refer that amendment to the Drafting Committee, together with the other amendments (A/CONF.39/C.1/L.202, L.204, L.207 and L.208), which were agreed to be of a drafting character.

28. Mr. BARROS (Chile) said he warmly supported the Canadian representative's remarks. The Committee of the Whole should take a decision on the French amendment (A/CONF.39/C.1/L.44).

29. Mr. ZEMANEK (Austria) said he also supported that view; where an amendment raised a point of substance and its sponsor did not press for a vote, the amendment should be deemed to have been withdrawn.

30. Mr. DE BRESSON (France) said that the issue of restricted multilateral treaties could best be decided after the Drafting Committee had reviewed its implications on all the articles. For that reason, it was undesirable to vote on that issue with respect to article 26 in isolation.

31. Mr. YASSEEN, Chairman of the Drafting Committee, said that the issue which had been referred to the Drafting Committee was a general one and did in fact affect a number of articles. But the Drafting Committee could not itself decide the issue; it needed instructions in the form of a decision on the substance by the Committee of the Whole. The same was true with regard to the problem of " general " multilateral treaties.

32. Mr. AMADO (Brazil) said that no harm would be done by referring the French amendment to the Drafting Committee, since that Committee could always report that an issue of substance was involved which called for a decision by the Committee of the Whole.

33. Mr. KOVALEV (Union of Soviet Socialist Republics) said that the Committee had already referred to the Drafting Committee a number of amendments on " restricted " multilateral treaties. It would be acting inconsistently if it were now to vote on the French amendment.

34. Mr. AUGE (Gabon) said that it would be premature to vote on the French amendment until a decision had been reached on the general issue of " restricted " multilateral treaties.

35. Mr. KEBRETH (Ethiopia) said he agreed with that view. The issue raised by the French amendment was not new; the substance had been discussed in connexion with the French proposal on article 2 (A/CONF.39/C.1/L.24).

36. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 26 and the amendments thereto to the Drafting Committee.

It was so agreed.[8]

Article 27 (General rule of interpretation), and

Article 28 (Supplementary means of interpretation)

37. The CHAIRMAN invited the Committee to consider together articles 27 and 28 and the amendments thereto.[9]

[7] See 6th meeting, paras. 33-44.

[8] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " until the second session of the Conference. Final Consideration of article 26 was therefore postponed until the second session.

[9] The following amendments had been submitted:

To article 27: Philippines, A/CONF.39/C.1/L.174; Pakistan, A/CONF.39/C.1/L.182; Ukrainian Soviet Socialist Republic,

38. Mr. McDOUGAL (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.156) to replace by a single article the provisions of articles 27 and 28, said that the text of those articles, as adopted by the International Law Commission, embodied over-rigid and unnecessarily restrictive requirements. The purpose of the United States amendment was to restore the authority of a process of interpretation which was well-established in international law and which had served the world well for several centuries.

39. The system adopted by the Commission, of two separate articles 27 and 28, established a hierarchical distinction between certain primary means of interpretation described as a " general rule of interpretation " and certain allegedly " supplementary " means of interpretation. Among the primary means, the predominant emphasis was laid on the text of the treaty, which was to be interpreted in accordance with the so-called " ordinary meaning " to be given to the terms " in their context and in the light of its object and purpose ". The commentary to article 27 explained, however, that the reference to " the context " was not to factual circumstances attending the conclusion of the treaty but to the verbal texts, and that the reference to " object and purpose " was not to the actual common intent of the parties, but rather to mere words about " object and purpose " intrinsic to the text. In fact, the commentary apparently flatly rejected that common intent as the goal of interpretation.

40. Under article 28, the so-called " supplementary " means of interpretation, which included " the preparatory work of the treaty and the circumstances of its conclusion " were barred to the interpreter, except merely to confirm the meaning resulting from the application of the " general rule " in article 27, in all cases other than the exceptional ones set forth in sub-paragraphs (*a*) and (*b*) of article 28.

41. In short, the whole system was built on the well-known maxim by Vattel that " It is not permissible to interpret what has no need of interpretation "—a proposition which had come to be recognized as an obscurantist tautology, since the determination of the question whether a text required, or did not require, interpretation was itself an interpretation. McNair had pointed out that the maxim " is constantly employed, both by advocates and tribunals, as an argument against seeking to find out what was the intention of the parties in using the words, having regard to the surrounding circumstances ", and had aptly described it as " a *petitio principii* because it begs the question whether the words used are, or are not, clear—a subjective matter because they may be clear to one man and not clear to another, and frequently to one or more judges and not to their colleagues ".[10]

42. Canons of interpretation as a whole had seldom been considered as mandatory rules of law that would preclude examination of relevant circumstances. Only rarely had principles regarding the plain and natural meaning, or the admissibility of preparatory work, been employed so as to foreclose inquiry. It was true that disputes on interpretation had on occasion been solved by applying simple dictionary definitions of words used in the text, but it had much more frequently been ruled that a text was meaningless apart from the context of the circumstances in which it had been framed. The overwhelming body of case-law of international courts and arbitral tribunals, and the practice of Ministries of Foreign Affairs in the interpretation of treaties, bore out the right of the interpreter to take into account any circumstance affecting the common intent that the parties had sought to express in the text. The practice of international organizations pointed in the same direction. The observer for the International Labour Organisation had stated at the 7th meeting of the Committee of the Whole [11] that " ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28 ". Interpreters, moreover, had habitually employed other principles of interpretation, such as that of effectiveness, which was not reflected in articles 27 and 28.

43. The restrictions placed by article 28 on the use of preparatory work did not represent established practice. Even in the *Lotus* case, which perhaps contained the most famous exposition of the alleged rule that " there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself ",[12] the Permanent Court of International Justice did in fact look at the preparatory work.

44. The rigid system of articles 27 and 28 was thus not an expression of existing rules of international law. Furthermore, if an attempt were made to introduce it, it would prove totally unworkable. It was based on the assumption that a text had a meaning apart from the circumstances of its framing, and that it could be interpreted without reference to any extraneous factor. In reality, words had no fixed or natural meaning which the parties to an agreement could not alter. The " plain and ordinary " meanings of words were multiple and ambiguous and could be made particular and clear only by reference to the factual circumstances of their use. Accordingly, an interpreter could not hope to apply the " general rule " in article 27, or to invoke the " supplementary means " authorized in article 28, without at the same time violating the rule of textual interpretation laid down in article 27. It was only by examining the circumstances of the conclusion of the treaty that a meaning could be ascribed to the text; and it was only by means of that examination, and by having recourse to the preparatory work, that it was possible to arrive at the conclusion that an " interpretation according to article 27 (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable ", and that the " supplementary means " could be used under article 28.

45. The fact that the textual approach to interpretation was impossible to apply was demonstrated by the very presence at the Conference of the Expert Consultant

A/CONF.39/C.1/L.201; Romania, A/CONF.39/C.1/L.203; Australia, A/CONF.39/C.1/L.210; Ceylon, A/CONF.39/C.1/L.212; Greece, A/CONF.39/C.1/L.213; Federal Republic of Germany, A/CONF.39/C.1/L.214; Spain, A/CONF.39/C.1/L.216.

To article 28: United Republic of Tanzania, A/CONF.39/C.1/L.215; Spain, A/CONF.39/C.1/L.217.

Amendments to combine articles 27 and 28 in a single article were submitted by the United States of America (A/CONF.39/C.1/L.156) and the Republic of Viet-Nam (A/CONF.39/C.1/L.199).

[10] McNair, *The Law of Treaties*, 1961, p. 372.

[11] Para. 12.

[12] *P.C.I.J.* (1927), Series A, No. 10, p. 16.

and by the frequent appeals to him for enlightenment on the " ordinary " meaning of the wording of the draft articles—necessary despite the full availability of the International Law Commisssion's preparatory work; the unquestioned authority exercised by him when clarifying that meaning was based not on his linguistic ability or his skill as a logician, but rather on his very special knowledge, as the Commission's Special Rapporteur on the law of treaties, of all the circumstances attending the framing of the draft.

46. The rigid and restrictive system of articles 27 and 28 should not be made international law because it could be employed by interpreters to impose upon the parties to a treaty agreements that they had never made. The parties to a treaty could well have a common intent quite different from that expressed by the " ordinary " meaning of the terms used in the text. The imposition upon the parties of certain alleged " ordinary " meanings, combined with the preclusionary hierarchy of means set forth in articles 27 and 28, could lead to the arbitrary distortion of their real intentions. It was essential to respect the free choice of the States parties regarding their agreements, and not to impose upon them the choices of others.

47. A modest concession had been made in paragraph 4 of article 27 in the provision that "A special meaning shall be given to a term if it is established that the parties so intended ". However, paragraph (17) of the commentary stated that " the burden of proof lies on the party invoking the special meaning of the term ", and it was not indicated how such special meaning could be established otherwise than by recourse to the means ruled out by article 28.

48. The criterion of ordinary meaning, because of its ambiguity, opened the door to arbitrary interpretations of the text and would create greater uncertainties than an insistence upon a comprehensive, contextual examination of all factors potentially relevant to common intent. An over-emphasis upon the primacy of the text led to decisions such as the much-criticized 1966 Advisory Opinion of the International Court of Justice in the most recent of the *South-West Africa* cases.[13]

49. The purpose of the United States amendment (A/CONF.39/C.1/L.156) was to eliminate the rigidities, restrictions and hierarchical distinctions in draft articles 27 and 28. The text of a treaty and the common public meanings of words would be made the point of departure of interpretation, but not the end of the inquiry. The text would be treated as one important index among many of the common intent of the parties. No fixed hierarchy would be established among the elements of interpretation; the amendment sought to make accessible to interpreters whatever elements might be significant in a particular set of circumstances, including ordinary meaning, subsequent practice and preparatory work, but not excluding others that might be also relevant.

50. The amended text thus proposed sought to preserve as much as possible of the original wording while merging the two articles. His delegation, however, was not wedded to any particular words or formulation. The choice of a formula was a matter of drafting, provided the basic objective was achieved of removing all hierarchical weightings and obstacles to an unrestricted inquiry into all elements relevant to rational interpretation.

51. Mr. PHAN-VAN-THINH (Republic of Viet-Nam), introducing his delegation's amendment to articles 27 and 28 (A/CONF.39/C.1/L.199), said that the proposal was essentially one of drafting. The introduction of a new sub-paragraph (*a*) in paragraph 3 of article 27 would obviate the need for article 28 and would greatly simplify the International Law Commission's text. The Commission's draft gave the impression that it wished to establish a kind of hierarchy for the various rules and means of interpretation, by drawing a distinction between rules of interpretation and supplementary means of interpretation. In his delegation's opinion, however, preparatory work and the circumstances in which the treaty had been concluded often represented means of interpretation as valid, if not as essential, as the context, particularly when they were concerned with ascertaining the intention of the parties. Moreover, it seemed logical to include preparatory work and the circumstances in which the treaty had been concluded in paragraph 3, so that they should precede the special meaning to be given to a term if it was established that the parties so intended, as provided in paragraph 4. If his delegations's drafting amendment was acceptable to the majority, the word " rule " in the title of article 27 should be in the plural.

52. Mr. IRA PLANA (Philippines) said that his delegation had submitted its amendment to article 27 (A/CONF. 39/C.1/L.174) because it considered that the word " context " in paragraph 2, as used by the International Law Commission, was rather too broad; it therefore proposed to limit the term to the text of the treaty, its preamble and annexes. The amendment would not affect the intention of the Commission, because sub-paragraphs 2(*a*) and 2(*b*) must in any case be considered together in interpreting the treaty. His delegation had no objection to the inclusion of additional primary means of interpretation in article 27.

53. Mr. SAMAD (Pakistan) said that his delegation had submitted its amendment to article 27 (A/CONF.39/ C.1/L.182) because, apart from the case of subsequent agreements between the parties regarding the interpretation of the treaty, there were cases where the parties entered into subsequent agreements concerning the implementation of the treaty, which might shed light on their intentions. His delegation had no objection to the amalgamation of articles 27 and 28.

54. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic), introducing his delegation's amendment to paragraph 1 of article 27 (A/CONF.39/C.1/L.201), said that the International Law Commission had discussed the form of the provision at length, and had rightly rejected proposals whereby a treaty might be interpreted exclusively in connexion with the intention of the parties. It had, however, gone to the other extreme in deciding that the interpretation should be based exclusively on the terms of the treaty in their context and in the light of its object and purpose; the text of a treaty was the result of negotiations during which the intentions of the parties became evident. Accordingly, his delegation had proposed the addition of the phrase " expressing the agreed intentions of the parties ", at the end of paragraph 1.

[13] *I.C.J. Reports 1966*, p. 6.

The amendment could be referred to the Drafting Committee.

55. Mr. VOICU (Romania) said that his delegation considered the International Law Commission's text of articles 27 and 28 to be generally acceptable, and that its amendment to article 27 (A/CONF.39/C.1/L.203) was purely a drafting amendment. Sub-paragraphs 2(*a*) and 2(*b*) of article 27 and the commentary thereto seemed to need some clarification: if, for purposes of interpretation, the context of a treaty comprised any agreement relating to the treaty which had been made between all the parties at the time of the conclusion of the treaty, obviously an interpretative agreement would be part of the context, and sub-paragraph 2(*a*) would be fully applicable to authentic interpretation, since it related to one of the essential instruments of interpretation. On the other hand, when an agreement made between all the parties at the time of the conclusion of a treaty had some relation to the treaty, although it had no interpretative character, it could no longer be regarded as an authentic instrument of interpretation. Its relation with the treaty might be an agreement *in pari materia:* for example, two States concluding a trade agreement and a financial agreement simultaneously might stipulate the relationship between the two instruments in a clause of the agreement, but it could not be assumed from the fact that they were materially related that one treaty was interpretative of the other.

56. The International Law Commission had prudently stated in paragraph (13) of its commentary that the fact that those two classes of documents were recognized as forming part of the context did not mean that they were necessarily to be considered as an integral part of the treaty, and that whether they were an actual part of the treaty depended on the intention of the parties in each case. Nevertheless, it was hard to conceive that, for instance, a cultural agreement concluded between all the parties at the time of the conclusion of a consular convention could be regarded as part of the text of that convention and as a means of interpreting that instrument. It should therefore be specified that the agreements in question were those " relevant " to interpretation. Such an addition seemed to be particularly important since paragraph 2 of article 27 introduced an obvious distinction between the annexes and the agreements relating to the treaty, which were protocols and exchanges of notes or letters between the parties at the time of the conclusion of a treaty.

57. Sub-paragraph 2(*b*) was pertinent to authentic interpretation because it attached the necessary importance to instruments made by one or more parties and accepted by the other parties as instruments related to the treaty. That paragraph related to interpretative declarations and interpretations *inter se*, but those two hypotheses were not clearly stated in the commentary, which remained somewhat obscure on two points. First, no example was given to prove that the provision related to an interpretative instrument made by some of the parties among themselves and formally accepted by the other parties. The Special Rapporteur had clarified the matter in his sixth report by stating that, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties.[14] The laconic formulation of sub-paragraph (*b*) gave no answer to the question whether the instrument in question related to the treaty by virtue of its content or of its interpretative character. Secondly, the provision contained no indication of the manner in which such an instrument should be accepted by the other parties. In the event of formal acceptance, the accepting parties would by law become co-authors of the instrument, but if the instrument was interpretative, its acceptance would have the effect of rendering a given interpretation authentic with regard to all the parties. If, on the other hand, the instrument was not interpretative, its acceptance would make the accepting States contracting parties.

58. Those were the reasons why the Romanian delegation had considered it necessary to submit its drafting amendments.

59. Mr. HARRY (Australia) said that his delegation's amendments to paragraph 3 of article 27 (A/CONF.39/C.1/L.210) related to the drafting only. Its proposed amendment to sub-paragraph (*a*) concerned the subject of agreement between the parties regarding the interpretation of the treaty. According to paragraph (14) of the commentary, for the purpose of the general rule of interpretation, any agreement between the parties on interpretation, whether made before, during, or after the conclusion of the treaty, should be taken into account. On the other hand, sub-paragraph (*a*) was limited to subsequent agreements on interpretation. Although sub-paragraph 2(*a*) should also be taken into account in that connexion, that clause, which concerned agreements on interpretation reached at the time of the conclusion of the treaty, did not necessarily include agreements on interpretation made at an earlier stage, while negotiations were still in process: the wording of the French and Spanish texts made that even more doubtful. The solution proposed by his delegation was simply to omit the word " subsequent " from sub-paragraph 3(*a*): the provision would then cover all agreements on the interpretation of the treaty, whenever made. That proposal corresponded with the solution adopted by the Commission itself in its 1964 draft in the then article 69 on interpretation.[15]

60. The Australian drafting amendment to sub-paragraph 3(*b*) had been prompted by the statement in paragraph (15) of the commentary that the Commission had had the common understanding of the parties in mind. The idea was clearly expressed in the French and Spanish texts, and the amendment therefore affected the English text only.

61. With regard to the substance of articles 27 and 28, the Australian delegation was in favour of using the International Law Commission's proposals as a basis. It considered that the " textual " approach was most likely to contribute to the certainty and security of treaty obligations; nevertheless, it respected the arguments advanced by the United States representative, and reserved the right to return at a later stage to the points he had mentioned.

62. Mr. JIMÉNEZ DE ARÉCHAGA (Uruguay) said

[14] *Yearbook of the International Law Commission, 1966*, vol. II, p. 98, para. 16.

[15] *Yearbook of the International Law Commission, 1964*, vol. II, p. 199.

that, in introducing his amendment, the United States representative had referred to two schools of thought on interpretation, one which sought to determine the genuine intention of the parties, and the other, followed by the International Law Commission, which based interpretation on the text of the treaty. In adopting that approach, the Commission had taken into account some opinions expressed on the Lauterpacht draft in the Institute of International Law.

63. Judge Huber, for instance, had stated that international law should avoid the idea of a " will of the parties " floating like a cloud over the *terra firma* of a contractual text. If respect for the wording of a treaty that had been signed and ratified was not something sacred, if the parties were to be allowed freely to invoke their supposed real will, an essential advantage of written and conventional law would be lost. The text signed was the only, and the most recent, expression of the common will of the parties.[16]

64. Similarly, Sir Eric Beckett had claimed that there was a complete unreality in the references to the supposed intention. As a matter of experience, it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had absolutely no common intention with regard to it. In other cases, the parties might all along have had divergent intentions with regard to the actual question in dispute. Each party had deliberately refrained from raising the matter, possibly hoping that the point would not arise in practice, or possibly expecting that, if it did, the text which had been agreed would produce the result which it desired. If there was too ready admission of the preparatory work, the State which had found a clear provision of the treaty inconvenient for one reason or another was likely to be furnished with a *tabula in naufragio*, because there was generally something in the preparatory work that could be found to support almost any contention.[17]

65. In the opinion of the Uruguayan delegation, the structure of the International Law Commission's texts should be maintained. The articles had deliberately been drafted in a progressive order, beginning with a reference to the text of the treaty, and gradually introducing first materials intrinsic to the text, and then such extrinsic materials as preparatory work, which was a means of shedding light on the intentions of the parties, but on which by definition no agreement had been reached between them. One reason why no reference had been made to preparatory work in article 27 was that the Commission had not wished to encourage parties to use such material as a means of infiltrating extrinsic elements into the text with a view to evading clear obligations. As Sir Eric Beckett had pointed out in the passage quoted above, it was only too easy for a State wishing to evade its obligations to inject an element of uncertainty by referring to preparatory work. A further reason for having two articles was to deal with the case of third States which had not participated in the conference convened to draw up the treaty.

66. The separation of the two articles did not mean that the Commission had ruled out the preparatory work in matters of interpretation; it had not presupposed two distinct phases of interpretation; on the contrary, the procedures listed in the two articles would be applied concurrently. The rule in article 28 was extremely flexible, and did not create any hierarchy between methods of interpretation. Article 27 contained a very broad definition of " context " which included much of the material traditionally regarded as preparatory work, provided it was so agreed between the parties.

67. One of the United States amendments separated the object and purpose of the treaty from the context, two elements that were in juxtaposition in the Commission's draft. The Commission had deliberately referred to the object and purpose of the treaty as the most important part of the context, not as an independent element, since the latter course might lead to distorted interpretations, and open the door to the teleological method that might result in a subjective and self-interested approach. The Uruguayan delegation supported the text of the two articles as drafted by the International Law Commission.

68. Mr. DADZIE (Ghana) said that his delegation had some doubts concerning the advisability of including provisions on interpretation in a convention which sought to codify the rules applicable to the conclusion, validity and termination of treaties. It was most unusual to codify rules of interpretation, although it was customary to restate principles of interpretation, because the latter were only guidelines intended to assist international tribunals and decision-makers in ascertaining the intention of the parties for the purpose of applying the terms of a treaty to a particular situation. Nevertheless, his delegation would accept a restatement of the factors to be taken into account in the interpretation of treaties, in the light of modern precedents and examinations of the whole problem of legal interpretation.

69. The first question that arose, however, was whether the provision should be obligatory, in the sense of laying down rules which international tribunals, arbitral bodies and decision-makers must apply. The Ghanaian delegation considered that there were no obligatory rules of interpretation in international law; there was ample authority in support of that view, which was, indeed, cited in the commentary. But there was a wealth of material on the principles of interpretation, developed on the basis of general notions and Latin maxims, analogies with municipal law, decisions of international tribunals and awards of arbitral bodies. When faced with the problem of interpretation, international tribunals and decision-makers selected from that material the principles they considered appropriate in the case at issue; any constraint to apply a particular rule derived from the logic of the situation in the light of precedents of interpretation.

70. Since those principles of interpretation were permissive, there could be no question of creating a hierarchy for their application. The crucial point in the function of interpretation was to ascertain the intention of the parties with regard to a particular problem, and it was therefore of no consequence how the intention was discovered. Accordingly, the Ghanaian delegation could not endorse the International Law Commission's adoption

[16] *Annuaire de l'Institut de droit international*, vol. 44 (1952), tome I, p. 199.

[17] *Annuaire de l'Institut de droit international*, vol. 43 (1950), tome I, pp. 438 and 440.

of the textual approach. In the first place, the precise definition of the term " ordinary meaning " was by no means clear, for day-to-day experience showed that words had no ordinary meaning in isolation from their context; indeed, during negotiations, words were sometimes used not to reflect agreement, but to conceal disagreement. Secondly, it was not clear how the object and purpose of the treaty would be determined in a given case. Article 27 and the commentary thereto seemed to limit that determination to the text, and if the text did not yield the necessary meaning, article 28 was hardly applicable. Paragraph 3 of article 27 allowed for reference to subsequent practice to establish the understanding of parties, but it was not clear what was meant by subsequent practice. Finally, his delegation failed to see how the special meaning intended by the parties was to be discovered if the use of the preparatory work of the treaty was to be resorted to for two purposes only.

71. It should be borne in mind that even the current Conference had recognized the need for something other than the text of the International Law Commission's draft; that was the reason for the presence of the Expert Consultant, who, despite the lucid commentary to the draft, had often been called upon to explain not only the text, but also the implications of the provisions and the intentions of the Commission. The Ghanaian delegation could therefore only accept a provision which combined the most important principles of interpretation in one permissive article and which indicated that the object of interpretation was to ascertain the intention of the parties in relation to particular problems arising out of the application of a treaty. Amendments such as those of the United States (A/CONF.39/C.1/L.156) and the Philippines (A/CONF.39/C.1/L.174) were consistent with that approach and should serve as a basis for the Committee's decision.

The meeting rose at 6 p.m.

THIRTY-SECOND MEETING

Saturday, 20 April 1968, at 10.45 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 27 (General rule of interpretation) and *Article 28* (Supplementary means of interpretation) *(continued)* [1]

1. Mr. PINTO (Ceylon) said that he had listened with close attention to the statements of the representatives of the United States and Uruguay regarding the two main approaches to the problem of treaty interpretation. In the first a comprehensive examination of the context was recommended with a view to ascertaining the common will of the parties, whereas in the second a hierarchical series of rules for determining the meaning of a treaty would be followed.

2. His delegation was in favour of placing emphasis on the search for the will of the parties, but it seemed that common sense should rule out the acceptance of a host of factors which the parties, to uphold their own interests, might consider to be relevant. It should be possible to combine the two and produce a text which, while emphasizing the paramount importance of the parties' intentions, would lay down definite rules of interpretation and guidelines concerning the respective importance of those two factors.

3. His delegation had submitted an amendment (A/CONF.39/C.1/L.212) which was consequential upon the somewhat restrictive approach adopted by the International Law Commission in articles 27 and 28. That approach seemed to raise a problem in respect of treaties adopted within international organizations. Paragraph 2 of article 27 mentioned two types of instruments that should be taken into consideration for the purpose of interpretation of the treaty, namely an agreement concluded between the parties and an instrument drawn up by one or more parties and accepted by the others.

4. In the case of treaties adopted within international organizations, provision should be made for a third type of instrument, comprising any explanatory memorandum or report that accompanied a treaty and was communicated to States, for signature or ratification, by the competent organ of the organization, and which the organization deemed important for the interpretation of the new treaty. Such a memorandum did in fact form part of the context of certain treaties but did not come under article 27 or even article 28. Examples of such memoranda or reports were those of the Executive Directors of the International Bank for Reconstruction and Development, which accompanied the Articles of Agreement of the International Finance Corporation [2] and of the International Development Association [3] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [4] —all treaties that had been adopted within the Bank. His delegation believed that article 27 should recognize the importance of instruments of that kind for the interpretation of the class of treaty in question. That was the purpose of its amendment.

5. It might be possible to argue that that question was already covered by article 4, but the Committee should consider well before reading too much into the unduly concise and perhaps already over-burdened terms of that article. To rely too much on article 4 would be to risk building up difficult problems of interpretation for the future in certain areas such as that dealt with in article 27. It would be as well to be explicit.

6. Mr. KRISPIS (Greece) said that paragraph 2 of article 27 provided that for the purpose of the interpretation of a treaty, the context should comprise principally the text of the treaty, including its preamble and annexes. There was no doubt that in the absence of an indication to the contrary, the preamble and the annexes formed part of the treaty. A question which arose more in practice, however, than in theory was whether the title of the treaty and the titles of its parts, chapters, sections and articles

[1] For a list of the amendments submitted to articles 27 and 28, see 31st meeting, footnote 9.

[2] United Nations, *Treaty Series*, vol. 264, p.117.

[3] *Op. cit.*, vol. 439, p. 249.

[4] *Op. cit.*, vol. 575, p. 159.