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Summary record of the 748th meeting

Topic:
Law of Treaties

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the application of the treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, and it is not possible to execute the treaty through a representing State, or such a representation has not been established, then the application of the treaty is suspended as between any parties upon the severance of their diplomatic relations."

56. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Jiménez de Aréchaga wished it to be understood that on the severance of diplomatic relations there was an obligation to appoint a representing State.

57. Mr. JIMÉNEZ de ARÉCHAGA replied in the negative. It was to cover that point that he had inserted the phrase " or such a representation has not been established ".

58. Mr. BARTOŠ said that he fully supported the wording proposed by the Special Rapporteur. An example of what could occur was to be found in the relations between the Federal Republic of Germany and Yugoslavia: the unilateral severance of diplomatic relations had not prevented the Federal Republic of Germany from fulfilling certain obligations to Yugoslavia. It was obvious that if diplomatic relations between two States were severed because of political differences, there could be no genuine co-operation between them: that was a case of impossibility of performance which it would be better not to mention expressly. The Special Rapporteur had adopted that course and the Commission should adhere to it.

59. Mr. VERDROSS thought it would be going too far to say that the severance of diplomatic relations did not affect the relations established between States by a treaty. It would be more realistic to say that " the obligations arising out of a treaty are not affected insofar as they are not incompatible with the situation created by the severance of diplomatic relations ".

60. Mr. ROSENNE, thanking the Special Rapporteur for complying with his suggestion at the fifteenth session,[5] said that article 65 A was acceptable to him. He partly agreed with Mr. Jiménez de Aréchaga, however, that to make the operation of the article subject to the whole of article 43 might introduce unforeseen complications. The article could be redrafted to state the general principle at the beginning and make such reference to article 43 as was necessary at the end.

61. Referring to a point made by the Chairman, he said that where a treaty stipulated that diplomatic remedies must be exhausted before recourse to other proceedings, once diplomatic relations had been severed it would be impossible to comply with that stipulation any longer.

62. It was important to include in the draft an article stating the rule of international law on the effect of the severance of diplomatic relations on treaties, because in the event of severance a municipal tribunal might have to apply rules of international law.

63. Mr. de LUNA considered that the Special Rapporteur had adopted the right approach. No State could divest itself of treaty obligations by breaking off diplomatic relations. In fact, the result of a breach of diplomatic relations was only a temporary impossibility of performance, so that not all the elements in article 43 would be applicable.

64. Mr. TUNKIN said that although article 65 A was likely to be generally acceptable, the Drafting Committee would doubtless need some guidance on certain points, in particular the relevance of article 43.

The meeting rose at 12.50 p.m.

748th MEETING

Thursday, 18 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167/Add.2)
(continued)

[Item 3 of the agenda]

ARTICLE 65 A (The effect of breach of diplomatic relations on the application of treaties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 65 A in the Special Rapporteur's third report (A/CN.4/167/Add.2).

2. Mr. YASSEEN said it seemed certain that the severance of diplomatic relations did not affect the validity of treaties and did not terminate them. Nevertheless, it resulted in the absence of diplomatic representatives and reflected an abnormal state of relations between two States. The latter point should be stressed as much as the former.

3. There were treaties whose application required action by diplomatic organs. If those organs ceased to exist, it was no longer possible to implement the treaty. That applied, for example, to treaties on extradition, trade, navigation and judicial assistance. It was true that there was an institution of international law under which a State's interests could be protected by the representatives of another State during the period of breach of diplomatic relations. But it was doubtful whether all questions could be settled through the representatives of a third State, and whether there might not be treaties whose execution required some

[5] *Ibid.*, 696th meeting, para. 21.

action by the representatives of the contracting State itself.

4. There were other types of treaty whose provisions could only be applied when relations between the States concerned were normal: for instance, treaties of friendship and treaties providing for assistance or co-operation in certain spheres, including the political sphere. It was difficult to see how an instrument like the Treaty of Zürich, which provided for consultation on political matters between Greece, Turkey and the United Kingdom, could be executed while diplomatic relations between the parties were severed. The Commission should stress the practical aspect of the nature of the treaty, and seek solutions appropriate to it.

5. Thus it might be provided that, in certain cases and for certain types of treaty, the severance of diplomatic relations would lead to the suspension of the treaty, but would not terminate or invalidate it. When diplomatic relations were resumed, the application of the treaty would resume its normal course unless otherwise decided by agreement between the parties.

6. Mr. Jiménez de Aréchaga's text [1] appeared to be more realistic than the Special Rapporteur's, though the expression "the uninterrupted maintenance of diplomatic relations" was perhaps not very felicitous; it would be better to state the condition in the words "if the application of the treaty necessitates the existence of diplomatic relations..."

7. Mr. CASTRÉN said he approved of the ideas expressed in the Special Rapporteur's article 65 A, but like Mr. Jiménez de Aréchaga and Mr. de Luna, he thought that reference should not be made to the whole of article 43,[2] but only to paragraphs 2 and 3 of that article. He also thought that the last clause "and, in particular, their obligation under article 55" should be deleted.

8. The formula proposed by Mr. Jiménez de Aréchaga was acceptable as to substance, but perhaps it was too detailed. He therefore preferred the Special Rapporteur's text with the amendments he had just suggested.

9. Mr. VERDROSS said he thought that Mr. Jiménez de Aréchaga's text was in conformity with existing law. In order to remove an apparent contradiction between the first and second sentences, however, it would be better to say in the first sentence that the severance of diplomatic relations between the parties to a treaty did not terminate the treaty; it would then be logical to state in the second sentence that, in certain specified cases, the application of the treaty might be suspended.

10. The CHAIRMAN observed that the members of the Commission were agreed on two points: first, that as a general rule the severance of diplomatic relations did not terminate a treaty; and secondly, that there were certain treaties which became impossible to apply when diplomatic relations were severed. It remained to be decided whether the Commission should deal with such impossibility of performance expressly in article 65 A, or consider that impossibility of performance was fully covered in article 43.

11. Speaking as a member of the Commission, he said he preferred the more prudent wording proposed by the Special Rapporteur. It would be better not to put in black and white that the severance of diplomatic relations could result in suspension of the application of a treaty, for States might be encouraged to use that means to secure the suspension of a treaty.

12. Mr. TUNKIN said that, although the Chairman had drawn attention to a very real risk, he considered that Mr. Jiménez de Aréchaga's text more clearly expressed the idea on which members of the Commission had reached agreement.

13. If reference was to be made to article 43, only paragraphs 2 and 3 should be mentioned.

14. Mr. TSURUOKA said that if the Commission decided to mention in the article that the parties to a treaty could execute it through the States representing their interests, it should explain in the commentary that when diplomatic relations between two States were broken off, those States could still have contacts at an international conference. Such contacts might be useful, not only where diplomatic relations had been severed, but also where one of two States did not recognize the other.

15. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman to a great extent. If there were several parties to a treaty, it would hardly be proper for one of them to rely on the severance of diplomatic relations with another to free itself from the obligation to perform certain actions required by the treaty.

16. One of the difficulties which had troubled him when examining the text proposed by Mr. Jiménez de Aréchaga, was that it was impossible to form an objective opinion on what ought to be the consequences of a severance of diplomatic relations without knowing the reason for it: the severance might be a gratuitous action by a State or a sanction against some grave step taken by another State. If the provision were based on impossibility of performance, that would leave certain elements to be appreciated in the light of the circumstances of each case.

17. He had left open the question of total impossibility of performance, which he thought unlikely to arise. There was, however, a special category of treaty of an immediate character, the application of which would be limited in time, and which might have to lapse if severance of diplomatic relations made performance impossible.

18. On re-examining article 43 and its relationship to article 65 A, he had begun to wonder whether article 43 was not too stringent. The language used had, of course, been prompted by the Commission's anxiety not to leave too many loopholes for the avoidance of treaty

[1] See 747th meeting, para. 55.

[2] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 19.

obligations, but article 65 A was concerned with the absence of machinery for the execution of obligations rather than with the permanent disappearance or destruction of the subject-matter of the treaty. If article 43 could be modified, a reference to it in article 65 A would still be the best solution. Clearly, what was essential was to stress the fact that treaty relations continued even if diplomatic relations were broken off.

19. The text proposed by Mr. Jiménez de Aréchaga would certainly need to be examined by the Drafting Committee, but it might be held to go too far and was open to certain drafting objections, notably in regard to the phrase " the uninterrupted maintenance of diplomatic relations ".

20. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should clearly specify that the severance of diplomatic relations did not itself entail either the termination or the suspension of treaties. True, the suspension of a treaty did become necessary in some cases, but that was for the indirect reason that severance of diplomatic relations had made performance impossible. It would be both dangerous and incorrect in law to imply that the severance itself could have the suspension of a treaty as its direct effect.

21. Mr, BRIGGS said that even if article 43 were modified, it still included too much for the purposes of article 65 A and the reference to it should therefore be dropped. For the reasons given by Mr. Jiménez de Aréchaga, he considered it inadvisable to refer to article 43.

22. With certain drafting changes, Mr. Jiménez de Aréchaga's text would be acceptable, once the contradiction mentioned by Mr. Verdross was removed. The reference to a representing State should also be dropped, since there was no obligation to appoint a representing State if impossibility of performance supervened.

23. Mr. PESSOU said he endorsed the Chairman's remarks. It would be remembered that when Nigeria had severed diplomatic relations with France in consequence of the French nuclear weapons tests in the Sahara, the resulting tension had been such that France could, if it had wished, have withdrawn the scholarships of fifty-seven Nigerian students; but France had preferred to honour its commitments. That example showed that in stating the principle which was the subject of article 65 A, the Commission should use very cautious and discreet language so as to safeguard relations between States as far as possible.

24. Mr. RUDA said he thought there was unanimous agreement in the Commission that severance of diplomatic relations did not affect the legal relations established between the parties by a treaty. Severance did not lead to termination, but it might lead to suspension through removal of the machinery to execute the provisions of the treaty or for reasons of the kind mentioned by Mr. Yasseen in connexion with treaties of friendship and mutual assistance, when the treaty became incompatible with the situation between the two States. Possibly Mr. Jiménez de Aréchaga's formulation, with the changes suggested by Mr. Verdross, might adequately cover the two cases.

25. Mr. PAL said he was inclined to prefer the form in which the Special Rapporteur had formulated the article. He suggested that the text should be amended by inserting the words " by itself " after the word " severance " and by deleting the final clause after the words " established by the treaty ". The objection to the opening words " subject to article 43 " was, in his view, ill conceived. That proviso did not necessarily mean that all the cases covered by article 43 were involved. It would be perfectly legitimate to have such a qualifying provision if all the cases within the scope of article 65 A were covered by the article referred to, Article 43, paragraphs 2 and 3, covered cases of partial impossibility of performance.

26. His objection to the text proposed by Mr. Jiménez de Aréchaga was that the exception it provided for was not comprehensive enough. Such a formulation would always have the defect of being too narrow.

27. Mr. CASTRÉN said that on reflection he realized that Mr. Jiménez de Aréchaga's proposal had many advantages; but he shared Mr. Pal's misgivings: if the Commission tried to go into detail, it might overlook something, and the consequences might be unfortunate if the article were interpreted restrictively. States which had severed diplomatic relations could resort to methods other than representation by third States. Consequently, he still preferred the Special Rapporteur's text, with minor amendments.

28. Mr. ROSENNE endorsed Mr. Pal's remarks.

29. Mr. TUNKIN said there was general agreement that severance *ipso facto* did not lead to the lapse of a treaty or to its becoming inapplicable.

30. It would be unwise to make special mention of the nature of the treaty or to go into too much detail. Perhaps agreement could be reached on an article consisting of the first sentence of Mr. Jiménez de Aréchaga's text, followed by a statement that the provision was subject to article 43, paragraphs 2 and 3.

31. Mr. JIMÉNEZ de ARÉCHAGA said that drafting points should be left to the Drafting Committee. He still thought it was inappropriate to refer to article 43, because the definition in paragraph 1 of that article governed the provisions in paragraphs 2 and 3.

32. With regard to the point of substance raised by Mr. Yasseen, it was doubtful whether there were any treaties of such a nature that severance would automatically lead to their extinction or suspension, though some provisions of a treaty might become inoperable as a result of severance and have to be suspended. Suspension might be only an incidental result of severance. Clearly the Drafting Committee would be faced with the task of formulating the exceptions to the general rule on which the Commission agreed.

33. Mr. de LUNA said he agreed with those speakers who had criticized the use of the words "Subject to article 43" to cover the exceptions to the rule that the severance of diplomatic relations did not, as such, affect treaty relations. Article 43 dealt solely with impossibility of performance on objective grounds; in paragraph 1, the impossibility envisaged was permanent, in paragraph 2 it was temporary, and in paragraph 3 it was partial, but the grounds were always objective. In the case covered by article 65 A, on the other hand, the impossibility of performance was based not on objective, but on purely subjective grounds.

34. In fact, two kinds of exceptions must be covered in article 65 A. The first was that dealt with in the draft submitted by Mr. Jiménez de Aréchaga, where the machinery for applying the treaty was lacking. The second was that mentioned by Mr. Yasseen, where severance of diplomatic relations and the lack of friendly relations which it implied, resulted in moral impossibility of performance.

35. The nature of the treaty would not provide much guidance in the matter. The question whether the treaty relationship would be affected by the severance of diplomatic relations did not depend on the nature of the treaty, but on the spirit in which diplomatic relations had been broken. Ultimately, it was a purely subjective matter and depended on the States concerned.

36. He could not accept the opening proviso "Subject to article 43" because the provisions of article 43 were not only too strict, but also covered different ground from article 65 A. The reference to article 43 should be replaced by a statement of the exceptions. Unfortunately, while it was possible to formulate the exceptions resulting from the absence of machinery, it would be extremely difficult to formulate those which resulted from moral impossibility of performance.

37. Mr. LIU said that he entirely agreed with the principle laid down in article 65A but wondered whether, in addition to being subject to the provisions of article 43, it ought not also to be made subject to those of article 44.

38. He agreed with Mr. Verdross that it would be inconsistent to state that severance of diplomatic relations did not affect the legal relations established by a treaty; the important point was that it did not lead to termination.

39. He doubted whether it was necessary to make any reference to article 55, since that article governed the whole draft.

40. The CHAIRMAN, speaking as a member of the Commission, suggested that in the case of treaties whose application required the intervention of diplomatic organs, it could be said that if those organs disappeared, the application of the treaty became impossible except through organs of a third State; that was the situation contemplated in Mr. Jiménez de Aréchaga's text.

41. But it had been said that there were treaties which by their nature required a certain atmosphere of agreement for their application, such as treaties of friendship and treaties of political collaboration. It would be dangerous to mention that class of treaty expressly in the draft; it was not referred to in Mr. Jiménez de Aréchaga's text, but it could be regarded as implicitly included in the Special Rapporteur's text, since the latter referred to article 43, and impossibility of performance due to the state of relations between the parties might come within the scope of paragraph 2 of that article.

42. Moreover, under the terms of article 43 a party could invoke the event in question as a ground for pleading that a treaty was impossible to perform and should consequently be suspended. Mr. Jiménez de Aréchaga's text went further, for it established the suspension of the treaty objectively. That was an important difference. In that respect, the Special Rapporteur's text was the more prudent.

43. Mr. AMADO stressed that the object of the article was to safeguard legal relations between States and ensure their continuity. Consequently, if a reference was made to article 43, it should be specified that paragraph 2 of that article was meant, not paragraph 1, which dealt with an entirely different case.

44. Mr. de LUNA said that, if the language of paragraph 2 of article 43 were used instead of referring to the article itself, that would go a long way towards solving the problem that had arisen. A sentence could be introduced reading, approximately:

> "Should impossibility of performance result therefrom such impossibility may be invoked only as a ground for suspending the operation of the treaty".

45. Mr. ROSENNE said that the discussion had convinced him of the need to link article 65 A with article 43 and not to introduce other criteria which might have unforeseen consequences: but article 43 would in all probability require some modification. For example, the wording of paragraph 2 was a little odd. He would have thought that it should read "If it is not clear that the disappearance or destruction of the subject-matter will be permanent ...".

46. The CHAIRMAN said that the Commission was not called upon to interpret article 43 at that stage. In his opinion, however, article 43, paragraph 2, referred to a temporary impossibility of performance, not a permanent impossibility resulting from the total and permanent disapearance of the subject-matter of the rights and objections stipulated in the treaty.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that article 43, which was subject to the separability provisions laid down in article 46, would cover cases in which treaties could be performed only in part as the result of the severance of diplomatic relations.

48. He suggested that article 65 A should be referred to the Drafting Committee for examination, together with Mr. Jiménez de Aréchaga's text and Mr. Verdross's comments. Some thought should also be given to the possibility of modifying article 43.

It was so agreed.

49. Mr. YASSEEN explained that when he had spoken of the impossibility of performing certain treaties while diplomatic relations were severed, he had not meant to exclude partial impossibility, for not all the provisions of a treaty would necessarily be impossible to apply. In that context the principle of separability of treaty provisions should be followed.

50. Mr. TUNKIN pointed out that the Drafting Committee would have to consider two different situations: one in which a State that had broken off diplomatic relations took steps to suspend or terminate a treaty, and one in which a State considered a severance of diplomatic relations as justification for suspending a treaty because the breach was incompatible with its performance.

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

51. The CHAIRMAN invited the Commission to consider the text of article 55 proposed by the Drafting Committee.

Article 55 (Pacta sunt servanda)

52. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee had agreed to propose the following text for article 55:

> "A treaty in force is binding upon the parties to it and must be performed by them in good faith. [Every party shall abstain from any act incompatible with the object and purpose of the treaty.]"

It had decided to retain the original title and had reached unanimous agreement on the first sentence. Opinion had been divided as to whether the sentence in brackets should be retained. Some members believed that the principles was implicit in the first sentence and that such an addition would only weaken the force of the article, whereas others regarded the two sentences as complementary and believed it would be advisable to stipulate that States must refrain from acts not expressly prohibited by the terms of the treaty, but incompatible with its object and purpose.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's wishes, the Drafting Committee had reduced article 55 to a simple statement of the fundamental principle.

54. Mr. LACHS said he had no objection to the first sentence, which was clear and concise, but he would like to know what interpretation the Drafting Committee placed on the phrase "the object and purpose of the treaty" in the second sentence.

55. Sir Humphrey WALDOCK, Special Rapporteur, replied that the phrase was used with the same meaning as in paragraph 1 (*d*) of article 18, on reservations. It had been taken from the advisory opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[3] The purpose of the second sentence was to deal with the problem of certain acts which, although not prohibited by the letter of the treaty, would, if accomplished, render its performance much more difficult. It was meant to strengthen the first sentence by going beyond its literal provisions.

56. Mr. PAREDES said that the first sentence of the new article 55 merely reproduced the universal principle *pacta sunt servanda* — a principle so obvious and so much in the nature of things that it hardly needed stating: anyone giving an undertaking was required to honour it.

57. The incorporation of that principle in international legal doctrine and its very frequent use could only be explained by the need to fight against the rigidity of the old concept of sovereignty, which gave the sovereign unlimited powers of decision, to which no obstacle was admitted. The maxim *pacta sunt servanda* had come to limit those powers.

58. The sentence stating the principle was in no way improved by adding that the parties must perform the treaty "in good faith", since that expression, which was more moral than legal in character, only amounted to an admonition to be of good behaviour. Besides being imprecise and fluid, the concept of good faith was very difficult to apply in practice, since it originated in a psychological process of the person deciding on the act in question.

59. Nevertheless, he thought it possible to speak of good faith if both the negative and the positive consequences were extracted from the concept: that meant prohibiting whatever hindered the performance of the treaty and prescribing the acts necessary to give it full effect. In other words, as he had maintained on another occasion, the parties should be bound by whatever followed from the nature and object of their agreement, even if it was not expressly stated in the treaty.[4] However, the prohibiting clause in brackets did no more than urge the duty to fulfil the treaty.

60. He would therefore be obliged to vote against the draft article.

61. Mr. AMADO said that the principle of good faith was one of the basic concepts of law. Its scope was very wide and included an obligation to refrain from certains acts. By stating that obligation in terms, the sentence in brackets tended to restrict the scope of the general principle. It might perhaps be better to leave it to the international courts to determine the limits of good faith.

62. Mr. ROSENNE said that while he had no objection in principle to the use of Latin, he was opposed to the title *pacta sunt servanda*. He would have preferred the title to be in English, French and Spanish, like the titles of articles 37 and 45 dealing with *jus cogens* and article 44 dealing with the *rebus sic stantibus* clause. If the title was voted on separately, he would vote against it.

63. The second sentence of article 55 embodied a phrase which had been used originally by the Inter-

[3] *I.C.J. Reports*, 1951, p. 24.

[4] 726th meeting, paras. 61 *et seq.*

national Court of Justice; he himself had suggested its introduction during the Commission's discussion of article 55. On reflection, however, he had reached the conclusion that, since it referred to only one aspect of the principle of good faith, it would be better to drop it for the time being and to limit article 55 to the clear statement of principle contained in the first sentence; the concept of good faith already covered the idea expressed in the second sentence. He suggested that the second sentence be transferred to the commentary, where it could serve as an illustration of the concept of good faith.

64. Mr. TSURUOKA said he was in favour of deleting the sentence in brackets; the article would be simpler and more vigorous without it.

65. Mr. BARTOS was in favour of retaining the Drafting Committee's text, includind the sentence in brackets. He reminded the Commission of the arguments he had advanced during the discussion of the original draft of article 55.[5]

66. Mr. LACHS, after thanking the Special Rapporteur for his explanation, said that the fact that the wording of the second sentence had been taken from an advisory opinion of the International Court of Justice in a particular case was an additional argument for deleting it. He could not agree that there was any analogy with the provisions on reservations, which dealt with a totally different subject. Furthermore, the sentence only illustrated the passive aspect of the *pacta sunt servanda* rule, which also had its active aspects.

67. With regard to Mr. Rosenne's objection to the use of the Latin expression "*pacta sunt servanda*", he observed that, in the title of article 37, the Commission had translated the term "*jus cogens*" into English, French and Spanish and left the Latin in brackets because the concept was a novel one. In article 44, the Commission had avoided the expression "*rebus sic stantibus*" not out of any reluctance to use a Latin phrase, but because misuse of that expression had brought it into discredit. The position was different in the case of the maxim "*pacta sunt servanda*", which could fittingly be given prominence.

68. Mr. CASTRÉN said that he was prepared to accept the Drafting Committee's text. He thought the second sentence was of some use and strengthened the statement of the principle.

69. Mr. de LUNA said that Latin had the advantage of conciseness. It would be difficult, if not impossible, to express the concept "*pacta sunt servanda*" in three words in English or Spanish. The use of a Latin formula of that kind could be compared with the use of terms of Greek origin in medicine; the meaning was clear to all scholars, whatever their native tongue. Even in treaties, it was quite common for Latin expressions to be used because of their universality. The use of a dead language also had the advantage that, precisely because it was not spoken, the meaning of the words was not liable to change with time as a result of usage. He therefore strongly advocated retaining the title "*pacta sunt servanda*".

70. He could not agree with Mr. Paredes on the question of good faith and, like Mr. Amado, strongly supported the reference to it in article 55. In fact, he regarded the principle of good faith as even more important than the *pacta sunt servanda* rule, which was one of the consequences of good faith in international relations.

71. He was in favour of deleting the second sentence which, far from strengthening the first, tended to weaken it. The fact that the wording was drawn from an advisory opinion of the International Court of Justice on a specific question was a strong argument against it. The case dealt with in that opinion was merely one instance of the obligations arising from the duty to perform the treaty in good faith.

72. Mr. TUNKIN said he would have preferred the title to be in the working languages, but he was bound to admit that a satisfactory equivalent was hard to find. In any case, as it was very probable that the titles would be dropped at future conferences, the point was of minor importance.

73. The second sentence was not only unnecessary, but weakened the principle stated in the first, as it might be taken to be an interpretation. Nevertheless, he could accept the second sentence if the words "In particular" were added at the beginning.

74. Mr. YASSEEN said he conceded that the phrase "*pacta sunt servanda*" could be used in certain European languages deriving, in varying degress, from Latin; but the same did not apply to languages of different origin, such as Arabic, in which there were maxims, well defined in Islamic law, expressing the same concept.

75. In his opinion, the first sentence of article 55 should be retained and the second deleted, for the substance of the second sentence was implicit in the first, and it would be inadvisable to stress one of the applications of the principle to the exclusion of the others.

76. Mr. REUTER agreed with Mr. Tunkin. He suggested that a full stop should be placed after the words "binding upon the parties to it" in the first sentence, and that the second sentence should read: "It must be performed by them in good faith and in particular the parties to the treaty must abstain...". That would emphasize the importance of the principle of good faith.

77. The CHAIRMAN, speaking as a member of the Commission, said that the maxim "*pacta sunt servanda*" was not only a convenient Latin expression, but also stated a principle which, since the time of Grotius, had represented the very essence of international law. It would be a pity to translate it, especially as it would be hard to find an equally satisfactory formula.

[5] *Ibid.* paras. 65 *et seq.*

78. The first sentence would be clearer and more correct if it read: "Every treaty is binding upon the parties among which it is in force". The second sentence seemed to be a source of misunderstanding. Its original purpose had been to strengthen the statement of the principle, but most members had expressed the opinion that it was more inclined to weaken it. That being so, it would probably be better to delete it.

79. Mr. VERDROSS endorsed the Chairman's remarks.

80. Mr. EL-ERIAN said he was in favour of retaining the title *pacta sunt servanda*, which was useful because of its universality.

81. The Drafting Committee had perhaps over-simplified article 55, but he supported the proposed text, particularly the reference to good faith. The Commission had already introduced that concept in article 17 and, by cross-reference, in a number of other articles which referred back to article 17.[6]

82. The second sentence of article 55 elaborated on the obligation to perform the treaty in good faith. Its purpose was to state that the application of the treaty was not confined to performance of the letter of its provisions. He supported the inclusion of that sentence and the insertion of the words "In particular", proposed by Mr. Tunkin, which would strengthen it by showing that the case mentioned was only one example of the obligations arising from the duty to perform the treaty in good faith.

83. Mr. ROSENNE pointed out that the titles used in the Commission's drafts in the past had not always disappeared; the codification conventions ultimately signed had sometimes retained the titles of the articles.

84. Of course, the principle *pacta sunt servanda* existed in all legal systems; but he could not accept the idea that universality must be equated with the use of Latin and he had therefore expressed reservations regarding the use of a Latin formula to express a universal idea. However, in view of the Chairman's appeal associating the *pacta sunt servanda* rule with the founders of international law and in particular with Grotius, he was prepared to withdraw his reservation.

85. Mr. BRIGGS said he was in favour of retaining the title of article 55, which embodied a universal maxim.

86. With regard to the Chairman's second remark, he pointed out that it was only in the French text that the difficulty arose; in the English text the words "to it" after the words "the parties" made the meaning clear.

87. He supported the reference to good faith and was in favour of retaining the second sentence, as he was not at all convinced that it in any way weakened the rule stated in the first. The concept it embodied was perhaps implicit in the first sentence, but would be even clearer if stated explicitly.

88. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Briggs that the second sentence did not in any way weaken the first. The first sentence expressed in absolute terms the obligation to perform the treaty in good faith; its formulation could perhaps be strengthened by replacing the words "is binding" by the words "shall be binding". It was true that the contents of the second sentence were included in the concept of good faith contained in the first sentence. However, he could not agree with Mr. Amado that the matter should be left to judicial interpretation; the very purpose of the second sentence was to facilitate the interpretation of the requirements of good faith in the present context, by the States which would have to apply the treaty. It seemed to him desirable to state the fact that the treaty relationship implied certain negative obligations.

89. Mr. AMADO said he still thought that some latitude should be left for interpretation. In any case, he thought it inadvisable to provide an interpretative instance immediately after the statement of a principle.

The meeting rose at 1 p.m.

749th MEETING

Monday, 22 June 1964, at 4.30 p.m.

Chairman: Mr. Roberto AGO

Organization of Future Sessions

[Item 6 of the agenda]

1. The CHAIRMAN announced that the Commission had considered item 6 of its agenda at a private meeting and reached the following decisions.

2. In 1965 and 1966, the Commission intended to complete its drafts on the law of treaties and on special missions, and to continue its work on relations between States and inter-governmental organizations and on succession of States in respect of treaties.

3. The Secretariat would try to obtain from governments as early as possible their comments on the two drafts to be completed, namely, those on the law of treaties and special missions.

4. In 1965, the Commission intended to complete Part I of its draft on the law of treaties and as many articles as possible of Part II, depending on the proposals submitted to it by the Special Rapporteur. It also intended to work on its draft on special missions.

5. In 1966, the Commission hoped to complete the whole of the draft on the law of treaties and the whole of the draft on special missions, and would

[6] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 175.