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FIFTY-NINTH MEETING

Wednesday, 8 May 1968, at 3.10 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 53 (Denunciation of a treaty containing no provision regarding termination) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 53 of the International Law Commission's draft.[1]

2. Sir Francis VALLAT (United Kingdom), introducing his delegation's amendment (A/CONF.39/C.1/L.311), said he thought article 53 could act as a safety-valve in the future convention, because it would permit the termination of or withdrawal from a treaty to take place smoothly and possibly as a matter of negotiation, without giving cause for controversy. By specifying a period of twelve months, paragraph 2 left sufficient time for discussion and negotiation before the notice took effect.

3. The task of the Conference was to strike a balance between the binding character of a treaty and the need to terminate it in certain circumstances. The stability of treaties had to be ensured in the interests of international peace and security, but provision also had to be made for parties to withdraw from treaties which, although of indefinite duration, were intrinsically temporary in character. The problem was to find the right formula for article 53. The Peruvian amendment (A/CONF.39/C.1/L.303) was too narrow and that submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) too general. The Cuban amendment (A/CONF.39/C.1/L.160), on the other hand, was very much in line with the purpose of the United Kingdom amendment (A/CONF.39/C.1/L.311), which was designed to introduce an additional ground for termination and stipulated that the right of denunciation or withdrawal might be implied from " the character of the treaty ". In view of the strong arguments advanced in favour of such a provision, especially by the Cuban representative, he thought it unnecessary to justify his delegation's amendment further.

4. Mr. EVRIGENIS (Greece) said that his delegation's amendment (A/CONF.39/C.1/L.315) was similar to and based on the same grounds as the amendments by Cuba (A/CONF.39/C.1/L.160), Peru (A/CONF.39/C.1/L.303) Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) and the United Kingdom (A/CONF.39/C.1/L.311).

5. It was a universally recognized principle of law that the implied intention of the parties should be sought and established in the light of the circumstances in which the agreement was made. That principle was clearly expressed by the International Law Commission in paragraph (5) of its commentary to article 53 in the statement that the right of denunciation or withdrawal would not be implied " unless it appears from the general circumstances of the case that the parties intended to allow the possibility or unilateral denunciation or withdrawal ". The Greek amendment simply inserted that proviso in the text of article 53. The wording of the Greek amendment was more flexible and more general than that of the other amendments to the same effect, so that it would cover all the objective circumstances which should be taken into account, where necessary, in determining the implied will of the parties, such as the nature of the treaty, the circumstances of its negotiation and conclusion and any other circumstance external or internal to the treaty which might enable the existence of an implied intention to be deduced in a particular case. It would be remembered that the expression " in the light of all the circumstances of the case " was commonly used in the same context in international private contracts. The principle that the implied intention of the parties regarding the law applicable to the contract should be sought " in the light of the circumstances of the case " had been unanimously confirmed both by legal theory and by judicial decisions in many countries; it would be useful to establish it also with respect to international treaties.

6. Mr. CASTRÉN (Finland) said that his delegation was entirely satisfied with the principle and formulation of article 53, which confirmed clearly and precisely the *pacta sunt servanda* principle. Accordingly, it could not support the five amendments submitted to that article; those amendments tended to substitute vague formulas for the International Law Commission's far more precise wording, which required that the intention of the parties to admit the possibility of denunciation or withdrawal from a treaty " is established ", namely in some way proved. The amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) seemed particularly dangerous because it reversed the presumption of the stability of treaties in favour of that of the right of denunciation or withdrawal, a theory which had been rejected almost unanimously by the leading authorities.

7. Mr. SMALL (New Zealand) said that, from the drafting point of view, paragraph 1 of article 53 represented an incorrect generalization. In fact, provision was made in other articles of the draft for several obvious cases in which a party might terminate or denounce or withdraw from a treaty even if the treaty did not provide for termination, and even if the parties to the treaty had not contemplated the possibility of withdrawal. That applied, for example, to the situations covered by articles 49 and 59 if read in conjunction with article 62.

8. His delegation supposed that the International Law Commission had preferred to formulate article 53 in simple terms rather than associate it with extensive and perhaps over-complicated reservations. In other words, article 53 laid down a ground for termination independently of the other grounds of termination, denunciation or withdrawal provided for in the other articles of the draft and in particular in articles 49 and 59 interpreted in conjunction with article 62.

9. Accordingly, his delegation was willing to accept the wording of article 53 on the understanding that that text in no way affected the operation of the process of denunciation and withdrawal in the circumstances laid down in

[1] For the list of the amendments submitted, see 58th meeting, footnote 5.

other articles which did not satisfy the tests laid down in article 53. It would have been possible to specify that in article 53, but his delegation did not necessarily suggest that the Drafting Committee should consider doing so.

10. Mr. JACOVIDES (Cyprus) said that, in his delegation's view, it would be inappropriate to infer from the silence of the parties on the question that they had necessarily intended to exclude the possibility of denunciation or withdrawal, particularly since several weighty authorities had expressed the view that the right of denunciation or withdrawal might well be implied in certain types of treaty, such as treaties of alliance; in that case, the presumed intention of the parties must be that in the absence of express provisions to the contrary, the right of the parties to denounce or withdraw from the treaty after giving reasonable notice was implied in the treaty. That opinion was based upon the law as well as on sound sense as it was clear that a treaty for alliance, for example, could not remain indefinitely in force if the underlying basis of the treaty had ceased to exist. Consequently the text of article 53 should be amended accordingly.

11. The amendments by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2), Cuba (A/CONF.39/C.1/L.160), the United Kingdom (A/CONF.39/C.1/L.311) and Greece (A/CONF.39/C.1/L.315) served the desired purpose, in particular the United Kingdom amendment, as the character of the treaty was a primary consideration in that respect.

12. Mr. ROSENNE (Israel) said that although the International Law Commission had made a step forward in reconciling divergent views, his delegation thought that article 53 of the draft was too elliptical and that it could be improved along the lines of the amendments by Cuba (A/CONF.39/C.1/L.160), Peru (A/CONF.39/C.1/L.303), and the United Kingdom (A/CONF.39/C.1/L.311). If the principle of that modification was accepted, the actual wording could be left to the Drafting Committee. His delegation preferred the formula proposed by the United Kingdom. Also, that part of the amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) referring to the circumstances of the conclusion of the treaty might be expressed in article 53 although that idea was actually contained in the text of the draft.

13. His delegation could not support the broad formula suggested by Greece (A/CONF.39/C.1/L.315), namely, " in the light of all the circumstances of the case ". Although the International Law Commission had used that expression in its commentary, it did not seem appropriate for inclusion in a dispositive text.

14. His delegation noted that no mention had been made in article 53 of the possibility of suspending the application of a treaty in the hypothesis dealt with in that article. The Drafting Committee might consider including a provision to that effect.

15. Mr. ARMANDO ROJAS (Venezuela) said he had nothing to add to the Spanish representative's very sound arguments in favour of the amendment by Spain (A/CONF.39/C.1/L.307 and Add.1 and 2), of which his country was a sponsor. He merely wished to point out that article 53 raised one of the most complex problems in contemporary international law, namely the right of the parties to denounce a treaty that did not contain any provisions to the contrary, or which, by its nature, must be considered as permanent.

16. According to paragraph (5) of the commentary " the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal ". In its present wording, article 53 deprived the parties to a treaty of their traditionally recognized right to denounce it, in the absence of a provision to the contrary; it was therefore unacceptable. On the other hand, the amendment by Spain, Colombia and Venezuela, by giving the principle an affirmative formulation, made it more coherent and more consistent with the right of denunciation that should be implicit in any treaty. Moreover, it took over an earlier suggestion made by the Special Rapporteur. [2] It laid down, as the only exceptions to the right of denunciation of or withdrawal from a treaty, the nature of the treaty and the circumstances of its conclusion.

17. With regard to paragraph 2, his delegation shared the opinion of those States which held that a twelve-months' time-limit was likely to be too long in certain cases and that it should be shortened. Perhaps that suggestion could be put to the Drafting Committee.

18. Mr. MARESCA (Italy) said that his delegation supported article 53 of the draft. To admit that, merely by the operation of its unilateral will, a party could at a given moment terminate a treaty to which it had itself subscribed, was to consider treaties as scraps of paper. If a party wished to reserve the right to terminate a treaty, it could always insert in the treaty a clause on denunciation. If it did not intend to reserve that right, it should keep silent.

19. Article 53 thus ensured the required legal certainty. The final provision in paragraph 1 of that article introduced an element of flexibility which should be accepted cautiously.

20. His delegation could not approve any of the amendments submitted to that article as they all had more or less the same effect of increasing the possibility of the unilateral denunciation of a treaty by one of the parties and of undermining the stability of international treaties.

21. Mr. SAMRUATRUAMPHOL (Thailand) said that in the opinion of his delegation, the essential point was to find the right balance between the requirements of the stability of treaties and the need to adapt treaty relations between States to the changing conditions of the modern world. That balance cuold only be achieved by taking into consideration the diversity of legal relationships, which demanded different solutions according to the circumstances.

22. His delegation therefore regarded the nature of a treaty and the circumstances of its conclusion as no less important than the intention of the parties in determining

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 28.

whether a treaty could be denounced. The Cuban amendment (A/CONF.39/C.1/L.160) fully met that view. The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) and the United Kingdom amendment (A/CONF.39/C.1/L.311) also deserved consideration by the Drafting Committee. His delegation would therefore vote in favour of those amendments.

23. Mr. MIRAS (Turkey) said that in the case provided for in article 53, the normal procedure was for the parties concerned to agree to revise the treaty. The Turkish delegation therefore found the existing wording of article 53 unsatisfactory.

24. The application of article 53 necessitated legal safeguards, without which his delegation could not support the retention of the article.

25. The amendments to the article tended to enlarge its scope and the Turkish delegation could not support them. Since they concerned matters of substance, they should all be put to the vote, together with article 53 itself.

26. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation subscribed to the basic principle expressed in draft article 53. That principle was consonant with the rule *pacta sunt servanda*, and the Soviet delegation had repeatedly declared that one of its major concerns was that the future convention on the law of treaties should not contain provisions permitting derogation from that fundamental rule, not only of international law but also of all systems of relations between States. His delegation was dissatisfied, however, with the wording of article 53, and particularly the concluding sentence of paragraph 1. It was difficult to establish the real intention of the parties unless it was expressly indicated in the text of the treaty. The concluding sentence of paragraph 1 was therefore calculated to raise difficulties of interpretation, particularly if the parties wished to object to the withdrawal of one of their number.

27. Instead of the present wording, it would have been better to say in substance that denunciation was impossible unless the object and purpose of the treaty showed that it could be denounced, subject of course to the procedures prescribed in article 53, paragraph 2 and in article 62. Such a formula would show that peace and boundary treaties, for example, were not open to denunciation because that would conflict with the object and purpose of the treaty.

28. In any event, the Soviet delegation thought the opening portion of paragraph 1 clearly expressed the fundamental principle, and it had therefore submitted no amendment. It would support those amendments which helped to clarify the text. The Cuban amendment (A/CONF.39/C.1/L.160) came closest to the Soviet delegation's viewpoint. It would therefore vote in favour of it. The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) went too far. The remaining amendments could be referred to the Drafting Committee.

29. Mr. VARGAS (Chile) said his delegation supported draft article 53, which clearly reaffirmed the rule *pacta sunt servanda*. Consequently, it could not accept those amendments which would facilitate denunciation or unilateral withdrawal where the treaty contained no provision on the matter. It could not therefore support the Cuban amendment (A/CONF.39/C.1/L.160), which left it to the discretion of one party to a treaty to decide whether or not it would continue to regard itself as bound by it. That would cause many difficulties it would be better to avoid. For the same reasons, his delegation could not support the amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2), which would reverse the general rule stated in article 53. It recognized, however, that the parties were entitled to denounce or withdraw from some treaties, but such cases should be an exception.

30. His delegation supported the Peruvian amendment (A/CONF.39/C.1/L.303), which emphasized even more clearly than the Commission's text the importance of the intention of the parties as an element determing the right of denunciation or withdrawal. On the other hand, it did not support the United Kingdom amendment (A/CONF.39/C.1/L.311), because the character of the treaty, however important, was not enough to determine the right of denunciation or withdrawal.

31. The Greek amendment (A/CONF.39/C.1L.315) deserved consideration by the Committee of the Whole, because it would introduce a useful element.

32. Mr. MAKAREWICZ (Poland) said he thought article 53 dealt with a particularly difficult matter. The possibility of denouncing a treaty should not be admitted too easily, since that would endanger the stability of treaties, but on the other hand, the possibility should be admitted if it was established that such was the intention of the parties. The International Law Commission had therefore rightly emphasized in its draft the importance of the intention of the parties. Many treaties contained no provision regarding their termination, in particular treaties in simplified form, which were quite common in contemporary practice; the subjects dealt with in treaties in simplified form were usually of such a nature that no one could claim that they were perpetual treaties. The right to denounce or withdraw from such treaties ought to depend on the general circumstances of the case, including the character of the treaty.

33. Several delegations which had submitted amendments had proposed the enumeration in article 53 of various objective circumstances from which the possibility of denunciation could be deduced, including the statements of the parties, the circumstances of the conclusion of the treaty and the nature of the treaty. In that respect, his delegation wished to draw attention to the Commission's commentary, which indicated the real meaning of the words " unless it is established that the parties intended to admit the possibility of denunciation or withdrawal". The Commission did not regard intention as a purely subjective element. The intention of the parties was to be inferred from " the general circumstances of the case ". The wording of paragraph 1 therefore seemed to cover all the relevant circumstances, including the statements of the parties, the circumstances of the conclusion of the treaty and, naturally, the character of the treaty. His delegation did not regard the nature of the treaty as a separate factor with respect to the intention

of the parties. It approved of the idea expressed in the second sentence of paragraph (5) of the commentary.

34. The Commission had rightly stressed that the very character of some treaties excluded the possibility that the contracting States intended them to be open to unilateral denunciation or withdrawal. Treaties of peace and treaties fixing territorial boundaries were cases in point.

35. Mr. MOUDILENO (Congo, Brazzaville) said he fully supported the Cuban representative's remarks and would vote for the Cuban amendment (A/CONF.39/C.1/L.160). The ceding of bases by small and weak States to other States was a very dangerous practice, as such a base often constituted a starting-point for a war of aggression against the country in whose territory it was situated or against a third State.

36. Mr. BISHOTA (United Republic of Tanzania) said that his delegation supported the original text of article 53. It might perhaps be useful to insert the word " unilateral " before the word " withdrawal ", so as to bring out clearly the distinction between articles 51 and 53.

37. Mr. KEARNEY (United States) thought that article 53 in its present form established a rule the application of which was simple and comprehensible. The amendments submitted created additional problems and did not provide any means for their solution. His delegation therefore supported the International Law Commission's text of article 53.

38. Mr. POP (Romania) pointed out that there were many treaties which did not contain any provision relating to their termination or denunciation and that the lack of such provisions had been a source of many difficulties in international relations. In certain cases, the denunciation of such a treaty had called forth protests, whereas in others it had been accepted without demur. In view of the differing practice of States in that respect, doctrine was also divided. Of the two possible solutions, namely the prohibition of denunciation or withdrawal and the possibility of denunciation and withdrawal in certain circumstances, his delegation considered that the second solution was preferable, because it was more in line with the new aspects of State practice.

39. Prohibition of the denunciation of treaties could be interpreted to mean that treaties were of unlimited duration and had a permanent character. That idea had been rejected by States. That did not mean, however that all treaties, without exception, could be denounced, despite the fact that they contained no express provision to that effect. In that case, it could be assumed that the parties, by not including any such clause in the treaty, had not admitted in principle the right of denunciation or withdrawal. But such a presumption might yield to clear proof of a contrary intention by the parties. For that reason, his delegation was in favour of the rule laid down in article 53 of the draft.

40. The question that the Committee had to decide was whether article 53 should confine itself to mentioning the intention of the parties or whether it should mention certain objective elements whereby the will of the parties could be determined. Those elements, such as the nature of the treaty, declarations by the parties or other circumstances might help in ascertaining the will of the parties. For that reason, the Cuban amendment (A/CONF.39/C.1/L.160 deserved consideration.

41. Mr. MYSLIL (Czechoslovakia) thought that the Commission should have tried to make a distinction between the different types of treaties for purposes of the application of article 53. For example, in the case of general multilateral treaties, stability might be the rule; they could be revised. In the case of bilateral agreements, they could be denounced, with the exception of peace treaties and treaties fixing territorial boundaries. The will of the parties might not be a decisive factor. The nature or type of treaty should also be taken into consideration. That was the idea behind the Cuban amendment (A/CONF.39/C.1/L.160), which his delegation would accordingly support. The amendment by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) went too far and was unacceptable.

42. Mr. ALCIVAR-CASTILLO (Ecuador) said that the nature of the treaty was not a contributory factor but a separate ground for terminating a treaty. Consequently, his delegation fully supported the Cuban amendment (A/CONF.39/C.1/L.160).

43. Mr. KEBRETH (Ethiopia) said that his delegation thought—and that attitude was justified by the International Law Commission's comments—that for certain categories of treaty, the nature of the treaty was the only controlling factor in determining the intention of the parties to admit the possibility of denunciation or withdrawal. The Commission had cited specific examples in that connexion. In those circumstances, his delegation approved the Commission's text.

44. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had been in favour of the stability of treaties save where a different intention of the parties could be inferred from certain factors. The formulation of that article, which was the opposite of that proposed by Spain, had been arrived at after very thorough study.

45. As to the phrase " unless it is established ", it should be remembered that, in the 1963 version of the article under consideration, the Commission had enumerated the factors from which to determine the intention of the parties. The article had provided: " unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties ".[3] The amendments submitted differed from that version in that they made the character of the treaty a separate element bearing no relation to the statements of the parties or to the circumstances surrounding the conclusion of the treaty. In its latest version the Commission had used the words " unless it is established ", which meant that certain evidence was needed; it had not mentioned the various elements available as grounds for denunciation or withdrawal. It had used a general form of words which covered by implication the character of the treaty, the circumstances of its conclusion and the statements of the parties, in other words all the elements mentioned in the amendments.

46. The New Zealand representative had raised a question of form which might also be a question of substance.

[3] *Yearbook of the International Law Commission, 1963*, vol. II, p. 200, article 39.

His observations regarding the Commission's intention were accurate. In that article the Commission had dealt with those cases in which the parties had the right of denunciation or withdrawal and were not required to furnish further grounds for such action. The ground here was the intention of the parties; it was entirely different from all other grounds for termination of a treaty. The Drafting Committee should take note of the New Zealand representative's observation and consider whether it would not be advisable to insert a safeguard clause.

47. Mr. ALVAREZ TABIO (Cuba) explained that his amendment related only to paragraph 1 of article 53. His delegation had no objection to paragraph 2.

48. Mr. RUIZ VARELA (Colombia) said that his delegation had joined in sponsoring the Spanish amendment (A/CONF.39/C.1/L.307 and Add.1 and 2); the text of that amendment was affirmative in form, well balanced and in keeping with legal theory and international practice. It stated a general rule on capacity to denounce a treaty which contained no provision regarding termination, and it provided a means of preserving the freedom of action of parties wishing to terminate a treaty. At the same time it provided for exceptions to that rule.

49. A further reason why his delegation supported the Spanish amendment was that it was in keeping with the provisions of the Convention on Treaties adopted by the Sixth International Conference of American States at Havana in 1928.[4]

50. Article 14 of that Convention specified, among the grounds for termination of a treaty, its " total or partial denunciation ". As to the conditions for denunciation, article 17 provided that, in the absence of a special clause, " a treaty may be denounced by any contracting State, which State shall notify the others of this decision, provided it has complied with all obligations covenanted therein "; the treaty terminated one year after the notification was made. That Convention was a useful contribution by the American countries to general international law; it was still the only instrument of positive law in existence on the subject, and was recognized by all specialists in international law as an excellent piece of codification. That provided his delegation with a further reason for vigorous support of the Spanish amendment (A/CONF.39/C.1/L.307 and Add.1 and 2).

51. Sir Francis VALLAT (United Kingdom) said that Sir Humphrey Waldock had raised a point which emerged from the International Law Commission's commentary: namely that, in order to have the right to denounce a treaty in virtue of article 53, it was necessary to rely on some element other than the character of the treaty. There was no doubt, however, that in certain cases the character of the treaty was the only guide. That was a practical consideration which the Convention should take into account. That idea was embodied in the Cuban amendment (A/CONF.39/C.1/L.160). Since that amendment affected only paragraph 1, his delegation was prepared to support it. He asked whether the word " statement " in that amendment ought not to be in the plural.

52. Mr. ALVAREZ TABIO (Cuba) confirmed that the amendment referred to the statements (in the plural) of the parties.

53. Sir Humphrey WALDOCK (Expert Consultant) said that the United Kingdom representative's comment was more applicable to the 1963 text, since in the new text the Commission had not listed separately the various elements from which to determine the intention of the parties but had used a very general form of words.

54. The CHAIRMAN put to the vote the amendments to article 53, beginning with the amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) as being the furthest removed from the original text.

The amendment submitted by Spain, Colombia and Venezuela (A/CONF.39/C.1/L.307 and Add.1 and 2) was rejected by 55 votes to 10, with 21 abstentions.

The Cuban amendment (A/CONF.39/C.1/L.160) was rejected, 34 votes being cast in favour and 34 against, with 24 abstentions.

The United Kingdom amendment (A/CONF.39/C.1/L.311) was adopted by 26 votes to 25, with 37 abstentions.

The Peruvian amendment (A/CONF.39/C.1/L.303) was rejected by 41 votes to 5, with 43 abstentions.

55. Mr. EVRIGENIS (Greece) said that, in the light of the explanations given by the Expert Consultant, his delegation withdrew its amendment (A/CONF.39/C.1/L.315).

56. The CHAIRMAN suggested that draft article 53, together with the United Kingdom amendment (A/CONF.39/C.1/L.311), should be referred to the Drafting Committee.

It was so agreed[5]

Article 54 (Suspension of the operation of a treaty by consent of the parties)[6]

57. Mr. ALVARADO (Peru), introducing his delegation's amendment (A/CONF.39/C.1/L.304) to article 54, sub-paragraph (*a*), explained that it raised no problem of substance; its sole purpose was to make an explicit reference to the conditions laid down in the treaty itself with regard to the suspension of its operation.

58. His delegation had submitted an identical amendment (A/CONF.39/C.1/L.231) to article 51, concerning termination of or withdrawal from a treaty, and considered it desirable that sub-paragraph (*a*) of article 54, concerning the suspension of the operation of a treaty, should be drawn up in equally clear language. The wording which his delegation proposed would make the sub-paragraph more definite and at the same time widen its scope, for it provided that the operation of a treaty might be suspended in conformity with several provisions instead of only one. In other words, it presented in a general form what the International Law Commission had presented in a restricted from. Since it was a drafting amendment (A/CONF.39/C.1/L.316), which would enable mittee without being put to the vote.

59. Mr. EVRIGENIS (Greece) introduced the Greek amendment (A/CONF.39/C.1/L.316) which would enable

[4] *Sixth International Conference of American States: Final Act (motions, agreements, resolutions and Conventions)* (Havana, 1928), p. 135.

[5] For resumption of the discussion on article 53, see 81st meeting.

[6] The following amendments had been submitted: Peru, A/CONF.39/C.1/L.304; Greece, A/CONF.39/C.1/L.316.

the parties to suspend the operation merely of certain provisions of a treaty. The introduction of that element of flexibility would be in keeping with the principle laid down in article 41, paragraph 1, which, it would seem, met with the approval of the Committee of the Whole. The Greek amendment could equally well be examined when the discussion of article 41 was resumed.

60. Mr. GEESTERANUS (Netherlands) said that the words " all the parties ", used in paragraph (*b*), raised a problem. It might perhaps be desirable not to limit the rule exclusively to the parties, but to take into account the interests of other States which had expressed their consent to be bound by the treaty but for which the treaty had not yet entered into force. The Netherlands had already submitted amendments on those lines to articles 36 and 51 (A/CONF.39/C.1/L.232 and L.313), and those amendments had been referred to the Drafting Committee. If the Drafting Committee accepted those two amendments, it might perhaps consider making the same change in article 54.

61. Sir Humphrey WALDOCK (Expert Consultant), replying to a question put by Mr. LUKASHUK (Ukrainian Soviet Socialist Republic), said that the International Law Commission had not imagined that article 41 could apply to the cases covered by article 54. The parties were sovereign in the matter of separability and in that of suspension, but article 41 dealt with rights conferred on the parties individually, whereas article 54 was concerned with an agreement among the parties.

62. The idea expressed in the Greek amendment seemed self-evident: since the parties might agree to suspend the operation of the treaty as a whole, they could manifestly agree to suspend the operation of certain of its provisions.

63. The CHAIRMAN suggested that article 54, together with the amendments, should be referred to the Drafting Committee.

It was so agreed.[7]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

64. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 9, 9 *bis*, 10 and 10 *bis* adopted by that Committee.

65. Mr. YASSEEN, Chairman of the Drafting Committee, said that he proposed first of all to make a few general remarks concerning the procedure for the drafting of articles in the different working languages. Those members of the Drafting Committee whose language was Chinese, Spanish or Russian carefully studied the text of the International Law Commission's draft prepared in their language and submitted from time to time to the Drafting Committee corrections to the syntax or terminology. The Committee then referred such corrections to the Conference's language services so that the latter could ensure that they did not affect the versions in the other languages. All the corrections relating to their own particular language alone were incorporated in the text of that version submitted by the Committee to the Committee of the Whole. To avoid tiresome repetitions, he would abstain from enumerating those corrections when submitting to the Committee of the Whole the articles adopted by the Drafting Committee, but would merely draw attention to the changes made by the Committee itself at its meetings.

Article 9 (Authentication of the text)[8]

66. Mr. YASSEEN, Chairman of the Drafting Committee, said that article 9 had been approved by the Committee of the Whole at its fifteenth meeting. The Drafting Committee had not considered it necessary to make any changes.

Article 9 was approved.

(New article) *Article 9* bis[9]

67. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 9 *bis* adopted by the Drafting Committee read as follows:

"*Article 9* bis

" The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, approval, acceptance or accession, or by any other means if so agreed."

68. At its 18th meeting the Committee of the Whole had adopted the principle common to two amendments, namely, the amendment submitted by the United States and Poland (A/CONF.39/C.1/L.88 and Add.1) proposing a new article 9 *bis*, and that submitted by Belgium (A/CONF.39/C.1/L.111) proposing a new article 12 *bis*.

69. The Committee had noted that the legal effect of those two amendments was the same: both laid down a subsidiary rule which left it open to the parties to agree to another method of expressing consent to be bound by a treaty. Most members of the Committee had preferred the formula proposed by the United States and Poland, as an introduction to the articles relating to methods of expressing consent to be bound by a treaty. The Drafting Committee had made only one change in the text proposed in the United States and Polish amendment; it had added a comma after the word " accession ".

70. Mr. HARRY (Australia) pointed out that in article 2, paragraph 1(*b*), the different methods of expressing consent to be bound by a treaty had been enumerated in a slightly different order than in article 9 *bis*. When it came to consider article 2, the Drafting Committee might perhaps rearrange those terms so that they appeared in the same order as in article 9 *bis*.

71. The CHAIRMAN thought that that would be possible, as the content of article 9 *bis* would determine the final form of paragraph 1(*b*) of article 2.

Article 9 bis *was approved.*

Article 10 (Consent to be bound by a treaty expressed by signature)[10]

72. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 10 adopted by the Drafting Committee read as follows:

[7] For resumption of the discussion on article 54, see 81st meeting.

[8] For earlier discussion of article 9, see 15th meeting.

[9] For earlier discussion of the proposed new article 9 *bis*, see 15th and 18th meetings. The proposed new article 12 *bis* was discussed at the 18th meeting.

[10] For earlier discussion of article 10, see 17th meeting.

"*Article 10*

" 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

" (*a*) the treaty provides that signature shall have that effect;

" (*b*) it is otherwise established that the negotiating States were agreed that signature should have that effect;

" (*c*) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

" 2. For the purposes of paragraph 1:

" (*a*) the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

" (*b*) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty."

73. The Drafting Committee had followed the suggestion made in a Spanish amendment (A/CONF.39/C.1/L.108) that the words " in question " after the word " State " in paragraph 1 (*c*) should be deleted. Those words added nothing to the meaning and created serious difficulties for the Spanish translation.

74. The Drafting Committee had not seen fit to accept any of the other amendments referred to it by the Committee of the Whole.

Article 10 was approved.

(New article) *Article 10* bis (Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty) [11]

75. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for the new article 10 *bis* adopted by the Drafting Committee read as follows:

"*Article 10* bis

" The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

" (*a*) the instruments provide that their exchange shall have that effect;

" (*b*) it is otherwise established that those States were agreed that the exchange of instruments should have that effect."

76. He reminded the Committee of the Whole that, at its 18th meeting, it had adopted the Polish amendment (A/CONF.39/C.1/L.89) proposing a new article 10 *bis* on the expression of the consent of States to be bound by a treaty constituted by instruments exchanged between the parties. In practice, that type of treaty frequently took the form of an exchange of notes.

77. The Drafting Committee had based itself on the Polish amendment, but had redrafted it so as to take account of the Committee of the Whole's decisions on the other articles relating to the expression of consent; the Committee of the Whole had deemed it inappropriate to include a subsidiary rule in favour of a particular method of expressing that consent.[12] The wording of the Polish amendment might be construed to mean that it was stating a subsidiary rule establishing the presumption that an exchange of instruments constituted a treaty. That was the conclusion that had been arrived at by the majority of the members of the Drafting Committee.

78. Mr. ROSENNE (Israel) said that he saw no objection, in principle, to the adoption of article 10 *bis*. In his view, the two new articles 9 *bis* and 10 *bis* were useful additions.

79. Article 10 *bis*, however, contained the expression " The consent of States ", whereas in all the other articles relating to participation in a treaty the expression " The consent of a State " had been used. Perhaps the Drafting Committee might consider that point and decide whether the plural form should be retained in article 10 *bis*.

80. Mr. HARRY (Australia) said that his delegation had noticed the slight difference in drafting and had thought that it was deliberate; since article 10 *bis* concerned an exchange of instruments between at least two States, the plural seemed to be justified.

81. Mr. BLIX (Sweden) said that the Committee of the Whole had adopted the Polish amendment by 42 votes to 10, with 27 abstentions. The text of article 10 *bis* submitted by the Drafting Committee was completely different from the text proposed by Poland. His delegation had made reservations on that matter in the Drafting Committee. The Polish proposal had above all the merit of establishing a legal presumption, a residual rule—which was undisputed in his delegation's view—that when a treaty had been entered into by means of an exchange of notes, the expression of consent lay in that exchange, unless otherwise expressly agreed.

82. There was undoubtedly much controversy on the question whether treaties generally entered into force by signature or ratification. The Committee of the Whole had not settled that question. But his delegation did not think there was much doubt that agreements in the form of an exchange of notes, unless otherwise provided, became binding on the parties at the time of such exchange, without any need for subsequent approval. Attempts had already been made to establish a rule that agreements in so-called simplified form did not require ratification. His delegation had never believed in the possibility of finding a workable definition of such agreements. Nevertheless, it recognized that an exchange of notes did constitute a definable category of agreements. It would be regrettable therefore not to provide, at least for that kind of agreement, a rule to the effect that no subsequent approval was required after the exchange of instruments, unless otherwise agreed between the parties.

83. Unfortunately, the Drafting Committee had drawn up a text which, unlike the Polish amendment adopted by the Committee of the Whole, contained no residuary rule, but merely followed the pattern of other provisions relating to consent. There was a danger that the Drafting Committee's text would throw doubt on the existence of that rule and would therefore be a step backwards rather than forwards. In fact, it was purely descriptive.

[11] For earlier discussion of the proposed new article 10 *bis*, see 17th and 18th meetings.

[12] See 18th meeting.

84. His delegation realized the difficulty of finding a satisfactory formulation for the idea contained in the Polish amendment. However, the Drafting Committee might perhaps endeavour to render that idea more faithfully. He would suggest a wording such as: " The consent of States to be bound by a treaty constituted by instruments exchanged between them and embodying agreement between them is expressed by that exchange, unless the States have otherwise agreed ".

85. If the Drafting Committee's text was put to the vote, his delegation would be obliged to abstain.

86. Mr. ROSENNE (Israel) said that his comment was not merely that the word " State " should be put in the singular. He had wished to draw the Committee's attention to the fact that the expression " the consent of States " in article 10 *bis* was a new concept in the context of the articles on the conclusion of treaties, and while the intention of the Drafting Committee was clear, the text proposed could give rise to difficulties. He therefore thought that the Drafting Committee should re-examine the matter.

87. Subject to that, the Israel delegation would be prepared to vote for the article as a whole.

88. Mr. YASSEEN, Chairman of the Drafting Committee, said that the expression " The consent of States " was justified since it was stated in article 10 *bis* that consent was expressed by an exchange of instruments, and several States were therefore involved.

89. With regard to the Swedish representative's comments, he said that the majority of the members of the Drafting Committee had interpreted the decision of the majority of the Committee of the Whole on the Polish amendment as signifying that there was no need to lay down a residuary rule prescribing an exchange of instruments. The Drafting Committee had taken into account the attitude of the Committee of the Whole concerning other ways of expressing consent, in particular signature and ratification; and the Committee of the Whole had clearly decided not to accept any other method as a residuary rule to be applied when the treaty did not provide otherwise.

90. Mr. DE BRESSON (France) said he agreed with the remarks of the Chairman of the Drafting Committee.

91. Mr. MATINE-DAFTARY (Iran) said he thought the Drafting Committee's wording was a little too free. Treaties in simplified form were the exception. His delegation maintained the view it had already expressed in the Committee of the Whole, namely that ratification was the rule and that other cases should be the exception. Article 10 *bis* as proposed might give rise to abuse by States that desired to evade ratification.

92. He supported the proposal to refer the article to the Drafting Committee once again.

93. Mr. NAHLIK (Poland) said he agreed with the Chairman of the Drafting Committee about the comment of the Israel representative.

94. With regard to the wording of the article, he fully supported the Swedish representative. When an agreement had been concluded in the form of an exchange of notes, it only rarely required ratification.

95. Mr. JAGOTA (India) said he saw no difference in substance between the wording proposed in the Polish amendment and that of the Drafting Committee. The concluding words of the Polish amendment stated a residuary rule; that rule also existed in a more positive form in the wording proposed by the Drafting Committee, which explained in greater detail how to ascertain whether States had expressed their consent. Article 10 *bis* was worded consistently with article 10 and the other articles concerning consent. The new formula suggested by the Swedish representative was less satisfactory.

96. The plural form of the word " States " at the beginning of the article was justified since several States would have expressed their consent.

97. The proposed wording was acceptable and did not need to be referred back to the Drafting Committee.

98. Mr. WERSHOF (Canada) said it would be better to defer the vote on article 10 *bis*. To send it back to the Drafting Committee would not imply criticism. The Drafting Committee would simply be invited to re-examine the article, and might very well do no more than confirm its wording. The Committee of the Whole had, however, adopted the Polish amendment, and in view of what the Polish representative had just said, it could scarcely approve a new version which did not fully express the Polish delegation's intentions.

99. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had spent several meetings on formulating article 10 *bis*, which was a difficult article. The proposed wording expressed the opinion of the majority of the Drafting Committee, whose views could scarcely have changed. If the Committee of the Whole wished to send the text back to the Drafting Committee, it would also have to give it precise instructions. The Drafting Committee could not take upon itself to lay down a residuary rule about a means of expressing consent for which the International Law Commission had not even provided, particularly since the Committee of the Whole had decided not to stipulate a residuary rule in the articles concerning other means of expressing consent.

100. Mr. JIMENEZ DE ARECHAGA (Uruguay) said he agreed with the comments by the Chairman of the Drafting Committee. The Drafting Committee had considered not only the decision of the Committee of the Whole on the Polish amendment but also its decisions on all the other ways of expressing consent. The Czechoslovak delegation, which had proposed the statement of a residuary rule in the article on signature, had withdrawn its proposal on the ground that it had not secured sufficient support in the Committee of the Whole.[13] Neither had a proposal of a group of Latin American States to treat ratification as a residuary rule been accepted by the majority.[14] The Drafting Committee had therefore considered that the Committee of the Whole had confirmed the attitude taken by the International Law Commission and had not desired to establish a residuary rule but merely to indicate a procedure.

[13] See 18th meeting, paras. 7 and 8.

[14] *Ibid.*, para. 14.

101. Article 10 *bis* was entirely new, and Governments had had no opportunity of expressing their opinions. It would be paradoxical to introduce a residuary rule in that article when the Committee of the Whole had decided not to prescribe a residuary rule with regard to the traditional modes of expressing consent.

102. The Drafting Committee had realized the danger of introducing a presumption in virtue of which a State could become bound to another State by such a simple and common act as an exchange of notes.

103. It was for the Committee of the Whole to take the final decision.

104. Mr. BADEN-SEMPER (Trinidad and Tobago) asked for the drafting point concerning the plural form of the word " States " to be dealt with separately from the substantive question if a vote was taken. In article 9 *bis*, the word " State " was in the singular, although that article also dealt with the exchange of instruments. It was merely a question of drafting, however, which could be settled by the Drafting Committee without a vote by the Committee of the Whole.

105. The CHAIRMAN invited the Committee of the Whole to adopt article 10 *bis* and to leave it to the Drafting Committee to decide whether the word " States " in the phrase " The consent of States " at the beginning of the article should remain in the plural.

Article 10 bis *was approved by 69 votes to 1, with 18 abstentions, subject to the reservation stated by the Chairman.*

The meeting rose at 5.45 p.m.

SIXTIETH MEETING

Thursday, 9 May 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 55 (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only)

1. The CHAIRMAN invited the Committee to consider article 55 of the International Law Commission's draft.[1]

2. Mr. DE BRESSON (France) said that the French amendment (A/CONF.39/C.1/L.47) was in line with the other French amendments concerning restricted multilateral treaties. That category of treaties should at all times be applied entire by all the parties, and should therefore be excluded from the application of article 55. The amendment should be referred to the Drafting Committee.

3. Mr. ALVARADO (Peru) said that the Peruvian amendment (A/CONF.39/C.1/L.305) was in keeping with the International Law Commission's text. From a procedural point of view there was an obvious analogy between article 55 and article 37. The Commission had stated in paragraph (2) of its commentary to article 55 that, although it did not think that formal notice should be made a specific condition for temporary suspension of the operation of the treaty, its omission from the present article was not to be understood as implying that the parties in question might not have a certain general obligation to inform the other parties of their *inter se* suspension of the operation of the treaty. Notifying the other parties was a matter of international courtesy. His delegation's amendment should be referred to the Drafting Committee.

4. Mr. EVRIGENIS (Greece) said that the purpose of the Greek amendment (A/CONF.39/C.1/L.317) was to make article 55 more precise. It was the only provision in that part of the draft that used the expression " provisions of the treaty " instead of the expression " of the treaty ", and it was desirable even for reasons of uniformity in terminology to make clear that the suspension of the application of a multilateral treaty could apply to the whole treaty or to certain of its provisions only. That was the purpose of the amendment, which could be referred to the Drafting Committee.

5. Mr. ZEMANEK (Austria) said that the six-State joint amendment (A/CONF.39/C.1/L.321 and Add.1) had superseded the Austrian, Finnish and Polish amendment (A/CONF.39/C.1/L.6 and Add.1 and 2) and the Canadian amendment (A/CONF.39/C.1/L.286). Its aim was to harmonize article 55 and article 37. Given the similarity of the situations dealt with in those two articles, it was desirable that the wording of article 55 should follow as closely as possible that of article 37. It was in the interests of the security of treaties that the obligation to notify the other parties of an agreement to suspend *inter se* should be a specific and not merely a general obligation.

6. Mr. STANFORD (Canada), speaking as one of the sponsors of the six-State joint amendment, said that the purpose of the changes to article 55 that it proposed was to provide a similar formulation to that contained in article 37. The phrase " is not prohibited by the treaty " had also been incorporated.

7. The Commission's text of article 55 laid down three cumulative conditions for suspension by agreement between certain of the parties only. The first was that the treaty " contains no provision regarding the suspension of its operation "; the other two were given in sub-paragraphs (*a*) and (*b*). The sponsors of the six-State amendment proposed that the first condition be changed to read " if such suspension is not prohibited by the treaty ", which was the language used in article 37. The mere fact that the treaty contained some provision relating to suspension should not prevent two or more parties from agreeing on suspension as between themselves, unless the provision actually prohibited it. The text in the amendment retained the other two conditions

[1] The following amendments had been submitted: Austria, Finland and Poland, A/CONF.39/C.1/L.6 and Add.1 and 2; France, A/CONF.39/C.1/L.47; Canada, A/CONF.39/C.1/L.286; Peru, A/CONF.39/C.1/L.305; Greece, A/CONF.39/C.1/L.317; Austria, Canada, Finland, Poland, Romania and Yugoslavia, A/CONF.39/C.1/L.321 and Add.1; Australia, A/CONF.39/C.1/L.324.