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Summary record of the 872nd meeting

Topic:
Law of Treaties

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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.

8. With regard to paragraph 1 (*b*), his own view was that its provisions should follow closely on those relating to the context of the treaty. The legal order formed the framework within which both the context and the terms of the treaty had to be understood.

9. It was his impression that the Commission was generally disinclined to deal with the problem of inter-temporal law in the draft articles. It was a matter of interpretation to determine the precise meaning of a term of international law used in a treaty or of a treaty provision which clearly involved the application of international law. The question whether the terms used were intended to have a fixed content or to change in meaning with the evolution of the law could be decided only by interpreting the intention of the parties. The matter was, strictly speaking, not one of inter-temporal law; the evolution of the law affected the application of the agreement, but not its meaning. That approach was, however, probably too subtle for the purpose of drafting a convention.

10. The text adopted in 1964 appeared to exclude the possibility of enlargement of the legal content of a treaty through the evolution of international law. At the same time, any attempt to give a more complete account of the position would present very great difficulties. In the circumstances, his own reluctant conclusion was that the attempt to solve that problem should be abandoned and that the Commission should confine the text of paragraph 1 (*b*) to a limited reference to " rules of international law ". He could not agree to the insertion of the word " customary " before the words " international law ", because that would make the reference too restrictive, or to the re-introduction of the word " general ", which had appeared in the 1964 text, but which he did not consider appropriate.

11. He had been impressed by Mr. Reuter's remarks about the context. Though all the elements in paragraph 1 were perhaps related to the context, he believed the Commission should endeavour to express the notion of the context in a way that would be commonly understood. He therefore suggested that the Drafting Committee should maintain the definition of the context in the new paragraph 3, but should try to improve its wording. Despite the attractions of the suggestion made by the Government of Israel (A/CN.4/186/Add.6) that a definition of the term " context " should be included in article 1, he believed that that definition was particularly well placed in article 69, because it was intended for a specific purpose. The definition might perhaps affect other articles of the draft, but only through interpretation.

12. The majority of members also appeared to wish to keep article 70 separate from article 69. The reference to preparatory work would thus remain in article 70.

13. In conclusion, he suggested that articles 69 and 71 should be referred to the Drafting Committee for consideration in the light of the discussion.

14. Mr. AMADO asked the Special Rapporteur to give his views on the question, raised by some members, of the preamble and annexes to a treaty.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that, as would be seen from paragraph 16 of his observations (A/CN.4/186/Add.6) he had had no intention of suggesting that the preamble and annexes of a treaty should be excluded from the definition of its context. In the definition in the new paragraph 3 of article 69, the words " including the preamble and annexes " had been dropped only because they embodied a self-evident statement, included in the 1964 text *ex abundanti cautela*. Those words could certainly be reinstated in paragraph 3.

16. Mr. ROSENNE said that, in his view, the opening words of paragraph 1 : " A treaty shall be interpreted . . . " were too strong. Throughout the draft articles, that kind of language was employed in the statement of imperative rules. In view of the Special Rapporteur's statement in paragraph 1 of his observations that the Commission had been " fully conscious in 1964 of the undesirability —if not impossibility—of confining the process of interpretation within rigid rules " the Drafting Committee should consider the possibility of using a less categorical formulation.

17. On the other hand, the Drafting Committee should consider making the new paragraph 3 of article 69 more categorical by replacing the words " shall be understood as comprising " by the words " shall comprise ". At the 769th meeting, the Special Rapporteur had accepted a suggestion to that effect,[2] but the matter had subsequently been overlooked.

18. He had no objection to article 69 being referred to the Drafting Committee, but he had strong reservations concerning the Special Rapporteur's observations on the question of preparatory work, a subject to which he would revert when article 70 came under consideration. He also wished to speak at a later stage on the question of the comparison of the various authentic versions of a multilingual treaty.

19. The CHAIRMAN, speaking as a member of the Commission, said that the opening words of paragraph 1 did not mean that interpretation was obligatory, but that if a treaty was interpreted, it must be done in good faith; the obligation to act in good faith should certainly be imposed.

20. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the Chairman's remarks on the question of good faith; but in English the " shall " form was used in statute law to denote imperative rules. The point raised by Mr. Rosenne could perhaps be met by means of a form of words such as " a treaty is to be interpreted . . . "

21. Mr. ROSENNE said he fully shared the Chairman's views on the question of good faith. But he still considered that the expression " shall be interpreted " was too strong in so far as it applied to the words " in accordance with the ordinary meaning ". The point was essentially one of drafting and could be left to the Drafting Committee.

22. Mr. EL-ERIAN suggested that it would be desirable not to refer article 69 to the Drafting Committee until the Commission had completed its consideration of article 70.

23. Sir Humphrey WALDOCK, Special Rapporteur, said there should be no difficulty in referring article 69

[2] *Yearbook of the International Law Commission, 1964*, vol. I, p. 313, paras. 45 and 46.

to the Drafting Committee, because that Committee would in any case only consider it in conjunction with article 70.

24. The CHAIRMAN invited the Commission to vote on the Special Rapporteur's proposal that article 69 should be referred to the Drafting Committee for consideration in the light of the discussion. That proposal also covered article 71, the contents of which had been incorporated in the new version of article 69.

The proposal was adopted by 14 votes to none, with 2 abstentions.[3]

25. Mr. TSURUOKA said that he had voted in favour of referring article 69 to the Drafting Committee on the understanding that the Commission could reconsider articles 69 and 70 together at a later stage.

26. The CHAIRMAN agreed that the articles concerning interpretation must be treated as a whole. He asked the Special Rapporteur whether he wished to make any introductory remarks before the Commission began its discussion of article 70 (A/CN.4/L.107).

27. Sir Humphrey WALDOCK, Special Rapporteur, said he had little to add to the introductory remarks he had made on articles 69-71 at the 869th meeting.[4] In the light of the prolonged discussion in 1964[5] and the agreement which had then been reached, he had felt that the general structure of article 70 should be maintained unless some very powerful arguments to the contrary emerged from the government comments. Those comments had not revealed any strong weight of opinion against the 1964 arrangement of the article, so he had made no new proposals on the matter.

28. Mr. TSURUOKA said that there was a certain lack of cohesion and logical sequence in articles 69 and 70. If an interpretation had been made in conformity with the provisions of article 69, that was to say in the light of the objects and purposes of the treaty, it was difficult to see how it could lead to a result which was " manifestly absurd or unreasonable in the light of the objects and purposes of the treaty ". Consequently, he still thought that, as he had suggested at the previous meeting, the two articles should be combined so as to make it clear that the preparatory work was one of the means that could be used to ascertain the natural and ordinary meaning of the terms in the context of, or within the general structure of, the treaty.

29. Mr. ROSENNE said that, on the question of the preparatory work, he adhered to the position of principle he had outlined at the 766th meeting.[6] He also maintained the reservation on article 71 which he had made at the 770th meeting, a reservation which the Special Rapporteur had rightly pointed out applied more to article 70 than to article 71.[7]

30. It was appropriate to approach the question of the preparatory work from the point of view of the Commission's own articles. Many of the draft articles on the law of treaties seemed to him to require some examination of the preparatory work for a given treaty if they were to be properly applied. Examples were articles 4 and 11, in which the expression " it appears from the circumstances " was used, and article 12, in which the same expression was used in one sub-paragraph and the phrase " was expressed during the negotiations " in another. The preparatory work might be relevant in the case of articles 31, 33, 34, 34 (*bis*) and 35; its examination was essential in the case of article 32. Article 39 was probably predicated on what had occurred during the negotiations phase—a point which was clearer in the 1963 version of the article (A/CN.4/L.107).

31. The preparatory work might also be relevant in the case of articles 39 (*bis*) and 41 (A/CN.4/L.115). He failed to see how the provisions of articles 44 and 46 (A/CN.4/L.115) could operate without reference to the preparatory work. Indeed, those provisions seemed to require more than an examination of the preparatory work since the reference to what constituted " an essential basis of the consent of the parties " in article 44, and to the consent of even one of the parties in article 46, might necessitate the investigation of highly subjective factors influencing the State's consent to be bound by a treaty.

32. All the articles he had just mentioned had been adopted in their existing form at the second reading, after the Commission's adoption in 1964 of article 70 with its reference to the circumstances of the conclusion of a treaty as a further means of interpretation. In his view, the Commission's own articles completely contradicted the thought underlying the subtle differentiation between articles 69 and 70.

33. He believed that the average practitioner would look at the preparatory work as a matter of routine. It might well be true, as Mr. Bartoš had pointed out at the 766th meeting,[8] that the examination could prove quite inconclusive; for example, the discussions on the question of flags of convenience at the United Nations Conference on the Law of the Sea, held at Geneva in 1958,[9] were certainly anything but helpful for interpreting the provisions of the Convention on the High Seas.[10] However, that was not sufficient reason for moving the preparatory work from its normal position among the material which the interpreter should have at his disposal from the outset.

34. With regard to multilateral treaties, his own experience suggested that States subsequently acceding to a treaty did not show any hesitation in making use of the preparatory work done at a conference in which they had not participated. Outstanding examples were to be found in some recent proceedings in the International Court of Justice relating to the interpretation of Article 36 (5) and Article 37 of its Statute, as revised at the San Francisco Conference; in one case both parties, and in another one party, had not been present at the Conference, but that fact had not prevented extensive reliance on the preparatory work both in the pleadings of the parties and in the judgment of the Court. The question should probably be solved in the light of the

[3] For resumption of discussion, see 883rd meeting, paras. 90-102, and 884th meeting, paras. 1-31.

[4] Paras. 53-59 and 67-69.

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

[6] *Ibid.*, vol. I, p. 283, para. 17.

[7] *Ibid.*, p. 317, paras. 38 and 39.

[8] *Ibid.*, p. 287, para. 57.

[9] United Nations Conference on the Law of the Sea, *Official Records*, vol. IV, general debate and pp. 61-67.

[10] *Op. cit.*, vol. II, p. 135.

particular circumstances of each case, so that it would not be opportune to lay down a general rule in the matter. He stressed, however, that he was referring to published and available preparatory work and not to other material not made available before the State concerned became a party to the treaty. Confidential material of that type would give rise to the question whether it could be invoked against third States.

35. The question also arose what constituted preparatory work. The Commission had been wise not to enter into that question, the answer to which depended on the circumstances of each case. He doubted whether the records of the Commission itself could properly be regarded as preparatory work for the conventions concluded by States on the basis of the drafts it had prepared. He had two reasons for such doubt: the first was that the Commission's drafts were rather remote from diplomatic conferences and the second that the members of the Commission did not represent States, but acted in their personal capacities. The records of the Commission were important for an understanding of the development of its collective thought as expressed in its reports, but States might well have a different understanding when they came to adopt any particular article. He had wished to make that general reservation, because it was sometimes said that the Commission's proceedings had the status of preparatory work. In so doing, however, he did not wish to prejudge in any way the status those proceedings might have in a concrete situation.

36. In conclusion, he stressed that the preparatory work ought to be available to the interpreter without the artificial limitations placed upon its use by article 70. Further, he believed that article 70 should not be retained as a separate article.

37. Mr. VERDROSS said he thought that, generally speaking, the Commission should not, at the second reading, alter articles approved at the first reading unless serious objections had been raised by governments.

38. He could agree to the rules on interpretation being split into two separate articles despite the fact that, in practice, interpretation by reference to the context and by reference to the preparatory work was often combined. However, recourse should only be had to the preparatory work in order to verify the result obtained by interpretation of the text or to elucidate the meaning of a provision that was not entirely clear. A text could only be corrected in the light of the preparatory work in the case contemplated in article 70, sub-paragraph (*b*). He doubted whether it would be possible to improve the wording of that article any further.

39. Mr. CASTRÉN said he agreed with the Special Rapporteur that the wording of article 70 should not be changed, although it had been criticized by some governments. The present text was well balanced, for it allowed recourse to further means of interpretation under certain conditions that had been aptly defined. There seemed to be good reason to refer to the preparatory work, but it should not be given too much weight. In short, article 70 should remain as it stood and be kept separate from article 69.

40. Mr. TABIBI said he was strongly in favour of maintaining article 70 as a separate article, because the " further " means of interpretation were vitally important for establishing the meaning of the text and the intention of the parties if the means listed in article 69 proved insufficient.

41. Mr. JIMÉNEZ de ARÉCHAGA said that the basic and the complementary means of interpretation should be dealt with in separate articles. As to the preparatory work, it was not always easy to draw the line between confirming a view previously reached and forming a view, but that depended on the inner mental processes of the interpreter. However, the distinction was necessary and would reinforce the Commission's 1964 thesis that the terms of a treaty might possess an objective meaning of their own which was independent of the psychological intention of the authors.

42. Mr. Rosenne had called attention to a possible difficulty, namely, that the fairly strict formulation of article 70 might lead to the inference that the preparatory work of a treaty could not be used to establish terms or provisions implied in a treaty. The Drafting Committee should be asked to review the relationship between the new text of article 70 and the articles mentioned by Mr. Rosenne, so as to decide whether a safeguarding clause was needed to obviate misunderstanding.

Mr. Briggs, First Vice-Chairman, took the Chair.

43. Mr. TUNKIN said that article 70 should certainly constitute a separate article; little would be gained by dealing with primary and secondary means of interpretation in a single provision. The distinction between the two categories was of great importance. The revised arrangement of articles 69 and 70 suggested by the Special Rapporteur was sound, and essential for the general requirements of a codification of treaty law. It brought out the important fact that the primary means of interpretation were those on which there was agreement between the parties.

44. The further means of interpretation dealt with in article 70 were not authentic means of interpretation because they did not reflect an established agreement between the parties, but they could, and often did, throw light on the origin or nature of ambiguities in the text. If the meaning of the text could not be established by the processes set out in paragraph 69, the further means of interpretation could be of use.

45. Mr. de LUNA said that the words " in the light of the objects and purposes of the treaty " in sub-paragraph (*b*) were unnecessary and should be dropped, as the point was already covered in article 69. Though it was preferable to set out the Commission's rules of interpretation in two separate articles, they must nevertheless be applied together.

46. Mr. REUTER said he accepted the Special Rapporteur's text for the same reasons as Mr. Tunkin.

47. There was, however, a point of drafting, which perhaps also affected the substance: he wondered whether the word " means " used in the title and in the text of article 70, was the most appropriate, or whether a more general term, such as " elements ", would be preferable. In any case, it was difficult to regard the circumstances of the conclusion of a treaty as a " means " of interpretation.

48. Furthermore, there were means of interpretation other than examination of the preparatory work and the circumstances of the conclusion of a treaty, so that the article was perhaps a little too reticent. At the previous meeting he had mentioned, by way of example, the possibility that a provision of a treaty interpreted in accordance with article 69 might lead to the conclusion that the parties had violated international law.[11] Would such an interpretation be " unreasonable " and accordingly fall under article 70, sub-paragraph (*b*)? In other words did the Commission consider that a treaty should be understood as not engaging the international responsibility of the parties?

49. Mr. AGO said that, on the whole, he was very much in favour of article 70 and hoped it would be kept as a separate article.

50. The word " means " had the merit of being in fairly common use where interpretation was concerned and the word " including " made it clear that recourse could be had to means other than the preparatory work or the circumstances of the conclusion of a treaty, though it probably would be wiser not to mention them expressly. As had already been pointed out, interpretation was an art and it was obvious that a variety of means might be found useful in a specific case. In its draft articles, however, the Commission had sought to single out the means most often used, and he knew of no others that could be be placed on the same footing as the preparatory work and the circumstances of the conclusion of a treaty. As it was, the preparatory work did not appear among the primary means in the draft, and if additional means were listed, that might detract from its importance, which would be undesirable.

51. He supported Mr. de Luna's proposal that the words " in the light of the objects and purposes of the treaty " should be deleted from sub-paragraph (*b*), as the point was already covered in article 69. Moreover, the result obtained might be " absurd or unreasonable " in itself, quite apart from the teleological aspect of the matter.

52. Mr. BARTOŠ said that he was far from being a fanatical partisan of preparatory work as a means of interpretation and had doubts about its legal value, but he recognized that it must be taken into account and sometimes even given a primary role. There were cases, particularly of bilateral treaties, in which the preparatory work brought to light what was sought by interpretation, for it provided an objective expression of the subjective element of the parties' intention. Hence, he might perhaps be among those who were averse to separating the means of interpretation set out in article 70 from article 69. In any case, the preparatory work must be taken into account, but without giving it too much importance.

53. Other elements more directly linked with the context, the meaning and even the purpose of the treaty should also be taken into account for interpretation: there were non-legal and political factors that explained and clarified a treaty. As François Gény had shown, words should not be construed solely in the light of legal, logical and linguistic data, but also by reference to psychological data. Certain dangers, threats and aspirations might compel the use or avoidance of certain words. For example, treaties concluded during the Second World War between the coalition of States fighting the Nazis contained many optimistic and idealistic terms, because at the time the ideas could not have been expressed differently. At a conference held in London in March-April 1946, some of those texts had been taken as a basis for arrangements for the repatriation of displaced persons, and although their validity had not been disputed, it had been necessary to interpret the obligations laid down in them in a more realistic manner. In seeking the meaning of terms, the time at which the text had been drawn up and the atmosphere in which the treaty had been concluded must always be taken into account.

54. A tendency to modify or to depart from the original meaning was inherent in any process of interpretation, unless, on the contrary, it was an effort to preserve that meaning and resist departures from it.

55. The Commission could not achieve perfection, but must lay down rules which took account of what was possible. The content of article 70 was necessary and should be retained, but it could not be entirely divorced from article 69. The art of interpretation consisted sometimes in combining the two means of interpretation referred to in those articles and sometimes in separating them.

The meeting rose at 12.45 p.m.

873rd MEETING

Monday, 20 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. Rosenne, Mr. Tabibi, 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]

ARTICLE 70 (Further means of interpretation) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 70 (A/CN.4/L.107) which could, of course, be discussed in conjunction with article 69, referred to the Drafting Committee at the previous meeting.

2. Mr. BRIGGS said that although the majority of the Commission appeared to be in favour of keeping article 70

[11] Para. 22.

[1] For text see 869th meeting, preceding para. 52.