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Summary record of the 764th meeting

Topic:
Law of Treaties

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104. The expression " the means of transport of the mission " would certainly not imply that the vehicles had to be owned by the mission; it would refer to means of transport used by the mission alone, to the exclusion of means of transport used in common with others. That might be explained in the commentary.

105. With regard to paragraph 3, he believe that it should be possible for the receiving State to advise the special mission to display its flag on all its vehicles but that it would be somewhat excessive to empower the receiving State to require the special mission to do so; the mission might prefer at times not to display its flag; if it failed to do so, despite the advice of the receiving State, it would be acting at its own risk.

106. The question of the place of the article would be settled later; the corresponding article was a part of the section on facilities, privileges and immunities in the Vienna Convention on Consular Relations, but not in the Vienna Convention on Diplomatic Relations.

107. Mr. BARTOŠ, Special Rapporteur, accepted the Chairman's suggestions. The rules which he had included in paragraph 2 and 3 were based on practice. The rule contained in paragraph 3 in particular, was not an innovation; all that could be said was that what it described was not the universal practice.

108. The argument advanced by Mr. Ruda was not valid, for although the members of a diplomatic mission other than the head of the mission were not entitled to display the flag, they were entitled to use the " CD " plate on their vehicles.

109. If the Commission decided to delete paragraph 3 it could recommend in a commentary that the receiving State should express the wish that members of the special mission should display their State's flag on their vehicles. Practical considerations, rather than prestige, were involved; he had in mind particularly the case of technical missions working in the field. It was unlikely that difficulties would arise in practice in the case of a head of Government or a minister.

110. Mr. de LUNA pointed out that the " CD " plate did not identify the specific State and therefore did not have the same value as the flag. From the point of view of safety, it could on occasions — though no doubt they were rare — be more dangerous to display the flag than not to display it.

111. The CHAIRMAN suggested that article 15 should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1.5 p.m.

764th MEETING

Monday, 13 July 1964, at 3 p.m.

Chairman: Mr. Roberto AGO

Law of Treaties

(resumed from the 760th meeting)

[Item 3 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 67 (General provision) [concerning the modification of treaties]

1. The CHAIRMAN invited the Commission to consider the following text proposed by the Drafting Committee for article 67:

> " A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide."

2. Mr. PAREDES thought that in the Spanish text the word *no* was unnecessary as the negative was already implied in the word *salvo*.

3. Mr. de LUNA said that usage differed in the various parts of the Spanish-speaking world. The word *salvo* denoted an exception rather than a negative. As had been agreed, the Spanish-speaking members of the Commission would confer about the Spanish text of the articles.

4. The CHAIRMAN, speaking as a member of the Commission, said that the phrase " the rules laid down in part I apply to such agreement " seemed to imply that the agreement would have to be in written form.

5. Sir Humphrey WALDOCK, Special Rapporteur, observed that the Chairman was largely right: the principal sections of part I dealt with the more formal types of treaty.

6. Mr. TUNKIN considered that the second sentence could be deleted without loss, for it added nothing.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the provision contained in the second sentence was intended to safeguard special clauses concerning revision.

8. Mr. BRIGGS considered that the second sentence of article 67 should be retained, and if the words " as referred to or defined in part I " were inserted before the word " except " it would be clear that the article did not cover oral or informal agreements.

9. Mr. de LUNA considered that safeguards were needed to ensure that the modification of treaties was carried out according to established rules and that States were not being given complete freedom to alter treaties at will.

10. Mr. ROSENNE proposed the deletion of the full stop after the word "parties" as well as the deletion of the words "the rules laid down in part I apply to such agreement". The article would then be strictly parallel to article 40, paragraph 1, and the word "agreement" would have the same meaning in both. Express provisions regarding modification in a treaty or in rules of an international organization would also be preserved.

11. Mr. TUNKIN said that the change proposed by Mr. Rosenne would completely alter the purport of the article; he preferred Mr. Brigg's suggestion.

12. Mr. BARTOŠ considered that both of the two sentences constituting article 67 should be retained. The first sentence stated the rule; the second referred to the growing practice in international conferences and even between States proposing to conclude a multilateral treaty.

13. Mr. YASSEEN considered that there was only one doubtful point regarding the interpretation of article 67 — the use of the word "agreement". The Commission should decide, by unambiguous language, whether the amending agreement had to be in writing. He asked whether the Drafting Committee had intended the provision to mean that the agreement would have to be in writing.

14. Mr. BRIGGS, Chairman of the Drafting Committee, said that the question mentioned by Mr. Yasseen had not been discussed in the Drafting Committee. The Special Rapporteur's earlier text (A/CN.4/167/Add.1) had referred to amendment by another instrument, but in fact amendments could take other forms.

15. Mr. YASSEEN said that, like the Chairman, he had construed the second sentence to mean that the amending agreement would be subject to the rules laid down in part I. Accordingly, it seemed, by virtue of the theory of the contrary act, that the provision required an agreement amending a treaty to be likewise in written form.

16. The CHAIRMAN, speaking as a member of the Commission, said he believed that the real problem lay in article 2 as approved by the Commission in 1962 at its 14th session.[1] Under the existing text, an unwritten agreement was incapable of amending a treaty. Was that what the Commission wanted?

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could not exclude the possibility of informal amendment, for example by means of a verbal declaration, even though it was likely to be uncommon.

18. The CHAIRMAN, speaking as a member of the Commission, considered that no State should be given the possibility of invoking the absence of a written agreement in a case when there had been a perfect and complete oral agreement.

19. Mr. VERDROSS proposed that, in order to reflect the idea expressed by the Chairman, the first sentence should be retained and in the second sentence the words "to such agreement" should be replaced by "to any instrument". In that way it would be clear that the second sentence applied only to written agreements.

20. Mr. YASSEEN considered that the article was concerned with only one amendment procedure, *viz.* amendment by means of an agreement, and that it did not exclude others.

21. The CHAIRMAN, speaking as a member of the Commission, pointed out that the need for agreement between the parties was mentioned in the first sentence, and then the second sentence went on to say, in effect, that the agreement could only be in written form.

22. Mr. VERDROSS said that the words "the rules laid down in part I apply to such agreement" would, as the provision stood, mean that those rules applied also to unwritten agreements, and that was a contradiction. That was why he had proposed that the words "to such agreement" should be replaced by "to any instrument".

23. Mr. AMADO proposed that the words "irrespective of the form of the agreement" should be added at the end of the first sentence.

24. The CHAIRMAN considered that Mr. Amado's amendment would not solve the problem arising from the second sentence.

25. Sir Humphrey WALDOCK, Special Rapporteur, proposed that at the beginning of the second sentence the words "if such agreement is in writing" should be inserted.

26. Mr. BARTOŠ said he was not concerned with the question of the form; he had wished to draw attention to the existence of a practical rule.

The Drafting Committee's redraft of article 67, amended as proposed by the Special Rapporteur, was adopted unanimously.

ARTICLE 68 (Amendment of multilateral treaties)

27. The CHAIRMAN invited the Commission to consider the Drafting Committee's text for article 68:

"1. Whenever it is proposed that a multilateral treaty should be amended in relation to all the parties, every party has the right, subject to the provisions of the treaty or the established rules of an international organization,

"(*a*) to be notified of the proposal and to take part in the decision as to the action, if any, to be taken in regard to it;

[1] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 163.

"(*b*) to take part in the conclusion of any agreement for the amendment of the treaty.

"2. Unless otherwise provided by the treaty or by the established rules of an international organization —

"(*a*) an agreement amending a treaty does bind any party to the treaty which does not become a party to such agreement;

"(*b*) the effect of the amending agreement is governed by article 65.

"3. The application of an amending agreement as between the States which become parties thereto may not be invoked by any other party to the treaty as a breach of the treaty if such party signed the text of the amending agreement or clearly indicated that it did not oppose the amendment."

28. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's request the Drafting Committee had in its redrafts of articles 68 and 69 drawn a more clear cut distinction between amendments originally designed to apply to all the parties and those intended to apply to a restricted group only. The requirement of notification, except in the case falling under paragraph 1 (*a*) of article 69, had been preserved in paragraph 2 of the redraft of that article.[2]

29. The CHAIRMAN, speaking as a member of the Commission, said that his only criticism of the drafting of paragraph 1 of the redraft of article 68 concerned the words "in relation to all the parties"; he suggested that the formula "as between all the parties" might be better.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's wording would be acceptable.

31. Mr. LACHS said that the Chairman's wording seemed hardly necessary in view of the existence of a separate provision on *inter se* amendments.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that his original text had indeed been based on that assumption but had met with objection.

33. Mr. CASTRÉN said that the question had already been discussed at length and that the Drafting Committee had been given precise instructions. The two different situations should be reflected in distinct provisions.

It was agreed that the words "as between" should be substituted for the words "in relation to".

34. Mr. PAL said that any proposal to amend a multilateral treaty should be notified to all the parties thereto, even if the proposed amendment was only intended to apply *inter se*. As it stood, article 68 was not adequate but he would not press his objection as the text was to be submitted to Governments for comment.

35. Sir Humphrey WALDOCK, Special Rapporteur, observed that Mr. Pal's preoccupation was met by the provision contained in article 69, paragraph 2.

36. Mr. BARTOŠ said that he did not understand the point of the proviso "subject to ..." in article 68, paragraph 1. Surely, the established rules of an international organization could not deprive certain States of the right to be notified of a proposal to amend the treaty. If that wording was retained he would vote against paragraph 1 and, if the provision in question was adopted by the majority of the Commission, he would abstain from the vote on article 68 as a whole. That formula would divide States into two categories — States which had the right to take part in the decision concerning any measures to be adopted and States which did not have that right. To adopt it would be to sanction the inequality of States.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the equality of States was not at issue, but there were cases when under the rules of an international organization a proposal to amend had to be submitted for decision by an organ of the organization However, he did not know of any rule circumscribing the right to be notified of such a proposal.

38. The CHAIRMAN, speaking as a member of the Commission, said that when it was proposed, for example, to amend an international labour convention, notice of the proposal was not necessarily sent to all the Members of the ILO.

39. Moreover, in the case of WHO the organs of that organization were empowered within certain limits to amend treaties without any notification or negotiation, and that authority was accepted in advance by the members.

40. Mr. BARTOŠ pointed out that even in WHO the States had to be duly informed and could raise objections.

41. The Commission should not approve a provision under which an international organization could deprive certain States of the right to be advised of proposals.

42. Mr. YASSEEN said he gathered that for Mr. Bartoš the rules guaranteeing the rights of States in that respect were rules of *jus cogens*; accordingly, there was no problem so long as what was involved were "treaties", for the proviso in paragraph 1, referring to treaties, could only mean treaties that were valid, including treaties which did not conflict with the rules of *jus cogens*.

43. Mr. TUNKIN said that in principle he agreed with Mr. Bartoš, who had raised an important point which had provoked doubts in his own mind about the second part of paragraph 1. All parties to a treaty had the right to be notified of a proposed amendment and to take part in the decision on the proposal.

44. Mr. PAREDES agreed with Mr. Bartoš; it was important to ensure that all parties to a treaty were

[2] *Vide infra*, para. 73.

notified of proposals to amend it, so that they could express their views and take part in the relevant discussions and decision. The modification of treaties should not take place in secrecy. In the case of multilateral treaties concluded under the auspices of an international organization, the views of all member States should be taken into account.

45. Mr. de LUNA said that the point raised by Mr. Bartoš might perhaps be mentioned in the commentary. He did not believe that notification could be made the subject of a rule of *jus cogens*.

46. The CHAIRMAN, speaking as a member of the Commission, said he did not believe the problem was a very serious one. The treaties in question were essentially technical instruments concluded within international organizations, which had to be adapted to changing conditions.

47. Mr. BRIGGS considered that in general all parties to a multilateral treaty should be notified of proposals to amend it, but it had to be recognized that some treaties and the rules of some international organizations limited the right to be notified, and States, in becoming parties to such a treaty or members of such an organization, were presumed to have voluntarily accepted that limitation.

48. Mr. ROSENNE said that there could also be cases where the right was extended; for example, under the 1958 Geneva Conventions on the Law of the Sea proposals for amending those Conventions were to be considered in the first place by the General Assembly, with the consequence that non-parties would have a say in the decision on such proposals. For the time being it would be wiser to maintain the text as proposed by the Drafting Committee; the whole problem would be reviewed in conjunction with the provisions contained in part I and article 48 concerning the constituent instruments of international organizations of treaties drawn up within them.

49. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion the passage in question did no harm. Either the treaty in question had been concluded within an international organization or, if not, it was hardly conceivable that States would include in a treaty a provision denying to any party the right to be notified.

50. Mr. BARTOŠ said that it was not the case of a treaty but that of the rules of an international organization which caused his concern. He proposed as a compromise that the words "to be notified of the proposal" should be placed after the words "every party has the right". Sub-paragraph (*a*) would then begin with the words "to take part in the decision".

51. Mr. CASTRÉN supported the proposal, which made the text acceptable by means of a slight change.

52. The CHAIRMAN, speaking as a member of the Commission, proposed that the word "notified", which was much too formal, should be replaced by "informed". What mattered was that the States should be informed.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept the insertion of the words "to have the proposal communicated to it and" after the words "every party has the right".

Paragraph 1, as so amended, was adopted unanimously.

Paragraph 2 was adopted unanimously.

54. Mr. TSURUOKA, referring to paragraph 3, asked whether the words "that it did not oppose the amendment" were intended to cover, for example, the case where a State participating in a conference had voted in favour of a proposed amendment. In his opinion, that case should be excluded, for that State's favourable vote was not a promise of ratification. The rule in paragraph 3 could be applied if there was no opposition after ratification of the text.

55. Mr. BARTOŠ said that he was less exacting in in that respect than Mr. Tsuruoka, who considered ratification indispensable. In his view it would be sufficient if the State in question had, over a long period of time, adopted an attitude towards the agreement which was not negative. The text of paragraph 3 under discussion was half-way between those two extremes, and he would vote for that text, even though it went too far.

56. The CHAIRMAN, speaking as a member of the Commission, thought that Mr. Bartoš's point of view might be taken into account if the words "clearly indicated" were replaced by "allowed it to be clearly understood".

57. He doubted whether it was advisable to mention the signature. There were cases where signature was not enough and where ratification as well was necessary for the State to become a party to the agreement; on the other hand there were many instances of agreements where signature was sufficient for that purpose. Accordingly, it might be better to delete the reference to signature.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that if the provision were amended in the manner suggested by the Chairman it might be regarded as too general by some members of the Commission. The Drafting Committee had sought to find some formula that would impose a strict requirement upon the State to give a clear indication that it did not oppose the amendment, and his original reference to adoption of the text had been dropped because certain members had argued that there was no means of ascertaining which way States had voted.

59. The CHAIRMAN, speaking as a member of the Commission, maintained that the reference to what might be only an intermediate stage, namely signature of the text, should be omitted.

60. Mr. TSURUOKA pointed out that if the reference to signature was deleted it would be difficult to determine whether there had or had not been opposition. A distinction had to be made between signature and a vote, for signature was a solemn act, even if only for the purpose of the authentification of the text, whereas a vote was often the result of a move made by a delegation which did not have enough time to consult its Government.

61. The CHAIRMAN asked whether, in Mr. Tsuruoka's opinion, a favourable vote was not a clear indication that the State in question did not oppose the amendment.

62. Mr. TSURUOKA replied that in his opinion the vote was not a sufficient criterion. He proposed that the words, " after the drafting of the text of the agreement in question," should be added between the words " clearly indicated " and " that it did not oppose the amendment ".

63. Sir Humphrey WALDOCK, Special Rapporteur, said that a change of the kind proposed by Mr. Tsuruoka, would go too far because there could be cases where States signified though the diplomatic channel that they were not interested in the modification of the treaty and would not attend the discussions.

64. Mr. de LUNA endorsed the Chairman's point of view.

65. Mr. TUNKIN said that from the beginning he had had doubts about the wisdom of including such a provision, because neither a vote on nor the signature of the text could be regarded as a definitive indication of a State's attitude. It might subsequently be realized that the amendment was inconsistent with its rights.

66. Mr. YASSEEN considered that paragraph 3 should be approved as it stood, for it was both necessary and adequate. The rule stated in the paragraph apparently referred on the one hand to States which had taken part in the amendment process and, on the other, States which had not taken part in that process. For the first category of States, the question was how far a State could go without waiving its right to claim that the amending agreement constituted a breach of the treaty; paragraph 3, as drafted, proceeded on the assumption that, by signing the text of the agreement, the State which had taken part in the amendment process waived the right to claim a breach of the treaty. With regard to States which had not participated in the amendment process, the rule proposed was that the State waived the right in question if it clearly indicated that it did not oppose the amendment. That indication could be given orally or through certain channels.

67. Mr. AMADO asked what exactly the verb " to indicate " was intended to mean. If it meant that there should be a formal indication, he agreed. The signature was an indication but in some cases it was only an intermediate act. Accordingly, it should be made a specific condition that the State must have signed the text of the agreement or given an indication analogous to signature.

68. Mr. ROSENNE said that the trend of the discussion had raised doubts in his mind as to the necessity of paragraph 3. Article 68 was already linked to article 65 with its general reservation concerning the responsibility a State might incur by concluding or applying a treaty the provisions of which were incompatible with its obligations towards another State under another treaty. In addition, article 47 contained both general rules regarding the application of the concept of estoppel in the law of treaties and a special reference to the connexion between estoppel and the material breach of a treaty.

69. Sir Humphrey WALDOCK, Special Rapporteur, considered that paragraph 3 embodied an important point of substance. It would be extraordinary if a State that had signed the text of an amending instrument, thereby helping to put into motion the machinery for entry into force, could subsequently claim that it was a breach of the original treaty. The provision had a limited object but did relate to an essential element in the process of amending multilateral treaties in modern practice, and he did not think that the point was covered in the other articles mentioned by the preceding speaker, at any rate in the form in which they were at present drafted.

70. The CHAIRMAN, speaking as a member of the Commission, said that he found the wording of paragraph 3 ambiguous. The words " if such party signed the text of the amending agreement " covered situations where a State had taken part in the process of amending the treaty, but only in cases where its signature was not a final binding act. The words " or clearly indicated that it did not oppose the amendment " covered a whole series of different situations, including the case where a State had taken part in the conference held to amend the treaty and, without having signed the agreement, signified that it had no objection to the amendment.

71. He suggested that the word " otherwise " should be inserted before the words " clearly indicated ".

72. Mr. TUNKIN said he continued to question the wisdom of including such a provision.

Paragraph 3 with the insertion of the word " otherwise " before the words " clearly indicated " was adopted by 13 votes to none with 5 abstentions.

Article 68, as a whole, as amended, was adopted unanimously.

ARTICLE 69 (Agreements to modify the application of treaties between certain of the parties only)

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following title and text for article 69:

" *Agreements to modify the application of treaties between certain of the parties only*

" 1. Two or more of the parties to a multilateral treaty may enter into a collateral agreement to modify the application of the treaty as between themselves alone if —

"(*a*) the possibility of such agreements is provided for by the treaty; or

"(*b*) the modification in question —

"(i) does not affect the enjoyment by the the other parties of their rights under the treaty;

"(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the objects and purposes of the treaty as a whole; and

"(iii) is not expressly or impliedly prohibited by the treaty.

"2. Except in a case falling under paragraph 1 (*a*), the conclusion of any such collateral agreement shall be notified to the other parties to the treaty."

74. The provisions of the article had been left practically unchanged, except for some drafting improvments. The main controversy that had arisen related to paragraph 2, which was now preceded by the opening proviso "Except in a case falling under paragraph 1 (*a*)". It had seemed to the Drafting Committee unnecessary to maintain the requirement of notification in a case where the treaty itself made provision for the possibility of an *inter se* agreement.

75. Mr. CASTRÉN said that, at the 754th meeting, he had proposed the deletion of paragraph 1 (*a*) and 1 (*b*) (ii); but those provisions had been retained in the new text. He would not press for their deletion since only a question of form was involved.

76. Fortunately, the Drafting Committee had not taken up the suggestion made by some members of the Commission that paragraph 2 should be deleted. Nevertheless, it had followed Mr. Reuter's suggestion and greatly weakened the provision. Although he did not deny that that change was justifiable in theory, he doubted whether the solution now adopted would be a sound one in practice. Under the new text, parties to an *inter se* agreement were not bound to give prior notification of their intention to the other parties to the original treaty: notification became obligatory only after the conclusion of the collateral agreement. The result would be that parties which had not been consulted about that agreement would be confronted with a *fait accompli* and any disputes concerning the legality of the *inter se* agreement would be more difficult to settle than they would have been if the parties had been able to state their objections at the stage when the collateral agreement was being prepared. In any case, the new draft of paragraph 2 should be supplemented by some such phrase as "as promptly as possible"; unless that addition were made, he would be unable to vote for the paragraph.

77. Mr. TSURUOKA proposed that the word "collateral" should be deleted in paragraphs 1 and 2. The deletion would not alter the sense of the article, whereas if that word were retained, the question of its precise meaning would arise.

78. Mr. PAREDES noted that paragraph 1 contemplated two completely different cases. One case was that where a treaty provided for the possibility of an *inter se* agreement. The second case was that envisaged in sub-paragraph (*b*), for which case the requirements specified in (i) and (ii) were laid down. The fact that those conditions were not specified for the case envisaged in sub-paragraph (*a*) seemed to imply that, where the treaty itself provided for the possibility of an *inter se* agreement, such an agreement could affect the enjoyment by the other parties of their rights under the treaty; also, that such an *inter se* agreement could relate to a provision derogation from which was incompatible with the effective execution of the objects and purposes of the treaty as a whole.

79. In connexion with paragraph 1 (*b*) (i), he wished to revert to a point which he had raised during the Commission's previous discussion of the subject. The provision in question specified that the *inter se* modification must not affect the enjoyment by the other parties of their rights under the treaty. It was essential, in that regard, to cover not only the case where the enjoyment of rights was affected but also that where greater obligations, duties or burdens were imposed. If, for example, an *inter se* agreement relating to navigation in a river or canal made provision for navigation by vessels of deeper draught or for navigation at other periods of the year than those specified in the original treaty, greater obligations or burdens might thereby be imposed upon other parties to the original treaty which were not parties to the *inter se* agreement.

80. Mr. VERDROSS thought that the expression "as between themselves alone" was not very felicitous; it would be better to say "so far as their mutual relations are concerned".

81. The words "expressly or impliedly" in paragraph 1 (*b*) (iii) should be deleted, for a prohibition could hardly be implied.

82. Mr. ROSENNE said that he wished to express his reservations regarding paragraph 2; he was not fully convinced of the necessity of its provisions and would therefore abstain from voting upon that paragraph.

83. With regard to paragraph 1, he supported the proposal by Mr. Verdross that in sub-paragraph (*b*) (iii) the words "expressly or impliedly" should be deleted.

84. Mr. BARTOS said that he did not regard the conditions laid down in paragraph 1 (*b*) as sufficient; as Mr. Paredes had said, the *inter se* agreement might also have an indirect effect on the interests of the parties to the original treaty; or again, it might alter the climate or balance of interests which the original treaty had created. He would therefore be obliged to abstain in the vote on paragraph 1.

85. He was also opposed to the rule appearing in paragraph 2. Even in the case of an *inter se* amendment made in conformity with the provisions of the treaty, it was necessary that the other parties should be acquainted with the purport of the amendment. Although, by

the terms of the Charter, publication of treaties was compulsory, there was often a delay before publication took place. Furthermore, since the authors of the Charter had held that every treaty should be brought to the notice even of the States not directly concerned, therefore *a fortiori* an *inter se* agreement amending a treaty for some of the parties should be communicated to all the parties to the original treaty. If the phrase "Except in a case falling under paragraph 1 (*a*)" were maintained, he would vote against paragraph 2 and would abstain in the vote on the article as a whole.

86. Mr. YASSEEN said that in his view the condition laid down in paragraph 1 (*b*) (ii) was contained in that laid down in (iii), for any modification that did not comply with condition (ii) would, at least implicitly, be prohibited by the treaty.

87. In paragraph 1 (*b*) (iii) the words "expressly or impliedly" were superfluous. The sentence would have exactly the same meaning without them, since a treaty always had to be construed by reference to what it said expressly and also in the light of what it implied.

88. He held the same views as Mr. Bartoš on paragraph 2 and considered that the proviso "Except in a case falling under paragraph 1 (*a*)" was undesirable.

89. The addition proposed by Mr. Castrén at the end of paragraph 2 was right in principle, but would have little effect in practice. It was impossible to stipulate a fixed time limit; and if the provision said simply that notification should be given within a reasonable time, it would be stating something that was already implicit in the obligation to act in good faith.

90. He considered that the word "collateral" should be retained, for it described correctly the relationship between the *inter se* agreement and the original treaty.

91. Mr. LACHS suggested that in the opening sentence of paragraph 1, the words "to modify the application of the treaty" should be amended to read "to modify the treaty" or "to amend the treaty" since what was at issue was the subsistence of the treaty, not the scope of its application. Another reason for the change was that it would bring the wording into line with that of paragraph 1 of article 68.

92. He supported the proposal by Mr. Tsuruoka for the deletion of the word "collateral". In some cases, the agreement might well have an independent existence.

93. He supported the proposal by Mr. Verdross that in paragraph 1 (*b*) (iii) the words "expressly or impliedly" should be omitted. The provision of paragraphs 1 (*b*) (i) and 1 (*b*) (ii) already covered the cases of implied prohibition arising from the substance or object of the treaty or of the rights set forth therein.

94. He agreed with the suggestion by Mr. Bartoš for the deletion of the opening proviso of paragraph 2 and supported Mr. Castrén's proposal for an addition at the end of the paragraph.

95. The CHAIRMAN suggested that the Commission should deal with paragraph 2 first, since its approach to paragraph 1 would be affected by the action taken on paragraph 2.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that for his part he did not feel strongly about the opening proviso of paragraph 2. He stressed, however, that it had been introduced in deference to the wishes of certain members who had thought that, where the possibility of an *inter se* agreement was already provided for in the treaty, it would be excessive to suggest that sovereign States had a duty to notify all the parties to the original treaty when they concluded such an agreement.

97. Mr. TUNKIN said that he understood the preoccupation of Mr. Bartoš. In reality, the problem differed according to the type of treaty involved. In the case of a multilateral treaty concluded between a small group of States, it would be appropriate to require the notification envisaged in paragraph 2. The position would, however, be different in the case of a general multilateral treaty. For example, the Soviet Union and the United States had recently concluded a bilateral consular convention. If the Vienna Convention on Consular Relations, 1963, had been in force, it would surely be excessive to suggest that the conclusion of such a bilateral convention should be notified to all the parties to the Vienna Convention, which permitted the conclusion of such bilateral agreements. It was difficult to see what purpose would be served by such a notification, particularly as the fact of the conclusion of a treaty was always made public and most treaties were registered with the United Nations Secretariat and published.

98. Mr. BARTOŠ observed that the Convention mentioned by Mr. Tunkin was an instance of the supplementary agreements referred to in article 73, paragraph 2, of the Vienna Convention on Consular Relations. He (Mr. Bartoš) had been referring to the very different case where the regime set up under the original treaty was altered by a subsequent *inter se* agreement.

99. His view on paragraph 1 (*b*) (iii) was the same as Mr. Yasseen's: with or without the words "expressly or impliedly" the provision would have to be interpreted in the same way.

100. Mr. ROSENNE said that if the opening proviso were deleted from paragraph 2, he would be obliged to vote against that paragraph. If the proviso were retained, he would abstain.

101. Mr VERDROSS said that, if the notification referred to in paragraph 2 concerned only the conclusion of an *inter se* agreement, it was unnecessary, since publication of all treaties was required under the Charter.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the notification of the conclusion of the agreement involved a matter of real substance. The registration and publication of treaties took a long time. Although it had been felt that in many cases it would be excessive to require the notification of a mere proposal for amendment, it had been considered desirable to require the notification of the conclusion of the amending instrument. However, it was advisable to maintain the opening proviso of paragraph 2 so as not to render the rule too rigid, for otherwise, the whole section might not be acceptable

to States. It should be remembered that, particularly in article 68, a certain measure of progressive development had been introduced on the subject of notification on points which were not as yet governed by settled principles; in order to obtain acceptance for the fairly strict rule laid down in article 68, the provisions of article 69 should be less strict.

103. Mr. de LUNA expressed support for the retention of the opening proviso in paragraph 2.

104. The case mentioned by Mr. Tunkin of the bilateral consular convention between the Soviet Union and the United States appeared to be covered by paragraph 1 (*a*) because the 1963 Vienna Convention on Consular Relations expressly provided for the possibility of the conclusion of such a bilateral convention. He added that a modification was not always necessarily the reversal of a rule in the amended instrument (amendment *contra legem*); the effect of the modification might be to add something that was consistent with that instrument (amendment *secundum legem*) of to remove doubts which had arisen (amendment *praeter legem*).

105. The CHAIRMAN noted that the Commission apparently wished to retain paragraph 2, including the "except" clause. The retention of that paragraph would necessitate certain consequential changes in the drafting of paragraph 1.

106. Speaking as a member of the Commission, he said that the words *Deux ou* should be added at the beginning of paragraph 1 of the French text. The word "collateral" was not very apt and might be dropped, for the opening passage of paragraph 1 made it sufficiently clear what agreement was involved. Furthermore, the purpose of such an agreement was to modify, not the "application" of the treaty, but the treaty itself, or the rules which it contained.

107. Paragraph 1 (*b*) (i) should read "does not affect the rights of the other parties under the treaty"; the word "enjoyment" distorted the meaning of the provision. In deference to the remarks of Mr. Paredes the words "or the performance of their obligations" might be added at the end of paragraph 1 (*b*) (i).

108. With regard to the proposal to delete paragraph 1 (ii), he considered that the Commission could either delete (ii) and retain the words "expressly or impliedly" in (iii), or else retain (ii) and delete the words "expressly or impliedly" in (iii).

109. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the word "collateral" which had been introduced solely to satisfy those members who wanted to underline the distinction between the case envisaged in article 69 and that in article 68.

110. He had no objection to the change proposed by Mr. Lachs in the opening sentence of paragraph 1, but wished to explain that the words "to modify the application of the treaty" were intended to stress that the *inter se* agreement could not modify the treaty itself; its effect was merely to modify, as between the parties to the *inter se* agreement, the rules embodied in the treaty. The condition in paragraph 1 (*b*) (i) that the modification must not affect "the enjoyment ... of ... rights under the treaty" was intended to cover changes which, without directly affecting the rights themselves, nevertheless had an indirect impact on the enjoyment of these rights.

111. In the same sub-paragraph, the valid point raised by Mr. Paredes of the possibility of increased burdens or obligations being imposed could be covered by adding a reference to the performance of obligations to that of the enjoyment of rights.

112. Paragraph 1 (*b*) (ii) embodied a useful provision derived from the important question, raised by the previous Special Rapporteur, of interdependent obligations. Although the point could be said to be covered by the notion of implied prohibition referred to in paragraph 1 (*b*) (iii), he thought that there was value in retaining the provisions of paragraph 1 (*b*) (ii), since there had been some discussion in the Commission on the particular subject.

113. Mr. TUNKIN favoured the retention of paragraph 1 (*b*) (ii), the provisions of which were stronger and possibly broader than those of paragraph 1 (*b*) (iii) on implied prohibition.

114. Mr. de LUNA strongly supported the retention of paragraph 1 (*b*) (ii) with its reference to the effective execution of the objects and purposes of the treaty, a notion which appeared in other articles of the draft.

115. Mr. LACHS said that the Commission was in fact faced with the choice of retaining either paragraph 1 (*b*) (ii) or the word "impliedly" in paragraph 1 (*b*) (iii). For his part, he supported the retention of paragraph 1 (*b*) (ii) with its explicit provisions, and the deletion of the nebulous terms "impliedly".

116. The CHAIRMAN put to the vote paragraph 1 as amended by the addition of the words *Deux ou* in the French text; the deletion of the word "collateral"; the deletion of the words "the application of"; the addition of the words "or the performance of their obligations" at the end of (*b*) (i); and the deletion of the words "expressly or impliedly" in (*b*) (iii).

Paragraph 1, as so amended, was adopted unanimously.

Paragraph 2, with the consequential deletion of the word "collateral", was adopted by 13 votes to 1, with 4 abstentions.

117. Mr. VERDROSS said that in the title of the article the words "the application of" should be omitted.

It was so agreed.

Article 69, as a whole, as amended, was adopted by 16 votes to 1, with 1 abstention.

118. Mr. ROSENNE proposed that the word "Revision" in the title of part III of the draft, "Application, Effects, Revision and Interpretation of Treaties" should be replaced by "Modification".

It was so agreed.

The meeting rose at 6.15 p.m.