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Summary record of the 871st meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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pretation of wills, which had to be interpreted according to the will of the testator in the ordinary meaning of the words used.

88. In international law, the problem of the " ordinary meaning " was complicated by the fact that there were multilateral treaties. There might be an " ordinary meaning " for the authors of the preliminary draft—generally national or international civil servants—for the authors of the subsequent drafts, for the most eloquent members of the drafting committees and for certain States which took part in the drafting, while others took none at all. In his view, the " ordinary meaning " was that which was understood *inter partes*—between the parties which had drafted the treaty.

89. Another factor which had to be taken into account was the evolution of language. The " ordinary meaning " might not always continue to be what it had been at the time of the treaty's conclusion. It had been said that diplomats were particularly conservative in the use of words, but the French Academy had recently pointed out that they were sometimes pioneers, since they had just attached a new meaning to the word " *communauté* ", which had formerly been an expression in the Civil Code, but which had now passed into international law.

90. In his opinion, " the parties " should be understood as meaning the parties which had participated in the authentication of the treaty, not in its conclusion. That was how he understood article 69, paragraph 2, which was an explanatory passage in which the parties had tried to give a special meaning to certain terms.

91. Next, was any significance to be attached to the order of sub-paragraphs (*a*), (*b*), (*c*) and (*d*)? Were they four factors which had the same value? Were they cumulative or graduated? The context, of course, must take first place, but where sub-paragraph (*c*) was concerned, there might be some doubt concerning the value of subsequent treaties of interpretation and the possibility of their having retroactive effect. He was accustomed to drafting protocols of interpretation which came into force on the day of the entry into force of the treaty of interpretation itself.

92. With regard to sub-paragraph (*b*) and the rules of international law, he was of the opinion that the rules of international law referred to were those in force at the time of the treaty's conclusion, not at the time of its interpretation. True, they might change in the interval, but in that case, being rules of *jus cogens*, they also changed the earlier treaty, since a new rule of *jus cogens* had supervened.

93. He had stated that the parties which should participate in the interpretation of the treaty were those which had participated in its authentication, because it was possible that parties might accede to the treaty subsequently. While such parties would certainly have a voice in any amendments to the treaty, had they the right to decide what had been the meaning of the words used at the time of its conclusion?

94. Moreover, it should be borne in mind that amendments to the treaty might lead to *inter se* interpretations of multilateral treaties valid only between certain parties. That was a question which had not been taken into account in the text and had not been considered by governments in their comments.

95. He was not in favour of relying on the preparatory work of multilateral treaties, particularly those of a universal character, but there was a problem where reservations might be made during the negotiations and accepted by the other parties as a compromise: did the compromise also cover the notion of the " ordinary meaning " of the words used? All members could think of international conferences convened by the United Nations at which, when it came to voting, compromise amendments had been submitted for the purpose of achieving a majority in order to save the conference and enable the text to be authenticated. Such amendments sometimes came near to rendering the text meaningless by adding phrases which were inconsistent with the rest.

96. That was why, if the preparatory work was taken into consideration for the purpose of discovering the origin of the ideas underlying a treaty, and if last-minute amendments—sometimes forgotten and not recorded—were disregarded, there was a risk of losing sight of the meaning which the majority had considered as the " ordinary meaning ", and which had enabled the treaty to be adopted.

The meeting rose at 1 p.m.

871st MEETING

Thursday, 16 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

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

ARTICLES 69 TO 71 (Interpretation of treaties) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of articles 69 to 71 on interpretation.

2. Mr. de LUNA said he would supplement his remarks of the previous day by some comments prompted by the statements of other members of the Commission.

3. With regard to the question of " context ", he was more convinced than ever of the need to draft paragraph 1

[1] See 869th meeting, preceding para. 52.

of article 69 on the lines he had suggested, namely " 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context of the treaty and in the light of ": followed by sub-paragraphs (*a*), (*b*), (*c*), (*d*). That method of interpretation was in conformity with a fundamental principle of all philological criticism which had been repeatedly reaffirmed in case-law. To the examples he had given in his previous statement, he would add the Advisory Opinion of the Permanent Court of International Justice, which had stated, in connexion with the Peace Treaty of Versailles, that " it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense ".[2]

4. With regard to the " objects and purposes " of the treaty, some members of the Commission, while recognizing that the terms used should be construed in the context of the treaty, and not in the light of its context, went on to say that the reference to the objects and purposes of the treaty should not be separated from paragraph 1. Anzilotti himself had stated that it was always dangerous to adhere to the literal meaning of words without having determined the objects and purposes of the treaty. That was an unquestionable truth, which had been the basis of article 19 of the Harvard Draft, of article 2, paragraph 2 of the Granada Resolution of the Institute of International Law and of the Advisory Opinion of the Permanent Court of International Justice in the *Exchange of Greek and Turkish Populations* case,[3] which affirmed that the Convention must be interpreted in accordance with its spirit.

5. He did not think, however, that the objects and purposes of the treaty should be referred to in the first sentence of paragraph 1 rather than in sub-paragraph (*a*). The Special Rapporteur had emphasized that the various rules formulated by the Commission were, so to speak, the ingredients of interpretation, and Mr. Reuter had taken the view that it was a question of method. Thus the other three sub-paragraphs might well be incorporated in the first sentence. In his view, there should be no watertight compartments, but only subtle distinctions between the phases, the first of which was the establishment of the will of the parties from the text, with the presumption, *juris tantum*, that it expressed their real will.

6. The objects and purposes of the treaty came immediately after the terms of the treaty, as was shown, for instance, by the Opinion of the Permanent Court of International Justice in the *Minority Schools in Albania* case,[4] and, earlier, by the award of the Permanent Court of Arbitration in the *Muscat Dhows* case (1905),[5] in which the Court had relied on the purpose of the treaty to interpret the word "*protégés*" used in the General Act of the Brussels Conference of 1890.

7. In attempting to distinguish between the terms of the treaty and its objects and purposes, care should, however, be taken not to go beyond the declared will of the parties, which constituted the basis of the agreement. The first consequence of teleological interpretation was application of the rule of effectiveness of the treaty; that rule was not erroneous, but it could lead imperceptibly to giving the purposes of the treaty an importance which was not always justified.

8. An example was the Treaty of Utrecht of 1713. By the terms of that treaty, France had been required to raze the fortifications at Dunkirk, which it had done; but immediately afterwards it had built another fortress nearby. England had rightly protested, arguing that France's action, though in accordance with the text of the treaty, was not in accordance with its objects and purposes, which were to prohibit France from possessing fortifications in the immediate vicinity of the English coast.

9. That principle was a delicate one to handle, as was shown by the *Corfu Channel* case. It had been maintained that under the terms of the special agreement between the United Kingdom and Albania the Court would not have jurisdiction to assess the amount of compensation.[6] In the light of the objects and purposes of the agreement, the Court had declared itself competent to assess the amount, for, as it had stated, " It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect ".[7]

10. Accordingly, despite the importance of the objects and purposes of a treaty, it was advisable to keep them separate from the terms of the treaty and to maintain a proper balance, for otherwise it was dangerous to have recourse to them, especially where gaps had to be filled. Consequently, he was still convinced that sub-paragraph (*a*) should read " (*a*) the objects and purposes of the treaty ".

11. The rules of international law should be mentioned in the article, immediately after the objects and purposes of the treaty. He cited a number of cases, in particular the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder*, in which the Permanent Court of International Justice had stated that " unless the contrary be clearly shown by the terms of that article, it must be considered that reference was made to a Convention made effective in accordance with the ordinary rules of international law ".[8] He also relied on the dissenting opinion of Judges Basdevant, Winiarski, McNair and Read in the *Conditions of Admission of a State to Membership of the United Nations* case, in which they had maintained that " in case of doubt it is the rule or principle of law which must prevail ".[9]

12. With regard to the controversy between Lauterpacht and McNair, it was clear from the case-law that the latter was right in recognizing that there was a presumption *juris tantum* that treaties—even treaties which created rights—were declaratory of international law. The reason was that when a judge wished to clarify the

[2] *P.C.I.J., 1922*, Series B, No. 2, p. 23.

[3] *P.C.I.J., 1925*, Series B, No. 10, p. 20; 1928, series *B*, No. 16, p. 19.

[4] *P.C.I.J., 1935*, Series A/B, No. 64, p. 20.

[5] Scott, *The Hague Court Reports* (First Series), Oxford University Press, New York, 1916, p. 97.

[6] *I.C.J. Reports*, 1949, p. 23.

[7] *Ibid.*, p. 24.

[8] *P.C.I.J.*, Series A, No. 23, p. 20.

[9] *I.C.J.*, Reports, 1948, p. 86.

meaning of a contractual provision, he endeavoured to link it with international law, which had the advantage of giving it a single or " univocal " meaning. If the judge started from the presumption that the treaty had been formulated in a legal vacuum and that where the treaty was silent or its meaning doubtful, reference to international law was inadmissible, then the term to be interpreted would be " multivocal ", because there were numerous ways of departing from a rule.

13. As to whether it was necessary to state that the rules applicable were those in force at the time when the treaty was concluded, or whether it was sufficient merely to refer to international law without further qualification in case the parties had wished to make the provisions of the treaty subject to the natural development of legal concepts and institutions, he still believed that the neutral text now proposed by the Special Rapporteur was acceptable, provided that it was made quite clear in the commentary that, normally, it would be necessary to follow international law as it had been at the time when the treaty was concluded, not as it was at the time of the interpretation. If the Commission considered that it was not bound to take account of the comments made by governments, he would prefer to revert to the 1964 text (A/CN.4/L.107).

14. He proposed that the reference to the preamble appearing in the 1964 text should be retained. The reason why a government had proposed its deletion was certainly because the preamble to a treaty did not lay down any rights or obligations for the parties; but that government was mistaken if it thought that declarations of principle or of the policy to be followed threw no more light on the objects and purposes of the treaty than did many standard clauses. The Permanent Court of International Justice had relied on the preamble to Part XIII of the Peace Treaty of Versailles, under which the International Labour Organisation had been established, for the purpose of interpreting that Treaty.[10] He also referred to an article on the question by Mr. Reuter in the *Journal du droit international.*[11]

15. He shared the view that preparatory work should be disregarded. In connexion with the *Interpretation of the Statute of the Memel Territory* (Preliminary Objection), the Permanent Court of International Justice had stated that " As regards the arguments based on the history of the text, the Court must first of all point out that, as it has constantly held, the preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear ".[12] With regard to the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, the Permanent Court had adhered to " the rule applied in its previous decisions that there is not occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text which is sufficiently clear in itself ".[13]

16. It was also necessary to take into account the methods used in drawing up multilateral treaties within international organizations. Apart from the exceptional case of the International Labour Conventions, where the authors of the text were not the same as the parties, owing to the participation of workers' and employers' delegates together with government delegates, such multilateral treaties were generally the work of a number of persons, including even international civil servants, and they were the subject of numerous compromises and arrangements. Furthermore, as the Yugoslav Government had pointed out, States which did not belong to the drafting committee, or acceded to the treaty later, did not know all the details of the treaty's preparation. There was also a danger of applying the historical element too rigidly to the situation at the time of the treaty's conclusion, whereas it was necessary to act cautiously, as the Permanent Court of International Justice had done in the *Diversion of water from the Meuse* case.[14]

17. Mr. REUTER said he would sum up the points on which statements by other members of the Commission had confirmed his opinion, or might perhaps lead him to modify it. He would not choose between the 1964 text and the new drafting until he had heard what the Special Rapporteur had to say.

18. One thing was certain : if the Commission adopted the new formula, it would be solely because it amounted to a very simple piece of advice, namely, to keep to the text for purposes of interpretation. If that was what the Commission wished—and he was assuming that it was—it should examine each provision of the article in that light.

19. That being so, he was absolutely convinced that the first sentence of article 69, paragraph 1 should not be worded " A treaty shall be interpreted . . . ". In practice, it was never the whole of a treaty that was interpreted; it was a legal rule. The passage should therefore read : " A rule enunciated in a treaty shall be interpreted " or " A provision of a treaty shall be interpreted . . . ". Unless that change was made, the Commission would have the greatest difficulty with the word " context " which it was constantly using, whereas up to the present it only intended to use the basic term " text " in paragraph 3, and even that was not certain.

20. It had also been said with reference to the first sentence that almost as much importance should be attached to the context as to the ordinary meaning of words, and that the context should be mentioned in the first sentence. He would have no objection; so far as he was concerned, interpretation meant the interpretation of a rule, and one worked down from the rule to the words and then up again from the rule to the other rules, in other words to the context.

21. Whatever solution was adopted, it was important to bear in mind that to speak of the " ordinary meaning " of the terms, or of words, in the context, implied that more than one ordinary meaning was possible : a meaning which did not take the context into account and another meaning which did. The Commission could therefore choose between saying " in accordance with the ordinary meaning of the words *and* in the context " or " in accordance with the ordinary meaning of the words in the context ". There was a slight difference between those two alternatives that affected paragraph 2, which had

[10] *P.C.I.J.*, Series B, No. 13, p. 14.

[11] *Journal du droit international*, 1953, pp. 13 *et seq.*

[12] *P.C.I.J.*, Series A/B, No. 47, p. 249.

[13] *P.C.I.J.*, Series B, No. 14, p. 28.

[14] *P.C.I.J., 1937*, Series A/B, No. 70, p. 21.

so much support. If it were suggested that there were meanings other than the ordinary meaning, it followed from what he had said that a meaning other than the ordinary meaning ascribed to a term in a provision would be ascribed to it because it corresponded to the context. When the Commission spoke of " the ordinary meaning in the context ", it was choosing between several ordinary meanings in the light of the context, so that paragraph 2 was perhaps no longer necessary. The Drafting Committee should examine that point very carefully.

22. With regard to sub-paragraph (*b*), he had reconsidered the view he had expressed at the previous meeting, namely, that that sub-paragraph should be placed at the end of the enumeration, after sub-paragraph (*d*). If the Commission accepted the idea that the whole of article 69 referred to the text of the treaty, the rules of international law mentioned in sub-paragraph (*b*) could only be the rules of international law to which the text itself referred. There might be cases in which other rules of international law would have to be taken into consideration; for example, if the examination of a rule stated in a treaty led to an interpretation which conflicted with an undertaking given by the parties in another rule, there was no doubt that it would be better to interpret the first rule in such a way that it did not conflict with the second; in other words, it must not be presumed that States were seeking to violate their undertakings. But such a case would come under article 70, which indicated the means to be used if the result was absurd or unreasonable. If sub-paragraph (*b*) was taken to refer to the rules of international law brought into operation by the application of the treaty, its proper place was immediately after sub-paragraph (*a*).

23. Furthermore, it would be better not to refer in sub-paragraph (*b*) to the rules of international law in force at the time of the treaty's conclusion. For instance, a treaty concluded by the United Kingdom in 1912 mentioned the territorial sea; that clearly involved the rules of international law concerning the territorial sea. In order to interpret that treaty in 1966, should reference be made to the territorial sea as defined in 1912 or as defined in 1966? That question had been much discussed in the course of legal proceedings. It was not easy to lay down a general rule on the subject. In some cases the parties had intended to refer to a fixed concept, which could only be that recognized at the time; but in other cases they had intended to refer to a variable concept, as defined at the time of application. It would be dangerous for the Commission to take sides on that question.

24. In sub-paragraph (*c*) it would be necessary to insert the word " subsequent " before the word " agreement ", since concomitant agreements were covered by paragraph 3.

25. Still proceeding on the assumption that the Commission would adopt the system which, in his view, justified the new wording of article 69, he noted that paragraph 3 of that article defined what the " context " of the treaty was understood to comprise. That paragraph should mention the " text " of the treaty itself, and then the annexes and any agreements which were separate but had been incorporated in the treaty or concluded at the same time.

26. Mr. EL-ERIAN said that as he had not taken part in the discussion on the articles concerning interpretation at the sixteenth session, he wished to comment on the problem as a whole, as well as on the new texts of articles 69 and 70 now before the Commission. He entirely agreed with the approach adopted in 1964 and paid a tribute to the Special Rapporteur's scholarly exposition of a controversial subject both in his third report[15] and in his careful analysis of the comments by governments in his sixth report (A/CN.4/186/Add.6). The 1964 commentary on articles 69 to 71 was lucid and clear. It did the Commission great credit to have formulated general legal principles and not merely guide lines for States; they would be of real value for the drafting and application of treaties.

27. A balance had been achieved in the 1964 texts when the Commission had pronounced itself in favour of the contextual approach in the broad sense, which meant interpretation in the light of the context of the treaty as well as its objects and purposes. Those were but two aspects of a single process. The primary sources for interpreting a treaty might have to be listed for purposes of logical presentation, but that did not justify the deduction of a hierarchical order. Interpretation was an intricate process for establishing the meaning of a text within the framework of the surrounding circumstances and in the light of rules of international law, so as to arrive at the most reasonable conclusions about the intention of the parties as to how the object of the treaty could best be attained.

28. He welcomed the distinction being made between primary and secondary means of interpretation. He had some difficulty with the words " further means " in the English text of article 70. The French version was " *moyens complémentaires* " and the Spanish " *otros medios* ". He would prefer the words " supplementary means ", which would be easier to translate into other languages.

29. The Commission had wisely decided to formulate rules that would be generally applicable to all treaties regardless of their nature instead of attempting to differentiate between law-making instruments and others.

30. Certain provisions in the draft articles concerning the conclusion of treaties might be regarded as a guide for governments, but it would be dangerous so to describe the rules of interpretation, for that might detract from their legal force. He was reminded of the differences of opinion about the relative legal force of the provisions of Chapter XI of the United Nations Charter (Declaration Regarding Non-Self-Governing Territories) compared with that of the provisions of other chapters. The Commission was therefore right in enumerating the principles of interpretation as legal rules and not as guide lines. The very fact that the enumeration in Article 36, paragraph 2, of the Statute of the International Court of Justice, concerning its jurisdiction, started with a sub-paragraph reading " the interpretation of a treaty " confirmed that the Commission was right.

31. In the 1964 text of article 69, paragraph 1 (*b*), (A/CN.4/L.107) the Commission had taken the inter-

[15] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 52 *et seq.*

temporal factor into account by inserting the words " in force at the time of its conclusion ". Now that it had decided not to deal with the impact of developments in customary law on the provisions of a treaty, it had to go back to the formula " the rules of international law ". The examples given in paragraph (11) of the 1964 commentary on article 69[16] showed that a rigid inter-temporal rule would be undesirable, since the scope and meaning of legal concepts used in treaties were subject to evolution and change. It was a question of investigating the intention of the parties. A distinction should be made between the use of a term as a definitive rule or as a legal concept the scope of which was changeable according to changes in the rules of international law. He was opposed to a rule of interpretation that would hamper progressive development by making it impossible to take account of such changes.

32. He agreed with the Special Rapporteur that the scope of sub-paragraph (*b*) of his new text should not be confined to rules of interpretation, but should also include substantive rules. On the other hand, he differed from the Special Rapporteur's view that the preamble of a treaty should be left out of the definition in paragraph 3. The preamble frequently formed an integral part of the text, particularly when it enunciated the objects and purposes of the treaty. A difference of opinion had arisen in the Sixth Committee of the General Assembly and in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, about the legal force of the principles enunciated in Article 2 of the Charter, those laid down in the Preamble and those in Article 1 relating to self-determination and respect for human rights. Committee I/1 of the San Francisco Conference had stated in its report that " It was very difficult, practically impossible, to draw a sharp and clear-cut distinction between what should be included under ' Purposes ', ' Principles ' or ' Preamble ' ";[17] the Committee had concluded that " the distinction between the three parts of the Charter under consideration is not particularly profound ".[18]

33. In order to maintain the distinction between primary and subsidiary means of interpretation, preparatory work should be dealt with in article 70. Such material should not be used at the outset of an inquiry into the meaning of a text, but it could be resorted to in order to confirm the meaning or elucidate it in case of ambiguity.

34. The rule to be adopted in regard to authentic versions of plurilingual treaties must not be too rigid. Some bilateral treaties were drawn up in two languages, each version being equally authentic, with a third version in yet another language. Allowance should also be made for the possibility that the original draft might have been prepared in one language only.

35. He supported the Special Rapporteur's suggestion that the 1964 text of article 71 should be incorporated in article 69, but it ought to be placed at the end of the article as paragraph 3. Paragraph 3 would then follow the present paragraph 1, thus linking up the two provisions and giving the appropriate prominence to the definition of the context of the treaty. The place for that definition was in article 69, not in article 1.

36. Mr. TSURUOKA said he wished to associate himself with the tribute paid to the Special Rapporteur for the work he had done on the articles concerning the interpretation of treaties. The ideas expressed in the new text of articles 69 and 70 would certainly be of practical utility; in the first place they would be of assistance to the parties, to ministries of foreign affairs and to other government departments responsible for applying treaties. To some extent, the rules would also ensure uniform interpretation and application by the parties, and they might perhaps reduce the risk of disputes over the application and interpretation of treaties. It would probably be going too far to claim that the rules would facilitate the settlement of disputes between the parties concerning interpretation, but they would certainly not make it any more difficult. In accordance with the general trend of opinion in the Commission, he therefore supported the inclusion of those ideas in the draft.

37. There were a few points which caused him concern, however. The Special Rapporteur had said that the rules were the expression of fundamental principles of international law accepted by almost all countries; moreover, Mr. El-Erian had pointed out that articles 69 and 70 would have binding legal force. But it would be essential to explain in a fairly detailed commentary exactly what that binding legal force meant and what were the consequences of the rules. After all, the freedom of international courts had to be safeguarded; he was particularly glad that judges would not be strictly bound by the two articles drafted by the Special Rapporteur.

38. The new text was an improvement on the old in several respects. It was more condensed, the ideas were better arranged, and it emphasized the exceptional character of paragraph 2 of article 69 as compared with paragraph 1. The omission of any express reference to the inter-temporal law was also an improvement. Lastly, the new text brought out more clearly the relationship between the ideas contained in paragraphs 1 and 3.

39. As to the question of the " ordinary meaning ", he shared the view expressed by several members: the terms of a treaty could not have any ordinary meaning independent of the text. The meaning to be given to the terms was the natural and ordinary meaning in the context, within the general structure of the treaty. That idea ought to be very clearly expressed at the outset.

40. The Commission would then enumerate a series of means to be used to determine the natural and ordinary meaning of the terms in the context of the treaty. The enumeration of those means did not imply any order of legal precedence; it merely met the intellectual need to proceed in a certain order. In his opinion, a treaty should be interpreted in good faith, according to the natural and ordinary meaning to be given to each term in the context of the treaty, in the light of (*a*) the text of the treaty; (*b*) the objects and purposes of the treaty; (*c*) the rules of international law; (*d*) any agreement concluded between the parties regarding interpretation; (*e*) " any subsequent practice . . . " etc. (sub-paragraph (*d*) of the new draft) and (*f*) the preparatory work.

[16] *Ibid.*, p. 202.

[17] *Documents of the United Nations Conference on International Organization*, vol. VI, p. 446.

[18] *Ibid.*, p. 447.

41. In other words, he would like the Special Rapporteur's two articles 69 and 70 to be combined in a single article. That would have the advantage of eliminating any order of legal precedence of the means of interpretation, and avoiding the risk of disputes as to whether the means provided for in the present article 69 were sufficient, or whether it was necessary to apply the " further " means referred to in article 70. The new single article would be entitled " Rule of interpretation ". It would leave the parties and international courts the greatest possible freedom to choose the combination of means to be employed.

42. Mr. TABIBI commended the Special Rapporteur for his contribution to the Commission's work on interpretation.

43. The Commission had already discussed the articles on interpretation at length in 1964,[19] and he would not dwell on points which he had raised then; but, in view of the complexity and difficulty of the subject, he would once again urge the Commission to refrain from laying down rigid rules that were likely to create problems rather than to solve them. The adoption of flexible rules would enable States to retain their present freedom of action.

44. It was generally recognized by the writers on the subject that there were three main elements involved in interpretation: the context of the treaty, its objects and purposes and the intention of the parties. It was essential that all three elements should be mentioned. Paragraph 1 of article 69 as reformulated by the Special Rapporteur referred only to the context and to the objects and purposes of the treaty; it made no mention of the intention of the parties, which was the most important factor involved.

45. Experience at the national level showed the extreme difficulty of laying down rules of interpretation. When drafting the Constitution of Afghanistan in 1964, the National Assembly had tried to include an article on the interpretation of the Constitution, but had failed to agree on a text.

46. He found paragraph 1 of the Special Rapporteur's new text of article 69 acceptable, provided that a reference to the intention of the parties was introduced; but he doubted whether the content of paragraph 2 could be regarded as a rule of law.

47. In paragraph 3, an element of weakness was introduced by the words " or has been made by some of them and assented to by the others ", referring to a related agreement. Instruments related to the treaty should be drawn up by all the parties and not merely by some of them. In many cases, the annexes to a treaty, such as the maps annexed to a boundary treaty, were more important than the text itself. Being part of the treaty, they should be drawn up in the same way as the text.

48. The CHAIRMAN, speaking as a member of the Commission, said that in his view the Commission had been right in not attempting to go into details and in confining itself to stating a few rules which could be considered the scientific basis of the art of interpretation. Since the purpose of interpretation was to determine the meaning and effect of the rules embodied in treaties, the Commission was proposing a general method for achieving that purpose, taking into account the nature of the interpretation and the nature of the instrument to be interpreted. The means enumerated were only various aspects of the same operation; they were arranged, not in any order of precedence, but in a practical order, which was self-evident in view of the circumstances.

49. The 1964 wording (A/CN.4/L.107) was preferable because of the way in which it introduced the context; the meaning of the terms should be determined " in the context ", not " in the light of the context ".

50. Although the word " text " did not appear in article 69, the rules set out gave precedence discreetly to the text of the treaty, which was right. It was better to refer to the text than to the intention or will of the parties as the source of the legal rule. For the rule was the expression of the will, and that expression was to be found in the text. Even if the will was clear, there could be no rule of written law without a text.

51. The reference to the rules of international law was indispensable, for just as a term could only be understood in a sentence, a sentence only in an article, and an article only in the treaty as a whole, it was impossible to understand the treaty except within the whole international legal order of which it formed a part, which it influenced and by which it was influenced. A treaty was an act of will; the parties had reached agreement, but their agreement was not *in vacuo*; it was situated in a legal order. In using certain terms, the parties had in mind concepts and meanings established by the legal order.

52. The omission of the word " general " before the words " international law " was justified, because a treaty concluded between several States should be interpreted in the light of the special international rules applying to those States, whether they were customary rules or rules of written law. It must be emphasized, however, that to be taken into consideration in interpreting the treaty, those rules, although not " general ", must be " common " to the parties to the treaty.

53. With regard to the inter-temporal law, it was obvious that the treaty, as an act of will, must be interpreted in the light of the international law in force at the time when it was concluded: it was necessary to ascertain what the will of the parties had been at a given moment. He was not opposed to the idea of evolution or dynamism of rules of law, but he recognized what belonged to interpretation and what belonged to modification. Rules could be changed by a subsequent agreement through various procedures. But the treaty had only one meaning: what the will of the parties had been at the time of its conclusion. In that connexion, he drew attention to the ingenious distinction which had been rightly drawn, by François Gény in particular, between the interpretation of rules, the purpose of which was to discover what existed, and free scientific research, which was concerned with the evolution or modification of rules of law and the creation of rules of law by other sources of the legal order. He was therefore in favour of retaining the words " in force at the time of its conclusion ", which had been included in paragraph 1 (*b*) of article 69 as adopted in 1964.

[19] *Yearbook of the International Law Commission, 1964*, vol. I, 765th and 766th meetings.

54. He had no objection to the proposal that the content of article 71 should become paragraph 2 of article 69.

55. He agreed with Mr. El-Erian that the proper place to define the context of the treaty was paragraph 3 of article 69, since the definition was given " for the purposes of its interpretation " and its scope was therefore very limited.

56. In conclusion, he too wished to pay a tribute to the Special Rapporteur for the clarity and subtlety he had shown in dealing with the articles on interpretation.

The meeting rose at 1.5 p.m.

872nd MEETING

Friday, 17 June 1966, at 11 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. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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]

ARTICLES 69-71 (Interpretation of treaties) *(continued)*[1]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 69.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would consider a number of detailed drafting suggestions made during the discussion. He would confine his own remarks at that stage to the observations of members on the main issues.

3. The first of those issues was the structure of articles 69 and 71. The discussion had shown that there was general support for the new arrangement in which the contents of the former paragraph 3 of article 69 were moved to paragraph 1 and those of article 71 were incorporated in article 69 as a new paragraph 2. On that last point, some members had reiterated the perfectly tenable view that any special meaning given by the parties to a term would be an ordinary meaning in the context of the treaty. According to that view, if the " ordinary meaning " was not divorced from the context of the treaty, there would be no need to include in article 69 a paragraph on special meanings of terms. However, he thought that that proposition was too subtle to be understood by many of those who would be likely to interpret treaties and that there was, therefore, a case for including the substance of article 71 in some form in article 69.

4. With regard to the greater problem of the formulation of paragraph 1 of article 69, he reminded the Commission that the new draft in his sixth report (A/CN.4/186/Add.6) was intended as an illustration of the result of accepting a number of government suggestions. The wording was accordingly based on the thesis that complete parity should be given to all the elements to be taken into account in the process of interpretation. The United States Government, in particular, in its anxiety to avoid any suggestion of hierarchy, had even challenged the primacy of the context of the treaty as being incompatible with the provision that a treaty must be interpreted in the light of any agreement between the parties on interpretation.

5. His own opinion was that the various other elements of interpretation, though possessing no less weight than the context in so far as they were relevant, could not be placed on an absolute parity with the context in a logical formulation of the general rule of interpretation. He agreed with those members who considered it inappropriate to speak of the interpretation of a treaty " in the light " of its context and would be prepared to place the words " in the context of the treaty " in the opening phrase. It could, however, be left to the Drafting Committee to decide whether those words should be included in the opening phrase or left at the beginning of subparagraph (*a*) in order to stress their strong connexion with the objects and purposes of the treaty. In either case, the words " in the context of the treaty " would immediately follow the reference to the " ordinary meaning " and precede the words " in the light of ".

6. It had been suggested that paragraph 1 (*c*) should be moved to a more prominent position in order to emphasize the importance of an agreement between the parties on the interpretation of the treaty. It should be remembered that an agreement of that type could be made either before or after the conclusion of the treaty. The language used in paragraph 3 (*a*) in 1964 (A/CN.4/L.107) had been intended to cover both situations.

7. There was a connexion between that problem and that of the relationship between paragraph 1 (*c*) and paragraph 3 on the definition of the context. He had included the reference to an instrument related to the treaty which had been made by some of the parties and assented to by the others in order to deal with a situation which not infrequently occurred in practice. There were cases in which instruments that were relevant for purposes of interpretation were not expressly agreed to be interpretative instruments, but formed part of the general transactions surrounding the treaty. The transaction at the San Francisco Conference relating to voting procedures in the Security Council was a case in point. The Drafting Committee would have to clarify the relationship between paragraph 1 (*c*) and paragraph 3. It might perhaps consider the possibility of confining the provisions of paragraph 1 (*c*) to agreements on interpretation entered into after the conclusion of the treaty.

[1] See 869th meeting, preceding para. 52.