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Summary record of the 766th meeting

Topic:
Law of Treaties

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ticle 73 to state that where that meaning was incompatible with rules of *jus cogens* emerging after the conclusion of the treaty, the meaning should be altered in conformity with those rules.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with Mr. Yasseen but thought that the point was a formal one ; there was not much difference in substance between himself and Mr. Tunkin. The reference in paragraph 1 of article 70 should be to the interpretation of a treaty in the context of the rules of international law contemporary to its conclusion. The question of substance raised by Mr. Tunkin was covered by article 73, sub-paragraph (*a*), which dealt with the emergence of any later rule of customary international law affecting the subject-matter of the treaty ; that provision would cover also the emergence of a rule of *jus cogens.*

95. The purpose of paragraph 1 (*b*) of article 70 was to cover such matters as the need to interpret a treaty in the light of the linguistic usages of the law at the time of the conclusion of the treaty. Clearly, only the contemporary law would be relevant from that point of view.

96. Lastly, in view of the inter-relation of the articles on interpretation, it was not possible to appreciate the Chairman's proposed article 70 unless his views were known on what should be the contents of the following articles.

97. The CHAIRMAN said that, to his mind, the following articles should be along the lines of those proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

766th MEETING

Wednesday, 15 July 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.3)

(continued)

[Item 3 of the agenda]

ARTICLE 71 (Application of the general rules) [concerning the interpretation of treaties]

1. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 71 of his draft (A/CN.4/167/Add.3), said that he had little to add to his commentary ; in particular, the controversy regarding the value, for purposes of interpretation, of the preparatory work of a treaty was well known.

2. Difficulties of interpretation arose in the cases, envisaged in paragraph 2 of article 70, where the text of the treaty itself was not sufficient to elucidate its meaning and it became necessary to have recourse to other means of interpretation.

3. There existed general agreement on the importance of the subsequent practice of the parties in relation to a treaty. However, it was only when that practice was concordant that it could be regarded as having the value of an authentic interpretation. In the case of multilateral treaties, the subsequent practice of only some of the parties was not automatically excluded as a means of interpretation ; if it did not cover a broad group of parties it would, of course, only serve as an indication, and more evidence would be required in support of the alleged interpretation. It was for that reason that he had dealt with the matter of subsequent practice in two different provisions, in paragraph 2 of article 71 and in article 73. In article 73, the subsequent practice mentioned was the concordant practice of all the parties to the treaty, which gave a clear indication of their authentic interpretation of the treaty.

4. The CHAIRMAN, speaking as a member of the Commission, said that he entirely agreed with the principles stated in paragraph 2 of article 71, even though not everything set out in sub-paragraphs (*a*), (*b*) and (*c*) was entirely necessary and the paragraph might accordingly be drafted more concisely.

5. Experience had convinced him of the importance of the three elements referred to in the paragraph, and not least of the preparatory work. It would be hard to understand exactly what the intentions of the parties had been without reference to the *travaux préparatoires,* the term being taken in its broadest sense, akin to the English " legislative history ". Secondly, it could happen that some of the intentions of the parties were not reflected in the preparatory work but might be inferred from the circumstances surrounding the treaty's conclusion. Thirdly, the subsequent practice of parties in relation to the treaty was a reliable guide for the purpose of its interpretation, but that was true only of the concordant practice of the parties, for any unilateral practice which was disputed by the other parties was not an element of interpretation. Accordingly, it would have to be specified that the subsequent practice to be taken into account in the interpretation of the treaty had to be concordant.

6. Mr. BRIGGS said that he supported the contents of both paragraphs of article 71.

7. In paragraph 1, as a matter of drafting, he considered that sub-paragraph (*a*) was unnecessary. In addition, sub-paragraphs (*b*) and (*c*) could be incorporated into the opening sentence. He therefore suggested that paragraph 1 should be reworded along the following lines :

"The context of the treaty shall be understood as comprising, in addition to the treaty, any instrument annexed to the treaty and any other instrument related to it at the time of its conclusion."

8. Paragraph 2 should be maintained as it stood, mainly for the reasons given by the Chairman. The means of interpretation therein mentioned were intended to serve in the situations envisaged in paragraph 2 of of article 70. If, after an attempt had been made at a textual interpretation based on the ordinary meaning of the words used in the treaty, the resulting interpretation was manifestly absurd or unreasonable, or in the event of ambiguity or obscurity, the means mentioned in paragraph 2 of article 71 could be resorted to. In that same paragraph, he agreed that sub-paragraphs (*a*), (*b*) and (*c*) should be retained as they stood.

9. Mr. RUDA said that if the reference to the preamble were omitted from paragraph 1 of article 71, it would be necessary to introduce into the commentary some explanation on the use of the preamble of a treaty for the purpose of its interpretation. It should be explained that the preamble of a treaty was both a legitimate and a valuable guide in interpretation.

10. He agreed with Mr. Tunkin [1] that the definition of "treaty" in article 1 of the Commission's draft covered much, if not all, of the substance of article 71, paragraph 1, which could therefore perhaps be deleted altogether.

11. Referring to paragraph 2, which dealt with auxiliary means of interpretation, he said he found himself in full agreement with the permissive form in which its provisions were drafted. However, he had some doubts regarding sub-paragraph (*a*). If the meaning of a term was clear, with the consequence that paragraph 1 of article 70 applied, there would surely be no need to resort to auxiliary means of interpretation for the purpose of confirming that meaning, which was already clear. He also had doubts regarding sub-paragraph (*c*), which dealt with the exceptional case covered by paragraph 3 of article 70. If, as stated in that latter provision, the special or extraordinary meaning of a term had been "established conclusively", then the meaning in question was perfectly clear and there should be no need to resort to auxiliary means of interpretation in order to establish that special meaning.

12. He added that, paragraph 2 of article 71 actually applied exclusively to the cases mentioned in paragraph 2 of article 70, for the whole system of auxiliary means of interpretation entered into play only where a textual interpretation led to a manifestly absurd or unreasonable meaning, or in the event of ambiguity or obscurity. That being so he thought that paragraph 2 of article 71 should be merged with paragraph 2 of article 70. With regard to the order in which the various auxiliary means were listed, he considered that the subsequent practice of the parties should be mentioned first, the circumstances surrounding the conclusion of the treaty second and the preparatory work last of all.

[1] See para. 50 of the summary record of the 765th meeting.

13. The CHAIRMAN observed that normally those auxiliary means were enumerated in chronological order.

14. Mr. ROSENNE said that he was in general agreement with the basis of article 71 and most of his observations would relate to matters of drafting.

15. He suggested that the opening words of paragraph 1 should be amended to read "For the purposes of article 70" instead of "In the application of article 70". The term "application" was used much too frequently in the draft and it could be a source of confusion.

16. He would prefer the words "including its preamble" to remain but if they were dropped, the commentary should explain clearly that the preamble constituted an integral part of an international treaty.

17. In paragraph 2, he suggested that the opening words should be amended to read "Reference may also be made, where necessary, to...". In addition, he suggested the deletion of the last words of the opening sentence "for the purpose of" and also of sub-paragraphs (*a*), (*b*) and (*c*). In the codification of the law of treaties, he did not believe that the Commission should touch upon problems of evidence and proof in international law. In any case, if those problems were to be dealt with, he did not believe that the sub-paragraphs in question would necessarily cover all that was relevant. In particular, sub-paragraph (*a*) introduced an unnecessary element of doctrinal controversy. It was true that there existed a number of apparently consistent pronouncements by the International Court of Justice and arbitral tribunals to the effect that *travaux préparatoires* had only been used to confirm what had been found to be the clear meaning of the text of a treaty. However, that case-law would be much more convincing if from the outset the Court or tribunal had refused to admit consideration of *travaux préparatoires* until it had first established whether or not the text was clear, but in fact, what had happened was that on all those occasions the *travaux préparatoires* had been fully and extensively placed before the Court or arbitral tribunal by one or other of the parties, if not by both. In the circumstances, to state that the *travaux préparatoires* had been used only to confirm an opinion already arrived at on the basis of the text of the treaty was coming close to a legal fiction. It was impossible to know by what processes judges reached their decisions and it was particularly difficult to accept the proposition that the *travaux préparatoires* had not actually contributed to form their opinion as to the meaning of a treaty which, nevertheless, they stated to be clear from its text, but which, as the pleadings in fact showed, was not so. At all events, it could be supposed that all practitioners of international law were free in their use of *travaux préparatoires*.

18. With regard to the order in which the sources should be mentioned in paragraph 2, he suggested that first place should be given to the circumstances surrounding the conclusion of the treaty, second place to the *travaux préparatoires* and last place to subsequent practice.

19. Mr. TUNKIN said that he was in general agreement with the basic ideas embodied in article 71 but thought that it overlapped to a considerable extent with article 73; hence the need for the rearrangement of the articles on interpretation which he had suggested at the previous meeting.[2]

20. In particular, the contents of paragraph 1 (*a*) of article 71 duplicated to some extent those of paragraph (*b*) of article 73. It was true that the latter provision referred to "any later agreement" and not specifically to an agreement on interpretation, but it was nevertheless true that an agreement which did not deal with interpretation could sometimes be relevant to the interpretation of an earlier treaty.

21. The subsequent practice of the parties in relation to the treaty was also mentioned both in article 71 and in article 73.

22. He therefore urged that some rearrangement of articles 70 to 73 should be undertaken in order to bring out more clearly the basic ideas put forward by the Special Rapporteur. In that rearrangement, article 70 would set forth the fundamental rule that the text of the treaty constituted the basic source of interpretation. Article 71 would then deal with what might be called sources of interpretation of the second degree; it would be followed in turn by another article dealing with subsidiary sources of interpretation.

23. Within that framework, article 71 would cover the following: first, subsequent agreements on the same subject-matter, so far as they were relevant to the interpretation of the original treaty; second, any later agreement on its interpretation; third, subsequent practice, provided that it was the concurrent practice of all the parties to the treaty. In connexion with the third source, some doubts had arisen whether it should be considered as a secondary source or merely as a subsidiary source. He personally regarded it as having the character of a secondary source; if the subsequent practice of all the parties concurred, it could be said that there existed between the parties a tacit agreement, at least on interpretation. The source was thus of the same order as the agreements he had just indicated as first and second sources.

24. The article which would follow article 71 and which would deal with subsidiary sources would cover preparatory work. He was not absolutely certain that the circumstances surrounding the conclusion of the treaty should be included under that same heading.

25. Turning to the wording of article 71, he expressed doubts regarding the need to retain paragraph 1, since in article 1 of part I of the draft the Commission had already indicated what it meant by "treaty" for the purposes of its draft articles. Perhaps the Drafting Committee should be invited to consider whether it was necessary to retain paragraph 1, inasmuch as some of the instruments therein mentioned were already covered by the definition of "treaty". Sub-paragraph (*c*) was not quite clear to him; he asked whether the instruments therein mentioned might not in some cases be *travaux préparatoires.*

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the instruments mentioned in paragraph 1 (*c*) of article 71 were not *travaux préparatoires.* One example of the type of instruments he had in mind was that of instruments of ratification.

27. Mr. TUNKIN, while accepting that explanation, pointed out that an instrument of that type would perhaps constitute a subsidiary source of interpretation.

28. The provisions of paragraph 2 of article 71 should, be thought, be divorced from those dealing with the secondary sources of interpretation. The contents of paragraph 2 should form a separate article, drafted on the following lines:

> "If the interpretation in accordance with the two previous articles does not bring about a sufficient clarification, reference may be made to other evidence or indications of the intentions of the parties..."

29. A formulation of that type would make it perfectly clear that subsidiary sources would be used only if primary and secondary sources proved of no avail.

30. The CHAIRMAN, speaking as a member of the Commission, said that according to the proposal he had made at the previous meeting,[3] paragraph 1 of article 71, which was intended to define the meaning of the expression "the context of the treaty" would be transferred to the first article of section III and would be drafted on the following lines:

> "The context of the treaty shall be understood as comprising, in addition to the entire text of the treaty, any instrument annexed to or related to it".

That wording would cover all kinds of instruments — instruments of ratification, exchanges of letters, annexes, collateral agreements and so on — in short, all documents to be taken into consideration, other than subsequent agreements establishing an interpretation.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the formulation suggested by the Chairman did not take into account the important question of agreements made by the parties before the conclusion of the treaty and related to it.

32. The CHAIRMAN, speaking as a member of the Commission, said that some such words as "and drawn up before or in connexion with its conclusion" might be added to the text he had proposed.

33. Sir Humphrey WALDOCK, Special Rapporteur, thought that the language proposed by the Chairman was much too broad. It could be construed as covering also future agreements. He suggested that the passage should commence with language along the following lines:

> "For purposes of interpretation, the context of the treaty shall be understood..."

[2] *Ibid.*, para. 51.

[3] *Ibid.*, para. 81.

34. Mr. CASTRÉN said that he could accept article 71 as submitted by the Special Rapporteur, although he recognized that probably most of the proposals by previous speakers were defensible. He had two remarks to make concerning paragraph 2. In order that it should not give too much weight to the subjective element, the provision might mention in addition to the intention of the parties, the interpretation of the treaty in general. So far as preparatory work was concerned, he agreed with the remark in paragraph (21) of the commentary that unpublished documents could also be taken into consideration, provided that they were accessible to the parties; that condition might perhaps be included in the body of the article.

35. M. de LUNA said he was in agreement with the Chairman's formulation for paragraph 1, which embodied ideas expressed by Mr. Tunkin, Mr. Briggs and Mr. Ruda.

36. So far as paragraph 2 was concerned, he agreed with Mr. Tunkin that a sort of order of importance among sources of interpretation should be established. In his opinion, subsequent practice should precede preparatory work in that enumeration. Unlike the Chairman, he did not attach much importance to the chronological order; the main difference between those two sources was that subsequent practice had a more objective character and also a greater measure of certainty than *travaux préparatoires*. All those who had participated in diplomatic negotiations were aware of the decisive part which informal discussions often played in the most delicate phase of the negotiations. As a result, the reasons which had impelled the parties to accept a certain formula of agreement frequently did not appear at all in the records of the meeting, so that those records did not provide a full guide to the will of the parties. All too often, the parties placed on record as little as possible, and certainly what committed them least.

37. There was also a very great difference between an announced intention and the carrying out of a certain programme. He suggested that a distinction should be made between intentions that were actually carried out and intentions that were merely announced.

38. Nor was the subsequent practice of the parties always a reliable guide for the purpose of interpretation; it might also have the effect of modifying the treaty, for the parties were free at any time to amend a treaty by means of their concurrent practice.

39. Another important problem, which could hardly be dealt with in the article itself but which should be mentioned in the commentary, concerned the constituent instruments of international organizations. The subsequent practice of the parties had in many cases led to interpretations which in effect amended the instruments concerned. Nothing said in the draft articles on interpretation should be capable in any way of preventing that progressive development within international organizations.

40. He agreed with Mr. Rosenne that it would be advisable to delete sub-paragraphs (*a*), (*b*) and (*c*) of article 71, paragraph 2. In particular, he entirely agreed with Mr. Rosenne's remarks on the use made by judges of *travaux préparatoires*. Having served in a judicial capacity for four years, he could safely assert that no one could claim to know how a judge actually arrived at his conclusions; that question was a completely different one from that of the statement of reasons which normally prefaced the operative part of any judicial decision. The situation was not without some similarity to that which he had described in his earlier remarks concerning the *travaux préparatoires* of a treaty.

41. Mr. LACHS said that in general the provisions of article 71 contained a sound and clear formulation of the rules of interpretation covered by that article.

42. Commenting on paragraph 1, he agreed with those speakers who had stressed the importance of the preamble of a treaty and suggested that the words "including its preamble" should be retained without the brackets. The preamble of a treaty was extremely important for the interpretation of a treaty as a whole. In a great many treaties, the object and purpose were indicated solely in the preamble, and the preamble was consequently essential for the purpose of a wider interpretation of the treaty. He had some doubts regarding paragraph 1 (*a*), which spoke of an agreement concluded by the parties as a basis for the interpretation of the treaty. He believed cases of such agreements were extremely rare but had no objection to such agreements, if any, being used as a source of interpretation.

43. He had, however, much greater difficulty in accepting the reference in paragraph 1 (*b*) to the annexes to a treaty. In many treaties, the annexes had a completely different standing from the international instrument itself; in particular, provision was often made for the amendment of an annex without the consent of all the parties to the treaty. An example of that situation was provided by the air navigation conventions concluded at Paris (1919)[4] and Chicago (1944).[5] The annexes to those conventions contained certain definitions, and in particular the definition of "aicraft". In both cases, the procedure for amending the annexes was much easier than that for amending the conventions. It was questionable whether annexes of that subsidiary character, with the flexible arrangements for their amendment for practical purposes, could be relied upon for purposes of interpretation, particularly since they were not agreed to by all the parties of the treaty. He thought that some qualifying phrase covering that type of annex was necessary.

44. In paragraph 1 (*c*), it should be made clear that the instruments mentioned should have been subscribed to by all the parties to the treaty. It was possible for some of the parties to a treaty to conclude an instrument related to the treaty that would constitute a sort of *inter se* agreement.

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[4] Convention for the Regulation of Aerial Navigation of 13 October 1919, *United Kingdom Treaty Series* No. 2 (1922).

[5] Convention on International Civil Aviation of 7 December 1944, United Nations *Treaty Series*, Vol. 15.

45. In paragraph 2, the most important issue was that of the relationship between preparatory work and subsequent practice; it was therefore not a matter for surprise that all speakers should have referred to that issue. In that connexion, he pointed out that, occasionally, the subsequent practice of the parties transformed a treaty so profoundly that it was made to serve a purpose diametrically opposed to the one for which it had been concluded. As an example, he mentioned the Treaty for collaboration in economic, social and cultural matters and for collective self-defence, signed at Brussels on 17 March 1948 by Belgium, France, Luxembourg, Netherlands and the United Kingdom [6] as a protection against Germany, to which the Federal Republic of Germany had, however, later been admitted as a party, with the consequence that the Brussels treaty had become a treaty of alliance with that country. The fact of the matter was that the intentions of the parties could change and be expressed in their subsequent practice.

46. He fully agreed with Mr. de Luna that, in international organizations, changes could be brought about by way of practice and interpretation in such a manner as to give to certain provisions of the constituent instrument a meaning which was very remote from that envisaged by the parties at the time of signature. The Charter of the United Nations provided a good example; nineteen years had elapsed since it had been signed, and many of its provisions were now construed in a manner completely different from that contemplated in 1945. It was also worth remembering that the original parties to the Charter were now outnumbered by the States that had acceded to the Charter since 1945; it would be going too far to claim that the original signatories had a greater say in the interpretation of the Charter than the majority. The burden of the operation of a treaty, in the light of the realities of international relations, fell upon all its signatories; there was therefore no reason for giving a higher standing to the intentions of the original parties in the matter of interpretation.

47. Paragraph 2 should strike a balance between subsequent pratice and *travaux préparatoires,* for even those who had participated in the *travaux préparatoires* might well change their minds later and express that change of views in their subsequent pratice.

48. Mr. YASSEEN said that article 71, paragraph 1, was intended to define what was meant by " the context of the treaty " for a specific purpose, and, accordingly, that definition did not necessarily have to be identical with the definition of " treaty ". For the purposes of the interpretation of a treaty one had to determine the entire " context ", and hence the provision should mention whatever might be helpful in the interpretation. The agreements arrived at between the parties as a condition of the conclusion of the treaty or as a basis for its interpretation (referred to in sub-paragraph (*a*)) might be agreements separate from the treaty, but they had a direct link with the treaty so far as the interpretation was concerned and hence should be enumerated among the elements comprising the context. The elements listed in sub-paragraphs (*b*) and (*c*) were also useful. Without going into questions of drafting, he therefore thought that the ideas stated in paragraph 1 were correct.

49. As to paragraph 2, he thought it was self-evident that interpretation was almost impossible on the basis of the text of the treaty alone. The text was the expression of the intentions of the parties, but a knowledge of the events during the drafting of the text was necessary for an understanding of those intentions. Extrinsic means of verifying the exact scope of the rule of law embodied in the treaty had to be resorted to. It was not always possible to adhere to the *prima facie* meaning of the text, even though that meaning might apparently be clear and reasonable. Clarity was relative and might be apparent only; in order to prove that the meaning was ambiguous or unreasonable, reference must be made to extrinsic factors, such as the circumstances surrounding the conclusion of a treaty and the preparatory work. He was not sure, however, that it was desirable to refer in that paragraph to the stage subsequent to the treaty's conclusion.

50. Mr. PAL said that, with regard to subsequent practice, whatever was mentioned in article 71 should be regarded as in aid of interpretation; the provision could not go beyond that.

51. The fundamental rule was laid down in article 70; in order to find out the real meaning of a treaty, it was necessary to consider the intention of the parties in so far as those parties had succeeded in expressing it in the language used by them in the treaty. Article 71 mentioned certain means which could be used in aid to finding out that intention; that article was based on the assumption that there was ambiguity in the text itself.

52. As he understood it, the reference in article 71 to subsequent practice meant that reference could be made to subsequent practice in so far as it helped to ascertain the intention of the parties. Accordingly, the subsequent practice that was material was that which emanated from the parties that were the authors of the treaty. Also, it should not have the effect of modifying the treaty; subsequent practice which amended a treaty raised a different issue.

53. He believed that those were the ideas underlying the Special Rapporteur's draft articles on interpretation. It was possible, however, that some drafting changes might be necessary in order that those ideas should be more adequately expressed.

54. He stressed the value of subsequent practice as an expression of the intention of the parties, when that subsequent practice took place before any dispute arose. In such an event, there could be no doubt that the practice in question would be of assistance in ascertaining the meaning of the treaty as understood in good faith by the parties themselves.

55. Mr. AMADO urged the Commission to cease delving into such fertile soil: every facet of the subject

[6] United Nations *Treaty Series,* Vol. 19.

could well lead to a battle of legal wits. Because he wanted the Commission to perform useful work he had, in the discussion on article 70, spoken in favour of the reference to the preamble and had opposed the use of the expression "the terms of the treaty". As to article 71, he was disturbed to note that some members wished to give so much weight to the *travaux préparatoires*. He did not dispute their value in the interpretation of a treaty, but, after all, words were often used to hide thoughts, and in negotiating a treaty States were concerned mainly to advance their interests. The *travaux préparatoires* should not therefore be placed on the same footing as such a traditional practice as authentic interpretation by States, even if that interpretation modified the meaning of a treaty. The Commission should have the courage not to seek perfection and should adopt article 71 as it stood, save perhaps the sub-paragraphs, which seemed to be designed for casuistry.

56. Mr. BARTOŠ said he wished to make some technical observations, although he remained faithful to the general conception he had propounded at the previous meeting. He agreed with other members that paragraph 1 (*b*) of article 71 to some extent conflicted with the definition of "treaty" embodied in article 1 of the Commission's draft. He was doubtful whether the expression "drawn up in connexion with the conclusion of" could be kept in sub-paragraph (*c*), even if the requisite explanations were given in the commentary; for if the Commission accepted the Special Rapporteur's idea that one had to inquire into the intentions of the parties, then it followed than the interpretation would be subjective. If the interpretation was to be based on instruments, it would be objective.

57. The reference to preparatory work would be of dubious value if the parties had made conflicting declarations or if a term had been used which could be construed in several ways and it was impossible to determine which of those constructions had prevailed. Besides, were States which subsequently acceded to a multilateral treaty bound to know everything that had preceded the treaty's conclusion? Experience with the drafting of multilateral treaties showed that a compromise was very often reached at the last minute which conflicted with the positions previously assumed and of which no explanation was found in the records of the discussion. Accordingly, he thought that too much should not be made of subjective expressions of the will of the parties as a clue to their intentions. He personally preferred objective interpretation, because the will of the parties as objectively expressed in the text of a treaty (unless there was very clear evidence of an error in wording) was the best guarantee of respect for the treaty and the best safeguard of treaty relations between States. The circumstances surrounding a treaty's conclusion were of more value for understanding the meaning of the treaty as a whole or of one of its clauses. He hoped therefore that the trend in the commentary would be less definitely towards the subjective conception of interpretation. Interpretation was sometimes a confirmation of a treaty's meaning, but far more often a modification of that meaning.

58. He had criticized the Special Rapporteur's approach, but his own was perhaps more dangerous, since it gave a freer hand, opened many avenues of escape from the clauses of a treaty and gave a great deal of opportunity for arbitrary conduct.

59. Mr. PESSOU remarked that the Commission should not overlook another aspect, which was a frequent source of difficulties, the matter of language and the impossibility, in some cases, of finding equivalent words in different languages. A illustration had been cited at the previous session[7] of the outbreak of a war between Italy and Abyssinia owing to a difference in the meaning of one word used in a treaty between the two countries concerned.

60. The CHAIRMAN said that, admittedly, the linguistic problem was important, but it would be dealt with in another article, concerning the interpretation of conflicting texts of treaties drawn up in more than one language.

61. Mr. VERDROSS said he shared Mr. Bartoš's misgivings. They might perhaps be allayed by slightly amending the wording of article 71, paragraph 2. Under article 70 auxiliary means could be used only in cases of doubt or if the ordinary meaning of a term did not lead to a reasonable interpretation, and article 71, paragraph 2, suggested other means of determining the intentions of the parties. The intention alone was not, however, a conclusive guide; it had to be expressed in the text of the treaty, however imperfect. Paragraph 2 might be amended to refer to "the intentions of the parties as expressed in the text of the treaty".

62. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the whole of article 71 was governed by the words "in the application of article 70", and article 70 dealt with the whole question of the text. The point could undoubtedly be clarified when the articles were redrafted.

63. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Lachs's point with regard to annexes was perhaps not so important as it appeared. If an annex constituted an *inter se* instrument among some of the parties, it would clearly not form part of the context that was relied upon to solve problems of interpretation that had arisen among the other parties or among all the parties. But if the annex was an instrument applicable to all the parties, it formed part of the context. In the case of a treaty on aerial navigation, for instance, if the air routes in question were specified in an annex to the treaty, it was obviously impossible to interpret the treaty without reference to the annex. If necessary, he was prepared to agree that no attempt should be made to define "context"; but if the Commission decided that such a definition was necessary, it would have to be very broad, for it would be very dangerous to omit any factor of importance. The question arose in a different way on each occasion.

64. The basic problem lay in article 71, paragraph 2,

[7] See *Yearbook of the International Law Commission, 1963*, Vol. I, para. 42 of the summary record of the 678th meeting.

which dealt with subsidiary means of interpretation. It had been claimed that, if the text was clear, there was no need to employ those means; but in many of the International Court's decisions, there was first a brief interpretation of a text that was regarded as clear and then a thorough analysis of the preparatory work to confirm that interpretation. Accordingly, even where a literal interpretation was obvious from the start, it was always desirable to confirm it if possible by reference to the *travaux préparatoires.*

65. The order of priority of the various subsidiary means of interpretation also varied from case to case. To give the same example again, a treaty on aerial navigation might use a rather vague geographic term. It might be that reference to subsequent practice would not provide a conclusive answer if it was evident from that practice that for some years the term had been interpreted narrowly — though without necessarily excluding a broader sense — and that the fact that it was open to different interpretations had only come to light later. In such a case, on the contrary, a study of the preparatory work might show that the negotiations had been spread over several years and that not until the State proposing the conclusion of the treaty had given a very narrow definition of the term in question had its proposal been accepted by the other States. In such a situation, it was clear that the treaty had eventually been concluded because the States which had at first been hesitant had been reassured by the knowledge that the term in question was to be taken in a narrow sense. Without reference to the preparatory work, it would be impossible to know on what basis the consent of the parties had been obtained.

66. The Commission should be very cautious and adopt a very flexible text which would offer several means of interpretation but would not impose any one of them; it should also be careful not to suggest that there was any order of preference among those means.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion on articles 70 and 71 had been instructive particularly on those points about which members claimed to differ from him but concerning which they had in fact said what he had intended to express. He therefore believed it should be possible to formulate acceptable texts.

68. If the "context of a treaty" was understood in a fairly liberal sense and defined on the lines suggested by the Chairman, some measure of hierarchical order would be given to the different elements of interpretation without going too far in that direction.

It was agreed that the Special Rapporteur should be requested to redraft articles 70 and 71 in the light of the discussion.

ARTICLE 72 (Effective interpretation of the terms: *ut res magis valeat quam pereat*)

69. The CHAIRMAN asked the Special Rapporteur wherther he still thought that article 72 should be a separate article, or whether he proposed to incorporate its contents either in article 70 or in article 71.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that he had submitted article 72 as a separate provision in order to ascertain the views of the Commission. He did not particularly favour retaining the maxim *ut res magis valeat quam pereat* because what the article really was concerned with was the effective interpretation of the terms of the treaty. He agreed with de Visscher[8] that it depended on the terms of the treaty itself whether the application of the principle led to a restrictive or to an extensive interpretation. The principle appeared in the jurisprudence of the International Court and was inherent in the notion of good faith. As he had indicated in the commentary, there was perhaps one reason for including such an article, for without it the somewhat strict rules laid down in the earlier articles concerning the text and context of a treaty might appear to exclude the notion that terms could be implied in a treaty (see paragraph (29) of the commentary).

71. Mr. VERDROSS doubted whether it was necessary to retain the article; for in his view it merely repeated what was already stated in article 70. Article 72 said in effect that, if the interpretation was in conformity with the rules set out earlier, the treaty would produce all the effects it was capable of producing.

72. Mr. CASTRÉN referred to the reservations he had expressed concerning article 72 earlier in the debate.[9]

73. The Special Rapporteur himself had hesitated (paragraph (27) of the commentary) to propose the inclusion of the principle of "effective" interpretation and had also pointed out (paragraph (16) of the commentary) that the International Court of Justice had refused to admit that principle. The Commission should follow the same course, especially since a number of other principles could be invoked against that of "effective interpretation", the bounds of which were hard to define. It would be enough to state, as did paragraph (29) of the commentary, that the principle of effective interpretation might be said to be implicit in the requirement of good faith. Besides, the rule of article 70 that a treaty should be interpreted by reference to its objects and purposes might in a way be said to constitute an affirmation of the principle of effective interpretation.

74. He therefore shared Mr. Verdross's view that article 72 should be dropped.

75. Mr. BARTOŠ said that, like Mr. Verdross and Mr. Castrén, he doubted whether the provisions of article 72 should be retained in the form of a separate article.

76. On the other hand, he attached particular importance to sub-paragraph (*b*) of article 72 which should be transferred bodily to article 70. Sub-paragraph (*a*), however, might be said to be implicit in the opening words of article 70, paragraph 2.

[8] Cited in para. (27) of the Special Rapporteur's commentary.

[9] See summary record of the 765th meeting, para. 21.

77. In the debate on article 70, Mr. Tunkin had said that the basis of the interpretation of a treaty should be the principles of international law.[10] His (Mr. Bartoš's) view was that the general rule should also make reference to the objects and purposes of the treaty. The rule should not refer solely to cases where the natural and ordinary meaning of a term led to an interpretation which was manifestly absurd; the objects and purposes of the treaty should be regarded as paramount.

78. Accordingly, although he considered that article 72 should not form a separate article, he hoped that its substance would, as one of the leading rules for the interpretation of treaties, form part of article 70, paragraph 1.

79. Mr. YASSEEN considered that the rule stated in article 72 should not appear in the draft. The purpose of interpreting a treaty was to ascertain the true sense and exact scope of the text; it followed that the fullest weight and effect should be given to the stipulations entered into by the parties. That was not merely a rule imposed by the principle of good faith; it was the basis of all interpretation.

80. Like Mr. Verdross, he thought that the article should be omitted.

81. Mr. de LUNA agreed with Mr Bartoš that it would be desirable to delete that article while preserving some of its features.

82. If the article was deleted, the question would be whether to make the provisions of a treaty as effective as possible by means of a so-called extensive interpretation or, on the contrary, to limit their effect so far as possible, by means of a restrictive interpretation.

83. The choice was not between legal effects and the total absence of such effects — or, in the terms of the maxim, between *valeat* and *pereat* — but rather between legal effects which were more or less far-reaching.

84. For many reasons States preferred in practice deliberately to rely on political expediency rather than on sound legal logic to determine certain consequences of treaty provisions. The Commission was as powerless as judges and States to change the tendency deliberately to limit the consequences of a treaty provision, since that limitation was desired by the parties. Actually, the Latin maxim was at variance with principles to which he attached greater importance; for example, the principle that a State was subject to an obligation only if the obligation was proved to exist. In case of doubt, the lack of proof of an obligation was a stronger argument than the principle of State sovereignty.

85. As he shared Mr. Verdross's opinion on the subject, he proposed that the entire article should be deleted, although the commentary should mention the case where a treaty provision produced no legal effects.

86. If, on the contrary, the Commission decided to retain the article he thought the text should be redrafted in such a way as to lessen the inclination towards an extensive interpretation which the present wording seemed to indicate. He proposed that the phrase "to give it the fullest weight and effect consistent" should be replaced by the words "to give it effect", which would preserve the only important feature; in other words, it would cover the situation where a treaty provision had no legal effect. The interpretation could be extensive or restrictive, as required, but it always had to be adequate.

87. Mr. LACHS said that the underlying idea of article 72 should be reflected in article 70 and he would have liked to preserve the Latin maxim which expressed it concisely. However, sub-paragraph (*b*) should precede sub-paragraph (*a*) because in any case of conflict it was the objects and purposes of the treaty which should prevail.

88. Mr. TABIBI considered that the substance of article 72 should be transferred to the fundamental rule to be stated in article 70.

89. The CHAIRMAN, speaking as a member of the Commission, warned against over-simplification of the problem. The Commission had decided to refer to the objects and purposes of the treaty in article 70, paragraph 1, as a basic criterion for interpretation. Article 72 had a different objective.

90. The deletion of paragraphs (*a*) and (*b*) would not mean ignoring the intention underlying that text, as reflected in the Latin maxim; interpretation should seek to save clauses of a treaty which where threatened with loss of effect through interpretation.

91. In addition, the article as drafted was definitely weighted in favour of extensive interpretation. That was his real reason for thinking that the article should be omitted, for he considered that the Commission should not express a preference either for extensive or for restrictive interpretation.

92. Mr. ROSENNE considered that the idea underlying article 72 that a treaty should be given an interpretation which would make it effective, should be retained; whether it should be embodied in a separate article or in article 70 was essentially a drafting question. The word "fullest" seemed to him excessive and should be replaced at the most by the word "full".

93. The discussion on articles 70 and 71 had perhaps been rather too theoretical: interpretation should not be viewed as an academic intellectual exercise performed in the abstract but as a practical process undertaken in concrete political circumstances. In that connexion he drew attention to the following passage in the comments by Sir Eric Beckett on Sir Hersch Lauterpacht's report to the Institute of International Law on the interpretation of treaties:

> "There is a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it is almost certain that the point which has arisen is one which the legislature never thought of at all. This is even more so in the case of the interpretation of treaties. As a matter of experience it often occurs that the difference between the parties to the treaties arises out of

[10] *Ibid.*, para. 49.

something which the parties never thought of when the treaty was concluded and that, therefore, they had absolutely on common intention with regard to it. In other cases the parties may all along have had divergent intentions with regard to the actual question which is in dispute. Each party deliberately refrained from raising the matter, possible hoping that this point would not arise in practice, or possibly expecting that if it did the text which was agreed would produce the result which it desired." [11]

94. The last few words in the passage he had quoted confirmed the importance of stressing the idea underlying article 72 as a primary element of what constituted interpretation, which it would be the purpose of article 70 to describe.

9. Mr. RUDA said he opposed the text of article 72 for reasons of form, similar to those mentioned by Mr. Verdross, and also for reasons of substance. He considered that the Special Rapporteur's text did not actually reflect the sense of the Latin maxim, the terms of which he endorsed. He believed that the maxim should be understood to mean that the interpretation should seek to give a treaty provision a positive legal effect and avoid its losing its effect. In applying the Latin maxim to the interpretation of the treaty the object should be to save the clauses of the treaty.

96. That point of view was very different from that reflected in the text proposed by Sir Humphrey Waldock, especially the expression, " the fullest weight and effect consistent ". There was a considerable difference between giving a provision its full effect — arriving at an extensive interpretation — and saving a clause of a treaty.

97. If the text with the vague formula " the fullest weight " was maintained, he would be unable to support it. Latin America had recently had experiences of the extensive interpretation of clauses which were important to its security. For that reason, and in the light of his personal experience, he would be unable to accept the text unless it was modified along the lines indicated by the Chairman.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the words " as to give it the fullest weight and effect consistent " were taken from principle IV in Sir Gerald Fitzmaurice's formulation (cited in paragraph (12) of the commentary), which also contained the qualifying phrase " and in such a way that a reason and a meaning can be attributed to every part of the text ". Perhaps the latter wording could be used when redrafting the text, as he imagined that the Chairman and Mr. Ruda had something of that kind in mind. The text could also be modified in such a way as not to favour extensive interpretation.

99. The CHAIRMAN, speaking as a member of the Commission, suggested that another solution would be to draft another separate article to express the basic idea that, when two interpretations were possible, preference should be given to the one which gave meaning to the treaty provision in question.

100. Mr. TUNKIN said that in the measure in which it might be acceptable the notion of effective interpretation could be incorporated in article 70, but caution was needed. An extensive interpretation sometimes went too far. Only sub-paragraph (*b*) of article 72 should be retained for inclusion in article 70.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that in essence the content of article 72 would be retained if sub-paragraph (*b*) were included in article 70.

102. The CHAIRMAN, speaking as a member of the Commission, said that he would not be sorry to see the Latin maxim deleted. The requirement of good faith and the reference to the objects and purposes of the treaty were already contained in article 70. whether one liked it or not, the rule formulated in article 72 would lead to an extensive interpretation.

103. In any case, the article related to rather hypothetical situations. The interpretations of a text, however divergent they might be, always gave it a meaning. It was hardly conceivable that a party would propose an interpretation which deprived the text of all meaning. On the other hand, it was inevitable that a provision like that in article 72, even if drafted in prudent terms, would ultimately tend to endorse an extensive interpretation.

104. He did not wish to suggest that the Commission should endorse the principle of restrictive interpretation, which was in any case applicable in situation where, out of respect for State sovereignty commitments had to be narrowly construed. Yet, it would be unwise even to suggest an extensive interpretation, in however prudent language, and for that reason he also favoured deletion of the text.

105. Mr. ROSENNE questioned whether article 72 was concerned with the alternatives of a restrictive or an extensive interpretation. Surely it dealt with a commonplace aspect of interpretation in general, namely, that it was always to be assumed that parties intended to give a meaning to the terms of the treaty.

106. The CHAIRMAN, speaking as a member of the Commission, considered that it was only logical to give preference to the interpretation which gave a meaning to the text. An interpretation given in good faith and taking account of the objects and purposes of a treaty would always necessarily seek to give a meaning to the text.

107. Mr. ROSENNE said that in the case contemplated by article 72 the choice was not between an interpretation which produced nonsense and one which produced sense but between two which made sense.

108. The CHAIRMAN said that in that case the question of an extensive interpretation would arise.

109. Mr. VERDROSS considered that, if article 72 was merely intented to cover cases where a provision

[11] *Annuaire de l'Institut de Droit International*, Vol. 43, tome 1, (1950), p. 438.

would or would not have a meaning, everything that needed to be said on the subject was already said in article 70, paragraph 2.

110. Mr. LACHS agreed with the preceding speaker and considered that the substance of article 72 could be incorporated in article 70, paragraph 2, subject to the omission of the words " as to give it the fullest weight and effect consistent with " for they might give the impression that the aim was to save the treaty at all costs regardless of whether it fulfilled the requirements of the time.

111. Mr. AMADO supported the suggestion made at the preceding meeting by Mr. de Luna and Mr. Tunkin that the reference to the objects and purposes of the treaty should appear in the fundamental rules of interpretation. He also agreed with Mr. Ruda's remarks.

112. However, in following the debate, he had been struck by the repeated references to the idea of extensive interpretation, whereas no one attached any importance to the word " weight ", which some members seemed to associate with the idea of extensive interpretation. But surely, the idea of " weight " in that connexion was a very concrete one and one of particular importance in a text intended fully to elucidate the substance and effects of a term.

113. He believed that the Latin maxim, highly respectable though it was, was out of date.

114. He paid a tribute to Mr. Bartoš, who, although opposed to any subjective interpretation, had agreed to the use of the expression " objects and purposes of the treaty ".

115. Mr. BRIGGS agreed with the majority that article 72 should not be maintained as a separate article, for if it were allowed to stand it would single out for special treatment one of the many canons of interpretation.

116. Perhaps the words " and so as to give it effect " might be inserted after the word " term " at the end of the opening phrase in article 70, paragraph 1.

117. Mr. RUDA considered the formula suggested by Mr. Briggs to be extremely dangerous. To give effect to a treaty, within a political conference at which there was a certain degree of tension, was particularly risky because the small States were under the sway of the large ones. Furthermore, with respect to whom could the provisions of a treaty be given effect?

118. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had been valuable in making it clear that the Commission attached great importance to the primacy of the text. He did not favour Mr. Briggs's amendment, for it might diminish the force of the fundamental rule.

119. The CHAIRMAN said that the majority of the Commission seemed to hold the view that the maxim *ut res magis valeat quam pereat* should not form the subject of a separate rule. In so far as it stated a logical rule, it was in any case implicit in the earlier provisions of sections III of the draft and there was perhaps no need to state it explicitly.

120. Accordingly, he suggested that for the time being article 72 should not appear in the section on the interpretation of treaties.

It was so agreed.

ARTICLE 73 (Effect of a later customary rule or of a later agreement on interpretation of a treaty)

121. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 73, said that if earlier in section III the " context of a treaty " was defined as comprising the rules of international law, then it might perhaps be argued that the evolution of those rules would be automatically taken into account at any point in time. In the first instance, in the interpretation of a treaty it was necessary to establish what the treaty was intended to mean, and it was questionable whether the effect on it of the emergence of later rules of law raised problems of interpretation. Rather he thought that it raised problems of the application of those rules to the treaty. As the emergence of later rules affected both the interpretation and the application of a treaty, it seemed preferable to deal with the question separately as one of inter-temporal law; he looked to the Commission for guidance.

122. Article 73 also dealt with subsequent treaties touching on or overlapping with the same subject matter and intended to modify the earlier treaty.

The meeting rose at 1 p.m.

767th MEETING

Thursday, 16 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Tributes to Mr. Liang

1. The CHAIRMAN said that the session was the last one that Mr. Liang would be attending in his present capacity. Mr. Liang was an old friend of many members of the Commission, and no doubt they would wish to associate themselves with the tribute to be paid by Mr. Amado, the senior member.