

plishment of the object or the purpose of the treaty. He favoured its retention in the present form”¹³⁷

(Note : The Sub- Committee on draft articles 39 to 75, appointed by the Committee, stated in its report that Article 57 was acceptable to it in the form drafted by the I.L.C.)

Article 58

“As regards the permanent destruction of an object under Article 58 (the Delegate of Ceylon) had some doubt as to whether the object contemplated was limited to the destruction of some material object and he wanted clarification in this regard”¹³⁸

“(The Delegate of Iraq) stated that he favoured (its) retention in the present form.”¹³⁹

“As regards Article 58, (the Delegate of Pakistan) was in favour of a formulation which would safeguard against situations in which destruction of the object is brought about by the act of the party itself.”¹⁴⁰

“Dr. M.K. Yasseen (I.L.C.). pointed out that “object” has been used in Article 58, in the material sense and referred to the examples given in the commentary by the International Law Commission.”¹⁴¹

(Note : The Sub-Committee on draft articles 39 to 75, appointed by the Committee, stated in its report that Article 58 was acceptable to it in the form drafted by the I.L.C.)

137. Ibid., p. 2, para 3.

138. Ibid., p. 2, para 3.

139. Ibid., p. 5, para 7.

140. Ibid., p. 6, para 9.

141. Ibid., p. 8, para 11.

“With regard to articles 58 and 59, the Delegate of Pakistan reiterated his earlier comments”¹⁴²

Article 59

“With regard to Article 59, (the Delegate of Ceylon) was of the view that the criteria indicated under clauses (a) and (b) of paragraph 1 were sufficiently indicative of the situations in which a fundamental change of circumstances may be invoked as a ground for terminating the treaty.”¹⁴³

“Commenting on the Article 59, (the Delegate of Iraq) stated all jurists admit the existence in International Law of the principle with which that article was concerned, and which is commonly known as the doctrine of *Rebus Sic Stantibus*, and that many systems of municipal laws recognise that principle quite apart from any actual impossibility of performance.(He) stated that he favoured (its) retention in the present form.”¹⁴⁴

“As regard Article 58, (the Delegate of Pakistan) was in favour of a formulation which would safeguard against situations in which destruction the object is brought about by the act of the party itself. He wanted a similar safeguard in Article 59, since a change in the fundamental circumstances could be brought about by the voluntary act of the party.”¹⁴⁵

“As regards Article 59, (the Delegate of U.A.R.) was not happy about the provision of paragraph 2 clause (a), in

142. Minutes of the 10th Meeting, held on 28th December, 1967, p. 2, para 8.

143. Minutes of the 6th Meeting, held on 23rd December, 1967, p. 2, para 3.

144. Ibid., p. 5, para 7.

145. Ibid., p. 6, para 9.

as much as boundaries in Asian and African countries had been fixed against their wishes. He therefore suggested a cautious approach in respect of the said rule.”¹⁴⁶

(Note : The Sub-Committee on draft articles 39 to 75, appointed by the Committee, stated in its report that Article 59 was acceptable to it in the form drafted by the I.L.C.)

“With regard to Articles 58 and 59, the Delegate of Pakistan reiterated his earlier comments.”¹⁴⁷

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

“One delegation was of the view that these articles (Articles 58 and 59) should be so formulated as to provide a safeguard against situations in which the destruction of the object or a change in the fundamental circumstances is brought about by the voluntary act of the party itself.”)

Article 60

“The Delegate of the U.A.R. was of the opinion that Article 60 should contain a provision relating to the suspension of diplomatic relations and suggested that first phrase of this article should read as follows :—

“The severance or suspension of diplomatic relations between parties to a treaty shall not affect the legal relations established between them by the treaty.”¹⁴⁸

(Note : The Sub-Committee on draft articles 39 to 75, appointed by the Committee, stated in its report :

146. *Ibid.*, p. 7, para 10.

147. Minutes of the 10th Meeting, held on 28th December, 1967, p. 2, para 8.

148. Minutes of the 6th Meeting, held on 23rd December, 1967, p. 7, para 10.

“The Sub-Committee agreed on adding the words “or suspension” after the word “severance”. The proposal had originally been made in the meeting of the main Committee on December 26, 1967.”)

“ All the Delegates with the exception of Ghana wanted the addition of the words “suspension or” before the word “severance” in Article 60.”¹⁴⁹

(Note : The Committee, in its comments annexed to its Interim Report on the Law of Treaties, stated :

“The majority in the Committee is in favour of the addition of the words “suspension or” before the word “severance”. A minority of one is of the opinion that the addition of these words is superfluous.”)

Article 65

(Note : The Sub-Committee on draft articles 39 to 75, appointed by the Committee, stated in its report :

“The Sub-Committee puts it for consideration by the main Committee whether the term “with respect to” contained in Article 65 (3) should be replaced by the term “in favour of” so as to make it absolutely clear that a party whose fraud, coercive or corrupt act has been the cause of the nullity of the treaty, cannot invoke Article 65 (3). This point is made clear in the commentary, but it is for consideration whether Article 65 (3) itself adequately reflects this understanding.”)

“ Article 65 was found acceptable to all the delegates.”¹⁵⁰

149. Minutes of the 10th Meeting, held on 28th December, 1967, p. 2, para 8.

150. *Ibid.*, p. 2, para 8.

Article 69

"The Delegate of Ceylon.suggested that consideration of Article 69 may be deferred, since the matter is being separately considered by the International Law Commission."¹⁵¹

".As regards Article 69, (the Delegate of Iraq) suggested exclusion of the question of succession of States and State responsibility from the field of law of treaties, because these could be treated separately."¹⁵²

(Note : The Sub-Committee on draft articles 39 to 75, appointed by the Committee, stated in its report that article 69 was acceptable to it in the form drafted by the I.L.C.)

Article 70

"The Delegate of Ceylon.favoured retention of Article 70 in its present form."¹⁵³

"The Delegate of Japan.said that he was not clear regarding the meaning of the provisions of Article 70."¹⁵⁴

(Note : The Sub-Committee on draft articles 39 to 76 appointed by the Committee, stated in its report that Article 70 was acceptable to it in the form drafted by the I.L.C.)

151. Minutes of the 6th Meeting, held on 23rd December, 1967, p. 2, para 3.

152. Ibid., p. 5, para 7.

153. Ibid., p. 2, para 3.

154. Ibid., p. 6, para. 8.

(VII) REPORTS OF THE THREE SUB-COMMITTEES APPOINTED AT THE NINTH SESSION, NEW DELHI.

REPORT OF THE SUB-COMMITTEE ON
ARTICLES 1 TO 22 OF THE I.L.C.'S DRAFT
ARTICLES ON THE LAW OF TREATIES

INTRODUCTION

The Sub-Committee has endeavoured to reach, as far as possible, unanimous conclusions and has concentrated only on substantive matters and not on subsidiary or secondary matters pertaining to drafting or minor changes. The question of Article 2(f) and (g) in relation to Article 22(a), for example, is considered by the Sub-Committee to be a question essentially pertaining to drafting and not to any important question of principle. Therefore, this Report deals only with an examination of Articles 5, 6(1)(b), 7, 10, 11 and 15 of the I.L.C.'s text.

(1) *Article 5*

The Sub-Committee is of opinion that Article 5 should be retained. Prof. Sultan (UAR) has suggested the replacement of paragraph 2 by the following draft :

“In case of union between States, the capacity of member States to conclude treaties will be subject to the respective constitutional provisions and limitations of that Union.”

The proposed amended text is intended to cover all kinds of Unions of States. The other members of the Sub-Committee consider that this proposal merits the serious consideration of the Committee.

(2) *Article 6(1)(b) read with Article 7*

The Sub-Committee is of opinion that the present text of Article 6(1) (b) may be retained on the understanding that

it is designed to solve certain practical difficulties which may arise under certain circumstances.

As to Article 7, the Sub-Committee is of opinion that there is no objection to the present text provided that it is amended in such a way as to include a provision to the effect that confirmation should be made within a reasonable time. This is suggested with a view to reducing the possibility of abuse.

(3) *Articles 10 and 11*

The Sub-Committee examined Articles 10 and 11 together and reached the conclusion that it might be preferable to state first the general rule that States are bound by treaties on ratification and that the exception is that they would be bound by treaties upon signature only if they so expressly state in the treaty. The Sub-Committee is also of the opinion that the drafting of these two Articles should cover all the cases without leaving any lacuna or creating any doubt. For these reasons, the Sub-Committee would like to modify the two Articles so as to read as follows :

“*Article 10* (this corresponds to Article 11 of the I.L.C.’s text)

Consent to be bound by a treaty expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when :

- (a) The treaty provides for such consent to be expressed by means of ratification;
- (b) Such consent is not expressed by signature alone as provided in Article 11;
- (c) The representative of the State in question has signed the treaty subject to ratification; or

(d) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 11 (this corresponds to Article 10 of the I.L.C.’s text)

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

- (a) The treaty provides that signature shall have that effect;
- (b) The intention of the State in question to give that effect to the signature appears from the full powers of its representative.

2. For the purposes of paragraph 1 :

- (a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
- (b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

The representative of Japan is of the opinion that Article 11 mentioned above should read as follows :

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

- (a) The treaty provides that signature shall have that effect;
- (b) It is otherwise established that the negotiating States were agreed that signature should have that effect;
- (c) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1 :

- (a) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
- (b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

(4) Article 15

The Sub-Committee is of opinion that this Article should be deleted. The State should not become bound by a treaty which has not yet come into force. If, however, the Committee takes the view that this Article should be retained, the Sub-Committee would suggest that the first sentence should be modified so as to read as follows :

“A State should refrain from acts tending to frustrate the object of a proposed treaty when” ; etc.

(5) Participation in general multilateral treaties

The majority of the members of the Sub-Committee (Ceylon, India and U.A.R.) considers that the right of every

State to participate in general multilateral treaties is of vital importance to the progressive development of international law. General multilateral treaties concern the international community as a whole. If international law is to be in keeping with the real interest of the international community and if universal acceptance of the progressive development of this legal order is desirable, then the participation of every member of the community in the process and procedure of law-making is essential.

The minority (Japan) holds that in view of the principle of freedom of contract and the existing practice of the international conferences held under the auspices of the United Nations and the possible complications that it may imply, it would be better that the draft articles be silent on this point.

Sd/- K. Nishimura
Chairman

Sd/- D.S. Wijewardene
Member

Sd/- Seiyid Muhammed
Member

Sd/- Hamed Sultan
Member

REPORT OF THE SUB-COMMITTEE ON ARTICLES 23 TO 38 OF THE I.L.C.'S DRAFT ARTICLES ON THE LAW OF TREATIES

The Sub-Committee, appointed at the Fifth Meeting of the Committee held on the 22nd December 1967, consisting of Mr. H.L. de Silva (Ceylon) Chairman, Prof. Harnam Singh (India) and Mr. A. Watanabe (Japan), to consider Articles 23 to 38, held meetings on the 22nd and 23rd December. In the light of the Committee's discussions and within the time available to it, the Sub-Committee decided to deal with three major problems, namely, (a) the formulation of the general rules of interpretation of treaties, (b) treaties and the rights and obligations of third States, and (c) successive treaties and the amendment and modification of treaties.

The formulation of general rules of interpretation of treaties

2. The Sub-Committee acknowledged the fact that there was a cleavage of opinion in regard to how the question of the interpretation of treaties should be approached. There was on the one hand those who considered the task of interpretation to be the elucidation of the text of a treaty and on the other those who held the view that the discovery of the true intention of the parties to be the paramount function of interpretation. While it is basic to the whole process of interpretation that the goal should be the ascertainment of the true intention of the parties, the Sub-Committee concluded that the primary emphasis should be placed on the intention as evidenced by the text, that is to say, the actual terms of the treaty and that it would not be either necessary or desirable to state specifically in Article 27 that the object of interpretation was the discovery of the intention of the parties. This

was manifest from the formulation of the general rule in clause 1 which was a succinct statement of the essential rule. By the further elaboration of what was meant by the expression "the context" in clause 2 and by the indication of additional sources of interpretation in clauses 3 and 4, the International Law Commission draft has taken full account of the paramountcy of the element of intention. The Sub-Committee, therefore, feels (subject to the reservation made by the Indian delegate alone which is discussed in the following paragraph) that the draft rules of interpretation are quite adequate to the ascertainment of intention and are a coherent body of rules, emphasising the unitary character of the interpretative process.

3. Although the representative of India suggested the assimilation of Article 28 to Article 27 as a new sub-clause (d) to clause 3 of Article 27, the majority felt that the distinction contemplated in the two Articles should be maintained. They felt that a formulation of the rule which did not stress sufficiently the primacy of the text in relation to extrinsic sources of interpretation would tend to considerable uncertainty and that there should be no room for recourse to preparatory material if the textual reading established a clear meaning in accordance with the rules specified in Article 28. While we appreciate that no rigid distinction is possible and that a nexus exists between the several sources, we are unable to accord preparatory material a parity of status with the primary criteria mentioned in Article 27 and think that the two Articles should be separate and distinct.

Treaties and the rights and obligations of third States

4. In regard to the question of rights conferred on third States, the Sub-Committee is of the view that, as in the case of obligations, the express consent of such third State should be a condition precedent to their creation. Whatever may be the true position in regard to stipulations for the benefit

of a third party in systems of municipal law, in international relations the express consent of such third State should, in our opinion, be required even in the case of the conferment of rights, consistently with the principle of the sovereign equality of all States.

5. The Sub-Committee also felt that such a requirement would also reduce any uncertainty in regard to the question whether a third State has assented to the conferment of the right. In our view the insistence on consent by the third State or States would in the case of multilateral treaties tend to the effective participation of all States in treaties of a law-making character. The Sub-Committee also felt that if express consent of the third State was stipulated as a requirement, it would help to reduce the danger of the creation of rights which carry with them contingent obligations to which such third State may well be deemed to have assented by its silence. Accordingly the Sub-Committee recommends the amendment of article 32 by the deletion of all the words commencing: "and the States assents thereto" to the end of paragraph 1 and the substitution therefor of the words: "and the State has expressly consented thereto". The Sub-Committee also recommends the amendment of article 30 by the interpolation of the word "express" before the word "consent".

Successive treaties and the amendment and modification of treaties

6. Provisions applicable to the amendment or revision of treaties and the conclusion of later treaties relating to the same subject matter were necessarily inevitable when circumstances changed requiring appropriate variations in the text of a treaty. If it was intended that the subsequent change in relation to the same subject matter was in substitution of the earlier agreement or was so far incompatible with the earlier version that the two were incapable of being applied together

the former treaty was effectively terminated or suspended according to Article 56.

7. But if the divergence or variation from the original version in relation to the same subject matter was not deemed by the parties to be inconsistent or was expressly made subject to such earlier treaty the two treaties are regarded as successively co-existing. In relation to such successive treaties relating to the same subject matter Article 26 distinguished between (a) cases where there was complete identity of parties in regard to the successive treaties—(clause 3) and (b) cases where all the parties to the earlier treaty were not parties to the later treaty—(clause 4). In regard to the case in (a) there was in effect a *pro tanto* amendment of the first treaty. In regard to case (b) Article 26 envisaged three separate positions: (i) as between States which were parties to both the earlier and the later treaty, only such parts of the earlier treaty as were compatible with the later only were saved; (ii) as between a State which was a party to both the earlier and the later treaty and a State which was party only to the earlier treaty, the earlier treaty prevailed; and (iii) as between a State which was party to both treaties and a State party only to the later treaty, obligations *inter se* were governed by the later treaty. The Sub-Committee respectfully agrees with the rules so formulated and recommends their endorsement by the Committee.

8. The Sub-Committee also considered Article 26 in relation to Article 37. It was noted that while Article 26 postulated the continued existence of separate treaties covering the same subject-matter, clause 4 of Article 26 formulating the rules leading to the novation of treaty obligations by subsequent treaties, Article 37 did not postulate the independent existence of a separate treaty, as distinct from the earlier treaty but notionally at least considered the new agreement to modify the treaty as being the same treaty, albeit in a modified form.