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Summary record of the 861st meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(2)

861st MEETING

Wednesday, 1 June 1966, at 3 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/183/Add.2; A/CN.4/L.107, L.115)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 40 (Termination or suspension of the operation of treaties by agreement) [51, 54]

[51, 54]

Article 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(*a*) In an instrument drawn up in whatever form the parties shall decide;

(*b*) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of . . . years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

1. The CHAIRMAN invited the Commission to consider article 40. The Drafting Committee's text, which had been submitted at the second part of the seventeenth session but consideration of which had been deferred, read:

" 1. A treaty may at any time be terminated by agreement of all the parties.

" 2. The operation of a treaty may at any time be suspended by agreement of all the parties.

" 3. The operation of a multilateral treaty may not be suspended as between certain parties only except under the same conditions as those laid down in article 67 for the modification of a multilateral treaty. "[1]

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, for the benefit of members who had not been present at the second part of the seventeenth session during the discussion of article 40 at the 829th and 841st meetings, he would explain that in his fifth report (A/CN.4/183/Add.2) he had proposed a new text to take into account the observation by the Israel Government that the version formulated by the Commission in 1963[2] seemed to exclude the possibility of tacit agreement to terminate a treaty. He had also suggested dropping the reference in paragraph 1 to the form of the instrument or act by means of which termination could take place.

3. Members who had attended the discussions during the second part of the seventeenth session seemed to have favoured the latter suggestion and had shown little inclination to follow the theory of the *acte contraire*. Mr. Ago had contended that suspension of the operation of a multilateral treaty might not necessarily require the agreement of all the parties and might result from something in the nature of an *inter se* agreement.[3] That argument had prompted him to wonder whether the text had been adequate. After some discussion it had been referred to the Drafting Committee at a relatively late stage in that session.

4. He had submitted a new text to the Drafting Committee that distinguished between the position in regard to bilateral treaties and the position in regard to multilateral treaties, introducing the idea of *inter se* suspension for the latter category. If such a provision were needed at all, it should be made subject to conditions of the kind laid down in article 67, because there was some analogy, though not complete identity, between the situations which the two articles were designed to cover. For lack of time the Drafting Committee had not gone into the matter very deeply and had provisionally approved the text reproduced in footnote 2 to document A/CN.4/L.115.[4] Members would have noted that the Drafting Committee's revised text for paragraph 3 contained a cross-reference to article 67.

5. Mr. Jiménez de Aréchaga had expressed doubts about the wisdom of introducing a provision that would enable the parties to a multilateral treaty to suspend its operation *inter se*, and that view had been shared by Mr. Bartoš. His own opinion was that, as long as the conditions set out in article 67 were specified, they would provide the necessary safeguards. Certain other members had expressed the view that the somewhat difficult point raised by Mr. Ago would need further reflection and accordingly, at the 841st meeting, the decision had been postponed.

6. The main question to be decided was whether or not to include in article 40 a provision on *inter se* suspension in the case of multilateral treaties and, if so, on what conditions the provision would apply.

7. Mr. JIMÉNEZ de ARÉCHAGA said he was opposed to paragraph 3 of the new draft. Under paragraph 1, termination was permitted only by agreement of all the parties, so that the Commission had upheld the classical principle of unanimity. But paragraph 3 would be the first and the only provision in the draft under which suspension was permitted in certain circumstances in which termination would not be permitted. It meant

[1] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, para. 57.

[2] *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 202.

[3] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 829th meeting, para. 84.

[4] See also paragraph 1 above.

divorcing the two institutions of termination and suspension and abandoning the legal foundation for suspension, which was the principle *in plus stat minus;* if a party had a right to terminate, then *a fortiori* it had a right to suspend the operation of the treaty. What then would be the independent legal foundation for suspension in the hypothesis of paragraph 3 ?. It would appear to be the provisions laid down in article 67 concerning modification, but he doubted whether such an extension by analogy of the scope of article 67 was permissible or would constitute a progressive development.

8. The practice on which the rule in article 67 had been based was twofold. It consisted in the first place of regional or other agreements, by means of which two or more parties to a multilateral treaty concluded between themselves an agreement which went further than the multilateral treaty. Normally, such an agreement was expressly authorized in the original instrument. In the second place, it consisted of *inter se* agreements revising general multilateral treaties which had become obsolete. During the past thirty years an exception to the traditional principle of unanimity in regard to termination, suspension or modification established by the Declaration of London of 1871,[5] had come into existence, based on the need for progressive development.

9. The reason for that exceptional practice was that the unanimity principle would confer upon a single State or a minority of States a power of veto that would prevent the majority from adapting an international instrument to fit new circumstances. The traditional principle of unanimity could not confer such power to maintain the *status quo* against the will of all the other parties.

10. In the case of suspension such *ratio legis* did not exist. The Commission should not attach as much weight to the right of several or even a majority of States wishing to suspend a valid multilateral treaty in force as to the right of a majority wishing to modify a treaty by means of *inter se* revision, because such modification might be for the purpose of maintaining the treaty in operation by eliminating obsolete provisions, whereas *inter se* suspension might be a concealed device for undermining the treaty régime. As Mr. Scelle had remarked, " there is a great difference between the axe of termination and the orthopaedics of revision ".

11. The safeguards laid down in article 67 were not sufficient for *inter se* suspension because, in contrast to the case of modifying a treaty in force, not only the rights of the other States but also their interest in the normal continuance of a perfectly valid multilateral treaty binding on all parties had to be protected. For example, a treaty establishing a free trade area could be ruined by an *inter se* agreement to dispense with the rules laid down in the reciprocal relations between the States concerned. To take a more striking example, in the case of a multilateral agreement on the peaceful settlement of disputes, such as the Pact of Bogota which provided for negotiation, consultation, inquiry and arbitration, and in the last resort for compulsory judicial settlement, could it be argued that a few parties were entitled to agree between themselves to suspend the provisions concerning compulsory jurisdiction? Such *inter se* suspension would seriously affect the interests of all the other parties, since they could no longer have confidence in the continued operation of a treaty of that nature if a number of parties had agreed among themselves to dispense with the execution of certain basic provisions. Moreover, the other parties would find it much more difficult to assert and exercise rights which in theory would remain intact. The Commission was entitled to confirm an exception to the principle of unanimity where that exception had been established by a large body of State practice on *inter se* revision or modification. But it should not be led, merely on the basis of logical argument or analogy, to provide for the second exception, when there was not a single instance in international practice of *inter se* suspension.

12. Furthermore, the argument based on logic proved too much. If *inter se* suspension was permitted on the ground that the rights of the remaining parties remained unaffected, then why should not *inter se* termination be allowed whenever those rights remained untouched? On a basis of pure logic, the Commission would thereby abolish the principle of the London Declaration, that termination required unanimity. As Justice Holmes had said, " the life of the law is not logic, but experience ".

13. Mr. ROSENNE said that at the beginning he had been ready to accept the Drafting Committee's revised text for paragraph 3 but he had been impressed by the force of Mr. Jiménez de Aréchaga's argument at the last session[6] and even more by his repetition of that argument.

14. Paragraphs 1 and 2 presented no difficulties and they might be combined, as Mr. Castrén had suggested at the 841st meeting. The suggestion that the scope of the provision on suspension might be extended by agreement between the parties needed careful thought. The development of the concept of suspension was one of the innovations introduced in the draft articles; the Commission should be cautious and not carry it too far. The revised paragraph 3 was the only provision in the draft articles covering a case of suspension which was not an alternative to termination, and he wondered whether it would be appropriate to transfer into that context the conditions laid down in article 67 concerning *inter se* modification which did fill a practical need.

15. Article 67 seemed likely to be kept substantially in the form approved at the sixteenth session. If the applicability to suspension of the conditions set out in that article were considered in turn, to take the first of them, it was unlikely that the treaty itself would provide for suspension. If it did, there was no problem but it was doubtful whether a rule to that effect should be included in a codification convention as that might encourage a practice which, if it occurred at all, was certainly rare.

16. The effect of the second condition, that the modification should not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, might be more serious for suspension because the suspension of the operation of a treaty between a group of parties for an indeterminate period might completely upset the general situation the treaty

[5] *British and Foreign State Papers*, vol. 61, p. 1198.

[6] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, paras. 62-68.

was meant to establish. The practical result of introducing such a condition into article 40 might be to create problems of the kind which had induced the Commission to insert in article 42 a provision—paragraph 2 (*c*)—dealing with the special situation, in cases of breach, that lead to a radical change in the position of one of the parties.

17. The condition that the modification should not relate to a provision derogation from which was incompatible with the effective execution of the objects and purposes of the treaty as a whole was also inappropriate to the case of *inter se* suspension, the effects of which were bound to be different from *inter se* modification and to be incompatible with effective execution.

18. As for the fourth condition, he doubted whether it would foster the progressive development of the law to encourage the inclusion in international instruments of clauses concerning *inter se* suspension or the prohibition of such clauses. In fact the objection was much the same as for the first condition.

19. The problem of what action the other parties were entitled to take on receiving notice of an *inter se* modification had been left open in article 67—and he was not questioning the Commission's decision on that point—but as far as *inter se* suspension was concerned, the matter must be elucidated. He therefore agreed with Mr. Jiménez de Aréchaga that paragraph 3 of article 40 ought to be deleted. Nevertheless, he thought that there was one omission from the article, unless the point was covered by implication, namely, the possibility of agreement by all the parties to permit withdrawal from the treaty or the temporary suspension of its operation by one party. That could be a matter of considerable practical importance.

20. Such a provision might be useful in cases of temporary impossibility of performance or temporary change of circumstances, as an alternative to the formal procedure laid down in article 51. It might be worth inserting an explicit provision on the matter in article 40, it being understood that the agreement of all the parties in such cases could be expressed informally or even tacitly.

21. Mr. BRIGGS said that he had no difficulty in accepting the Drafting Committee's text of paragraphs 1 and 2, but was opposed to paragraph 3 which raised problems of correlation between articles 40 and 67 and possibly others. Article 67 permitted *inter se* modification of treaties and although article 40, paragraph 3, did not forbid *inter se* suspension, the conditions laid down in article 46, paragraph 3 might be applicable. However, the latter differed from those in article 67, or at least had been expressed in different language. The conditions laid down in article 67 were perhaps not adapted to *inter se* suspension.

22. It was important to remember that article 67 had not been drafted with suspension in mind, and if a third paragraph were needed at all in article 40, it should not merely incorporate article 67 by reference but ought to deal with cases when *inter se* suspension of the operation of a treaty by fewer than all the parties was permissible. Under article 42, paragraph 1, a material breach of a bilateral treaty provided a ground for the injured party to suspend its operation unilaterally. Under paragraph 2 (*b*), a party to a multilateral treaty specially affected by a breach could also invoke that as a ground for suspending the operation of the treaty in whole or in part. Under paragraph 2 (*c*), any other party could suspend operation of the treaty with respect to itself if the breach was of such a character that it radically changed the position of every other party with respect to further performance of the obligations. Temporary impossibility of performance as a ground for unilateral suspension was provided for in article 43.

23. The Commission would have to consider whether there were any other instances when suspension might be permissible without the agreement of all the parties, as now required by article 40, paragraph 2. Personally he doubted whether any need existed for *inter se* suspension, but he was open to persuasion. However, a general rule was clearly needed to prevent *inter se* suspension from being used as a means of frustrating performance of the treaty.

24. Mr. de LUNA said that he shared the Special Rapporteur's views on paragraph 3. He had in mind cases—which were not hypothetical but were found in international practice—of so-called "local" clauses which concerned a few of the parties to a multilateral treaty. The complete suspension of a treaty was very difficult except under the conditions which the Commission had laid down in article 67, but there could be a partial suspension of those "local" clauses, which were usually of a territorial nature or concerned reciprocal services between two or more parties. In that case, the same general principle applied as in the case of modification. Since the Commission had admitted the possibility of a treaty being amended by *inter se* agreements —derogation from the general obligation imposed by multilateral treaties—there could not be the slightest objection to the suspension of clauses which did not affect the object of the multilateral treaty and were not detrimental to the interests of the other parties.

25. He had no strong views on the method to be followed, provided that the text of the draft remained elegant. Was it necessary to restate principles that were very similar to those of article 67 or would it be sufficient to include a cross-reference to that article? It appeared from paragraph 3, as worded by the Drafting Committee, that the operation of a multilateral treaty in part only would no longer be possible except in the case of a clause of limited scope not affecting the parties which had not agreed to the suspension *inter se*. By making a slight change in the paragraph, a cross-reference to article 67 might be all that was needed.

26. Mr. VERDROSS said that he had no difficulty in accepting paragraphs 1 and 2. In paragraph 3, a cross-reference to article 67 was not enough and it would perhaps be better to drop the paragraph altogether.

27. Mr. AMADO said that he had difficulty in deciding between the two schools of thought. Unless other speakers dispelled his doubts, he would support Mr. de Luna.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not have particularly strong views about paragraph 3 but if Mr. Ago's line of reasoning, which had some logical force, were followed, the necessary safe-

guards must be included in the provision and they should be close to the kind of conditions laid down in article 67.

29. The attempts to refute the argument that there was a close parallel between paragraph 3 and article 67 had been quite unpersuasive: article 40, paragraph 3 dealt with the suspension of the operation of a multilateral treaty between some of the parties only and they could not in any circumstances suspend the treaty as a whole for all the parties. Should some of the parties find themselves in difficulties over operating the treaty, they would be able to modify it provided the conditions laid down in article 67 were complied with. A suspension of operation, if applied in good faith under article 40, would be a temporary expedient that could not involve a risk of an *inter se* arrangement radically changing the position vis-à-vis all the other parties. By putting an end to an *inter se* suspension, the parties to it would bring themselves back into line with the other States. The analogy between the two situations was quite close.

30. Of course it could be argued that article 40, paragraph 3, was unnecessary because the parties themselves could agree on such an arrangement in accordance with the conditions laid down in article 67 by first modifying the treaty and then cancelling the modification.

31. It was mistaken to ascribe serious dangers to paragraph 3. If they existed at all they would arise also under article 67, but the conditions there laid down were already very stringent and, if applied in good faith, afforded enough protection.

32. It might be true that the suspension of operation of a whole treaty was not very often envisaged in a multilateral instrument but the inclusion of treaty provisions allowing for the suspension of quite large portions of a treaty, in certain circumstances, was very common.

33. The CHAIRMAN, speaking as a member of the Commission, said that, at the second part of the seventeenth session, he had suggested the postponement of the consideration of the article in the interests of a more thorough study of the question of suspension, which had been introduced at short notice.

34. One point had been established beyond all doubt: there was no connexion between termination and suspension. Suspension was by its very nature temporary; if it were final, it would constitute termination, and, as such, would be subject to separate rules. Suspension was not identical to modification, but resembled it closely, the difference between the two being perhaps one of degree. Those reasons led him, in the first place, to question the position of the paragraph. He doubted whether suspension should be mentioned in the same context as the case in which a treaty could be terminated. Moreover, in view of the connexion between the two cases, it would be appropriate to treat suspension in the same way as modification. It seemed to him, therefore, that a cross-reference to the article stipulating certain conditions for modification might be sufficient to safeguard the interests of the international community in the case of the suspension of a treaty.

35. The provisions of paragraphs 1 (*a*) and (*b*) of article 67 could be adapted to the case of suspension by stating that two or more parties could conclude an agreement for the purpose of suspending the treaty as between themselves if the suspension did not interfere either with the enjoyment by the other parties of the rights they possessed under the treaty or with the performance of their obligations, if it was not prejudicial to the objects and purposes of the treaty as a whole in relation to the international community, and if it was not prohibited by the treaty. Those conditions would safeguard the interests both of the parties and of the international community. Subject to that change, he would have no difficulty in accepting the Drafting Committee's text.

36. Mr. TUNKIN said that, during the second part of the previous session, he had had some hesitation regarding paragraph 3 and had therefore supported the proposal by Mr. Yasseen to postpone the consideration of article 40 until the present session.

37. He agreed with the Special Rapporteur, the Chairman and Mr. de Luna that instances of the *inter se* suspension of the operation of multilateral treaties were not rare in practice, although perhaps not much publicized. In the circumstances, the question arose whether a special provision should be included on the question in article 40, or whether the matter should be considered to be covered for all practical purposes by the provisions of article 67. He himself had no strong feelings on the question but was inclined to accept the Drafting Committee's proposal to include a paragraph 3 in article 40.

38. That being so, he agreed with those members who held that the reference to article 67 provided sufficient safeguards to prevent the *inter se* suspension of the operation of the treaty from being used to injure the rights and interests of the other parties.

39. Mr. AGO said he was a little surprised that a problem which was essentially of minor importance should give rise to such animated discussion. Theoretical analogies between certain cases should not be pushed too far, but if it were decided to take them into account, it must be recognized that suspension had more affinity to modification than to termination. It might become necessary to suspend the operation of a treaty during the actual process of its modification. International affairs produced so many unexpected situations that it might prove necessary temporarily to suspend the operation of a treaty between a group of States. Moreover, it would be pointless for the Commission to try to oppose a practice which already existed. For that reason, he was in favour of retaining the article, in the form in which it had been submitted by the Special Rapporteur.

40. The only amendment he would like to propose would be the insertion at the beginning of the article of the usual reservation relating to cases in which the treaty provided otherwise. That reservation also applied to the termination of treaties; for example, it could be specified in the treaty that if it was terminated by a certain number of parties, it would come to an end. There were no reasons for excluding the possibility that the treaty itself might establish a rule on that point which was less strict than or different from that stated in article 40.

41. Mr. CASTRÉN said that he, too, considered paragraphs 1 and 2 acceptable.

42. He had been no more convinced than had the Special Rapporteur by the arguments of the critics of

paragraph 3. He did not see what dangers could arise from the inclusion of such a provision in the draft. On the contrary, that provision could usefully supplement the provisions of article 67 concerning *inter se* agreements. As had already been pointed out, a State practice in the matter was in existence. There were also treaties, such as the Barcelona Conventions of 1921[7] and the Chicago Convention on International Civil Aviation of 1944,[8] which authorized the parties to suspend their application for certain exceptional periods, for instance in the event of war.

43. It would be premature to delete paragraph 3 before the Drafting Committee had had an opportunity to reconsider it. The wording could undoubtedly be improved, as the Chairman had said, but the guarantees at present envisaged were reasonably satisfactory.

44. Mr. EL-ERIAN said he supported article 40 as proposed by the Drafting Committee. He had been impressed, but not convinced, by the arguments put forward by Mr. Jiménez de Aréchaga. Treaty relations were so varied, complex and intricate that it was inadvisable to introduce very strict rules in the matter. That was why he favoured a flexible formula; sufficient safeguards were provided by the reference to article 67 in the proposed paragraph 3.

45. Mr. ROSENNE said that article 40, paragraphs 1 and 2, stated the elementary proposition that a treaty could be terminated or suspended at any time by the agreement of all the parties. It would go against the whole hypothesis of the article to introduce a proviso making a reservation for the case in which the treaty provided otherwise.

46. Clearly, if the treaty contained any clause on the subject of the suspension of its own operation, that clause would prevail. But the question before the Commission was a different one; the Commission was called upon to decide whether, quite apart from any treaty provisions on the subject, it was going to introduce the dangerous innovation represented by the provisions of paragraph 3. He had great misgivings on that point and thought that any cases that might arise in practice were already covered by other articles of the draft, or could be covered by other articles, subject to minor modifications.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the majority of the Commission seemed inclined to maintain paragraph 3, at any rate until the final text of the article was formulated.

48. There was no identity between termination and suspension in the present connexion. As for the dangers which had been mentioned, the position would be better protected if paragraph 3 were included in article 40. The question would then not be ignored and express provision would be made for the application of the rather strict safeguards set forth in article 67.

49. With regard to the drafting, he would endeavour to take Mr. Ago's suggestion into account, although it was difficult to reconcile it with the present formulation of paragraphs 1 and 2 which stated that a treaty " may at any time " be terminated or suspended by agreement of all the parties.

50. Mr. JIMÉNEZ de ARÉCHAGA said that he had not been at all convinced by the discussion and regretted that such a dangerous innovation was being introduced.

51. As adopted in 1963, article 40 laid down in its paragraph 2 the rule that the operation of a treaty could only be suspended by the unanimous agreement of the parties. It was significant that in its comments no government had opposed that text. Nevertheless, at the second part of the seventeenth session, the new idea of an *inter se* suspension without the unanimous consent of the parties to the treaty had been introduced. The other States had an interest in the continuity of the treaty and that interest should be protected. Provision for *inter se* suspension would create and encourage a new practice liable to undermine, through continued suspension, the regime established by a multilateral treaty.

52. Mr. BRIGGS said he wished to repeat his suggestion that paragraph 3 should be so drafted as to state fully the safeguards in the matter. A mere reference to article 67 was not satisfactory because that article had not been drafted with suspension in mind. As it now stood, paragraph 3 would not cover all the cases of suspension, such as those to which he had referred in his earlier remarks.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 3 was intended to deal with cases of suspension by agreement rather than with the other cases of suspension arising from special grounds, such as breach, mentioned by Mr. Briggs. Such other grounds could, of course, constitute the motive behind the agreement of the parties to suspend the operation of the treaty, but any attempt to introduce that idea would complicate unduly the provisions of the various articles.

54. Paragraph 3 should be confined to the case in which the parties for their own reasons and regardless of the existence of any possible other grounds of suspension, decided to suspend the operation of the treaty as between themselves. The obligation to comply with the conditions set forth in article 67 would ensure that the rights of the other parties were not prejudiced in any way.

55. He proposed that article 40 be referred back to the Drafting Committee in the light of the discussion.

56. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee might nevertheless consider the possibility of adapting the wording of the provisions concerning modification to cover suspension, giving particular attention to the case of the suspension of the treaty as a whole. Paragraph 1 (*b*) (*ii*) of article 67 referred only to the case in which it was proposed to amend a single provision of a treaty. The condition should be stated that the suspension of the operation of the treaty as a whole must not be prejudicial to certain interests of the international community. That was a point which the Drafting Committee ought to consider.

57. Speaking as Chairman, he suggested that the Commission now refer article 40 back to the Drafting Com-

[7] League of Nations, *Treaty Series*, vol. VII, p. 29, art. 6 and p. 61, art. 19.

[8] United Nations, *Treaty Series*, vol. 15, p. 356, art. 89.

mittee, as the Special Rapporteur had already proposed, for reconsideration in the light of the discussion.

It was so agreed.[9]

The meeting rose at 5.5. p.m.

[9] For resumption of discussion, see 876th meeting, paras. 90-94 and 103-119.

862nd MEETING

Thursday, 2 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/183, A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 29 (*bis*) (Notifications and communications) [73]

2. Mr. BRIGGS, Chairman of the Drafting Committee, after drawing the Commission's attention to the text of article 29 (*bis*) as provisionally adopted at the first part of the seventeenth session,[1] said the Special Rapporteur would explain the reasons for the changes now being proposed by the Drafting Committee. The changes would be seen from a comparison of the two texts, which read:

Article 29 (bis)

Text provisionally adopted at the first part of the seventeenth session

Communications and notifications to contracting States

Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made:

(*a*) In cases where there is no depositary, directly to each of the States in question;

(*b*) In cases where there is a depositary, to the depositary for communication to the States in question.

Drafting Committee's text

Notifications and communications

Unless the treaty otherwise provides, any notification or communication required to be made to any State under the terms of the treaty or of the present articles shall:

(*a*) be transmitted to the depositary or, in the absence of a depositary, directly to the State in question;

(*b*) be considered as having been made to a State upon its receipt by the depositary or, in the absence of a depositary, upon its receipt by that State.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's text had been prepared during the examination of article 50 and the whole problem of the manner in which notifications and communications become effective. The Drafting Committee's view was that a satisfactory presentation of the various related provisions had not yet been achieved. There were three stages to consider: the transmission of notifications or communications: their receipt, and finally the time in law at which they were to be regarded as having been made. The problem was a familiar one in private contract law. As treaties often laid down time-limits for notifications or their expiry, it was clearly important to establish at what moment they could be considered as having been made. The Drafting Committee had reviewed the text provisionally adopted at the previous session and had introduced a new element to cover that last point.

4. Much thought had been given to the problems arising when the parties to a multilateral treaty provided for a depositary to act as their agent. The Drafting Committee had considered whether allowance should be made for the time required for the administrative processes of transmitting the notice or communication from the depositary to the State concerned. The kind of difficulties that could arise when a period was specified had been brought to light during the preliminary objections to the Court's jurisdiction in the *Case concerning Right of Passage over Indian Territory*.[2]

5. The Committee had concluded that it was undesirable to frame a provision as to when the notice or communication took effect since that would depend on the provisions of the treaty or of the instrument being communicated itself.

6. Mr. VERDROSS, referring to paragraph (*b*), asked what the Drafting Committee thought the legal position would be if the depositary or the State to which the notification was addressed refused to accept it. It seemed to him that the crucial moment was not when the notification or communication was made, but when it was delivered to the depositary or the State which received it directly.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that if a State refused to receive a notification or communication, that would be a new element to be taken into account in establishing the facts of a case, but the possibility had no relevance to article 29 (*bis*). If the

[1] *Yearbook of the International Law Commission, 1965*, vol. I, 815th meeting, paras. 61 and 62.

[2] *I.C.J. Reports, 1957*, p. 125.