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Law of Treaties - Comments by Governments on parts I and II of the draft articles on the law of treaties drawn up by the Commission at its fourteenth and fifteenth session: Addendum

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LAW OF TREATIES

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Addendum

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SECTION I

WRITTEN COMMENTS BY GOVERNMENTS

23. SWEDEN

Transmitted by a letter of 2 April 1965 from the Royal Ministry for Foreign Affairs

[Original: English]

[Part II]

Preliminary observations of the Swedish Government on Part II of the Draft Articles on Law of Treaties drawn up by the International Law Commission at its fifteenth session

The Swedish Government wishes first to submit some views on the terminology used in the draft to describe the various forms of invalidity of treaties and the various grounds for invalidating treaties.

In article 31 a State is authorized to withdraw its consent to a treaty under certain circumstances. It does not seem clear, however, whether such withdrawal of consent will affect the treaty only from the moment it is expressed or retroactively from its conclusion.

Articles 32 (1) and 35 (1) prescribe that treaties are to be without any legal effect. According to comment (3) to the latter article, this expression would mean that the treaty is ipso facto void and absolutely null. It is not clear whether the expression is deemed to have the same meaning in article 32, although this is made likely by the fact that article 47 refers to nullity both under article 32 and article 35 and provides that treaties stricken by such nullity may nevertheless be valid by acquiescence. It may be queried whether it would not be desirable to use more uniform terminology.

Under articles 36, 37 and 45 treaties become void under certain circumstances. In comment (6) to article 36 the treaties dealt with in the article are said to be "void ab initio", rather than voidable. It is not clear whether this flows from the article itself or from articles 47 and 52. Nor is it clear whether the treaties void under article 37 because of conflict with a peremptory norm are, likewise void "ab initio". They are characterized as null in comment (4) to article 37, but unlike the treaties dealt with in article 36, they are subject to article 52.

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Under articles 33 and 34 fraud and error may be invoked as invalidating the consent given by a State to a treaty. Comment (8) to article 34 declares this to mean that the treaties are not automatically void, but if the ground is invoked, the treaties will be void ab initio. It appears from article 47 that these treaties may also be characterized as null. Again, it would seem desirable to achieve more uniform terminology. It may be queried whether the expression may be invoked as invalidating the consent is adequate to convey the desired meaning. Any fact, presumably, may be invoked. The relevant question is whether a given fact has any legal consequence. The expression does not appear to answer that question.

With respect to the particular articles, the Swedish Government, without prejudice to the final position it may take, wishes to submit the following comments:

Article 30. In view, inter alia, of the draft article 8 submitted by the Commission, that "every State may become a party" to general multilateral treaties unless otherwise provided by the treaties or the established rules of an international organization the case must be envisaged that a State recognized by some parties to a multilateral convention may become a party to such a convention, although it is not recognized by one or several of the other parties to the convention. The practice seems to be followed in this matter that a party which, because of non-recognition, finds itself unable to accept the obligation to apply the multilateral convention to another party, formally notifies the depositary of the position taken.

Article 31. The Swedish Government shares the view of the Commission that it would introduce serious risks for the security of treaties generally to leave it to internal law to determine the competent treaty-making organ of a State, and that the basic principle should be, as the Commission suggests, "that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent".

The exception to this rule contemplated by the Commission covers the cases where a violation of internal law is manifest. The formulation of that exception does not seem quite satisfactory: if the consent in these cases is indeed "invalidated", it could not very well be "withdrawn". A better formulation of the present substance would seem to be:

"... shall not invalidate the consent expressed by its representative. Nevertheless, in case the violation of its internal law was manifest, a State may withdraw the consent expressed by its representative. In other cases it may not withdraw such consent unless the other parties to the treaty so agree."

Article 32. The provisions contained in this draft article are closely connected with the draft presented on article 4, which was criticized by the Swedish Government in its comments to the first part of the Commission's draft. It was pointed out in that context that rather than prescribing that agents should be provided with full powers - something that is often dispensed with in practice - the draft ought to answer the legally interesting question what effect, if any, should be attributed to consent expressed by a representative who had not been asked to present any evidence of authority and who, in fact, had not possessed authority.

For systematic reasons it may be desirable to retain in the first part of the draft rules regarding the existence of competence, and to insert into the second part the corresponding rules relating to the effect of lack of competence. A reformulation of article 4 seems nevertheless desirable to eliminate what may be viewed as procedural recommendations and to insert only rules of legal significance. Sub-paragraphs 1 and 2 of article 4 would not call for any modification. Sub-paragraph 3, however, might be changed to read along the following lines:

"No other representative of a State shall be deemed, (by his offices and functions and) without presenting evidence in the form of written credentials, to posses authority to negotiate on behalf of his State."

While the original text would seem to imply a duty to request the presenting of full powers - which in practice is commonly dispensed with - the above text would simply lay down that a State which negotiates or signs an agreement with a representative not presenting full powers may find that the latter was not authorized. Such a formulation would tie up well with draft article 32 (1). Sub-paragraph 4 (a) of article 4 might similarly be changed to read along the following lines:

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"Subject to the provision of sub-paragraph 1, a representative of a State shall not be deemed, (by his offices and functions and) without presenting evidence in the form of written credentials, to possess authority to sign a treaty on behalf of his State."

Such formulation, again, would well tie up with the provision of article 32 (1), while the present formulation of sub-paragraph 4 (a) would seem to lay down as mandatory that full powers must be requested.

The substance of draft sub-paragraph 4 (b) relating to agreements in simplified form was criticized in the earlier Swedish comments. It was suggested to be easier for a State to ask a foreign representative to present a full power than it is for a State to prevent all its representatives from acting without authority. To this argument is added the circumstance that it is extremely difficult to delimit the concept of agreements in simplified form. If that concept cannot be well defined, there would be a large group of cases where, under the draft presented by the Commission, it would be uncertain whether the lack of authority of the agent would render the treaty invalid under article 32. From the point of view of clarity it would therefore be preferable to treat the conclusion of agreements in simplified form in the same way as the conclusion of other agreements. This is best done by the exclusion of article 4 (b). That modification would simplify the application of article 32.

The question may further be raised whether in article 32 (1) or the burden of denunciation should not be placed upon the State whose representative has acted without authority. Even though the other State should bear the risk when it has not checked the existence of authority, it would not be unreasonable - in view of the fact that such risk-taking is most common - to ask that the first State should denounce the agreements as soon as it becomes aware of it, or else be held bound. The commentary (4) to article 32 as well as article 47 point in this direction, but an express modification of the last part of article 32 (1) would seem to be required.

Articles 33 (fraud) and 34 (error) deal with contingencies that must be very rare and, there may be a question on this ground whether they are really needed at the present stage. However, the formulations appear unobjectionable.

Article 35 (personal coercion) likewise deals with a contingency that is most unusual. As there have been some well-known cases of this kind, however, and as the rule has a good deal of support in doctrine, an express provision on the matter might perhaps be desirable.

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Articles 36 (coercion of a State), 37 (violation of a peremptory norm), 44 (fundamental change of circumstances), and 45 (violation of an emerging peremptory norm) represent a bold tackling of difficult problems that are connected with the very structure of present-day international society. It is, of course, only logical than when the threat or use of force against a State is forbidden under Article 2 (4) of the United Nations Charter, a treaty imposed by such threat or use of force should also be invalid. Rules prescribing the invalidity of treaties violating existing or emerging peremptory norms likewise may be said to be required from the viewpoint of logic and consistency. The formal inclusion of such rules in an instrument covering the law of treaties, however welcome from the standpoint of theory and progressive development, must necessarily also be considered in the context of present-day political organization of the international society.

The stability of State relations, cannot, of course, but be threatened by the conclusion of treaties through coercion or in violation of peremptory norms of international law. One cannot, however, completely disregard the fact that invalidation of a great many existing treaties - especially border treaties - which have been brought about through some form of coercion, would dangerously upset the existing stability. It should also be borne in mind that so long as the international community is not equipped with an organization capable of ensuring peaceful change and effectively implementing its decisions, unfortunately treaties may continue to be made - armistices, peace settlements and others - in contravention of legal principles, and yet continue to be upheld and gradually - like past peace treaties - even become an element of stability.

To the concern voiced above, is added concern for the method by which the invalidity of a treaty is envisaged to be determined. The circumstance cannot be disregarded that while the draft submitted considerably develops and specifies the grounds on which treaties may be claimed to be invalid, it does not similarly develop the methods by which such claims may be examined and authoritatively decided. The orderly procedure prescribed in article 51 is thoughtfully drafted and useful as far as it goes. It does not, however, offer any safeguards against abusive claims of invalidity that a State may be tempted to advance on the basis of any one of the many grounds provided in the draft. Even more disconcerting

is the fact that the article does not appear to answer whether a treaty is subject to unilateral termination or remains valid, once the means indicated in Article 33 of the Charter have been exhausted without result.

In this connexion attention must also be paid to article 51 (5). If the meaning of this provision is that a State - to take the examples cited in paragraph (7) of the comment - discovering that an error or change of circumstances has occurred, may cease immediately to perform under the treaty and merely invoke the error or the change of circumstances as a ground for termination, the strength of the article, limited as it is, will be even further reduced

Problems connected with a policy of "non-recognition" of treaties deemed invalid would not, of course, disappear even if compulsory jurisdiction were given to the International Court of Justice to determine claims of invalidity based upon provisions regarding, for instance, changed circumstances. Such jurisdiction would, however, do much to reduce the risk of abusive claims.

Articles 38 (1), (2) and (3) (a) (termination of treaties through the operation of their own provisions) contain interpretative rules, the need for which may be somewhat doubtful. The provision laid down in sub-paragraph (3) (b) seems to be a useful residuary rule.

Article 39 offers a reasonable and partly new solution to the problem raised by treaties containing no provisions regarding their termination.

Article 40 (2) and (3) likewise seem to contain useful innovations regarding the termination or suspension of the operation of multilateral treaties, while the need for sub-paragraph 1 is less obvious.

Article 41 (termination implied from entering into a subsequent treaty) likewise lays down a rule of construction that may be useful.

Article 42 deals with the important question of the effect of breach of treaty obligations. The limitation of the article to "material breach" seems well advised and the definition of that concept acceptable. The question may be raised whether the procedure prescribed in article 51 offers an adequate and sufficiently rapid response to the urgent problem of breach of a treaty.

With respect to breach of a multilateral treaty the provisions suggested might, in most instances, be adequate. It is noted, however, that the draft only entitles a party to a multilateral treaty to suspend or terminate the treaty in

relation to another party which has violated it or to seek the agreement of the other parties in order to free itself wholly from the treaty. Circumstances might be such, however, that the State ought to be allowed even to terminate or suspend the treaty unilaterally, e.g. if the participation of the State committing the breach was an essential condition for the adherence of the other State.

Article 43 on supervening impossibility of performance may be useful, even though the contingency envisaged is probably rare.

(Articles 44 and 45 have been commented upon above.)

Article 46 on separability appears on the whole to be a most useful and necessary complement to the development of grounds of nullity and termination. The - perhaps inadvertent - reference in subparagraph (1) to the possibility of a treaty providing about its own nullity might well be avoided.

Article 47 on waiver and acquiescence seems likewise to be an indispensable complement to the rest of the draft. It would seem desirable in addition expressly to provide in this article that a State may by its conduct or through acquiescence be debarred from exercising its right under article 31 to withdraw its consent.

Article 48 contains a special rule on the termination of constituent instruments of international organizations and of treaties which have been drawn up within international organizations. Such a rule would seem to be required. As several of "the provisions of part II, section III" referred to will be clearly inapplicable to the treaties concerned, it might be preferable to refer to "relevant provisions of part II, section III".

The provision contained in article 49 on evidence of authority to denounce, terminate or withdraw from a treaty, might perhaps with advantage be attached to article 4 itself. It would seem even more important to provide expressly that lack of such authority might entail invalidity of the act in accordance with article 32.

The rule contained in article 50 that a State may revoke its notice of termination or denunciation may be framed in too general terms. While the rule suggested may be reasonable in cases such as a breach, it is doubtful whether it is acceptable regarding normal notices of termination in accordance with express provisions for notice in treaties. The purpose of such provisions would seem to

be to enable other parties to take suitable measures in good time to meet the new situation. These measures could not be taken with confidence if notices of termination were susceptible of being revoked. The rule suggested might also have the effect of neutralizing provisions requiring advance notice, as it would, in fact, make it possible for a State to defer its decision to terminate until the day before the notice given would take effect.

Article 51 has been commented upon above.

Article 52 regarding the legal consequences of the nullity of a treaty deals in very general and abstract terms with problems of great complexity. A fuller discussion than that offered in the commentary would seem desirable to illustrate and analyse the various cases that may arise. The expression "may be required" in subparagraph 1 (b) seems inadequate.

Article 53 regarding the legal consequences of the termination of a treaty similarly calls for further clarification. The delimitation between article 53 (2) and article 52 is not obvious: article 52 deals with the nullity of treaties, and thereby presumably refers at any rate to all treaties termed void, a term used in article 52 (1) (a), but article 53 (2), too, refers to treaties which are void.

It might perhaps be preferable to speak, in article 53, of releasing parties "from any further obligation to apply a treaty", rather than releasing the same parties "from application of the treaty". Cf. article 54. The expression "a situation ... shall retain its validity" also seems to require improvement.

Although article 54 on the legal consequences of the suspension of the operation of a treaty is somewhat less complex than the previous articles, further illustration of the effect of the abstract rules might be clarifying.
