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Summary record of the 733rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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73. The Commission had agreed that its work on the law of treaties should take the form of a draft convention, not of a code. Certain situations in international relations, which were not contrary to international law, but were nevertheless of a particular character, should not be generalized in a draft convention on the law of treaties.

74. He appreciated the efforts of the Special Rapporteur to submit draft articles that were as complete as possible to the Commission, so that it could decide which provisions should be retained for the purposes of a draft convention; he had, for example, done well to provide the Commission with an opportunity of discussing the question of the colonial clause in connexion with article 58. But the special situations dealt with in articles 59 and 60 belonged rather to the commentary than to the text of the articles. The Commission should avoid any suggestion that it approved of situations which were not consistent with contemporary international law, and should not derive general rules from special situations. His position was rather similar to that taken by the Commission on article 3, concerning the capacity to conclude treaties; for although there were exceptional cases, such as neutrality, in which the capacity of a State to conclude certain treaties was restricted, the Commission, as stated in paragraph (1) of its commentary on article 3¹¹ had held that it would not be appropriate to enter into all the detailed problems of capacity which might arise and had decided to set out, in that article, broad provisions concerning capacity to conclude treaties.

The meeting rose at 1 p.m.

733rd MEETING

Thursday, 28 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 59 (Extension of a treaty to the territory of a State with its authorization) and

ARTICLE 60 (Application of a treaty concluded by one State on behalf of another) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of articles 59 and 60, in the Special Rapporteur's third report (A/CN.4/167).

¹¹ *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*

2. Mr. TSURUOKA said that he considered article 60 useful, if not absolutely essential. The substance of it might perhaps be included in the commentary on the part of the draft concerning the conclusion of treaties, or it might be made into a separate article for inclusion in that part. With the development of international relations, the method described in the article was likely to be used more often; besides, its use might mitigate the inconveniences caused by the rupture of diplomatic relations between two States.

3. With regard to the substance of the article, it would be well to stress in the commentary that the consent of the party with which the agent State concluded the treaty was indispensable. In the interests of the stability of international relations, the Commission might also mention the question of the evidence of authority. That was an important point where a relationship between two independent States was concerned.

4. Mr. JIMÉNEZ de ARÉCHAGA suggested that the idea, if not the actual wording, of paragraph 1 of article 60 should be retained, namely, that a State could confer upon another State authority to represent it in concluding a treaty, as Luxembourg had done with Belgium, and in demanding compliance with its terms, as Liechtenstein had done with Switzerland. He agreed with the Special Rapporteur that that kind of situation might well occur more frequently in the future. It was significant that both the cases quoted were cases of small countries having a customs or other economic union with a larger neighbouring country. In view of the new widespread tendency to organize economic associations, such as the Free Trade Association being formed in Latin America, with the aim of broadening production areas and markets, the Commission should not ignore, much less condemn, a practice whereby a small economically developing State could secure a better bargaining position by allowing another State to act on its behalf. Another possibility was that a State which was protecting the interests of another State following its severance of diplomatic relations with a third State, might quite legitimately have occasion to conclude a treaty on its behalf.

5. The Commission should not adopt a negative attitude to the legitimate institution of agency merely because it might have been used in the past to set up protectorates. Many other legitimate institutions had been used for objectionable purposes, but the Commission had not decided that it should not deal with them. It should be remembered that representation by the operation of law did not exist in international law; the only form of representation was by virtue of a treaty. Any agency relationship which might be established would therefore be subject to the rules in Parts I and II of the draft articles. Such rules as those relating to free consent, nullity on grounds of coercion, *jus cogens*, the power of denunciation in certain circumstances, and determination for change of circumstances would apply in all cases. There would thus be ample safeguards to ensure that no State would in future, as had happened in the past, use the method of agency by treaty to set up a protectorate regime against the free will of the State represented.

6. Mr. TABIBI said that he had no objection to the principle of paragraph 1 of article 60, since representation was well established in the practice of States and did not necessarily have a colonial connotation. However, the conclusion of a treaty by one State on behalf of another was a rare practice which was tending to become even rarer.

7. He doubted the wisdom of retaining paragraph 2 in its present position because of the connexion with the topic or relations between States and intergovernmental organizations. Moreover, the whole question of treaties between international organizations and States needed careful study. While acting as Chairman of the Technical Assistance Board and of the Technical Assistance Committee he had been able to note a diversity of practice amounting to unequal treatment of the various States having treaty relations with the United Nations in the matter of technical assistance. In particular, the manner in which the question of local costs was treated differed from one technical assistance agreement to another. It was clear that the whole subject needed separate study and its place was not in article 60.

8. Since it was generally agreed that article 59 should be dropped, the opening sentence of paragraph 1 of the commentary to article 60 should also be deleted.

9. Mr. CASTRÉN said he agreed with Mr. Reuter and Mr. Jiménez de Aréchaga that paragraph 1 of article 60 stated a correct and practical rule of a general nature, which should be retained without any restriction.

10. But like other members of the Commission he thought that the proper place for that rule was the part of the draft dealing with the conclusion of treaties. If a State authorized another State to conclude a treaty on its behalf, that treaty clearly applied to the authorizing State just as it did to a party to the treaty. The second sentence of paragraph 1 seemed to be an unnecessary repetition of that rule.

11. Paragraph 2 should be deleted.

12. Mr. ROSENNE said the discussion had shown that the matter dealt with in paragraph 1 of article 60 called for a simple formulation to the effect that a State could become a party to a treaty through the action of another State in conformity with the provisions of Part I, provided the co-contracting States were aware of the situation and consented to it. A provision along those lines could be included in Part III on the understanding that its position would be decided later.

13. It was not easy to dismiss the problem dealt with in paragraph 2. The essential idea behind the provision was that, in the case of a treaty to which an international organization was a party, there was nothing in principle to prevent individual States which were members of the organization from becoming subjects of rights and obligations under the treaty directly, if so agreed in the treaty itself. That situation constituted a new form of treaty-making which had nothing to do with agency. The judgments of the International

Court of Justice in the *South-West Africa* cases¹ and the *Northern Cameroons* case² provided limited authority for the general proposition that the process constituted a possible development of treaty law. The Commission should, therefore, without getting involved in detail, include in its draft on the law of treaties a general statement of principle regarding that development.

14. The examples given in paragraph (3) of the commentary on article 59 showed that the matter was one of increasing importance in regard to economic agreements. He was well aware that at its fourteenth session the Commission had "reaffirmed its decisions of 1951 and 1959 to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States".³ He did not suggest that the Commission should reverse that decision or enter into the question in detail, but merely that it should reserve the point, and should do so explicitly.

15. Mr. PAL said that Part III dealt, among other things, with the application of treaties, meaning treaties the making of which had already been dealt with. The questions of a treaty concluded by one State on behalf of another and of a treaty concluded by an international organization in the circumstances specified in paragraph 2 of article 60, were not dealt with elsewhere in the draft and had hitherto been kept clearly outside its scope.

16. The present position was, therefore, that Part I dealt only with the conclusion, entry into force and registration of treaties concluded by States on their own behalf, and excluded treaties concluded by international organizations. Part III, purporting to deal with the application, effects, revision and interpretation of treaties must be taken as referring to treaties concluded in accordance with Part I. There was thus no place for the provisions of articles 59 and 60 in the present arrangement. Consequently, if the Commission decided that treaties of the kind contemplated in articles 59 and 60 were possible, it should insert in Part I provisions on the conditions to which the making of such treaties would be subject and on the requirements they must fulfil in order to exist. Once that was done, it would be possible to deal with the problem of the application of such treaties.

17. The CHAIRMAN, speaking as a member of the Commission, said he wished to correct what he had said about paragraph 2 of article 60 at the previous meeting.⁴ It was true that the Commission had decided earlier to leave aside treaties concluded by international organizations, in other words, treaties to which they were parties. But article 60 dealt with the case in which a State was a party to a treaty by virtue of an agency relationship. Paragraph 1 dealt with the case in which the State was represented by another State,

¹ *I.C.J. Reports*, 1962, p. 319.

² *Op. cit.* 1963, p. 15.

³ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161, para. 21.

⁴ Para. 68.

so the case in which the State was itself represented by an organization remained to be dealt with in paragraph 2. In that case only States were parties to the treaty.

18. When an international organization concluded a treaty there were three possible cases. First, it could conclude the treaty for itself, in which case it was the organization which assumed obligations and acquired rights. Secondly, it could act not truly as an organization, but rather as the joint organ of States; that case raised no difficulties. Thirdly, it could act as agent for certain States; that kind of relationship might perhaps be fairly common in the future. Provided the Commission definitely restricted paragraph 2 of article 60 to the third case, it could retain the provision without going back on its former decision.

19. Mr. TUNKIN said that he doubted very much whether representation of one State by another in the conclusion of treaties was a normal practice. Apart from colonial practice, instances of such representation were very much the exception. The only example given was that of the Belgium-Luxembourg Economic Union, and even that was open to some doubt. There appeared to be a tendency to discuss representation on the analogy of private law, but the situation in international relations was completely different from that obtaining under municipal law.

20. It had been suggested that the practice of representation in treaty-making was gaining favour. The cases mentioned, however, were not cases of one State acting on behalf of another, but of an international organization acting for its member States. With regard to paragraph 1, he still believed that a general rule should not be derived from the generalization of a special case, particularly since the formulation of such a rule would have undesirable connotations.

21. He could not agree with the Chairman regarding paragraph 2. Where an international organization entered into a treaty, there would always be the problem of responsibility for the treaty with regard to both the organization and the member States. There had been a good deal of discussion on that problem in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space,⁵ which had recently discussed the question of liability for damage caused by objects launched into outer space, where the launching was part of a project carried out by an international organization. It had been generally agreed that at least in those cases the liability of the international organization did not exclude that of the member States; international responsibility arose in respect both of the organization and of the member States. The Commission should not take a decision on a problem the examination of which it had already wisely decided to defer.

22. Mr. PAL said he must emphasize that, if the Commission intended to deal with treaties concluded by one State on behalf of another, it should first formulate a text on the requirements for making such treaties.

23. Mr. ELIAS said he agreed with the speakers who had urged that paragraph 2 of article 60 should be deleted. Even if it was decided to retain its contents, they should be placed elsewhere, because they were in a completely different category from those of paragraph 1.

24. He agreed with Mr. Pal that the contents of paragraph 1 should be transferred to Part I of the draft. Perhaps the Commission could decide at once whether the idea expressed in that paragraph should be included; if so, a decision on where to place it could be left till later. The second sentence of paragraph 1 should be deleted in any case, because it added nothing to the provision in the first sentence.

25. It was true that only one special case had been adduced in support of paragraph 1, but that paragraph covered a subject which had not been dealt with elsewhere and it should be included in the draft. He had been impressed by Mr. Jiménez de Aréchaga's remarks about the safeguards provided by the provisions of Part I against the subjection of one State by another. After considering the matter in that light, he agreed that the Commission should not restrict the freedom of States to make the type of arrangement referred to in paragraph 1 if they wished.

26. Mr. de LUNA said that he agreed with Mr. Rosenne and Mr. Ago about the substance of paragraph 2 of article 60. The capacity of organizations to conclude treaties was not directly at issue.

27. As to the form, he would have preferred the Commission also to consider treaties concluded by international organizations, but the fact remained that it had decided not to do so until later. Paragraph 2 as it stood, however, assumed that the capacity of organizations to conclude treaties was recognized. Unlike some members of the Commission, he acknowledged that capacity. Article 5 of the Treaty of 16 February 1933 establishing the Little Entente provided for the possibility of collective representation in relations with other States.⁶ The phenomenon was not perhaps very common, but it was not exceptional either.

28. Mr. BRIGGS said that there would be a serious gap in the draft articles if the Commission omitted all reference to the situation envisaged in paragraph 1 of article 60. The practice dealt with there was likely to become increasingly important for economic agreements and perhaps in other fields as well. He saw no reason why the Commission should omit to deal with an important problem merely because of certain connotations which were irrelevant to the problem itself. On that point, he associated himself with the observations made by Mr. Jiménez de Aréchaga.

29. Both the Chairman and Mr. Rosenne had made a convincing case for retaining the idea expressed in paragraph 2.

30. Mr. BARTOŠ said that in substance he agreed with the ideas put forward by Mr. Rosenne and the Chairman about paragraph 2 of article 60. On careful

⁵ A/AC.105/C.2/SR 31-35 and A/AC.105/19, Annex II.

⁶ League of Nations *Treaty Series*, Vol. CXXXIX, p. 237.

consideration, however, it would be found that the paragraph referred to two kinds of relations: those between States through the organization and those between the organization itself and States. The Commission had in fact decided that the second kind of relations should be studied in connexion with another draft, to be prepared by Mr. El-Erian. The question was whether organizations had the capacity to represent States and, if so, what were the effects of their exercising that capacity.

31. Mr. EL-ERIAN said he had been impressed by the remarks of Mr. Jiménez de Aréchaga and Mr. Elias. Although he still believed that there was no need for it, if the majority of the Commission wished to make provision for the special case contemplated in paragraph 1 of article 60, he would not resist, provided that other parts of the draft contained guarantees against imposed representation, and that a clear distinction was made between legitimate representation and representation imposed by force. A distinction must be drawn, as was done by leading authorities, between colonial protectorates and the legitimate practice whereby a small State freely agreed to entrust another State with its representation for the purposes of concluding a treaty. On that point valuable criteria had been suggested by Mr. Bartoš, concerning the limited and revocable character of the agency agreement.

32. Paragraph 2 raised a difficult problem. Although the Commission had decided not to deal with treaties entered into by international organizations, references to such treaties had been included in earlier articles, in particular, article 3, paragraph 3,⁷ dealing with the capacity of international organizations to conclude treaties. Provisions of that kind had been adopted for the sake of completeness. In the present context, the position was perhaps different, but he did not wish to take a definite stand at that early stage.

33. The CHAIRMAN, speaking as a member of the Commission, said he had two comments to make. First, with regard to paragraph 1 of article 60, it was quite true that the institution of agency was not so common in international as it was in private law. Still, it existed in international law and its use was more widespread than was generally recognized. It was not the Commission's practice to consider only matters of common occurrence. At its last session it had even adopted an article on fraud, and cases of fraud in international practice were certainly much rarer than cases of agency. The Commission should therefore deal with the case of one State acting as agent for another, taking care, of course, to draft the article and the commentary in such a way as to avoid giving the impression that it approved of obsolete institutions.

34. Mr. Tunkin maintained that what paragraph 2 really dealt with was the capacity of international organizations to conclude treaties and to bind their member States. If the Commission preferred to postpone the examination of all cases in which an international organization took part in the conclusion of a treaty,

he would bow to its wishes; but he was afraid that the question was not as simple as that. There were cases in which a State was committed, not as a member of an organization, but as a State represented by that organization. Sooner or later the question would have to be considered.

35. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there seemed to be general agreement not to retain article 59, on the ground that it dealt with a very special case that need not be generalized into a rule. He still thought, however, that as he had indicated in the commentary the position of Liechtenstein was an example of something very close to territorial application, though in a special field — that of economics.

36. Perhaps he should mention in passing that the example of the agreement between the United States and EURATOM⁸ would probably be one that Mr. El-Erian would need to consider in his report on relations between States and inter-governmental organizations, since it would clearly be binding territorially on the individual member States of that organization.

37. For much the same reasons as those put forward by the Chairman, he believed that article 60 should be retained. Perhaps he had made the article a little more difficult for members of the Commission by framing it in too absolute a manner and in terms of "application". A possible solution would be to redraft it in permissive form, opening with some such words as "A State may become a party to a treaty through the action of another State... etc.". As a safeguard, it would probably be necessary to include the conditions laid down article 59.

38. As the Commission had already included a provision in article 3, paragraph 3, concerning the capacity of international organizations to conclude treaties, it would be appropriate to include in article 60 a provision covering the possibility of a State becoming a party to a treaty by being represented by an international organization for the purposes of concluding the treaty. That was particularly important, as the practice was becoming more frequent. But, of course, he would not consider it necessary to go too closely into the relations between an international organization and its member States, which would have to be dealt with in Mr. El-Erian's report.

39. The Commission would also have to consider later whether article 60 should remain in its present position or not.

40. In view of the agreement reached on articles 59 and 60 he would, of course, have to re-write the commentary.

41. The CHAIRMAN suggested that article 60 be referred to the Drafting Committee.

It was so agreed.

42. The CHAIRMAN invited the Special Rapporteur to introduce article 61.

⁷ *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*

⁸ *United Nations Treaty Series, Vol. 338, p. 136.*

ARTICLE 61 (Treaties create neither obligations nor rights for third States)

43. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 61, 62 and 63 dealt with thorny problems and their drafting had given him considerable trouble. In the interest of orderly discussion, it would be better for the Commission first to take up article 61, which enunciated the general principle, leaving aside its opening phrase, which referred to exceptions provided for in the other two articles.

44. The general principle was well-known and he had set out the evidence and the jurisprudence in support of it in the commentary, so that no further detailed observations from him were called for. Paragraph 2 was a saving clause designed to avoid any apparent inconsistency with the provisions laid down in Part I.

45. Mr. de LUNA said that the principle stated in article 61 raised no difficulties and conflicted neither with doctrine nor with case law.

46. With regard to drafting, he thought that in paragraph 1 (a), the words "nor modify in any way their legal rights" should be deleted, because to impose an obligation always meant modifying a right.

47. Mr. LACHS said that there was some contradiction between two statements in paragraph 1 of the commentary. The first statement was that the justification for the rule did not rest simply on the general concept of the law of contract that agreements neither imposed obligations nor conferred benefits upon third parties, but on the sovereignty and independence of States; the second statement was that treaties has special characteristics which distinguished them from civil law agreements, and that it seemed more correct to regard the rule that a treaty applied only between the parties as an independent rule of customary international law. As the rule enunciated in article 61 derived from the sovereignty and independence of States, it must be based on a principle of international law, not on custom.

48. The case of the *German Interests in Polish Upper Silesia*,⁹ discussed in paragraph 4 of the commentary, was one in which Poland, recognized by the Allied and Associated Powers as well as by Germany in 1918, had claimed benefits under the Armistice Convention and the Protocol of Spa, though it had not been a party to those agreements. It had based its claims on the ground of having acceded to them by implication and tacitly; it had not claimed rights as a third State. However, the Permanent Court of International Justice had construed the Armistice Convention and the Protocol of Spa in such a way as to exclude the presumption of those treaties being open. That decision did not correspond to the situation under discussion.

49. Mr. YASSEEN said that the principle enunciated in article 61 was very clear. It was based on an international rule deriving from the principle of State sovereignty, by virtue of which an obligation to which a State had not subscribed could not be asserted against

it, and a right which it had not accepted in advance could not be conferred on it. An article on that question was thus perfectly appropriate in a general draft on the law of treaties, and did not appear to raise any difficulties. He only wished to make a few comments on the form of the article.

50. Like Mr. de Luna, he thought it would be better not to use the word "modify" in paragraph 1 (a), for to modify a right against the will of a State was, in a sense, to impose an obligation on it. In addition, he suggested that the article should begin with the provisions of paragraph 2, and read, approximately: "Without prejudice to any obligations and rights which may attach to a State with respect to a treaty under Part I of these articles prior to its having become a party, and except as provided in articles 62 and 63, a treaty applies only between the parties".

51. The CHAIRMAN, speaking as a member of the Commission, said that it might be preferable not to refer, in the commentary on article 61, to the origin of the principle stated, unless it was absolutely essential. He himself did not think that the principle was a typical consequence of State sovereignty. Its origin lay rather in the very nature of the contractual relationship; that was why it had been applied in all systems of municipal law long before it had been applied in international law. It should not be forgotten that, even in municipal law, if rights or obligations for others were sometimes deemed to derive from an agreement, it was always by virtue of a law. The consent or agreement in itself was only the source of rights and obligations for the parties to the agreement.

52. With regard to the deletion proposed by Mr. de Luna in paragraph 1 (a) it was not certain that the modification of a right was always equivalent to imposing an obligation; for example, a State might enjoy a right of a certain scope and the purpose of the treaty might be to maintain that right in being, but to reduce its scope.

53. Mr. YASSEEN said the rule that treaty obligations could not be asserted against third States was certainly a consequence of State sovereignty. It was possible to regard that rule as a general principle within the meaning of article 36 of the Statute of the Court. It was indeed generally recognized, but it could be regarded as a rule of international law taken from the international order itself — as a consequence following from the principle of State sovereignty and confirmed by custom. As the Chairman had suggested, however, it might perhaps be preferable not to discuss the juridical basis of the rule.

54. Mr. ELIAS said that the principle laid down in article 61 would be regarded as generally recognized and there was no need to dwell on the origin of the rule or to state whether it derived from the law of contract in municipal systems or from the sovereignty of States. The principle was a corollary of the broader principle that only the parties were bound by a treaty.

55. With regard to drafting, he suggested that the exceptions should be brought together in paragraph 2,

⁹ P.C.I.J., 1926, Series A, No. 7.

leaving paragraph 1 to state the rule. The more neutral word "affect" should be substituted for the word "modify" in sub-paragraph (a),

56. Mr. ROSENNE said that article 61 was acceptable, but the content of paragraph 2 could be relegated to the commentary. The qualification at the beginning of paragraph 1, if re-worded to read "Except as provided for in these articles", would cover all the exceptions. He hoped it would not be thought necessary to go into theoretical considerations concerning the very difficult problem of the precise legal status of final clauses.

57. There was perhaps some degree of overlapping between the latter part of sub-paragraph (a) and sub-paragraph (b), but that was a matter which could be dealt with by the Drafting Committee.

58. The Commission was unlikely to reach agreement on the theoretical basis of the rule, but it should be stressed in the commentary that the maxim *pacta tertiis nec nocent nec prosunt* was an autonomous and independent principle of international law, without drawing any analogies with the law of contract.

59. Mr. CASTRÉN said he was prepared to accept the rule laid down in article 61. But as the maxim *pacta tertiis nec nocent nec prosunt* was also subject to exceptions in international law, it seemed necessary to mention some of those exceptions in the body of the article. But even the title of the article suggested that it stated an absolute rule; he therefore suggested adding the word "normally" before the word "create".

60. The reference to articles 62 and 63 in paragraph 1 was not sufficient; it might be well also to mention articles 59 and 64, or, as Mr. Rosenne had proposed, to make a general reference. In addition, it might be advisable to refer in the commentary to the United Nations Charter, several provisions of which, being of very general scope, applied to all States, even those which were not Members of the United Nations. It was generally acknowledged that, strictly speaking, those provisions did not bind non-Member States, but in practice those States could not entirely ignore the principles which the United Nations was endeavouring to uphold. Perhaps State succession could also be mentioned in the commentary.

61. Mr. de LUNA said it was only for the sake of elegance that he had suggested deleting the last phrase in paragraph 1 (a). Rights could be modified either by being restricted or by being enlarged. Restricting a right was equivalent to imposing an obligation, and enlarging a right was equivalent to conferring a right. Accordingly, the idea expressed by the phrase in question was already embodied, partly in sub-paragraph (a) itself and partly in sub-paragraph (b). To overcome that purely drafting difficulty, it might be best to combine sub-paragraphs (a) and (b) of paragraph 1.

62. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Castrén that some reference should be made in the commentary at least to article 2, paragraph 6, of the United Nations Charter, which was an example

of a treaty provision extending to States that had not been among the original parties to the instrument.

63. The latter part of paragraph 1 (a) of the article under discussion, reading: "nor modify in any way their legal rights" should be dropped, as should the whole of paragraph 2, the purport of which would be clear from the context of the articles.

64. In order that the article should enunciate first and foremost the fundamental principle, he proposed that it be re-drafted to read: "A treaty does not impose any legal obligations or confer any legal rights upon States not parties to the treaty, except as provided for in the following articles".

65. Mr. BRIGGS said he agreed that the principle stated in the article was correct. No attempt should be made to discuss its legal basis.

66. Mr. BARTOŠ shared the view that the rule that treaty obligations could not be asserted against third States should be based on the principle of State sovereignty. But it was recognized that the two principles *res inter alios acta* and *pacta tertiis nec nocent nec prosunt* were general principles constituting sources of positive international law which were observed in practice. Hence the position was different when international relations had reached a stage at which there was also some degree of interdependence of States.

67. It was perhaps not sufficient to refer to the provisions of articles 62 and 63 and it would be advisable also to mention the subsequent articles, particularly article 64, which was very closely connected with the subject-matter of article 61. The question was whether it was the treaties, or the customs arising out of them which produced legal effects. Both theories were tenable, but in practice States often invoked treaties which had given rise to customary rules, and for practical reasons were inclined to consider the customary rule identical with what the treaty or treaties provided. During the Nuremberg trials, for example, reference had been made to conventions of a humanitarian nature which had created general, in other words customary, rules. Moreover, a treaty establishing the status of a territory might confer rights on a certain State; for example, if a State was recognized by a treaty which might be said to have the force of a source of general law, taking the form of a collective declaration. He would revert to the situation of the beneficiary under the treaty when the Commission took up articles 62 and 63; he considered that the legal status of the beneficiary should be settled more precisely. Generally speaking, he accepted the rule stated in article 61, though he had reservations regarding the form of the article.

68. Mr. TUNKIN said that article 61 set out in very clear language a principle he was prepared to accept; he was opposed to any proposals which might give rise to misunderstandings. He did not consider it necessary to refer to the provisions of article 62 and 63 as a whole, since special situations called for special rules.

69. The obligations referred to in paragraph 2 did not derive from the treaty, but from situations which

arose while the treaty was being framed. That was a different question and, for the sake of greater clarity, it would be better to delete the paragraph as Mr. Rosenne had suggested.

70. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that article 61 seemed generally acceptable and he would have no objection to its being re-drafted more or less on the lines suggested by Mr. Jiménez de Aréchaga.

71. The only divergence of opinion seemed to have arisen over the word "modify", and he agreed with Mr. de Luna that, even without the words "nor modify in any way their legal rights", sub-paragraphs (a) and (b) would be sufficient. He had incorporated that phrase in order to stress a particular element which had often come up in practice — in the *Island of Palmas* arbitration,¹⁰ for example — but he had been conscious that it was, strictly speaking, superfluous. The words could be omitted without affecting the substance of the rule.

72. He had no strong feelings about paragraph 2, which could be dropped. Its purpose had been to serve as a reminder that States might, in a limited sense, acquire certain obligations, even before becoming parties to a treaty.

73. Mr. Elias's suggestion that the word "modify" should be replaced by the word "affect" was not acceptable, because that word was too loose. A treaty did in fact sometimes "affect" the rights of third parties, even when legally it did not "modify" them.

74. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the Latin maxim *pacta tertiis nec nocent nec prosunt* fully expressed all the elements of the rule, since it covered everything that might be to the advantage or disadvantage of third States. But if the intention was to define the scope of the rule by referring to obligations and rights, it would still have to be decided whether the restriction of a right was equivalent to the imposition of an obligation, which might not always be the case. No doubt the Drafting Committee would be able to find a solution.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that if the maxim *pacta tertiis nec nocent nec prosunt* was to be mentioned in the title of the article it should be placed in brackets. Generally speaking, the Commission should exercise restraint in using Latin maxims borrowed from Civil Law.

76. The CHAIRMAN suggested that article 61 be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 12.50 p.m.

734th MEETING

Friday, 29 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167)

(continued)

[Item 3 of the agenda]

ARTICLE 62 (Treaties providing for obligations or rights of third States)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 62 in his third report (A/CN.4/167).
2. Sir Humphrey WALDOCK, Special Rapporteur, said that during the discussion on article 61 it had been pointed out that that article and the two succeeding ones at some points touched on the topic of State succession; in that connexion he wished to draw attention to the statement in paragraph 6 of the introduction to his third report, that "to examine how far successor States may constitute exceptions to the *pacta tertiis nec nocent nec prosunt* rule would be to deal with a major point of principle which is of the very essence of the topic of State succession." It might be desirable to make some further allusion to that point in the commentary on article 61 or 62.
3. Sir Gerald Fitzmaurice, in his fifth report, had devoted twenty-one articles to rules concerning the legal effects of treaties on third States.¹ Some of those rules were covered in other parts of the draft articles adopted by the Commission, but the substance of the remainder had been put into articles 62-64 and he asked members to call attention to anything omitted which they considered it essential to include.
4. Perhaps, in the interests of orderly discussion, the Commission should first deal separately with paragraph 1 of article 62, discussing the question of obligations before tackling the question of rights.
5. As stated in paragraph 1, the principle was that a treaty did not create obligations for third States unless the parties intended it to provide a means of accepting such an obligation, which the third State must accept or tacitly assent to, thus creating a kind of collateral obligation between itself and the parties to the treaty. The language used in paragraph 1 had been carefully chosen so as to avoid any possible implication that there could be any imposition of an obligation. What was involved was an invitation to a third State or States to participate in a provision or set of provisions without becoming a party to the whole treaty.
6. One aspect of the *Free Zones* case² was an illustration of the principle stated in paragraph 1. Article

¹ *Yearbook of the International Law Commission, 1960*, Vol. II, pp. 75 et seq.

² *P.C.I.J.*, 1929, Series A, No. 22; *P.C.I.J.*, 1932, Series A/B, No. 46.

¹⁰ *United Nations Reports of International Arbitral Awards*, Vol. II, p. 829.