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Summary record of the 708th meeting

Topic:
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the wording of article 7 on fraud, which provided that, where a State had 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 ". The position was that fraud did not automatically end the treaty; it was open to the injured party to invoke the fraud as a ground for invalidity.

85. Paragraph 2 (*b*) also raised the question who would " require " the offending party to restore the other party to its previous position. An additional provision should be inserted giving the necessary powers to the organ having powers of decision under article 25. Unless such a provision were inserted, the organ in question might not be authorized to deal fully with that matter.

86. Articles 27 and 28 could only be accepted on the understanding that when the Commission came to consider, at its next session, the effects of treaties on third States, it would examine the position of third States with reference to the legal effects of the nullity, avoidance and termination of treaties.

87. Mr. YASSEEN thought that the main question raised by paragraph 2 was the fate of the acts performed and the situations created pursuant to the treaty before its avoidance; in other words, whether the avoidance operated retrospectively or as from its date.

88. He believed that a distinction could be made according to the grounds for avoidance, or more particularly, according to whether those grounds were concomitant with, or subsequent to, the conclusion of the treaty.

89. Where the grounds for avoidance were concomitant with the conclusion of the treaty, it could be held that the acts performed in pursuance of the treaty should not have been performed. Where the grounds for avoidance were subsequent, it could rightly be maintained that it had been possible to perform the treaty properly for a certain time; consequently, it was logical that acts performed before the subsequent grounds for avoidance had existed should remain valid. That was the case when there was a fundamental change of circumstances or a new rule of *jus cogens* supervened, which was incompatible with the treaty. On the basis of that criterion it was possible to say that in some cases avoidance took effect as from its date and in others retrospectively.

90. But then a further question arose: nullity declared for reasons subsequent to the treaty's conclusion might not only mean nullity of the treaty itself, but also preclude continuation of a situation created by the treaty. That would be an immediate effect, not only with respect to the treaty itself, but also with respect to the situation, which would have to cease as soon as the treaty was avoided.

91. Mr. VERDROSS observed that paragraph 2 referred to the avoidance, not the nullity of the treaty. A treaty could only be avoided by the agreement of the parties or by the decision of an organ whose competence had been recognized by those parties. Hence the avoidance could not be presumed to be retrospective. Everything depended on the terms of the instrument by which the treaty was avoided.

92. The CHAIRMAN, speaking as a member of the Commission, said that his doubts regarding paragraph 2 had been confirmed by the discussion.

93. Doubts had now arisen in his mind regarding paragraph 1. To take the example of a transfer of territory on the basis of a treaty which had been obtained by coercion, the treaty being void, any acts done in reliance upon it would, under paragraph 1, have no legal force or effect. But that solution would run counter to the recognized principle of international law that the *de facto* authorities of a territory could, for instance, levy taxes; for if paragraph 1 were applied as it stood, the State which recovered the territory would be entitled to levy the same taxes a second time.

94. Mr. BARTOŠ said that avoidance must be applied for, even if the grounds for it were *ex nunc*, not *ex tunc*. It was necessary to distinguish between the effect of the grounds for avoidance and the award in which the grounds invoked by the party wishing to invalidate the treaty were declared admissible.

95. Mr. AGO agreed with Mr. Verdross; the word " *annulation* " (avoidance) should not be used in paragraph 2, which dealt with cases of nullity, not of avoidance. The case he had referred to was one of real nullity *ab initio*, even if the nullity was established only later.

96. In international law avoidance, strictly speaking, could only result from agreement between the parties or an arbitral award; otherwise, it was not a case of avoidance, but of delayed nullity, which was precisely what occurred when a new rule of *jus cogens* supervened or performance became impossible owing to the disappearance of the object of the treaty, which made the treaty a nullity from that moment. That was not avoidance in the true sense of the term.

97. In deciding what formula to adopt, the Commission might perhaps be guided by Mr. Tunkin's proposal.

The meeting rose at 12.55 p.m.

708th MEETING

Wednesday, 26 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 27 in section V of the Special Rapporteur's second report (A/CN.4/156/Add.3).

ARTICLE 27 (LEGAL EFFECTS OF THE NULLITY OR AVOIDANCE OF A TREATY) (*continued*)

2. Mr. BARTOŠ said that a distinction should be made between instruments considered to be void *ab initio* and voidable instruments.

3. So far as the former were concerned, the general rule was that stated in paragraph 1 of the draft article, and on that point he shared the view of the Special Rapporteur. But even though, in law, instruments which were void were without legal effect *ab initio*, in practice there arose the question of acts performed between the time when the treaty entered into force and the time when nullity was invoked, whether or not through certain courts or organs. In such cases, although the rule required restoration to the previous position, such restoration was sometimes impossible, for the reasons he had explained at the previous meeting (paras. 65-69).

4. With regard to voidable treaties, which could be avoided either by agreement between the parties or by an arbitral award, the position was less clear, for the effects could be *ex nunc* or *ex tunc*. It was therefore very difficult to say in such a case that the position was the same as that contemplated in paragraph 1 of the article, even if the cause was such that its effects were *ex tunc*. Even in the case of a voidable treaty there could be effects *ab initio*, because the nullity of the acts did not necessarily begin at the moment when avoidance took place. A distinction should therefore be drawn between cases of avoidance, including even retrospective avoidance, and cases of nullity which must be declared to be nullity *ab initio*. It seemed that that point was not entirely clear in the article.

5. The Special Rapporteur had perhaps taken the view that in the first case, that of a treaty avoided *ex tunc*, paragraph 1 would be applicable. But there was another case: that in which the effects of avoidance were *ex nunc*. He therefore urged that a distinction should be made, in regard to voidable instruments, between cases in which the effects of avoidance were *ex nunc* and those in which they were *ex tunc*.

6. He shared the opinion of Mr. Verdross and Mr. Ago regarding the practical consequences, which were *de facto* rather than *de jure* consequences, but the importance even of *de facto* consequences must be taken into account in real life.

7. Mr. PAL said that no major difficulty appeared to have arisen in connexion with paragraph 1 of the article although it spoke of a treaty being " void *ab initio* ", an expression which had not been used in any of the substantive articles. In that paragraph, he felt that it was not altogether correct to say that " any acts done in reliance upon the void instrument shall have no legal force or effect "; in fact, they might have some legal force, but not under the treaty itself. Again, such acts could have certain legal consequences. In the circumstances, it would be more correct to say that a treaty that was void *ab initio* could not create legal rights.

8. With regard to paragraph 2, he noted that the expression " a treaty avoided as from a date subsequent to its entry into force " was nowhere to be found in the earlier articles. In most of the articles which the Commission had adopted, it was provided that a treaty vitiated by one of the circumstances mentioned in those articles was void from its inception. The grounds stated in the various substantive articles mostly related to the consent given to the treaty. If the consent was defective, there was no treaty at all. If the Commission wished to contemplate the possibility of the avoidance of a treaty from a certain date subsequent to its entry into force, by virtue perhaps of notice given to that effect, some provision would have to be included on the subject.

9. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that paragraph 2 had been intended to cover cases which had found expression in the original draft articles. For example, his original proposal for article 7, on fraud (A/CN.4/156), had contemplated a certain election for the injured party to avoid the treaty either *ab initio* or on the date of, or immediately after, the discovery of the fraud. One reason for that proposal had been that an element of choice was a familiar concept of English law. A much stronger reason, however, was that it was not always possible to undo altogether situations created under a treaty. Some treaties were contractual in character, others were legislative. Many treaties had consequences in internal law. Hence it was not easy simply to declare that a treaty was void *ab initio*. Moreover, even if it were possible to undo everything that had been done by virtue of the treaty, that might not be the most satisfactory solution for the injured party. That was why he had included provisions which made it possible for the injured party to decide whether it wished to void the treaty *ab initio*, or to cancel it as from a certain date. He had included provisions of the same type in the article on unilateral error induced by one of the parties, which had been discarded, and in the article on the personal coercion of representatives (A/CN.4/156, articles 9 and 11).

10. In the redrafting of the substantive articles by the Drafting Committee, those ideas had been dropped. For example, article 7, on fraud, merely stated that the injured party could invoke the fraud as invalidating its consent. The injured party was thus given a clear-cut choice between having no treaty at all and accepting the treaty into which it had been induced to enter by the fraudulent conduct of the offending party. He had some misgivings regarding the situation which would thus be created for the injured party. However, since the Commission had decided not to include the right of election of the injured party, the logical result was that there was no longer any scope for paragraph 2 of article 27.

11. In saying that, he was not overlooking the point raised by Mr. Ago and Mr. Tunkin regarding the possible cases of conflict with a new rule of *jus cogens* and of subsequent impossibility of performance. Those cases offered some scope for a rule of the kind stated in paragraph 2, but as they were cases of termination and therefore properly belonged to article 28, they did not justify the retention of that paragraph in article 27.

12. He noted the drafting points which had been raised regarding the use of the words " shall have no legal force or effect " in paragraph 1, and the words " as far as possible " in paragraphs 1 and 2 (*b*).

13. He suggested that article 27 be referred to the Drafting Committee on the understanding that para-

graph 2 would be dropped as no longer necessary in the light of the Commission's decisions on the substantive articles.

14. Mr. AGO said that the Special Rapporteur had just drawn attention to an essential point, which made him wonder whether the provisions of articles 27 and 28 should really be set out in two separate articles.

15. It was true, up to a point, that paragraph 2 of article 27 touched on the question of the termination of treaties, but there were nevertheless two cases to be considered which differed in some respects, even if they had similar effects. They were, first, treaties which became void as from a date different from that of their entry into force by virtue of a general rule, as in the event of impossibility of performance or the supervention of a new rule of *jus cogens*; and secondly, treaties which terminated by reason of a voluntary act of the parties, such as denunciation.

16. But as the Commission must concern itself mainly with the rights and obligations deriving from the treaty when it became void or was terminated in one way or another, there could hardly be said to be material for two separate articles. The question would be better regulated if the provisions were incorporated in a single article, provided that separate paragraphs were devoted to the case dealt with in paragraph 1 of article 27, and to the provisions in paragraph 2 of article 27 and in article 28.

17. Mr. de LUNA agreed with those observations, because articles 27 and 28 in fact dealt with the same problems, which were amenable to the same legal techniques. There were examples in international practice of the parties to a treaty agreeing that certain obligations deriving from the treaty should continue to be enforceable even after its termination or invalidation. In that case the parties agreed, in respect of those post-contractual obligations, on a guarantee against non-performance: that was the notion of *culpa post contractum*. Such a treaty left an obligation for the parties after its termination.

18. That example was applicable to the two cases considered in articles 27 and 28. Like Mr. Ago, he thought that the provisions of those two articles should be combined.

19. The CHAIRMAN said that the Commission would be in a better position to consider Mr. Ago's proposal to combine articles 27 and 28 when it had discussed article 28.

20. He invited members to comment on the Special Rapporteur's suggestion that article 27 should be referred to the Drafting Committee on the understanding that paragraph 2 would be dropped.

21. Mr. TUNKIN said that article 27 should be referred to the Drafting Committee without any instructions. He had his doubts regarding the deletion of paragraph 2 and thought that the whole matter would be clearer when the Commission had discussed article 28.

22. Mr. ROSENNE said that he too was in favour of referring the whole of article 27 to the Drafting Committee.

23. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 27 as a whole to the Drafting Committee, with the comments made during the discussion.

It was so agreed.

Article 28 (Legal effect of the termination of a treaty)

24. Sir Humphrey WALDOCK, Special Rapporteur, said that the main principle of the article, which dealt with the legal effect of the termination of a treaty, was stated in paragraph 1.

25. The point raised regarding the expression " shall retain their full force and effect " used in article 27, paragraph 2, also had a bearing on the language of paragraph 1 (*b*) of article 28. It had been pointed out that the development of a new rule of *jus cogens* which terminated a treaty might also have some consequences for the rights previously acquired under that treaty. The preservation of all that had been done while the treaty was in force should not be laid down as an absolute rule. Paragraph 1 (*b*) would therefore have to be redrafted.

26. Mr. VERDROSS said that the principle of article 28 was self-evident. There could be no doubt that, if a treaty ceased to exist, the obligations arising from it also ceased to exist. But it hardly seemed possible to say " unless the treaty otherwise provides ", for if the treaty had ceased to exist completely, it could not provide anything. If it was recognized that certain obligations deriving from the treaty still existed, it must be recognized that the provision of the treaty establishing them was still in force. Alternatively, the parties might have made a new treaty and agreed that certain rights and obligations under the earlier treaty should remain in force. Thus the substance of the provision was acceptable, even if self-evident, but the drafting should be amended.

27. Mr. AGO said that generally speaking he endorsed the principle underlying article 28; he wished to make only a few comments on what were mainly drafting points.

28. The word " *régulière* " in the French text seemed less suitable than the word " lawful " in the English text.

29. Referring to the particular point raised by Mr. Verdross, he said there were some multilateral treaties, particularly those which were the constituent instruments of international organizations, which provided that a State might withdraw from the organization, but that even after it had ceased to be a member it would continue to be bound during a specified period to fulfil certain obligations or comply with certain rules. No doubt, the Special Rapporteur had been thinking mainly of that case, and the phrase " unless the treaty otherwise provides " should be repeated in paragraph 2. The case seldom arose in connexion with a bilateral treaty, but was common with multilateral treaties.

30. Paragraph 3 was particularly important. The Special Rapporteur had probably wished to cover mainly codifying treaties, which merely re-affirmed general rules of international law. Obviously, the validity of such rules must be preserved at all costs; a State could not be allowed to withdraw from a general convention codifying a particular branch of law and to conclude that it was no longer bound by any obligation in that sphere, even one based on custom. The draft was not, perhaps, worded as clearly or as felicitously as it might have been, but it expressed an essential idea. The Drafting Committee should be able to arrive at an entirely satisfactory text by making a few drafting changes.

31. Mr. LACHS said that the Special Rapporteur had already noted that the problem of a supervening rule of *jus cogens* would necessitate some redrafting of the provisions of paragraph 1 (*b*). Personally, he would go further and suggest that the nature of the rights in question should be taken into account when considering the problem of their continued existence after the termination of the treaty. Some rights were permanent and were therefore not affected by the termination of the treaty; some were extinquished and were likewise not affected; but others were continuing and temporary and were bound to fall when the treaty itself fell.

32. He agreed with Mr. Ago that paragraph 3 embodied a very important principle of law. He suggested that the word " also " before " under international law " should be deleted, since it suggested that treaty provisions were superior to rules of *jus cogens* of general international law. In fact, rules of general international law took precedence, as was shown by such an important example as the preamble to the Hague Convention of 1907 on the Laws and Customs of War on Land. In that preamble, the contracting parties had declared that " in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[1] It was thus made perfectly clear that, even if the Hague Convention were to fall, the rules of general international law would remain.

33. Mr. CASTRÉN said he did not quite understand the point raised by Mr. Verdross. A treaty could, of course, lay down the conditions for its termination, and, if it did, they should be observed. Possibly the drafting was not wholly satisfactory in that respect, and it might be better to say " unless the treaty provided otherwise ". As to the form of the article, he must make the same observations as he had made in connexion with article 26, namely, that paragraph 1 should apply only to bilateral treaties, since paragraph 2 applied to multilateral treaties *mutatis mutandis*.

[1] Scott, J. B., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 101-102.

34. Mr. CADIEUX said he agreed with Mr. Verdross on the point he had raised, so far as ordinary bilateral or multilateral treaties were concerned: but a distinction should be made where the object of a multilateral treaty was to establish a mandatory rule of law, as for example in Article 2, paragraph 6, of the United Nations Charter. Even if a Member State withdrew from the United Nations, it must continue to respect the general principles of the Charter. In the other cases, it was hard to see how a treaty which no longer existed could regulate what happened later.

35. Mr. TUNKIN pointed out that articles 27 and 28 dealt with two different situations. In the cases contemplated in article 27, the treaty itself became void, most frequently because it was contrary to a rule of *jus cogens*; that was the case, for example, where a treaty had been imposed by force. In the cases contemplated in article 28, there was no defect in the treaty itself; it could continue, but it was the will of the parties to terminate it. He was not certain that it was possible to cover the two situations by one and the same rule. Perhaps the Drafting Committee could consider that point; the possibility of combining articles 27 and 28 would depend on its decision.

36. The contents of paragraph 3 were self-evident and were probably a matter of general interpretation. If a rule of international law imposed some obligation parallel to the treaty obligations, the obligation under general international law would continue in being. On the whole, he was inclined to doubt the necessity of including paragraph 3 in the draft, because its contents did not belong to the law of treaties.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that he had had doubts about including the word " also " in paragraph 3 and had now been convinced by Mr. Lachs that it should be dropped as unnecessary.

38. The point raised by Mr. Verdross concerning the opening words of paragraph 1, " Unless the treaty otherwise provides ", seemed to be largely theoretical. He had been thinking of the provisions of general multilateral treaties on the situation arising upon the withdrawal of a party, where it was often laid down that the treaty as such would no longer be binding on the withdrawing party, but that at the same time certain obligations continued. Those obligations were derived from the original consent given by the party. The point was largely one of drafting and could be referred to the Drafting Committee.

39. Another point which was largely a matter of drafting had been raised by Mr. Castrén, who had criticized the omission, in paragraph 1 of article 28, as in paragraphs 1 and 2 of article 27, to qualify the treaties in question as " bilateral ". In fact, paragraph 1 of article 28 would apply in principle not only to a bilateral treaty, but also to a multilateral treaty when the whole of it was terminated. The purpose of paragraph 3 was to deal with the case in which a particular State withdrew from a multilateral treaty.

40. The point raised by Mr. Tunkin could be referred to the Drafting Committee, as he had himself suggested.

41. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 28 to the Drafting Committee together with article 27.

It was so agreed.

Articles submitted by the Drafting Committee (resumed from 705th meeting)

42. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 15 in section III.

ARTICLE 15 (TREATIES CONTAINING PROVISIONS REGARDING THEIR TERMINATION)

43. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had decided to drop the words " duration or " from the title and proposed a new text for article 15 which read:

" 1. A treaty terminates:

" (*a*) on such date or on the expiry of such period as may be fixed in the treaty;

" (*b*) on the taking effect of a resolutory condition provided for in the treaty;

" (*c*) on the occurrence of any other event specified in the treaty as bringing it to an end.

" 2. When a party to a bilateral treaty has given notice of denunciation in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

" 3. (*a*) When a party to a multilateral treaty has given notice of denunciation or withdrawal in conformity with the terms of the treaty, the treaty ceases to apply to such party as from the date upon which the denunciation or withdrawal takes effect.

" (*b*) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force.

" (*c*) A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force, unless the remaining parties shall so decide."

44. In accordance with the Commission's wishes the article had been considerably abbreviated. The Drafting Committee was aware that the provisions of paragraph 1 might be regarded as somewhat obvious, but nevertheless considered them necessary for the purposes of a draft convention on the law of treaties. The main points of substance were contained in paragraph 3; it would be remembered that some members of the Commission had attached special importance to the rule contained in paragraph 3 (*c*).

45. Mr. CASTRÉN observed that the Drafting Committee had redrafted all the articles in section II in a more concise and clearer form, while retaining the essentials of the ideas and principles adopted by the Special Rapporteur in his draft; it had succeeded in condensing into a single, short sentence even very important articles, such as those dealing with the effects of fraud and coercion and those relating to *jus cogens*. But in the case of article 15, which, with one exception, contained only obvious truths, the Drafting Committee had considered it necessary to retain a fairly long text. In his opinion, the Committee could have shortened the original text further.

46. At the first reading of article 15 he had submitted a draft amendment consisting of two paragraphs which preserved the essentials of the text proposed by the Special Rapporteur (688th meeting, para. 9). That amendment had been supported by several members of the Commission, and he therefore re-introduced it.

47. The amendment read:

" 1. The provisions of a treaty which relate to the duration or to the termination thereof for one or all of the parties shall be applicable subject to articles 18 to 22.

" 2. A treaty shall not come to an end by reason only of the fact that the number of parties has fallen below the minimum number originally specified in the treaty for its entry into force, unless the States still parties to the treaty so decide."

Paragraph 1 was based on paragraph 1 of the original draft (A/CN.4/156/Add.1), to which he had added the phrase " for one or all of the parties " in order to cover all the cases that might arise, whether the treaty was bilateral or multilateral. Paragraph 2 corresponded in its entirety to the paragraph 3 (*c*) proposed by the Drafting Committee, which was the only provision of substance in the draft; the other provisions merely confirmed the rules deriving from the principle *pacta sunt servanda*.

48. Paragraph 3 (*b*) of the Drafting Committee's text merely stated what was already implied in paragraph 1 (*c*), which also applied to multilateral treaties.

49. He could not accept paragraph 1 of the Drafting Committee's text. The intention seemed to have been to give a complete list of the cases in which treaties containing provisions concerning their termination came to an end. But such treaties might terminate for other reasons, either under rules of general international law or by the common will of the parties. It therefore seemed necessary to include a cross-reference to articles 18 to 22 of the draft, as the Special Rapporteur had done in his original draft and he (Mr. Castrén) had done in his amendment.

50. Again, the text proposed by the Drafting Committee did not cover the case mentioned by the Special Rapporteur in paragraph 6 of his draft. The first line of the new article should accordingly be replaced by the words: " A treaty containing provisions regarding its termination terminates: ". Admittedly, that was made clear in the title of the article, but the titles were only provisional and were not authoritative. Moreover, it often happened that they were deleted at the diplomatic con-

ference which settled the final text. In any case, the text of the articles should be sufficiently clear and complete to make it unnecessary to consult the titles.

51. Mr. VERDROSS said that he, too, found the redraft of article 15 incomplete in that it dealt solely with termination by virtue of clauses contained in the treaty itself, and disregarded cases in which the treaty terminated in conformity with rules of general international law.

52. Mr. YASSEEN said that the scope of article 15 was, in fact, limited to cases provided for in the treaty itself. He approved of the new text, which without being laconic was much shorter than the original draft. The only suggestion he wished to make was that the last clause in paragraph 3 (*c*), " unless the remaining parties shall so decide ", should be deleted, since that condition was self-evident.

53. Mr. AGO pointed out that the second sort of cases mentioned by Mr. Verdross was dealt with in article 16. As its title indicated, article 15 dealt only with cases in which the treaty contained provisions regarding its termination; that being so, the article could hardly be more than descriptive. However, it was well to state certain obvious truths.

54. It was true that paragraph 3 (*b*) dealt with a specific case already covered by paragraph 1 (*c*), but its real purpose was to introduce paragraph 3 (*c*). The Commission might perhaps wish to combine sub-paragraphs (*b*) and (*c*) of paragraph 3 by linking them together with the word " however "; there would be no harm in deleting the last phrase in sub-paragraph (*c*).

55. He proposed that the words " given notice of ", in paragraphs 2 and 3, should be replaced by the word " effected ", because the treaty might prescribe other means than the giving of notice for making denunciation effective.

56. Mr. CASTRÉN said he still preferred the wording he had proposed. He could accept a text which stated the obvious but not a text with gaps. He could not vote for article 15 unless the wording of the title was incorporated in the body of the article and paragraph 1 was supplemented in the manner he had suggested.

57. Mr. ROSENNE said that, as the question of titles of articles had been mentioned, he would urge the Commission to bear in mind that the practice of diplomatic conferences in that regard was far from uniform and was largely influenced by political considerations. For example, it had been decided at the Conference on the Law of the Sea to omit the titles of articles and retain those of sections, but titles of articles had been included in the Vienna Convention on Consular Relations. The Commission should not seek to anticipate the final outcome in any given draft and should maintain its fairly consistent practice of including titles, because they were necessary to determine the scope and subject-matter of chapters, sections or articles and formed an integral part of the drafts which it submitted to the General Assembly and to governments. He could certainly not subscribe to the view that preambles and titles were of no importance; considerable importance had been attached to the preamble and headings of the United Nations Charter at the San Francisco Conference, which had taken a clear decision on the matter.

58. Mr. TUNKIN said he agreed with Mr. Castrén that the text of each article should be quite clear and self-contained, in case the title were eventually omitted; he therefore favoured the insertion of the words " which contains provisions regarding termination " after the words " A treaty ", in the first line of paragraph 1.

59. He also shared Mr. Castrén's view that paragraph 1 was probably not exhaustive as to the manner in which a treaty might be terminated and that it would be useful to make that clear in the text.

60. Mr. BARTOŠ said that, although he intended to vote for article 15, he must emphasize that he did not approve of paragraph 3 (*c*). If the number of the parties to a general multilateral treaty fell below the number specified in the treaty as necessary for its entry into force, the treaty might still be valid as between the remaining parties if they so wished, but it would cease to be a general multilateral treaty.

61. The Drafting Committee's failure to include all the words of the title in the body of the article so as to make the provision quite clear was merely an oversight, which should be remedied.

62. Mr. Castrén's other proposal, namely, that paragraph 1 should also mention cases other than those referred to in sub-paragraphs (*a*), (*b*) and (*c*) was neither necessary nor feasible, in his opinion, for he did not see what other cases the article could apply to. But if there were such cases, the necessary additions should be made.

63. Mr. de LUNA considered that the titles and preambles of legal instruments were just as important as, if not more important than, the text itself: they threw light on the text and showed how it should be interpreted. That was especially true of constitutions. In the draft being prepared by the Commission the titles were inseparable from the text of the articles.

64. Mr. CADIEUX said that the essential point about the titles was that the Commission should be consistent throughout its draft. The question whether the wording of the titles and sub-titles should be incorporated in the articles was not only a matter of drafting, but might affect the substance. If the words in the title were added to the text of article 15, it would imply that the enumeration was exhaustive, which might have legal consequences. As he was not sure that the enumeration was complete, he would prefer to leave the text as it stood.

65. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Castrén's suggestion that the content of the title should be included in the opening phrase of paragraph 1, since there was no certainty that the title would be retained when the draft came before an international conference.

66. He hoped the Commission would indicate that the enumeration in paragraph 1 was incomplete, because treaties containing provisions regarding their termination could also be brought to an end in other ways, for example, as a result of a change in circumstances.

67. Mr. AGO thought the text would be improved if the words of the title were added. The article would then be certain to be understood, even if the title disappeared.

68. As to the question whether the enumeration in paragraph 1 was exhaustive or not, he really could not see what other case there could be in which a treaty terminated in conformity with one of its own provisions, since sub-paragraph (*c*) referred to " any other event specified in the treaty as bringing it to an end ".

69. Sir Humphrey WALDOCK, Special Rapporteur, said he recognized that paragraph 1 was not exhaustive as far as all possible causes of extinction of a treaty under general international law were concerned; but he agreed with Mr. Ago that if it were limited, as the Drafting Committee had intended, to termination under clauses contained in the treaty itself, all the possibilities would have been covered.

70. He would feel hesitant about inserting at the beginning of the article some such proviso as " Subject to the provisions of the following articles ", which Mr. Castrén perhaps had in mind, because those other articles might not cover every conceivable cause of termination under international law. There would be a greater danger in widening the scope of the article in that manner than in maintaining its present structure.

71. The amendment to the first phrase in paragraph 1 was quite acceptable and would be consistent with the Drafting Committee's wording for article 16.

72. The CHAIRMAN, speaking as a member of the Commission, said that it could be inferred from paragraph 1 as at present drafted that treaties containing provisions for their termination could not come to an end for reasons other than those provided for in them.

73. Mr. BRIGGS said he agreed that the meaning of each article must be perfectly clear from the text itself: it should not be necessary to rely on the title for its elucidation. It should be possible to omit the sub-paragraphs of paragraph 1, which could be worded in quite general terms.

74. Mr. AGO suggested that the difficulty mentioned by the Chairman could be overcome by slightly amending paragraph 1 to read: " A treaty which ceases to exist by virtue of a provision contained in the treaty itself terminates... "

75. Mr. EL-ERIAN said that the doubts he had expressed in the Drafting Committee about paragraph 1 (*c*) subsisted. He was still unable to understand what it meant and how it differed from a resolutory condition, which was the subject of the preceding sub-paragraph.

76. Mr. GROS supported the Drafting Committee's text, with the amendment accepted by the Special Rapporteur, namely the addition of the words " which contains provisions regarding termination " after the words " A treaty " in paragraph 1.

77. The articles in section III formed an integral whole, so there was no need to specify in article 15 that the article applied subject to general rules laid down later in the draft.

78. In reply to Mr. El-Erian's comment on paragraph 1 (*c*), he suggested that the word " event ", which was not perhaps the best choice, should not be used, and that the provision should be replaced by some such formula as " or in any other manner contemplated in the treaty ".

79. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 1 was open to the dangerous interpretation that certain grounds for termination, for instance, a change of circumstances, were not applicable to treaties containing provisions regarding their termination — a view put forward by certain writers, but not one which he supposed the Commission would wish to adopt. That objection could easily be met by some modification of the text on the lines suggested by Mr. Ago.

80. Mr. CASTRÉN thought that paragraph 1 would be greatly improved by the amendment suggested by Mr. Ago. If that amendment were accepted, he could support the article.

81. Mr. de LUNA strongly supported Mr. Gros' comment; there should not be too many cross-references between the articles, and it was evident that the provisions of article 15 could not prevail over rules of general international law.

82. Mr. AGO said that the enumeration in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 was useful because it specified the time when termination took place. Sub-paragraph (*a*) referred to a future event which was certain to occur and was determined in time, in other words a time-limit. Sub-paragraph (*b*) referred to a future event which was uncertain, in other words a condition. Sub-paragraph (*c*) referred to a future event which was certain to occur, but at an unknown date, for example, the death of a sovereign; it was, therefore, an important provision and should be retained.

83. Mr. YASSEEN said he agreed with Mr. El-Erian; either a time-limit or a condition must be stated. The example given by Mr. Ago was also one of a time-limit. Thus the first two sub-paragraphs of paragraph 1 seemed adequate. Nevertheless, although it was not necessary, sub-paragraph (*c*) might be useful if redrafted to read: " on the occurrence of any other ground for termination specified in the treaty ".

84. Mr. CADIEUX said that some such wording for paragraph 1 (*c*) as had been suggested by Mr. Gros would be acceptable. Paragraph 1 could also be amended in the way Mr. Castrén wished.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion seemed to have revealed a wide measure of agreement on the substance of article 15

and such divergences of view as had emerged related more to the way in which it was drafted.

86. He hoped that Mr. Gros would not press his amendment to paragraph 1 (*c*), as it would shift the emphasis from the temporal element of termination to its mode, which had not been the Drafting Committee's intention. Nor would he favour the replacement of that paragraph by the text proposed by Mr. Castrén during the first reading.

87. The amendment suggested by Mr. Ago to meet the point made by the Chairman would not alter the sense of the paragraph and he did not believe that anyone reading the article in the context of section III as a whole could possibly conclude that treaties containing provisions regarding their termination fell wholly outside the application of certain general provisions contained in the succeeding articles. Any such construction would be in defiance of the normal rules of interpretation. Perhaps the Drafting Committee could be relied on to make such changes as were necessary to cover the points raised during the discussion.

88. The CHAIRMAN suggested that, subject to drafting changes, the Commission might vote on article 15.

89. Mr. CASTRÉN, supported by Mr. YASSEEN, asked that the vote be postponed until the Commission had the Drafting Committee's new text before it; otherwise he would be obliged to abstain.

It was so agreed.

The meeting rose at 12.30 p.m.

709th MEETING

Thursday, 27 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

Articles submitted by the Drafting Committee (continued)

1. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 16.

Article 16 (Treaties containing no provisions regarding their termination)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed, in replacement of articles 16 and 17, a new article 16 entitled "Treaties containing no provisions regarding their termination" which read:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation unless it appears from the nature of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties did not intend to exclude the possibility of denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depository twelve months' notice to that effect."

3. The detailed article 17 he had originally put forward on the implied right of denunciation (A/CN.4/156/Add.1) had not commended itself to the Commission, in which two trends of opinion had emerged. Some members had been opposed to any article on the subject and others, while not in favour of anything as comprehensive as the original article 17, had thought it necessary to provide for the possibility of an implied right of denunciation or withdrawal when it could be inferred from the intention of the parties that those acts had not been excluded.

4. He emphasized that the Drafting Committee was not proposing that the intention of the Parties could be inferred solely from the nature of the treaty without having regard to the circumstances of its conclusion.

5. Consideration of the title of the article might be held over until the Commission came to consider the new text of article 15 which was to be prepared as a result of the discussion at the previous meeting.

6. Mr. VERDROSS proposed, first, that in the phrase "unless it appears from the nature of the treaty", the word "nature", whose meaning was debateable, should be replaced by the word "object".

7. Secondly, and more important, since article 16 was based on the very sound principle that such a treaty could not be denounced, the condition for derogation from that principle should be expressed in positive rather than negative form. He therefore proposed that the words "the parties did not intend to exclude" should be replaced by some such wording as "it was the intention of the parties to admit".

8. Mr. CADIEUX said he wished to make a few suggestions relating only to the form of the article, and apologized for raising questions which might perhaps already have been settled at the first reading or in the Drafting Committee.

9. First, it seemed to him that the idea expressed by the words "the statements of the parties" was already contained in the expression "the circumstances of its conclusion"; if it was desired to refer specifically to the statements of the parties, that could be done in the commentary.

10. Secondly, it would be better if the word "possibility", near the end of the first sentence, were replaced by "right" or "faculty".

11. Thirdly, the expression "In the latter case" at the beginning of the second sentence was not very felicitous; since in fact only one case was contemplated, it would be better to say simply "In that case".

12. Sir Humphrey WALDOCK, Special Rapporteur, explained that the phrase "statements of the parties"