

Document:
A/CN.4/175/Add.3

**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**

Topic:
Law of Treaties

*Downloaded from the web site of the International Law
Commission (<http://www.un.org/law/ilc/index.htm>)*

UNITED NATIONS

GENERAL
ASSEMBLY



Distr.
GENERAL

A/CN.4/175/Add.3
15 April 1965

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Seventeenth session

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

CONTENTS

	Page
SECTION I - WRITTEN COMMENTS BY GOVERNMENTS	2
24. Canada	2

SECTION I

WRITTEN COMMENTS BY GOVERNMENTS

24. CANADA

Transmitted by a letter of 7 April 1965 from the Under-Secretary of State for External Affairs.

Part II

Original: English

Article 40: Termination or suspension of the Operation of Treaties by Agreement.

Comment: In clause 2 of this article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in article 9, it be from the date of adoption, (i.e. that it be from the time the treaty in question has been opened for signature).

It is to be noted that in article 9 of Part I of the draft Law of Treaties, drawn up at the fourteenth session of the International Law Commission, in clause 1(a) and clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on clause 2 of article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years^{1/}. This would seem a reasonable choice.

Article 42: Termination or Suspension of the Operation of a Treaty as a consequence of its breach.

Comment: Article 42, in its present version, does not provide for a right, where there is a material breach of a treaty, of another party unilaterally (and not merely by common and perhaps even unanimous agreement with the other parties) to withdraw from the treaty in question. Instead it would appear, from the Commission's commentary on the provision in question, that the members considered that a right of suspension provided adequate protection to a State directly affected by such a breach.

The implication of the present draft rule, set out in article 42.2(a), as regards multilateral treaties of a sort under which the States party agree to refrain from some action or other, is that in the case of a flagrant violation by one party no other party would have any recourse on its own. That is because it could not suspend its obligations vis-à-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties.

^{1/} Yearbook of the International Law Commission, 1963, vol. II, p.71, para.3 of Commentary on draft article 18.

Since it would appear desirable that the provisions of the draft Law of Treaties be of such a nature that they not only attract the widest possible support but are also as widely observed as possible, consideration might be given to amending article 42 in such a way that, where there has been a violation of a treaty of the sort discussed above, the legitimate right of suspension of an individual party need not depend on a consensus but may be exercised erga omnes.

Both the present Rapporteur, Sir Humphrey Waldock, and the previous Rapporteur, Sir Gerald Fitzmaurice, in their draft articles on this matter, provided that in the case where one party were to commit a general breach of such a treaty, it would be open to individual states unilaterally to withdraw from it. Sir Gerald Fitzmaurice recommended that "if a party commits a general breach of the entire treaty in such a way as to be tantamount to a repudiation, the other parties may treat it as being at an end, or any one of them may withdraw from further participation".^{2/}

Sir Humphrey Waldock, in his commentary on his draft article 20.4(b), mentioned that its intention was to cover "cases such as these, where the defaults of a key State or a number of States go far to undermine the whole treaty regime and it seems desirable that individual parties should also have the right, not merely of terminating their treaty relation with the defaulting State but of withdrawing altogether from the treaty".^{3/}

In the draft amendment which Mr. Erik Castrén proposed to the present Rapporteur's draft of this article, at the fifteenth session of the Commission, he too provided for a right of unilateral withdrawal, under certain circumstances, on the following terms: ^{4/}

"2(b) in the relations between itself and the other parties, withdrawal from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty".

^{2/} Yearbook of the International Law Commission, 1957, vol.II, p 31, draft article 19.1 (iii).

^{3/} ibid., 1963, vol.II,p.77, para.17.

^{4/} 691st meeting, para.67; ibid., 1963, vol.I,p.120.

Article 44: Rebus sic stantibus
 Fundamental change of circumstances.

Comment: The exclusion established under section 3(a) of this article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formulated without the Commission having taken into consideration such treaties (if any) under which a boundary has been established by reference to a thalweg. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could indeed radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that article 44(3)(a) should be modified to cover such a case.

The modification might be along the following lines:

"To a treaty fixing a boundary, except if such abboundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurrence; or".
