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Summary record of the 750th meeting

Topic:

Law of Treaties

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from the treaty " by the words " unless the treaty provides otherwise ", which were used elsewhere in the draft. The reference to the intention of the parties was too vague and might give rise to difficulties of interpretation.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that that change would be acceptable.

Article 58 was referred back to the Drafting Committee for revision in the light of the discussion.

The meeting rose at 5.45 p.m.

750th MEETING

Tuesday, 23 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to continue consideration of the articles submitted by the Drafting Committee.

ADDITIONAL ARTICLE FOR PART I (FORMER ARTICLE 60) (Authorization to act on behalf of another State in the conclusion of a treaty)

2. Sir Humphrey WALDOCK, Special Rapporteur, said it would be remembered that after discussing his drafts of 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),[1] the Commission had decided to omit article 59 and to invite the Drafting Committee to examine article 60 and consider whether the right context for its subject-matter was Part I of the draft on the law of treaties (Conclusion, entry into force and registration of treaties). The Drafting Committee had reached the conclusion that the subject matter of article 60 belonged in Part I and had prepared the following tentative draft of an article.

" *Authorization to act on behalf of another State in the conclusion of a treaty*

" A State may authorize another State to perform on its behalf any act necessary for the conclusion of a treaty provided that the other States participating in the adoption of the text of the treaty agree thereto."

3. Although the intention was to introduce that provision in Part I, it would nevertheless be included in the report on the current session, in order to bring it to the notice of governments and to invite their comments.

4. Mr. VERDROSS proposed that the last part of the text, beginning with the words " provided that " be deleted, as such a proviso was not consistent with existing law; other States could not refuse to recognize that Switzerland, for example, was authorized to conclude international treaties on behalf of Liechtenstein. The case in which one State authorized another State to act on its behalf was quite different from that in which a State designated a diplomatic agent to represent it permanently in the territory of another State; in the latter case the consent of the receiving State was necessary.

5. Mr. PESSOU said he supported Mr. Verdross's proposal. Furthermore, the word " empower " (*donner pouvoir à*) would be better than " authorize ", for it showed more clearly that every State was sovereign.

6. Mr. CASTRÉN also supported Mr. Verdross's proposal, for the reasons given by Mr. Verdross.

7. Mr. BARTOŠ said he approved of the text proposed by the Drafting Committee, on the understanding that the authorization could be revoked at any time by the State which had given it. He was not opposed to the practice of delegation of power, even on a long-term basis, but he considered that if it was not specified that the arrangement was revocable, the provision would jeopardize the principle of independence of States laid down in the Charter and condone situations that might be tantamount to a disguised protectorate.

8. Mr. JIMÉNEZ de ARÉCHAGA, referring to the proposal to delete the concluding proviso, said that there might appear to be some reason for the deletion, since the authorization in question did not require consent or recognition by the other States in order to be granted. However, the article embodied two ideas: first, that one State could authorize another to perform on its behalf any act necessary for the conclusion of a treaty; and second, that such an authorization could only be exercised with the consent of the other States concerned. The best manner of dealing with the problem was to make clear that the consent of the other parties was required not for the granting, but for the exercise of the authorization.

9. Mr. ROSENNE agreed with those remarks. The question raised was not one of recognition, but of knowing with whom one was contracting.

10. Mr. YASSEEN said that the validity of the authorization referred to in the article was not conditional on the agreement of the other parties, and he therefore supported Mr. Verdross's proposal. Nevertheless, the other parties must know whom they were dealing with when a State negotiated or concluded a treaty on behalf

[1] 732nd and 733rd meetings.

of another State; hence the Commission should provide that the other parties must be notified of the authorization. In addition, as he had said during the previous discussion on article 60, the authorization should always be revocable.[2]

11. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Jiménez de Aréchaga and Mr. Rosenne had explained the position adequately. His own draft of article 59 (A/CN.4/167) had simply stipulated that the other parties must be aware of the authorization. If a State objected to the arrangement whereby one State represented another, it was always open to it to refuse to negotiate with the representing State. In substance, it was therefore true to say that the assent of the other States was necessary. However, he found Mr. Yasseen's suggestion acceptable, in that the provision thus amended would make it clear that the other States must be aware of the authorization; their right to object could be implied.

12. He maintained his view that the case of Liechtenstein and Switzerland was a very special one.

13. Mr. REUTER said he supported Mr. Verdross's proposal, because the representation of one State by another for the purpose of concluding a treaty might perhaps raise a problem of recognition, but could not be conditional on the consent *stricto sensu* of the other parties.

14. The article proposed had been drafted with the legitimate intention of giving an implicit warning against the protectorate system, but it left aside the structures which could be founded on the equality of States, such as unions of States, federations, or even international organizations. The article did not say whether a State could authorize the organs of a union of States to act on its behalf. Some members of the Commission might perhaps think that that question was connected with the question of relations between States and inter-governmental organizations. For his part, he would not be able to accept the article if it ruled out the possibility of States delegating to certain organs of a union of States the right to perform certain acts for the purpose of concluding international treaties.

15. The CHAIRMAN said he thought all the members of the Commission agreed that the proposed text in no way prejudged the question whether a State could delegate to an international organization the power to conclude a treaty on its behalf.

16. Speaking as a member of the Commission, he asked the Drafting Committee and the Special Rapporteur whether the first part of the article really meant that the representing State could conclude a treaty on behalf of the represented State, or whether it referred only to the intermediate acts, exclusive of the actual conclusion.

17. He recognized that the concluding proviso of the article was too strict: in the case of a multilateral treaty it would be impossible to make sure of obtaining the consent of all the other States. He therefore suggested that the passage beginning "provided that" should be replaced by the words "if the other States do not object".

18. Sir Humphrey WALDOCK, Special Rapporteur, said that his original draft of article 60 (A/CN.4/167) had spoken of the conclusion of a treaty by one State on behalf of another State. However, the Drafting Committee's object in proposing the text under discussion had been to make allowance also for the case in which, for example, a State which was being represented by another State at a conference reserved to itself the right of ratification.

19. In reply to the Chairman's other point, he said that the other States had to be aware of the authorization, for it was clearly the right of States to know with whom they were contracting. The position varied with the type of treaty. In the case of a multilateral treaty, the conference convened to establish the text would sooner or later have to deal with the question of credentials and today it did not necessarily do so at the opening. Moreover, it was possible that a State which had not felt sufficiently affected to send delegates to a conference, might change its mind and ask another State to act on its behalf. The crucial moment for the negotiating States to know of any such authorization would be the time of settlement of the final clauses of the treaty, in other words, the adoption of the text of the treaty.

20. The CHAIRMAN, speaking as a member of the Commission, said that the first part of the article would be less ambiguous if it specified that a State could authorize another State to conclude a treaty on its behalf and to perform any act necessary for the conclusion of the treaty.

21. With regard to the last part of the article, he still thought that provision should be made for objection by the other parties in certain cases.

22. Mr. TUNKIN said that the Drafting Committee had proceeded on the assumption that, in normal cases, the authorization would relate to the performance of some particular act or acts, but not to the whole process of concluding a treaty. It would hardly be possible under existing conditions for one State to authorize another to ratify a treaty on its behalf. Such a situation would be most abnormal and would suggest a sort of protectorate. He was therefore opposed to the amendment suggested by the Chairman. The wording proposed by the Drafting Committee did not exclude the exceptional case in which a State authorized another to perform all the acts leading up to the conclusion of a treaty, but it was important not to give undue prominence to that exceptional case.

23. The CHAIRMAN, speaking as a member of the Commission, said he still thought that normally, where there was an agency relationship, it was for the purpose of concluding a treaty. That was particularly true of treaties which came into force on signature.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had thought that the

[2] 732nd meeting, para. 47.

commentary would deal with the question of an authorization given by a State to a union of States or to an international organization to act on its behalf. The alternative would be to say in the article that a State might authorize "another State or subject of international law to perform on its behalf any act, etc." The Committee had not made any reference to those cases in the article, because it was to be placed in section II of Part I, which was entitled "Conclusion of treaties by States". Admittedly, when one State concluded a treaty with another through an international organization the treaty was still concluded between States, but the introduction of the organization complicated the matter and the Committee had preferred to confine the article to authorizations given to States.

25. With regard to the point mentioned by Mr. Tunkin, he pointed out the relevance of quasi-federal relationships and economic unions of the type linking Belgium and Luxembourg. Another illustration of representation of one State by another in the conclusion of treaties was provided by the Byelorussian SSR and the Ukrainian SSR, which were parties to treaties as separate subjects of international law, but for which the USSR acted on occasion in the conclusion of international treaties.

26. Mr. PAL said that the problem which had arisen would be largely solved if the proposed additional article was placed in section II of Part I near article 4, which dealt with the authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty. The additional article could be formulated as proposed by Mr. Verdross, and article 4 could be slightly amended so as to cover the case of one State representing another and the requirements for such representation.

27. The CHAIRMAN said that the Commission appeared to be in agreement on the position of the new article.

28. Mr. VERDROSS supported Mr. Yasseen's suggestion; the last part of the article could be amended to read: "provided that the other States have been notified of the authorization". The other States could not deny that the agency relation was a lawful one, but they were entitled to know of its existence. They could decline to negotiate a particular treaty with the representing State, but they could not deny its authority to conclude such a treaty.

29. The case of Switzerland and Liechtenstein was not unique; there was also the Belgium-Luxembourg Economic Union relationships such as those between Bhutan and India.

30. Sir Humphrey WALDOCK, Special Rapporteur, said he had not claimed that the case of Liechtenstein was unique; in fact, he had mentioned other cases in the commentary on his original article 60. He had pointed out, however, that the agreement between Liechtenstein and Switzerland was a very peculiar form of treaty arrangement which the Commission had agreed to leave aside.

31. Mr. BARTOŠ was in favour of retaining the concluding proviso as it appeared in the Drafting Committee's text because, for one reason, there had been cases in which the possibility of certain agency relationships had been excluded by virtue of a special status. For example, representation of the Free Territory of Trieste by Italy or by Yugoslavia had been expressly prohibited. No doubt that kind of restriction was exceptional — and contrary to the principles of the equality and sovereignty of States — but it might be necessary for political reasons and for the maintenance of world peace.

32. Mr. de LUNA said that the wording suggested by the Chairman was clearer than that proposed by the Drafting Committee. However, it was not absolutely essential to specify that a State could authorize another to perform all the acts leading up to the conclusion of a treaty. He agreed that the authorization should be brought to the notice of the other States concerned, but he could not agree that notification should be made an actual condition for the validity of the authorization. The authorization was valid regardless of any notification to other States; the notification was necessary only to enable the representing State to act on behalf of the represented State *vis-à-vis* the other States. If the other States did not wish to negotiate under those conditions, it was always open to them not to enter into negotiations.

33. Nor was the consent of the other States a necessary condition for the validity of the authorization. As he had pointed out, the consent was necessary only to enable the representing State to act upon the authorization.

34. Mr. EL-ERIAN reserved his position regarding the additional article, which the Commission had not an opportunity to discuss when it had considered the effects of treaties on third parties. The Commission had regarded that question as being of an exceptional character, and he thought it unnecessary to go into details regarding the exceptional situation contemplated in the article.

35. He found the main provision of the article much too broad, in that it referred to "any act" necessary for the conclusion of a treaty. With regard to the proviso, he supported Mr. Yasseen's suggestion that the reference to agreement by the other States should be replaced by a reference to the requirement of notification.

36. The CHAIRMAN, speaking as a member of the Commission, said that the situation contemplated in the article was not exceptional and need not necessarily arise from quasi-constitutional arrangements such as the Belgium-Luxembourg Economic Union. There would be a serious gap in the Commission's draft if no such article was included.

37. Mr. TUNKIN said there appeared to be general agreement regarding the first part of the article.

38. With regard to the discussion on the concluding proviso, he reiterated his view that the whole article dealt with exceptional cases; that was why his first impression had been that the article was hardly necessary. Normally, in international relations every State

acted for itself alone; the representation of one State by another was quite exceptional in modern times, although there were still a few small British protectorates.

39. The very fact that one State was authorized to act for another could have political implications. Pressure had sometimes been exerted on a State to make it subscribe to an authorization of that type. Other States might not be prepared to accept such a situation, and their right to object should be recognized. He therefore considered that the Commission should at least amend the article to provide for notification of the authorization and for the right of the other States to object.

40. Mr. YASSEEN explained that when making his earlier remarks he had not lost sight of the fact that a State was free to enter or not to enter into treaty relations with other States. Notification would be the condition not of the validity of the authorization, but perhaps of its efficacy. The concluding proviso of the article could be replaced by a second sentence reading:

> "The other States which are to conclude the treaty must be duly notified of the authorization."

Thus amended, the article would not in any way imply that the other States were obliged to negotiate and conclude the treaty with the representing State.

41. Mr. de LUNA said that his objection had been to notification being made a condition of the authorization. He suggested that the proviso should be replaced by a separate sentence reading:

> "The other States participating in the adoption of the text of the treaty must agree to the performance of the said act."

42. Mr. AMADO proposed that the article should be drafted to read:

> "If a State is authorized by another State to conclude a treaty on its behalf, the consent of the other party or parties is necessary."

That wording would remove the obscurities without over-emphasizing the fact that the other States must be told what was happening.

43. Mr. ELIAS proposed, as a compromise solution, that the words "provided that" should be replaced by the word "if" and the words "agree thereto" by the words "are aware of such authorization and do not object to it".

44. Mr. PAL said it did not seem to him very material whether the second part of the article was retained or deleted. The fact that one State authorized another to act on its behalf did not mean that other States would be bound to act under the authority even against their own inclination.

45. Mr. TUNKIN supported Mr. Elias' suggestion subject to drafting changes.

46. Referring to the point made by Mr. PAL, he said it would not be sufficient merely to state that the authorization was possible; such a statement could be held to imply that other States were obliged to accept the situation.

47. Mr. JIMÉNEZ de ARÉCHAGA suggested that the article should be referred back to the Drafting Committee.

48. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the article should be redrafted on the following lines:

> "A State may authorize another State to perform on its behalf any act necessary for the conclusion of a treaty provided that the other States participating in the adoption of the text have notice of such authorization and do not object."

49. He would prefer not to include the words "to it" proposed by Mr. Elias, in order to avoid the implication that the other States could object to the actual authorization. By virtue of the principle of the independence of States there would be no right to object to the authorization itself; other States could only object to negotiating with the representing State under those conditions.

50. Another difference between his text and that proposed by Mr. Elias was the use of the words "have notice of" instead of "are aware of".

51. Mr. LIU said it would be better not to be content with a mere awareness by other States. It was extremely difficult to determine whether a State was aware of a a situation or not. He would therefore prefer the article to stipulate that the other States should be duly notified and that there must be no objection on their part.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that such a stipulation would be too strict. In the case of the union between Belgium and Luxembourg, there would be no formal notification of the right of Belgium to represent Luxembourg, but there would be notice of the situation. In some cases, a formal notification might be given, but not always, so the article should be drafted in more cautious terms.

53. Mr. ELIAS said that the omission of the concluding words "to it" would leave the text open to several interpretations. Brevity should not be achieved at the expense of clarity.

54. He did not think that the article should be referred back to the Drafting Committee without a clearer indication of what the Commission had agreed upon.

55. The CHAIRMAN observed that the members of the Commission were agreed on the substance: if a State negotiated on behalf of another State, the other parties must know of the agency relationship; they could not refuse to recognize an authorization given by one State to another, but they could refuse to negotiate under those conditions. It would be for the Drafting Committee to find the most appropriate wording.

56. Speaking as a member of the Commission, he maintained that the authorization related essentially

to the act of concluding the treaty. That point might be made clear in the commentary.

57. He added that, in his opinion, the words "*les autres Etats appelés à adopter le texte du traité*" in the French text did not exactly correspond to the English wording "the other States participating in the adoption of the text of the treaty".

58. Sir Humphrey WALDOCK, Special Rapporteur, said that in the opinion of the Drafting Committee, the stage at which the text of a treaty was adopted was the critical moment when the participating States had to know with which others they were going to enter into treaty relations.

59. The CHAIRMAN, speaking as a member of the Commission, expressed the opinion that the door should be left open to every possibility by using a more general expression such as "contracting States", so that the concluding passage would not refer solely to the moment at which the text of the treaty was adopted.

60. Mr. REUTER said he would have to oppose any text which called in question an institution so well established as the Customs union and which would allow a State, either during the negotiations or even when the text of the treaty was adopted, to object that it could not agree to deal with the authorized representative.

61. He would prefer the Commission to specify that a State could not delegate functions of sovereignty permanently, except under arrangements preserving the equality of States or to an international organization.

The additional article for Part I (former article 60) was referred back to the Drafting Committee for revision in the light of the discussion.

ARTICLE 61 (Treaties create neither obligations nor rights for States not parties)

62. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following new text for article 61:

"*Treaties create neither obligations nor rights for States not parties*

"A treaty applies only between the parties and neither imposes any obligations nor confers any rights upon States not parties to it."

63. The Drafting Committee considered that that was a concise and exact rendering of the general rule. It would be noted that in the English text the reference to "third States", which had appeared in the Special Rapporteur's original draft (A/CN.4/167), had been dropped from the titles of article 61 and the three following articles proposed by the Committee, which read:

"*Article 62*

"*Treaties providing for obligations for States not parties*

"A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound.

"*Article 62 A*

"*Treaties providing for rights for States not parties*

"1. A State may exercise a right provided for in a treaty to which it is not a party if (*a*) the parties to the treaty intended the provision to accord that right either to the State in question or to a group of States to which it belongs or to all States, and (*b*) the State expressly or impliedly assents thereto.

"2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in, or in conformity with, the treaty for the exercise of the right.

"*Article 62 B*

"*Termination or amendment of provisions regarding rights or obligations of States not parties*

"When in accordance with article 62 or 62 A a State is subject to an obligation or entitled to exercise a right under a provision of a treaty to which it is not party, the provision may only be terminated or amended with the consent of that State, unless it appears from the treaty or the circumstances of its conclusion that the obligation or right was intended to be revocable."

64. Mr. RUDA said that the titles and wording of articles 61, 62 and 62 A proposed by the Drafting Committee were inconsistent. Whereas the title of article 61 stated that "Treaties create neither obligations nor rights for States not parties", the titles of the immediately following articles 62 and 62 A referred to treaties providing for obligations and rights for States not parties. Again, the categorical rule laid down in article 61 was followed by the exceptions provided for in articles 62 and 62 A. Perhaps the apparent illogicality could be remedied by adding the words "in principle" at the beginning of article 61.

65. The CHAIRMAN, speaking as a member of the Commission, asked whether it was a rule of the Commission to give a separate title to each article, or whether it could group several articles together under a single title. If permissible, it would be convenient to group the three articles in question under the heading "Treaties and third States".

66. Sir Humphrey WALDOCK, Special Rapporteur, said it had been the Commission's practice to give each article a title. It would, of course, be possible to devise a more general title for article 61 such as "Treaties and their effects on third parties".

67. Some members of the Drafting Committee had not entirely approved of so absolute an affirmation as that made in article 61 and had considered that a qualifying phrase of the kind suggested by Mr. Ruda was necessary; but it had finally been decided that article 61 could remain as it stood provided that articles 62 and 62 A were properly formulated.

68. Mr. BRIGGS explained that the Drafting Committee had been at pains not to take a position on the

doctrinal controversy which had arisen in the Commission as to whether a treaty could actually create rights for third States or only provide an offer of a right which could be accepted or declined. The Committee had decided that it would not be inconsistent to use the phrase " neither imposes any obligations nor confers any rights " in article 61 and to speak of treaty provisions that could be the " means of establishing " a right or obligation in the following articles. Although some members had argued that article 61 should be made subject to the two succeeding articles, such a proviso had been rejected as out of place, because the succeeding articles did not really constitute exceptions to article 61.

69. Mr. CASTRÉN said that, although he found the wording of the articles generally satisfactory, and despite the explanations given by the Special Rapporteur and Mr. Briggs, he agreed with Mr. Ruda that the titles and contents of the articles were too broadly drafted in so far as they related to rights. The text proposed by Mr. Jiménez de Aréchaga for article 62 C [3] mentioned treaties that conferred rights on third States, so that article 61 should at least contain a saving clause referring to articles 62 A and 62 C.

70. Mr. ROSENNE drew attention to the discrepancy between the titles of articles 61 to 62 B in the different languages. In the French and Spanish versions, the expressions " Etats tiers " and " terceros Estados " were used, although the term " third States " had been deliberately avoided in the English.

71. He suggested that the Commission should follow the order in which the Drafting Committee has proceeded and leave the discussion of article 61 until after articles 62, 62 A and 62 B had been considered.

72. Mr. VERDROSS said that he fully agreed with Mr. Ruda and Mr. Castrén. Article 61 should consist only of the first phrase, " A treaty applies only between the parties ". The second part of the sentence was unnecessary and, indeed, inaccurate, since there could be treaties providing for obligations for States not parties — the case dealt with in article 62 — and treaties providing for rights for States not parties — the case dealt with in article 62 A. Moreover, it might be advisable to add a proviso concerning the rights and obligations of a successor State, which might read : " without prejudice to the rules of State succession ".

73. The CHAIRMAN, speaking as a member of the Commission, said that apart from its title article 61 seemed to him to be well drafted. A treaty did not, as such, impose any obligations or confer any rights on a non-party State without that State's consent. That principle was confirmed in the other articles and the arrangement was therefore a logical one. One might be opposed to the arrangement, but assuming that it was adopted, the formulation proposed by the Drafting Committee was satisfactory.

74. Mr. de LUNA associated himself with the comments made by Mr. Ruda and Mr. Verdross. Although it was true that a treaty could not create obligations for a non-party State without its consent, it could nevertheless create subjective rights, whether or not they were exercised by the States for which they had been created. Hence the text should satisfy those who did not admit that a treaty could really create rights and regarded it as making an offer that might be accepted or declined. That being so it was unnecessary to make any reference to States not parties. So far as obligations were concerned, the question of third States did not arise. So far as rights were concerned, it was still uncertain which members of the Commission believed that treaties could create rights without the need for another treaty to establish those rights with the consent of the States for which they had been created.

75. In any event, in laying down that rule, the Commission was merely giving expression to the general principle *res inter alios acta aliis nec prodest nec nocet*. Article 62 should be so worded as to take both views into account : the view of those who regarded the right as an offer that had been accepted, and the view which he, for one, maintained, that subjective rights could be conferred on a non-party State without any need for its acceptance.

76. The CHAIRMAN urged the members of the Commission not to resume the long discussion which had already taken place on the principle. They were in agreement on one point, which had been emphasized by Mr. Jiménez de Aréchaga, namely, that the consent of a non-party State was required before either an obligation or a right could exist. That meant, not that there must be external evidence of consent in each case, but that two States could not impose an obligation or a right on another State against its will.

77. Mr. LACHS said he could subscribe to the principles embodied in articles 61 to 62 B, but he feared that if article 61 were read in isolation instead of in the context of the four articles, it might give the impression of regulating the whole matter, whereas articles 62 and 62 A were complementary and provided for exceptions to the rule.

78. As in some other instances the word " applies " might not be altogether satisfactory and perhaps it should be replaced by the word " binds ", in which case the word " between " would need to be deleted.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the use of the word " binds " would not be altogether satisfactory. The word " applies " was being used in an intransitive sense.

80. Although originally he had had some objections to the somewhat bald statement of principle in article 61, he had come round to the view that it could stand, because, as drafted, the two succeeding articles clearly showed that obligations and rights might arise for third parties subject to their consent.

81. The formula did not seem to him to compromise the position either of those members who regarded articles 62 and 62 A as exceptions or of those who did not.

[3] 752nd meeting, para. 1.

82. The CHAIRMAN, speaking as a member of the Commission, said he would prefer to leave the text as it was; but in order to satisfy Mr. Lachs he would suggest that some such clause as "subject to the provisions of the following articles" be added to article 61.

83. Mr. REUTER suggested the words "without prejudice to the following articles".

84. Mr. ELIAS suggested that the title of article 61 be amended to read "The effect of a treaty upon States not parties to it" and that the titles of the succeeding three articles be dropped. The general principle stated in article 61 would then be read in conjunction with the remaining provisions, which could be left as they stood.

85. The CHAIRMAN observed that the same result could be achieved by making articles 62 to 62 B into paragraphs of article 61.

86. Mr. TABIBI said he was not in favour of altering the title of article 61; it explained the content of the principle laid down, the exceptions to which were stated in the two succeeding articles. He was, however, in favour of deleting the latter part of the article from the words "and neither imposes". The question of the succession of States in the matter of treaties might also be mentioned, as suggested by Mr. Verdross.

87. Mr. PESSOU said that if it was necessary to find a title for the whole of the text, his preference would be a formula such as that suggested by the Chairman: "Treaties and third States". The general rule could be set out clearly in article 61, and articles 62 and 62 A, which stated the exceptions, could begin with word "however".

88. Mr. YASSEEN said that article 61 was very well drafted and stated the existing rule of positive law, in other words the general principle of international law that treaties could not be invoked against third States. The same was true of articles 62, 62 A and 62 B. The essential point was that the situations provided for in articles 62, 62 A and 62 B were not exceptional; those articles based the rights and obligations that might result from a treaty on the general theory of international agreement. In reality neither the rights nor the obligations existed until they had been accepted by the non-party State. He was not in favour of introducing into article 61 a clause such as "subject to the provisions of the following articles", which might give the impression that there were exceptions. He was prepared to accept the articles as proposed by the Drafting Committee.

89. Mr. AMADO suggested that the difficulty might be overcome by retaining the existing title of article 61 and its opening phrase and beginning article 62 with the sentence:

> "A treaty imposes no obligations and confers no rights on States not parties to it, but a State may be bound by an obligation provided for in a provision of a treaty to which it is not a party."

90. The CHAIRMAN pointed out that that would mean recasting the whole text, as Mr. Amado's proposal referred only to obligations and not to rights.

91. Mr. ROSENNE said that article 61 was a precise statement of the law as it stood, both in its positive and its negative aspects, and should be left unchanged. The principle involved was the application to the law of treaties of the more general and fundamental rule *res inter alios acta tertiis nec nocent nec prosunt* and the Commission should be careful not to upset that rule.

92. Rather than combine the four articles, it would be preferable to place them in a seperate section together with article 64, which was also closely linked with them.

93. There was no need to mention in the text of article 61 the question of State succession, concerning which a general reservation had been made in the introduction to Part III of the Special Rapporteur's third report (A/CN.4/167) and in the commentary on certain articles. The same procedure would suffice in the present instance.

94. The CHAIRMAN thought that generally speaking it would be advisable to introduce as few reservations as possible concerning State succession or State responsibility, since the Commission might subsequently overlook the need for them in other articles.

95. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Rosenne that the matter of State succession should be dealt with in the commentary only, because in whatever language the reservation was inserted in the text of the articles themselves, it would hardly be possible not to prejudge the existence or non-existence of a possible rule of State succession.

96. Mr. JIMÉNEZ de ARÉCHAGA said that there was a contradiction between article 61 and articles 62 and 62 A. Mr. Briggs's explanation that article 61 referred only to the creation of rights was contradicted by the use of the word "confers" rather than "creates". Mr. Yasseen's contention that articles 62 and 62 A did not constitute exceptions would only be tenable if the words "without their assent" appeared at the end of article 61. The only way of removing the contradiction would be to include in article 61 some neutral formula such as "subject to the provisions of the following articles" which would make it plain that the succeeding provisions were not exceptions.

97. Mr. RUDA said that as he had not been present at the earlier discussion on the principle, he was only concerned to prevent any apparent contradiction in the presentation of the three articles. There were two prerequisites for the granting of rights and the imposition of obligations: the intention of the parties to a treaty to impose the obligations and to confer the rights, and the consent of the third State to accept them. Those elements should be common to the articles under consideration: but the idea of consent was lacking in article 61, so that it might perhaps be advisable to add some such phrase as "except with their consent".

98. The CHAIRMAN, speaking as a member of the Commission, pointed out that in that case the word "imposes" in article 61 would become meaningless and there would be no need for the next two articles. He would prefer a saving clause on the lines suggested by Mr. Reuter.

99. Mr. RUDA confirmed that his suggestion would involve the deletion of the subsequent articles. He would be prepared to accept a saving clause, however.

100. Mr. AMADO said that the Special Rapporteur's objection that a saving clause would affect the actual substance of the articles had yet to be answered, but the Commission appeared to have abandoned every other solution, including even the wording he had suggested himself, against which the Chairman's objection was hardly valid.

101. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Amado so far as the idea was concerned, and therefore favoured a saving clause, for he did not see how an article could begin with the word "however".

102. Mr. ROSENNE said that he would regret the insertion of any qualifications in article 61, for in his opinion that article accurately and forcefully stated the general principle. In the form in which they were drafted, he did not consider that articles 62 and 62 A constituted exceptions.

103. Mr. PAREDES said he was in favour of a single title for the four articles. Every treaty was essentially concerned with some matter of particular interest to the parties, and any rights or obligations that might be created for non-party States should be regarded as exceptions. Articles 62 and 62 A stated exceptions to the rule contained in article 61, with which he agreed.

104. The CHAIRMAN suggested that at its next meeting the Commission should first consider articles 62, 62 A and 62 B, so as to reach full agreement on their contents, and then revert to article 61.

It was so agreed.

The meeting rose at 1 p.m.

751st MEETING

Wednesday, 24 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(continued)

[Item 3 of the agenda]

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the group of four articles relating to the effects of treaties on States not parties to them in the order agreed at the previous meeting, taking articles 62, 62 A and 62 B first and then reverting to article 61.

ARTICLE 62 (Treaties providing for obligations for States not parties)

2. Mr. BRIGGS, Chairman of the Drafting Committee said that the Committee proposed the following title and text for article 62:

"*Treaties providing for obligations for States not parties*

"A State may become bound by an obligation contained in a provision of a treaty to which it is not a party if the parties intended the provision to be the means of establishing that obligation and the State in question has expressly agreed to be so bound."

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the French text of article 62 did not exactly correspond to the English.

4. Mr. REUTER said he agreed that the verb "être" did not convey the idea of movement in the English verb "to become", but a literal translation would not be correct French.

5. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the opening words of article 62 should be amended to read "An obligation may arise for a State from a provision of a treaty ...".

6. Mr. LIU said that probably the phrase "A State may become bound" had been used in order to establish the link between articles 62 and 61, but if they were ultimately to be combined it would suffice to say "A State may be bound".

7. Article 61 [1] spoke of "imposing" obligations and "conferring" rights, whereas the succeeding articles spoke of "establishing" obligations and "according" rights. The language should be made uniform.

8. The CHAIRMAN said that the terms "impose" and "establish" had been used advisedly in order to stress that the assent of the third State was necessary for the obligations to come into being.

Article 62 was approved with the amendment suggested by the Special Rapporteur.

ARTICLE 62 A (Treaties providing for rights for States not parties)

9. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 62 A:

"*Treaties providing for rights of States not parties*

"1. A State may exercise a right provided for in a treaty to which it is not a party if (*a*) the parties to the treaty intended the provision to accord that right either to the State in question or to a group

[1] See previous meeting, para. 62.