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

which emerged from the very title of that complex article.

40. In the first place, there was an element of ambiguity in the word " successive ", for it was difficult to decide which of two treaties was the later one: for example, if convention A had been signed in 1964 and convention B in 1965, but convention B entered into force in 1966 and convention A not until 1968, the question arose which should be regarded as the prior treaty. His delegation's opinion was that the decisive date should be that of the adoption of the treaty; it based that view on paragraph 1 of article 56, which referred to the conclusion of a later treaty. It would, however, welcome the Expert Consultant's views on the matter.

41. The second point, perhaps more significant, concerned the words " relating to the same subject-matter ". There were, of course, cases where a series of treaties, relating to such specific subjects as copyright or safety of life at sea, clearly fell within the scope of the rule set out in article 26. But if, for example, a convention on such a specific topic as third party liability in the field of nuclear energy contained a provision relating to the taking of legal action in the courts of one State and the giving effect to judgements in the courts of another State, it could not be regarded as relating to the same subject-matter as a later treaty on the entirely different topic of the general reciprocal recognition and enforcement of judgements. The phrase in question should be construed strictly and should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involved was one of interpretation or of the application of such maxims as *generalia specialibus non derogant.*

42. Furthermore, paragraph 2 of the International Law Commission's text of article 26 implied that the article was in the nature of a residuary rule, although it was not specifically drafted as such, for the content of the article clearly led to the assumption that matters involving the application of successive treaties could be regulated in the series of treaties themselves; indeed, it was to be hoped that those matters would be so regulated. Finally, the Japanese amendment (A/CONF.39/C.1/L.207) was correct in principle, for where a treaty specified that it was not to be considered inconsistent with an earlier treaty, the question became one of interpretation, not of the application of successive treaties.

43. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation has supported article 26 at the first session on the understanding that the conclusion of successive treaties could not exempt States from the obligation to observe the *pacta sunt servanda* principle, of from the scrupulous observance of earlier treaties. The Soviet Union had submitted an amendment to that effect (A/CONF.39/C.1/L.202), which had not been accepted by the Drafting Committee because it had considered that the International Law Commission's text covered the point. His delegation now supported article 26 on the assumption that the Committee of the Whole shared that view.

44. Mr. KEARNEY (United States of America) said that his delegation regarded the Japanese amendment (A/CONF.39/C.1/L.207) as a very sensible proposal, because it believed that, if a treaty specified that it was not to be considered as inconsistent with another treaty, the purpose of the clause was not that the earlier or the later treaty should prevail, but that an effort be made to read the provisions of both treaties in a consistent manner and to allow both sets of provisions to exist as far as possible.

45. The CHAIRMAN suggested that article 26 be referred back to the Drafting Committee for consideration with the four amendments already before it.

It was so agreed. [10]

The meeting rose at 4.40 p.m.

[10] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

EIGHTY-SIXTH MEETING

Friday, 11 April 1969 at 10.55 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 36 (Amendment of multilateral treaties) [1]

1. The CHAIRMAN said that at the first session of the Conference the Committee of the Whole had decided to refer article 36 to the Drafting Committee, together with the amendments submitted by France (A/CONF.39/C.1/L.45) and the Netherlands (A/CONF.39/C.1/L.232). The French delegation had now withdrawn its amendment. He suggested that the Committee should refer article 36 back to the Drafting Committee together with the Netherlands amendment.

It was so agreed. [2]

Article 37 (Agreements to modify multilateral treaties between certain of the parties only) [3]

2. The CHAIRMAN said that amendments had been submitted to article 37 by France (A/CONF.39/C.1/L.46), Australia (A./CONF.39/C.I/L.237), Czechoslovakia (A/CONF.39/C.1/L.238) and Bulgaria, Romania and Syria (A/CONF.39/C.1/L.240). The Czechoslovak amendment and the amendment submitted by Bulgaria, Romania and Syria had been referred to

[1] For earlier discussion of article 36, see 36th meeting, paras. 53-79, and 37th meeting, paras. 1-27.

[2] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

[3] For earlier discussion of article 37, see 37th meeting, paras. 28-56.

the Drafting Committee at the first session. The French amendment had been withdrawn. At the request of the Australian delegation, the amendment in document A/CONF.39/C.1/L.237 was to be considered by the Committee and voted on.

3. Mr. MERON (Israel) said that the Netherlands amendment (A/CONF.39/C.1/L.232) to paragraph 2 of article 36 was to replace the words " every party " by " every contracting State ", so that any proposal to modify a multilateral treaty would have to be notified to all the contracting States, whether the treaty had entered into force or not. It seemed desirable to make a similar change in paragraph 2 of article 37, in which the words " the other parties " would be replaced by the words " the other contracting States ". The effect of that amendment would be to widen the circle of States to be notified and to bring article 37, paragraph 2, into line with article 36, paragraph 2. He commended that suggestion to the attention of the Drafting Committee.

4. Mr. BRAZIL (Australia) said that the purpose of his delegation's amendment to article 37 (A/CONF.39/C.1/L.237) was to remove the class of treaties covered by article 17, paragraph 2, from the scope of article 37. That was probably a question of substance. The amendment had not been voted on at the first session because the Conference had deemed it desirable to defer a decision on the matter until it had reached some conclusion with regard to article 17, paragraph 2. The Committee of the Whole had now adopted that paragraph, under which, in the case of certain treaties between a limited number of States, a reservation required acceptance by all the parties. His delegation had abstained in the vote on article 17 as a whole, but it approved the principle of paragraph 2. If that provision was valid in regard to reservations, it was also valid in the case of article 37, relating to the modification of treaties between certain of the parties only, and of article 55, concerning the suspension of the operation of treaties between certain of the parties only. Although the wording of article 37, paragraph 2, as drafted by the International Law Commission might be said to suffice to guarantee the integrity and security of a treaty in some cases, his delegation thought it would be preferable to acknowledge expressly that a particular class of treaty existed whose integrity should be maintained.

5. Mrs. ADAMSEN (Denmark) said that, as it had stated at the first session, her delegation considered that no new restrictions should be placed on the conclusion of multilateral treaties. It was preferable not to remove the class of treaties covered by article 17, paragraph 2, from the scope of article 37. The important thing was that the rights of the parties should be respected, and article 37, paragraph 1 (*b*) (ii), provided adequate safeguards in that respect. Her delegation was not convinced that there really was an analogy between article 17, paragraph 2, and article 37, paragraph 2. There might be justification for not allowing reservations at the time when a treaty was concluded, whereas at a later stage the need for modification might become apparent and be perfectly justified. Her delegation preferred the International Law Commission's text.

6. Mr. DADZIE (Ghana) said that all the articles of the convention were interrelated; no party would be allowed to apply any provision in such a way as to contravene another provision. The effect of expressly mentioning the case provided for in the Australian amendment would be to exclude from the scope of that general rule the cases which were not mentioned. Although his delegation understood the idea behind the Australian delegation's amendment, it preferred the International Law Commission's text, in which there was reference to article 17, paragraph 2.

7. Mr. BRAZIL (Australia) pointed out that if his delegation's amendment was adopted, it would still be possible to modify treaties concluded between a limited number of States, but the consent of all the parties would be needed. The purpose of the amendment was to apply the unanimity rule, which had been accepted in the case of article 17, paragraph 2, to a similar situation provided for in article 37.

8. Mr. MARESCA (Italy) said that while there were rules of *jus cogens* from which derogation was impossible, there were other rules of law which could be applied more flexibly. To introduce new restrictions on the rules of international law would hamper the development of treaty law. The need for some restrictions was understandable in one case of reservations, but not when it was a matter of modifying multilateral agreements. Article 37 provided every safeguard that *inter se* agreements would not be incompatible with multilateral agreements. His delegation thought that rigid rules should not be introduced into the convention; consequently, it could not approve the Australian delegation's proposal.

9. Mr. CARMONA (Venezuela) said that article 17, paragraph 2 had been adopted by the Committee subject to approval by the plenary Conference. If the Committee adopted the Australian amendment, it would be prejudging the plenary Conference's decision on that paragraph. The Venezuelan delegation would therefore not vote for the Australian amendment, which in its view was incompatible with established principles and with the interests of States in general.

10. Mr. DENIS (Belgium) said the Australian delegation itself had acknowledged that certain cases to which its amendment applied were already covered by article 37, paragraph 2. The question was whether every case needed to be covered, including provisions of a treaty which were not of a fundamental nature. The Australian proposal might in certain circumstances bring normal relations between States to a standstill. It should also be noted that the Australian amendment in fact reintroduced the amendment which the French delegation had considered it unnecessary to maintain. The Belgian delegation would therefore not be able to support the Australian amendment.

11. Mr. USENKO (Union of Soviet Socialist Republics) said that his delegation was in favour of the

amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.238) and by Bulgaria, Romania and Syria (A/CONF.39/C.1/L.240); but it could not support the Australian amendment.

The Australian amendment (A/CONF.39/C.1/L.237) was rejected by 62 votes to 4, with 22 abstentions.

12. The CHAIRMAN suggested that article 37 and the amendments relating thereto (A/CONF.39/C.1/L.238 and L.240) should be referred to the Drafting Committee.

It was so agreed.[4]

Article 55 (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only) [5]

13. The CHAIRMAN said that the only proposal relating to article 55 still before the Committee was the amendment by Australia (A/CONF.39/C.1/L.324), since the French amendment (A/CONF.39/C.1/L.47) had been withdrawn by its sponsor at the 84th meeting.[6] An amendment by Peru (A/CONF.39/C.1/L.305), which was of a drafting nature, had been referred to the Drafting Committee at the first session.

14. Mr. BRAZIL (Australia) said that since the Committee had just rejected the Australian amendment to article 37 (A/CONF.39/C.1/L.237), it probably would not approve the Australian amendment to article 55 (A/CONF.39/C.1/L.324). His delegation was therefore withdrawing it.

15. Mr. JAGOTA (India) said that the Committee could choose between the text proposed in the Peruvian amendment (A/CONF.39/C.1/L.305) and the new text of article 55, paragraph 2, proposed by Austria, Canada, Finland, Poland, Romania and Yugoslavia (A/CONF.39/C.1/L.321 and Add.1) and adopted at the first session of the Conference. He personally would like to see the Conference keep the wording proposed for paragraph 2 in the joint amendment, which had been adopted by 82 votes to none, with 6 abstentions. With the Peruvian amendment it would not be clear what would happen if the other parties notified, or any other States, raised an objection to the suspension of the operation of certain provisions of a treaty. It would be better to keep the most flexible wording possible.

16. With regard to the text adopted at the first session (A/CONF.39/C.1/L.321 and Add.1) he wished to submit a few suggestions for the Drafting Committee's consideration. The legal question raised in article 55 was similar to that raised in article 37, since it turned on the suspension of legal obligations deriving from a treaty. The two articles should therefore be drafted on similar lines. Article 37 dealt with three cases; the first where a multilateral treaty itself prohibited any agreement on the modification of any of its provisions; the second where the treaty specifically permitted the modification of some of its provisions; and the third where the treaty contained no specific provision concerning modification. Article 55 as at present drafted covered only two of the cases: the case where the treaty prohibited the suspension of the operation of some of its provisions, and the case where the treaty did not contain any specific provision to that effect. In order to meet any difficulty, the third case should also be covered, namely the case where the treaty specifically permitted the suspension of the operation of some of its provisions, so that the compatibility test would not apply to such a case.

17. The CHAIRMAN said that the Drafting Committee would no doubt bear those suggestions in mind.

18. He suggested that article 55, as amended at the first session, be referred to the Drafting Committee together with the Peruvian amendment.

It was so agreed.[7]

Article 66 (Consequences of the termination of a treaty) [8]

19. The CHAIRMAN said that the French amendment (A/CONF.39/C.1/L.49), which was the only amendment to article 66, had been withdrawn by its sponsor at the 84th meeting.[9] He suggested that article 66 be referred to the Drafting Committee.

It was so agreed.[10]

The meeting rose at 11.40 a.m.

[4] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

[5] For earlier discussion of article 55, see 60th meeting, paras. 1-42.

[6] See 84th meeting, para. 3.

[7] For the resumption of the discussion in the Committee of the Whole, see 99th meeting.

[8] For earlier discussion of article 66, see 75th meeting, paras. 1-8.

[9] See 84th meeting, para. 3.

[10] For the resumption of the discussion in the Committee of the Whole, see 99th meeting.

EIGHTY-SEVENTH MEETING

Monday, 14 April 1969, at 10.55 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 2 (Use of terms) [1]

1. The CHAIRMAN invited the Committee to consider the amendment to draft article 2 submitted at the first session and still before the Committee of the Whole

[1] For earlier discussion, see 4th, 5th and 6th meetings.