United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.32

32nd meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

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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.

also formed part of the treaty. A convention on the law of treaties had to answer that question. It was well known that jurists attached importance to the titles of the articles of a treaty in determining the real meaning of the text of the articles. The existence of a comma or a semi-colon and their precise position were sometimes taken into account. The convention should therefore state that those titles formed part of the text of a treaty. It was quite possible that the Committee of the Whole would agree unanimously on the substance of the amendment proposed by the Greek delegation (A/CONF.39/C.1/L.213). If so it could simply be referred to the Drafting Committee.

7. In the opinion of the Greek delegation, the interpretation of a treaty was essentially a mental process of attempting to establish the intention of the parties to the treaty as expressed in words. There was no absolute interpretation with a given text; there were usually several possible interpretations, and there might even be conflicting interpretations. Consequently, interpretation could not obey set rules. If a treaty contained one or more rules as to its interpretation, those rules themselves would need to be interpreted, but at that point no rules of interpretation would be available. Even if a treaty provided rules for the interpretation of clauses regarding interpretation, those provisions would require to be interpreted by means not contained in the treaty. There was a vicious circle and thus it would be vain to set down rules about interpretation. All that could be done was to facilitate interpretation and lay down guidelines to assist jurists in their efforts to determine the meaning of a text. Under those conditions, it seemed impossible to draw up guidelines on interpretation in the form of rules of law. One had to be content with a description of the various factors which would facilitate the task of interpretation. Jurists should be given the means of discovering the ideas conveyed by the words used by the authors of a treaty to express their intention.

8. The object of article 27 was to base interpretation mainly on the ordinary meaning to be given to the terms of the treaty. What did the words " the ordinary meaning to be given to the terms of the treaty " signify? The Greek delegation doubted whether it was really possible to speak of " the ordinary meaning " of words. The mere consultation of a dictionary would immediately reveal that a single word could have many meanings. Moreover, the same word was sometimes used to describe more than one thing, and the same thing could be described by two or more words. Language also developed; the word " territory " for example, used to mean *terra firma* only, but had come to be applied to the territorial sea and perhaps to the continental shelf. The time factor thus influenced the meaning of words.

9. In the opinion of his delegation, articles 27 and 28 were among the less happy provisions of the International Law Commission's draft. It would be wise to have only a single article entitled " Interpretation of a treaty " and to take into consideration for that purpose all the factors connected with the intention of the parties. The United States amendment (A/CONF.39/C.1/L.156) was acceptable in that respect and the Greek delegation would therefore support it. If it was approved by the Committee of the Whole, his delegation would withdraw its own amendment, since the United States proposal did not refer to the preamble and annexes, which it seemed could be taken for granted.

10. Mr. BLOMEYER-BARTENSTEIN (Federal Republic of Germany) said that the rule stated in article 27, paragraph 3(*c*) differed from the other provisions in article 27 in so far as it referred to a body of rules which had no direct relation to the treaty in question. In his delegation's opinion the sub-paragraph would have to be completed. Why should only the rules of general international law applicable between the parties be taken into account? Would it not be sensible, and even necessary, to try to interpret treaties in such a manner that they did not conflict with prior treaties which the parties had concluded with other States? When there was a possibility of interpreting a treaty so that it was consistent with the other obligations of a party, that interpretation should take precedence in order to avoid conflicting obligations, and it could not be assumed that a State concluding a treaty with another State intended to violate its obligations vis-à-vis a third State.

11. The delegation of the Federal Republic of Germany considered that an additional provision to that effect should be inserted in article 27, paragraph 3, because at present States were regulating more and more questions by means of bilateral and multilateral treaties. It could of course be argued that a State which had concluded a treaty in good faith was entitled to expect to learn from its partner of all the possible limitations to which the obligations forming part of the treaty in the course of negotiation might be subject. Only those facts of which the parties were aware when they gave their consent to be bound could be considered to be part of the consent. That reasoning might, however, lead to an infringement of the contractual rights of third States which had also been acquired in good faith. Third States were equally entitled to have their legal interests protected.

12. The amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.214) was not intended to cover cases in which a party to a treaty had concluded another treaty with a third party dealing with the same subject-matter, with the result that it could only fulfil its obligations towards one of the two parties. Such a case clearly constituted a breach of the treaty which came under article 57 of the draft convention. The amendment dealt with cases where it was possible to reconcile the different obligations of one party vis-à-vis two different parties. It might be assumed, for example, that State A had concluded with States B and C two treaties, the provisions of which overlapped in part. If A and B had accepted the compulsory jurisdiction of the International Court of Justice, party B might bring the case before the Court asking for a decision based on the text of the treaty concluded with A. State C which wished to protect its rights under the terms of its treaty with State A would request the Court to be permitted to intervene under article 62 of the Statute. In its final judgement the Court would have to decide whose rights were to be protected, a question not easy to settle, in particular if party A could prove that it had acted in good faith itself. If the text and the context of the two treaties permitted an interpretation which would leave both treaties valid and would enable party A to fulfil both of them, it was hard to imagine that the Court would prefer a solution which would cause unwarranted harm to at least one of the parties. The

grounds underlying the decision of the Court or of an arbitral tribunal in a case of that sort should also guide the parties. That was the reason for the amendment submitted by the Federal Republic of Germany. It did not introduce any new ideas into matters of interpretation, but merely formulated a principle which was self-evident and was probably already used in practice by the parties to a treaty and by courts. If that rule was not incorporated in the convention, there might be misunderstanding; the rules on interpretation seemed so elaborate that they might be regarded as exhaustive. That might entail the exclusion of all means other than those mentioned in Section 3 on interpretation.

13. His delegation considered that its proposal contained nothing new of substance, but it did, nevertheless, contain a new element. The proposal might be referred to the Drafting Committee.

14. Mr. MALITI (United Republic of Tanzania) said he could not accept either of the two proposals regarding interpretation, as set out in draft articles 27 and 28 and in the United States amendment (A/CONF.39/C.1/L.156) respectively. After carefully studying the matter, the Tanzanian delegation had decided to submit an amendment (A/CONF.39/C.1/L.215) which might reconcile the two opposing views. The object of the amendment, which would delete the entire wording of article 28 after the word " conclusion ", was to impart greater flexibility to the International Law Commission's draft, so that recourse could also be had to " the preparatory work of the treaty and the circumstances of its conclusion ". The Tanzanian delegation had thought it preferable for the wording in question to be submitted as a separate article so as to make it clear that whereas article 27 stated the primary sources of evidence, the rule contained in article 28 dealt with supplementary means of interpretation. Recourse without restriction could thus be had to the preparatory work of the treaty and the circumstances of its conclusion, although primary importance should be given to the meaning derived from the application of article 27.

15. Consequently, the Tanzanian delegation could not accept the United States proposal, which would attribute equal importance to all the means of interpretation it listed.

16. He did not share the view of those delegations which had questioned the purpose and necessity of codifying international rules regarding the interpretation of a treaty. The fact that no amendment had been submitted proposing the deletion of articles 27, 28 and 29 suggested that even those delegations were not absolutely convinced that the interpretation rules should not be codified.

17. The divergence of opinion between the respective supporters of the International Law Commission's draft and the United States amendment turned on the question whether or not the preparatory work of the treaty and the circumstances of its conclusion were as important as the means of interpretation specified in article 27. In that respect his delegation agreed with the statement in paragraph (10) of the commentary on article 27 and 28: " Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation ".

18. It might also be asked what was meant by " preparatory work ". The proceedings of the Conference were preserved in the form of summary records and were widely circulated, but there were also confidential communications exchanged between Governments before the Conference and negotiations between the various regional groups, as well as conversations at receptions on issues discussed in the Conference. Were those discussions part of the preparatory work just as much as the official documents of committees ? At what stage of negotiations could the preparatory work be said to reflect the intention of the parties ? The Committee should therefore be extremely cautious in dealing with preparatory work. The preparatory work of the treaty and the circumstances of its conclusion could only play a secondary part in interpretation.

19. The International Law Commission had pointed out in paragraph (10) of its commentary that the provisions of article 28 did not have the effect of drawing a rigid line between the different means of interpretation. The latter part of the article could therefore be deleted without loss, leaving the text clearer and capable of a more realistic application.

20. Mr. NAHLIK (Poland) said that, had it not been for the objections raised against articles 27 and 28, in particular in connexion with the United States amendment, those articles could have been adopted without much discussion, as their wording was extremely clear and convincing. He would like to submit four observations in that respect.

21. Firstly, the International Law Commission had been accused of having been too " conservative " in its treatment of the subject, by paying too much attention to the text of the treaty. It was true that, in its commentary, the International Law Commission, while noting the existence of three main approaches to interpretation— " textual ", " intentional " and " functional "— affirmed its preference for the first of those approaches and stressed the paramount importance of the text for the interpretation of treaties. Nevertheless, in many of the draft articles, the Commission had shown great concern for the intentions—both explicit and implicit—of the parties. Moreover it had expressly mentioned the object and purpose of the treaty in article 27. Accordingly, the Commission excluded neither the approach based on the intentions of the parties, nor the functional approach; it merely attributed prime importance to the study of the text.

22. Secondly, the alleged opposition between those three approaches was largely artificial. As had been pointed out by Professors Fenwick and Verdross, among many other authorities, the intention of the parties was to be gathered, above all, from the text of the treaty. That seemed indeed to be a question of common sense. There was no proof more direct and more authentic of the intentions of the parties than the text they drew up together to embody those very intentions.

23. Thirdly, although the so-called Vattel principle, according to which what was clear required no interpretation, had been referred to as " obscurantist tautology ", it had nevertheless been approved by eminent

authors such as Guggenheim and Rousseau, and confirmed on many occasions by national and international courts; to quote but one such pronouncement, it had been confirmed by the International Court of Justice in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations*.[5] Of course, the same word might have several meanings, but that was true of certain words only. Moreover, among different meanings of a word, there was usually one which could be considered as its " ordinary " or " natural " meaning. It was common sense again to assume that that was probably the one that the parties had adopted. And that was what the International Law Commission proposed. However, a special meaning might be given to a term, in accordance with the intention of the parties. As that would be an exception to the rule, it would need to be proved.

24. Fourthly, referring to the criticism that the International Law Commission had not attached sufficient importance, as means of interpretation, to the circumstances in which the treaty had been concluded, especially to the preparatory work, he recalled that both the Permanent Court of International Justice and the International Court of Justice had on many occasions, such as the *Lotus* case,[6] or the *Jurisdiction of the European Commission of the Danube* case,[7] displayed great caution in that respect. Most authors also limited the possibility of having recourse to historical interpretation to certain cases only, for example for interpreting " controversial provisions ", (Oppenheim, ed. Lauterpacht) or to " *traités-contrats* " only but not to " *traités-lois* " (Rousseau). Guggenheim had pointed out how divergent and subjective historical arguments could be, while Lord McNair had asked the plain question " Once you start on this line of inquiry, where are you going to stop ? " Finally, the following two objections against excessive emphasis on " historical " interpretation could be made: firstly, although the historical elements surrounding the conclusion of important treaties such as the Treaty of Versailles or the United Nations Charter were well known, in the case of agreements of minor importance the historical elements were neither well known nor easily accessible; secondly, in view of the modern practice of acceding to multilateral treaties, it was not fair to States which had acceded to a given text if they could run the risk of being confronted at any time with the history of the drawing up of the treaty in which they had had no part. Accordingly, without entirely neglecting the historical elements of interpretation the International Law Commission had rightly considered them as auxiliary means of interpretation.

25. Lastly, he found it hard to understand how a classification of means of interpretation which placed the main emphasis on the text of treaties could be considered to endanger the treaty relations between States. The text was the most stable and permanent element of a treaty. Consequently, emphasis on the value of the text could strengthen the stability and permanency of treaty relations. What would endanger them would be precisely to depart from the text in which the parties had expressed their intentions.

26. His delegation firmly supported the substance of the text of the two articles drafted by the International Law Commission. Perhaps some minor drafting changes could be made, but that should be left to the Drafting Committee, to which some of the amendments submitted could be referred.

27. Mr. COLE (Sierra Leone) said his view was that, despite the difficulty of the question of the interpretation of treaties, the convention should contain provisions likely to facilitate the task of the authorities that had to interpret treaties. He was glad, therefore, that the deletion of articles 27 and 28 had not been requested.

28. His delegation fully supported the text prepared by the International Law Commission, for its provisions were simple, realistic and non-controversial. Anything that might have been left out in article 27 was covered by article 28, which did not appear to be restrictive.

29. He merely wished to make two suggestions for submission to the Drafting Committee. The first concerned the word " agreement " used in sub-paragraphs 2(*a*) and 3(*a*) of article 27 which, according to paragraphs (13) and (14) of the International Law Commission's commentary, meant an agreement in writing. Perhaps it would be better to say so explicitly in the text of the article. The second suggestion was in connexion with paragraph (17) of the commentary, which stated that the purpose of paragraph 4 of article 27 was to emphasize that the burden of proof lay on the party invoking the special meaning of the term. His delegation would very much like to see that point embodied in the text of the article, by way of clarification.

30. It was in the light of those considerations that his delegation would vote on the amendments affecting the substance of articles 27 and 28.

31. Mr. MARTINEZ CARO (Spain) said that the Spanish representative in the Sixth Committee of the General Assembly had already emphasized the pre-eminence of the text of the treaty as an objective expression of the will of the parties in preference to any subjective reconstruction of their intentions from the preparatory work.[8]

32. Authoritative opinion had nevertheless criticized the excessive rigidity of the International Law Commission's draft on the ground that it sought to interpret words in accordance with dictionary definitions, which might conflict with the will of the parties. It also happened that the parties adopted a meaning other than the ordinary meaning; that frequently occurred, and provision should be made for that eventuality. Moreover, when the parties were members of the same system of law, a term, although it might have a special meaning for third parties would have an ordinary meaning for the parties concerned and not a special meaning in the sense of paragraph 4 of article 27.

33. The substance of the problem lay in a proper appreciation of the rule stated in article 27, paragraph 1, to which the first Spanish amendment (A/CONF.39/C.1/L.216) related. The general aim of the amendment was, if possible, to reconcile the opposing views of the respective supporters of the pre-eminence of the text and the

[5] *I.C.J. Reports, 1950.*

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

[7] *P.C.I.J.* (1927), Series B, No. 14.

[8] *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 912th meeting, para. 38.

intention of the parties by clarifying the significance of the expression " ordinary meaning ", since it was the text which should initially be taken as the basis for determining the ordinary meaning given to a term in relations between the parties. It was a question not of looking to the special intentions of the parties, but to their common intentions. The purpose of the Spanish amendment was thus threefold: to introduce an element of relativity essential in the law of treaties, to include a moderate subjective element, namely the common intention of the parties, and to mitigate the severity of article 27 otherwise than in the exceptional circumstances covered by paragraph 4. The interpreter should work from the elements constituting the legal world which the treaty represented.

34. It could be objected that the expressions " ordinary meaning " and " between the parties " contradicted each other. The Spanish delegation had decided to retain the word " ordinary " for practical reasons. Parties usually employed terms in the meaning which was " ordinary " at the time when the treaty was drawn up. If that was not so, and a given term had another meaning, either ordinary or special, between the parties, then that meaning should prevail. In any case, the matter could be referred to the Drafting Committee for consideration.

35. With regard to his delegation's amendment to article 28 (A/CONF.39/C.1/L.217), he pointed out that although the reference to subsequent acts of the parties lengthened the list of supplementary means, it was nevertheless necessary. Those acts were covered neither by article 27, paragraph 3, nor indeed by article 38, since they did not necessarily constitute an " agreement " of the parties. The replacement of the word " confirm " by " supplement " reflected more accurately the role of the means of interpretation contemplated in article 28.

36. He inquired whether the word " instrument " in the amendment by Ceylon (A/CONF.39/C.1/L.212) could include the resolutions of competent organs of an organization.

37. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation attached great importance to the problem of interpretation of treaties. Proper interpretation was essential for the proper performance of a treaty, and would strengthen the *pacta sunt servanda* rule, which was essential in international law.

38. The object of interpretation was to establish the common intentions of the parties, as expressed in the common purpose of the treaty. That consideration justified the amendment by the Ukrainian SSR (A/CONF.39/C.1/L.201).

39. The text of the treaty was the main source of those intentions because it fixed in words the common intentions on which the parties had agreed. The International Law Commission had therefore been right to stress the importance of the context, including the preamble, the annexes and the other instruments relating to the treaty, and to separate them, as the main factor in interpretation, from the supplementary means described in article 28.

40. The United States amendment completely upset the system adopted by the International Law Commission. The single-article solution minimized the role of the text by presenting it as merely one factor amongst others. The proposal was politically dangerous, in that it would permit an arbitary interpretation divorced from the text and capable of altering its meaning, which was only possible if the change was the subject of agreement between the parties.

41. Amendments such as that submitted by the United States departed from the pattern proposed by the International Law Commission by reflecting the special interests of States participating in the Conference. The purpose of the International Law Commission's strict formulation was to avoid unilateral interpretation by States and to bring out their common intention.

42. The expression " interpreted in good faith in accordance with the ordinary meaning " ha l been criticized on the ground that words might have mo r than one meaning, but as the Polish representative had said, that was the case with only a minority of words. That minority was covered by article 27, paragraph 4. Of course, an agreement might not always be clear; in that case, the International Law Commission's draft authorized recourse to supplementary means of interpretation.

43. The Soviet Union delegation could not support the United States amendment, which aimed at sanctioning a system which would permit the arbitrary and unilateral interpretation, and consequently also application, of a treaty. The Commission's draft, on the other hand, met the requirements of contemporary international relations. The amendments submitted by the Ukrainian SSR, Pakistan, Greece, Romania and Australia (A/CONF.39/C.1/L.201, L.182, L.213, L.203 and L. 210) might improve the wording. That was unfortunately not so with the amendment submitted by the Federal Republic of Germany (A/CONF.39/C.1/L.214), because it would enable States which were not parties to a treaty to intervene in its interpretation.

44. Mr. DE BRESSON (France) said that articles 27 and 28 had rightly been included in the draft convention. Compared with the provisions dealing with the entry into force and the termination of treaties, those dealing with application were already far from numerous. It would therefore be regrettable if the provisions on the method of interpreting international agreements were deleted.

45. Articles 27 and 28 were a thorny matter, inasmuch as they could be regarded as reflecting the doctrinal conflict between those who advocated giving preference to the letter of a treaty and those who held that the intention of the parties should predominate. The proposed new articles did not seem, however, wholly to justify that way of viewing the matter.

46. Throughout the provisions of articles 27 and 28 there was an underlying recognition of the intention of the parties as the foundation for the interpretation of treaties. The authors of the draft had nevertheless believed that the intention should be sought in the first place in the instruments made jointly by the parties, which alone could lead to an objective interpretation, and only thereafter in the more subjective elements comprising, in particular, the preparatory work and the circumstances in which the agreement had been concluded.

47. The French delegation remained firmly of the opinion that the best way to ascertain the intention of the parties to a treaty was primarily to examine the text in which they had determined to express and record their agreement. What would be the use of negotiators devoting

months, even years, to preparing a text and weighing every expression in it, if, finally, the meaning of the terms adopted could be challenged at the first opportunity? In that particular case logic and legal stability were on common ground. It was much less hazardous and much more equitable when ascertaining the intention of the parties to rely on what they had agreed in writing, rather than to seek outside the text elements of intent which were far more unreliable, scattered as they were through incomplete or unilateral documents. Care should be taken not to give preference to the ulterior motives of the negotiators over the ideas they had decided to express and formally to record.

48. The reference in article 27, paragraph 1 to the " ordinary meaning " of the terms used was an entirely satisfactory solution. It covered both the usual dictionary meaning of words and the special meaning that words might acquire in the context of a given convention, the object of which might require recourse to a specific use of terms.

49. The French delegation maintained therefore that in interpreting a treaty the ordinary meaning of the text should be preferred. It believed that it would be equally legitimate to have recourse in the first place for enlightenment on the text to the agreements made when a treaty was concluded or to any formal or implied agreements between the parties during the interpretation or application of a treaty. If, despite such precautions, any doubt lingered about the meaning of a provision in a treaty, it would then be quite natural to have recourse to the preparatory work and the circumstances of the conclusion of a treaty, as provided in article 28.

50. His delegation was therefore in favour of the text proposed by the International Law Commission, as it found it the most reasonable, the soundest and the most suited to an objective attempt to ascertain the joint intention of the parties. It could not support the amendments submitted by the United States of America (A/CONF.39/C.1/L.156), the Philippines (A/CONF.39/C.1/L.174) and the Republic of Viet-Nam (A/CONF.39/C.1/L.199) in so far as they were intended to remove a certain hierarchy in the means of interpretation which the French delegation considered necessary. On the other hand, it was in favour of the amendments submitted by Pakistan (A/CONF.39/C.1/L.182), the Ukrainian SSR (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203) and Australia (A/CONF.39/C.1/L.210), which had the merit of clarifying the Commission's text. His delegation had not yet had time to consider the amendments which had just been circulated.

51. Some objections to articles 27 and 28 would perhaps be lessened if they had not been given titles which accentuated the difficulties raised by the articles. He reserved the right to revert to the general problem of titles of the various draft articles.

52. Mr. AMADO (Brazil) reminded the Committee that Vattel himself had laid it down that the terms should be interpreted in accordance with the meaning attributed to them when the treaty was concluded. The meaning of the text or, in other words, the ordinary meaning to be attributed to the terms of a treaty in their context was, therefore, the starting point for interpretation. The Brazilian delegation fully shared that view, which was also that held by the International Law Commission. The Commission, having very carefully considered all the aspects of interpretation and having reviewed older and more modern formulations, had endeavoured to make the notion of context more specific, as article 27, paragraph 2 testified.

53. The other means of interpretation referred to in article 28 should be called " *supplémentaires* " rather than " *complémentaires* ". Although the preparatory work must undoubtedly be borne in mind, the utmost caution was necessary. States sometimes concealed their real views on the questions under discussion at conferences or resorted to friendly States to express them. A certain degree of confusion was thereby created, and gave rise to mistrust.

54. The Brazilian delegation was in favour of the International Law Commission's draft. It could not accept the amendments submitted by the United States of America (A/CONF.39/C.1/L.156) and the Federal Republic of Germany (A/CONF.39/C.1/L.214). On the other hand, it supported the amendments submitted by Australia (A/CONF.39/C.1/L.210), Pakistan (A/CONF.39/C.1/L.182), the Ukrainian SSR (A/CONF.39/C.1/L.201) and Romania (A/CONF.39/C.1/L.203), which made the Commission's text clearer.

55. Mr. STREZOV (Bulgaria) said he approved of the substance of articles 27 and 28 of the International Law Commission's draft. In his opinion, article 27 set out satisfactorily the general legal rules observed by Ministries of Foreign Affairs in interpreting international treaties. In a convention on the law of treaties, the practice of Ministries of Foreign Affairs was more important than the views of the various schools of thought. Moreover, the solution adopted by the International Law Commission took international precedents into account.

56. He also approved of the logical reasoning by which the International Law Commission had been guided in setting out the means of interpreting a treaty. It was undeniable that the real intention of the parties should be sought in the first place in the text of the treaty itself. It was only when the general rules set out in article 27 did not make it possible to give a clear and reasonable meaning to a clause in a treaty or to a treaty as a whole that recourse should be had to the supplementary means of interpretation mentioned in article 28.

57. With regard to the drafting, he supported the amendments by Romania (A/CONF.39/C.1/L.203) and the Ukrainian SSR (A/CONF.39/C.1/L.201), which made the International Law Commission's text clearer. On the other hand, he could not support the amendments submitted by the Republic of Viet-Nam (A/CONF.39/C.1/L.199) and the United States of America (A/CONF.39/C.1/L.156), to combine articles 27 and 28 in a single article.

58. Mr. MARESCA (Italy) observed that an agreement was the meeting of the wills of the parties. To grasp the meaning of a treaty and to measure its scope was to grasp the intentions of the parties and measure their scope. It was the text of the treaty which disclosed the intention of the parties. Of course, it was the meaning and not the letter that should be taken into consideration. It sometimes happened, however, that the text did not

disclose the deeper intention of the parties in any precise manner. Recourse should then be had to all the means of interpretation listed in the Commission's draft articles 27 and 28. No hierarchy should be established as between those means. The preparatory work and the circumstances in which a treaty had been concluded should not be regarded as subsidiary means of interpretation. The Italian delegation was therefore in favour of combining articles 27 and 28 in a single article. It would support the amendments to article 28, if that article was not combined with article 27.

The meeting rose at 12.55 p.m.

THIRTY-THIRD MEETING

Monday, 22 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 27 (General rule of interpretation) and

Article 28 (Supplementary means of interpretation) *(continued)*

1. THE CHAIRMAN invited the Committee to continue its consideration of articles 27 and 28 of the International Law Commission's draft. [1]

2. Mr. SINCLAIR (United Kingdom) said he wished to analyse some of the arguments advanced by the United States representative during the Committee's 31st meeting [2] when introducing his delegation's amendment (A/CONF.39/C.1/L.156) to articles 27 and 28. A particular reason for subjecting those articles to careful examination was that the statements made in the debate would constitute part of the preparatory work of the forthcoming convention on the law of treaties.

3. The most important issue raised in connexion with the subject of treaty interpretation was that of the primary aim of treaty interpretation. It was often asserted that it was to ascertain the common intention of the parties, independently of the text. That view had been subjected to fierce criticism in the debate on treaty interpretation in the Institute of International Law in the early 1950s and had ultimately been decisively rejected by the Institute. Parts of the United States representative's statement had seemed to be directed towards reviving the doctrine thus rejected.

4. The United Kingdom delegation did not consider that there was any undue rigidity in ascribing paramount importance to the principle of textuality in treaty interpretation. As had already been pointed out by the representative of Uruguay, the dangers of the alternative doctrine had been persuasively presented by Sir Eric Beckett at the Institute of International Law when he had stated that there was a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it was almost certain that the point which had arisen was one which the legislature had never thought of at all; that was even more so in the case of the interpretation of treaties. 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 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 which was in dispute; each party had deliberately refrained from raising the matter, possibly hoping that that point would not arise in practice, or possibly expecting that if it did, the text which was agreed would produce the result which it desired. [3]

5. The United Kingdom delegation upheld the view expressed in the resolution adopted on the subject by the Institute of International Law in 1956, according to which, when agreement had been reached between the parties on the text of the treaty, the natural and ordinary meaning of the terms of the treaty should be taken as the basis for interpretation; the terms of the provisions of the treaty should be interpreted in the context as a whole, in good faith, and in the light of the principles of international law. [4]

6. As the International Law Commission stated in paragraph (11) of its commentary to the articles, the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. Moreover, in the case of many important multilateral conventions, some of the parties might have joined by subsequent accession, particularly in the case of new States which had not been in a position to participate in preparing the original instruments. It was hardly possible to interpret the rights and obligations of those acceding States in the light of the supposed common intention of the original drafters; it was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.

7. With regard to the criticisms levelled against the phrase " ordinary meaning ", the words obviously could not be viewed in isolation; it was inconceivable that the International Law Commission had intended that interpreters of treaties should arbitrarily select dictionary meanings when construing treaty texts. Paragraph 1 of article 27 referred to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and paragraph (12) of the commentary clearly indicated the sense in which the term " ordinary meaning " was used. The Commission presumably also had in mind the need to differentiate between the ordinary meaning of a treaty provision and any special meaning which might be established in accordance with paragraph 4 of the article. In any case, the concept

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

[2] Paras. 38-50.

[3] See *Annuaire de l'Institut de droit international*, vol. 43 (1950), tome I, p. 438.

[4] *Op. cit.*, vol. 46, (1956), p. 349.