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Summary record of the 751st meeting

Topic:
Law of Treaties

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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.

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."

10. Mr. VERDROSS said he approved of the drafting of paragraph 1 as far as the end of clause (*a*). The words "A State may exercise" were also acceptable to those who held that actual rights could be created for third States, for it had never been part of their theory that rights could be imposed on third States. On the other hand it seemed that the supporters of the opposite theory might be able to drop clause (*b*), which recognized that the assent could be implied, since they held that the exercise of the right constituted implied assent.

11. The CHAIRMAN pointed out that if clause (*b*) were deleted all idea of assent would be removed. By merely saying that a State might exercise a right, the Commission would give the impression that, in its opinion, the right existed independently of assent.

12. Mr. JIMÉNEZ de ARÉCHAGA said that although on theoretical grounds he had some sympathy with Mr. Verdross's view, he must point out that clause (*b*) was intended as a compromise to reconcile the difference of opinion between those who believed that the right derived directly from the treaty and those who considered that the express or implied assent of the third State was necessary before the right could come into existence.

13. Mr. ROSENNE agreed with the previous speaker.

14. Mr. YASSEEN said that although he supported the theory of the supplementary agreement, he doubted whether clause (*b*) should be retained, since to exercise a right was to accept it. However, he could only agree to the deletion of that clause if the text of the paragraph was amended, for instance, by replacing the words "exercise a right" by the words "expressly or impliedly accept a right".

15. Mr. JIMÉNEZ de ARÉCHAGA said that the compromise solution should be retained.

16. The CHAIRMAN, speaking as a member of the Commission, said he thought Mr. Yasseen's suggestion had merit, for the present wording of clause (*b*) was rather illogical. To say that a State could exercise a right if it had given its assent suggested that the assent must precede the exercise of the right, whereas in fact the very moment a State decided to exercise the right, it gave its implied assent thereby.

17. Mr. JIMÉNEZ de ARÉCHAGA observed that what needed to be emphasized was that the State concerned could exercise the right provided for it.

18. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Jiménez de Aréchaga. Possibly the difficulty mentioned by Mr. Verdross might be removed if the opening words of the article were amended to read "A right may arise for a State from a provision in a treaty ...".

19. Mr. de LUNA said he thought the Commission had agreed that a neutral formula should be adopted. But the Special Rapporteur's text favoured one particular theory — that which regarded a right provided for in a treaty for a third State as an offer requiring acceptance.

20. Mr. ROSENNE said that the wording suggested by the Special Rapporteur would be acceptable. He was not sure whether perfect symmetry in the language used in the various articles was either necessary or desirable. Any changes would in any case need to be reviewed by the Drafting Committee.

21. Mr. JIMÉNEZ de ARÉCHAGA said that the Special Rapporteur's suggestion would offer a way out.

22. Mr. BRIGGS said that the wording suggested by Mr. Yasseen was both clearer and neater and would not prejudge the question whether the treaty created the right or provided a means for the parties to offer a right to non-party States.

23. The CHAIRMAN, speaking as a member of the Commission, said that the beginning of paragraph 1 might be amended to read "A State may expressly or tacitly assent to a right ..."

24. Mr. TUNKIN said that if it were amended as suggested by Mr. Yasseen, the provision would be virtually meaningless and would say nothing on the main question, which was whether a right could arise from a treaty for a non-party State.

25. The CHAIRMAN said that, on further reflection, he considered the Special Rapporteur's wording preferable to his own.

26. Mr. RUDA observed that a right was never accepted or assented to: it was exercised.

27. Mr. LIU said that the titles of articles 62 and 62 A should both be dropped, as it was undesirable to give the impression that they provided a classification of certain types of treaty.

28. The CHAIRMAN pointed out that the titles referred to treaties "providing for", not "creating", rights or obligations.

29. Mr. BRIGGS said that the titles of all the articles would have to be reconsidered by the Drafting Committee.

30. Mr. REUTER said it would be better to use the present tense instead of the past in the French text, the word "*entendaient*" being replaced by "*entendent*" and the words "*a donné*" by "*donne*".

31. Mr. VERDROSS supported that change.

32. He thought it should be explained in the commentary that if, in the circumstances contemplated in

article 62 A, a State exercised a right arising for it from a treaty to which it was not a party, according to the theory which denied the creation of rights in favour of third States without their consent, that State could be deemed to have consented implicitly to accept the right.

33. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. Reuter that it would be preferable to use the present tense.

The wording suggested by the Special Rapporteur for paragraph 1 was approved, and it was agreed that the present tense should be used.

34. Mr. RUDA said that the Spanish text of paragraph 2 did not correspond to the English and should be altered.

35. Mr. JIMÉNEZ de ARÉCHAGA agreed.

36. The CHAIRMAN thought the French text also needed alteration; he was not sure what was meant by the words "*ou conformément au traité*".

37. Mr. LACHS asked whether the phrase "or in conformity with", in paragraph 2, was intended to refer to conditions laid down outside the treaty itself.

38. Sir Humphrey WALDOCK, Special Rapporteur, replied that it was. An example of such conditions would be those laid down by a State concerning rights of passage by waterway through its territory. Such a State would be entitled to promulgate regulations in conformity with the treaty; but not necessarily by virtue of the treaty; the regulations would naturally have to be observed by all States exercising rights under the treaty.

39. Mr. LACHS asked what would be the relationship between such an instrument and the original treaty.

40. Mr. ROSENNE said he could not see why the phrase "or in conformity with" should cause any difficulty.

41. Mr. LACHS pointed out that a treaty might be signed and enter into force after consultation with non-parties interested in exercising rights under the treaty, and the parties themselves might subsequently agree on additional conditions limiting the enjoyment of the rights in question.

42. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Lachs wished an express reference to related instruments to be added.

43. Mr. TUNKIN said that the meaning of the words "or in conformity with" was perfectly clear and was consistent with practice. For example, certain navigation rules quite separate from, but in conformity with, the 1948 Convention regarding the Regime of Navigation on the Danube [2] and with general rules of international law were accepted by the parties to that Convention. He was unable to see why the words in question should cause any problem.

44. Mr. BRIGGS said that presumably the phrase was meant to refer to conditions not actually laid down, but provided for in the treaty; for example, the treaty might contain a clause enabling the territorial State to enact certain regulations.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs's example was not exactly a case in point; in such circumstances, the conditions existed by virtue of the treaty.

46. The CHAIRMAN suggested, in the light of Mr. Lachs's remarks, that paragraph 2 might be amended to read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions for the exercise of that right laid down by the parties in the treaty or in conformity with the treaty in other instruments".

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the conditions might not necessarily be laid down by one of the parties in an instrument of the kind referred to. They were more often laid down by a territorial State in the exercise of its sovereignty.

48. Mr. ROSENNE suggested that the difficulty could be overcome by substituting the word "by" for the word "in" after the words "conditions laid down" and striking out the two commas.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that that solution would be acceptable.

50. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Tunkin on the substantive issue, but considered it unnecessary for the Commission to enter into the question who was competent to establish conditions outside the treaty. The present drafting of paragraph 2 was perhaps rather awkward and might be amended to read: "... the conditions laid down in the treaty or established in conformity with it ..."

51. Mr. LACHS said that if additional conditions were stipulated by the parties it would be necessary to determine the relationship between those conditions and the original treaty. He therefore suggested that the sentence should read "A State exercising a right in accordance with paragraph 1 shall comply with the conditions laid down in the treaty or in related instruments in conformity with it".

52. The CHAIRMAN said that the exercise of the right should be linked with the conditions, for otherwise the provision would be meaningless.

53. Mr. de LUNA agreed with Mr. Lachs. The problem was very important, especially if it was accepted that there were two agreements: the main treaty and a related instrument. The essential point was that the Commission should not draft the provision in terms that would allow obligations to be imposed on a third State without its consent. A State accepting a right

[2] United Nations *Treaty Series*, Vol. 33, p. 197.

must know what it was doing and what commitments it was entering into.

54. Mr. REUTER pointed out that that problem had given rise to serious international disputes such as those concerning rights of transit through Indian territory, passage through the Corfu Channel, and navigation in the North Atlantic. He would therefore prefer a formula which did not raise the problem, such as " the conditions laid down by a treaty for the exercise of the right referred to in paragraph 1 shall be binding on a State which intends to exercise that right " ; that would leave the doctrinal question open.

55. Mr. YASSEEN observed that in such cases the non-party State could not have more than the treaty had been intended to offer. Hence it was logical that those who wished to take advantage of the right should have to comply with the conditions laid down in, or in conformity with, the treaty. The wording of the paragraph met every requirement and was entirely satisfactory.

56. Mr. TUNKIN said he thought the discussion had shown that it would be wiser for the Commission to draft paragraph 2 in such a way as to refer only to the provisions of the treaty itself.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the phrase " or in conformity with " was of some value because conditions existing outside the treaty might have to be observed.

58. The CHAIRMAN, speaking as a member of the Commission, said that a party might well be able to lay down certain rules because it was empowered to do so under the treaty. If those rules were in conformity with the treaty, the non-party State would have to comply with them ; if they were not, the non-party State would not be bound.

59. Mr. BARTOŠ said that he found the wording of paragraph 2 satisfactory, but it should be clearly understood that the conditions laid down in the treaty, to which that paragraph referred, must be in conformity with the general rules of international law.

60. Mr. JIMÉNEZ de ARÉCHAGA said that the text would be incomplete if it referred solely to the conditions laid down in the treaty, since it would not include additional regulations such as those establishing the limits of draught for vessels on an international waterway. As the text stood at present, the rights of the territorial State would be taken into consideration. On the other side, the requirement that the additional conditions should be in conformity with the treaty constituted an important guarantee for users.

61. Mr. LACHS expressed a strong preference for the Chairman's text ; he was firmly convinced of the need to drop the reference to conditions outside the treaty.

62. Mr. ROSENNE said that the omission of the phrase " or in conformity with " would open the way for misunderstanding. After all, certain conditions might be laid down outside the treaty, as in the purely hypothetical case of a treaty concerning freedom of navigation through the Corinth Canal, which made no mention of detailed regulations governing, for example, the carriage of explosives ; the territorial State would be entitled to draw up such regulations provided that there was no violation of the treaty.

63. Mr. RUDA said he agreed with Mr. Rosenne. The conditions in question were laid down in two kinds of instrument : the treaty itself, and national legislation on the subject, which must be in conformity with the treaty. If the words " or in conformity with " were left out, there would be no reference to part of the conditions laid down.

64. Mr. de LUNA said that, since an obligation could not be imposed on a State without its consent, it seemed to him that the obligation could only be one imposed by a rule of international law or by a treaty and, consequently, one which the third State had accepted either under international law or by accepting the treaty.

65. The CHAIRMAN pointed out that the provision was not concerned with establishing obligations, but only with the conditions governing the exercise of a right. That right could not only be accepted by the third State as it was offered, and it was offered subject to certain conditions governing its exercise, which were either expressly laid down in the treaty or would be determined by the party concerned in accordance with the terms of the treaty.

66. He understood that the majority of the Commission would prefer to mention the additional limitations. Accordingly, he thought that paragraph 2 should be referred back to the Drafting Committee with the request that it should give particular consideration to the formula " the conditions governing the exercise of that right provided for by the treaty or established in conformity with it " and should make any other changes in the paragraph that were consequential on the redrafting of paragraph 1.

It was so agreed.

ARTICLE 62 B (Termination or amendment of provisions regarding rights or obligations of States not parties)

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

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

" When in accordance with articles 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."

68. Sir Humphrey WALDOCK, Special Rapporteur, said it would be desirable to reserve the words " or the circumstances of its conclusion " in view of the discussion to which those words had given rise.

69. Mr. VERDROSS said that in principle he approved of the wording of the article, which he took to mean, *a contrario,* that so long as the non-party State had not exercised the right in question, that right could be terminated or amended by the parties.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that the provision, as he had originally drafted it in his report (A/CN.4/167, article 62, para. 3) had embodied two limitations, one of which was that mentioned by Mr. Verdross. The limitation in question, however, was covered by implication in the Drafting Committee's text; by a process of *a contrario* reasoning, it could be deduced from that text that, until a State became subject to an obligation or became entitled to exercise a right under a provision of the treaty, it was possible to terminate the obligation or right in question.

71. Mr. ROSENNE said he had accepted the text of article 62 B in the Drafting Committee, but he now had misgivings on two points. The first was the use of the verb " terminate ", which he had himself previously suggested should be used in place of " revoke ".[3] On careful consideration, he would prefer to revert to a term such as " revoke ", because an examination of the articles in Part II (invalidity and termination of treaties) showed that there were many methods of termination. Article 62 B was intended to refer to the case in which the parties agreed to amend or put an end to a treaty provision, not to that in which a party had a right to call for the termination of the treaty in accordance with some of the provisions of Part II.

72. The second point which caused him concern was the need to cover the case of suspension of the operation of a treaty by agreement among the parties. He thought that article 62 B should be adjusted so as to refer to an agreement to revoke or amend the provision in question, and so as to apply both to the suspension and to the termination of the treaty.

73. Mr. YASSEEN said he could accept the wording of the article as a whole, but it might perhaps be preferable to use a positive formula such as "... the provision may be terminated or amended with the consent of that State ...", so as not to prejudge the possibility of terminating the provision under other rules already adopted by the Commission.

74. In addition, the final passage would be improved if it read: " unless it appears from the treaty that the provision was revocable "; that would eliminate the controversial phrase " or the circumstances of its conclusion " and bring the end of the sentence into line with the beginning, which referred to a " provision ", not to an obligation or a right.

75. Mr. BARTOŠ said that on the whole he was satisfied with the text proposed. When a State had declined the proposal made to it in the treaty, its consent was not necessary for the amendment or termination of that proposal. That interpretation was fully in conformity with clause (*b*) of article 62 A, paragraph 1. But there was a period of option and it was open to question whether the provisions of the treaty could be amended before that period had elapsed. The Drafting Committee had omitted to take account of the period of option, which was very common in practice. The third State might have expected that it would be in a position to exercise the right or assume the obligation and have made arrangements to do so; in that event it would not be fair for the parties to the treaty to be able to withdraw their proposal unilaterally. The Commission should make provision for that case, which could arise very frequently in practice.

76. Mr. JIMÉNEZ de ARÉCHAGA said he was prepared to accept article 62 B as drafted. He pointed out, however, that the wording of the article reversed the presumption established by the Permanent Court of International Justice in the *Free Zones* case.[4] In that case, the Court had proceeded on the assumption that any provision in favour of a third State could be revoked by the parties to the treaty unless the treaty itself or the circumstances of the case showed an intention to provide for irrevocability. Article 62 B, on the other hand, was based on the assumption that the right of the third State was irrevocable unless a contrary intention appeared from the treaty or the circumstances of its conclusion. He had no objection to reversing the Court's ruling, but thought it would be going too far to drop the reference to the circumstances of the treaty's conclusion. Without that reference, article 62 B would, in effect, state that the right was irrevocable unless the parties to the treaty took care to insert in it an explicit provision to the contrary. He did not believe that such a formulation would constitute progressive development, or that it would encourage the use of the method contemplated in the article under discussion.

77. Mr. TUNKIN favoured the Drafting Committee's text. Although he had had some doubts on the point, he would prefer to keep the reference to the circumstances of the treaty's conclusion.

78. In view of the close links between article 62 B and articles 62 and 62 A, he suggested that the Drafting Committee should consider bringing the wording of article 62 B into line with that of the other two articles.

79. The CHAIRMAN, speaking as a member of the Commission, said that on the whole he found the text acceptable. However, he feared that the expression " under a provision of a treaty " might give the impression that the right or obligation had been directly created by the treaty, which would be inconsistent with the previous articles. It might perhaps be better to use some such expression as " arising from a treaty " (" *découlant d'un traité* ").

80. He did not think it would be enough to refer to the terms of the treaty in the final clause; and the

[3] 737th meeting, para. 20.

[4] *P.C.I.J.*, 1929, Series A, No. 22, and 1932, Series A/B, No. 46.

expression " or the circumstances of its conclusion " was itself too restrictive, since revocability might be the consequence of an event subsequent to the conclusion of the treaty, for instance, diplomatic conversations with the non-party State concerned. It would perhaps be better to use the phrase " or the circumstances ", which was both more concise and broader in meaning.

81. The adjective " revocable " was no doubt appropriate for a right, but less so for an obligation.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficulty could be overcome by redrafting the " unless " clause on the lines suggested by Mr. Yasseen, to read " unless the provision was intended to be revocable ".

83. Mr. de LUNA said that notwithstanding the commendable efforts made, the attempt to steer a middle course between two different doctrinal positions had produced an eclectic text that was neither elegant nor clear.

84. It was obvious that without the consent of the non-party State, no obligation could arise for that State. As far as rights were concerned, it would be natural for those members who accepted the doctrine of offer and acceptance to regard the offer as a unilateral legal instrument. For those who, like himself, considered that the right existed by virtue of the treaty even before it was exercised, irrevocability would be the rule, by virtue of the autonomy of the will of the parties.

85. The CHAIRMAN, speaking as a member of the Commission, observed that since article 62 B referred back to articles 62 and 62 A, it was clear that the right came into existence only when the non-party State had given its consent, either expressly, or impliedly, by exercising the right. Until it did so, the right was revocable.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's comment went a little too far. Members such as Mr. Verdross, Mr. Jiménez de Aréchaga, Mr. de Luna and himself did not admit that nothing in the nature of a right existed until the consent of the third State was given. The purpose of the formula used in article 62 B was to leave the doctrinal question open. All the members of the Commission agreed that, except where there was a contrary intention of the parties, a perfect and irrevocable right existed in principle only when the consent of the non-party State had been given. The use of the present tense in article 62B made it possible to keep the doctrinal question open.

87. Regardless of doctrinal differences, all the members of the Commission agreed that, in practice, the right of the non-party State should be revocable until that State had accepted or exercised it.

88. The CHAIRMAN said that that idea could be expressed by stating that, as soon as a right or an obligation came into being, it ceased to be revocable.

89. Mr. CASTRÉN said that he could accept the article as a whole, with the drafting changes proposed.

90. During the earlier discussion on article 62 he had proposed a text which made the terms of the treaty the only criterion for determining the question of revocability.[5] The non-party State would be put in a difficult position if it was obliged to examine not only the text of the treaty, but also other factors, which might even have arisen after the conclusion of a treaty. It might have taken steps to exercise its right which involved economic sacrifices; it should not be possible to deprive it of that right without its consent unless the terms of the treaty showed that the right was revocable. He therefore proposed that the words " or the circumstances of its conclusion " should be deleted. He did not think that the Permanent Court of International Justice had decided the question, and that opinion was supported by the Special Rapporteur's commentary on the original draft article 62 (A/CN.4/167).

91. Sir Humphrey WALDOCK, Special Rapporteur, said that the Permanent Court had not in fact ruled on the question. The ruling to which Mr. Jiménez de Aréchaga had referred was contained in the dissenting opinion of Judges Hurst and Altamira.[6] As far as the Court was concerned, it had rather assumed that the provision in favour of the third party was irrevocable in the particular case because of the circumstances.

92. The difficulty in article 62 B arose to a large extent from the attempt to deal concurrently with obligations and rights, in respect of which the positions were slightly different. With regard to obligations, it was the possibility of amendment of the relevant treaty provision that was important to the non-party State; the termination of an obligation, and in most cases its suspension, would not be a matter of concern to that State. With regard to rights, the non-party State was the beneficiary and it would be appropriate to lay down a stricter rule.

93. The CHAIRMAN said it might happen that the treaty itself contained no provision on the subject, but the parties, in a communication to the non-party State, stipulated the revocability of the right and that State accepted the revocability.

94. Mr. YASSEEN said that the parties could amend the treaty after its conclusion, but before acceptance by the non-party State. However, that subsequent agreement between the parties should be brought to the notice of the non-party State concerned in the same way as the original treaty.

95. The CHAIRMAN suggested that article 62 B should be referred back to the Drafting Committee.

It was so agreed.

ARTICLE 61 (Treaties create neither obligations nor rights for States not parties) *(resumed from the previous meeting)*

96. The CHAIRMAN invited the Commission to resume consideration of article 61, which read:

[5] 738th meeting, para. 7.

[6] *P.C.I.J.*, 1932, Series A/B, No. 46, pp. 174 *et seq.*

"*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."

97. He reminded the Commission that Mr. Rosenne had agreed to the use of the Latin maxim *pacta tertiis nec nocent nec prosunt* in the title. That would make it possible to avoid the obvious contradiction between the present title and the titles of the following articles, which specifically referred to treaties providing for obligations or rights for States not parties.

98. Mr. BRIGGS said that the main idea of the Drafting Committee in its formulation of articles 61, 62, 62 A and 62 B, had been to differentiate between rights and obligations. In keeping with that idea, he suggested that articles 61 and 62 should be combined, all reference to rights being omitted from article 61. The combined article would read:

"1. A treaty applied only between the parties and imposes no obligations upon States not parties to it.

"2. A State may become bound by an obligation ..." (as in the article 62 [7] proposed by the Drafting Committee).

99. It would thus be possible to overcome the difficulty arising from the fact that, according to one school of thought, the treaty itself conferred rights on the non-party State, whereas according to the other school, the treaty made an offer which needed acceptance for its completion. Obligations would be dealt with in one article, and rights in subsequent articles.

100. Mr. ROSENNE said he had grave misgivings regarding Mr. Briggs's proposal. The principle embodied in article 61 was a very fundamental one which was broader than the law of treaties itself — the principle expressed in the maxim *res inter alios acta aliis nec prodest nec nocet*. The wording proposed by Mr. Briggs might therefore have much more far-reaching effects than would appear at first sight.

101. Mr. BRIGGS pointed out that the essential statement that a treaty applied only between the parties would remain.

102. The CHAIRMAN thought that the formula proposed was nevertheless extremely dangerous. The article would refer only to obligations and say nothing about rights.

103. Mr. CASTRÉN said he supported Mr. Briggs's proposal, which would avoid many difficulties. The Commission had always tried to keep rights and obligations separate, but article 61 dealt with both together.

104. Mr. ELIAS said it was undesirable to alter the contents of article 61 in the manner suggested by Mr. Briggs; that article expressed an autonomous and fundamental principle which should be given due prominence.

105. He had suggested at the previous meeting that the four articles 61, 62, 62 A and 62 B should be grouped together so as to emphasize their interrelation.[8] If that were done, the titles could be dropped and replaced by a new comprehensive title such as:

"Effects of a treaty on States not parties to it".

106. The CHAIRMAN said he thought Mr. Elias's proposal should be considered after the Commission had decided whether to retain the text proposed by the Drafting Committee or to amend the article as proposed by Mr. Briggs.

107. Mr. YASSEEN was in favour of retaining the article in the form proposed by the Drafting Committee. To say that a treaty applied only between the parties was to state a principle from which followed two consequences of the same kind and equal force, namely, that a treaty did not impose any obligation and did not confer any right on non-party States. Those two consequences should be stated immediately after the general principle.

108. Mr. VERDROSS said that for practical reasons, in particular to facilitate voting, it would be better to deal with rights and obligations in two separate provisions. Besides, there was no need to state at once, in article 61, what would be said in the following articles. He was in favour of retaining only the first phrase of the article.

109. Mr. AMADO said that the starting point of the discussion was the fact that there was a glaring contradiction, beginning with the titles themselves, between article 61 and the next two articles. That fact must be tackled and a solution found, but Mr. Briggs's proposal was no solution. The Commission should seek the logical continuity between a principle and its consequences.

110. Mr. EL-ERIAN said he was in favour of retaining article 61, which was a useful general statement of a general principle.

111. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. El-Erian. Personally, he would have liked the provisions on rights to be separated from those on obligations, but he thought the principle stated in article 61 should be retained as it stood. Nevertheless, he was also in favour of adding a proviso such as that suggested by the Chairman at the previous meeting,[9] which would make the principle in article 61 subject to the provisions of article 62.

112. Mr. TUNKIN said he was in favour of retaining article 61, for the reasons already stated.

113. To add a proviso such as "subject to the following articles" would be going too far, for it would imply that the following articles stated exceptions, which they did not.

114. He proposed that, as Mr. Ruda had suggested at the previous meeting,[10] the words "except with their

[7] See para. 2 above.

[8] 750th meeting, para. 84.

[9] Para. 82.

[10] Para. 97.

consent " be added at the end of the Drafting Committee's text of article 61. There would thus be a logical sequence between article 61 and the articles that followed.

115. Mr. RUDA agreed with Mr. Tunkin. He realized that the proposal he had made at the previous meeting to add that proviso to article 61 and delete the following articles had been rather too drastic. On reflection, he thought that the following articles could be retained if article 61 was amended as Mr. Tunkin has just proposed. Article 61 would then state the principle and the following articles would show how it was to be applied. If the Commission did not wish to adopt that solution, it would still be necessary to remove the contradiction between article 61 and the following articles.

116. Mr. CASTRÉN observed that Mr. Briggs's proposal would not eliminate the statement of principle; it was merely a way of dividing it into two parts, one in one article and the other in the next.

117. The CHAIRMAN, speaking as a member of the Commission, said he was becoming increasingly inclined to accept the solution proposed by Mr. Ruda and Mr. Briggs.

118. Mr. PAL said he was in favour of retaining article 61 as proposed by the Drafting Committee. He did not believe that the phrase suggested by Mr. Ruda would remove all the difficulties: consent was not the only requirement specified in articles 62, 62 A and 62 B. He suggested that the problem could perhaps be solved by amending article 61 to state that a treaty applied only between the parties and " by itself " neither imposed any obligations nor conferred any rights upon States not parties to it.

119. The CHAIRMAN pointed out that that kind of wording had already been considered without success.

120. Mr. TABIBI supported article 61 as the expression of the fundamental rule concerning the effects of treaties on non-party States. But he was not altogether satisfied with the title of the article.

121. Mr. de LUNA stressed that all the difficulties arose from the fact that the Commission was not taking a stand in favour of either of the two legal theories on the subject. Article 61 as drafted presented difficulties for those members who favoured the theory of offer and acceptance. Other members considered that a treaty could not impose obligations on non-party States, but that it could confer rights on them.

122. He would be prepared to accept the traditional rule laid down in article 61 in the context of the series of articles now under consideration.

123. Mr. AMADO said that none of the proposed solutions satisfied him. He therefore suggested that the Commission should adopt the articles as they stood without troubling itself any more about the contradiction between article 61 and the following articles. The future would show how those articles were to be interpreted.

124. Mr. RUDA said that his doctrinal position was the same as that of Mr. de Luna, Mr. Jiménez de Aréchaga and Mr. Verdross. Without entering into the question of substance, however, he wished to stress that from the point of view of form there was an obvious contradiction between article 61 and the following articles.

125. He did not think the provisions submitted were completely neutral with regard to the two doctrines supported during the discussion; article 62 A, in particular, inclined towards the doctrine he favoured himself.

126. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept either of the two solutions which had been put forward. Article 61 expressed the general rule, but should, of course, be read in conjunction with the other articles of the draft. There was nothing very strange in the fact that articles 62 A and 62 B qualified the general rule laid down in article 61; there was perhaps some element of inelegance, because of the absence from article 61 of any anticipatory reference to the subsequent articles. From the legal point of view, however, no difficulty arose so long as the qualifications were stated in the articles. It was probably desirable to amend the title so as to show that article 61 stated only the general rule regarding the effect of treaties on non-party States.

127. Nevertheless, he would have no objection to the addition of the words suggested by Mr. Ruda, particularly since the term " consent " was used; that term was wider than " agreement " and committed the Commission no further than it had already committed itself in articles 62 and 62 A.

128. The CHAIRMAN, speaking as a member of the Commission, said he had definitely come round to Mr. Ruda's suggestion, although he had at first opposed it at the previous meeting. Thus amended, article 61 was less categorical and heralded what followed.

129. The first phrase might perhaps be improved if it were amended to read: " A treaty produces legal effects only for the parties ".

130. Mr. REUTER objected that that wording would give even greater weight to the need, mentioned by Mr. Jiménez de Aréchaga, for a reference to the most-favoured-nation clause in that part of the draft.

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

It was so agreed.

The meeting rose at 1.10 p.m.