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Summary record of the 710th meeting

Topic:

Law of Treaties

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offending State under the treaty, including its purely contractual provisions. During the earlier discussion, he had also drawn attention to the fact that certain law-making conventions such as the Genocide Convention dealt with matters of general customary law, but were nevertheless subject to denunciation under certain conditions (693rd meeting, paras. 31-32).

119. He had much sympathy with the reservations which had been made by a number of members, but he thought the point was to some extent covered by the provisions of Article 28 (A/CN.4/156/Add.3), paragraph 3 of which, as amended at the previous meeting (para. 37), specified that the termination of a treaty in no way impaired the duty of a state " to fulfil any obligations embodied in the treaty which are binding upon it under international law independently of the treaty ".

120. With regard to the drafting points raised by Mr. Lachs, in his original draft he had used the term " unlawful " instead of " unfounded ". The intention in speaking of " mutual agreement " in paragraph 2 (*b*) had been to refer to the unanimous consent of the other parties.

121. The CHAIRMAN pointed out that suspension under paragraph 2 (*b*) (i) at least should not require unanimous consent.

122. Mr. BARTOŠ said that he wished to enter the same reservation to article 20 as he had made to the previous article. It was hard enough to grant States a virtual right of veto, but it would be even worse to enable them to act as *agent provocateur* in the international community by committing a breach which gave other States a pretext for denouncing the treaty to the detriment of those acting in good faith. He would therefore abstain from voting on article 20.

123. Mr. CADIEUX thought that where suspension was concerned the provisions of paragraph 2 (*b*) did not raise any difficulties when the States acted in concert, for the right granted in sub-paragraph (i) was one which they enjoyed individually in any case. It did not seem necessary in that instance to specify the minimum number of parties to a multilateral convention required for a decision, but the question of a majority or a specified number of parties might arise where the termination of a treaty was concerned.

124. Mr. YASSEEN thought that a State might be allowed to take the initiative in suspending the performance of a treaty, but that unanimity must be required for the termination of a general multilateral treaty. A separate paragraph should have been devoted to the latter case, stressing the need for unanimity.

125. Mr. de LUNA supported Mr. Bartoš's remarks, and fully agreed with Mr. Yasseen. In present or future international relations it was very easy for a small State which had no responsibility not only to act as *agent provocateur*, but also to break a treaty in order to serve the secrets interests of a great Power and provide it with an opportunity of starting the whole procedure for terminating the treaty.

126. Sir Humphrey WALDOCK, Special Rapporteur, said that the unanimity intended in paragraph 2 (*b*) did not include the State that had broken the treaty. He agreed that paragraph 2 (*b*) (i) was not strictly necessary, because each of the other parties concerned had the right to take the action specified in paragraph 2 (*a*). The provision was useful, however, because perhaps not all the parties could be regarded as injured parties and it was useful to emphasize their solidarity in the face of a serious breach.

127. Mr. TUNKIN suggested that the words " mutual agreement " in paragraph 2 (*b*) should be replaced by " common agreement ", which would correspond to the expression " *d'un commun accord* ", in the French text.

128. The CHAIRMAN put article 20 to the vote, on the understanding that the change just suggested by Mr. Tunkin would be made and that the Drafting Committee would endeavour to improve upon the words " unfounded " in paragraph 3 (*a*) and " *répudiation* " in the French text of the same paragraph.

Article 20 was adopted on that understanding by 12 votes to none with 5 abstentions.

The meeting rose at 1 p.m.

710th MEETING

Friday, 28 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)

ARTICLE 21 (EXTINCTION OF A PARTY)

1. The CHAIRMAN invited the Commission to consider the Drafting Committee's decision to delete the provision on the extinction of a party which had formed the subject of paragraph 1 of the original draft article 21 (A/CN.4/156/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his original article 21 had dealt with three distinct problems: the disappearance of one of the parties to a treaty, the disappearance of the subject-matter and supervening illegality of performance because of a new rule of *jus cogens*. The discussion on the first reading having shown the advisability of dealing with those three problems in separate articles, he had submitted to the Drafting Committee three draft articles, the first of which was entitled " Extinction of a party " and was numbered article 21.

3. In the Commission, there had been very little support for paragraph 1 of article 21, dealing with the extinction of a party. In the Drafting Committee, it had become

clear that it was not possible to draft a satisfactory article on the impossibility of performance resulting from such extinction without some reference to State succession. The Drafting Committee had accordingly decided to dispense with the provision he had submitted as the new article 21. That did not, of course, mean that the whole of the original article 21 had been deleted: the provisions on the other two problems it dealt with had been embodied in the articles 21 *bis* and 22 *bis* proposed by the Drafting Committee.

4. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to delete the provision on the extinction of a party contained in paragraph 1 of the original article 21.

It was so agreed.

ARTICLE 21 (*bis*) (SUPERVISING IMPOSSIBILITY OF PERFORMANCE)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the text of the new article 21 (*bis*) proposed by the Drafting Committee read:

> " 1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the complete and permanent disappearance of the subject-matter of the rights and obligations contained in the treaty.
>
> " 2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty."

6. The question of subsequent impossibility because of the disappearance of the subject-matter of the treaty had originally been dealt with in paragraphs 2 and 3 of article 21. Paragraph 1 of article 21 (*bis*) was shorter than paragraph 2 of the original article 21 and no longer drew any distinction between the disappearance of the physical subject-matter and the disappearance of a " legal arrangement or régime to which the rights and obligations established by the treaty directly relate ". In view of the difficulties of interpretation to which the use of such terms as " legal arrangement " and " régime " could give rise, the Drafting Committee had decided to express the rule in broad terms covering the disappearance both of the physical subject-matter and of such metaphysical elements as a legal régime.

7. Paragraph 2 of article 21 (*bis*) was a shorter version of paragraph 3 of the original article 21.

8. Mr. PAREDES, commenting on the rule stated in paragraph 1, said he found the requirement of complete disappearance of the subject-matter unduly strict; for without disappearing completely, the subject-matter might deteriorate to such an extent that it no longer served the purpose for which it has been intended. For example, if a treaty was concluded for the international leasing of an island off which there were large stocks of fish or of other marine species in which a State was interested, and those stocks later greatly decreased or disappeared, should the treaty or the lease nevertheless subsist ? Or if a navigable river had ceased to be navigable owing to a great fall in the water level or because the current had become excessively swift, would the rights and obligations imposed or contracted in respect of navigation continue in being ?

9. In the provision under discussion it would be sufficient to affirm the right to apply for termination of the treaty when its subject-matter no longer served the purposes intended by the parties on concluding the treaty or when performance had been impossible from the time it was first proposed.

10. Mr. LACHS said he supported the article as a whole, though careful attention should be given to the point raised by Mr. Paredes. Another example would be a treaty between two States conceding reciprocal fishing rights; stocks might be depleted in the waters of one State, but not in those of the other. In that case, the disappearance of the subject-matter would be complete only as far as one of the two parties was concerned, but it would have a decisive effect on the possibility of carrying out the treaty.

11. Mr. TUNKIN said he agreed that there appeared to be a gap in paragraph 1. In order to meet the point raised by Mr. Paredes to some extent, he suggested that the word " complete " and possibly also the word " permanent " should be deleted. If paragraph 1 merely stated that the impossibility resulted from the disappearance of the subject-matter, the provision, interpreted in the manner indicated by the Special Rapporteur, should prove generally satisfactory.

12. In paragraph 2, he suggested that the words " impossibility of performance " should be replaced by the words " disappearance of the subject-matter ".

13. Mr. VERDROSS supported Mr. Tunkin's suggestion concerning paragraph 2; but he thought that as paragraph 1 referred to a treaty whose subject-matter had completely disappeared, it should not be said that a party could invoke the impossibility of performing the treaty, for with the complete disappearance of its subject-matter, the treaty automatically ceased to be in force.

14. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to the deletion of the word " complete "; he also suggested that the words " or destruction " should be added after the word " disappearance ". Those two changes would cover a case in which the physical subject-matter did not actually disappear, but was so wrecked that it could not be restored; they should go some way towards meeting the point raised by Mr. Paredes.

15. He had been rather startled by the examples given of treaties relating to fisheries. Fish stocks disappeared or migrated for quite mysterious reasons; they could also be quickly exhausted by over-fishing. In fact depletion of fish stocks was so complex a subject that the Commission should hesitate to make it a reason for introducing qualifications into the article.

16. Although he agreed that the word " complete " was unduly strong and should be dropped, he urged

that the word " permanent " should be retained. It was a necessary element in the doctrine of subsequent impossibility that it could not be invoked as applying in a case of temporary impossibility; the impossibility had to be at least of long duration. An additional reason for retaining the word " permanent " was the contrast with the provisions of paragraph 2.

17. He could not agree with Mr. Verdross, who had criticized the formulation of paragraph 1 on the grounds that impossibility of performance should result in the *ipso facto* termination of the treaty, without the need for a party to invoke the impossibility. In fact, situations such as those contemplated in article 21 *bis* were not always uncontroversial and the whole purpose of the procedural articles was to deal with disputes that might arise in connexion with the substantive provisions; it was therefore necessary to provide that the interested party could invoke the impossibility of performance. It could not simply be stated that impossibility of performance terminated the treaty. Some safeguard would have to be introduced, however, to cover the situation in which a State did not take any steps because the impossibility of performance was self-evident. In those circumstances, it should not be possible at a later stage to accuse the State of not complying with its obligations under the treaty, and the State should not be precluded from invoking impossibility of performance in reply to a belated claim of that nature.

18. Mr. LACHS said that he had mentioned fisheries merely by way of illustration; other examples could be given and the issue remained a very real one. However, he could accept the Special Rapporteur's reasoning and he suggested that the whole matter should be made clear in the commentary.

19. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to the Special Rapporteur's suggestion that the words " complete and permanent disappearance of the subject-matter " in paragraph 1 should be replaced by the words " permanent disappearance or destruction of the subject-matter ".

It was so agreed.

20. The CHAIRMAN asked for comments on Mr. Tunkin's suggestion that the words " impossibility of performance " in paragraph 2 should be replaced by the words " disappearance of the subject-matter ".

21. Mr. PAREDES urged that the word " performance " should be retained. The expression " impossibility of performance " was much wider in scope than " disappearance of the subject-matter ". As had already been pointed out, performance might become impossible even though the subject matter subsisted, if it no longer served the purpose for which it was intended. If the text referred only to disappearance of the subject-matter, the scope of the article would be unduly limited.

22. Mr. BARTOŠ endorsed Mr. Paredes' objection. Cases did indeed occur in practice in which performance became impossible owing to the disappearance, perhaps temporarily, of the subject-matter of the rights and obligations of a treaty. For example, if a treaty between two States provided for the supply of certain quantities of electricity generated by means of a dam which was subsequently destroyed, performance of the treaty obligations would become impossible and there might be no certainty that the storage basin could be rebuilt. If, after some years, the storage basin was rebuilt and the generation of electricity resumed, would there be an obligation to resume the supply of electricity, or would the treaty have been terminated by the disappearance of its subject-matter ? In the actual case he had in mind, during the negotiations between the States concerned, the experts had given no conclusive answer to the question whether the subject-matter should be considered to have disappeared and its destruction to be complete and irreparable, or whether the situation was a temporary one.

23. The crucial question about impossibility of performance was not the disappearance of the subject-matter but the circumstances of its disappearance. It was sometimes difficult to say whether impossibility of performance would be permanent or not.

24. Mr. CASTRÉN said he understood Mr. Paredes' concern, and the explanations given by Mr. Bartoš had convinced him that the text proposed by the Drafting Committee should stand. Another reason was the need to use the same expression in both paragraphs of the article.

25. Mr. TUNKIN said he would not press his amendment to paragraph 2. The reference to " impossibility of performance " would give the provision a wider scope.

26. The CHAIRMAN said that in that case paragraph 2 would remain unchanged. He put article 21 *bis* to the vote with the amendment to paragraph 1 which had already been adopted.

Article 21 bis, thus amended, was adopted unanimously.

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 22 read:

" 1. Subject to the provisions of paragraphs 2 and 3, a change in the circumstances existing at the time when a treaty was entered into may not be invoked as a ground for terminating or withdrawing from the treaty.

" 2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when a treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

" (*a*) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

" (*b*) the effect of the change is wholly to transform in an esential respect the character of the obligations undertaken in the treaty.

"3. Paragraph 2 does not apply:

"(*a*) to a treaty establishing a territorial settlement, or

"(*b*) to changes of circumstances for which the parties have made provision in the treaty itself."

28. His original article 22 (A/CN.4/156/Add.1) had been entitled "The doctrine of *rebus sic stantibus*"; it had set out the rule in elaborate terms and in paragraphs 3, 4 and 5 had specified a number of exceptions. In an attempt to reconcile the different views expressed in the Commission, the Drafting Committee had produced a much shorter text in three paragraphs.

29. In paragraph 1, the negative formulation of the rule had been retained in deference to the wishes of the majority of the Commission; the purpose was to emphasize that it was not a normal rule, but an exceptional one.

30. Paragraph 2 stated the conditions under which the rule operated and had proved quite difficult to draft. Much of the substance of the original paragraph 2 had been retained, but the wording had been considerably simplified; the Drafting Committee had considered, in particular, the doubts expressed during the discussion as to whether sub-paragraphs (*b*) and (*c*) of the original paragraph 2 should be alternative or cumulative.

31. Paragraph 3 stated the exceptions to the rule; the first was that set out in sub-paragraph (*a*) which was intended to cover the cases mentioned in the original paragraph 5. The expression "territorial settlement" would cover ancillary rights arising from a transfer of territory.

32. Sub-paragraph (*b*) dealt with the case in which the treaty actually made provision for the change of circumstances. That exception had met with general approval, although he understood that Mr. Yasseen maintained his objection to it.

33. Mr. YASSEEN said that the draft prepared by the Drafting Committee was definitely more precise than the original text. He had, however, one general comment to make.

34. The principle *rebus sic stantibus* was a general rule of well-defined scope. It might be qualified by conditions and limitations, but there should be no hesitation in applying it once those conditions were fulfilled. Paragraph 1 of the text proposed by the Drafting Committee did not seem to reflect an attitude favourable to the application of that rule — quite the contrary.

35. In his opinion, paragraph 1 was not essential, for it did not really state a rule of law, but expressed a certain attitude towards the principle *rebus sic stantibus*. He therefore proposed that it should be deleted. Article 22 would then consist of two paragraphs only, paragraph 2 of the present text becoming paragraph 1 of the new version, which might read: "A fundamental change which occurs with regard to a fact or situation existing at the time when the treaty was entered into may be invoked as a ground for terminating or withdrawing from the treaty if: ".

36. In addition, the word "wholly" should be deleted from the present paragraph 2 (*b*), for it was sufficient to say that the effect of the change was to transform the character of the obligations "in an essential respect". It would be going too far to require a complete transformation; such a stipulation might preclude the application of the *rebus sic stantibus* rule.

37. Paragraph 3 (*b*) contained essential provisions which he did not consider to be incompatible with his position on the *rebus sic stantibus* principle, which he regarded as *jus cogens*. It was true that one of the conditions required for the application of the general theory of revision and of the *rebus sic stantibus* principle was that the change of circumstances must not have been foreseen at the time of concluding the treaty, but that did not mean that the principle could not be considered a rule of *jus cogens*.

38. Mr. CADIEUX said that the Drafting Committee was once again to be congratulated on its work. He approved of the principle set out in the new text, which he was quite willing to accept. He wished, however, to comment on various points in the article.

39. First, in paragraph 1, there was perhaps no need to refer to paragraph 3, which also stated the conditions under which the *rebus sic stantibus* principle did not apply. It would be sufficient to retain the reference to paragraph 2.

40. Secondly, the wording of paragraph 3 (*b*) could be simplified, while preserving the essential idea, if the words "for which the parties have made provision" were changed to "provided for".

41. Thirdly, what was the relationship between article 22 and article 25, concerning procedure ? Perhaps the Commission intended to include in article 25 a cross-reference to article 22. At all events, it was important to consider carefully the procedure that could be adopted for the settlement of disputes arising out of the interpretation of article 22, which could easily lead to abuses.

42. Mr. CASTRÉN said he was prepared to accept the simplified redraft of article 22 provided that the additional conditions laid down for the application of the article in the original text were satisfactorily laid down in article 4, which the Drafting Committee had not yet finished reviewing, and provided that article 25, for which the Commission had not yet adopted the final text, was recast so as to provide the necessary safeguards against unilateral and arbitrary denunciations.

43. With regard to the drafting of article 22, he proposed, first, that the adjective "fundamental" should be deleted from paragraph 2, as the idea was clear enough from sub-paragraphs (*a*) and (*b*); on the other hand there would be no harm in retaining it in the title.

44. Secondly, in paragraph 1, the reference to paragraph 3 should be deleted, since that paragraph, far from qualifying the main rule laid down in paragraph 1, actually affirmed it.

45. Mr. TABIBI thought the essential provision of the article was paragraph 2, which dealt with fundamental changes of circumstances; paragraph 1 did not contain any rule and should be dropped.

46. Paragraph 3, which stated exceptions, should also be deleted. Sub-paragraph (*a*) would except from the application of the rule a wide range of treaties which, in many parts of the world, were the decisive criterion for the doctrine of *rebus sic stantibus*; territorial settlements affected the fate of millions of human beings and to exclude them from the application of article 22 would undermine its provisions.

47. Sub-paragraph (*b*) made an exception of the case in which the parties had made provision for the change of circumstances in the treaty. That exception was not justified. The change in circumstances would affect the provision in question in the same way as the rest of the treaty.

48. The provisions of article 22 should be confined to those contained in paragraph 2.

49. Mr. BARTOŠ said he would not oppose the redraft of article 22 which, although not perfect, was at least the only text on which the Drafting Committee had been able to agree; but he wished to make a few comments on it.

50. The exact meaning of paragraph 3 (*b*) was not clear to him. Was it for the change of circumstances that the parties had made provision, or for the circumstances themselves ? A general clause stating that a change of circumstances had no effect on a treaty was very dangerous. True, a saving clause specifying that no change of circumstances would affect the treaty was included in the international treaties of public law made by the International Bank for Reconstruction and Development and even in many treaties between strong and weak States. It might perhaps be accepted that certain changes of circumstances could be provided for by the parties, but the *rebus sic stantibus* rule was a rule of *jus cogens*, and it would be dangerous to adopt a text that might lend itself to the perhaps mistaken interpretation that derogations from the concept of the *rebus sic stantibus* rule as established *jus cogens* were permitted under contractual clauses in treaties.

51. He therefore reserved his position on that interpretation, though he would not rule out the possibility of the parties making provision for certain changes and even adopting subsidiary provisions to remedy situations caused by a change of circumstances, always provided that the parties to the treaty were aware not only of the changes in question, but also of their possible effects.

52. He also entered a reservation similar to that made by Mr. Tabibi concerning the meaning of paragraph 3 (*a*). Mr. Tabibi had put forward an idea which he (Mr. Bartoš) had himself gone into when the article had been discussed on the first reading (695th meeting, para. 64). But although the new text was less stringent and the concessions which had been made were quite reasonable, he still had doubts about the meaning of the expression " territorial settlement ". If it meant the demarcation of frontiers, he was almost inclined to accept the idea on the principle of the territorial integrity of States, but if it was to be understood in its wider sense, he must make a reservation.

53. He agreed with Mr. Rosenne on the practical consequences of the application of the *rebus sic stantibus* principle in case-law. The theory involved was not that the *rebus sic stantibus* rule must always prevail over the will expressed by the contracting parties at the time of concluding the treaty, and that no request for revision, or even temporary suspension, could ever be entertained. He was entirely opposed to such a view if it would preclude the practical solution that was essential in contemporary international relations, namely, to stop short of saying that the will of the parties no longer existed in all cases. That will had existed and the subject-matter of the treaty existed, but the circumstances had so changed that performance of treaty had become impossible under the former conditions; but it might be possible to maintain at least part of the treaty.

54. In modern practice States sought means to achieve the object laid down in a treaty by provisionally suspending its performance or by revision. That idea had been rejected by the Drafting Committee, and he was not asking for it to be taken up again; but he hoped the Special Rapporteur would mention in his report that some members had drawn the Commission's attention to that conception of the effects of the *rebus sic stantibus* principle, which differed from the conception of the majority, but would certainly be accepted in international law some day.

55. Mr. VERDROSS congratulated the Drafting Committee on having succeeded in formulating the most difficult article in the draft.

56. Paragraph 1 expressed a correct idea, but as Mr. Yasseen had observed, it was a statement of doctrine rather than a rule of law. He therefore proposed that it should be transferred to the commentary.

57. Paragraph 2 was the most important; the Drafting Committee had clearly stated the two cases in which a change of circumstances could be invoked as a ground for terminating a treaty. He proposed that the phrase " not foreseen by the parties " should be inserted in sub-paragraph (*b*) after the word " change ". For if the change had been foreseen, sub-paragraph (*a*) would apply.

58. With regard to paragraph 3 (*a*), he agreed with Mr. Tabibi and Mr. Bartoš that no exception should be made for treaties establishing a territorial settlement. Perhaps the Drafting Committee had been thinking of territorial rights in regard to which the provision might be justified. But there was no reason why a treaty relating to territorial questions should not be subject to the same rule as other treaties. The Commission could therefore delete paragraph 3 (*a*).

59. Paragraph 3 (*b*) was correct, but it should have specified that the changes of circumstances contemplated were changes concerning which the parties had wished to bind themselves. Moreover, the words " in the treaty itself " should be deleted, for the changes in question might have been provided for elsewhere.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the French translation of paragraph 3 (*b*) was not accurate: it did not render the precise meaning of the words " have made provision ".

61. Mr. YASSEEN said that he understood paragraph 3 (*b*) in the sense explained by Mr. Bartoš. If the parties had foreseen the change of circumstances at the time of concluding the treaty, then the principle of *rebus sic stantibus* could not be invoked; hence he considered that the paragraph 3 (*b*) did not conflict with his conception of *jus cogens*. According to paragraph 3, paragraph 2 did not apply to changes for which provision had been made by the parties. The question whether the treaty contained provisions concerning the effects of the changes was quite a different matter. In the French text, paragraph 3 (*b*) could not be construed as authorizing the parties to incorporate in the treaty a clause exempting the treaty from the effect of any change in circumstances. Such a clause would be void because it would be incompatible with a *jus cogens* rule.

62. Mr. ROSENNE said he would have liked the Commission to insert the words " or suspending its operation " at the end of paragraph 1 and hoped that that point could be taken up when the whole question of suspension was re-considered.

63. He agreed with Mr. Castrén about the close interrelationship between article 22 and articles 24 and 25.

64. The CHAIRMAN, speaking as a member of the Commission, said he supported article 22, which he found well-balanced.

65. He was not in favour of the deletion of either paragraph 1 or paragraph 3, both of which were necessary for the general structure of the article.

66. The word " fundamental " in paragraph 2 should be retained.

67. The reference to paragraph 3 in the opening proviso of paragraph 1 could be dropped.

68. Mr. PAREDES said it was essential to maintain the principle of *rebus sic stantibus* and to give it a very wide application in modern life, in which international relations were so stormy and subject to abrupt changes. The principle was based on a proper interpretation of the will of the parties which, in the case of fundamental changes, would not have concluded a treaty or would not have done so in the same terms if the circumstances had been those which arose later. In some cases, even when the contracting parties had foreseen the changes and accepted them in advance, that could not prevent the application of the *rebus sic stantibus* rule. He therefore supported the proposal to delete paragraph 3 (*b*).

69. In support of his argument he gave the example of a government which had come to power by a *coup d'état* and had concluded a treaty with a foreign government for moral and material support to restore it to power if ever the constitutional government was re-established. Would the guarantee clause be valid and would the foreign Power have to implement it if the constitutional government was re-established ? He did not think so.

70. He supported the proposal to delete paragraph 1 because it was drafted in terms which entailed a general repudiation of the *rebus sic stantibus* rule.

71. He also supported the proposal to delete paragraph 3 (*a*). Treaties establishing territorial settlements involved not only questions of frontier demarcation, but also legal questions for the populations concerned and various economic matters. Consequently, the broad terms of paragraph 3 (*a*) were incompatible with various rights, such as the right of self-determination of peoples.

72. The *rebus sic stantibus* rule should have a much wider application than was provided for in article 22.

73. Mr. LACHS said that the Drafting Committee had succeeded in drafting a provision on an essential principle which ought to commend itself to the Commission. It was essential to strike a balance between respect for the stability of treaties and the need to take into account essential changes that fundamentally altered the character of a treaty. If the notion of change were interpreted too loosely, it might open the way for the kind of acts which had been witnessed during the period between the wars, when certain States, invoking the doctrine of *rebus sic stantibus*, had torn up or violated treaties. As an example, it was sufficient to mention Hitlerite Germany, whose behaviour could not be condoned.

74. He approved of the way in which the Drafting Committee had linked paragraphs 1 and 2, first establishing the principle that the mere passage of time did not affect a treaty and then laying down the conditions under which a fundamental change could be held to have occurred and could be a ground for termination or withdrawal.

75. Perhaps the wording of paragraph 1 could be strengthened by indicating that a change *per se* would not suffice as a ground for termination; that would bring out even more emphatically the need to preserve the stability of treaties.

76. He supported Mr. Cadieux's amendment deleting from paragraph 1 the reference to paragraph 3.

77. The word " fundamental " could be omitted from paragraph 2 and he also favoured the deletion of the word " wholly " in paragraph 2 (*b*), which was rendered unnecessary by the word " essential ".

78. He fully sympathized with Mr. Tabibi's concern over paragraph 3 (*a*), but wondered whether it was relevant to the question of self-determination. States were freeing themselves from colonial subjection and were gaining independence in accordance with what had become a substantive rule of contemporary international law. Any treaty conflicting with that rule would come under the application of other articles of the draft, including article 22 *bis*.

79. He urged the Commission to accept paragraph 2 (*a*), which was reasonable and presented the matter in the proper perspective. Frontier settlements ought to be stabilized so as to prevent their being challenged on grounds of an essential change in circumstances, as had occurred during the thirties.

80. He hesitated to accept paragraph 3 (*b*), because it seemed to him unlikely that the parties could foresee changes of circumstances accurately at the time when a treaty was concluded.

81. Mr. TUNKIN said that the new text of article 22 was generally acceptable. The doctrine of *rebus sic stantibus* could not be regarded as a principle that took precedence over other rules of international law, nor should it be understood too widely; he was glad that the term itself had now been dropped because of the many different ways in which it had been defined.

82. In order to prevent any misunderstanding about the scope of paragraph 3 (*a*), the word " frontiers " should be substituted for the words " a territorial settlement "; it would then be perfectly clear that no reference to such questions as the establishment of military bases was intended.

83. Paragraph 3 (*b*) ought to be deleted because it was inconceivable that the parties could foresee changes of circumstances that would wholly transform the character of the obligations undertaken in the treaty.

84. Mr. GROS said that he shared Mr. Lachs' views on every point. Mr. Tunkin had also very clearly explained the spirit in which the Commission had decided to state what would be a rule of international law for the first time. There was already a doctrine on the effects of certain changes of circumstances and everyone knew how much harm it had done. Consequently, the Commission should not give the impression that it was encouraging the application of any such doctrine. The text proposed was clear and struck a balance between the need to maintain the stability of treaties and the need to take account of the effects of a fundamental change of circumstances, in certain cases. The Commission should take care not to disturb that balance by amendments to the article.

85. He could agree to the deletion of the word " wholly " in paragraph 2 (*b*), but at the beginning of paragraph 2 he would prefer to retain the word " fundamental ", which had been carefully considered and was one of the limitations that were essential in order to prevent abuses of the kind referred to during the discussion.

86. As Mr. Lachs had pointed out, paragraph 3 (*a*) was most important and useful; perhaps there would be no objection to referring to a " frontier treaty " rather than to a " territorial settlement ".

87. On the other hand, he parted company with Mr. Tunkin where paragraph 3 (*b*) was concerned. There were, in practice, treaties which made provision for the possibility of fundamental changes during their execution. For instance, recent economic treaties contained provisions on the eventuality of " serious disequilibrium " or " fundamental disturbances " in a country's economic situation, which established remedial methods and procedures. If such provisions had not been included in the treaty, it might be claimed in such circumstances that a fundamental change had occurred; but where the treaty made provision for the change and prescribed the remedy, that remedy must be applied, not the general system of fundamental change of circumstances laid down in article 22.

88. Hence he could not vote for the article if paragraph 3 were deleted.

89. Mr. EL-ERIAN said that, faced with a difficult task, the Drafting Committee had produced a compromise between the obligation to safeguard the stability of treaties and the necessity of recognizing the realities of change.

90. Paragraph 1 made it clear that not every change in circumstances could be invoked as a ground for termination.

91. Paragraph 2 usefully emphasized the fundamental character of the change that could provide a ground for termination and then went on to define the two conditions that must be satisfied: the first was subjective and related to the will of the parties; the second, in paragraph 2 (*b*), was objective; the idea of an implied clause had been dropped altogether.

92. The word " wholly " in paragraph 2 (*b*) served no useful purpose and could be omitted.

93. In his opinion the purpose of paragraph 3 (*b*) was not to eliminate any application of the rule of a change in circumstances; Mr. Gros' reading of that provision was surely the correct one.

94. Mr. BARTOŠ said he wished to make his position clear on certain points. The *rebus sic stantibus* rule existed, could be applied and had been applied; but it was not universally recognized. The Commission had wished, not to codify that rule, but rather to use its underlying idea to lay down a generally acceptable rule that would make for the progressive development of international law. The rule contemplated would not disrupt international law, but on the contrary would make an adjustment possible and was calculated to establish harmony between the facts and the law, so that when changes of fact occurred in the international order, their claims could not be denied by invoking the *pacta sunt servanda* rule.

95. He was at one with Mr. Lachs in stressing the link between articles 22 and 22 *bis*. A distinction should be made between the introduction of a new rule — where article 22 *bis* would apply — and the application, after the conclusion of the treaty, of a contractual rule which had existed at the time of its conclusion. In the latter case article 22 would apply, because a change of circumstances had supervened.

96. Mr. TABIBI said that no progress could be made in the development of international law unless the changes in international life were taken into account, though not to the detriment of the sanctity of treaties.

97. Contrary to what Mr. Lachs had said, he still maintained that paragraph 3 (*a*) ran counter to the principle of self-determination. A number of treaties had in fact been annulled because of radical changes in circumstances. Such was the speed of change in the modern world that some treaties could lose their relevance to reality almost before the ink was dry.

98. His concern over the consequences of paragraph 3 (*a*), which was shared by other members, could not be allayed by Mr. Tunkin's amendment, and the arguments advanced against his view had failed to convince him.

99. Mr. de LUNA warmly congratulated the Drafting Committee and endorsed the comments of Mr. Lachs, Mr. Tunkin and Mr. Gros. He had been particularly impressed by what Mr. Gros had said about paragraph 3 (*b*). By way of illustration, he referred to a treaty drafted in 1962 under the auspices of OECD on the protection of foreign property. Article 4 of that treaty established the *bona fide* obligation to guarantee the repatriation of property; it had given rise to lively discussion, as a result of which Greece had managed to secure the inclusion in the body of the treaty of a limitation originally in the commentary, under which the parties were required to honour that guarantee only so long as their balance of payments situation permitted them to do so within reason.

100. Mr. TUNKIN replying to Mr. Gros' comments, said that the deletion of paragraph 3 (*b*) would not mean that provisions concerning changes of circumstances included in the treaty itself would not apply, but that they would be subject to the conditions set out in paragraph 2. On the other hand, if paragraph 3 (*b*) were retained it would override the provisions of paragraph 2.

101. Mr. BRIGGS said he could not agree to the deletion of paragraph 1, because it was essential to state that a mere change in circumstances did not provide a legal basis for terminating a treaty.

102. In paragraph 2 (*b*), an objective criterion which had never formed part of the original doctrine of *rebus sic stantibus* had been combined with a subjective criterion.

103. He was opposed to deleting paragraph 3, which laid down exceptions to a rule that was being proposed by the Commission *de lege ferenda.* He agreed with Mr. Gros that there was no rule in existence whereby a fundamental change of circumstances could be invoked as a ground for termination, and he was inclined to think that even with the safeguards provided the article went too far, particularly since it made no provision for the reference of disputes to compulsory jurisdiction.

104. He endorsed Mr. Gros' comments on paragraph 3 (*b*).

105. The CHAIRMAN welcomed Mr. Stavropoulos, Legal Counsel of the United Nations.

106. Mr. STAVROPOULOS, Legal Counsel, said he was glad to have an opportunity of attending one of the Commission's meetings. It might perhaps be of interest to members, in the context of the illuminating discussion which was taking place on article 22, to know that during his long service with the United Nations he had been consulted on at least five occasions by representatives of governments which wished to invoke, in good faith, the doctrine of *rebus sic stantibus.* In each case the difficulty had been the lack of any precedent from which an objective criterion could be derived for determining whether the circumstances had in fact so changed that the government in question would be protected against a charge of taking arbitrary action.

The meeting rose at 1 p.m.

711th MEETING

Monday, 1 July 1963, at 3 p.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 continue consideration of the new text proposed by the Drafting Committee for article 22 (previous meeting, para. 27).

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES) (*continued*)

2. Mr. PAL said that the proposed text was intended to meet the same requirements as the doctrine of *rebus sic stantibus.* That doctrine had originated as one of interpretation; it read into every treaty an implied clause providing that the treaty was concluded subject to the material conditions remaining the same: *omnis conventio intelligitur rebus sic stantibus.* The concept of the sanctity of treaties, as expressed in the maxim *pacta sunt servanda,* was primarily an instrument of rigid *status quo* policy, which, in its strict application, meant seeking to protect today, not the position of today, but the position of yesterday, despite the fact that material changes might have intervened. The doctrine of *rebus sic stantibus* had had to be introduced to serve the real purpose of law, which was to preserve today's way of life. It would be wrong to judge that doctrine only by the questionable assertions of the past.

3. Many recent treaties actually contained a clause providing that if, during the lifetime of the treaty, either party should consider that there had been a change in the basic assumptions underlying the agreement, it should be open to that party to set in motion the procedure for revision or termination of the treaty. Adjustment under such a provision would seem to be less difficult than under the proposed provisions of article 22, which appeared to have been unduly influenced by the fact that in the past there had been some abuse of the *rebus sic stantibus* doctrine. Personally, he thought that was a wrong approach and he accordingly supported those members who had proposed the deletion of paragraph 1 and the amendment of paragraph 2. The two paragraphs read together limited the doctrine to the point of abrogation.

4. He also supported the proposal to delete paragraph 3 (*a*), for the reasons given by Mr. Tabibi.

5. He was opposed to paragraph 3 (*b*), for the reasons given by Mr. Tunkin.

6. The provisions of article 22 should be confined to those contained in paragraph 2, with a number of drafting changes. First, the adjective "fundamental" before the word "change" in the first line should be dropped if sub-paragraph (*b*) were to be retained. That