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A/CN.4/SR.746

Summary record of the 746th meeting

Topic:

Law of Treaties

Extract from the Yearbook of the International Law Commission:-

1964, vol. I

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tion envisaged in paragraph 2 of article 68 was similar, the same terms should be used. It was also necessary to bear in mind the language used in paragraph 2 of article 46, on the separability of treaty provisions. In paragraph 2 of article 69, the terminology used throughout Part I of the draft article [19] should be followed.

68. When speaking earlier, he had opposed the inclusion in article 67 of the obligation to consult the party concerned, but in the case of article 68, paragraph 1, he was prepared to accept the right of consultation of the other parties to the treaty. There was no contradiction between those two positions. The parties to a treaty were not obliged to enter into consultations with any party making a proposal to amend the treaty. But should a proposal for revision be made, all the parties were entitled to be notified of the proposal and, if any negotiations actually took place, all the parties were entitled to be consulted and to participate in them.

69. It had also been asked whether other States concerned in the treaty should not also be invited to take part in the negotiations for its amendment. In principle, there was much to be said for inviting them, especially in view of the contemporary trend towards universality in international law; but he feared it might open the way for unduly wide participation in the amendment of treaties. The wisest course would be to adopt a well-defined criterion, by providing that all States which had taken part in drawing up the original treaty could participate in the negotiations for its amendment.

70. In article 69, the provisions of paragraph 3 (*b*) seemed premature, in that they anticipated a violation where none might take place. As he had pointed out during the discussion of article 65, the text of a treaty could be apparently incompatible with that of another treaty without any actual conflict arising. The second treaty could remain a dead letter or be applied in such a way as not to give rise to any conflict in the application of the two treaties. The Special Rapporteur had forestalled that objection by beginning paragraph 3 (*b*) with the word "If", but its provisions should be clarified.

71. He could not support the opening proviso of article 67. A treaty could contain an absolute prohibition of all amendments. There were treaties which specifically stated that they were laying down the law for all time; one example was the Peace of Westphalia of 1648. But clearly, even if a treaty contained such a clause, it was still open to amendment.

72. A treaty could also contain a clause which laid down a time limit, or specified the procedure, for its amendment. Provisions of that type were permissible, since they did not constitute an obstacle in perpetuity to the adaptation of the treaty to changing circumstances. Nevertheless, even where such provisions existed, there could be no doubt that, with the unanimous agreement of all the parties to the treaty, it was possible to override the time limit and any other procedural conditions that might be laid down in it.

[19] *Yearbook of the International Law Commission*, Vol. II, pp. 161 *et seq.*

73. He would speak later on the distinction between the conclusion of a new treaty and the revision of an existing one.

The meeting rose at 6 p.m.

746th MEETING

Tuesday, 16 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(A/CN.4/167/Add.1)
(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) *(continued)*,

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) *(continued)* and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 67 to 69 in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Mr. PAL said it was vitally important to provide for the revision of treaties, in recognition of the inevitable evolution in relations between States. Treaties were significant devices of States in their mutual relations; they were instruments of stability as well as of change in international community relations. They were catalysts and moderators of political forces in the international arena. Treaties had gained special significance because they called for conscious and voluntary action founded on explicit consent and free will, binding States solely through the manifestation of their consensus based on complete and unabridged sovereignty.

3. The world was already witnessing a loosening of the former rigidity in international community conduct. Barring unforeseen disturbances, that trend could be expected to continue in its essentials, which would mean considerable variations and developments in treaty relations. Existing treaty relations would certainly need re-adjustment and extension; an example was provided by regional arrangements, which would require readjustment in many respects to provide for their extension to much wider regions, of which no area could be excluded except by its own choice. Any regional arrangement which had not hitherto included

that feature, either expressly or in spirit, would in due course need revision, at least to remove the impression that whatever might be the future of the arrangement, some particular group of States was not to have a place in it.

4. Commenting on the drafting of article 68 he said that paragraph 2, though requiring substantial amendment, should be retained. It should be expressly stated that the conditions laid down in sub-paragraphs (*a*), (*b*) and (*c*) must be fulfilled before an *inter se* amendment could be valid; that provision would constitute an additional safeguard for third States which might be affected. He suggested that *inter se* amendments without the concurrence of the interested third States might be prohibited.

5. Mr. LACHS, expressing his satisfaction that the discussion had turned to basic problems, said that treaties, like other international institutions, could become obsolete; when that happened they should be replaced by new instruments rather than touched up in an effort to adapt them to new circumstances.

6. In considering how the articles should be drafted, the Commission should take into account some of the practical problems which revision might create. In the case of a bilateral treaty, if one of the parties, on being notified of a proposal to amend the treaty, refused to entertain it, the other would presumably initiate the procedure for termination. In the case of a multilateral treaty, the parties wishing to amend could do so either by bilateral or by multilateral agreement among themselves; many treaties, e.g. the Universal Postal Convention of 1878,[1] the annexes to the Convention of 1919 relating to the Regulation of Aerial Navigation [2] and the International Sugar Agreement of 1953,[3] expressly allowed amendment even if the consent of all the parties could not be obtained.

7. A treaty might provide for the possibility of *inter se* arrangements, but practice showed that such arrangements were not amendments in the true sense of the term: they were really separate instruments. A clause permitting *inter se* arrangements had been inserted in the International Coventions of 1883 for the Protection of Industrial Property.[4] Such arrangements should not be covered in the draft. It was essential to provide a rule that would regulate the situation arising in the event of a dispute concerning the admissibility of amendments. Although the requirement of unanimity was a fundamental one, it should not enable a single party to frustrate change by the exercise of a veto. Clearly, if agreement could not be reached on the amendment of a treaty, the parties in favour of amendment would seek to terminate the treaty and conclude a new one. Alternatively, provision could be made for the convening of a conference which, by a specified majority, could adopt an amendment that would enter into force as an integral part of the original treaty; but in such cases the consent of the parties would be necessary. If such practical considerations were borne in mind the drafting of the three articles should present no real difficulty.

8. Mr. ROSENNE said that the Commission should endeavour to formulate clear rules on the revision of treaties, so as to forestall abuses of the kind that had occurred in the past. The Special Rapporteur had asked for guidance on whether the point of departure should be an absolute unanimity rule, on the lines of that contained in article 40, paragraph 2,[5] or the absolute right of all the parties to be notified of a proposal to amend or revise a treaty, with the proviso that none of them would have a right of veto and that no amendment would become binding on States which had not consented to it. Personally he fully subscribed to the second alternative and regarded the provisions contained in articles 67, 68, paragraphs 1 and 3, and 69 as the essential elements of such a rule. His reasons for taking that stand were very much the same as those put forward by the Special Rapporteur in his commentary. The articles should cover the main procedural stages of revision, namely, the initiation of the process, the adoption of the amendment, its entry into force and its effects in so far as they were not covered in the general articles of the draft. It would be clearer if each stage were dealt with separately, and some of the provisions might need review in the light of article 65. The articles concerning revision would be no less significant than those relating to reservations and they would play an important part in placing the law of treaties on secure foundations.

9. After further reflection he had concluded that, with various drafting changes, article 67 would serve a useful purpose. It was necessary to bring out the primacy of the treaty itself with special reference to the obligation in sub-paragraph (*b*). That might be achieved by replacing the opening phrase by the words " Unless the treaty otherwise provides ".

10. He agreed with the Special Rapporteur that in law there was no significant difference between modification, amendment and revision, but the parties themselves were free to attach a special meaning to any of those terms, and indeed some of the examples cited in the *Handbook of Final Clauses* (ST/LEG/6) showed that they sometimes did so.

11. Article 68, paragraph 1, was acceptable as far as it went, but since it was limited to the rights of the parties to the original treaty, it did not cover the ground entirely; for the treaty itself, or the constitution of an international organization within which the treaty had been concluded, might confer rights on other States besides the parties. Consequently, article 68, paragraph 1, should also refer in some way to the primacy of the treaty and should allow for the fact that the standing rules made under the constituent instruments of certain international organizations provided for the amendment of treaties concluded within

[1] *British and Foreign State Papers*, Vol. LXIX, p. 210.

[2] League of Nations *Treaty Series*, Vol. XI, p. 174.

[3] United Nations *Treaty Series*, Vol. 258, p. 154.

[4] *British and Foreign State Papers*, Vol. LXXIV, p. 44.

[5] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 15.

them; that was true of the International Labour Organisation though not of the United Nations.

12. He could accept the Special Rapporteur's suggestion, though it had been rather lukewarm, that at least for the initial stages of the revision procedure provisions modelled on those of article 9, paragraph 1,[6] and article 40, paragraph 2, should apply.

13. Mr. Tunkin's suggestion that the procedure to be followed at a conference convened for the purpose of revising a treaty should be regulated in greater detail, appeared to imply that any of the parties might be entitled to exercise a right of veto during the opening stages. He could not agree with that view, which was inconsistent with the whole philosophy of the draft and was not justified by contemporary practice as reflected in revision clauses in treaties and in cases in which revision was undertaken in the absence of such clauses. What was significant was the consequences of an amending conference, and they were correctly set out in article 69, paragraph 1.

14. The suggestion that it might be necessary to deal separately with bilateral and multilateral treaties could be examined, but he remained unconvinced that there were any real legal differences between them so far as revision was concerned. Bearing in mind the general characteristics of bilateral treaty relationships, he thought that the provisions already adopted concerning the termination of treaties would be adequate; implicit in those provisions was the idea that their purpose was to establish a regulated system for re-negotiating treaties found to be unsatisfactory.

15. After hearing the comments made by Mr. Tunkin he thought that perhaps the Commission should consider a firmer unanimity rule for treaties concluded among a small group of States, though such treaties were admittedly an ill-defined category. Article 9, paragraph 2 and article 20, paragraph 3 could be relevant.

16. A distinction should be drawn between *inter se* proposals for revision and a revision that was adopted after consultation with all the parties but came into effect only on an *inter se* basis. Article 68, paragraph 2, semed to be concerned with the former, not with proposals to revise in the strict sense, and thus interrupted the sequence of the three articles. However, he was not certain that the substance of the paragraph should be dropped altogether: perhaps it might be incorporated in a separate article or dealt with in connexion with article 65.

17. He agreed with Mr. Castrén that article 68, paragraph 3, should be redrafted as a separate article stressing the cardinal importance of the adoption of the amendment or revision, but the words "the conclusion and entry into force" should be deleted, as they might be open to misconstruction and did not correspond to any of the section headings in Part I of the draft, all of which from article 4 onwards would be applicable.

18. In view of the modern practice of embodying amendments to treaties in resolutions of the competent organs of international organizations, he agreed with the Special Raporteur's use of the word "instrument". For the purposes of the law of treaties such documents were deemed to be treaties.

19. He reserved his position on article 69 and wished to put two questions to the Special Rapporteur concerning the text. First, what was the meaning of the phrase "took part in the adoption of" in paragraph 2 (*a*)? What would be the position, for example, of a State which took part in a session of the General Assembly, but remained silent during the discussion on an item concerning the revision of an international instrument and did not take part in the voting on the revision? Secondly, in view of paragraph (19) of the commentary, should not article 40 be referred to in paragraph 3 (*a*)?

20. It had been suggested at the previous meeting that States which did not accept the revision of a treaty should be entitled to withdraw from the original treaty without any implication that such action constituted a breach. If that proposition were accepted, the right should exist side by side with the right of any State to regard itself and others as still bound by the original treaty. Article 40 would then protect States against termination in the guise of revision.

21. Mr. RUDA said that he would confine his remarks to a few general comments on articles 67 to 69. Mr. El-Erian and Mr. Yasseen had stressed two fundamental requirements of the law; first, the need for stability of legal rules, to provide security for international transactions; second, the need to adapt legal rules to a changing reality — an adaptation sometimes called for in the interests of justice. The need for stability explained why unanimity of the parties was required for the revision of a treaty. The need for adaptation to change explained the emergence of certain techniques, in particular treaty clauses which permitted revision by a specified majority or within the framework of the constitution of an international organization.

22. In the Special Rapporteur's draft, the system of *inter se* treaties appeared to be the basic technique for revision. Paragraph (7) of the commentary on articles 67 to 69 stated that "the use of *inter se* agreements now appears to be an established technique for the amendment and revision of multilateral treaties". Mr. Tunkin and Mr. Lachs had pointed out that *inter se* treaties did not really constitute amendments, and he supported that view since the original treaty subsisted notwithstanding the *inter se* agreement; the latter in fact constituted a new treaty, which could of course be complementary or supplementary to the original treaty. The *inter se* agreement was distinct from the original treaty both in its content and in its regulations. The existence of two treaties on the same subject gave rise to a problem of conflicting obligations, dealt with in article 65; it was not a problem of revision or amendment. He was not opposed to *inter se* treaties; a treaty of that type was valid, but might engage a State's responsibility if its conclusion constituted a breach of an earlier treaty. From the point of view of legal technique, however, the conclusion of an *inter se* treaty did not constitute an amendment or revision procedure,

[6] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 168.

unless the terms "amendment" and "revision" were construed very broadly.

23. In the absence of an international legislative authority which could impose its decisions on all the parties to a treaty, the Commission had two alternatives. The first was to deal with revision, as distinct from the effects of revision, by laying down a procedure in three stages: (i) the proposal for amendment made by one of the parties (article 67, sub-paragraph (*a*)); (ii) notification of and consultation with all the parties to the treaty (article 68, paragraph 1); (iii) entry into force of the amendment in accordance with the rules laid down in Part I (article 68, paragraph 3). That approach would reflect the traditional procedure under existing general international law.

24. The second alternative was to establish a system for the future, as suggested by Mr. Tunkin at the previous meeting. That system would also involve rules governing three procedural stages: (i) rules for convening a conference for the revision of the treaty; (ii) rules for the adoption of amendments, such as the two-thirds majority rule; (iii) rules governing the entry into force of amendments. In drafting such rules for the future, the Commission should endeavour to balance the need for stability with the need for change and adaptation and thereby contribute to the progressive development of international law.

25. He would speak on the individual articles later.

26. Mr. VERDROSS said he had a few additional remarks to make concerning article 67, on which he had already spoken at the 744th meeting. In his opinion any contracting party to a bilateral or multilateral treaty could propose an amendment to the treaty, even if it contained a provision to the effect that no amendment could be proposed until after a certain time had elapsed, for that provision itself could be amended. He was accordingly in favour of deleting the opening clause of article 67, but not for the reason given by Mr. Bartoš that it would be contrary to *jus cogens* for a treaty to contain such a provision.

27. With regard to sub-paragraph (*b*) of article 67, he shared Mr. Ago's opinion[7] and doubted whether any such obligation as was there laid down really existed. It was more out of respect for a rule of international courtesy that the other parties ought to consider the proposal for amendment. Nevertheless, as the Commission should contribute to the progressive development of international law, he was not opposed to retaining that sub-paragraph, provided that the words "and in consultation with the party concerned" were deleted.

28. Whereas article 67 applied both to bilateral and to multilateral treaties, articles 68 and 69 applied only to multilateral treaties. That distinction should be reflected in the titles of the articles. The Commission might devote one or two articles to the procedure for amending multilateral treaties. In those articles, it would first state that if a treaty, or the constituent instrument of an international organization, contained rules on amendment procedure, that procedure must be followed; it would then say that in the absence of such rules the treaty could be amended by a conference or by some other procedure agreed upon between the parties. There would follow an article concerning the effects of amendment of a treaty on States which had not accepted the amendment.

29. At first glance, it might be thought that the problem of the amendment of a multilateral treaty by a few States *inter se* had no connexion with the problem of the amendment of multilateral treaties. And yet, amendment by agreement of several parties *inter se* was so closely related to the problem of the amendment of treaties that it should certainly be regulated by those articles. In paragraph 2 of article 68, the Special Rapporteur had very well stated the conditions that must be fulfilled for amendment *inter se*; but he did not wish, in that case, to oblige the contracting parties concerned to notify the other parties of their intention to amend the treaty *inter se*. Such an obligation was necessary, however, even if the *inter se* agreement did not affect the rights of the other parties, but only injured their interests. It was possible, for example, that several States parties to the Vienna Convention on Diplomatic Relations might wish to amend that Convention *inter se* in order to grant more privileges to their respective diplomats; such a project might affect the interests of the other parties without affecting their rights. He therefore agreed with Mr. Castrén and Mr. Yasseen that when a group of States wished to amend a treaty *inter se*, even if they did not intend to violate the rights of the other parties, they should nevertheless consult with all the other parties.

30. With regard to the effects of *inter se* amendment on States which had not accepted the amendment, he approved of the provisions proposed by the Special Rapporteur. He feared, however, that paragraph 2 (*a*) of article 69 was not very clear. What exactly was the meaning of the expression "took part in the adoption" of the instrument? Did it mean having taken part in the conference or having signed the instrument? No doubt that was only a matter of drafting.

31. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the suggestion that the term "revision" should not be used either in the titles or in the body of the articles, since for many people it had a special connotation that was best avoided; the Commission should steer clear of the shifting sands of peaceful change and should not get involved in the political problems of the revision of treaties — not merely revision by agreement of the parties, but revision by decision or recommendation of a political authority such as the General Assembly. He preferred the French term "modification": it appeared somewhat broader in meaning than "amendment", which conveyed the idea of changes of detail. He was certainly in favour of the revision of unjust treaties, but the present discussion was not the occasion to raise that question.

32. He supported the deletion of article 67, for it raised numerous difficulties. The main substance of that article could be incorporated in paragraph 1 of article 68.

[7] 744th meeting, para. 75.

With regard to articles 68 and 69, he agreed, on the whole, with Mr. Briggs and also, to some extent, with Mr. Tunkin, for he thought they differed less on substance than in their approach. Mr. Briggs had discussed the proposed articles from the point of view of drafting and rearrangement, while Mr. Tunkin had dealt with the basic notions involved. Thus while he supported Mr. Briggs' suggestion that the provisions on treaty amendment proper should be separated from those on *inter se* agreements, he agreed with Mr. Tunkin that the articles on amendment should begin with a statement that they were intended to supplement the will of the parties as expressed in the treaty; the provisions of the treaty should always take precedence. In that connexion, the Chairman had pointed out that it was always possible to amend the treaty provisions on amendment procedure; but the procedure for amendment established in the treaty would also apply in that case. Thus the treaty provisions on amendment would always take precedence. The fact was, as the Special Rapporteur had pointed out, that treaties did not often cover the subject and, when they did, not fully. The draft articles should therefore include some rules to supplement the stated will of the parties.

33. He also agreed with Mr. Tunkin on the need for a certain symmetry with the provisions on termination; that could be achieved by a cross-reference to article 40, for example. He did not agree, however, that the amendment procedure must be strictly formal or that a conference was always necessary for amending a treaty. An agreement to terminate a treaty could be made by less formal procedures, as shown by article 40, paragraph 1 (*b*).

34. As to the arrangement of the draft articles on the amendment of treaties, he favoured a separate article, prominently placed, to express the right to be consulted at present embodied in article 68, paragraph 1. Another separate article would cover the adoption of the amending instrument in conformity with the rules laid down in Part I, as provided in article 68, paragraph 3. Those provisions would be followed by one or two articles on the effects of the amending instrument. Separate provision would be made for its negative effects on States which did not ratify the amendment, as in paragraph 1 of article 69, and for its positive effects, as proposed by the Special Rapporteur in paragraph 3 (*a*) of that article, with the cross-reference to articles 41 and 65. The right of withdrawal, provision for which had been suggested by Mr. Tunkin should, however, be carefully considered, taking into account the rules applicable in international organizations.

35. The most serious problem was that of *inter se* agreements. He fully agreed with Mr. Tunkin that it was different from the problem of revision, but that did not justify deletion of the provisions on the subject. Complementary or supplementary *inter se* agreements had, in practice, become an essential technique, and a necessary safety valve, for the adjustment of treaties to the dynamic needs of international society. If such a technique had not existed, there would have been stagnation in many treaty relations, particularly after the Second World War, when treaties had had to be adjusted to new conditions, but when it had been out of the question to invite enemy States to a conference on the subject or to give them a right to veto any alteration of the treaties. The *inter se* procedure had been the means resorted to for that necessary evolution. The Commission should take that experience into account and make provision for the *inter se* procedure so as to avoid the stagnation that would result from the *liberum veto* of a single party. In that respect, the Commission should bear in mind the progressive recommendations made to the General Assembly concerning extended participation in general multilateral treaties concluded under the auspices of the League of Nations.

36. The provisions drafted on the subject by the Special Rapporteur seemed to contain the necessary safeguards against abuse. He suggested, however, that those provisions should be rearranged as three separate articles in the following order: first, a statement of the possibility of concluding *inter se* agreements, at the moment embodied in article 68, paragraph 2; second, a provision dealing with the effect of such agreements, as in article 69, paragraph 3 (*b*); third, the rule of estoppel in article 69, paragraph 2.

37. He proposed that the first of those provisions should begin with the words:

> "Notwithstanding the provisions of the previous articles, certain of the parties may modify...".

The remainder would reflect the present contents of article 68, paragraph 2; sub-paragraph (*a*) would not be deleted as suggested by Mr. Yasseen, since it contained an essential guarantee.

38. With regard to paragraph 2 (*a*) of article 69, he shared the doubts expressed by other members regarding the expression "took part in the adoption". The rule of estoppel should apply only to a State which had actually voted in favour of the amendment. He supported Mr. Yasseen's suggestion that paragraph 2 (*b*) should be deleted.

39. Mr. REUTER said he thought that articles 67 to 69 dealt with two questions which differed both in importance and in kind.

40. The first question — or the first to arise in chronological order — was dealt with in article 67 and in article 68, paragraph 1: it concerned the position of a State party to a treaty in the revision process, that State being considered individually. The question seemed to have been raised as touching a fundamental right of States. It was considered from two points of view in the draft: first, the right of initiative, in article 67, and then the right of participation, article 68, paragraph 1.

41. Although he accepted the general idea expressed in article 67, he did not approve of the drafting, which, to his mind, was both too precise and not precise enough. It was too precise in that the wording was almost provocative and the expression "notify ... of a proposal" applied to an extreme case; the idea would be better expressed in more general terms. But, the text also lacked precision, for it should leave no doubt that the party which took the initiative only had the right

to ask whether negotiations should take place; it did not have the initiative in negotiation or the right to start negotiations. He would therefore prefer some such wording as: "may enter into consultation with the other party or parties to the treaty on the desirability or necessity of undertaking the amendment or revision of the treaty". There were indeed cases in which a change in circumstances made the amendment of a treaty really necessary. What should be guaranteed was that a party wishing to invoke the change in circumstances should be able to enter into consultation with the other parties.

42. Article 68 dealt with a much broader right: not merely the right to be consulted, but the right to participate in the negotiations if they were properly initiated. It might perhaps be advisable, therefore, to combine article 67 and article 68, paragraph 1, in a single provision that was both simpler and more precise, drawing the distinction between consultation and negotiation. To say that the other parties were bound to consider the proposal in good faith did not add much, but he was not opposed to that stipulation.

43. He agreed with several other members of the Commission that article 68, paragraph 3, might be made a separate article.

44. The second, more important, question was the actual right to amend or revise treaties. Article 69 dealt with that question and article 68, paragraph 2, would probably be better placed in article 69. The only reason why the Commission was considering the problem was the lack of express provisions on amendment and revision in treaties themselves.

45. Mr. Tunkin had raised the preliminary question of defining the term "revision". If the Commission did not provide a definition, there might be some confusion between articles 69 and 65.

46. Mr. Tunkin, supported by Mr. Lachs, apparently proposed that revision should be defined by its effects: there would be revision only where a treaty disappeared and was replaced by another treaty. If the initial treaty subsisted, the case would be governed by other articles, in particular article 65.

47. If the Commission accepted that definition, which was a logical and reasonable one, little would remain to be said in article 69. Revision thus understood could only take place either by the unanimous decision of the parties, or by a majority decision if the treaty contained a clause permitting it and prescribing a procedure for terminating the treaty. The procedure might be more or less radical, depending on whether the minority parties were bound by the revision voted by the majority (which was perhaps the case in certain international organizations) or whether, on the contrary, they could withdraw from the initial treaty if they did not accept the revision, and the original treaty could be reduced to nothing (the case of the postal conventions). He did not think the Commission could go so far as to propose such strict quasi-legislative clauses applicable to all future treaties — still less to existing treaties. As Mr. Rosenne had pointed out, the problem of revision was connected with that of reservations. Although the Commission had made provision for reservations and accepted that States could protect their will up to a point at the time of concluding a treaty, it could not lay down a general rule that the minority States would be obliged to renounce the advantage of membership of the revision committee.

48. The Commission might decide to adopt another definition of revision. It might treat revision either as an agreement the main object and intention of which was to revise a treaty, or as recourse to a special supplementary procedure applicable only to treaties whose terms did not preclude revision — which would involve setting up conference machinery. It was clear that the Commission was hesitating between the unanimity rule, which would preclude the possibility of a conference, and a rule fixing an arbitrary number of accessions. As to proposals for revision, every treaty provided definite information in its final clause prescribing the conditions for entry into force. If the terms of the treaty provided that it should not enter into force unless ratified by all the parties, the logical inference was that a proposal for revision must also be accepted unanimously. If, on the other hand, the entry into force of the treaty was contingent on ratification by a certain number of States only, whether specified or not, then perhaps a parallel formula should be adopted at any revision conference that might be convened.

49. Mr. YASSEEN agreed with those who saw only a difference in degree between "amendment" and "revision". With regard to the articles under consideration, he saw no reason why, once the rules fixed by a treaty had been overtaken by events, the possibility of general amendment — in other words, revision — should be ruled out. In his opinion, therefore, the term "revision" should be retained and the scope of the articles should not be confined to minor changes.

50. In that context, two kinds of *inter se* agreements should be distinguished: those having a particular object and those with a general object. Agreements of the first kind were those concluded by virtue, or within the framework, of certain multilateral treaties, between a certain number of the parties to the exclusion of the rest. They were intended to co-exist with the treaties. For instance, certain parties to the Vienna Convention on Diplomatic Relations, which were united by particular interests, might agree to give their diplomats more privileges. Such an agreement, limited to a certain number of States, was not a revision treaty; its purpose was merely to supplement the general treaty as between certain parties to it.

51. It was rather the second kind of *inter se* agreements that were of interest to the Commission, namely, agreements whose purpose was to amend or revise an earlier treaty which no longer corresponded to the existing situation. In such cases a number of the parties agreed to put forward proposals for the revision of the treaty and, on meeting with opposition from other parties, in order to break the deadlock of the unanimity principle, resorted to the palliative of an *inter se* agreement, the original treaty remaining in force for the objecting States. In his opinion, it was essential to

deal with that case in the context of the draft articles under consideration, for the purpose of such agreements was in fact to amend the original treaty or replace it.

52. Mr. TUNKIN noted that some members had spoken in favour of dealing with *inter se* agreements. In that connexion, he wished to stress that, in his statement at the previous meeting, he had not opposed that idea. He had emphasized that *inter se* treaties, which could be perfectly valid within the framework of the original treaty, should be treated as distinct from revision. The expression "*inter se* revision", could create considerable confusion.

53. In fact, an *inter se* agreement was not a agreement revising the earlier treaty, but constituted a separate treaty. Admittedly, the practical results could occasionally be similar, but it was essential to make a distinction between two separate legal institutions. So long as that distinction was made and the provisions on each institution were kept separate, he could agree, in general, to the substance of article 68, paragraph 2, provided that its provisions were suitably completed.

54. The basic rule for amendment of a treaty was that the provisions of the treaty itself should apply; the primacy of the treaty provisions was in keeping with the *pacta sunt servanda* rule. Where the treaty did not contain any provisions on amendment, the problem of procedure arose. He had not advocated the need for a conference in every case, but the agreement of all the parties to the treaty was necessary to convene a conference. The parties could, of course, agree on a simpler procedure if they wished; for example, the proposed amendment could be circulated to all of them by the depositary and, if approved, could be ratified. On the other had, a proposal could be made to convene a conference, and the suggestion made by Mr. Reuter concerning the procedure to be followed in those circumstances was extremely valuable.

55. The question of the legal effects of amendments could be settled by the texts of the amendments themselves. The conference which adopted the amendments could decide on the number of ratifications required for their entry into force and also on their consequences for States which did not ratify them. The draft articles should specify that the matter could be decided by the conference, and lay down a residual rule along the lines of article 69, paragraph 1, for application failing such decision.

56. He would not object if some provisions on *inter se* agreements were included in the draft articles, but a clear distinction should be made between such agreements and the revision of treaties.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that the differences of opinion which had arisen during the discussion were perhaps not as great as they might appear at first sight; it was true that there was substantial disagreement on one point, but he hoped it would still be possible for the Commission to produce acceptable draft articles on amendment and revision. While he would be prepared to accept a greater separation between the provisions on *inter se* agreements and those on revision, which also might result in *inter se* amendment of a treaty, he would strongly oppose the exclusion of the former subject. The *inter se* procedure constituted the crux of the whole problem of the amendment of multilateral treaties and without a reference to that procedure, articles 67 and 69 would become meaningless.

The meeting rose at 12.50 p.m.

747th MEETING

Wednesday, 17 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(A/CN.4/167 and Add.1 and 2)

(continued)

[Item 3 of the agenda]

ARTICLE 67 (Proposals for amending or revising a treaty) *(continued)*,

ARTICLE 68 (Right of a party to be consulted in regard to the amendment or revision of a treaty) *(continued)* and

ARTICLE 69 (Effect of an amending or revising instrument on the rights and obligations of the parties) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 67 to 69 in the Special Rapporteur's third report (A/CN.4/167/Add.1).

2. Mr. El-Erian said that, as he had dealt only with article 67 in his previous statement, he now wished to make some general comments on articles 68 and 69. The debate had shown that a distinction should be made between the partial alteration of the provisions of a treaty and its total replacement by a new treaty. Total replacement was already covered by article 41 (Termination implied from entering into a subsequent treaty).[1] It was therefore his understanding that articles 68 and 69 dealt with the partial alteration of a treaty.

3. Mr. Tunkin and Mr. Lachs had stressed that an *inter se* agreement did not involve a material revision of the body of the treaty; but since it introduced a new element into the general regime of the treaty, certain safeguards should be provided to ensure that it did not affect the enjoyment by the other parties of their

[1] *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 16.