Document:-
**A/CN.4/SR.863**

**Summary record of the 863rd meeting**

Topic:
**Law of Treaties**

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

there was a wide difference between the situation of an umpire or third arbitrator and that of a state representative; an umpire was selected jointly by both States parties to the dispute, while a State representative was selected, appointed and instructed exclusively by his own government. If the representative allowed himself to be corrupted, there was always on the part of his own State a *culpa in eligendo* or a *culpa in vigilando*.

87. The proposed paragraph 2 was also very loose as to the content of the rule. Corruption would naturally cover bribery, but there were many other ways of obtaining the goodwill of a representative. How would the dividing line be drawn between corruption and admissible courtesy? It might be suggested, on the analogy of private law, that the deciding factor was whether there had been sufficiently strong inducement to procure consent to a treaty which would not otherwise have been given. But although the objective fact of inducement might be proved, it was very difficult to establish the subjective element of whether the inducement actually procured a consent which would not otherwise have been given. A party interested in getting rid of treaty obligations could allege that certain courtesies and favours extended to its representative were the factors which determined his consent and the representative might, out of patriotism or for other reasons, be prepared to support that allegation with his own testimony. It would endeanger the stability and security of international relations to open the door to that type of allegation. If the statement of the representative himself was not to be regarded as decisive in the matter, how would a court or arbitrator determine whether the inducements received had been strong enough to procure consent? That point could not be decided by reference to the treaty itself, because to do so would introduce the concept of *lésion* as vitiating consent, a concept which the Commission had very properly set aside in 1964.

88. He failed to see the relationship between coercion and corruption that could justify covering the two in a single article. Coercion suppressed the freedom of consent, while corruption, like error and fraud, affected the basis of fact which determined a freely given consent.

89. Corruption itself naturally deserved condemnation but he was concerned at the damaging effect which paragraph 2 might have with respect to the draft articles, which had already been criticized as affecting to some extent the security and stability of international transactions because of the very detailed enumeration they contained of the grounds of invalidity and termination.

90. The most serious defect in the proposed paragraph 2, however, resulted from adding it to the article concerning coercion, instead of leaving the matter to be regulated by the provisions of article 33 on the subject of fraud. All legal systems considered that, while an agreement obtained by coercion was void regardless of the agent who had employed the coercion, an agreement obtained by fraud was voidable when, and only when, the other contracting party was responsible for the fraud. By linking corruption with coercion, the Commission would be departing from that time-honoured principle of law; under paragraph 2, the question of the agent of corruption was immaterial.

91. In fact, there was a very important reason for confining invalidity to those cases in which the agent responsible for the fraud or the corruption was the other contracting party. Whereas violence was a notorious and obvious fact, that was not true of fraud, or of corruption which was one form of fraud. Under the proposed paragraph 2, even if a contracting State was entirely innocent and in fact unaware of the corruption, the treaty into which it had entered might become void as soon as it was revealed that there had been some action by an independent source which was alleged to constitute a form of corruption; that source might be a private company interested in a particular provision of the treaty, or even a third State which might have an interest in the treaty becoming void.

92. The most serious forms of corruption, namely, those in which the other contracting State had itself been guilty of corrupting the representative, were already covered by article 33. Under that article, a State which had been induced to conclude a treaty by the fraudulent conduct of the other contracting State could invoke the fraud as invalidating its consent, and the corruption or bribery of a foreign representative undoubtedly constituted most serious fraudulent conduct. If the matter were left to be governed by article 33, the treaty would not be void *ab initio* but would be voidable at the option of the State which had been the victim of the fraudulent conduct on the part of the other contracting State, and not merely of some third party.

93. The term of article 46 on the separability of treaty provisions also made it advisable to deal with the problem of corruption through the article on fraud, and not by means of a new paragraph in article 35. Separability was admitted in cases of fraud but not in the case of coercion. If paragraph 2 were left in article 35, there would be no separability in cases of corruption, with the absurd result that a long and important treaty negotiated in good faith could become void *ab initio* and be deprived of all legal effect merely because one of the representatives of a State had been induced to accept a minor provision of the treaty by a gift received from a private company interested in that particular provision. It was easy to see all the dangers of abuse that such a possibility could create.

The meeting rose at 1.5 p.m.

---

## 863rd MEETING

*Friday, 3 June 1966, at 10 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* 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/L.107, L.115)

*(continued)*

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

*(continued)*

ARTICLE 35 (Coercion of a representative of the State) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 35.

2. Mr. CASTRÉN said that he had been one of those members of the Drafting Committee who had considered it desirable to deal in the draft with the problem of corruption. After hearing the statement by Mr. Jiménez de Aréchaga at the previous meeting, however, he was now hesitant. States had resorted to corruption during the negotiation and conclusion of treaties, but such cases were fortunately rare. They also differed greatly, and it might be extremely hard to determine whether there was corruption in the strict sense. It could also be argued that a State which had chosen its representatives badly and entrusted such important tasks as the negotiation and conclusion of treaties to dishonest persons had only itself to blame.

3. In any case, it ought to be made clear that the act of corruption must be imputed to the other State party to the treaty, never to a third State or to private individuals or associations. Even with that restriction, there was reason to fear abuses: a State might unwarrantedly withdraw from a treaty under the pretext of corruption.

4. Again, as Mr. Jiménez de Aréchaga had urged, the sanction provided for in article 35 was too severe for the case of corruption, which could more properly be assimilated to fraud or error than to coercion.

5. He was not prepared to take a final position on the main issue—whether or not paragraph 2 should be retained—until he had heard the views of the other members of the Commission, but regarded the provision as unacceptable without considerable revision along the lines he had indicated.

6. Mr. de LUNA said that, in his first report, Sir Gerald Fitzmaurice had taken as the title for article 4, the first of a series entitled " Certain fundamental principles of treaty law ",[2] the maxim *ex consensu advenit vinculum*. In his third report, he had placed that article, in its final version, at the beginning of the section on defective consent. Paragraph 1 of that final version, renumbered article 9 and entitled " Consent in general ", read: " The mutual consent of the parties, and reality of consent on the part of each party, is an essential condition of the validity of any treaty ... "[3] The will of the State, which was the basis of all treaties, must not be vitiated, since consent must be freely given. If consent were procured by means of the corruption of a representative, that consent was just as void as consent obtained by fraud, coercion or error. That proposition was the only logical one in law; there was not in international law any rule to the effect that, even if the corruption of a representative were established, his expression of consent must necessarily be attributed to the State.

7. It had been said that, although there were examples in arbitration, there had been no instance in international practice of a treaty voided by corruption. But even Mr. Jiménez de Aréchaga, who had so strongly opposed the inclusion of paragraph 2, had recognized that cases of treaties obtained by corruption had occurred. In fact, there had been cases of that type much more recently than in the nineteenth century and the whole problem was of great importance in relation to the international obligations contracted by certain new States. At the fifteenth session, Mr. Tunkin had made some remarks on the subject of fraud which were equally relevant to the question of corruption. What he said was: " The history of international relations showed that fraud had been used by some States, especially as an instrument of colonial or other aggressive policy. Perhaps instances should not be sought in the literature on the subject, because the authorities might be disinclined to discuss shameful acts belonging to the past ".[4] The absence of any reference to corruption in the literature could be explained in the same way. In the period of colonial imperialism, European writers considered that international law governed only the relations between those States which they described as " civilized nations ". Unequal treaties and treaties obtained by means of corruption were considered perfectly valid in the relations with States outside the club of " civilized nations ".

8. International law on the subject of defects of consent had gone through three stages. In the first stage, the earliest writers had applied to the law of treaties the Roman law concept of defects of consent. In the second stage, the appearance of the positivist school in the nineteenth century had led to the abandonment of that concept, on the ground that notions derived from private law should not be imported into international law. That view had been upheld even quite recently by the eminent contemporary writer Rousseau, but it ignored the fact that international law, being a body of law like any other, needed the concepts of consent and defective consent. In the third stage, coercion, fraud and error had been recognized as factors that vitiated consent and made a treaty null and void.

9. Corruption should be recognized as an additional defect of consent, in that its effects were the same as those of coercion, fraud and error. From the practical point of view, it was even more necessary to make provision in the draft articles for cases of corruption than for the other three cases; the problem of treaties obtained by means of corruption was much more likely to occur in the future than that of treaties obtained by coercion, fraud or error.

[1] See 862nd meeting, preceding para. 75 and para. 75.

[2] *Yearbook of the International Law Commission, 1956*, vol. II, p. 108.

[3] *Yearbook of the International Law Commission, 1958*, vol. II, p. 25.

[4] *Yearbook of the International Law Commission, 1963*, vol. I, 678th meeting, para. 41.

10. The various arguments which had been put forward against the inclusion of paragraph 2 applied equally well to articles 33, 34 and 36, as well as to paragraph 1 of article 35. For example, there was a subjective element in the determination of fraud, but that had not prevented the Commission from adopting article 33. It had been said that corruption was difficult to define, but it was even more difficult to define fraud. Again, the difficulty of proving corruption was no argument at all, since difficulties of that kind arose in connexion with all the draft articles.

11. He could not agree that corruption came close to fraud. Fraud consisted in inducing the other party into error; corruption consisted in offers or gifts made before consent was given. Fraud and corruption represented two different forms of international bad faith and it was essential to make separate provision for each of them in the draft articles.

12. He was in favour of retaining paragraph 2 and opposed to either its deletion or its amalgamation with article 33.

13. Mr. VERDROSS said he was in favour of retaining the rule stated in paragraph 2.

14. Two main arguments had been advanced against including a rule concerning corruption. One was that cases of corruption were rare; that was true, but the argument was not decisive. The other was that the rule might give rise to abuses; but that was the argument used by Professor Schwarzenberger against the rule proposed by the Commission concerning *jus cogens*. On the other hand, it was possible by analogy to argue, in favour of the rule, that an arbitral award was void if the arbitrator had been corrupted.

15. The proposed rule, however, could not be left in article 35, because corruption was not the same thing as coercion. Corruption should be the subject of a special article, for which a place would have to be found in the draft.

16. Mr. BARTOŠ said that the question of corruption deserved to be mentioned in the draft, but he had some observations to make concerning the inclusion of the proposed paragraph 2 in article 35.

17. First, there was a great difference between the crime of coercion and that of corruption, although both invalidated consent. Coercion could be unilateral; although the possibilities of resisting coercion should not be overlooked, it was the consequence of certain unilateral acts, whereas corruption always had two aspects, one active and the other passive, and it was an offence which was characterized by the fact that it could not be committed without complicity. It was therefore, as other speakers had already observed, impossible to deal with coercion and corruption under the same heading. Corruption should be included under defects of consent. Many treaties had been concluded by that evil means in the past, and there might be others in the future, although parliamentary control and the equality of States, once it had become a reality, would no doubt reduce their number.

18. In his study of the law of treaties, he had noted the existence of a fairly common practice of certain big capitalist States, that of combining a business contract, which came within the province of private international law, with what was called a treaty of guarantee, which was in the province of public international law. The business contract was first concluded between a State, or an undertaking designated by the State, and a large corporation of international monopoly character; the performance of the contract was then guaranteed by a treaty between the debtor State and the State to which the capitalist corporation belonged. Corruption could sometimes play a part in the conclusion of the contract, but the treaty was not directly vitiated by any defect of that nature. The Commission's draft was restricted to the law of treaties, and could not trespass on the law of contracts, even where the contracts were covered by a treaty; in a case of the kind to which he had just referred, therefore, the proposed rule would be without effect. He had considered it his duty to draw the Commission's attention to that particular instance.

19. Nevertheless, he remained firmly in favour of including that rule in the draft, even though there were many degrees and forms of corruption. But the rule should not be included in the article on coercion, because coercion and corruption were different kinds of defect. Nor should corruption be assimilated to fraud. It would therefore be best to deal with the question of corruption in a separate article, which would be frankly entitled: " Corruption of representatives ".

20. He had no objection to paragraph 1.

21. Mr. TSURUOKA said that he could not accept paragraph 2, with regard to which he supported the arguments of Mr. Jiménez de Aréchaga and shared the doubts of Mr. Castrén. From a practical point of view, it was one thing to condemn corruption and another to include a provision on corruption in the draft. If freedom of consent was invalidated by corruption, the validity of the treaty was impaired as a consequence. But that did not mean that corruption need be dealt with in the draft. That course would be justified if cases of corruption were numerous, if the notion of corruption were clear, and if there were a reliable procedure for establishing it; but such was not the case. Corruption took various forms—a gift of money, the promise of a lucrative position, and other tempting offers. In cases of corruption, it was hard to say whether the whole responsibility lay with the State whose representatives had resorted to corruption, or whether the representatives of the complainant State were also partly to blame.

22. It had been said that cases of corruption had been frequent, particularly during the colonialist era. But by the time the Commission's articles came into force, colonialism would probably be a thing of the past, and in any case, with the progress in communications, the situation today could not be compared with what it was once.

23. If the conclusion of the treaty had been procured by corruption, it was not only the representative of the State who was responsible; the government itself must have yielded to temptation or have been negligent. But it was scarcely conceivable that a government worthy of the name could be a victim of corruption. It would be dangerous to start from the presumption that governments and their representatives were not necessarily honest; that would suggest a low standard of inter-

national morality and be tantamount to encouraging States to start disputes by alleging, for the purpose of evading their obligations, that their representatives had been corrupted.

24. For the proposed rule to be effective, the two States would have to agree that corruption had taken place; if they did so, they could easily remedy the situation by some other means, such as amending the text of the treaty; and the rule was therefore unnecessary.

25. The proposed rule also had the defect that it did not state clearly who had the right to invoke the nullity of the treaty on the ground of corruption; did a State not a party to the treaty also have that right?

26. Finally, if a State was accused of having corrupted the representative of another State, it might deny having done so and argue that a particular favour it had granted had no connexion with the negotiation of the treaty or was merely a proper reward for services rendered.

27. The rule contained in paragraph 2 would therefore have more disadvantages than advantages for the security of treaty relations between States.

28. Mr. REUTER said he was in favour of retaining the article more or less as it stood. Corruption did take place and there were precedents: at the first Hague Conference, in 1899, the draft prepared by the Russian Government had provided for corruption as a ground for nullity of arbitral awards.[5]

29. The Commission's position with regard to the article on corruption was perhaps connected with a position taken on the procedure for concluding treaties, a matter on which it had been divided. The majority had been unwilling to lay down as a mandatory rule of general international law that all international treaties were subject to the obligation to ratify. It could now be maintained that the obligation to ratify should have been recognized, however burdensome the formalities required by each State, for it would have helped to prevent corruption. But in any case, the majority, of which he had been one, had been against that rule and quite rightly, it appeared, for the Commission must be optimistic and not complicate international relations unduly by fearing the worst. Since the Commission was proposing a rule which did not make ratification necessary, the mention of corruption constituted a useful warning.

30. From the theoretical point of view also, the provision in paragraph 2 was quite appropriate in article 35. The effect of corruption was to misrepresent the will of the State and the representative whose will was affected, whether by coercion, in paragraph 1, or by corruption, in paragraph 2, no longer represented the State. The title of the article might perhaps be amended to read " Action affecting the representative of a State. ".

31. It had been suggested that the provision might provide States with a pretext for not executing a treaty, but other pretexts were unfortunately not lacking.

32. The text of the article was very satisfactory; there must not only be corruption, but also a causal connexion between the corruption and the consent of the State. There were many cases of corruption which did not come within the scope of paragraph 2. Talleyrand was known to have been corrupted by every Government with which France had negotiated and the Emperor had not been unaware of it, but no one could say that France's consent to the treaties it had signed had been obtained by corruption.

33. All the problems connected with international responsibility and diplomatic protection fell outside the scope of paragraph 2. Everyone knew of international disputes in which a Government had evidence that its officials had been corrupted by a private concern, but hesitated to use that fact in a court of law, in case it turned to its own disadvantage. That was a problem of responsibility with which the Commission was not concerned for the moment.

34. Mr. TUNKIN said he was in favour of retaining paragraph 2, which was a necessary provision for the protection of weak States against powerful States. The need to retain paragraph 2 was the same, regardless of the frequency or otherwise of instances of treaties procured by corruption. Corruption as a means of obtaining consent to unequal treaties had been a common practice in the colonialist era and was now a not uncommon feature of neo-colonialist activities.

35. Even those who opposed the retention of paragraph 2 had admitted that the corruption of the representative of a State invalidated the consent expressed by him. There was, therefore, every reason for making provision in the draft articles for the invalidity of treaties procured by corruption.

36. With regard to the suggestion that cases of corruption were already covered by the article on fraud, Mr. de Luna had convincingly demonstrated that corruption was completely different from fraud. It was therefore necessary to keep the provisions on corruption and fraud quite separate.

37. He was unimpressed by the argument that the rule stated in paragraph 2 was not completely clear. All rules of law were intended to be applied to a multitude of different cases. A general rule could never correspond on all points to any actual case. There would therefore always be an element of ambiguity in the statement of any rule of law and all that could be said was that perhaps that ambiguity was somewhat greater in the statement of the rule on corruption than in the rule on fraud. That, however, was not a convincing argument against the retention of paragraph 2.

38. Nor was he convinced by the remark of Mr. Tsuruoka that the inclusion of paragraph 2 might suggest a low standard of international morality. In municipal law, there were provisions in the penal code for dealing with a wide variety of offences but that did not indicate a low standard of morality in the country concerned.

39. With regard to the placing of the provision, he would be in favour of making paragraph 2 a separate article. Paragraph 1 of article 35 dealt with the very dangerous case of a treaty obtained by coercion, and from both the factual and the legal points of view, coercion and corruption were different. The Commission had therefore no option but to separate the two para-

[5] *The Proceedings of The Hague Peace Conferences: the Conference of 1899* (New York, Oxford University Press, 1920), p. 804, art. 26.

graphs of article 35, even if that meant giving some unwanted prominence to the question of corruption.

40. Mr. BRIGGS said that the Commission had discharged a whole quiver of arrows at the stability of treaties, in the form of a series of provisions on defects of consent, and that on the basis of little or no State practice. It was now proposed, in paragraph 2 of article 35, to establish corruption as an independent legal ground of invalidity, although it was admitted that there was no case on record of any treaty having been invalidated on grounds of corruption of the representative who had expressd the consent of the State to be bound by the treaty.

41. Moreover, paragraph 2 did not provide that corruption was merely a ground for invalidity which could be invoked by a State; it proclaimed the unproved assumption that if a State's consent to be bound by a treaty had been procured by corruption, that treaty would be without any legal effect.

42. The problem arose as to what was covered by the term " corruption "; a bribe in money would certainly constitute corruption, but an offer of support, say, in an election to a United Nations organ might also be used as an inducement to procure consent to a treaty. It was hard to decide whether a case of that kind should be included in the term " corruption " as a ground for invalidating consent to a treaty.

43. In practice, if corruption were retained as an independent ground of invalidity, it would thus become possible to avoid treaty obligations by means of a mere unproved allegation that the treaty had been procured by corruption.

44. There was no necessity to include in the draft articles provisions to deal with every form of undue influence and to set up every one of them as a separate ground of invalidity.

45. Mr. TSURUOKA explained that, in saying it should not be assumed that the representative was of very low morality, he had been thinking of the usefulness of the proposed provisions, which depended on the frequency of the cases. The reason why he had tried to clarify the idea and the procedure was that it was the first time that an idea of that kind had been introduced as a ground of invalidity. Whenever the Commission wished to innovate, it must study the question more thoroughly and formulate the solution as fully as possible.

46. If the Commission wished to mention all the cases in which consent might be impaired, in addition to intellectual and moral causes, it would also have to include the permanent or temporary physical condition of the representative; that showed the danger of going into too much detail.

47. The CHAIRMAN, speaking as a member of the Commission, said that it was not a question of protecting everything that had the appearance of a treaty, but of protecting treaties worthy of the name, which were essentially deliberate acts based on the consent of the parties. A logical general rule inherent in the very nature of a treaty laid down that anything which had not been consented to could not form the basis of a treaty. Consequently, if it was proved that the will of a State had not been expressed, there could be no question of a treaty.

48. The matters referred to by Mr. Tsuruoka were taken for granted in international law. When anyone spoke of the representative of a State expressing that State's consent, it was taken for granted that he meant a human being capable of expressing a will. Obviously if the representative of a State were certified as insane, no international court or arbitrator would uphold the contention that the instrument which he had helped to prepare on behalf of the State was a treaty.

49. Corruption invalidated consent and falsified the will of the State. Since the consent of the State had not been properly expressed, there was no treaty. Cases of corruption were no rarer than cases of fraud, but the Commission had included a provision on fraud, and in the present state of international law, in which the sovereign equality of States had to be safeguarded, it was very important to formulate a rule on corruption also. Moreover, as corruption was neither fraud nor coercion, it could not be covered by articles relating to fraud or coercion and should be dealt with in a separate article.

50. Mr. de LUNA said that it was always dangerous to formulate definitions in law but he would suggest as a definition of corruption: " Corruption is when the representative, before expressing consent on behalf of the State, has accepted an offer or promise, or gift as an inducement to express in a particular way the consent of the State he represents ".

51. There were three elements in that definition: first, the idea that the offer, promise or gift was made prior to the expression of consent; secondly, the notion that the inducement could take a number of different forms, including that of an offer or promise of some gift or benefit to be given at a later stage; thirdly, the idea that the inducement should have the effect of swaying the decision of the State in a particular direction. On that last point, it was appropriate to remember the example of Talleyrand, who had received gifts from foreign powers but had nonetheless acted in accordance with the interests of France, so that despite the bribery he still validly represented, and defended, the interests of his State.

52. He could not agree with Mr. Briggs's interpretation of the provisions of paragraph 2. Neither that paragraph nor any other provision on defects of consent in the draft articles could possibly be construed as permitting a State unilaterally to repudiate its obligations under a treaty.

53. Questions of procedure were governed by the provisions of article 51. A State which claimed that a treaty was invalid was required under that article to notify the other party or parties of its claim. If the claim was disputed, the parties were required to seek a solution of the question through the means indicated in Article 33 of the Charter, such as arbitration or judicial settlement. If no means of settlement were found, the parties would remain in their respective positions. That situation, however, arose in connexion with all the substantive articles.

54. With regard to the placing of the provision on corruption, he favoured a separate article, since the ques-

tion was neither one of fraud nor one of coercion. If, however, it was felt undesirable for psychological reasons to give undue prominence to the question of corruption, paragraph 2 could be left in article 35, subject to the amendment of the title of the article as suggested by Mr. Reuter.

55. Mr. JIMÉNEZ de ARÉCHAGA said that he had been misunderstood. His main line of argument, which he had developed at the previous meeting,[6] was not that the Drafting Committee's text was open to abuse, or that jurisprudence was lacking or that such a rule could not be applied by existing international tribunals. Nor had he argued that a treaty procured by corruption was valid. His argument had been that the treaty was voidable under the terms of article 33, which clearly covered the situation, although some additional explanation might be needed in the commentary. That was the best way to handle the problem, rather than in an independent provision or article framed as broadly as the text proposed by the Drafting Committee.

56. It was beyond dispute that the corruption or bribery by a State of the representative of another State engaged in negotiating a treaty constituted fraudulent conduct that entitled the injured party to invoke it as a ground for invalidating consent. That interpretation was fully confirmed by the text of article 33 (A/CN.4/L.115) and the last sentence in paragraph (4) of the commentary[7] on the article.

57. Misrepresentation, concealment or non-disclosure of illicit benefit by any party to an act of corruption would vitiate an agreement secured by that means. Mr. de Luna, supported by the Chairman and Mr. Tunkin, had argued that there was a great difference between corruption and fraud and that the latter was a means of procuring consent by leading the other party into error, whereas in the case of corruption an agent had been suborned by bribery or some other benefit.

58. The means should not be confused with the results. Corruption was not an independent ground of defective consent, but a possible means of procuring consent through fraud or "*dol*". Rules of international law should not, any more than rules of municipal law, seek to cover expressly every means of obtaining consent by fraud. There was fraud or "*dol*" in the case of corruption because a State had been induced to consent to a treaty by an error brought about by the other party: the State's consent had been given in the belief that an agent representing that State had been defending its interests and not his own or the interests of the other party. That essentially was the situation contemplated in the concept of "*dol*" found in French law. The "*conduite frauduleuse*" consisted in there having been a secret understanding between an unfaithful agent and the other contracting party, a manœuvre that had succeeded in inducing consent which would not otherwise have been given.

59. On the delicate question of law as to whether corruption was or was not comprised in the concept of fraud or "*dol*" and how it should be dealt with, the Commission should be guided by the experience accumulated over the centuries in private contract law of municipal systems. To take an example from doctrine and case law, in France, the failure by an agent to disclose to his principal that he had received a bribe or a special benefit from the other party was regarded as a ground of nullity based on "*dol*" resulting from the manœuvres of the other party with the complicity of the unfaithful agent. However, when the agent had been corrupted by a third party, the agreement was upheld so that the innocent party should not suffer from the consequences of such corruption; the rule followed in that case was that the principal should suffer the consequences of his choice of agent.

60. Paragraph (4) of the 1963 commentary on article 33 indicated the trend of opinion in the Commission and he continued to think that it would be preferable to formulate the article on fraud in as broad terms as possible, leaving its scope to be worked out in practice and by international tribunals. Nothing would be gained by attempting to enumerate the different methods whereby consent to a treaty could be secured through fraudulent conduct.

61. Mr. de LUNA said he questioned the view put forward by Mr. Jiménez de Aréchaga, that corruption could be assimilated to a special case of fraud or *dol* as a means of procuring the consent of a State. That was too general a definition since it could also be applied to coercion, for threats directed against a representative were only one way of procuring his consent.

62. A definition of fraud in internal law had been given in 1889 in the case of *Derry v. Peek*, from which it appeared that fraud was not to be confused with corruption. According to that definition fraud was "to induce any other person by intentional misrepresentation or concealment of a material fact peculiarly within his own knowledge, to enter into a contract, conveyance or similar transaction with him which he would not have entered into had he known the truth." In French internal law, there was fraud when one of the contracting parties misled the other.

63. If Mr. Jiménez de Aréchaga admitted that consent invalidated by corruption could not produce its full legal effect, it should be possible to reach agreement on the *sedes materiae*. But it would never be fraud, which was not a matter of determining the will of the representative of the State, but of deceiving the State itself. A well-known example was the treaty of Uccialli of 1889 between Italy and Abyssinia,[8] by the Amharic text of which Abyssinia retained the right to conduct its own foreign relations, whereas by the Italian text, which he could not read, the Emperor of Abyssinia granted Italy the right to represent his country in foreign affairs.

64. It was clear from those examples that, legally speaking, corruption was not a special case of "*dol*" or fraud. The general idea of means of procuring consent was so wide that it covered practically all the articles dealing with defect of consent,

65. Mr. TUNKIN said that Mr. Jiménez de Aréchaga, while admitting that the possibility of corruption should be covered, had tried to persuade the Commission that

[6] Paras. 84-93.

[7] *Yearbook of the International Law Commission, 1963*, vol. II, p. 195.

[8] *British and Foreign State Papers*, vol. LXXXI, p. 733.

that was already done in article 33; yet the division of opinion proved that some doubt subsisted as to whether fraud included corruption. A specific provision on the matter was needed to obviate any possible misconstruction, particularly in view of the categorical nature of the rule in the second sentence of the revised article 30,[9] which read " A treaty the invalidity of which is established under the present articles is void ".

66. Mr. JIMÉNEZ de ARÉCHAGA said that fraud or " *dol* ", in the wide sense used by the Commission, covered any method employed by one contracting party with the deliberate intention of leading the other party into an error which determined consent. Corruption in which a contracting party was the active agent was one such method. Mr. Tunkin's argument that the divergence of view proved that an article was necessary was not persuasive, since in other instances of possible doubt about the scope of an article, the necessary explanations had been inserted in the commentary.

67. But his main objection was that the proposed article did not confine itself to stating that in the case of corruption the provisions on fraud would apply: it went much further. In contradistinction to article 33, the scope of application of the proposed paragraph 2 of article 35 was too wide and would bring to the ground, as null *ab initio*, any treaty consent to which had been obtained by corruption from any source whatever.

68. The CHAIRMAN, speaking as a member of the Commission, said he would try to give his view of the position in international law. There were, it was true, judgments which assimilated corruption to fraud, but that was due to the role of jurisprudence in internal law, especially in countries where the law was codified, for although there were articles on fraud in internal law, there were none on corruption. A judge who had to try a case of corruption was naturally bound to condemn it, but instead of basing his judgment on elements from which he could formulate a new rule to fill that gap in the law, he would probably prefer to base it on an existing article and proceed by analogy, even though the analogy might not always be a very close one.

69. The Commission was not trying a case, however; it was preparing a draft of international legislation and had more freedom of action than a judge in a national court. It should deal with the case direct, and, since many of its members considered that corruption and fraud were different defects in consent, it should formulate a rule accordingly.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that he was in the difficult position of agreeing partly with a great deal of what had been said. He might have been able to subscribe to the arguments developed by Mr. Jiménez de Aréchaga, because acts involving the corruption of a representative must be regarded as fraudulent, but if corruption were to be treated as a ground of invalidity it would have to be corruption attributable to a State and that would mean having to interpret corruption in a broad sense. If the term " fraud " were generally accepted as denoting such acts as the bribing of a representative to induce consent, it might be possible to cover the matter in the way suggested by Mr. Jiménez de Aréchaga.

71. Manifestly there was a difference of opinion in the Commission on that very point, although all might agree that, at least by implication, corruption would be understood to be covered. As a result of the discussion at the second part of the seventeenth session, he had attempted to produce a provision on corruption while still of the opinion that, if anything were to be included in the draft on the subject, it must be done as discreetly as possible, because the reaction of States to a provision framed in very bald terms might be unfavourable.

72. At the outset he had suggested a simple mention of corruption in article 35, paragraph 1, but that suggestion had been left aside by the Drafting Committee, which preferred that the problem of coercion should be treated entirely separately. He had not been very impressed by the need for a separate article because, for example, blackmail of a representative of a State, which was one form of coercion, was not very different from the corruption of that representative, so far as the obtaining of his signature to a treaty was concerned.

73. Should the Commission decide not to have a separate article but to insert a provision in article 35, it must take a clear position as to whether the provisions concerning estoppel and separability should apply in cases of invalidity due to corruption.

74. Now that the order of articles 33 and 34 had been reversed, if corruption were to be dealt with in a separate article its logical place would be between articles 33 and 35, in other words between "fraud" and "personal coercion".

75. There was a difference of opinion in the Commission as to whether corruption was necessarily a reason for avoiding the whole treaty. Some members considered that only certain provisions might be tainted and that the injured State would not necessarily wish the whole treaty to fall to the ground; others considered that corruption would fundamentally undermine confidence between the parties and therefore put an end to the whole treaty.

76. By and large the discussion at the present meeting had revealed some weight of opinion in favour of drafting an explicit provision instead of leaving the matter to be covered by the article on fraud. If that were the Commission's final conclusion, perhaps a separate article would be preferable and would make it easier for a diplomatic conference to decide the question when the Commission's draft came to be examined. There was some irony in the fact that at one stage, even the mention of corruption in the title of his draft article 35 had been received with alarm by the Drafting Committee as giving too much prominence to " corruption ".

77. Whatever the Commission's final decision, members must be clear as to where the responsibility for a representative's yielding to corruption would lie. A State necessarily had a certain responsibility for its own selection of competent and honest representatives, so that the mere fact that a representative had taken a bribe from some person would not be enough. The corruption of a representative for the purpose of invalidating a treaty must mean corruption by the other party, whether by direct or by indirect means.

78. The problems that had arisen during the discussion prompted him to suggest that the article be referred back

[9] See 862nd meeting, para. 75.

to the Drafting Committee with a tacit directive that a decision was needed on whether or not to insert a separate provision in the draft articles, and if so where.

79. The CHAIRMAN said that the Commission had to decide three questions. First, should a provision on corruption be included in the draft articles? Secondly, should the provision be in article 35 or should it form a separate article? Thirdly, if the provision formed a separate article, would the status of corruption be that of coercion or of error, and that raised the question of separability and estoppel. The Commission should perhaps decide, by voting, what instructions it wished to give the Drafting Committee.

80. Mr. CASTRÉN said he could agree to the inclusion in the draft of a provision on corruption on condition that it was a separate article, preferably placed after article 33 on fraud, that it was made clear that it applied only to corruption by another contracting party and not by a third State or private person or association, and that the legal consequences of corruption were the same as those of fraud, namely, not nullity, but voidability, and that the rule of separability of the provisions of a treaty also applied.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether it was necessary for the Commission to vote at that stage because he had enough information about members' views to enable him to prepare a new text on corruption for examination by the Drafting Committee. The discussion had revealed little support for the present text of article 35, paragraph 2.

82. Mr. BRIGGS said that there were only fourteen members of the Commission present at that moment, so it was undesirable to take a vote. It was the Commission's custom to refer articles to the Drafting Committee for re-examination in the light of the discussion. Clearly the choice lay between three alternatives, a provision in article 35, a separate article, or a modification of article 33. The matter should be referred back to the Drafting Committee.

83. Mr. TUNKIN said he agreed that there was no need to take a vote, but unless more precise instructions were given to the Drafting Committee the discussion on substance might be reopened there. The Commission should either take a vote or instruct the Drafting Committee to put forward proposals for a provision on corruption for inclusion in the draft articles, together with a recommendation as to its placing.

84. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin. The trends of opinion were now known and the question could be referred back to the Drafting Committee in the light of the discussion.

85. The CHAIRMAN suggested that article 35 be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*[10]

The meeting rose at 12.45 p.m.

[10] For resumption of discussion, see 865th meeting, paras. 1-27, article 34 (*bis*).

## 864th MEETING

*Monday, 6 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. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

### Law of Treaties

**(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

*(continued)*

ARTICLE 51 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty)[1] [62]

1. The CHAIRMAN invited the Commission to consider the title and new text for article 51 proposed by the Drafting Committee, which read:

" *Procedure to be followed in cases of invalidity termination, withdrawal from or suspension of the operation of a treaty*

" 1. A party which claims that a treaty is invalid, or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under its provisions, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the grounds therefor.

" 2. If, after the expiry of a period which shall not be less than three months except in cases of special urgency, no party has raised any objection, the party making the notification may carry out the measure which it has proposed. In that event, article 50 shall apply.

" 3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

" 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

" 5. Without prejudice to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation. "

[1] For earlier discussion, see 845th meeting, paras. 1-65.