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Summary record of the 864th meeting

Topic:
Law of Treaties

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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.

¹⁰For 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.

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that several changes had been made to the 1963 text (A/CN.4/L.107). The order of articles 50 and 51 had been reversed and the 1963 title "Procedure in other cases" had accordingly been changed to "Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty".

3. With regard to the text, the opening words of paragraph 1 had been amended so as to draw a distinction between a party claiming that a treaty was invalid *ab initio* and a party alleging a ground for terminating, withdrawing from or suspending the operation of a treaty. In the French text, the term "*allègue*" had been replaced by "*fait valoir*" and "*motif*" by the more appropriate term "*cause*".

4. The former sub-paragraphs (a) and (b) had been dropped as such, but the substance of sub-paragraph (a) had been incorporated as the second sentence of the new paragraph 1, while that of sub-paragraph (b) had been transferred to the new paragraph 2, less the concept of a time period set by the claimant party.

5. Paragraphs 3 and 4 in English were identical with the 1963 text; in the French text, the words "*une autre partie*" in paragraph 3 had been replaced by "*toute autre partie*" and the plural noun "*dispositions*" in paragraph 4 by the singular. Paragraph 5 had been re-drafted without altering the substance, so as to make the meaning clearer.

6. The CHAIRMAN invited the Commission to consider the new text for article 51 paragraph by paragraph.

Paragraph 1

7. Mr. JIMÉNEZ de ARÉCHAGA said that the 1963 presentation had the advantage of leaving no doubt on the very serious matter of the scope of article 51. By placing it after article 50, and entitling it "Procedure in other cases", the Commission had then stressed the fact that the provisions of article 51 applied in all cases in which a State claimed invalidity or termination, or alleged grounds for withdrawing from or suspending the operation of a treaty, under any of the draft articles.

8. There was some danger that the presentation now proposed might introduce an element of unilateralism. No doubt it had been the intention of the Drafting Committee that the provisions of article 51 should continue to govern the initial procedure in all cases and that the provisions of article 50 should come into play only after the procedure of article 51 had been followed, but that intention had not been made sufficiently clear. Paragraph 2 of article 51 stated that, in the cases governed by it, article 50 would apply, but it did not say that article 50 would not apply in other cases.

9. In a matter of such great importance as the procedure to be followed to invalidate or terminate treaties, it was essential to avoid all ambiguity. The presentation now proposed could lead to the interpretation that article 51 governed only those cases in which invalidity could be invoked at the option of the interested party, whereas article 50 governed cases of invalidity *ab initio*. It was clearly not the Drafting Committee's intention to arrive at such a result, but that interpretation was not only

possible but even plausible. The difficulty could be overcome if in the first sentence of paragraph 1, after the words "claims that a treaty is invalid", the words "under any of the provisions of articles 31 to 37" were added, and the words "otherwise than under its provisions" were replaced by the words "under articles 39 and 41 to 45 inclusive".

10. Mr. BRIGGS said that, if those changes were made, any ground of invalidity based on earlier articles of the draft would be excluded from the procedure laid down in article 51.

11. Mr. JIMÉNEZ de ARÉCHAGA said that it had been the Commission's understanding that all the grounds of invalidity and termination were set forth in the articles to which he had referred.

12. Mr. ROSENNE said that paragraph 1 of article 30 as adopted at the 862nd meeting² stated "The validity of a treaty may be impeached only through the application of the present articles". Paragraph 2, as adopted at the second part of the seventeenth session, stated that termination, denunciation, withdrawal or suspension could be effected "only as a result of the application of the terms of the treaty or of the present articles".³ During the discussion on those provisions, the question had been raised whether the draft articles covered all cases of invalidity and termination and it had been pointed out that there could be cases that lay outside the law of treaties altogether;⁴ one example given had been that of termination which might arise as a consequence of State responsibility or State succession. For that reason, he would need time for reflection before he could give an opinion on Mr. Jiménez de Aréchaga's suggestion.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 51 and 50 must be viewed in the light of the earlier articles, particularly article 30. The order of the two articles had been deliberately reversed by the Drafting Committee, so as to make it clear that article 50, which dealt with the final act of termination of a treaty, presupposed that the act was performed in circumstances in which termination was legitimate.

14. The difficulty in article 51 was that despite its safeguards, its provisions on negotiations and its reference to Article 33 of the Charter, it did not deal with the possibility of a deadlock. Clearly, under article 50, if no settlement was reached after exhausting the procedures specified in article 51, the parties would be left to act on their own responsibility. That looseness was inherent in the rules of contemporary international law on the adjudication of disputes.

15. He sympathized with Mr. Jiménez de Aréchaga's wish to see the provisions of article 51 made as clear as possible but it should be remembered that the Commission had not covered all the factual causes of termination in its draft articles; obsolescence, for example, had not been dealt with specifically. As far as State responsibility and State succession were concerned, however, he himself believed that they were governed by different principles.

² Para. 75.

³ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, para. 21.

⁴ *Ibid.*, 823rd and 841st meetings.

16. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting paragraph 1, which was an improvement on paragraph 1 of the article adopted in 1963. It was impossible fully to understand article 51 without referring to article 30, which made it clear that the grounds for invalidity were stated exhaustively in the articles.
17. Mr. AGO said he hoped the Commission would take time to reflect on the proposal made by Mr. Jiménez de Aréchaga, which he himself regarded quite favourably. It was important to draft the article very precisely. The Commission should continue its examination of the article, and return later to paragraph 1 and Mr. Jiménez de Aréchaga's proposal.
18. Quite apart from that proposal, he would suggest that, in the French text, the words "*autrement qu'en vertu des dispositions*" be replaced by the words "*autrement que sur la base des dispositions*", as had already been done in several articles. Also in the French text, at least, the title should be improved by amending it to read "*Procédure à suivre en cas de nullité d'un traité, de cause pour y mettre fin,*" etc., because the word "*fin*" used by itself suggested an "end" in the absolute sense.
19. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Ago's proposal concerning the title; furthermore, the words "*du traité*" should be inserted after the word "*retrait*".
20. Mr. CASTRÉN said he agreed that the proposed additions to the title were justified, but they might make it rather too long.
21. The CHAIRMAN, speaking as a member of the Commission, said it was essential that the title should be not only accurate, but also grammatically correct.
22. Mr. TUNKIN said that he would hesitate to introduce the reference to specific articles suggested by Mr. Jiménez de Aréchaga. Paragraph 1 as it stood could hardly give grounds for apprehension as to the scope of its provisions.
23. Those provisions, both in the 1963 text and in the Drafting Committee's rewording, were placed within the framework of the Charter, and referred specifically to the methods of peaceful settlement laid down in Article 33 of the Charter. Article 51 was incomplete to the extent that Article 33 of the Charter itself was incomplete. If the States chose a specific procedure to try and settle their dispute, and that procedure did not lead to a settlement, the State concerned might take some other action, subject of course to the prohibition of the threat or use of force contained in the Charter itself. In 1963, it had been clear that in such cases, unilateral action could be taken by the State under its responsibility.
24. Mr. de LUNA said that, although he sympathized with the desire of Mr. Jiménez de Aréchaga to uphold the security of international relations by tightening the procedure for termination, he did not favour the introduction of references to specific articles. The experience of codification in municipal law emphasized the dangers of enumeration; even if, at the time of codification, an enumeration could be shown to be complete, there could be no certainty that new cases for which provision had not been made would not arise in the future.
25. In the circumstances, he favoured the approach adopted by the Drafting Committee, subject to a possible improvement of the language.
26. Mr. JIMÉNEZ de ARÉCHAGA said that reference had been made to the situation arising under paragraph 3, which specified that, if objection was raised, the parties must seek a solution through the means indicated in Article 33 of the Charter. As he interpreted that situation, no unilateral action was possible under paragraph 3; unilateral action was permitted only in the event of no objection being made, which was the situation covered by the provisions of paragraph 2.
27. As far as paragraph 1 was concerned, he had no strong feelings as to the formulation, provided its provisions were kept as comprehensive as they had been in the text adopted in 1963.
28. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Jiménez de Aréchaga's object could be achieved in some other way. For example, the opening words could be amended to read: "Any party which claims that any treaty" and the words "otherwise than under its provisions" could be replaced by the words "under the provisions of the present articles"; if that second change were adopted, the comma after the words "a treaty is invalid" should be dropped.
29. Another point which deserved consideration was the inappropriateness of referring to the "parties" to an invalid treaty, bearing in mind the definition of "party" in article 1 (f) (*bis*) as "a State which has consented to be bound by a treaty and for which the treaty has come into force".
- Paragraph 2*
30. Mr. REUTER said that the object of paragraph 2 was to establish a kind of moratorium; that was a fair and salutary idea, but he doubted whether it was applicable to all the cases contemplated in paragraph 1. In particular, in the case of supervening impossibility of performance provided for in article 43, the treaty would in fact cease to be applied before the period had expired. In the present drafting, the expression "may carry out the measure" seemed to mean that the party in question could legally take the measure it had proposed. It might therefore be more accurate to say "may consider the measure it has proposed as having been accepted", which would not decide the question whether the measure was taken or not.
31. Mr. AGO said he agreed that the moratorium could not be applied in the case contemplated by Mr. Reuter. He would hesitate to accept the wording suggested by Mr. Reuter, however, because to generalize the idea that after three months the State could consider the measure it had proposed as having been accepted, would give the impression that the measure could be taken immediately, whereas, generally speaking, that was not what the Commission intended. The Drafting Committee should review the wording carefully and try to reconcile all the requirements.
32. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "measure" was intended to refer to a step or legal act performed with respect to the treaty.

33. In the example given by Mr. Reuter, if the impossibility of performance was real, there was nothing in the provisions of paragraph 2 to prevent the State concerned from raising the question of the continued validity of the treaty on its own responsibility.

34. Mr. JIMÉNEZ de ARÉCHAGA said that the words "except in cases of special urgency" ought to allay Mr. Reuter's concern, particularly as, in cases of impossibility of performance, the treaty would not have been performed and the question discussed by the parties would be that of responsibility for the non-performance.

35. Mr. BRIGGS said that the problem went back to the second sentence of paragraph 1, which required the notification to indicate the measure proposed to be taken with respect to the treaty. Perhaps that sentence should be made more explicit.

36. Mr. REUTER said he had only intended to comment on the drafting, because there seemed to be no doubt about the meaning of paragraph 2. In the French version, at least, the expression "*prendre la mesure*" was too active and too precise to apply to all the cases contemplated in paragraph 1. It might perhaps be better to say "*appliquer la solution*". The word "solution" would certainly be better than the word "measure" in cases where a State claimed that a treaty was valid.

Paragraph 3

37. Mr. BRIGGS asked whether the second sentence of paragraph 2, "In that event, article 50 shall apply", should not also apply to paragraph 3.

38. Mr. AGO said that the expression "a solution of the question" was not very felicitous. It would be more accurate to speak of a "settlement of the dispute", for if the parties had to resort to the means indicated in Article 33 of the Charter, the question to be settled was certainly a dispute. Alternatively, if the Commission preferred not to use the word "dispute", it could delete the words "of the question".

39. The CHAIRMAN, speaking as a member of the Commission, said he preferred Mr. Ago's second alternative.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he was not in favour of using the term "dispute", as he did not wish to prejudge the technical question whether a dispute would actually arise. As far as the English text was concerned, the expression "solution of the question" was satisfactory.

41. With regard to the question raised by Mr. Briggs, it was by no means clear that article 50 would apply in the cases contemplated in paragraph 3; the parties might reach an agreement, so that no unilateral action would take place. The purpose of the last sentence of paragraph 2 was to make it clear that the unilateral act of the State concerned could not be of an informal character; for example, under article 50, the State receiving the notification could call for full powers from the State making it.

42. Mr. TUNKIN said that the reference to article 50 was not necessary either in paragraph 2 or in paragraph 3. The matter was clear from the sequence of the articles.

43. Mr. BRIGGS said that he was inclined to share that view.

44. Mr. JIMÉNEZ de ARÉCHAGA said that he could agree to the omission of the reference to article 50 in paragraph 3, but he thought that its inclusion was necessary in paragraph 2 in order to emphasize the sequence of events, particularly since it was proposed to reverse the order of the two articles.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that it might be an improvement to combine the second sentence of paragraph 2 with the first, which would then conclude with some such wording as "in the manner provided for in article 50".

Paragraph 4

No comment.

Paragraph 5

46. Mr. CASTRÉN said he still thought the Swedish Government had been right in criticizing paragraph 5. It was dangerous, because it could be understood as an invitation to dispense with the procedure laid down in the previous paragraphs, which would reduce the already rather weak safeguards to nothing. Moreover, it dealt with a point of detail, whereas the draft articles should deal only with general problems. He therefore proposed that paragraph 5 be deleted or transferred to the commentary.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of paragraph 5 were not very important but should be retained, because they were logical. They had been included in order to avoid creating a situation in which a State, merely because a notification had not been made, might be prevented from raising some self-evident grounds of termination such as impossibility of performance.

48. Mr. de LUNA said he also was in favour of retaining paragraph 5. If it were dropped, the effect might well be the opposite of that desired by the advocates of that course. A State which had doubts with regard to the validity of a treaty might be tempted to put forward a claim of invalidity, or call for the termination or suspension of a treaty, merely as a precaution. Under the provisions of paragraph 5, a State in that position could remain on the defensive and only raise the issue if another State claimed the performance of the doubtful treaty, or alleged its violation.

49. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion on article 51, said that some useful drafting suggestions had been made but there was no disposition to depart from the main structure of the 1963 article. The general feeling was that the shorter text proposed by the Drafting Committee represented an improvement but that further improvement was still possible. He accordingly proposed that article 51 be referred back to the Drafting Committee for reconsideration in the light of the discussion.

50. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 51 back to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*⁵

⁵ For resumption of discussion, see 865th meeting, paras. 28-53.

ARTICLE 50 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [63,64]

51. The CHAIRMAN invited the Commission to consider article 50, for which the Drafting Committee had proposed a new title and text⁶ which read:

“Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty”

“1. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of the present articles shall be carried out through an instrument communicated to the other parties in accordance with article 29 (*bis*).

“2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.”

52. Mr. BRIGGS, Chairman of the Drafting Committee, said that in addition to reversing the order of articles 50 and 51, the Drafting Committee had proposed a new title which described better the contents of the article as redrafted.

53. In paragraph 1, the reference to communication through the diplomatic or other official channel had been replaced by a reference to “an instrument communicated to the other parties in accordance with article 29 (*bis*)”.

54. The new paragraph 2, dealing with the evidence of authority to denounce a treaty, embodied an idea originally contained in article 49, which had since been dropped.

55. The former paragraph 2 had been deleted and its contents made the subject of the new article 50 (*bis*) entitled “Revocation of notifications and instruments provided for in articles 51 and 50”.⁷

56. Lastly, the purport of the article had been changed by adding the words “or of the present articles” after the words “of the treaty” in paragraph 1.

57. Mr. ROSENNE said he wished to suggest, as a general question, the insertion of a provision, either in article 50 or elsewhere in the draft articles, to the effect that termination of or withdrawal from a treaty should be registered with the Secretariat of the United Nations under Article 102 of the Charter and article 25 of the Commission’s draft articles, which made provision for the registration and publication of the conclusion of treaties. Article 2, paragraph 1, of the General Assembly’s regulations⁸ to give effect to Article 102 of the Charter called for the registration of any “subsequent action” which effected a change in a treaty, and article 26, paragraph 4, of the draft articles (Correction of errors in texts or in certified copies of treaties) contained a special provision on registration.

⁶ For previous title and text, see document A/CN.4/L.107. For earlier discussion, see *Yearbook of the International Law Commission, 1966*, vol. I, part I, 836th meeting, paras. 52-91, and 842nd meeting, para. 107.

⁷ See below, para. 74.

⁸ Reproduced as an annex to the Commission’s report on its fourteenth session; see *Yearbook of the International Law Commission, 1962*, vol. II, pp. 194-195.

58. His reason for that suggestion was that articles 51 and 50 were intended to introduce order into the process of the termination of treaties and to close the door to certain abuses which had occurred in the period between the two world wars. That purpose would be furthered if a provision were included somewhere requiring the registration of the termination of, or withdrawal from, a treaty.

59. Mr. BRIGGS said that since articles 48 and 49 had been deleted, adoption of the Drafting Committee’s proposal to reverse the order of articles 50 and 51 would make article 51 follow article 47, which dealt with estoppel.

60. In view of the insufficient safeguards embodied in article 51, it was unfortunate that the redraft of article 50 referred to acts by which a treaty was declared invalid or terminated. In actual fact, none of the substantive articles adopted by the Commission provided a basis for a unilateral act of denunciation or termination; the various substantive articles referred to grounds of invalidity or termination and article 51 itself referred not to “acts” but to “measures”. He would accordingly suggest that, in paragraph 1, the words “or of the present articles” be replaced by the words “or in application of article 51 of the present articles”.

61. Mr. REUTER said that article 51 provided for two kinds of act: first, the act by which the State made its claim and secondly, the act by which, after the expiry of the period of three months, the State unilaterally took the measure it had proposed if the means indicated in Article 33 of the Charter had not made it possible to reach a solution. In view of that possibility of a unilateral act which was reserved in article 51, paragraph 1 of article 50 was correct.

62. Mr. TUNKIN said that the Commission must be consistent and face realities. Even in the situations contemplated in article 51, paragraphs 2 and 3, States might in the end have recourse to unilateral action to declare a treaty invalid or their intention to withdraw from it, and article 50, paragraph 1 did not exclude such a possibility. To argue the other way would mean providing for compulsory international adjudication and it was common knowledge that for the time being such a provision had no chance of being accepted by States. The Drafting Committee had given a great deal of thought to article 50 and he doubted whether it would be able to improve on the present wording which was clear and not open to misconstruction.

63. Mr. EL-ERIAN said that in the Drafting Committee he had expressed his apprehensions about any attempt to modify article 50 because of the danger that it might upset the balance achieved at the fifteenth session in regard to the doctrinal division of opinion in the Commission. As he understood it, the view of certain members was that, in the last resort, the problems raised by unilateral acts must be treated in their proper perspective as aspects of the pacific settlement of disputes in accordance with Article 33 of the Charter.

64. Mr. JIMÉNEZ de ARÉCHAGA said that, in view of the suggestion by Mr. Briggs and the comments by other members about the close links between articles 50 and 51, the two should be re-examined to-

gether by the Drafting Committee. The whole discussion seemed to suggest that the fundamental pattern established at the fifteenth session, which had then proved acceptable to the Commission, would have to be maintained.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission must decide how it wished to handle articles 50 and 51. Personally he had never lost sight of the fact that the balance achieved at the fifteenth session was a delicate one. He had always been in favour of fairly strict procedural safeguards and the force of the safeguards had not been diminished by the changes now introduced in those two articles by the Drafting Committee. Article 50 in its new form was of value at the present stage in the development of international law, and article 51 should help to protect the stability of treaties by introducing some measure of regularity in procedure. Read together the two articles constituted a progressive development.

66. Mr. Briggs might be right in thinking that the procedural safeguards in article 51 were inadequate, but they were reinforced by various other provisions in the draft articles designed to accomplish the same result.

67. The Commission must face the fact that a compulsory adjudication clause was unlikely to be accepted in a codifying convention and that once the alternative procedures laid down in article 51 had been tried unsuccessfully, a state of deadlock might be reached between the parties. However, there was no reason to suppose that the draft articles would be interpreted as licensing States to resort lightly to unilateral action. Article 50 in its revised form did not authorize States to do anything not already authorized in other provisions of the draft and, far from derogating from the procedural safeguards laid down, should in fact strengthen them.

68. Mr. TUNKIN said that there was no point in referring article 50 back to the Drafting Committee. The problems involved had been discussed at great length, both in the Commission and in the Drafting Committee, at various stages of the work and no new considerations had come to light at the present discussion. The Commission should speed up its work so as to give the Special Rapporteur enough time during the session to prepare the draft texts of the commentaries, a task he could not undertake until the Commission had reached a final decision about the articles themselves.

69. Mr. JIMÉNEZ de ARÉCHAGA and Mr. TSURUOKA said they could not vote for article 50 until they knew what the content of article 51 would be.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not Mr. Jiménez de Aréchaga's proposal concerning article 50 that he had challenged, but his suggestion that the Commission might have to revert to the 1963 structure of articles 50 and 51, a step which could hardly be taken at that stage. It seemed to him unnecessary to refer article 50 back to the Drafting Committee.

71. Mr. EL-ERIAN said that he had always appreciated the way in which the Special Rapporteur tried to take account of differing views expressed in the Commission itself and those emanating from governments or dele-

gations to the Sixth Committee. A number of improvements had been introduced in articles 50 and 51, but the general framework established at the fifteenth session must be maintained because of the delicate balance it reflected.

72. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Jiménez de Aréchaga's view, because he considered that the two articles were very closely connected. Once article 51 had been reviewed, it would not take long to discuss article 50.

73. Speaking as Chairman, he put to the vote Mr. Jiménez de Aréchaga's proposal that article 50 be referred back to the Drafting Committee.

Mr Jiménez de Aréchaga's proposal was adopted by 7 votes to 4, with 5 abstentions.⁹

NEW ARTICLE

ARTICLE 50 (*bis*) (Revocation of notifications and instruments provided for in articles 51 and 50) [64]

74. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new article 50 (*bis*), based on the former paragraph 2 of article 50 (A/CN.4/L.107), reading:

“ Revocation of notifications and instruments provided for in articles 51 and 50 ”

“ A notification or instrument provided for in articles 51 and 50 may be revoked at any time before it takes effect. ”

75. The CHAIRMAN, speaking as a member of the Commission, said he had no objection to the new drafting, but wondered whether it was possible to speak of the revocation of “ an instrument ” in French; he thought it was only the legal act which could be revoked.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the word “ instrument ” had been used in order to refer the reader back to article 50 and to make clear that there was a difference between a notification, which might be of a preliminary kind, and a final act, which should be a formal communication to the other parties. In the commentary on article 50 (*bis*), it would be necessary to explain why the Commission had rejected the idea that any assent by other parties would be needed in the latter case.

77. Some governments had criticized an earlier version of the provision concerning the revocation of notifications and instruments provided for in articles 50 and 51, on the ground that one of the objects of notifications or time-limits was to enable the other parties to make the necessary administrative arrangements for the situation that would develop, once the act took effect. Those governments found unacceptable the proposition that, if a time-limit were imposed and the other parties had made administrative changes, they could then be confronted with a simple act of revocation which, to take effect, would not require their assent. In the Commission, arguments for and against had been put forward, but the consensus of opinion in the Drafting Committee

⁹ For resumption of discussion, see 865th meeting, paras. 54-63.

had been that the wisest course was to drop the requirement that the assent of the other parties would be needed for an act of revocation to take effect.

78. Mr. BARTOŠ, replying to Mr. Yasseen, said that the word "instrument" had been used in order to emphasize that the act must take a special form, because a most important question was involved. It would be very difficult for the Commission, having adopted that system and given the act in question a very formal character, to reduce it again to a simple act. It was well to emphasize that an act of revocation must be in solemn form, even though the Commission had not prescribed that form for the initial act of concluding a treaty, but only required the expression of consent in writing by a State party to the treaty.

79. He supported the Drafting Committee's text for the article.

80. The CHAIRMAN, speaking as a member of the Commission, said that he had not been expressing an opinion on the substance of the article, merely a doubt about the possibility, in French, of speaking of the revocation of an instrument.

81. Mr. TSURUOKA said that if the article were put to the vote he would have to abstain, because the interest of the State to which the revocation was addressed did not seem to him to be sufficiently protected if the act of revocation produced its effect immediately the notification or instrument was revoked.

82. The CHAIRMAN put to the vote article 50 (*bis*) as proposed by the Drafting Committee.

Article 50 (bis) was adopted by 12 votes to none, with 3 abstentions.

ARTICLE 52 (Consequences of the invalidity of a treaty) [65]¹⁰

83. The CHAIRMAN invited the Commission to resume consideration of article 52, for which the Drafting Committee proposed a new title and text reading:

"Consequences of the invalidity of a treaty"

"1. The provisions of a void treaty have no legal force.

"2. If acts have nevertheless been performed in reliance on such a treaty:

(a) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) Acts performed in good faith before the nullity was invoked are not rendered unlawful by reason only of the nullity of the treaty.

"3. In cases falling under articles 33, 35 or 36, paragraph 2 does not apply with respect to the party to which the fraud, coercion or corrupt act is imputable.

"4. In the case of invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty."

84. Mr. BRIGGS, Chairman of the Drafting Committee, said that the word "legal" had been dropped from the title of the article. Paragraph 1 was new. In paragraph 2 the order of the sub-paragraphs in the 1963 text had been reversed and the wording sharpened. Paragraph 3 was based on the former paragraph 2, but had been amplified so as to refer to a corrupt act. Paragraph 4 contained a restatement of the principle set out in the former paragraph 3.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that his earlier attempts to draft an article on the consequences of invalidity had been complicated by the existence of articles 37 and 45 that dealt with a further ground of invalidity by reason of conflict with *jus cogens*. It was important that members should know, in discussing article 52, that there was now in addition a separate article 53 (*bis*)¹¹ which would deal in one paragraph with cases under article 37, and in a second paragraph with cases under article 45.

86. Mr. ROSENNE said that he had no difficulty in accepting the Drafting Committee's text of article 52 but wished to know what was its relationship to article 39 (*bis*) (A/CN.4/115) as adopted at the second part of the seventeenth session. The provision in article 39 (*bis*) had originated in article 38, paragraph 3 (*b*) of the 1963 text (A/CN.4/L.107), which had been exclusively concerned with termination. Now that article 39 (*bis*) stood alone in part II, it could also be interpreted as being applicable in cases where the treaty was voidable at the option of one of the parties, especially under articles 31, 32, 33 and 34. He was less concerned with cases where treaties were void under articles 35, 36 and 37.

87. In cases when a treaty was rendered void by the action of one party successfully invoking one of the grounds invalidating consent so that it ceased to be a party, and the number of parties fell below the minimum necessary for the entry into force of the treaty, he assumed that article 39 (*bis*) would apply. If a problem did exist, perhaps it was article 39 (*bis*) and not article 52 that would need to be re-examined.

88. Mr. de LUNA said he agreed with Mr. Rosenne. If there was nullity *ab initio* of the consent of a State to a multilateral treaty, it was impossible to apply the provisions of article 39 (*bis*). The *sedes materiae*, however, was not article 52 but article 39 (*bis*), because it was established *a posteriori* that there had never been a sufficient number of parties for the treaty to enter into force, and the result was therefore nullity *ab initio*, in the same way as if there had been no consent by one of the parties, although such a situation would be impossible.

89. Sir Humphrey WALDOCK said he understood Mr. Rosenne's preoccupation but the point was covered in article 39 (*bis*).

90. Mr. AGO said that one article that might affect article 52 was the new article 53 (*bis*), to which the Special Rapporteur had referred. As he personally would prefer article 53 (*bis*) to be deleted and its two paragraphs included in two other articles, he hoped approval of

¹⁰ For earlier discussion, see 846th meeting, paras. 1-57.

¹¹ For the text of article 53 (*bis*), see 865th meeting, para. 71.

article 52 would be without prejudice to the fate of article 53 (*bis*), paragraph 1.

91. The CHAIRMAN, speaking as a member of the Commission, said that it was on the strength of the Special Rapporteur's assurance with regard to article 53 (*bis*) that several members of the Commission had accepted article 52, to which otherwise there would have been many objections.

92. Mr. TSURUOKA said that paragraph 3 contained a reference to corruption. As the Commission had not yet taken any decision on that matter, he presumed that the vote on article 52 would be without prejudice to whatever position it might take with regard to corruption.

93. Mr. BRIGGS, Chairman of the Drafting Committee, said that the vote on article 52 should be deferred until the Commission had before it the Drafting Committee's text of article 53 (*bis*): they must be examined together.

94. Mr. TUNKIN said he agreed with the Chairman of the Drafting Committee. Article 52 stated a general rule and article 53 (*bis*) would provide particular rules concerning invalidity as a consequence of a conflict with *jus cogens*.

95. The CHAIRMAN suggested that the decision on article 52 be deferred until the Commission had examined article 53 (*bis*).

*It was so agreed.*¹²

ARTICLE 53 (Consequences of the termination of a treaty) [66]¹³

96. The CHAIRMAN invited the Commission to resume consideration of article 53, for which the Drafting Committee had proposed a new title and text reading:

"Consequences of the termination of a treaty"

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present articles:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any rights or obligations of the parties or any legal situation created through the execution of the treaty prior to its termination.

"2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

97. Mr. BRIGGS, Chairman of the Drafting Committee, said that paragraph 2 of the 1963 text was to be transferred to article 53 (*bis*), while paragraph 4 of the 1963 text was now incorporated in article 30 (*bis*) (A/CN.4/L.115), leaving only paragraphs 1 and 3, the substance of which the Drafting Committee had sought

to cover in the revised text. The principles it set out had been approved by the Commission at its fifteenth session.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion at the present session had been focussed on paragraph 1 of the 1963 text. The Drafting Committee had tried to devise a formula that would safeguard the legitimate interests of the parties under the treaty, leaving aside the difficult issues raised by the doctrine of vested rights.

99. Mr. BRIGGS said that he had already recorded his objection to the proviso "unless the treaty otherwise provides or the parties otherwise agree", which was inappropriate from a drafting point of view.

100. Mr. BARTOŠ said he would abstain in the vote on article 53 because it was directly connected with article 29 (*bis*). He was not satisfied with the system provided for in article 29 (*bis*), which was still being considered by the Drafting Committee.

101. The CHAIRMAN put article 53 as revised by the Drafting Committee to the vote.

*Article 53 was adopted by 10 votes to none, with 5 abstentions.*¹⁴

102. Mr. PAREDES, explaining his vote, said that his objections applied only to paragraph 1 (*b*). He considered it impossible to maintain, as the Commission did in that provision, that the rights and obligations created while the treaty was in force could subsist, while at the same time affirming in article 52, paragraph 2 (*a*), a sort of right to restitution *in integrum* for those who had suffered from the consequences of the invalidity of a treaty. There was a duality if not an actual opposition, contrary to all legal thinking, between the two points of view: on the one hand full restitution, and on the other hand the thesis that the rights and obligations had been created in a valid manner and produced legal effects.

The meeting rose at 5.45 p.m.

¹⁴ The Drafting Committee subsequently made some changes in the French text of article 53, which was therefore put to the vote a second time (see 865th meeting, paras. 66-69). For a further amendment to the text of the article, see 891st meeting, para. 88.

865th MEETING

Wednesday, 8 June 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later, Mr. Herbert W. BRIGGS

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, 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.

¹² For decision on article 52, and the discussion of article 53 (*bis*), see 865th meeting, paras. 64, 65 and 71-85.

¹³ For earlier discussion, see 846th meeting, paras. 59-78, 847th meeting, paras. 2-89, and 848th meeting, paras. 1-18.