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duction to the question as a whole: it did not relate to bilateral agreements alone. It might be that the Drafting Committee could find a solution. He was doubtful, however, whether the Ceylonese amendment added anything useful to the text.

70. Article 36 was complicated and should be read in conjunction with the provisions of article 37. Although he had no objection to the rule set forth in paragraph 2 of article 36, if a rule on that point had to be included in the convention, he queried whether it was really desirable, for it might be difficult to identify the parties to a long-established treaty in view of the uncertainties surrounding the law of State succession.

71. With regard to the question raised by the representative of Singapore concerning paragraph 3 of article 36, he was looking forward with interest to the Expert Consultant's reply.

72. The residual rule in paragraph 5 of article 36, which his delegation accepted in principle, might give rise to difficulties, for in practice mistakes did occur. Moreover, if a State which had to enact internal legislation to give effect to a treaty within its territory found itself in the situation referred to in paragraph 5, it would have to provide for two classes of States in its implementing legislation.

73. Nevertheless, he was not opposed to that rule, in so far as it was cast as a double residual rule. It would, in fact, apply only in the absence of a contrary intention expressed either in the treaty, or by the party itself.

74. He saw no need for the French amendment, because the parties to a restricted multilateral treaty would inevitably stipulate expressly that the treaty could be amended only by the unanimous consent of the parties. In any event, he was opposed to the subdivision of multilateral treaties into categories.

75. He would be interested to hear the comments of the Expert Consultant on the amendment proposed by the Netherlands.

76. His delegation was not opposed to article 36, but the article undoubtedly represented the progressive development of international law and might give rise to some practical difficulties.

77. Mr. KEARNEY (United States of America) agreed that the amendment of a treaty should, if tantamount to a new treaty, result from a written agreement. In that respect, the expression " any procedure " in the amendment by Ceylon was too vague, since it could imply that a treaty could be modified by an oral amendment. He would like to know the Expert Consultant's views on that point.

78. The question of the written form also arose with article 36, particularly in connexion with the notification as provided in paragraph 2. The Drafting Committee should clarify the position, because the written form clearly seemed to be the rule, at least for multilateral treaties.

79. Moreover, paragraph 5 of article 36 did not seem to cover the case where the parties had decided that their amendment to the treaty must be accepted by any State becoming a party to it. The United States delegation did not think that a provision of that kind was prohibited by article 36, as worded, but it wished to know the Expert Consultant's opinion on the matter.

The meeting rose at 1 p.m.

THIRTY-SEVENTH MEETING

Wednesday, 24 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 35 (General rule regarding the amendment of treaties) and

Article 36 (Amendment of multilateral treaties) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of articles 35 and 36 of the International Law Commission's draft.[1]

2. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that the Commission had rejected the kind of language used in the amendment by Ceylon (A/CONF.39/C.1/L.153) in order that respect for amending procedures provided for in the treaty might not be endangered. Treaties often contained procedures for amendment and, in accordance with the principle *pacta sunt servanda*, those procedures should be observed unless there was unanimous agreement between the parties to disregard them.

3. Both parts of the second sentence in article 35 were important, and laid down that the rules in Part II applied. The same conditions for the adoption of amendments to a treaty as those provided in article 8 obtained, in other words a two-thirds majority was required. In that way, a small group of States could not frustrate the amendment of multilateral treaties.

4. He would not vote for the amendment by Ceylon. The purpose of the Chilean amendment (A/CONF.39/C.1/L.235) was to cover bilateral treaties, but that was already done in the Commission's draft, so that the amendment was unnecessary. The guarantees sought in the Chilean proposal were provided by the reference to Part II. In Part II, article 8, paragraph 1 laid down the general rule that the adoption of an amending treaty took place by unanimous consent, subject to the provisions of paragraph 2 of that article. If the Chilean proposal were adopted, there would be no general rule for multilateral treaty amendments not adopted at international conferences.

5. Some mention had been made of practical difficulties to which article 36 might give rise, but they could be overcome by resort to *inter se* agreements, as provided in article 37.

6. Mr. ARIFF (Malaysia) said that the amendment by Ceylon covered the situation when a treaty provided

[1] For the list of the amendments to articles 35 and 36, see 36th meeting, footnote 5.

for its own amendment and the parties agreed on a procedure of their own choice. For example, it could be by means of an exchange of notes. The words " by agreement between the parties " should certainly be kept, as well as the second sentence in the International Law Commission's draft.

7. Mr. DE LA GUARDIA (Argentina) said he supported the text submitted by the Commission. The amendments by Ceylon and Chile were unduly restrictive, and distorted the sense of the article.

8. Mr. SAMRUATRUAMPHOL (Thailand) said he was in favour of the Commission's draft for articles 35 and 36. The Chilean amendment appeared to be unnecessary, but that submitted by Ceylon deserved examination.

9. Mr. RIPHAGEN (Netherlands) said that the purpose of the Netherlands amendment to article 36 (A/CONF. 39/C.1/L.232) was to enlarge the circle of States entitled to participate in the negotiations relating to the modification of a multilateral treaty. Often such treaties did not enter into force until many years after the adoption of the text owing to the large number of ratifications required for its entry into force. In the meantime, all the States which had expressed their consent to be bound should have the right to take part in the amending process. The text as submitted by the Commission limited the faculty to take part in the amending process to the parties, but until the treaty entered into force, there were no parties. The phrase proposed by his delegation " contracting States " would cover all States which had expressed their consent to be bound.

10. Mr. MARESCA (Italy) said that although the proposition contained in the Chilean amendment (A/CONF.39/C.1/L.235) might seem self-evident, it was nevertheless desirable to include it. The renewal of treaty law was an essential aspect of international law.

11. The presumption contained in paragraph 5(*a*) of article 36 seemed to him to go too far.

12. The French amendment (A/CONF.39/C.1/L.45) could go to the Drafting Committee. He was not convinced that there was any practical need to introduce the notion of restricted multilateral treaties, and feared that such an addition would make for rigidity and complicate the process of amendment.

13. Mr. BARROS (Chile) said that the title of article 35 made it clear that bilateral treaties were covered as well as multilateral treaties. He agreed with the Uruguayan representative that the Chilean amendment was already implicit in the Commission's draft but he still thought it preferable to insert an express rule on the point.

14. Sir Humphrey WALDOCK (Expert Consultant) said that the Uruguayan representative had exactly described what had been the International Law Commission's intention. There could be no shadow of doubt that the rule for which the Chilean representative was contending was already contained in the Commission's draft of article 35.

15. The Australian representative had asked why the Commission had left out the reference, which had previously appeared in the article, to agreements " in written form ". It had recognized that in some cases treaties, especially those in simplified form, were varied by informal procedures and even by oral agreement of ministers, so that an express reference to agreement in written form might give the impression that amendment by oral agreement was excluded as a matter of course. The Commission had not accepted the principle of an " *acte contraire* " and considered that amendment by oral agreements would be covered by the general reservation in article 3.

16. The Netherlands amendment to paragraph 2 of article 36 was designed to cover cases when there was a considerable interval between signature and entry into force. In that event a text might be found to be unsatisfactory, so that it would be desirable to amend it, in order to attract the ratifications necessary to bring it into force, but he did not think that the Netherlands amendment offered quite the right solution for such cases. The States which needed to be consulted in such cases were surely the negotiating States rather than the contracting States. What the Commission had tried to do had been to find the right balance between attributing a reasonable freedom to the parties to amend a treaty and protecting the rights that States must be considered to have in the text of a treaty which they had drawn up and adopted. If the treaty was not yet in force and amendment became necessary, that would clearly have to be done by the States which had taken part in drawing up the text, and the Commission had thought it sufficient to leave the matter to diplomatic action. The Commission's draft had dealt rather with cases when the treaty was already in force. The Netherlands amendment might fill a gap, but for reasons a little different from those advanced in its support. It would help to cover the not uncommon case of a State which had established its consent to be bound but for which the treaty would not come into force until after the expiry of a short interval of time.

17. With regard to a point made by the representative of Singapore at the previous meeting concerning paragraph 3, it would be going too far to exclude from the right to become parties to an amending agreement States which, under the final clauses, had a right to participate in the treaty. It was the interests of the negotiating States which the Commission had sought to protect. The rule formulated in paragraph 3 also covered any State entitled to become a party under the final clauses and in that respect was perhaps too wide, but it could only be restricted by confining it to the negotiating States.

18. The presumption contained in paragraph 5 had been fairly fully explained in the commentary. The Commission had been informed that, in United Nations practice, States often gave no indication of their intentions when depositing an instrument of ratification, the reason often being that they had not given the matter any thought. Where no clear statement of intention existed, a presumption would be made *de lege ferenda* of their intention to become a party to the amended version of the treaty. The kind of treaties most often in need of amendment were technical ones to which States were hardly likely to wish to become parties when the text had already been overtaken by events and undergone amendment.

19. Mr. BARROS (Chile) said that the discussion had shown that in substance his amendment (A/CONF.39/

C.1/L.235) was perhaps unnecessary. He was thinking in particular of the statement by the Expert Consultant that there could be no shadow of doubt that the rule for which Chile was contending in its amendment was already contained in article 35. The record of that statement could prove very valuable if some day it were desired to ascertain the history of article 35 and the scope of its application with regard to the revision of bilateral treaties. On that understanding, he would withdraw the Chilean amendment.

20. Mr. PINTO (Ceylon) said that his amendment (A/CONF.39/C.1/L.153) was purely of a drafting character and he would withdraw it.

21. The CHAIRMAN said that, since both the Chilean and the Ceylonese amendments had been withdrawn, article 35 could now be referred to the Drafting Committee.

It was so agreed.[2]

22. The CHAIRMAN suggested that since the amendments to article 36 by France (A/CONF.39/C.1/L.45) and the Netherlands (A/CONF.39/C.1/L.232) were both of a drafting character, they could be referred to the Drafting Committee.

23. Mr. WERSHOF (Canada) said that the French amendment raised a controversial issue of substance, and was certainly not a mere drafting matter. He understood that at a later stage all the French amendments on the question of restricted multilateral treaties would come up for decision. In the meantime, the final decision on article 36 might perhaps be deferred.

24. The CHAIRMAN said it had been agreed that in due course the Commission should consider the French amendment on restricted multilateral treaties.

25. Mr. VEROSTA (Austria) said that, for reasons of internal constitutional law, his delegation must reserve its position with respect to the interpretation of subsequent treaties. He agreed with the Expert Consultant that suitable latitude should be allowed as to the form which amendments to treaties might take; it could even be oral.

26. He hoped, in due course, to learn what the difference was between amendment and modification of treaties; both terms were used in the title of Part IV.

27. The CHAIRMAN suggested that, on the understanding he had mentioned, article 36 should be referred to the Drafting Committee.

It was so agreed.[3]

Article 37 (Agreements to modify multilateral treaties between certain of the parties only)

28. The CHAIRMAN invited the Committee to consider article 37 and the amendments thereto.[4]

29. Mr. DE BRESSON (France), introducing his amendment to article 37 (A/CONF.39/C.1/L.46), said that its purpose was similar to that of earlier amendments submitted by France to other articles of the draft: to take into account the special case of restricted multilateral treaties.

30. Article 37 specified the conditions under which a multilateral treaty could be modified between certain of the parties only. A provision of that type could have no application to a restricted multilateral treaty as the French delegation conceived such a treaty. For that reason, his delegation proposed the insertion, at the beginning of paragraph 1, of the proviso " Except in the case of a restricted multilateral treaty ".

31. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.237), said that, when the Committee had considered article 17, it had approved, subject to drafting, the provisions of paragraph 2 of that article to the effect that, in certain circumstances, a reservation required the acceptance of all the parties to the treaty. The purpose of his amendment (A/CONF.39/C.1/L.237) was to specify the requirement of the agreement of all the parties to the treaty if, in the same circumstances, some of the parties wished to modify the treaty between themselves only. There was a clear analogy between the two cases envisaged in paragraph 2 of article 17 and in article 37 respectively.

32. Mr. ŽOUREK (Czechoslovakia) said that article 37, which dealt with an extremely complex problem, was generally acceptable. His delegation had, however, submitted a drafting amendment (A/CONF.39/C.1/L.238) to add, at the end of paragraph 1(*b*) (iii), the words " or by another rule of international law." The purpose of that amendment was to clarify the meaning of the sub-paragraph. The word " treaty " as used in article 37 clearly meant the multilateral treaty in question and *inter se* agreements might well be prohibited, not by that treaty but by some other treaty, or by a rule of general international law. A case in point was Article 20 of the Covenant of the League of Nations which had prohibited for the future the conclusion of any treaty inconsistent with the terms of the Covenant. The position would be similar in the case of an *inter se* agreement which violated a general norm of international law, such as a rule of international criminal law.

33. Mr. BOLINTINEANU (Romania), introducing the joint amendment (A/CONF.39/C.1/L.240), said that there was an error in the French original: the concluding words of the opening phrase of sub-paragraph (*b*) should read " *à condition que celle-ci* ".

34. The purpose of the joint amendment, which was purely one of drafting and presentation, was to give first place to the requirement that the *inter se* modification must not be prohibited by the treaty; if the treaty prohibited such an *inter se* agreement, there was no occasion to examine the application of the other two requirements set forth in sub-paragraphs 1(*b*) (i) and 1(*b*) (ii). It was only where no such prohibition existed in the treaty that the parties concerned would have to consider whether the *inter se* agreement could be concluded without affecting the other parties to the treaty, and without frustrating the object and purpose of the treaty. The proposed presentation set forth those three

[2] For resumption of the discussion on article 35, see 78th meeting.

[3] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to " restricted multilateral treaties " until the second session of the Conference. Further consideration of article 36 was therefore postponed.

[4] The following amendments had been submitted: France, A/CONF.39/C.1/L.46; Australia, A/CONF.39/C.1/L.237; Czechoslovakia, A/CONF.39/C.1/L.238; Bulgaria, Romania and Syria, A/CONF.39/C.1/L.240.

requirements in a more logical order than the present text of paragraph 1(*b*), and had the further merit of underlining the primacy of the text of the treaty. Paragraph (2) of the commentary drew attention to the fact that all three requirements of paragraph 1(*b*) of article 37 must be fulfilled: " These conditions are not alternative, but cumulative ". That being so, the order in which they were set down in paragraph 1(*b*) did not affect the substance of the whole provision. The effect of the text with or without the joint amendment (A/CONF.39/C.1/L.240) would be the same; the amendment should therefore be referred to the Drafting Committee.

35. Mr. DE BRESSON (France) said he was afraid that the complex provisions of article 37 might in practice conflict with those of article 36, paragraph 2. There was a danger that parties wishing to amend a multilateral treaty might use an *inter se* agreement under article 37 in order to bypass the procedural requirements of article 36. He had also considerable doubts regarding the usefulness of article 37, since the case it envisaged would appear to be already covered by article 26. Furthermore, the concept of an *inter se* modification could prove in practice to be detrimental to the security of international treaty relations.

36. He would like to hear the views of the Expert Consultant on those points before deciding on the position of his delegation.

37. Mr. STREZOV (Bulgaria) said that the arrangement adopted in the joint amendment (A/CONF.39/C.1/L.240) of which his delegation was one of the sponsors was more logical than that of the present text. Paragraph 1(*a*) and the opening phrase of paragraph 1(*b*) would state the two outside limits, by providing respectively for the case in which *inter se* agreements were expressly allowed and that in which they were prohibited by the treaty. Sub-paragraphs 1(*b*) (i) and 1(*b*) (ii) would then define the conditions which the agreement must fulfil.

38. He hoped the Drafting Committee would give the joint amendment careful consideration.

39. Mr. SINCLAIR (United Kingdom) said that real problems could arise from the joint application of articles 36 and 37. An operation which began as an attempt to amend the treaty for all the parties could easily end as a modification between some of them *inter se*. On the other hand, an *inter se* modification agreed upon as between some of the parties only might appeal to the others and lead ultimately to the amendment of the treaty for all the parties to it. He would be grateful if the Expert Consultant would explain how to draw the distinction between " amendment " and " modification " in cases of that kind.

40. Again, in cases which began under article 36 but ended under article 37, he feared that the provisions of paragraph 1(*b*) of article 37 might well prove much too rigid. In treaty revision, flexibility was essential, particularly where long-established treaties were concerned. There had been cases where an attempt had been made to assemble all the parties to a multilateral treaty, but without success; if a revision operation of that type came under article 37, the conditions laid down in paragraph 1(*b*) might prove to be unduly strict.

41. With regard to the amendments, his delegation had already stated its position on the French proposal relating to " restricted " multilateral treaties. He would reserve his position on the Australian amendment (A/CONF.39/C.1/L.237) until the final text of article 17, paragraph 2, emerged from the Drafting Committee.

42. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that article 37 served a very useful purpose by dealing with a situation which was not uncommon in practice. Regional arrangements, for which the United Nations Charter itself made specific provision in articles 52 to 54, were an important example of *inter se* agreements to vary, as between some of the parties, the provisions of the main treaty. Frequently a number of States bound by close historic and other ties would be able, in their *inter se* relations, to go further than the other parties in the direction of progress marked by the main treaty.

43. *Inter se* agreements were often the result of a process for amending a treaty set in motion under article 36. They also provided a necessary safety-valve for cases in which, for one reason or another, a useful step forward could not be immediately approved by a few of the original parties. In technical conventions, such as those on air navigation or postal relations, the *inter se* procedure had become a necessity of everyday international life and to prohibit such agreements, or render them unnecessarily difficult, would give to a single party a right of veto in matters where there was a genuine need to keep abreast of developments.

44. Another reason for retaining article 37 was that its deletion would do away with the safeguards embodied in sub-paragraphs 1(*b*) (i) and 1(*b*) (ii). The provisions of article 26 as they stood would not fill that gap. Paragraph 5 of article 26 began with the words " Paragraph 4 is without prejudice to article 37 ", thereby establishing a close link between the provisions of the two articles. If therefore article 37 were to be deleted, the substance of its provisions would have to be reintroduced in article 26.

45. Mr. VEROSTA (Austria) said that, in article 35, his delegation had been able to accept the term " agreement " in a broad sense. But in article 37 the position was different, particularly in view of the words used in paragraph 1 " may conclude an agreement to modify ": an agreement which was said to be " concluded " could not be anything but a formal treaty. He would be grateful to the Expert Consultant for an explanation on that point, and also on the distinction between " amendment " as used in articles 35 and 36, and " modification " as used in article 37.

46. With regard to the joint amendment (A/CONF.39/C.1/L.240), he would suggest that the concluding words of the opening phrase " provided that the modification " be replaced by the single word " and "; that change would make the meaning clearer.

47. Mr. SØRENSEN (Denmark) said he strongly supported the International Law Commission's formulation of article 37 for the reasons already given by the representative of Uruguay. For the same reasons, he opposed the amendment by Australia (A/CONF.39/C.1/L.237), which would place an additional restriction on the conclusion of *inter se* agreements by introducing a reference to treaties of the type envisaged in article 17. His country was particularly concerned to avoid any

such limitations being imposed on the *inter se* modification of agreements between a limited number of States of the type referred to in paragraph 2 of article 17. The analogy drawn by the representative of Australia between a reservation and an *inter se* modification was more apparent than real. At the time of the conclusion of a multilateral treaty, it might be justifiable to exclude reservations but, as time passed, the need for *inter se* modifications could well become apparent.

48. His country had considerable experience of agreements between a limited number of States, and it had not been at all uncommon for a treaty of that type to require *inter se* modification. A treaty on the status of citizens of one of the States parties in the territory of another was often found, with the passage of time, to require changes in order to bring its provisions up to date. The procedure for revision would then be embarked upon in the manner indicated in article 36, but it would be found that one or two of the parties were not yet ready to make the desired modification because they had not kept quite abreast of the new developments. In cases of that type, there was no reason to exclude an *inter se* agreement which brought the system up to date between the States concerned, provided the rights of the other original parties were not violated. The provisions of paragraph 1(*b*) of article 37 afforded ample safeguards in that respect, and the further restrictions suggested in the Australian proposal were unnecessary.

49. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had used the term " agreement " advisedly in article 37 so as to avoid any confusion with the term " the treaty " which, in the context, referred to the particular multilateral treaty that it was proposed to modify in the relations between some of its parties only.

50. Similarly, the Commission had found it convenient to reserve the use of the term " amendment " for cases where there was an intention to amend the treaty for all its parties as in article 36. The term " modification " had been used in article 37 for the case where a small circle of States wished to vary the provisions of the initial instrument in the relations between themselves; the case was not one of a full amendment of the treaty from the point of view of the intention of the parties, or even in law. It would be ultimately for the Drafting Committee and the Committee of the Whole to decide on those questions of terminology.

51. The International Law Commission had considered at length the problem of the relationship between article 26 and articles 36 and 37. The Commission's approach had been aptly described by the representatives of Uruguay and Denmark. With regard to the point raised by the representative of France, he said that article 26 dealt with the application of two successive treaties which came into conflict; the second treaty did not purport to be an amendment of the first, but rather a separate treaty. It was undesirable to encourage the notion that an agreement which violated the initial agreement could be resorted to for purposes of modification. The case envisaged in article 36 was one in which the initial intention of the parties was to amend the treaty as between all the parties. That process might of course ultimately result in the emergence of certain *inter se* relationships if not all the parties to the treaty ratified the amendment. However, the amending agreement would, from the beginning, be open to participation by all the original parties.

52. The case envisaged in article 37 was quite different from those contemplated in articles 35 and 36. Article 37 dealt with the case where from the outset some of the parties had the intention of varying certain provisions of the treaty in their particular relations. One obvious example was that of agreements at the regional level. Articles 26 and 37 would thus meet two distinct sets of needs. As far as article 37 was concerned, it was necessary to make its provisions strict, in order to prevent abuses which would constitute violations of treaty obligations.

53. Mr. VEROSTA (Austria) said he was grateful to the Expert Consultant for his clarification and would suggest that, in view of the somewhat special meaning attached to the terms " amendment " and " modification ", an appropriate provision describing their use be inserted in article 2, paragraph 1.

54. Mr. BOLINTINEANU (Romania), speaking on behalf of the sponsors of the joint amendment (A/CONF. 39/C.1/L.240), said the representative of Austria had made a most useful suggestion which should be referred to the Drafting Committee along with the joint amendment itself, for use in drafting the English text. As far as the French text was concerned, the concluding words of the opening phrase of sub-paragraph (*b*) would still read " *à condition que celle-ci* ".

55. The CHAIRMAN said that the amendments by France and Australia (A/CONF.39/C.1/L.46 and L.237) would remain in abeyance until the question of " restricted " multilateral treaties came to be decided.

56. If there were no objections, he would consider that the Committee agreed to refer article 37 to the Drafting Committee, together with the Czechoslovak amendment (A/CONF.39/C.1/L.238) and the joint amendment (A/CONF.39/C.1/L.240).

It was so agreed.[5]

Article 38 (Modification of treaties by subsequent practice)[6]

57. Mr. CASTRÉN (Finland) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.143) to delete article 38 for the same reasons as had prompted it to propose the deletion of article 34, namely, that it did not regard it as expedient to deal in a convention on the law of treaties with the complex questions of relationships between customary and treaty law. Another reason for the Finnish amendment was that article 38 seemed to duplicate sub-paragraph 3(*b*) of article 27, under which subsequent practice in the application of the treaty which established the understanding of the parties regarding its interpretation was to be taken into account. That rule of interpretation in itself meant that a treaty could be

[5] At the 80th meeting, the Committee of the Whole decided to defer consideration of all amendments relating to "restricted multilateral treaties " until the second session of the Conference. Further consideration of article 37 was therefore postponed.

[6] The following amendments had been submitted: Finland, A/CONF.39/C.1/L.143; Japan, A/CONF.39/C.1/L.200; Venezuela, A/CONF.39/C.1/L.206; Republic of Viet-Nam, A/CONF.39/C.1/L.220; France, A/CONF.39/C.1/L.241.

modified by the practice of the parties and, in any case, the distinction between those two provisions of the draft was practically non-existent. The Finnish delegation had therefore proposed the deletion of article 38.

58. Mr. FUJISAKI (Japan), introducing his delegation's amendment (A/CONF.39/C.1/L.200) to delete article 38, said that the Japanese Constitution stipulated that treaties must be concluded with the approval of the Legislature, and the same rule applied to the amendment of a treaty. Modification might not mean exactly the same thing as amendment, but it was obviously difficult to draw a clear distinction. An arbitration between France and the United States regarding the interpretation of a bilateral air transport services agreement was cited in the commentary as an example, but the Japanese delegation did not consider that such practice was soundly enough established to warrant the inclusion of the rule in the convention.

59. Mr. CARMONA (Venezuela), introducing his delegation's amendment (A/CONF.39/C.1/L.206) to delete article 38, said that the original article on modification in the International Law Commission's 1964 draft had covered three cases—namely, modification by a subsequent treaty relating to the same subject matter to the extent that their provisions were incompatible, the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all parties, and subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions.[7] One Government had observed in its comments that sub-paragraph (*b*) of the then article 68 was redundant because it dealt with a matter of pure interpretation. The Special Rapporteur on the law of treaties had clearly shown in his sixth report in 1966 the weakness of the argument for maintaining the former sub-paragraph (*d*) of article 68, which had become article 34 of the present draft and which the majority of the Commission had regarded as an independent provision. Furthermore, the Special Rapporteur had stated that practice contrary to a treaty constituted a violation, not an interpretation of the treaty.[8] Cases of amplification of a treaty, on the other hand, were recognized as simple questions of interpretation, and it was obvious that the article as now drafted had no legal basis.

60. Practice incompatible with a treaty constituted no basis for a new rule of law, but an abuse of law and a violation of the treaty. When the parties found that circumstances had changed, they could not authorize a violation of law, but should proceed to modify the treaty by concluding another or by preparing an additional protocol which would legalize the new situation; that had always been the procedure followed by the international community. Practice in itself could not be a basis for derogation from written domestic or international law; the common law practice could not be regarded as generally applicable, and the arbitration case between the United States and France cited in the commentary did not alter that situation. The Venezuelan delegation therefore objected strongly to the wording of article 38 and hoped that the Committee would decide to delete it.

61. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation had submitted its proposal (A/CONF. 39/C.1/L.220) to delete article 38 because, in the first place, the word "*celle-ci*" in the French text grammatically referred to the application of the treaty, which could not establish the agreement of the parties to modify its provisions.

62. But irrespective of that drafting difficulty, his delegation could see no advantage in including a provision on modification of treaties by subsequent practice. If, in applying the treaty, the parties noted that new circumstances had arisen since the signature of the treaty, which made modification or redrafting desirable or necessary, they could at any time agree in writing on an appendix, protocol or annex to the original treaty. To allow for the possibility of modifying the treaty by subsequent practice would open the door to all kinds of interpretations, in the course of which the treaty might lose much of its substance. Deletion of the article would in no way diminish the possibility of subsequent adaptation to circumstances and would not detract from the flexibility of application; on the contrary, it would lead to greater certainty and security.

63. Mr. DE BRESSON (France) said that, although the idea of recourse to State practice in the application of a treaty as a means of interpretation was unexceptionable, it was quite a different matter to lay down a rule whereby that practice could in itself alter the substance of treaty obligations. The formulation of article 38 was open to three main objections. First, many international agreements contained specific provisions on the conditions of their revision: to admit that the parties could derogate from those clauses merely by their conduct in the application of the treaty would deprive those provisions of all meaning. Secondly, adoption of the article might raise serious constitutional problems for many States: the principle of formal parallelism required that modifications of a treaty at the domestic level should follow the same procedure as the original text. If the manner in which the responsible officials applied the treaty was in itself capable of leading to modification, that requirement of parallelism could hardly be met. Moreover, it was doubtful whether the precise and strict conditions laid down in article 6 and the following articles of the draft, on consent to be bound by a treaty, would retain any meaning if the treaty could be subsequently modified in the manner provided for in article 38. Thirdly, the rule proposed in article 38 would hardly conform with the harmony of international relations. Indeed, if States were given the impression that any flexible attitude towards the application of a treaty was tantamount to agreement to modify the treaty, they would tend in future to become much more circumspect and rigid in their attitudes.

64. Those considerations alone might have led the French delegation to join other delegations in proposing the deletion of article 38. But although the rule, if formulated in too general terms, might actually be dangerous, it was nevertheless valid in the case of certain technical agreements, which might indeed be modified by practice under certain circumstances. If the Committee

[7] *Yearbook of the International Law Commission, 1964*, vol. II, p. 198, article 68.

[8] *Yearbook of the International Law Commission, 1966*, vol. II, p. 90.

decided to retain the article, the French delegation considered that the rule it stated should be kept within the limits of its actual application in a well-known arbitration award by an eminent personage closely connected with the work of the Conference. To that end, it had submitted its amendment (A/CONF.39/C.1/L.21), providing that the principle in that article might not apply either when the treaty itself specified the manner in which it could be revised, or when the form in which it had been concluded constituted a bar to its modification under different conditions.

65. Mr. MARTINEZ CARO (Spain) said that from the outset his delegation had had serious doubts about the advisability of including article 38 in the convention, and as the Conference proceeded, its doubts had only increased. Those delegations which had proposed the deletion of the article were merely confirming the apprehensions expressed by some members of the International Law Commission in 1964 and 1966. The commentary itself showed that the article was far from convincing; in fact it was so unclear that it could mean almost anything.

66. The principle on which article 38 was based was that a tacit agreement might lead to the modification of a treaty when evidence of such agreement was provided by the subsequent practice of the parties in applying the treaty. That principle raised a number of problems. The first problem was to clarify the new legal concept of the practice of the parties which modified the text of a treaty. Article 38 already combined four legal concepts: interpretation based on practice establishing agreement; scope of application of the treaty by the parties; modification of treaties, otherwise than by formal amendment; and amendment of treaties in accordance with articles 35 to 37, which also included amendment in the traditional sense of revision. It was questionable whether an additional concept, of the practice of the parties capable of modifying a text, was justified, or whether it could not be incorporated in one of those four. The International Law Commission itself stated in paragraph (1) of its commentary to the article that " the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice ", and a member of the Commission had said that the difference between interpretation and modification was only one of degree. [9] Even if the Commission's contention that " legally the processes are distinct " were accepted, the difficulty of separating them cast serious doubt on the advisability of retaining the provision. The Drafting Committee already had before it a Spanish amendment (A/CONF.39/C.1/L.217) to include a reference to subsequent practice in article 28, on supplementary means of interpretation.

67. The next problem was whether article 38 was or was not compatible with the other provisions of the draft. The wording " the agreement of the parties to modify " the provisions of a treaty could only mean tacit agreement, whereas under article 2 the scope of the convention extended only to treaties in written form; consequently, article 38 was a derogatory clause, affecting the conclusion, entry into force, amendment and termination of a treaty, and might be used as an escape clause in respect of all those stages of treaty-making.

68. With regard to consent to be bound by a treaty, the adoption of the article would make it possible for any Government official, even a minor official, to alter what had been agreed upon in a formally ratified treaty. Moreover, such changes might conflict with fundamental provisions of the convention, despite the terms of articles 43 and 44 and the rules the Committee had already approved in article 6 and 7. One member of the International Law Commission had suggested specifying in the commentary that the subsequent practice must be attributable to the State through the acts or omissions of those officials competent to bind the State on the international plane; [10] but in day-to-day practice treaties were not applied by officials at that high level. Article 38 thus opened the way to unconstitutional modifications of a treaty, to which parliament would never consent in a written treaty. If parliamentary approval was required to bind the State, the same rule should apply to practice in the application of the treaty.

69. Moreover, if it were agreed that a treaty could be modified by subsequent practice in its application, it might be asked whether that applied to all the provisions of a treaty. Mr. Tunkin had argued in the Commission that only secondary provisions, not the essential provisions of a treaty, could be thus modified; [11] but neither article 38 nor the commentary shed any light on that vital point.

70. Another difficulty would arise if the treaty contained a clause on modification. In that event, could an official who did not possess treaty-making authority nevertheless modify the special revision or modification clause? If so, article 38 could mean that it was possible and legal to do by tacit agreement what it was impossible and illegal to do by formal agreement; it could only be regarded as conflicting with the principle *pacta sunt servanda.*

71. Further, the statement that subsequent practice in the application of the treaty might establish the agreement of the parties raised difficulties concerning the sense in which the terms " practice " and " parties " were used. " Practice " was a very broad term, which might include acts of various organs dealing with foreign relations and active and passive attitudes; its use raised questions of assent and acquiescence, unilateral acts and, more specifically, validity of protests. One member of the Commission had stated that a practice entailing desuetude could be used to bring a treaty to an end, and *a fortiori* as a means of modifying it: [12] that surely meant that article 38 offered new grounds for the termination of a treaty.

72. Even if it were claimed that the notion of practice was clear, the notion of consistency of practice was not, nor how long the practice must continue before agreement on modification could be established. That led to the delicate area of the relationship between customary and treaty law. Sir Humphrey Waldock had stated in the International Law Commission that there was a similarity between the formation of custom and the implied agreement contemplated in the article. [13] The problem became particularly serious if article 38 were read together with article 34, for then difficult questions of " legal custom " arose in connexion with bilateral treaties, and the no less

[9] *Yearbook of the International Law Commission, 1966*, vol. I, part II, 866th meeting, para. 26.

[10] *Ibid.*, para. 9.

[11] *Ibid.*, para. 18.

[12] *Ibid.*, para. 60.

[13] *Ibid.*, 876th meeting, para. 44.

difficult question of the effect of custom on third States, in connexion with multilateral treaties.

73. Finally, the practice referred to was the practice of the parties. But it was not clear which parties. Was it the practice of some of the parties without objection from the others, or was it the practice of some of the parties despite the objection of the others, or was it that, as stated in paragraph (2) of the commentary, " the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question "? That raised the two further problems, of the possibility of a practice *inter se* being established among a small group of the parties to a treaty, and of the position of new States acceding to the treaty vis-à-vis the existence, prior to their accession, of a practice which had modified the provisions of the instrument.

74. All those difficulties arose from the fact that article 38 was a hybrid between the logical solutions of modification of a treaty by another treaty, and modification by the establishment of a new customary rule binding on all the parties. The first case was covered by articles 35 to 37, and the second fell outside the scope of the convention, except for a negative and unnecessary reference to it in article 34. The Commission's attempt to cover both solutions has resulted in an article which could only undermine the stability of treaty relations and should therefore be deleted.

75. Mr. VARGAS (Chile) said that his delegation would vote for the deletion of article 38, in the belief that the adoption of the provision would weaken the principle of *pacta sunt servanda* which the Committee had adopted in article 23. Once a treaty was in force, the parties were bound by it until it was modified in accordance with article 35, by agreement between the parties. That agreement implied express consent by the States in question. If article 38 were adopted, any State wishing to evade its obligations under a treaty could invoke subsequent practice with a view to modifying the treaty for its own ends. The Chilean delegation considered that subsequent practice might be a useful element in the interpretation of a treaty, and had therefore supported sub-paragraph 3(*b*) of article 27, but it could not agree that such practice in the application of the treaty in itself sufficed to modify the treaty without an express consent of the parties. Any changes of circumstances necessitating modification could be dealt with through the procedures set out in article 36. Since article 38 was not only superfluous but potentially dangerous, his delegation hoped that it would be deleted; in the contrary event, it would support the French amendment (A/CONF.39/C.1/L.241), which, although not entirely satisfactory, improved the International Law Commission's text of the article.

76. Mr. WERSHOF (Canada) said that his delegation, too, was in favour of the deletion of article 38. If the Committee decided to retain the article, his delegation would support the French amendment (A/CONF.39/C.1/L.241).

77. In the event of the article being retained, he would ask the Expert Consultant for clarification on two points. First, was it appropriate to use the word " modification " in article 38, when it was used in a special sense in article 37? Secondly, did " the agreement of the parties " mean all the parties in the case of multilateral treaties or, as in article 37, two or more parties who might bring about modification of the treaty *inter se*?

The meeting rose at 6 p.m.

THIRTY-EIGHTH MEETING

Thursday, 25 April 1968, at 11.5 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 38 (Modification of treaties by subsequent practice) *(continued)* [1]

1. Mr. GRISHIN (Union of Soviet Socialist Republics) said that the reason why there had been so many proposals to delete the article was that its provisions were not in conformity either with the rules of international law or with those of internal law.

2. On the international plane, the article did not set any limits for the modification of a treaty by subsequent practice, so it could happen that, in practice, relations between the parties to a treaty would be different from those established by the treaty. It was true that that situation could arise, but it could not be reflected and legalized in a convention as important as that on the law of treaties. Such legalization would be incompatible with the purposes of the convention and the stability of international treaties, and in addition, it would create difficulties for third States.

3. It had been asked whether the subsequent practice on which the modification of a treaty was to be based would be that followed by all the parties to the treaty or only by some of them. Article 38 gave no answer to that question. If it was to be the practice of all the parties, it would be better to apply articles 35 and 37 than to take as a basis the practice followed in applying the treaty, which would make it hard to determine what part of the treaty had been modified and when. If the practice of only some of the parties was sufficient, it would be necessary to know the requisite number of parties and whether a practice which did not reflect general agreement could modify the treaty for other parties which had not followed that practice and might not agree with it. The Soviet Union delegation considered that the reply to the latter question must be in the negative, if only because of the principle *pacta sunt servanda.*

4. Moreover, the requirements of internal law, that was to say the rules of constitutional law governing the conclusion of international treaties, should not be overlooked.

5. For all those reasons, article 38 could not be retained in the convention on the law of treaties. The fewer controversial articles the convention contained, the easier it would be to apply.

6. Mr. KEARNEY (United States of America) said he supported the amendments submitted by Finland (A/

[1] For the list of the amendments submitted, see 37th meeting, footnote 6.