

Document:-  
**A/CN.4/SR.859**

**Summary record of the 859th meeting**

Topic:  
**Law of Treaties**

Extract from the Yearbook of the International Law Commission:-  
**1966, vol. I(2)**

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111. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 64 to the Drafting Committee as suggested by the Special Rapporteur.

*It was so agreed.*<sup>16</sup>

The meeting rose at 12.55 p.m.

<sup>16</sup> For resumption of discussion, see 875th meeting, paras. 9-28.

## 859th MEETING

*Thursday, 26 May 1966, at 10 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

### Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

*(continued)*

[Item 1 of the agenda]

ARTICLE 65 (Procedure for amending treaties) [35]

#### *Article 65*

##### *Procedure for amending treaties*

A treaty may be amended by agreement between the parties. If it is in writing, 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.

1. The CHAIRMAN invited the Commission to consider article 65, for which the Special Rapporteur had proposed the following rewording:

“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 may otherwise provide.”

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, of the four articles forming section II, on the modification of treaties, article 68, on the modification of a treaty by a subsequent treaty, by subsequent practice or by customary law, dealt with a somewhat different aspect of modification. The remaining three articles formed a group and, in discussing article 65, it was useful to bear in mind also the provisions of articles 66<sup>1</sup> and 67<sup>2</sup>.

<sup>1</sup> For the text of article 66, see below, preceding para. 51.

<sup>2</sup> See 860th meeting, preceding para. 33.

3. Article 65 was in the nature of an introductory article and set forth the two general rules on the procedure for modification. The first rule, that a treaty could be amended by agreement between the parties, had been couched in general terms because the Commission had not wished to lay down too rigid a rule as to the conditions under which an amending agreement might be binding.

4. The second sentence of article 65, which made provision for the application to the amending agreement of the rules laid down in part I, had been criticized by some governments, the main objection being to the opening words “If it is in writing”, which the Commission had introduced in order not to exclude the possibility of amending a treaty by tacit agreement. He was quite agreeable to dropping those words, since the legal force of international agreements not in written form was safeguarded by the provisions of article 2(b), already adopted by the Commission, and article 65 made explicit reference to part I, in which article 2 was placed. For the actual wording, he had adopted the Netherlands Government’s proposal in preference to that put forward by the Israel Government.

5. A number of governments had also criticized the concluding proviso relating to “the established rules of an international organization”. That criticism applied also to article 66, and the United States Government had pointed out that it affected certain other articles as well. As he had indicated in paragraph 2 of his own observations (A/CN.4/186), the Commission had anticipated that point. The Commission had never contemplated giving overriding effect to the established rules of an international organization, thereby creating a kind of concept of a law-making competence in international organizations which would automatically impinge on the law of treaties; it had merely wished to reserve the special procedures of certain organizations, such as that for the amendment of international labour conventions which was governed by the rules of the ILO. In any case, the point had already been disposed of by the Commission’s adoption at the first part of its seventeenth session of article 3 (*bis*) (A/CN.4/L.115) which would automatically require the deletion from article 65 of the reference to the “established rules of an international organization”. It only remained for the Drafting Committee to examine article 3 (*bis*) carefully in the light of the government comments on article 65 in order to ensure that the reservation in article 3 (*bis*) had been expressed in sufficiently narrow terms to confine it to constituent instruments of international organizations and to treaties drawn up as part of the actual functions of an organization.

6. Mr. CASTRÉN said that he could accept the new wording suggested by the Special Rapporteur; it seemed likely to allay most of the misgivings of governments and was an improvement on the text adopted in 1964. It would certainly be better not to specify that the article referred only to agreements in writing, since article 2(b) already contained a general reservation, which was applicable to all the articles and which left the problems connected with oral agreements open.

7. Similarly, since article 3 (*bis*) contained a general reservation concerning treaties which were constituent

instruments of an international organization or had been drawn up within an international organization, the reference to the rules of an international organization might be deleted from article 65, but article 3 (*bis*) might with advantage be re-examined in the light of the comments of the Government of Israel, as the Special Rapporteur had proposed.

8. He agreed with the Special Rapporteur on the point raised by the Government of the United States; that was a special problem and no attempt should be made to solve it in that article.

9. Mr. VERDROSS said he agreed with Mr. Castrén that the Commission could take account of the comments of governments in the way proposed by the Special Rapporteur. He wondered, however, whether the abridged version of article 65 was still needed. Apart from the reservations in the second sentence, the proposed new text said practically the same as sub-paragraph (a) of article 68; the two articles might perhaps be combined.

10. Mr. ROSENNE said it was correct in principle to delete the reference to "the established rules of an international organization", and since the Special Rapporteur had spoken of that deletion as an automatic consequence of the adoption of article 3 (*bis*), the Drafting Committee would have to examine whether the same reference should not also be eliminated from articles 6, 7, 12, 18 and 29.

11. He agreed with the Special Rapporteur that the text of article 3 (*bis*) required careful examination in the light of government comments on other articles.

12. He could accept article 65 as proposed by the Special Rapporteur and, unlike Mr. Verdross, considered it an essential provision. It could of course be combined with article 68 but, in that case, it was the provisions of article 68 which should be moved back to article 65, not the reverse.

13. Mr. EL-ERIAN said that he fully agreed with Mr. Castrén and that he accepted the Special Rapporteur's redraft.

14. The question of the reference to the established rules of an international organization had been greatly facilitated by the Commission's adoption of article 3 (*bis*). However, he did not believe that it would be possible to make article 3 (*bis*) any more restrictive. The reference to treaties "drawn up within an international organization" was sufficient in that respect and he had been impressed by the Special Rapporteur's remarks in paragraph 5 of his observations, in particular by his reference to Chapters IX and X of the Charter.

15. Mr. de LUNA said that he supported the Special Rapporteur's proposal for the deletion of two phrases in the article, but was less happy over the retention of the remaining provision. The only rule left in article 65 after the deletions would be the statement that a treaty could be amended by a subsequent agreement, which would itself constitute a treaty and as such be governed by part I. The main preoccupation of governments concerned the possibility of a tacit agreement being invoked to amend a treaty. In that respect, the reference in the original text to the amending agreement being in writing served some purpose, although he was prepared

to see it deleted for the reasons given by the Special Rapporteur.

16. He was inclined to agree with Mr. Rosenne that articles 65 and 68 might be combined in a single article which would begin by stating the general principle that a treaty could be amended by a subsequent agreement and would then go on to say that modification could result from a subsequent treaty, subsequent practice or the subsequent emergence of a new rule of customary law, as set forth in sub-paragraphs (a), (b) and (c) of article 68.

17. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's rewording of article 65.

18. Article 65 had a definite function in the system of the Commission's draft articles and did not duplicate article 68. It referred to a treaty in which the parties deliberately set out to amend the earlier treaty; in paragraph (a) of article 68, the reference was to a new treaty which had the unintended consequence of modifying the application of the earlier treaty. The two ideas were completely different.

19. He could not agree with Mr. de Luna with regard to the content of the Special Rapporteur's proposal. The article stated two important substantive rules. The first was that the modifying agreement constituted a new treaty and was governed by the provisions of part I. The second was contained in the concluding proviso "except in so far as the treaty may otherwise provide". The purpose of that proviso was to legitimate the practice of including in the treaty itself provisions for special amending procedures, such as amendment by majority vote or by the decision of some organ.

20. Mr. VERDROSS said he feared there was a slight misunderstanding between Mr. Rosenne and himself. What he had intended to propose was not that article 65 should be deleted, but merely that it should be combined with sub-paragraph (a) of article 68; the same result might be achieved by retaining the proposed rule in article 65 and then amending sub-paragraph (a) of article 68.

21. The CHAIRMAN, speaking as a member of the Commission, said he first wished to point out that the title of the article was not quite correct; it was concerned not with procedure, but with a substantive rule.

22. He agreed with those governments, in particular that of the Netherlands, which thought it undesirable to underline in article 65 the possibility of treaties being amended by tacit or oral agreement. At the second part of the seventeenth session, he had questioned the wisdom of a rule under which a treaty might be terminated by oral agreement.<sup>3</sup> Such agreements were possible, admittedly, but their use should not be given too much prominence; that was even more true of the amendment of treaties, which might involve more serious problems than termination.

23. As several governments had suggested, it would be desirable to delete the reference to international organizations. The Commission had already discussed on several occasions whether the articles of the draft

<sup>3</sup> *Yearbook of the International Law Commission, 1966*, vol. I, part I, 829th meeting, para. 68.

applied to treaties concluded under the auspices of or within international organizations, by States acting in their capacity as members of those organizations. In any case, with the inclusion of article 3 (*bis*) in the draft, there was no longer any need to retain that exception in article 65.

24. When amended as proposed by the Special Rapporteur, article 65 seemed at first sight to state a self-evident truth, but as Mr. Jiménez de Aréchaga had just pointed out, it also specified, first, that an agreement amending an earlier agreement was governed by the rules in part I of the draft and, secondly, that reference must be made to the treaty itself, which might contain special provisions relating to its amendment. The latter point was particularly valuable; if, for instance, the parties had agreed that a treaty might be amended by a certain majority, it must clearly be recognized that that rule applied to the treaty in question. Article 65 therefore served a useful purpose.

25. Mr. EL-ERIAN said that article 65 was useful in that it laid down the general principle that a treaty might be amended by a subsequent agreement, to which the provisions of part I applied. The final proviso opened the way for laying down special amending procedures in the treaty itself.

26. The title should be amended by replacing the reference to the "procedure" for amending treaties by a reference to the general principle on the amendment of treaties.

27. Mr. BRIGGS said he could accept the two amendments proposed by the Special Rapporteur. Nothing was lost by dropping the words "If it is in writing", since the rules in part I referred to treaties, which were defined in article 1 (*a*) as international agreements "in written form".

28. He also agreed with the Special Rapporteur's reasons for deleting the reference to "the established rules of an international organization". As Chairman of the Drafting Committee, he was grateful to Mr. Rosenne for drawing attention to a number of other articles which contained those words; the Drafting Committee would examine whether that reference should be deleted in those articles as well.

29. On the retention of article 65, he fully agreed with the remarks of Mr. Jiménez de Aréchaga and the Chairman. It was essential to retain article 65 as a separate article in its present position, for it was the only article which covered both bilateral and multilateral treaties. The provisions of the following two articles were confined to multilateral treaties, and article 68 did not deal with the question of the formal amendment of treaties but with the operation of a treaty in the light of a subsequent treaty, a subsequent practice, or the subsequent emergence of a new rule of customary law in the circumstances set forth in sub-paragraphs (*a*), (*b*) and (*c*) of article 68.

30. Mr. BARTOŠ said that he was opposed to the amendment of treaties by oral agreement. However, under the rules governing the registration of treaties, agreements concluded orally but recorded in writing were not to be regarded as oral agreements. In such cases, although the intention of the parties had been expressed

orally, there was written evidence of the existence and content of the agreement; the "arrangements" of Anglo-American practice came into that category. Such agreements produced the same effect as treaties in writing.

31. Mr. de LUNA said that he had not proposed the deletion of article 65, but had merely suggested, like Mr. Verdross, that it might conveniently be combined with article 68. The only difference between the provisions of article 65 and those of sub-paragraph (*a*) of article 68 was that, in the case covered by the latter provision, the second treaty had not been concluded by the parties for the sole purpose of amending the earlier treaty.

32. The rule laid down in sub-paragraph (*a*) of article 68 was in fact a repetition of that contained in article 63, on the subject of the application of conflicting provisions of two successive treaties.

33. Mr. AMADO said that he was in general agreement with the Special Rapporteur and those speakers who had supported his new text. He agreed, however, with the Chairman that the term "procedure" in the title of the article should be changed, as it was incorrect. It should be noted that article 65 stated a general rule concerning the amendment of treaties, whereas article 68 dealt with questions relating to their operation.

34. Sir Humphrey WALDOCK, Special Rapporteur, after thanking Mr. Jiménez de Aréchaga and the Chairman for answering the point which had been raised with regard to the respective functions of articles 65 and 68, said he would urge the Commission not to engage at present in a discussion of article 68, a difficult article which dealt with a special matter and on which he would submit his own observations and proposals in due course. Article 68 had its genesis in an article in the section on interpretation, and the Commission had experienced great difficulty in placing it.

35. He fully endorsed Mr. Jiménez de Aréchaga's observation that article 68 was completely different from articles 65 and 66, which dealt with an agreement in which the parties set out deliberately to amend the earlier treaty. At the sixteenth session, members of the Commission had attached great importance to the distinction between the amendment of the treaty itself, for which provision was made in articles 65 and 66, and the case covered by article 67, of *inter se* agreements. In article 67, the Commission had been careful not to speak of "amendment", because the original treaty was not amended as a text; some of its parties merely entered into a modified *inter se* agreement. Article 68 dealt with some entirely different matters, involving the accidental modification of the operation of the treaty by subsequent events; in two cases covered by that article, there was no intention to amend the text of the treaty.

36. Mr. CASTRÉN said he agreed with Mr. de Luna that it would be possible to combine articles 65 and 68, but he shared the misgivings of the Special Rapporteur and other members of the Commission that the resulting article might be too long and too complex, and give rise to confusion. It would be better, therefore, to keep them separate.

37. He supported the proposal by the Chairman and Mr. El-Erian that a change should be made in the title

of article 65; it should probably be amended along the lines suggested by Mr. El-Erian.

38. Mr. REUTER said that, in view of the importance attached to the principle of sovereignty in the draft, the Commission would seem to intend that article 65 should state the so-called principle of the *acte contraire*, the principle that a treaty which had been concluded in a certain way could always be amended in the same way. If that was the intention of article 65, it was an important and useful rule, bearing as it did on a problem which was not purely theoretical.

39. For example, if the parties had provided in a treaty that it could not be amended until a certain number of years had elapsed, was any amendment of the treaty prohibited before that period had elapsed or could the parties to the treaty amend that provision of the treaty so that they could revise the treaty before the date laid down? The point might seem rather academic in the case of bilateral treaties, but it did nevertheless arise. It was more serious in the case of treaties concerning international organizations, especially when the parties had agreed in the treaty that its amendment should be more difficult than its conclusion. For example, if it was considered that the establishment of an international organization resulted in the creation of a legal entity and if it was provided that the treaty could not be revised except with the participation of one of the organization's organs, it was possible that governments might wish to amend that rule among themselves. Could they do so or was that no longer within their power?

40. The Commission should certainly make its intention in that respect absolutely clear.

41. Mr. BARTOŠ said that the question raised by Mr. Reuter had been discussed at length by international jurists. The point was whether the rule which existed in comparative municipal law, that the parties had the capacity to decide the form of their contracts, also applied to treaties, or whether each expression of sovereign will was complete in itself. It sometimes occurred in practice that the basic provisions of a treaty which had been concluded in the most formal manner, with a preamble, final clauses and a ratification procedure, and to which the parties had given wide publicity, were subsequently amended by an agreement in simplified form or even by a mere exchange of notes. It was possible that the treaty had been concluded in a particular political atmosphere and that, following a change in that atmosphere, the two States had agreed to reduce its importance or even to let it virtually lapse as discreetly as possible.

42. In his view, the rule which appeared in all civil codes and in customary law, including the common law, whereby the parties committed themselves in advance to use a certain form of contract, did not apply to international treaties; States were free at all times to choose the form of agreement which suited them. An expression of the will had been given; it could also be changed, but the form in which it was changed could differ from that in which it had been given; the parties were not tied to any given form.

43. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission had never intended to endorse the theory

of the *acte contraire*. In fact, the Commission had agreed that a formal treaty could be repealed or amended by a less formal agreement, or even by subsequent custom.

44. With regard to the other point raised by Mr. Reuter, the concluding proviso, "except in so far as the treaty may otherwise provide", ensured that it would be possible to establish in the treaty amendment procedures which could be either easier or more difficult than the procedures employed for adopting the treaty itself. It was impossible to accept the theory, which had been put forward by one delegation in the United Nations, that the Charter could be amended by a two-thirds majority—the majority by which it had been adopted originally—in disregard of the express provisions of Articles 108 and 109 of the Charter.

45. Mr. AGO said that the article laid down an important rule. He agreed with the Special Rapporteur and with those members of the Commission who believed that the important point was to state that the rules laid down for the conclusion of a treaty should apply to its amendment, except where the treaty itself provided for different rules, which might make amendment easier or harder than conclusion. The Commission intended to give the parties both possibilities.

46. In view of the content of article 3 (*bis*) there was no longer any need to refer in article 65 to the established rules of an international organization.

47. He was in favour of the text proposed by the Special Rapporteur, except that the article should preferably be headed "Rule applicable to the amendment of treaties". He also agreed with the Special Rapporteur that article 68 was far from satisfactory and would have to be revised.

48. Sir Humphrey WALDOCK, Special Rapporteur, said he endorsed Mr. Jiménez de Aréchaga's remarks on the rejection by the Commission of the theory of the *acte contraire*. Article 65 gave full liberty to the parties to agree on their own procedures for amendment. In doing so, they would naturally take into account their constitutional positions, but that was a matter which concerned the parties exclusively.

49. He proposed that article 65 should be referred to the Drafting Committee with instructions to amend its title and consider its wording in the light of the discussion.

50. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 65 to the Drafting Committee, as proposed by the Special Rapporteur.

*It was so agreed.*<sup>4</sup>

ARTICLE 66 (Amendment of multilateral treaties) [36]

*Article 66*

*Amendment of multilateral treaties*

1. Whenever it is proposed that a multilateral treaty should be amended as between all the parties, every party has the right to have the proposal communicated to it,

<sup>4</sup> For resumption of discussion, see 875th meeting, paras. 29-41.

and, subject to the provisions of the treaty or the established rules of an international organization:

(a) To take part in the decision as to the action, if any, to be taken in regard to it;

(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 not 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 63.

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 has otherwise clearly indicated that it did not oppose the amendment.

51. The CHAIRMAN invited the Commission to consider article 66, for which the Special Rapporteur had proposed a revised text reading:

" 1. Unless the treaty otherwise provides, any proposal to amend a multilateral treaty as between all the parties must be notified to every other party which shall have the right to take part in:

(a) The decision as to the action, if any, to be taken in regard to such proposal;

(b) The conclusion of any agreement for the amendment of the treaty.

" 2. Unless the treaty otherwise provides:

(a) An agreement amending a treaty does not 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 63.

" 3. If the proposal relates to a multilateral treaty which has not yet entered into force, it must be notified to every State which by its signature or otherwise shall have adopted or endorsed the text. *Mutatis mutandis*, paragraphs 1 and 2 shall then apply with respect to each such State.

" 4. A party to the treaty, which by its signature or otherwise has adopted or endorsed the text of the amending agreement but without becoming a party thereto, may not object to the application of that agreement as between any States which have become parties to it."

52. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his revised text, the reference in paragraphs 1 and 2 to the established rules of an international organization had been deleted for the reasons already given by him in connexion with article 65.<sup>5</sup>

53. In response to a comment by the Government of Israel, he had amended the opening sentence of paragraph 1 so as to make notification subject to the proviso "Unless the treaty otherwise provides"; since the substantive rights set forth in sub-paragraphs (a) and (b)

were subject to the provisions of the treaty, it was logical that the same should be true of the notification. The whole of paragraph 1 would thus be couched in the form of a residuary rule, as had already been the case in the 1964 text with regard to sub-paragraphs (a) and (b).

54. In paragraph 3 of his observations (A/CN.4/186), he examined the possibility that the Israel Government's suggestion might perhaps have been intended to cover also the right of a party to put forward a proposal for amending a multilateral treaty. In 1964, the Commission had discussed the practice of including in certain multilateral treaties clauses designed to restrict the making of proposals for amendment in some manner, for example, until after the lapse of a specified period of time.<sup>6</sup> The Commission, however, had arrived at the conclusion that it could not lay down, as a rule of law, that the parties to a treaty were not at liberty to make any proposals for amendment at all. On the political and diplomatic plane, the question of the amendment of a treaty could always be raised. Accordingly, he had not proposed in his revised text that the opening proviso of paragraph 1 should govern also the right of a party to put forward a proposal for amending a multilateral treaty.

55. Paragraph 5 of his observations dealt with a point raised by the Government of Israel in regard to the notification of proposals of amendment. The point applied to article 67 as well and related to the "intermediate" case in which the notice of amendment was made at a time when the parties proposing the amendment did not yet know whether the ultimate result would be an amendment of the treaty as such for all the parties, or merely an *inter se* agreement. Cases of that type did arise in practice but it was difficult to provide for them; any attempt to lay down rules in the matter might hinder the progress of political negotiations on desirable proposals for the amendment of a treaty. Moreover, it was hard to draw a dividing line between preliminary discussions and mature proposals for amendment. His own suggested solution to the problem was that paragraph 2 of article 67 should be strengthened. When the Commission came to consider article 67, it would have before it his analysis of government comments, from which it would note the concern expressed by a number of governments at the looseness of the provisions on notification contained in that article.

56. In paragraph 6 of his observations, he discussed the question of the rights or interests of States that had taken part in drawing up the treaty, and whether those States, even if they were not yet parties, should not be notified of proposals for the amendment of the text. The question had engaged the attention of the Commission in connexion with other articles as well. He had himself originally proposed provisions safeguarding the interests of all those States, but the Commission had arrived at the conclusion that such safeguards would lead to too much complication and would grant too great a benefit to States which had shown little real interest in the text of the treaty.

57. In paragraph 7 of his observations, he discussed the case, mentioned by the Government of Israel, of

<sup>5</sup> See paragraph 5 above.

<sup>6</sup> See *Yearbook of the International Law Commission, 1964*, vol. I, 744th-747th meetings.

the possible amendment of the text before the treaty came into force. Sometimes States would fail to ratify a treaty precisely because of some defect in the text, whereas if the text were amended, the necessary number of ratifications for entry into force might well be obtained. In order to take that point into account, he had drafted a new paragraph 3 for the consideration of the Commission.

58. The point raised by the Hungarian Government and referred to in paragraph 8 of his observations had been discussed by the Commission in connexion with article 8 on participation in a treaty, the decision on which had been postponed.

59. The Government of Israel had suggested that, in paragraph 2(b), reference should be made not only to article 63, but also to articles 59-61. As indicated in paragraph 9 of his observations, he considered that it was sufficient to refer to article 63, which already gave effect to the essential rule of article 59 which protected the rights of third States and prevented any obligations from being imposed upon them, so that they could not be deprived of their rights under an earlier treaty without their consent.

60. Three Governments had criticized paragraph 3 of article 66 and he had discussed their criticisms in paragraphs 10-13 of his observations; he had proposed a rewording of the paragraph, which would now become paragraph 4. The Commission would have to consider whether that concluding paragraph was necessary and, if so, what its terms should be. His view was that the provision should be restricted to the narrow point of estoppel arising from the adoption or endorsement of the amending agreement.

61. Mr. AGO said the Special Rapporteur should remove the uncertainty created by the opening sentence of paragraph 1 of his revised text; it could be taken to mean that the proposal to amend must be notified only to the parties which had the right to take part in the acts in question, which would make the whole article unintelligible.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that the opening sentence of paragraph 1 was intended to mean that the proposal must be notified to all the parties and that those parties would have the right to take part in the decision mentioned in sub-paragraph (a) and in the conclusion of any amending agreement, as mentioned in sub-paragraph (b). The language was somewhat ambiguous and the Drafting Committee should consider its improvement. There was, of course, no intention to go back on the Commission's 1964 decision that every party had the right to be notified.

63. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the Special Rapporteur that paragraph 1 called for some drafting changes. Perhaps all that was necessary in the revised text was to put a full stop after the word "party" and substitute the words "The party thus notified" for the word "which". The rest of the text need not be broken up into sub-paragraphs.

64. Paragraph 2, with the insertion of the word "amended" after the words "Unless the", was acceptable.

65. Paragraphs 3 and 4 should be deleted. He was not convinced that a provision was needed concerning the amendment of a treaty not yet in force or that signatory States were entitled to be notified and to participate in the amending process on an equal footing with States that were actually parties to the treaty. Surely such a provision had no place in the general system of the Commission's draft articles which elsewhere were concerned with treaties that were in force. The signatories to a treaty not yet in force possessed complete freedom to adopt a new text by means of an independent agreement. Moreover, paragraph 3 presented practical difficulties in connexion with notification and termination, as the Special Rapporteur had pointed out.

66. Paragraph 3 of the 1964 text had served some purpose, inasmuch as it covered the case of breach and provided for estoppel. He mentioned that point in the hope that the Special Rapporteur might be disposed to modify the somewhat rigid standpoint he had adopted in regard to article 63. His new paragraph 4 for article 66 should be brought into line with article 67 because it was evident that a State, whether or not it had signed the text, was not entitled to contest the application of the amended agreement as between other States, unless its rights were affected and it could only object to such an *inter se* agreement if the conditions specified in article 67 were not fulfilled.

67. Mr. TUNKIN said that the discussion of articles 66 and 67 during the sixteenth session had revealed a certain difference of opinion. He agreed on the whole with the Special Rapporteur's analysis of the observations received from governments and delegations on the former article.

68. He had some sympathy with the Hungarian Government's comment on paragraph 1 because, as the international community expanded with the appearance of new States, what could be regarded as general multilateral treaties might not at any given moment include all States among the parties; but that was a problem of participation and more relevant to article 8. The Special Rapporteur's suggestion to drop the reference to the "established rules of an international organization" in paragraph 1 was acceptable as well as his other suggested changes in that paragraph.

69. To a large extent he shared the doubts expressed by Mr. Jiménez de Aréchaga about the revised text of paragraph 3, which might result in instability and confusion by allowing any State to propose amendments to a text already adopted, even before the treaty had entered into force. That might require a second conference to consider the amendment, and not all the States that had participated in drawing up the text might attend. Such action should certainly not be encouraged, and the contingency was in any case covered in the opening proviso of paragraph 1. Paragraph 3 should be dropped.

70. Doubts had been expressed about the utility of the revised paragraph 4 on the ground that the point was already covered in article 67: that was a matter that could be examined by the Drafting Committee. His own view was that the paragraph could be left out, mainly for the reasons given by Mr. Jiménez de Aréchaga. If it were retained, some drafting changes would have

to be made to remove any misunderstanding about the meaning of the words "or otherwise has adopted or endorsed . . .".

71. Mr. ROSENNE said that the Special Rapporteur's new text for paragraphs 1 and 2, with the drafting changes proposed by Mr. Jiménez de Aréchaga, was acceptable.

72. The arguments for and against retaining paragraph 3 were fairly evenly balanced. Perhaps a provision on those lines was needed because, if his interpretation was right, it might constitute an exception to the provisions of article 17. It would be helpful to hear the Special Rapporteur's views on the relationship between those two provisions.

73. He reserved his position in regard to the new paragraph 4.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not yet given a great deal of thought to the relationship between the revised paragraph 3 and article 17. Although the obligation to refrain from acts calculated to frustrate the object of a proposed treaty, laid down in article 17, might be held to preclude proposals to amend a text before its entry into force, it might be going too far to make a cross-reference in paragraph 3 to that obligation.

75. He had been more preoccupied with the question whether a provision of the kind embodied in paragraph 3 was necessary at all. He had no strong views on the matter but had put forward a text for the Commission to consider. There was considerable force in Mr. Tunkin's argument that it would be undesirable to encourage States, before the entry into force of the treaty, to tamper with a text already approved or adopted. Perhaps the problem could be left aside for decision by States, particularly in view of the political aspects.

76. The purpose of paragraph 3, which was not a particularly radical provision, was to enable any State that had taken part in the formulation of the text to be consulted on a proposal to amend it before the treaty had entered into force and before, strictly speaking, any parties existed. He had no particular liking for the drafting of paragraph 3; there was a very real difficulty in finding a suitable form of words to designate the States which had taken part in the formulation of the text. They could not be described as the signatories nor as those which had adopted the text; in the latter case the records of the final voting might not necessarily suffice to identify them. The difficulty had been discussed at length by the Commission in the past, but no satisfactory solution had yet been found. He noted that Mr. Tunkin had not offered any alternative version for paragraph 3 either.

77. Mr. CASTRÉN said that the amendments which the Special Rapporteur had proposed to the 1964 text in the light of the comments made by governments seemed on the whole to be justified. The special reservations in regard to the "established rules of an international organization" should be deleted from paragraphs 1 and 2, as they had been from article 65, for the reasons given by the Special Rapporteur in his observations. His other amendments to paragraph 1 were also of a formal nature and, as they improved the text, they were acceptable.

78. Paragraph 2 had been left as it was, except for the deletion of the reservation to which he had already referred, and the Special Rapporteur had been right in rejecting the other proposed amendments.

79. The new paragraph 4, former paragraph 3, was more precise and less categorical on a number of points. It no longer provided that a breach of the treaty had taken place if certain States parties to the treaty started to apply, in their mutual relations and without the consent of the other parties, an agreement amending the treaty. According to the new text, the parties could give their assent by adopting or endorsing the text of the amending agreement by signature or otherwise. In that particular respect, however, he had the impression that the 1964 text, which was clearer and more precise, would be preferable. The expression "adopting the text of the treaty" had been severely criticized in 1964. Perhaps, even, as Mr. Jiménez de Aréchaga had said, the article was not necessary at all.

80. He doubted the wisdom of including the new provision contained in paragraph 3, for although cases might arise in which some of the States which had concluded a treaty wished to amend it before it had come into force, such cases were fairly rare, and that special and complicated issue should not be raised in draft articles devoted to general rules.

81. Mr. de LUNA said that he whole-heartedly approved the new form which the Special Rapporteur had given to paragraphs 1 and 2. In the light of the new text of article 3 (*bis*), the reference to the established rules of an international organization could be deleted.

82. He shared the doubts which had been expressed as to the advisability of including paragraph 3 in the article. Admittedly, it quite often happened that, when a specific number of ratifications was required for the entry into force of a multilateral treaty, ten years or so elapsed before the necessary number of ratifications were obtained. During that interval, the parties might reconsider the treaty or circumstances might change, thus creating an obstacle to the ratification of the treaty which the parties could overcome by amending the treaty. In that case, a problem of interpretation arose. According to article 17, States were obliged to refrain "from acts calculated to frustrate the object" of a treaty. Consequently, if the amendment did not frustrate the object of the treaty, there was no need for the paragraph 3 suggested by the Special Rapporteur: States were quite free to propose an amendment even to a treaty that had not yet come into force. On the other hand, if the amendment was such that it frustrated the object of the treaty, the Commission should make some specific observation on the subject, if only in the commentary to article 17.

83. He agreed with Mr. Jiménez de Aréchaga on paragraph 4. The principle *nemo potest venire contra factum proprium* was self-evident, but should be reaffirmed. The only question was whether the *sedes materiae* was article 66 or article 67. In fact, article 67 dealt with the modification of multilateral treaties between certain of the parties, and the new paragraph 4 of article 66 was also concerned with the application of the agreement in relations between certain parties.

84. Paragraph 4 was based on comments made by governments which left him completely unconvinced. The principle *nemo potest venire contra factum proprium* was a general principle of international law which the new text expressed in a very weak form. That being so, whether the paragraph was left in article 66 or transferred to article 67, he would prefer that it should convey, in unambiguous terms, the Special Rapporteur's idea that a State could not object to anything which it had endorsed by its own previous conduct.

85. Mr. AGO said that he did not believe that there was any real link between article 66 and article 17. The Commission's concern in article 17 was to ensure that States refrained from acts which might frustrate the object of a treaty; but such acts certainly did not include a straightforward proposal to amend the treaty. The question dealt with in article 66, on the other hand, was the rather exceptional case in which one party proposed an amendment to the treaty before it had come into force. Cases of that kind were, in fact, less rare than was generally supposed. It might happen that special difficulties arose in connexion with the entry into force of the treaty, and that one party took the initiative in proposing an amendment to the treaty for the specific purpose of overcoming those difficulties and facilitating the entry into force of the treaty. The Special Rapporteur had asked which States had to be notified by the State proposing to amend the treaty since, as the treaty was not in force, there were not as yet any parties to it, and in any case those States which had ratified it were not the only ones which had to be notified of the proposal. It was then that a slightly arbitrary choice had to be made, and the Special Rapporteur's choice, that States which had in any way expressed approval of the first treaty be notified of the proposal to amend the treaty, was still the least arbitrary.

86. Mr. VERDROSS said that the Special Rapporteur had improved the article considerably. He approved the omission of the reference to the established rules of an international organization, and paragraphs 1 and 2 called for no further comment.

87. With regard to paragraph 3, though he realized that no rule of the kind it stated existed as yet in international law, in his opinion international courtesy required that a State should be invited to take part in the amendment of a treaty which it had signed or approved. The question now was whether that rule of courtesy should be converted into a rule of law. He had no definite views on the matter and would abide by the opinion of the majority.

88. Paragraph 4 in fact stated the existing law and met all the objections which one government had raised to the earlier text.

89. Mr. BRIGGS said that, subject to drafting changes, paragraphs 1 and 2 in the Special Rapporteur's revised text were acceptable. He particularly welcomed the disappearance of the reference to the established rules of an international organization.

90. There was no need for paragraph 3. The formation of any such rule, for which he doubted whether there was any foundation in practice, should not be encouraged.

91. He also questioned the need for paragraph 4, although the drafting was certainly an improvement on the 1964 version. The purpose was to make provision for amendment of a text of interest to all the States concerned and not to deal with *inter se* agreements, a matter covered in the following article. As had been indicated by the Special Rapporteur in paragraph 11 of his observations, an amending agreement signed by the great majority of the parties to the treaty did not usually come into force for all of them, owing to the failure of some to ratify it. Under the terms of article 66, all the parties had the right to be notified of a proposal to amend, unless the treaty provided otherwise, and to participate in the decision on the action to be taken, if any; under paragraph 2 (a) they had the right not to accept the amending agreement and paragraph 2 (b) indicated what the legal situation would be in that event. Paragraph 4 was therefore quite unnecessary since the Commission was trying to deal not with situations in which responsibility was incurred but with amendments intended to be applicable to all the parties.

92. Mr. ROSENNE, referring to the possible connexion between paragraph 3 and article 17, said that the question he had raised could not be completely dismissed, although it might be covered in the commentary on article 17. Incidentally, his impression was that the French version of the phrase used in the first sentence of article 17, "to refrain from acts calculated to frustrate the object", "*s'abstenir d'actes de nature à réduire à néant l'objet*", seemed stronger and might be the more correct. If paragraph 3 of article 66 were retained, its object would be defeated if the provision were limited to States which had adopted or approved the text. Clearly its application ought to extend to all States that had participated in drawing up the original treaty. On balance, it would be preferable to drop the paragraph altogether.

93. Mr. TSURUOKA said he thought Mr. Rosenne was right. Actual experience of international life showed that when consideration was given to amending a treaty in order to overcome difficulties connected with its entry into force, it was because there were not enough ratifications, and because ratification presented problems for a number of States. When States believed that, rather than try to insist on the original text, it would be advisable to make some slight amendments to it in order to enable the treaty to come into force, the States most directly interested in its amendment were those which had not signed or ratified the treaty. In such a case, the normal practice would be to invite all States which were interested in the subject-matter of the treaty. He therefore thought that paragraph 3, as drafted by the Special Rapporteur, was too narrow and somewhat out of keeping with the requirements of present-day practice.

94. Mr. AGO said that, everything considered, he agreed with Mr. Rosenne and Mr. Tsuruoka. There was no reason to limit the invitation merely to States which had approved the first treaty. In all probability, the States which had neither approved nor signed nor in any way indicated their assent to the treaty would include some States which would be quite prepared to accept the amended treaty. It would be better, therefore, that in such a case the invitation should be extended at least to all States which had participated in the conference

at which the original text had been drafted. That was, of course, the minimum number of States which should be invited; if any new States had come into being in the meantime to which the subject-matter of the treaty was perhaps of interest, they could also be invited. But such an obligation should not in any way be interpreted as restrictive.

95. Mr. REUTER said that the text as a whole was very satisfactory. As Mr. Jiménez de Aréchaga had suggested, paragraph 1 might be simplified, and subparagraphs (a) and (b) combined.

96. Paragraphs 3 and 4 might not be absolutely indispensable. He had some doubts about retaining a paragraph which was merely designed to restate the principle of estoppel. Paragraph 3 was, perhaps, useful in the light of a dual phenomenon of which there were some notable examples in history—on the one hand, the effect of parliamentary procedure and, on the other hand, the undoubtedly predominant role which certain States had played in the adoption of certain treaties. He was thinking of very important countries where the senate had distinguished itself by refusing to approve treaties. It would certainly be helpful to establish a more or less continuous procedure to counter the disastrous effects on important international treaties of the attitude adopted by the parliamentary bodies of great Powers. He was, therefore, in favour of retaining the paragraph, and strongly supported the Special Rapporteur's views on the matter.

97. Mr. TUNKIN said that no member advocating the deletion of paragraph 3 would contend that States were debarred from taking action to amend a treaty which had not secured enough ratifications to enter into force. The only point at issue was whether the Commission ought to include a provision of a kind that could be interpreted as treating on the same footing an amendment to a treaty in force and one to a treaty not in force.

98. The reference to paragraph 1 in paragraph 3 was misleading because it was not clear whether the scope of the proviso "unless the treaty otherwise provides" was intended to comprise the temporal element. If not, paragraph 1 did not cover the possibility of a treaty containing clauses governing the submission of proposals for amendments to the text before the treaty came into force. Under paragraph 3, any State was entitled to propose an amendment before the treaty had entered into force. If his reading of paragraphs 1 and 3 was correct, his objection to maintaining the latter was even stronger than when he had first commented on the article.

99. Mr. BARTOŠ said that the utmost importance should be attached to a treaty that had been concluded, even if it had not come into force. If a supervening change of circumstances prevented the will of the parties which had participated in the drafting of the treaty from producing its effect, some remedy had to be found.

100. It might be, for instance, that a historical event of minor importance supervening between the time when the treaty was drafted and the expiry of the time-limit for the deposit of ratifications would suffice to make it impossible for certain governments to subscribe to the obligations which they had intended to assume at the

time of authentication. What was the best procedure to follow? Was it better to abandon the treaty altogether or—regardless of whether the treaty contained rules relating to revision or not—to initiate negotiations with a view to saving what could still be saved? In general, rules relating to revision were applicable after ratification and after entry into force; but what the Commission had to find was a remedy which could be applied before the entry into force of the treaty, for the specific purpose of facilitating its entry into force. The Commission had not dealt with that point in its draft articles, and the Drafting Committee should give it some thought.

The meeting rose at 1 p.m.

## 860th MEETING

Friday, 27 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

### Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 66 (Amendment of multilateral treaties)  
(continued)<sup>1</sup>

1. The CHAIRMAN invited the Commission to continue consideration of article 66.
2. Mr. JIMÉNEZ de ARÉCHAGA, amplifying the objections he had put forward at the previous meeting<sup>2</sup> to paragraph 3 in the Special Rapporteur's revised text,<sup>3</sup> said that it ought to be examined from the threefold standpoint of whether it embodied a rule of international law requiring codification, whether it contributed to the development of international law and whether it fitted into the structure of the draft. The answer to the first question was in the negative. At its sixteenth session, the Commission had proposed in paragraph 1 a rule granting to all parties the right to be notified and to participate in the amendment of a treaty, while recognizing that such a procedure was not normally followed in practice. The reaction of governments and delegations to that proposal had been favourable, but that was no reason for extending the rule to an entirely different situation.
3. In paragraph (11) of the commentary on the 1964 text, after setting out the practice against such a rule,

<sup>1</sup> See 859th meeting, preceding para. 51.

<sup>2</sup> *Ibid.*, para. 65.

<sup>3</sup> *Ibid.*, para. 51.