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Summary record of the 737th meeting

Topic:
Law of Treaties

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always easy to determine in a particular instance which of the two was the uppermost element; in case of doubt, it would be appropriate to place the emphasis on the obligation and to insist on consent being given specifically by the third State. Where the right was the more prominent element, the evidence of consent need not be so clear-cut.

71. He would try to prepare for the Drafting Committee a new text of paragraphs 2 and 3 which would place rights conferred upon third parties more on the basis of agreement, although not such formal agreement as in the case of obligations.

72. Mr. TUNKIN said that his remarks regarding the judgments of the International Court had merely been intended to show that he disagreed with the opinion of the late Sir Hersch Lauterpacht that pronouncements by the International Court of Justice constituted the law.[11] Proof that that view was not generally held was provided by the fact that only some forty States had accepted the compulsory jurisdiction of the Court. But even if it were accepted that the decisions of the Court took State practice into account, there was a broad field of practice that had never come to the notice of the Court. In any case, the Commission should pay special attention to recent State practice.

The meeting rose at 12.30 p.m.

737th MEETING

Wednesday, 3 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

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

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. JIMÉNEZ de ARÉCHAGA said that several speakers had emphasized the need to establish the source of the right of the third State. In common with Mr. Verdross, Mr. Lachs and the Special Rapporteur, he took the view that the right of the third State derived directly from the treaty as such and was available to that State as soon as the treaty entered into force. As he understood them, the Chairman, Mr. Reuter, Mr. Yasseen and Mr. Elias took the view that the right of the third State was based on a second or additional agreement entered into between the original parties to the treaty and the third State. Notwithstanding that cleavage of opinion on the theoretical aspect of the problem, he believed that it was possible to draft a rule which would be generally acceptable and would at the same time reflect the practice of States.

3. The rule should incorporate one element on which all were agreed, namely, the principle that the consent of the third State was essential. The third State was the sole judge of whether or not it should exercise the proffered right. No one had suggested that a right could be imposed on a State against its will, for not only would that be contrary to the principle of the equality of sovereign States, but it would not be feasible. No State could be compelled to exercise a right against its will: that would, in fact, constitute the imposition of an obligation and as such would fall under the general rule contained in article 61 and in article 62, paragraph 1. As the Latin maxim had it, *invito beneficium non datur*. That element was clearly brought out in the opening sentence of paragraph 2: "...a State is entitled to invoke a right...". The provision was thus based on the assumption that the favoured State would perform an act of will by invoking or claiming the proffered right.

4. There was also general agreement on a second element, namely, that the consent of the third State need not take the form of a second or collateral agreement, but could be expressed in any form in which the real consent of States was manifested in international practice. What was essential was the existence of real consent, and practice showed that such consent could be revealed by conduct, the commonest form being the very act of claiming or invoking the right. It would be carrying a fiction too far to claim that the exercise of a right by a third State constituted the consent to a second or collateral agreement from which that very right originated; the second agreement could hardly come into being at the same moment as the right was exercised.

5. The Permanent Court of International Justice had held, in the *Free Zones* case, that the acceptance could result from the fact that the provision of the Treaty of Versailles on the Free Zones had been requested by Switzerland before that treaty was concluded.[1] It seemed impossible to contend that consent to a second or collateral agreement could result from a request that a certain provision be included in the first agreement in which the original offer was supposed to have been made. Nor did he believe that a collateral agreement was entered into by the Member States of the United Nations with a non-Member State every time such a non-Member State availed itself of the rights conferred upon it by Article 35 (2) or Article 32 of the Charter.

[11] Lauterpacht, H., *The Development of International Law by the International Court of Justice*, London, 1958, pp. 20-22.

[1] *P.C.I.J.*, 1929, Series A, No. 22, pp. 17-18; *P.C.I.J.*, 1932, Series A/B, No. 46, p. 141.

or by Article 35 (2) of the Statute of the International Court of Justice.

6. Paragraph 2 should be redrafted to take into account the two elements on which all members were agreed. It was neither possible nor desirable to attempt to draft it in exactly the same form as paragraph 1, which in fact made provision for a second or supplementary agreement. Sub-paragraph (*a*) should be worded so as also to cover the case in which a treaty provision created a right for all States, as did the Charter provisions to which he had referred. The opening words of the paragraph, "Subject to paragraph 3", were unnecessary and should be deleted.

7. Mr. Paredes had suggested that the provisions relating to rights and to obligations should be placed in separate articles; he himself would suggest that the four paragraphs of article 62 should form four separate articles.

8. There had been some criticism of the negative formulation of paragraph 2 (*b*). That formulation was understandable because the provision dealt with a waiver of the power to renounce a right. However, to meet that criticism, he suggested that sub-paragraph (*b*) should be reworded as a proviso to sub-paragraph (*a*), to read, approximately: "this right cannot, however, be invoked when the State has previously disclaimed it".

9. He could not support Mr. Lachs's suggestion of a time-limit for disclaiming or acquiescence; no time-limit had been imposed in State practice and there had in fact been cases in which provisions of that kind had benefited States which had not come into existence until long after the treaty had entered into force.

10. Paragraph 3 seemed to him to place undue stress on the right of the original parties to revoke the provision benefiting the third State; he therefore suggested that it be reworded in negative terms to read, approximately:

"The provision in question may not be amended... when

"(*a*) the parties to the treaty entered into a specific agreement with the latter with regard to the creation of the right; or

"(*b*) the intention to create an irrevocable right appears from the terms of the treaty..."

11. Paragraph 3 was the acid test of the theory of the offer and the collateral agreement. Its provisions could not be accepted by those who advocated that theory, since no State could be deprived of a contractual right without its consent. In practice, of course, instances of such rights being revoked had been rare. It was difficult to see how it was possible, for example, to revoke the rights granted to third States under the peace settlements of the first and second world wars or under the United Nations Charter. Three examples could be given from State practice, however. In the first two cases, the *Treaty of Prague*[2] and the *Aaland Islands*,[3] it had been accepted that the provision could be revoked without the consent of the beneficiary; but in the third, the *Free Zones* case,[4] the Court had held that a stipulation in favour of a third party conferred an irrevocable right when, and only when, the contracting parties had clearly had the intention of creating an irrevocable right. However, the Court had stated that the intention of granting an actual right "cannot be lightly presumed", but must be explicit or result from the circumstances. The matter was, as the Court had said "une question d'espèce". That judicial precedent could not be set aside by "lightly presuming" that in all cases the rights conferred could not be revoked or modified. As suggested by the Special Rapporteur in paragraph (23) of his commentary, the matter should be decided in light of the intention of the parties in each specific case.

12. The fact that it was not possible to provide for irrevocability in all cases seemed conclusive proof that the theory of a collateral agreement did not constitute an adequate description of the doctrinal position; it was clear that Articles 32 and 35 (2) of the Charter and Article 35 (2) of the Statute of the International Court could be amended at any time through the established amendment procedures. He could not agree with Mr. Elias that while provisions of that type remained in force they did not confer rights, just because they were liable to be amended without the consent of the beneficiaries. In all those cases, the Charter or Statute provision conferred a legally enforceable right while it remained in force.

13. Mr. ROSENNE said that on the main questions of principle involved in paragraph 3 he agreed with Mr. Jiménez de Aréchaga. The Commission should recognize that there was a fundamental division of opinion among its members with regard to the theoretical and philosophical issues involved. In fact, the Commission was divided over the meaning of such terms as "third party" and "right". In such circumstances, a pragmatic approach was desirable which would not prejudice the doctrinal attitude of any member, and the text to be adopted should be based on State practice.

14. He himself had no strong views on the theoretical issue and thought that a good case could be made for both of the views put forward. In drafting paragraph 2, however, it was essential to remember the importance of a reasonable measure of stability in international relations. Peaceful change was important, but it was undoubtedly true that stability was the primary concern in the law of treaties.

15. The question whether the right or benefit conferred on a third State was revocable or not must depend on the terms of the original agreement, as suggested by the Special Rapporteur in paragraph (23) of his commentary, where he said that "The revocability or otherwise of the stipulation must, it is thought, be essentially a question of the intention of the parties". In that context, "parties" meant parties to the original agreement. There were many arguments in favour of that

[2] See Roxburgh, R. F., *International Conventions and Third States*, London, 1917, pp. 42-45.

[3] League of Nations *Official Journal*, October 1920, Special Supplement No. 3.

[4] *P.C.I.J.*, 1932, Series A/B, No. 46, pp. 147-148.

rule, but he need mention only one, which was that the right created in favour of a third State could derive from one of the original parties only, and that its subsistence could be a term of the agreement between the two original parties. It was therefore essential to give due weight to the intention of the original parties.

16. Paragraph 3 could be reformulated to incline towards a presumption of irrevocability unless a contrary intention appeared from the terms of the original treaty, the circumstances of its conclusion, or the statements of the parties. If there really did exist a collateral agreement between one or more of the original parties and the third State, it should have priority. Then the case would not really fall within the provisions of article 62 ; in fact, he saw no need to use the adjective " collateral " ; the position would be that an agreement existed which made the law for the parties to it.

17. He could not support the suggestion that a time-limit should be set for the acceptance of the right by the third State, though of course a time-limit could be specified in a particular treaty if the original parties wished it. It would not be practical to lay down a general time-limit in the draft articles and it must be recognized that it was not usual to set such time-limits in treaties.

18. The thought underlying paragraph 2 (*b*) should also find a place in paragraph 3 ; the third State undoubtedly had the faculty to reject the proffered right, whatever the effect on the original agreement.

19. With regard to the form of consent, it would be better to avoid any rigid formulation. State practice showed that many forms were used, some of which did not even involve direct communication ; communication might be through a third party, such as the Secretariat of the United Nations. The essential point was that the consent of the third State, both to obligations and to rights, must be real.

20. As to the drafting of paragraph 3, he was not altogether satisfied with the words " amended or revoked ". The verb " to amend " was used in connexion with revision and the verb " to revoke " came very close to the concept of termination. He therefore suggested that, if the idea underlying paragraph 3 were accepted by the Commission, the language should be co-ordinated with that of the provisions on revision and termination. The question of suspension of the operation of the principal agreement would also need to be covered.

21. Paragraph 4 was acceptable in principle. Although there was some justification for the suggestion that the four paragraphs of article 62 should be made into separate articles, it would be difficult to separate rights and obligations in the presentation of the provisions. Separation would have the advantage of presenting the rules in the form of statements of principle ; but it might lead to the false assumption that it was always possible to differentiate between rights and obligations. His tentative view was that articles 61 to 64 might form a separate chapter of the draft articles.

22. Mr. PAL said he agreed with the substance of paragraphs 2, 3 and 4. Whatever doubts he might have entertained had been dispelled by the commentary on article 62 and by Mr. Jiménez de Aréchaga's remarks.

23. It had been said that, in the discussion, rights were being confused with benefits. The Special Rapporteur's commentary was free from any such confusion and drew a clear distinction between the conferment of a benefit and the creation of a right ; he had discussed the position at length and arrived at the decision that the case to be dealt with in article 62 should be that in which a right was being conferred on the third State. The Special Rapporteur had consulted various authorities including the three previous Special Rapporteurs, had analysed State practice in the matter, which was far from uniform, and had put forward his own view, which he (Mr. Pal) was prepared to accept.

24. He agreed with Mr. Jiménez de Aréchaga regarding the significance of the word "invoke" in paragraph 2. Paragraph (7) of the commentary explained the view that the third State acquired a legal right to invoke directly the provision conferring the benefit, and that that right was not conditional on any specific act of acceptance by the third State, in other words, on any collateral agreement between it and the parties to the treaty. Paragraph (8) of the commentary gave the Special Rapporteur's own view.

25. In discussing the juridical basis of the right of the third State, the Special Rapporteur had reached the conclusion, after searching scrutiny, that it lay in the intention of the original parties, who had the capacity to confer either a mere benefit or an enforceable right. He had not stated that what was conferred upon the third State always constituted a right, but that the original parties to the treaty could confer a right upon a third State if they wished. He had also made it clear that, in his view, the intention of the parties to the treaty was sufficient without the need for an acceptance by the third State, a view in which he (Mr. Pal) concurred. The difficulty seen by some members of the Commission in that regard appeared to originate from the recollection of problems that had arisen in some systems of municipal law, in which it had once been held that the parties to a contract could confer a benefit upon a third party, but not an enforceable right, on the ground that enforcement was confined to the parties to the contract. However, it was now generally recognized in municipal law that the third party could have an enforceable right in certain circumstances.

26. With regard to paragraph 3, he could not agree that the right to revoke could be exercised at any time in all cases. Some adjustment was necessary at least, in view of paragraph 4. He did not believe anyone would accept the idea that if the third State complied with the condition laid down in the treaty, the right still remained revocable solely at the will of the original parties.

27. He supported the drafting suggestions made by Mr. Jiménez de Aréchaga.

28. Mr. de LUNA said that the discussion on article 62 had centred on the question whether a treaty could create obligations and rights for a third State. The members of the Commission were divided on the point, mainly, it seemed, because of the differences in their legal training. Mr. El-Erian had, of course, been right in saying that it was dangerous to carry the analogy between private law and international law too far. Nevertheless, it was noteworthy that article 1119 of the French Civil Code, which had inherited formalist concepts from Roman law, laid down that a person could normally enter into an undertaking or make a stipulation in his own name only for himself — a principle to which it then admitted exceptions — whereas article 328 of the German Civil Code and article 112 of the Swiss Code of obligations laid down that a contract could create a right in favour of a third party direct, without its knowledge or consent. It might therefore be better, as Mr. Rosenne had suggested, for the Commission to leave aside doctrinal questions and agree on the question of fact.

29. He had already explained that he did not believe that a treaty could create obligations for a third State. On the creation of rights he held a different opinion. Obligations and rights were two different things. A right was a subjective faculty, which the subject was free to exercise or not; hence, a right could be created and conferred on a subject without consulting him. A right derived, not from acceptance by a third State, but from the will of the parties, by virtue of the principle *pacta sunt servanda.*

30. The case of treaties which produced effects on a third State even against the will of the parties, merely as a result of international co-operation and the interdependence of States, could be disregarded; the same applied to treaties such as the Treaty of Prague,[5] which purported to confer certain benefits on third States, but not to create rights.

31. The case to be considered was that in which a subjective right was acquired by a third State through the direct and immediate effect of a treaty. It had been asked whether the third State did not simply accede to the treaty; but the parties to a treaty sometimes wished to confer a certain right on a third State without imposing on it the obligations provided for in the treaty. It had also been asked how a third State, which was absent and unaware of the proceedings could acquire such a right. That was certainly what happened in private law — in testamentary disposition, for example, though it was true that in that case there was a legal norm. In international law the norm was the *pacta sunt servanda* principle, and the right derived from the reciprocal undertaking entered into by the parties to the treaty.

32. There was a difficulty, however, in explaining in that way the provision in paragraph 3 (*b*) concerning the irrevocability of the right. It was necessary to have recourse to the principle of good faith or perhaps to that of estoppel.

33. He supported the suggestion made by Mr. Paredes and Mr. Jiménez de Aréchaga that paragraph 1, dealing with obligations — for which the consent of the third State was required — should be separated from article 62. The rest of the article could be revised by the Drafting Committee.

34. The CHAIRMAN, speaking as a member of the Commission, noted that the discussion had brought opinions a little closer together, at least on the practical level. Members of the Commission recognized, for example, that when the possibility of creating a right was discussed, it was a subjective right that was meant; no one questioned that a treaty could confer benefits on a third State, the problem was whether it could create an actual right for a third State.

35. It was also agreed that the treaty itself, of its own force, could no more confer a right on a third State than impose an obligation on it. The source of the third State's right could only be an agreement between the parties to the treaty and the third State, or a general rule of customary law whereby such a right could be created if it was provided for in a treaty between other parties. In private law. the right of the third party derived from the law, not from the contract. He himself did not believe that practice proved the existence of such a rule in international law. If the existence of such a rule was recognized, however, as it was by Mr. Verdross and Mr. Jiménez de Aréchaga, its logical consequences must also be recognized: the right of the third State existed from the moment when the treaty was concluded, and there was no question of its consent. The third State could waive its right, but it could not object to the right being created.

36. On the other hand, if it was held that the third State's consent was the source of the right, that consent must be required to be given, either expressly — the positive formulation preferred by Mr. Castrén and several other members of the Commission — or impliedly — the negative formulation proposed by the Special Rapporteur, according to which the right was presumed to have been accepted so long as it had not been rejected. Rejection, the negation of consent, was quite different from waiver. If the Commission could reach agreement on that fundamental point, the principal difficulty concerning article 62 would have been overcome.

37. With regard to the consent of the third State, he shared Mr. Tunkin's view that the Commission should not adopt a formalistic approach; the essential was the reality of consent. But the situation could differ widely from one case to another. It might be that the third State had in fact long been claiming the right which the parties to the treaty had agreed to grant it. In that case it could not be said that the parties were really making an offer; it was more like an acceptance on their part, so that it could then be acknowledged that the right existed immediately. Conversely, where the third State had not made any claim, the parties offered it a certain right, which would exist only from the moment when the third State gave its consent. In such a case it might be quite obvious from the

[5] *British and Foreign State Papers*, Vol. LVI, p. 1050.

circumstances that the third State intended to accept the right, and the formula proposed by the Special Rapporteur would then be satisfactory.

38. But there could be less clear-cut cases, in which the third State had claimed a certain right and the parties agreed to grant it another, for instance, the use of free ports, with freedom of transit, instead of access to the sea. The third State might not be satisfied with what was offered it, and the very idea that its right could come into being without its consent was contrary to the principle of sovereignty. In such a case, and also where the third State was offered both rights and obligations simultaneously, the expression of consent was particularly necessary and its reality must be beyond doubt.

39. Theoretical differences should not prevent the Commission from reaching agreement on paragraph 3. Those who based the existence of the third State's right on a general rule of customary law would conclude that the right existed by virtue of that rule from the moment when the treaty was concluded, and that consequently it could not be revoked by the parties. Those who held — as he did — that the third State's right was based on consent would say that the right was revocable only if it had not yet really come into being. The offer by the parties could be withdrawn so long as the right had not yet been accepted or so long as the attitude of the third State was still uncertain, but as soon as the third State had given its consent the right was irrevocable. Even when the treaty terminated as between the parties, the conclusion must be the same: once the right of the third State existed, whether in virtue of a general rule or as a result of its consent, it could only be revoked with the consent of the third State.

40. Paragraph 4 raised no great difficulties.

41. As to whether the rules on those matters should be assembled in one article or made into several articles, both arrangements had their advantages; but perhaps division into separate articles might make it more difficult to deal with the very important case in which rights and obligations were proposed together.

Mr. Briggs, First Vice-Chairman, took the Chair.

42. Mr. BARTOŠ said he was convinced that even though it started from the old adage that rights and duties — or obligations — were the two sides of the same medal, the Commission should clearly distinguish between them. Paragraph 1 concerned an invitation to a third State to assume an obligation, whereas paragraph 2 dealt with the offer to that State of a right that did not yet exist. The first consideration in linking the two concepts must be that the parties to what had — wrongly, he thought — been called the "main treaty" could neither impose obligations nor confer rights on a third State; they could only agree among themselves to issue an invitation or make an offer to a third State. When they offered a right they reciprocally undertook to grant that right in the future. The source of the right was the link between the so-called main treaty and the expression of the will of the third State — a view which came close to that of Mr. Verdross.

43. The question of accession by the third State arose at that point. According to his theory rights and obligations did not exist in the abstract; they were always linked with their bases, in other words with certain facts and circumstances. Every right must be exercised in a particular context. The so-called main treaty should be regarded not only as a juridical fact for the States bound by the contractual relationship, but also, for third States, as a simple fact, but one which, if they consented, would determine the content and efficacy of the proposed obligation or right. The linking or combining of the so-called main treaty and the will of the third State did not constitute a collateral agreement, but a partial accession of the third State to the relevant provisions of the treaty. Such accession sometimes resulted from acceptance given even before the treaty had been concluded when, for example, the right had been previously claimed by the third State; then, if the terms of the treaty did not satisfy that claim, it became necessary to bring the two wills into agreement subsequently.

44. With regard to the rule proposed in paragraph 2, he thought that the parties created not an actual right, but the faculty, for the beneficiary State, to make use of provisions of the treaty and the possibility of exercising that faculty. In modern international law States were sovereign and could accept or reject what was offered to them.

45. Paragraph 2, and also paragraph 4, which was closely connected with it, raised two theoretical questions. The first was whether the right was really created by the treaty, or whether it had not already existed in the objective international order, the parties merely recognizing its existence and taking advantage of that recognition to determine the conditions for exercising it. There had been several cases in which that problem had arisen: for example, the provisions of the Treaty of Berlin concerning Montenegro's rights in its territorial sea.[6] The general rule had been that every State had a sovereign right in its territorial sea. That right was a normal attribute of the sovereignty of the coastal State, which must also comply with certain conditions laid down on the subject. The Treaty had given Austria-Hungary maritime police rights, which were an attribute of the coastal State according to the normal rules of positive international law even at that time. It might be asked whether that provision had not in fact limited or denatured the existing right and whether the parties to the Treaty had been entitled to form a right contrary to the international legal order.

46. The second question was whether the parties to a treaty could in fact freely stipulate conditions for the exercise of a right offered to a third State, by restricting that State in the exercise of its right, which it possessed without restriction. In some cases it was to be feared that a right had been usurped under the cloak of benevolent intention. It should be specified that the stipulated conditions must remain within the limits of objective law. States could not by themselves create and use the right.

[6] *British and Foreign State Papers*, Vol. LXIX, p. 760.

47. With regard to paragraph 2 (*b*), it might be asked whether the reference was to rejection of the right granted or renunciation of its exercise. If the third State had not yet made use of the right offered to it or had not yet expressed its acceptance, there could be no question of rejecting the right, for it had not yet come into being. As Mr. Verdross had said, only the "faculty" of exercising the right existed.

48. It was very important to settle the question of the period, whether indeterminate or not, within which the third State could decline to avail itself of that faculty, for the creation of such a right had sometimes been used as a device to establish a certain political or legal situation. If the theory of accession, or even partial accession, was accepted, it would be difficult to authorize a third State to reject such a right after accepting it.

49. Paragraph 3 raised the question whether the provision of the so-called main treaty could be amended or revoked without the consent of the third State concerned. He considered that as the legal relationship was created by the consent given to the parties to the so-called main treaty, sometimes even by a collateral agreement when certain conditions had to be specified or when the third State made certain reservations which were accepted by the parties, it was hardly possible to amend or revoke the relevant provision without the consent of that State, since the right had become part of its international heritage. But if there was a clause in the treaty providing for the possibility of revocation or of a precarious situation, the State which had accepted that clause had thereby accepted that possibility.

50. Another question arose when there was a change of circumstances. In that case the *rebus sic stantibus* clause applied and the matter could also be settled by agreement. In that case the revocability did not derive from the treaty, but from a general principle of international law having the force of a general rule on the *rebus sic stantibus* clause, accepted by the Commission at its last session, which recognized that clause as a legal institution.[7]

51. Mr. EL-ERIAN said that article 62 was certainly one of the most complex and important in Part III of the draft and touched on a number of theoretical issues on which the Commission, not surprisingly, was divided. It was important to keep in mind that the article was not to provide a residual rule for the interpretation of old treaties concluded in conditions rather different from those which now prevailed, but a general rule which would be applicable to both past and future treaties.

52. The starting point should not be the principle of a stipulation in favour of another, drawn from private law. As had been held in some of the dissenting opinions in the *Free Zones* case, such stipulations were not admissible in relations between States, because they conflicted with the principle of sovereignty.

53. In his opinion, the basis of the article should be the concept of an offer by the parties and a collateral agreement between them and the third State or States, which would provide a more solid foundation for the obligation and would take the principle of sovereignty into account. All the necessary guarantees regarding free consent by the third State must also be inserted.

54. He was unable to see the relevance to the present article of the provisions of treaties creating objective regimes, referred to in paragraph 10 of the commentary, because the obligations and rights deriving from such provisions had a different source.

55. The word "right" had given rise to some difficulty, and in the context of paragraph 3 it did not seem to correspond to the idea formulated in paragraph 2. Perhaps the word "benefit" would express the intention more clearly: it was used in a similar context in article 18 of the Harvard research draft,[8] in article 9 of the Havana Convention of 1928[9] and in article 9 of the draft of the International Commission of Jurists, adopted in 1927.[10]

56. Paragraph 4 dealt with the relationship between a right and its corresponding obligations. But there were also instances of pre-existing rights being recognized in a treaty; for example, the right to the restoration of independence which had been usurped or restricted against the free will of the people and in violation of their inherent sovereign rights, which did not derive from the treaty itself. In such cases the sanctions laid down in article 42, namely, termination as a consequence of breach of a treaty by one of the parties, would not apply.

57. Mr. LACHS said that the modern trend was towards all interested States taking part in the drafting of a treaty, so that the institution of third States was vanishing. It was true that during the epoch of the European law of nations, when a certain group of States had formed as it were an exclusive club, certain instruments had been concluded containing stipulations on behalf of other States, and the potential beneficiaries had been debarred from claiming or enforcing the rights thus conferred, which had remained a dead letter. But that chapter of history was closed and it was now recognized, both in State practice and by authorities on international law, that from the time a third State manifested the intention of availing itself of the right stipulated, that right could be claimed and became enforceable.

58. The reasons why the parties to a treaty might wish to extend rights and obligations under it to third States could be economic or political, and it might seem that in the long run it would serve their own interests to do so, but there was hardly any justification for the view that such rights were in the nature of a gift.

59. The references made during the discussion to treaty provisions relating to the establishment of new States

[7] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 20.

[8] *American Journal of International Law, 1935*, Vol. 29. No. 4, *Supplement*, p. 661.

[9] Hudson, *International Legislation*, Vol. IV, p. 2381.

[10] *American Journal of International Law, 1928*, Vol. 22, No. 1, *Special Supplement*, p. 245.

did not seem to be pertinent, because in that case the rights had their source outside the treaty; the treaty could only confirm the fact that a new State was coming into existence.

60. Paragraph 3 would have to be modified, because once the legal relationship had been established between the parties to the treaty and the third State availing itself of the right conferred, that right must become irrevocable except with the consent of the third State.

61. Article 62 must be drafted in such a way as to take account of the progressive development of international law in the direction he had indicated. There should be no difficulty in drafting the provision concerning obligations, as the conditions for their validity were clear and had not given rise to any significant disagreement in the Commission. It should be made plain that the article was concerned with real and not with alleged rights. Provisions declaratory of an existing right which had its source outside the treaty would not come within the scope of the article, and the same applied to limitation of an existing right.

62. Finally, as he had said at the previous meeting, when rights and obligations were closely linked, they must both be subject to the requirement governing obligations.

63. Mr. TSURUOKA said he had followed the discussion on article 62 with great interest, but was not convinced that, from the practical viewpoint, it was really necessary to deal with that question in a set of draft articles on the law of treaties. If the majority of the Commission wished to retain the article, no matter what theory was adopted as a basis for it, the important point was to define clearly the situations which came within the scope of its provisions.

64. As the Special Rapporteur had clearly explained in his commentary, such a situation comprised two elements: the will of the parties, expressed in a treaty, to create a right in favour of a third State, and the acceptance of that right by the third State. Whatever form it took, acceptance was essential if the third State was to be given some legal security. The fact that a treaty contained a provision whereby two States offered a faculty or a right to a third State which was not a party to the treaty was one of the necessary conditions, but it was not enough; it was only with the acceptance of the third State that the situation envisaged was complete. Hence the mere fact that two States had expressed their will in a treaty was not enough to justify revocation or modification of the right or faculty in question by the parties to the treaty without the consent of the third State.

65. He attached some importance to the question of acceptance and he wished to stress that acceptance must be complete. If one of the conditions for the exercise of the right was altered, however, the original situation would no longer obtain, for the third State would have become a party to a new treaty; it would then be the provisions of that treaty which would apply in relations between the former third State and the parties to the original treaty. Paragraph 4 was necessary for the logic of the argument; but in order to avoid injury to the third State, it should be stated in the commentary that the treaty must be sufficiently well known to the third State, and the stipulations affecting it sufficiently clear, to prevent any unnecessary complications, for instance, in cases of fraud.

66. As the situation contemplated in article 62 seldom arose in real life and as the situations that most nearly approximated to it were dealt with in a different way in the practice of most States, the Commission's aims should be to draft an article consistent with equity and calculated to safeguard the stability of treaties, while at the same time ensuring the effectiveness of the rules it proposed to establish.

67. Mr. YASSEEN observed that some members of the Commission found it difficult to accept the proposition that the actual exercise of a faculty or right could constitute an agreement. It was generally recognized, however, that the will of the third State could be expressed in any form that was not contrary to a rule of law; it followed that the actual exercise of a right offered showed the will to accept the offer and could *ipso facto* constitute the complementary agreement which must exist between the parties to the treaty and the third State.

68. With regard to paragraph 3, which dealt with the revocability of a right granted to a third State, he supported the theory of the complementary or additional agreement and believed that the right could not come into being before there was consent. It followed that the States parties to the treaty could change the situation and withdraw the offer they had made. But what happened after the third State had given its consent? It seemed that the answer to that question was to be found primarily in the main treaty, since it was that treaty which defined the offer made by the parties. Hence, it was quite proper to consult the original treaty to ascertain whether the right accepted could be revoked, even after the third State had given its consent. If the main treaty showed that the offer had been limited and precarious, then the third State could have accepted that offer only and it was therefore revocable even after consent had been given. The third State had no option but to accept that expression of will, for the complementary or collateral agreement was not a negotiated instrument; it was in the nature of a contract of accession, and the third State accepted the offer as defined in the main treaty.

69. Nevertheless, as the Commission was drafting a convention on the law of treaties and its main concern should be to safeguard the security of international transactions, it seemed essential to establish a presumption in favour of the irrevocability of the right conferred. Paragraph 3 should therefore be amended to emphasize that the offer by the parties, once accepted, could not be revoked unless the possibility of its revocation was apparent from the main treaty itself. That presumption should be understood to be subject to the possible application of the *rebus sic stantibus* principle, since the circumstances might change and the parties to the main treaty might consider it necessary to amend its terms. In that case, the presumption of

irrevocability should not be a bar to the operation of the *rebus sic stantibus* clause.

70. He had no objection to paragraph 4, which seemed to be in full conformity with the theory of the complementary agreement and of the offer defined by the main treaty. As some members of the Commission had stressed, however, the paragraph could not be strictly applied in the case of a right which derived, not from the main treaty, but from another source of international law.

71. Mr. VERDROSS said he noted, as Mr. Ago had done, that differences of doctrine in regard to paragraph 3 were diminishing at the practical level. For the supporters of the two conflicting theories recognized that a right or faculty conferred on a third State by virtue of a treaty was revocable so long as there was no agreement with the third State. He acknowledged that the right was imperfect so long as the third State had not given its consent, and he accepted the idea underlying paragraph 3. He had some doubts about sub-paragraph (*b*), however, for even if the parties to the treaty had intended to confer an irrevocable right on the third State, since it had not yet accepted the right, they could amend the provisions of the treaty and decide whether the right was revocable or not. Consequently, the question of revocability depended entirely on the existence of an agreement with the third State. He was therefore prepared to accept the provisions of sub-paragraph (*a*), but thought that sub-paragraph (*b*) should be deleted.

72. The case mentioned by Mr. Ago — in which negotiations had been conducted from the outset between the parties to the treaty and the third State, and having asked for a certain right, that State was granted a different right — did not seem to him to come within the scope of article 62. For the article only concerned cases in which the parties to the treaty granted a right to a third State without having negotiated with it; if they had negotiated with the third State, the problem of consent arose from the outset.

73. Mr. PESSOU said that situations like that contemplated in article 62 had, of course, occurred in the past, but they would probably be rather rare in the future; hence the Commission should probably not attach too much importance to an article which might not have any practical application.

74. As Mr. Lachs had pointed out in connexion with paragraph 1, it was for the Commission to prevent that situation from occurring, for it conflicted with the rule stated in article 61. Above all, in order to overcome the difficulty created by such a situation, it would be better to ensure that all the States and interested parties would be present at the negotiations than to provide for the granting of rights by an indirect procedure. It was difficult to imagine, for example, that the Niger, which had been an international river until 1963 and whose new status had been defined by the principal riparian States, could be the subject of a treaty without the participation of one of those States.

75. In his opinion, therefore, neither paragraph 1 nor paragraph 2 — and still less paragraph 3 — was satisfactory in regard to drafting or to the principle laid down. The Commission should not spend any more time on the article, a redraft of which should make it possible to overcome the present difficulties.

The meeting rose at 1 p.m.

738th MEETING

Thursday, 4 June 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

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

1. The CHAIRMAN invited the Commission to continue consideration of article 62 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. AMADO observed that the discussion was throwing little light on a topic that involved elementary principles of international law. Ranged against each other in the controversy were the thesis of such writers as Rousseau and McNair, who to some extent followed Anzilotti, and the modern thesis upheld by the Special Rapporteur and Mr. Jiménez de Aréchaga, while some members of the Commission had not taken any definite position.

3. It would, of course, be difficult to avoid certain incidental questions, such as the creation of definitive legal situations. There were in fact situations to which the question of irrevocability was not relevant, such as that resulting from the treaty concluded between Brazil and Argentina recognizing the independence of Uruguay,[1] or the situations established by treaties having objective effects, such as certain treaties concerning communications. But cases of that kind were in reality remote from the normal concept of the *stipulation pour autrui*; so without seeking to hinder the development of modern treaty practice, the Commission should be very cautious about them.

4. Rousseau had clearly shown that it was difficult to decide whether the principle of the *stipulation pour autrui*, an institution of municipal law, was applicable in international relations, for it seemed that international practice was usually loath to admit that *pacta in favorem tertiis* could provide not only advantages, but "actual rights", the expression used in the Special

[1] *British and Foreign State Papers*, Vol. XV, p. 935.