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Summary record of the 824th meeting

Topic:
Law of Treaties

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97. Sir Humphrey WALDOCK, Special Rapporteur, said that the reservations expressed by Mr. Briggs were understandable, as his standpoint was quite different from that adopted by the Special Rapporteur and, indeed, by the Commission itself at its fifteenth session.

98. He agreed that the word " violation " was not particularly well-chosen but considered that in other respects the new version of the article proposed in his fifth report was both more elegant and more faithfully reflected the Commission's decision at its fifteenth session.

99. Mr. AMADO pointed out that article 31 as reformulated did not contain the notion of the consent of a State expressed by its representative, which appeared in articles 32, 34 and 35. Could that notion be dropped from one article and retained in others? It had also appeared in the former version of article 31, the last sentence of which read " Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree ".

100. Mr. CASTRÉN said that, in principle, he approved the substance of the article, and its form had been greatly improved in the new version. Nevertheless, the reference to " its " internal law was not very clear, and he therefore suggested that the opening words of the article read " A State may not invoke the fact that a treaty has been concluded in violation of its internal law as invalidating its consent . . .".

101. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would have to bear in mind the comment made by some governments that the Commission had failed to make clear that the provisions concerning separability also applied to article 31. One possibility would be to specify in article 47 the articles to which the provisions about separability were applicable.

102. In his opinion, article 31 could now be referred to the Drafting Committee in the light of the discussion.

103. The CHAIRMAN, speaking as a member of the Commission, said that from the point of view of the violation of internal law, the question of separability was very complex. It was a delicate matter to distinguish between a rule which a negotiator could accept because it did not violate his State's internal law, and a rule which did violate that law, and he doubted whether the Drafting Committee would be able to find a satisfactory solution.

104. Speaking as Chairman, he suggested that article 31 be referred to the Drafting Committee.

It was so agreed.[9]

105. The CHAIRMAN, noting that both Vice-Chairmen were absent, suggested that Mr. Elias, the General Rapporteur, be asked to take the Chair in the Drafting Committee, and that Mr. Cadieux be appointed a member of that Committee, pending the arrival of Mr. Reuter.

It was so agreed.

The meeting rose at 1 p.m.

[9] For resumption of discussion, see 841st meeting, paras. 42-56.

824th MEETING

Wednesday, 5 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 32 (Lack of authority to bind the State)

Article 32

Lack of authority to bind the State

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

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States. (A/CN.4/L.107, p. 32)

1. The CHAIRMAN invited the Commission to consider article 32, for which the Special Rapporteur, in his fourth report (A/CN.4/177/Add.2, p. 21), had proposed a new title and text which read:

Unauthorized act of a representative

1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only after the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 32 dealt with the lack of authority to

express a State's consent to be bound by a treaty, not by reason of internal constitutional provisions but because the representative had not been furnished with the necessary authority. The article was closely connected with the provisions of article 4, to which a cross-reference must be made, and when redrafting the article he had of course had in mind the modifications introduced at the fifteenth session in article 4. He had also tried to take account of certain drafting points made by governments.

3. In paragraph 1, the wording " invalidating such expression of consent unless the consent has afterwards " should be substituted for " invalidating such consent unless this has afterwards "; that would make the meaning much clearer.

4. Mr. AMADO, noting that the title of the article, previously " Lack of authority to bind the State ", had become " Unauthorized act of a representative ", said he found it regrettable that the words " *compétence* " and " *pouvoir* " (" authority " and " power ") had become practically interchangeable. He preferred the term " *compétence* " (" authority ") and hoped it would be maintained in the title. In the new version of the article there was a slight change of emphasis: instead of looking at the act of the representative, one now had to consider the person of that representative. It was an example of how a series of seemingly pure drafting changes could ultimately lead to alterations that might have legal consequences.

5. Mr. CASTRÉN said that he approved both the new title and the new formulation. He questioned, however, whether the words " representing his State for the purpose " were necessary; the other condition, expressed by the words " furnished with the necessary authority " might suffice. The previous text had referred only to " authority ".

6. Mr. AGO, referring to paragraph 1, said that, since 1963, the Commission had radically amended article 4, which was now concerned only with full powers. It was doubtful whether the words " or as furnished with the necessary authority " could be used without giving article 4 a significance which it no longer had.

7. Paragraph 2 dealt with one of the most delicate points in the whole draft. It spoke of a " restriction " on the authority of a representative, which was rather vague, since it might mean a restriction on the full powers in a particular case, but it could also mean a general restriction of a constitutional character, and that would change the entire scope of the article. Was the fact that a restriction had been brought to the notice of the other contracting States to be regarded as sufficient grounds for invoking it as invalidating the expression of consent? If the restriction was of a constitutional character, if for example it limited the power of the head of State to express the State's consent in cases where he was not authorized by Parliament for that purpose, would it be sufficient for a State to have sent the text of its constitution to all the other States in order to be able thereafter, when concluding a treaty, to invoke that restriction as invalidating its consent if it had been given in disregard of such restriction? What he wished to prevent was that the paragraph should lead to the adoption of an idea which was certainly not that of the Commission as a whole.

8. Mr. ELIAS said that in paragraph 1 he disliked the introduction of the words " for the purpose ", which were unnecessary and made for imprecision. The change from " who cannot be considered " to " who is not considered " was hardly an improvement, and the same applied to the change of tense in the final proviso.

9. In paragraph 2, the words " disregard of " would be better than " omission to observe ".

10. Mr. AMADO said that he found the text rather odd, especially the English version which used such expressions as " for the purpose ", " furnished " and " omission to observe ".

11. With regard to Mr. Ago's remarks, he too thought that there was a danger that paragraph 2 might create difficulties, particularly in circumstances where frequent changes of government might occur. The Drafting Committee would have to consider the matter very carefully.

12. Mr. YASSEEN said that he had difficulty in accepting the new formulation of paragraph 1, which spoke of invalidating " consent ". His view was that the State's consent could not be presumed to have been expressed in cases where the representative of the State had exceeded his authority. He preferred the former version which had referred to the " act " of the representative.

13. On the other hand, he found paragraph 2 logical and acceptable; it did not raise the constitutional issue, which was dealt with in another article, and also seemed to have some practical value. Cases occurred where a State restricted the authority of its representative; if the representative disregarded the restrictions placed upon him, the State concerned could not be held responsible for his acts. To the extent that he failed to respect those restrictions, he could not be regarded as a representative of his State. In order that those restrictions should take effect, it was of course logical to require that they should be brought to the notice of the other contracting States.

14. Mr. BRIGGS said that article 32 dealt with an agent's competence to bind the State rather than with the invalidity of a State's purported consent. If the article was needed at all—and at the fifteenth session about half the Commission's members had thought it was not—it either belonged to article 4 or should be placed immediately after it. Article 4, as revised at the first part of the seventeenth session, specified the categories of persons authorized to negotiate and conclude treaties. It followed that a representative not so authorized under the terms of that article could not express consent which could be regarded as valid, unless his act was subsequently confirmed. In paragraph 1, therefore, it would be more accurate to refer to " such act " than to " such consent ".

15. He was not certain that a provision of the kind contained in the Special Rapporteur's new text of article 32, paragraph 2, was required at all.

16. Mr. AGO said that, according to Mr. Yasseen, paragraph 2 was harmless because it referred only to the case where a representative had exceeded his instructions; actually, both the new and the old versions of the article

seemed to go further and to cover even cases where the head of State or the minister was involved.

17. In fact, the problem which had been settled in article 31 was again before the Commission. To invalidate its consent, was all that was necessary that it should have brought some restriction or other to the notice of the other State? If the intention was to limit the scope of the paragraph to cases where full powers contained restrictions for a particular case, the provision should say so clearly.

18. Mr. TUNKIN said that he was of much the same opinion as Mr. Briggs. But the question of the placing of article 32, which had been discussed at the fifteenth session, was of great significance.

19. In his opinion the content of article 32 should be transferred to article 4 or immediately following it. The Special Rapporteur's new text was unnecessarily circuitous and failed to state as plainly as did the 1963 draft that the act of a person not duly authorized to represent the State could have no legal effect. He therefore favoured the earlier draft.

20. Mr. ROSENNE said that, at the outset, article 32 had appeared to him to present no difficulties, but after hearing the discussion he had become aware that it dealt with two entirely different topics, one the act of an unauthorized person and the other an unauthorized act of a representative, the latter being described in article 4.

21. Paragraph 1 would need to be refashioned so as to bring out more clearly its connexion with article 4, and probably be re-placed in part I.

22. As paragraph 2 dealt with the validity or invalidity of consent to be bound, it certainly belonged to part II, but its wording should be made uniform with that of other provisions concerned with the grounds upon which invalidity could be invoked.

23. Mr. YASSEEN said that the drafting of paragraph 2 was sufficiently clear to avoid the consequences which Mr. Ago apprehended. The text referred to " a particular restriction " and provided that it must be brought to the notice of the other parties. Possibly the representative's authority was limited and he was empowered to sign *ad referendum* only. Say, for instance, the negotiations had covered two questions; later on, the State might decide to limit the authority of its representative, and authorize him to express its consent on only one of the two questions.

24. Mr. CADIEUX said that, in his view, article 32 had certain positive features and should form part of the system of rules to be submitted to governments. At that stage it was difficult to say definitely whether the article should be in part II, or whether it should be regarded as a modification of article 4; but on the whole he was inclined to share the Special Rapporteur's view. The article was really concerned with the validity of an international instrument and with the circumstances in which that validity could be disputed.

25. Like Mr. Briggs, he had had some hesitation about the drafting of the last part of paragraph 1, but the Special Rapporteur's suggestion on that point had fully satisfied him.

26. His view on paragraph 2 was the same as Mr. Yasseen's. The question of the authority of those authorized *ex officio* to bind the State was covered by article 31; paragraph 2 applied only to the case of persons duly authorized to bind the State. It might even be applicable to ministers for foreign affairs and heads of State, who did not always have unrestricted authority to bind a State. The situation contemplated in the paragraph was not one where ratification was imperfect or where there were constitutional limitations, but one where there was a particular restriction which might limit the authority of a person who would normally be authorized to bind a State.

27. It seemed to him, therefore, that paragraph 2 was useful and its drafting acceptable. In order to cover the problem raised by Mr. Ago, the commentary should refer to the special circumstances envisaged in the paragraph.

28. Sir Humphrey WALDOCK, Special Rapporteur, said he realized that article 32 dealt with two different matters, but at its fifteenth session the Commission had decided that it would be convenient to deal in one article both with the unauthorized act of a representative of a State and with the act of a person who was not a representative for purposes of concluding a treaty.

29. His new draft had been criticized by Mr. Tunkin for not using wording similar to that approved in 1963. His purpose in modifying the wording had been to achieve some degree of uniformity of language in the various provisions concerned with invalidity.

30. Furthermore, it was not, strictly speaking, correct to say that the act of an unauthorized representative had no legal effect, because it might be subsequently confirmed by his State. That point would have to be taken into account if the content of paragraph 1 were transferred to article 4 or to a new article immediately following it. The question would then arise as to whether a provision would need to be included in part II so as to cover the invalidity aspect. He was not clear what was the general opinion on that point.

31. Of course, in practice, cases of unauthorized persons negotiating treaties were uncommon. One example which came to mind was that of a British Resident in the Persian Gulf who had purported to conclude an agreement with a Persian Minister without instructions from the British Government, which had disavowed his action.[1]

32. The Drafting Committee should have no difficulty in revising paragraph 2, if the Commission decided to retain it, so as to make clear that the intention was to refer to restrictions on a representative with regard to a particular treaty, and not to restrictions resulting from internal constitutional provisions. Mr. Ago's preoccupation would then be met.

33. It was reassuring that no government or delegation had misunderstood the purpose of the text.

34. The CHAIRMAN asked members to indicate whether they considered that article 32 should be referred

[1] Treaty of Shiraz, August 30, 1822, signed by Mirza Mahommed Zaki Khan, the Minister of Fars, and Captain William Bruce, British Resident at Bushire. See Adamiyat F., *Bahrein Islands, A Legal and Diplomatic Study of the British-Iranian Controversy*, New York, 1955, pp. 106-111.

to the Drafting Committee with instructions to redraft paragraph 1, and decide whether it should be retained in part II or whether it should be placed in or after article 4.

35. Mr. ELIAS proposed that article 32 be referred to the Drafting Committee.

36. Mr. CASTRÉN said he agreed that the article should be referred to the Drafting Committee, though after listening to the Special Rapporteur's explanations, he still considered that the new text was an improvement on the earlier draft because it left the injured party with several possible courses of action. He would also prefer that the article should remain where it now was. Like Mr. Cadieux, he considered that its main subject was not representation but the representative's lack of authority, which might have the consequence of invalidating the treaty.

37. Mr. AGO said that his views on paragraph 1 were the same as Mr. Rosenne's; the provision dealt with the act of a person who was not considered as the representative of a State within the meaning of article 4, in other words, with an act which did not express the consent of the State and did not produce legal effects. Such a provision was, however, unnecessary since the case was covered by article 4.

38. The Commission ought rather to consider whether it should not widen the scope of the provision somewhat and say that, notwithstanding the restrictions set out in article 4, cases might occur where a person who was not considered as the representative of the State had performed an act which had ultimately expressed the State's consent because it had been confirmed later.

39. It would then be sufficient to add a paragraph stating that, where a person who was not considered as the State's representative in the particular case acted to express the consent of that State, that unauthorized expression of consent could later be confirmed by a duly authorized representative. The right place for such a paragraph would be after article 4 rather than in article 32, which referred to validity. In such a case, validity was not in issue; no consent had been expressed, consequently there was no treaty until confirmation was forthcoming.

40. If article 32 were to consist only of paragraph 2, it should state clearly that the restriction mentioned was one that applied to a particular case and not a general restriction; the latter case would be covered by article 31.

41. Mr. ROSENNE said he supported Mr. Elias's proposal that article 32 be referred to the Drafting Committee.

42. It was essential to retain the words " expressly or impliedly " in paragraph 1, which represented the important element in the rule laid down in article 32.

43. Mr. BRIGGS said he also agreed that the article should be referred to the Drafting Committee.

44. However, since the Special Rapporteur was anxious to ascertain the view of the Commission, he felt bound to say that, in his opinion, if the content of paragraph 1 were transferred to article 4, there was no need to restate the principle in part II as well, because the article was not concerned with the question of invalidity but with the competence of the agent and with an act performed without authority. His opinion was reinforced by the fact that the Commission had not sought to cover all problems of invalidity in part II.

45. He doubted whether there was any need to retain the substance of paragraph 2 in article 32, but that was a point that could safely be left to the Drafting Committee.

46. Mr. TUNKIN said that paragraph 1 should be transferred to article 4 or to a new article 4 *(bis)*. Paragraph 2, being concerned with validity as such, should remain in part II.

47. Mr. YASSEEN said that he was still convinced that the original version of paragraph 1 was preferable, because it was realistic. A representative could express the consent of his State only if he was authorized to do so, either specially or generally, in accordance with international law. The object was to confirm not the consent but the act itself. The question of the retrospective effect of the confirmation might then arise. There was nothing to prevent a State from confirming retrospectively an act performed by its representative who had exceeded his authority.

48. Mr. AMADO suggested that the well-known formula, " authority of a representative to express validly . . . ", might be used with advantage.

49. Mr. CASTRÉN, replying to Mr. Yasseen, pointed out that paragraph 1 did not speak of the case where a representative " expresses the consent " but of the case where he " purports to express the consent "; moreover, the paragraph specifically referred to " lack of authority ".

50. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no objection to article 32 and the problems arising out of it being referred to the Drafting Committee, he would prefer paragraph 1 to be associated with article 4, either as part of that article or as an article 4 *bis*. An instance of the seriousness of the problem was the Pilja case of 1939, in which the Deputy Minister for Foreign Affairs of Yugoslavia had been accused of acting *ultra vires*.

51. Speaking as Chairman, he suggested that article 32 and the questions arising out of it be referred to the Drafting Committee.

It was so agreed.[2]

ARTICLE 33 (Fraud)

Article 33

Fraud

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

2. Under the conditions specified in article 46, the State in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates. (A/CN.4/L.107, p. 32)

52. The CHAIRMAN invited the Commission to consider article 33, for which a new text had been

[2] For resumption of discussion, see 840th meeting, paras. 1-13.

proposed by the Special Rapporteur, in his fifth report (A/CN.4/183, p. 29), which read:

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

53. Sir Humphrey WALDOCK, Special Rapporteur, said that a few governments had opposed the idea of separate articles on fraud and error but the majority had neither comments nor objections to offer. The two questions were essentially different and the effects of fraud were more serious, because they destroyed the confidence between the parties.

54. He found acceptable the suggestion by the Government of Israel to reverse the order of the two articles, because fraud was both graver in its consequences and also closer to coercion.

55. Some governments had suggested that it was not enough to refer to fraudulent conduct and that mention should also be made of fraudulent acts. He had no objection to such a change, though he doubted its necessity.

56. Some governments had commented on the difficulty of defining fraud and on the fact that there was no exact correlation between the English term and the French "*dol*".

57. He had not included paragraph 2 of article 33 in his new version, on the assumption that the draft would contain a general provision on separability that would cover all the articles to which that principle applied. It might be more convenient to examine the question of separability as a whole, and then decide to which individual articles it applied. He accordingly suggested that, for the time being, consideration of paragraph 2 be deferred.

58. One government had suggested laying a time-limit on the right to invoke fraud as a ground of invalidity, but that was a point that should be taken up in connexion with article 47.

59. Mr. AGO said he agreed with all that the Special Rapporteur had said. It would be meaningless to deal in one and the same article with two notions as different from each other as fraud and error; yet it would be desirable to reverse the order of the two articles dealing with those two ideas, in order to establish a gradation in the seriousness of the grounds for nullity. The question of the order of the articles might in any case not be settled until later.

60. What he particularly agreed with was the Special Rapporteur's proposal that paragraph 2 of the article as adopted in 1963 be omitted, since the entire question of the separability of treaties was to be reconsidered by the Commission. He had had serious misgivings about paragraph 2. A treaty sometimes consisted of several seemingly independent parts which were, however, the outcome of reciprocal concessions and hung together. Conceivably, a State might have accepted a particular clause of a treaty for the sole reason that, in its opinion, another clause in the treaty offset the first; it would be wrong if, in such a case, the State were obliged to remain bound by the one if the other became void from lack of consent. Even in dealing with the case of error, the Commission would have to study the question with the utmost care.

61. Mr. ELIAS said he supported the Special Rapporteur's new formulation, which contained all that was required.

62. He also favoured dropping paragraph 2 and dealing with it as part of the general problem of separability. Notwithstanding the suggestions made by some of them for improvements in the wording, it was clear that governments hesitated to accept the severance of clauses vitiated by fraud from others that were not so vitiated.

63. Mr. CASTRÉN said that article 33 should be retained; it might follow the article concerning error, for the reasons given by the Government of Israel and accepted by the Special Rapporteur.

64. He could accept the redraft proposed by the Special Rapporteur, which was not materially different from the previous draft. The addition of the word "act" in paragraph 1 seemed to be justified.

65. He could also accept the Special Rapporteur's proposal that paragraph 2 be omitted, since he had already accepted his proposal for redrafting article 46 and for inserting it before the series of articles now being considered.

66. The Commission had been right to refrain, in 1963, from attempting a definition of the meaning of the word "fraud", and there was no need to revert to that point.

67. In the opinion of a few governments, the right to plead fraud should be exercised within a specified time-limit; but, like the Special Rapporteur, he considered that in that respect article 47 offered sufficient guarantees against possible malpractice.

68. Mr. YASSEEN said that article 33, as redrafted by the Special Rapporteur, should be retained. The addition of the word "act" was an improvement.

69. In view of the trend of the debate on article 30 at the previous meeting, from which it was apparent that the Commission was proposing to draft restrictively all the provisions concerning possible grounds for the nullity of a treaty, an article on the subject of fraud was indispensable.

70. Clearly, paragraph 2 should be left in suspense for the time being since, as proposed by the Special Rapporteur, the Commission would consider the entire question of the separability of treaties as a whole.

71. Mr. CADIEUX said that he accepted the text proposed by the Special Rapporteur, which was an improvement.

72. After the close of the discussion on that article, however, the Special Rapporteur might perhaps give his opinion on the United Kingdom Government's suggestion that provision be made for independent adjudication on the interpretation and the application of the article in the event of dispute; a similar idea seemed to have been in the mind of the Government of the United States. It was not perhaps necessary to deal with that question in connexion with article 33, but the Commission should consider it at some point and express a judgment on it.

73. Mr. BEDJAOUI said he had studied the comments by governments, in particular those opposed to both article 33 and article 34, and his personal view was that both articles were necessary, even if the cases where a treaty was invalidated by reason of fraud or error were not very frequent. He regretted, however, that the Commission should have singled out only those two grounds, fraud and error; he would have liked it to consider also the effect of material injury *(lésion)*.

74. Inasmuch as Algeria's colonial history had begun with a fraud—the conclusion of the treaty of Tafna in 1837 between Emir Abd-El-Kader and Marshal Bugeaud[3] — he was particularly pleased to see an article on fraud in the Commission's draft.

75. The redraft proposed by the Special Rapporteur was very satisfactory. The reversal of the order of articles 33 and 34 would be an improvement and the addition of the word " act " would dispel all doubt. Furthermore, it was right to omit paragraph 2, for fraud destroyed all confidence and vitiated the treaty altogether.

76. Mr. TUNKIN said that he was in complete agreement with the Special Rapporteur's proposals for paragraph 1.

77. With regard to paragraph 2, he would hesitate at that stage to support its deletion; the Commission should suspend its decision on the paragraph and revert to it and to the corresponding paragraphs of other articles when it discussed 46. The discussion might then show that a paragraph 2 in some form was necessary in article 33.

78. Mr. ROSENNE said he was glad to have the support of the Special Rapporteur and other members for his Government's proposal to reverse the order of articles 33 and 34.

79. With regard to paragraph 1, he had a doubt which was rather fundamental in character. He would put forward the tentative suggestion to drop the adjective " contracting " before the word " State "; as the text now stood, it would require the fraud to have been induced by a contracting party, and he asked what would be the position if it had been the result of the action of another State.

80. With regard to paragraph 2, he understood the position to be that the question of separability was completely reserved; when the Commission discussed the substantive article on separability, it would consider its application to each individual article.

81. Mr. AMADO asked whether, after the addition of the word " act " in the Special Rapporteur's new text, it was sufficiently clear that the word " fraudulent " qualified also the word " conduct ".

82. Mr. BRIGGS said he supported the suggestion by Mr. Cadieux that note should be taken of the United Kingdom Government comment that provision should be made for independent adjudication on the interpretation and application of article 33 (A/CN.4/183, p. 26). The United States Government had also suggested that it would be highly desirable to include a requirement that the fraud should be determined judicially. No change was of course required in the language of article 33 : the matter could be dealt with when the Commission examined article 51.

83. He also supported the suggestion by the Government of Israel for the reversal of the order of articles 33 and 34.

84. With regard to paragraph 2, he agreed that it should be taken up in connexion with article 46 and he supported the Special Rapporteur's suggestion that, for the time being, the Commission suspend its decision on that paragraph.

85. He favoured the Special Rapporteur's rewording of paragraph 1, but suggested the insertion of the words " a ground for " before the words " invalidating its consent ". That would emphasize that the mere fact of invoking fraud did not automatically invalidate consent. The expression " invoke as a ground for invalidating " was to be found in the Special Rapporteur's redrafts of articles 46, 47 and 49 (A/CN.4/183). A similar expression was used in some of the articles adopted by the Commission at its fifteenth and sixteenth sessions.

86. Mr. PESSOU said he supported Mr. Briggs's remarks and also attached a great deal of value to Mr. Ago's comments. From the point of view of method, while whatever provisions could be grouped together should be so grouped, provisions dealing with independent matters should be kept separate.

87. With reference to Mr. Bedjaoui's suggestion, even in the light of the historical reference by which the suggestion had been accompanied, it was hardly possible to introduce the private-law notion of injury *(lésion)* without coming back to the *actio pauliana* of Roman Law.

88. The CHAIRMAN, speaking as a member of the Commission, said he would be ready to agree to the suggestion that the discussion should for the moment disregard the question of the separability of treaties, which was dealt with in the original paragraph 2 and could be discussed later. On that point he agreed with Mr. Ago, not only because the different clauses of a treaty were the result of a compromise but also because some of the provisions of a treaty were subordinate to the principal clause.

89. With regard to the order of the articles concerning fraud and error, no doubt fraud was a narrower concept than error, but since international practice attached more importance to fraud, he would prefer articles 33 and 34 to remain in the existing order. He would, however, be prepared to leave that point to the Drafting Committee.

90. If the addition of the word " act " removed the misgivings of some governments, he would not object to its insertion, even though he considered that the idea of an isolated act would be covered by the term " conduct ".

91. With regard to Mr. Rosenne's suggestion that not only the fraudulent conduct of a contracting State but also that of other States should be capable of being invoked, he considered that a provision to that effect should appear rather in the article concerning error, or that a suitable passage should be included in the commentary to that article, even though theoretically it was

[3] de Clerq, *Recueil des traités de la France*, Vol. IV, p. 375, Paris, 1880.

conceivable that there might be fraud through the behaviour of another State.

92. Mr. Briggs's proposal created some difficulty, since if the English word " ground " were translated in French by " *motif* ", the term might be ambiguous, for the " *motif* " was what decisively affected the formation of the will and not what gave the right to perform the act.

93. He could accept the Special Rapporteur's proposal and the article could be referred to the Drafting Committee.

94. Mr. AGO said that the Chairman had raised some questions which should be most carefully considered by the Drafting Committee.

95. At least so far as the French text was concerned, he was reluctant to agree to the addition of the word " act " *(acte)*, for it might convey the idea of a juridical act or deed. The word " conduct " would cover any isolated act or series of acts, or even an omission, and consequently would suffice.

96. The difficulty created by the English term " ground " and the French " *motif* " might perhaps derive from a difference of approach between the legal systems descended from Roman law and the others. The French expression " *viciant son consentement* " expressed all that was meant. The difference which had given rise to the difficulty had been present already in the 1963 draft.

97. Mr. YASSEEN said he disagreed with Mr. Ago's interpretation of the meaning of the word " conduct ", which he took to suggest a certain continuity, and continuity could not consist of a single act. That was why some States had taken the view that article 33 should provide expressly that fraud could consist of a single act. The addition of the word " act " was accordingly of some value.

98. The CHAIRMAN, speaking as a member of the Commission, said that to his mind " conduct " could be either an isolated act or a continuous series of acts. According to the opinions of learned writers, fraud did not necessarily consist of a number of acts.

99. Mr. AMADO said that the interpretation of a term like " conduct " should be left to those responsible for interpreting the text.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that he personally shared the view that the term " conduct " was broad enough to cover both a single act and a series of acts; he had discussed the point in paragraph 3 of his observations on article 33 (A/CN.4/183, p. 28). He had, however, no objection to the insertion of the words " act or " before " conduct " in order to take into account a number of government comments. The question could be left to the Drafting Committee.

101. With regard to Mr. Amado's remarks, he felt that, in English, the adjective " fraudulent ", covered both " act " and " conduct ", especially since the following operative statement, " may invoke the fraud ", threw the adjective to both expressions. However, that point could also be left to the Drafting Committee.

102. With regard to Mr. Briggs's suggestion to introduce the words " a ground for ", the Commission had used that phrase in other articles, especially those on termination. The question had been discussed in 1963 in connexion with the effect of the draft articles on the stability of treaties. The aim was to stress that the rules embodied in the various articles did not authorize a State to pronounce unilaterally the invalidity of a treaty. The use of the expression was also intended to emphasize that the various articles in question were covered by the provisions on the procedure for invoking grounds for invalidity. In the articles on fraud and error, however, the Commission had used the same expression as was used in the French text. The Drafting Committee could examine the matter, bearing in mind the Commission's concern with the stability of treaties.

103. Mr. Rosenne had suggested deleting the word " contracting " before " State " so as to cover the possibility of fraud being committed by another State. The Chairman had answered that point: if the fraud was committed by another State, it did not constitute grounds for invalidating consent *vis-à-vis* a contracting State which was not responsible for that fraud. Of course, the matter would be different in the event of complicity, which would extend the effect to the contracting State benefiting from the fraud.

104. With regard to paragraph 2, he had not suggested its deletion, but only that the question should be examined in connexion with article 46; the problem of separability should be considered in connexion with each article in order to ascertain whether any distinction should be drawn between the various articles.

105. The question of independent adjudication, to which attention had been drawn by Mr. Cadieux, arose in connexion with many of the articles of the draft. The matter had been discussed at length in 1963 and had been raised by governments in connexion with numerous articles. He did not feel that it was necessary to take it up in connexion with article 33, which could now be referred to the Drafting Committee for consideration in the light of the discussion.

106. Mr. ROSENNE said that he accepted the Chairman's explanation, which had been endorsed by the Special Rapporteur, of the reasons for the retention of the word " contracting " before " State ".

107. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 33 to the Drafting Committee, on the understanding that paragraph 2 would be reserved for consideration with the article on separability.

It was so agreed.[4]

The meeting rose at 1 p.m.

[4] For resumption of discussion, see 840th meeting, paras. 14-18.