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Summary record of the 874th meeting

Topic:
Law of Treaties

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He hoped that members would send in their corrections as early as possible.

54. The CHAIRMAN said that the officers of the Commission had considered a further question: the duration of the current session. On the basis of the information provided by the Secretariat, they had found that the Commission would not be able to conclude its session on 8 July and that it was difficult to say yet whether it would be able to do so on 15 July. The officers therefore proposed that the session should be provisionally extended until 15 July. It could then be decided, in the light of the progress made during the next two or three weeks, whether that date was final or whether any further extension was necessary.

55. After a discussion in which Mr. JIMÉNEZ de ARÉCHAGA, Mr. TUNKIN, Mr. AGO, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. AMADO, Mr. VERDROSS and Mr. ROSENNE took part, the CHAIRMAN proposed that, since it was uncertain whether the Commission could in fact complete its work by 15 July, it should decide to conclude its session on 19 July at the latest. He hoped that members of the Commission would try to make their statements shorter.

It was so agreed.

The meeting rose at 6.5 p.m.

874th MEETING

Tuesday, 21 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. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoack.

Law of Treaties

(A/CN.4/186 and Add.1-7; A/CN.4/L.107, L.115 and Corr.1)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 72 (Treaties drawn up in two or more languages)

ARTICLE 73 (Interpretation of treaties having two or more texts)

1. The CHAIRMAN invited the Commission to consider articles 72 and 73 (A/CN.4/L.107), for which the Special Rapporteur proposed a new combined text, reading:

Article 72 [29]

Interpretation of treaties drawn up in two or more languages

1. When the text of a treaty has been authenticated in accordance with the provisions of article 7 in two

or more languages, the text is authoritative in each language, unless the treaty otherwise provides.

2. A version of the treaty drawn up in a language other than one of those in which the text was authenticated shall also be considered as an authentic text and authoritative if the treaty so provides or the parties so agree.

3. Authentic texts are equally authoritative in each language unless the treaty provides that, in the event of divergence, a particular text shall prevail.

4. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 3, when a comparison of the texts discloses a difference in the expression of the treaty and any resulting ambiguity or obscurity is not removed by the application of article 69-70, a meaning which as far as possible reconciles the texts shall be adopted.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his sixth report (A/CN.4/186/Add.7), he had suggested that articles 72 and 73 should be combined into a single article of four paragraphs which preserved the substance of the two original articles.

3. There had been few government comments on articles 72 and 73. One of the questions raised had been whether the term "text" or "version" should be used. On that point, he referred the Commission to paragraphs 2-5 of his observations. The United States Government had pointed to the need to stress the unity of the treaty and he had taken that point into account in redrafting articles 72 and 73.

4. The reference in paragraph 2(b) of the former article 72 to "the established rules of an international organization" had been dropped in order to take into account the general provisions on the subject of international organizations adopted by the Commission in article 3 (*bis*) (A/CN.4/L.115).

5. Mr. VERDROSS said he approved of the new wording proposed by the Special Rapporteur. However, it might perhaps be necessary to add at the end of paragraph 4 a provision to the effect that, if it was impossible to find a meaning which reconciled the texts, the language to be considered should be that in which the treaty had been drawn up.

6. Mr. TSURUOKA said he accepted the whole of the article proposed by the Special Rapporteur. The reservation in the second sentence of paragraph 4 regarding the case mentioned in paragraph 3 was important, because that case was fairly common. For example, if Japan and Thailand concluded a treaty, it would normally be drafted in Japanese and in Thai; an English text might also be drawn up, however, and the treaty might stipulate that the three texts were equally authentic, but that in the event of a dispute over interpretation, the English text would prevail.

7. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's proposal combining articles 72 and 73. He was satisfied by the arguments for the use of the word "text" in preference to "version" given in paragraphs 3 and 4 of the Special Rapporteur's observations.

8. The emphasis placed on the equality of authentic texts raised the question whether comparison of authentic texts should be included among the elements of interpretation listed in article 69. The Special Rapporteur had dealt with that question in paragraph 23 of his observations on articles 69 to 71 (A/CN.4/186/Add.6) and had reached a negative conclusion. The point was, however, a new one which had not been fully discussed in 1964 and which should now be given careful consideration. His own position, which was based on doctrine, normal practice and principle, was that it was essential to refer to the comparison of authentic texts, or at least of those texts in which the treaty had been drawn up by the parties at the negotiating stage. It was aptly said in the comment on article 19 of the Harvard research draft that "the versions in all languages must be considered together".¹ In that same connexion, Rousseau had written:

"Dans le cas où un traité est rédigé en deux ou plusieurs langues, il est difficile *a priori* pour l'interprète de s'attacher à une version plutôt qu'à une autre."²

Lord McNair had pointed out that "when the treaty does not indicate which text is authentic or which in case of divergence should prevail, there is ample authority for the view that the two or more texts should help one another, so that it is permissible to interpret one text by reference to another."³

The following statement had been made by Kiss on the same subject:

"Lorsque des textes en plusieurs langues font également foi, il convient d'utiliser l'ensemble des textes pour déterminer le sens véritable du traité. Par conséquent, lorsqu'un des textes faisant foi est clair et que l'autre ne l'est pas, le sens de ce dernier doit être dégagé par l'interprétation du premier. Cependant, lorsqu'il y a divergence entre deux textes ayant tous les deux le même caractère officiel, il est impossible de tirer un argument définitif de leur comparaison."⁴

Speaking for the French delegation at the 355th meeting of the Sixth Committee, Mme Bastid had said:

"In international relations, States should in good faith rely on all the texts in order to determine the true meaning of a convention."⁵

In the American Law Institute's Restatement it was pointed out that the factors to be considered included "comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritativeness of the different texts."⁶ The comment went on to say:

"If an international agreement is concluded in two or more languages, each of which is equally authentic,

ambiguities in the text in one language may be clarified by reference to a more precise formulation in another language."⁷

9. A good illustration of the situation he had in mind was provided by the Commission's own discussion on article 44 at its 842nd meeting, when the Special Rapporteur had said that the French-speaking members of the Drafting Committee were probably more satisfied with the French version than the English-speaking members with the English.⁸

10. It was of interest to note that, at the San Francisco Conference, the Advisory Committee of Jurists had expressed the view that "the Charter must be signed as an entity, including all five texts", and had pointed to the fact that Article 111 "makes each text an integral part of the Charter".⁹ That view ran counter to some of the arguments put forward in paragraph 23 of the Special Rapporteur's observations (A/CN.4/186/Add.6).

11. A good practitioner would almost automatically compare the different language versions before commencing any process of interpretation. In view of that practice, which was familiar to all members of the Commission, it would be misleading to place the comparison of different language texts in a secondary position in article 73.

12. It could be argued that the expression "A treaty" in article 69, paragraph 1, necessarily implied all the language versions taken as a unit. It was preferable, however, not to leave that point to be decided by interpretation and to discourage any tendency to base the interpretation of a treaty on a single language version only; such a tendency would seriously impair the basic concept of the treaty as a single unit.

13. The difficulties encountered by the Drafting Committee in formulating the Commission's own draft articles provided the best illustration of the practical need for comparison of the different language versions of a multilingual instrument. He therefore endorsed Mr. Pessou's remarks at the 766th meeting regarding the difficulty, and in some cases the impossibility, of finding equivalent words in different languages and he was unable to agree with the reply given by the Chairman that the matter would be dealt with in another article.¹⁰

14. The expression "lack of concordance" used in article 26, paragraph 3 (A/CN.4/L.115) also implied a process of comparison.

15. Lastly, the reasons given by the Special Rapporteur in paragraph 22 of his observations for transferring the contents of article 71 to article 69 (A/CN.4/186/Add.6) were equally applicable to the present discussion, because the arrangement now proposed for articles 72 and 73 failed to make clear the extent to which preparatory work could be employed in the interpretation of a multilingual instrument.

¹ *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935, p. 971.

² Rousseau, *Principes généraux du droit international public*, vol. I (1944), p. 721.

³ McNair, *The Law of Treaties* (1961), p. 433.

⁴ A. C. Kiss, *Répertoire de la pratique française en matière de droit international public*, vol. I, p. 465.

⁵ *Official Records of the General Assembly, Seventh Session, Sixth Committee, 355th meeting, paragraph 15.*

⁶ American Law Institute, *Restatement of the Law, Second: Foreign Relations Law of the United States* (1965), §147, p. 451.

⁷ *Ibid.*, p. 454.

⁸ *Yearbook of the International Law Commission, 1966*, vol. I, part I, 842nd meeting, para. 41.

⁹ *Documents of the United Nations Conference on International Organization*, vol. XVII, p. 452, cited in the Secretariat memorandum "Preparation of Multilingual treaties" (A/CN.4/187, para. 5).

¹⁰ *Yearbook of International Law Commission, 1964*, vol. I, p. 287, paras. 59 and 60.

16. He therefore concluded that article 69 would be deficient if it made no reference to the comparison of texts as a means of interpretation. Articles 72 and 73 as combined by the Special Rapporteur were adequate for the matters with which they were concerned, but it was essential to introduce into article 69 a reference to the comparison of different authentic texts as one of the means available to the interpreter of multilingual treaties.
17. Mr. CASTRÉN said that on the whole he supported the new text submitted by the Special Rapporteur. He thought, however, that it might be advisable to supplement the proviso in paragraph 1 by adding the words "or the parties have otherwise agreed" after the words "otherwise provides"; since a double proviso—relating both to the provisions of the treaty and to the agreement of the parties—appeared in paragraph 2, a similar one could be included in paragraph 1.
18. Moreover, in paragraph 2, it would be sufficient to say that a version drawn up in a language other than one of those in which the text had been authenticated would also be considered an authentic text if the treaty so provided or the parties so agreed; the words "and authoritative" could be deleted.
19. Lastly, in the French text of paragraph 4, the words "*autant que possible*" should be placed after the word "*concilier*"; that order would be closer to the original English text.
20. Mr. AGO said he found the new text submitted by the Special Rapporteur acceptable so far as the substance was concerned, but thought that it could be simplified and clarified.
21. For instance, paragraph 3 was not really necessary; the particular case contemplated in that paragraph was adequately covered by the proviso "unless the treaty otherwise provides" in paragraph 1.
22. Mr. Verdross' comment on paragraph 4 was justified; but if reference was made to the preparatory work and to the circumstances of the conclusion of the treaty in accordance with article 70, it would inevitably be found that the treaty had originally been drawn up in a particular language and that fact was bound to be taken into account. That was quite sufficient; the Commission should not go so far as to place a premium on the version drafted in a language which might have been used for purely fortuitous reasons.
23. Paragraph 2 dealt with a separate question and should therefore be transferred to the end of the article. In addition, the positive form in which that paragraph had been drafted was not very felicitous; it would be better to use the customary form: "A version . . . shall not be considered as an authentic text unless the treaty otherwise provides or the parties have otherwise agreed".
24. Mr. BRIGGS said that the Special Rapporteur's observations on articles 72 and 73 were an eloquent defence of the incorrect practice of States in referring to different "texts" instead of to different language "versions" of a treaty. He hoped that the Commission would not encourage that practice.
25. He approved of the Special Rapporteur's proposal for the combination of articles 72 and 73, as that change was a drafting improvement.
26. He had been impressed by Mr. Ago's argument that paragraph 1 contained by implication the substance of paragraph 3. In order to make the position clear, the word "equally" might be inserted between the words "the text is" and the words "authoritative in each language". Paragraph 3 could then be eliminated as redundant.
27. He further suggested that in the text of paragraph 2 proposed by the Special Rapporteur, the words "be considered as an authentic text and authoritative" should be replaced by the words "be considered as authentic and authoritative". Alternatively, the phrase could be amended to read "be considered an authentic part of the text and authoritative".
28. He questioned the need for paragraph 4 of the Special Rapporteur's new text. The statement in the first sentence that "The terms of the treaty are presumed to have the same meaning in each authentic text" was already implicit in the provisions of paragraph 1 and that fact would be even clearer if the word "equally" was inserted before the word "authentic" in paragraph 1, as he had just proposed.
29. With regard to paragraph 2, he doubted whether a version of the treaty could be placed on a basis of complete equality with the authentic text and urged that the question should be re-examined.
30. Sir Humphrey WALDOCK, Special Rapporteur, said he could not accept the last suggestion made by Mr. Briggs. The Commission could not adopt any provision that would disregard the express will of the parties. If a treaty specifically laid down that a version drawn up in a language other than those in which the text had been authenticated would also be considered as an authentic text, the intention of the parties must prevail on that point. The case envisaged in paragraph 2, moreover, reflected a common practice, which should be taken into account.
31. Consideration could be given to the suggestion by Mr. Ago that paragraph 2 should be stated in negative terms. The basic proposition would, however, remain unchanged.
32. He was prepared to agree that, subject to a modification of paragraph 1, paragraph 3 should be dropped as redundant. He had taken its provisions from paragraph 1 of the former article 73, where they had served as a link between paragraph 2 of that article and article 72.
33. The point made by Mr. Verdross had been considered by the Commission in 1964, but the conclusion had been reached that it was not acceptable to go any further than was done in article 73. It was inadvisable to try to lay down a general rule providing an automatic solution for the case in which two or more authentic texts could not be reconciled. If, after resort to all the means of interpretation set out in article 69 and the further means set out in article 70, it was found impossible to determine the meaning of a treaty provision, then, according to paragraph 4 of the new article 72, an attempt must be made to find a meaning which as far as possible reconciled the various authentic texts. Beyond that it was inadvisable to go, and if no reconciliation of the texts was possible, the interpretation should be left to be determined in the light of all the circumstances. It was

impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail, for the defects of that text might be the source of the difficulty.

34. Consequently, although he appreciated the point raised by Mr. Verdross, he did not feel able to accept his suggestion. The question of comparison of the authentic texts in the various languages was covered by the provisions of articles 69 and 70, particularly those on preparatory work and on the circumstances of the conclusion of the treaty.

35. With regard to the larger question raised by Mr. Rosenne, he was reluctant to introduce into article 69 a reference to the comparison of texts as one of the principal means of interpreting a treaty. While it was true that the interpreter normally undertook such a comparison, it would be going too far to give that process the status of a criterion for the determination of an interpretation according to law. To erect comparison into one of the means of legal interpretation set out in article 69 would imply that it was no longer possible to rely on a single text as an expression of the will of the parties until a difficulty arose and that it was necessary to consult all the authentic texts for that purpose; such a procedure would have a number of drawbacks and would, in particular, involve practical difficulties for the legal advisers of the newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.

36. In conclusion, he proposed that articles 72 and 73 should be referred to the Drafting Committee for consideration in the light of the discussion; that Committee would take into account the drafting suggestions which had been made and to which he had not referred in detail.

37. Mr. VERDROSS said that if the Commission did not accept his proposal, anyone reading the second sentence of paragraph 4 would wonder what would happen if it was not possible to adopt a meaning which reconciled the texts. While agreeing with Mr. Rosenne and Mr. Ago that the language in which the treaty had been drawn up would be taken into account in application of the rule laid down in article 70, he proposed, in order to overcome the difficulty, that the words "as far as possible" should be deleted.

38. Mr. CASTRÉN observed that if the words "*autant que possible*" were placed after the word "*concilier*" in the French text, as he had proposed in his first statement, the difficulty referred to by Mr. Verdross would be greatly reduced.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would examine the problems arising from the use of the words "as far as possible".

40. Mr. EL-ERIAN said he agreed with the Special Rapporteur's proposal that articles 72 and 73 should be combined.

41. For the reasons given by the Special Rapporteur, he preferred the term "text" to "version". The former term was that used in the Charter and in the conventions adopted by diplomatic conferences on the basis of the Commission's drafts. Moreover, he was convinced that its use did not detract from the unity of the treaty.

42. He agreed with the Special Rapporteur that it would be going too far to treat comparison of the authentic texts in different languages as a general rule of interpretation. Much depended on the circumstances of each individual case. The texts in the various languages could be examined as part of the preparatory work and, in case of ambiguity, it would be possible, under the provisions of paragraph 4 as proposed by the Special Rapporteur, to attempt to remove the ambiguity by reconciling the various texts.

43. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer articles 72 and 73 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

*It was so decided.*¹¹

44. The CHAIRMAN said that having learned that Mr. Lachs had been detained in Warsaw by illness, he had requested the Secretariat to send him a letter expressing the Commission's best wishes for his quick recovery.

The meeting rose at 12 noon.

¹¹ For resumption of the discussion of the combined article, see 884th meeting, paras. 42-49.

875th MEETING

Wednesday, 22 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. Ruda, 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]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

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

ARTICLE 63 (Application of successive treaties relating to the same subject-matter) [26]¹

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 63 should be revised to read:

¹ For earlier discussion, see 857th meeting, paras. 1-95, and 858th meeting, paras. 1-35.