Document:-
**A/CN.4/SR.860**

# Summary record of the 860th meeting

Topic:
**Law of Treaties**

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

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.

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## 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.

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### 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)*[1]

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[2] to paragraph 3 in the Special Rapporteur's revised text,[3] 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,

[1] See 859th meeting, preceding para. 51.

[2] *Ibid.*, para. 65.

[3] *Ibid.*, para. 51.

the Commission had stated that it nevertheless considered that " . . . the very nature of the legal relation established by a treaty requires that every party should be consulted in regard to any amendment or revision of the treaty. The fact that this has not always happened in the past is not a sufficient reason for setting aside a principle which seems to flow directly from the obligation assumed by the parties to perform the treaty in good faith. "[4] The justification for the Commission's proposal in paragraph 1 was the existence of a treaty relationship between the parties, but that could not hold for a rule intended to apply in cases where no treaty relationship yet existed.

4. Paragraph 3 of the Special Rapporteur's revised text, far from contributing to the development of international law, might have the contrary result. For example, all Member States of the United Nations and parties to the Statue of the International Court of Justice had been invited to the second Geneva Conference on the Law of the Sea, and not just those States which had taken part in the adoption of the conventions drawn up at the first Conference. Even if, as suggested by Mr. Ago, the rule in paragraph 3 were framed in wider terms, the practical difficulty mentioned by the Special Rapporteur of determining which States should be invited would still remain. That proved that the Commission was moving beyond the realm of treaty law into that of rules governing the convening of international conferences. If paragraph 3 were included in its revised form, the Commission would have formulated a rule regarding the convocation of second conferences without having established a rule concerning the first conference. In 1964 it had decided not to included in its draft a rule on convening the first conference on the ground that that matter fell outside the law of treaties.

5. An even more important objection to attempting to codify rules as to which States ought to be invited to take part in the negotiation of general multilateral treaties was the danger of trying to legislate for the future. As Mr. Tsuruoka had pointed out at the previous meeting, that question had to be decided according to the circumstances in each case and according to the nature of the treaty, either by the international organization concerned or by the States convening the conference. One of the factors that had to be taken into account was the possible emergence of new States during the interval between the two conferences.

6. The CHAIRMAN, speaking as a member of the Commission, said that before a rule such as that stated in paragraph 3 was included in the text, a detailed study was needed of the many problems which it was likely to raise. It might be better not to complicate matters by including a provision of that kind.

7. Mr. de LUNA said he still thought that the difficulties could be solved by inserting, in the commentary on article 17, a sentence stating that that article could in no way be interpreted as applying to a proposal for amending a treaty which was not yet in force.

8. The point was of some practical importance as could be shown by the recent case of an agreement on appellations of origin, particularly for wines and cheeses, to which France and Italy were parties. As the other countries, including Spain, had not ratified the agreement, France and Italy had proposed an amendment which had been approved at a second conference held at Lisbon. It had thus been the countries which had ratified the agreement which had taken the initiative in proposing the amendment, in order to induce the other countries to ratify it.

9. Mr. AGO said he agreed that the inclusion in article 66 of a provision such as that contained in paragraph 3 might complicate the article, and that it would be better to restrict the provisions of the article to proposals for amending a treaty already in force.

10. He supported Mr. de Luna's suggestion that the matter should be mentioned in the commentary, but preferably in the commentary on article 66. To include it in the commentary on article 17 would result in a complete misunderstanding of the meaning of article 17, which dealt with acts frustrating the object of the treaty, and that had nothing to do with a proposal to amend the treaty.

11. In the commentary, the Commission might say that it had considered the question of a proposal to amend a treaty which had not yet come into force but had preferred not to lay down a specific rule on the subject, in order to avoid giving the impression of encouraging a practice which, in normal circumstances, seemed reprehensible; it did, however, think that, if such a case did arise, at least all States which had participated in the drafting of the first treaty should normally be invited to participate in the negotiations on the proposed amendment. A sentence on those or similar lines would express the idea contained in the paragraph, while the text of the article itself would be shortened.

12. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that only small drafting changes had been proposed in paragraphs 1 and 2, and they could be left to the Drafting Committee.

13. There seemed to be some hesitation about maintaining paragraph 3 of his revised text and the weight of opinion might even be against it, but that need not be particularly disturbing because, should the situation which paragraph 3 was intended to cover arise, States could always remedy the matter by diplomatic action.

14. Most of the arguments adduced against the inclusion of paragraph 3 had not been very convincing, because in paragraph 1 the Commission had laid down a strict rule the effect of which would be that from the moment a general multilateral treaty came into force, any consideration of its amendment would become a matter for the parties alone. The Commission had limited the scope of paragraph 1 in a way that would exclude from the amending process, once the treaty had come into force, the States which had attended the conference, signed the text, and might be considering ratification, so that the rule was probably stricter than existing international practice. So far as amendment of major multilateral treaties was concerned, it was more usual for the States that had taken part in the drawing up of the text and which had certain expectations under the final clauses of being able to proceed to rati-

[4] *Yearbook of the International Law Commission, 1964*, vol. II, p. 196

fication to be consulted. The course which the Commission had decided to adopt on that point at the sixteenth session might penalize a State failing to ratify the text at an early date, should a question of amending the text arise.

15. The main reason for maintaining paragraph 3 was that there could be instances where the original text had proved unsatisfactory and some action was needed to put it right before States would be willing to become parties. The Secretariat had reminded him of the interesting example of the 1956 International Agreement on Olive Oil,[5] the final clauses of which had given trouble and had had to be amended before the States taking part in the 1963 Conference had been willing to proceed with the 1963 Agreement. The danger lay not in States resorting too lightly to the amendment of a text, but in their doing nothing about a defective one: inertia was the great enemy of the development of treaty relations. The political hazards which some members saw in the revised paragraph 3 did not exist. Obviously an unfounded amendment put forward shortly after the text had been drawn up would not be entertained by the other States.

16. Some members might feel it was unnecessary to deal with the issue, but if it were not left aside he was among those who considered that the category of States which could take part in the consideration of an amendment should be fairly wide. He had tried various alternatives in different contexts in other articles to overcome the difficulty, such as the States that were " entitled to become parties " or " the States which participated in the adoption of the text "; but all had met with objection.

17. He was unable to agree with Mr. Jiménez de Aréchaga: surely when a text had been drawn up, and adopted with the final clauses that enabled States to become parties by one procedure or another, whatever the legal status of the text before it came into force as a treaty, participation in the process of drawing it up created certain rights. On that point the Commission was agreed. A State that had signed, adopted, or otherwise endorsed the text, had more than an interest in it and amendment became a serious matter because it could alter the basis on which that State might have expected to ratify, adhere or accede. To confer the right contemplated in the revised paragraph 3 on that category of States would constitute a parallel provision to paragraph 1.

18. If paragraph 3 were dropped altogether, the point could be covered in the commentary, but paragraph 3 would undoubtedly mitigate the stringent tenor of article 66.

19. Some members had suggested that paragraph 4 was redundant because article 67 covered the problem of *inter se* agreements. Certainly there was a relationship between the two situations that those provisions were intended to cover, but they were by no means the same. In article 67 the right of certain parties only to agree between themselves to modify a treaty—the agreement to be operative only between them—was admitted, but under strict conditions limiting the possibility to instances when that would not adversely affect the rights and obligations of the other States.

20. Article 66, paragraph 4, was designed to cover the case of a proposal for an amendment intended to apply between all the parties; that might give rise to something analogous to an *inter se* agreement through the failure of some States to ratify the amending agreement. In the cases envisaged, a conference would be called to draw up a text containing the amendments which the States that had participated in drawing up the " master " treaty would be entitled to sign, ratify and so on. The conditions laid down in article 67 might not have been satisfied; for the nature of the proposed amendments would be immaterial, provided they commended themselves to the great majority of States that had participated in the original conference.

21. The purpose of paragraph 4 was to indicate plainly that, once the participants had agreed to draw up and adopt an amending agreement, the States which afterwards ratified the agreement and put it into force as between themselves were not doing anything illegitimate. If paragraph 4 were dropped, that point would be open to argument, particularly if the Commission maintained the provision that the amending agreement was not binding on States which had not become parties to it. Those States would be able to claim that the treaty was being violated by the mere action of the other States in putting into effect the amending agreement as between themselves. In fact paragraph 4 dealt with estoppel. The issue might not be of great practical significance and he had never come across an example of a signatory to the original text challenging the right of States which had ratified an amending agreement to put it into force between themselves, but it must clearly understood that paragraph 4 and article 67 covered *inter se* agreements arising in entirely different circumstances and that the legal situation was not identical.

22. Paragraph 3 in the 1964 text of article 66 had been justifiably criticized by the United States Government. His revised paragraph 4 sought to attenuate the rigour of that rule and would fill a gap in the draft that ought to be filled. The problem could be examined by the Drafting Committee.

23. Mr. ROSENNE said that the Special Rapporteur's emphasis on the strictness of the rule laid down in paragraph 1 had injected a new element into the discussion. He appeared to construe paragraph 1 as excluding from the process of amending a multilateral treaty States that were not parties. His (Mr. Rosenne's) reading of the purport of that paragraph was quite different, namely, that it was strict in the sense that it definitely conferred rights on the parties but that it did not deprive other States of the right to take part in the amending process, if that were appropriate in a particular situation.

24. The discussions that had taken place in the General Assembly in 1962, 1963 and 1965, and at the Commission's fifteenth session, on the problem of opening to accession what were known as the League of Nations " closed " treaties, had focused attention on the problem of the relationship between the rights of States parties to those treaties and the more general problem of the

[5] The text of the 1956 Agreement will be found in United Nations Conference on Olive Oil, 1955, *Summary of Proceedings* (United Nations publication, Sales No.: 1956. II D. 1), p. 20.

rights of other States Members of the United Nations. In the General Assembly resolutions adopted on the subject, a sharp distinction had been drawn between those two categories of States, but although States parties certainly possessed rights of the kind set out in article 66, paragraph 1, it had never been understood that such rights were confined exclusively to those States. If the Special Rapporteur's reading of paragraph 1 was a different one, then the wording would have to be changed.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne had misunderstood. His argument had been that the real danger that article 66 might present was that the rule set forth in paragraph 1, if included in a codification convention that eventually came into force, might be acted upon by depositaries or other States. He himself had never thought that the rule laid down in paragraph 1 should preclude certain States from being consulted in regard to the amendment of multilateral treaties. In the case of most multilateral treaties of a general character, States were invited to take part in the process of drawing up the text because their participation was thought to be desirable, and the same held good for an amending agreement.

26. The rule in paragraph 1 was strict in the sense that it only admitted that the parties had a right, as distinct from an interest, in taking part in the discussion of an amending agreement. To illustrate what he had in mind, he would take the case of a multilateral treaty that required twelve ratifications in order to enter into force; so long as only eleven had been received by the depositary, all the States that had participated in drawing up the text would have the right to be consulted over a proposal for amendment, but the moment the twelfth ratification was received and the treaty came into force, the right to participate would become limited to the actual States parties. Thus, on the plane of right, the legal situation might change from one day to another. Of course, as far as political factors were concerned, nothing laid down in the draft could prevent the parties from providing otherwise in the treaty itself.

27. Mr. TUNKIN said he fully endorsed the Special Rapporteur's view that, as far as general multilateral treaties were concerned, article 66 was too restrictive. The Drafting Committee might have to consider enlarging its scope.

28. In the case of ordinary multilateral treaties, presumably not many States other than the parties would be interested in amending the text soon after it had come into force. However, a problem could arise over treaties that might originally have been of interest to only a few States and which in course of time came to be of interest to more States; the interest of the latter could certainly not be ignored.

29. If the problem covered in the revised paragraph 3 were to be dealt with in the commentary, the wording would have to be thoroughly revised because as it stood it was incorrect. If an international conference were convened to amend an old treaty adopted by a two-thirds majority, why should the States that had voted against the text of the original treaty be prevented from taking part in that second conference?

30. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with what Mr. Tunkin had said, but the reason why he had put forward a more restrictive formula in his revised text of article 66 was that members had objected to the obscurity of such phrases as " the States that had participated in the adoption of the text ". He himself had never been convinced that it would be right to exclude States that had voted against the adoption of the text, but, as Special Rapporteur, he had tried to take account of the view of certain members that such States were not entitled to take part in the amending process.

31. Mr. BARTOŠ said that the arguments of those who had voted against the adoption of the text of the treaty might have been supported by the facts. It would therefore perhaps not be wise or in keeping with constructive jurisprudence to exclude on principle all countries which had formerly opposed the treaty from the procedure for amending it. All those who had participated in the first conference, or had been entitled to do so, should be invited to the second conference at which a generally acceptable solution would be sought. If the text of the treaty were amended, the majority view might change.

32. The CHAIRMAN suggested that the Commission adopt the special Rapporteur's proposal and refer article 66 to the Drafting Committee.

*It was so agreed.*[6]

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) [37]

[37]

*Article 67*

*Agreements to modify multilateral treaties between certain of the parties only*

1. Two or more of the parties to a multilateral treaty may enter into an agreement to modify 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 other parties of their rights under the treaty or the performance of their obligations;

(*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 prohibited by the treaty.

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

33. The CHAIRMAN invited the Commission to consider article 67. The Special Rapporteur had suggested adopting the Israel Government's amendment to paragraph 1(*a*) whereby the words " such an agreement " would be substituted for the words " such agreements ". He had also suggested a revised text for paragraph 2, reading:

" Except in a case falling under paragraph 1(*a*), the parties concerned shall notify the other parties

[6] For resumption of discussion, see 875th meeting, paras. 42-78.

of their intention to conclude any such agreement and of the nature of its provisions ".

34. Sir Humphrey WALDOCK, Special Rapporteur, said that article 67 dealt not with the amendment of a treaty as such, but with a process that the Commission had chosen to describe as the modification of a treaty between certain parties only by means of a subsequent agreement between themselves. In the context, the use of the words " modify " or " modification " was appropriate, because the article was intended to deal with special arrangements by some of the parties that would have the effect of modifying the operation of the treaty only as between themselves.

35. The article, which had been discussed at considerable length during the sixteenth session,[7] had not attracted much comment from governments or delegations. The Finnish Government had suggested deleting the third condition in paragraph 1(*b*), on the ground that the point was covered in the second condition. In paragraph 1 of his observations and proposals he had explained his reasons for rejecting that suggestion. Even though there might be some overlapping, the two provisions were not identical. The Commission's aim had been to formulate strict conditions for *inter se* agreements and he agreed with that view. If it were decided that some overlapping did exist, it was the second condition that should be dropped rather than the third.

36. The drafting change suggested by the Israel Government in paragraph 1(*a*) was an improvement and should be adopted.

37. The main point of substance raised by three governments—those of Finland, Israel and the Netherlands—related to the question of notification dealt with in paragraph 2. The Israel Government, in its comments on article 66, had drawn attention to the intermediate case where a proposal for amendment might be discussed between a small group of States that had not yet decided whether it should apply *inter se*, or whether it would be a proposal for the amendment of the treaty as a whole. He had suggested that the problem might be dealt with by laying down more stringent requirements concerning notification in article 67; the criticism by the three governments that the conditions about notification in article 67 were too loosely formulated was well-founded. There was a real need for the other State or States to be protected against encroachments upon their rights in cases when an *inter se* agreement was no longer a mere political assertion and had reached the stage of a proposal. In such cases a requirement to notify other parties was needed.

38. The point made by the Finnish Government about cases where the treaty itself contemplated, or even provided for, the possibility for a special agreement between the parties to the treaty was in itself valid; practice provided some well-known examples. At its sixteenth session the Commission had considered the matter and had decided not to lay down the requirement suggested by the Finnish Government because it would seem to go too far, desirable though it was for every party to be aware of any developments connected with the treaty. When the parties themselves had provided for the possibility of *inter se* agreements but had inserted no requirements in the treaty itself about notification, it might almost amount to altering the provisions of the treaty if the Commission were to lay down a rule requiring notification.

39. Mr. CASTRÉN said that certain governments, including that of Finland, had made proposals for amending article 67. Their criticisms had been mainly directed against paragraph 2 which, they considered, did not deal satisfactorily with the important question of notification, since it did not take sufficient account of the interests of States parties to the treaty which were not included in so-called *inter se* agreements.

40. He noted with satisfaction that the Special Rapporteur had taken account of the concern expressed by those governments and had proposed a new text which was a real improvement on that of 1964. He was therefore prepared to accept that text subject to certain drafting amendments, and would be able to vote for the article as a whole, because the other disputed points were of minor importance.

41. Mr. TSURUOKA said that, like the 1964 text, the new text of paragraph 2 proposed by the Special Rapporteur began with the words " Except in a case falling under praragraph 1(*a*) ". It seemed to him, however, that paragraph 2 dealt only with notification, whereas it was not certain that paragraph 1(*a*) also referred to notification. It was thus not clear how the proviso applied, and he would prefer a wording such as: " Unless the treaty otherwise provides ".

42. Further, in his opinion, where an additional agreement on the modification *inter se* of the main treaty did not fulfil the conditions laid down in paragraph 1, the question which arose was one of a violation of the treaty and, as such, was governed by the articles on breach.

43. Mr. BARTOŠ said that three possible situations might arise in connexion with the conclusion of *inter se* treaties. First, if the main treaty explicitly prohibited the parties from concluding an *inter se* agreement, such an agreement would be impossible without a flagrant violation of the main treaty.

44. Secondly, the main treaty might impose restrictions on the conclusion of *inter se* treaties. The Convention on Consular Relations, for instance, authorized the parties to conclude additional agreements, provided they did not go beyond the scope of the general Convention. In that case, States which availed themselves of the possibility of concluding an *inter se* agreement had an obligation towards the other States, since they had assumed a commitment towards them, within the general association of States, to remain within the scope of the main treaty. That being so, the form in which notification was made was immaterial. All States which were not parties to the *inter se* treaty were entitled to consider that the main treaty had been violated if the *inter se* treaty went beyond certain limits defined in the general convention. The Commission should not let itself be led into granting the facilities claimed by certain governments for concluding *inter se* agreements without any requirement to notify them to the other parties.

[7] See *Yearbook of the International Law Commission, 1964*, vol. I, 745th, 746th, 747th, 754th and 764th meetings.

45. Thirdly, the main treaty might contain no provisions on the matter. That did not mean that States parties were free to do whatever they liked and to conclude *inter se* treaties; in view of the general reciprocity rule implicit in the law of treaties, all States parties were interested in knowing what derogations were made from the main treaty. The parties to a general treaty could not enjoy all the advantages arising from that association and at the same time enter into a separate association offering special advantages, which it was not open to certain of the parties to join and from which they were excluded.

46. The proper solution lay in a general system of law. If States applied the principle of good faith, they had no need to conceal any *inter se* agreements they concluded. He was therefore opposed to dispensing with the requirement of notification.

47. Mr. JIMÉNEZ de ARÉCHAGA said he supported article 67 as revised by the Special Rapporteur. There remained, however, the question of the possible application of the procedure laid down in article 67 to cases of suspension. It was his understanding that the Commission would deal with that point when it considered paragraph 3 of article 40, an article which, at the second part of its seventeenth session, the Commission had decided to defer until the present session. It would then be possible to decide whether article 40 should refer back to the provisions of article 67.[8]

48. With regard to the difference between articles 67 and 66, it should be noted that the cases envisaged in them were different in the initial stages, but the subsequent effects might be the same. If a State which had participated in the procedure of amendment under article 66 later failed to ratify the amending agreement, the resulting situation would be similar to that contemplated in article 67; there would be an *inter se* agreement between those parties which had ratified the amending agreement.

49. The Commission should consider how the provisions of paragraph 4 of article 66 would affect article 67. Under article 67, a State which was not a party to the *inter se* agreement could not object to its application as between the parties to it if its own rights were not affected. The provisions of the proposed paragraph 4 of article 66, however, could give the contrary impression, in that they appeared to give to a party which had not signed the amending agreement the right to object to its application as between the parties to it. The Special Rapporteur and the Drafting Committee should therefore examine carefully the problem of the co-ordination of the provisions of article 67 with those of paragraph 4 of article 66.

50. Mr. AGO said that he would make his comments on the form of the article in the Drafting Committee.

51. In general, he approved the text, but he was not convinced that paragraph 2 should be amended in the manner suggested by the Special Rapporteur, who thought that notification should be made not only of the conclusion of an *inter se* agreement, but even of the intention to conclude such an agreement. Too much suspicion was being displayed of *inter se* agreements, though he would have thought that they should, in general, be viewed with favour. If fifty States had succeeded in concluding a treaty which went up to a certain point only—for instance, a treaty on consular questions—and ten States were able to go further and grant each other more extensive advantages, why should they not do so? Was there any reason for opposing that practice, which was perfectly normal?

52. The situation envisaged in paragraph 1(*b*) (*ii*) was really an extreme case. If States had agreed to sign a treaty, it was difficult to believe that some of them would later wish to conclude an agreement designed to frustrate the object of the treaty.

53. It would normally be enough for the conclusion of the treaty to be notified. If it were decided that notification should be made earlier, it would be necessary to decide at what point. When could it be said that States were intending to include an *inter se* agreement, and when did they have to give notice of their intention? It was after all possible to have an intention and not to carry it into effect. Further, how would it be possible to describe the provisions of the agreement concerned before they were in their final form? In short, a large number of diplomatic difficulties might be created for no good reason. If there was a strong feeling that the parties should be notified of the treaty before it was definitive, the obligation to notify would have to relate to the period after the *inter se* treaty had already been concluded and was in final form, but before it had come into force. In that case, the right course would be to include a provision to the effect that notification of any agreement of that kind to the other parties to the multilateral treaty had to be made before the entry into force of the agreement concerned.

54. Mr. REUTER said that the Drafting Committee would have to try to bring the French and Spanish versions more into line with the English. The latter version, in which the word " between " was used both in the title and in the text was perfectly clear and correct, whereas the expressions " *dans les relations entre* " and " *en sus relaciones mutuas* " were a little ambiguous. On the whole however, the text of the article was satisfactory.

55. As Mr. Jiménez de Aréchaga had pointed out, application of the procedure laid down in article 66 might lead to the result contemplated in article 67. It might, therefore, be asked whether, conversely, the application of article 67 might not bring into play the procedure laid down in article 66. The text of paragraph 2 adopted at first reading did not specify by whom the notification should be made. According to the new text, it was " the parties concerned " which had to do so. The purpose of that notification was to enable the other parties to indicate their opposition if they considered that the conditions set forth in paragraph 1 were not fulfilled. What would happen if the other parties, instead of objecting, stated that they were interested in the proposed modification, wished to participate in it and requested the convening of a general conference for that purpose? In his view, the other parties would be acting within their rights in calling for such a conference, but did the Commission share his view?

[8] For discussion of article 40, see 861st meeting.

56. If the Commission's intention was to give the other States the right to initiate the procedure laid down in article 66, the wording proposed by the Special Rapporteur was preferable, despite the use of the vague term " intention ". But it would also be possible to adopt an intermediate solution between that wording and the one proposed by Mr. Ago, for example by requiring the parties concerned to notify the other parties of their intention " before initiating the procedure for the conclusion of a separate agreement ". A wording of that kind would enable the other States wishing to participate in the *inter se* agreement to request the convening of a conference for the purpose.

57. Mr. VERDROSS said that, for the reasons stated by the Special Rapporteur, he favoured the retention of paragraph 1, as adopted by the Commission at first reading.

58. With regard to paragraph 2, which had already been discussed at length in 1964, he sympathized with Mr. Ago's view. It was, however, impossible to disregard the fact that the States parties to a multilateral treaty had an interest in being informed when a group of States wished to conclude an *inter se* agreement modifying that treaty. Even if the rights of the other States were not affected by such an agreement, their interests might be. Article 67 should include some reference to that point, perhaps on the lines suggested by Mr. Reuter.

59. Mr. CASTRÉN said he agreed with Mr. Ago that, in general, *inter se* agreements served the interests of the States which had recourse to that procedure. At the same time, however, they might be detrimental to the interests of other States. As had been pointed out by Mr. Verdross and Mr. Bartoš, there was a certain solidarity between the States parties to a multilateral treaty. It was therefore not sufficient to require notification after the event: the other States must be informed of the intention of certain States to conclude an *inter se* agreement.

60. The wording proposed by Mr. Ago did not specify how long before the entry into force of the agreement the notification should be made; the notification might thus come too late. He himself would be inclined to accept the wording suggested by Mr. Reuter.

61. Mr. de LUNA said that he supported the retention of paragraph 1, for the reasons given by the Special Rapporteur.

62. With regard to paragraph 2, given the fact that *inter se* agreements were perfectly admissible in international practice, it was necessary to bear in mind that many multilateral treaties, which were often not of a general character—peace treaties, for example—contained clauses which could be described as " local ", such as those relating to frontiers and affecting only two States. Accordingly, if the purpose of an *inter se* agreement was not to modify a " local " clause but to go further and make changes in the general treaty though without frustrating its object, all the States parties to the general treaty had an interest in the matter, because the *inter se* agreement might gradually erode some of the principles on which the general treaty was based.

63. That being so, Mr. Ago had been right to ask how it was possible to notify a mere intention in the absence of a definitive text. Mr. Reuter had also made a valid point, since it was natural that a party which had participated in the main treaty should wish to take part, if only as an observer, in the negotiations prior to the conclusion of an *inter se* agreement, in order to prevent its interests from being prejudiced, or to ensure the strict observance of the rules on the conclusion of *inter se* agreements, laid down by the Commission or contained in the main treaty itself.

64. In his view, the Commission should consider the desirability of making it possible for all the States parties to the multilateral treaty to be informed when a group of such States was about to open negotiations with a view to the conclusion of an *inter se* agreement, so that they could take part in the negotiations if they saw fit or at least be represented by observers who could put forward their comments and, if necessary, their objections.

65. Mr. TUNKIN said that the problem dealt with in article 67 was very close to that in article 63: it concerned the conclusion of a later agreement which did not include all the parties to the earlier one.

66. The difficulties which had arisen in connexion with paragraph 2 were not connected with drafting; they arose from the situations which the rule embodied in that paragraph was meant to cover. The conclusion of *inter se* agreements was primarily possible in the case of those multilateral treaties which operated in fact on a bilateral basis. It was therefore undesirable to introduce any further complications by requiring the notification of a mere intention to negotiate an *inter se* agreement. Even after its signature, an *inter se* agreement might not be ratified and it would be excessive to require its notification before it actually came into effect. The problem of participation did not arise, because the *inter se* agreement envisaged in article 67 related to a multilateral treaty which operated on a bilateral basis. The parties to the *inter se* agreement could negotiate it without asking other parties to participate.

67. Notification of *inter se* agreements was necessary in order to enable the other parties to the original agreement to ascertain whether the conditions specified in paragraphs 1(*a*) and 1(*b*) were fulfilled. Paragraph 2 thus supplemented the safeguards provided in paragraph 1 and he was in favour of its retention in the form in which it had been adopted in 1964.

68. Mr. BRIGGS said that article 67 contained a highly desirable provision, which was in accordance with State practice and satisfied a real need in international relations.

69. The safeguards provided in paragraph 1 were sufficient; those in sections (*i*), (*ii*) and (*iii*) of paragraph 1(*b*) should be taken together. Although they overlapped to some extent, they supplemented each other and it was essential to retain them all.

70. With regard to paragraph 2, he shared Mr. Tunkin's doubts about the proposed redraft, although he had at first been attracted by Mr. Ago's suggestion that notification should be required before the *inter se* agreement entered into force.

71. The provisions of article 67 left two questions open. The first was that of the legal effect of a violation of the

provisions of paragraph 1. That matter was covered by other articles of the draft; if, for example, the violation of the rule embodied in paragraph 1(*b*) of article 67 amounted to a material breach of the original treaty, the provisions of article 42 would apply.

72. The other question was that of the legal effect of an objection made after receiving notice under paragraph 2. If, following that notification, a State party to the original treaty objected, the question arose whether the objecting States would then have a right to participate in the negotiation of the second agreement. Would such a State always have a right to participate? Would it also have the right to prevent the application of an *inter se* agreement concluded despite its protest? In his opinion, those questions should be left open.

73. His view generally was that notification should be required only after the conclusion of an *inter se* agreement; the introduction of any other complicating factor might hamper the operation of the procedure laid down in article 67, which States had found useful in their relations.

74. Mr. BARTOŠ said he wished to make it clear that he was in no way opposed to *inter se* agreements as such. The conclusion of *inter se* agreements was in a sense authorized by the United Nations Charter itself, in the articles relating to regional arrangements. Furthermore, as Mr. Tunkin had pointed out, there were multilateral treaties under which certain States parties were invited to conclude regional or bilateral agreements among themselves. The Convention on International Civil Aviation,[9] signed at Chicago, made express provision for the conclusion of bilateral agreements between States parties to the Convention, subject to the obligation to notify ICAO, which made such agreements public. *Inter se* agreements were not only permissible under international law; they were useful and sometimes even necessary.

75. It was also his view that, in all cases, the States parties to the main treaty had an interest in being informed in one way or another of the existence and contents of *inter se* agreements modifying the treaty. As pointed out by Mr. Tunkin, the other States might wish to participate in the *inter se* agreement; in any event, they should at least be warned so that they could protect their rights and ascertain their position with regard to the existing obligations under the main treaty.

76. The notification of *inter se* agreements was also necessary in order to safeguard the principle of non-discrimination. If the main treaty authorized special régimes and certain parties established such a régime among themselves, the other parties must be informed so that they could instruct their representatives not to lodge a complaint on discovering that different treatment was being accorded to other States by virtue of an *inter se* agreement.

77. The general rule of notification was consistent with the principle of open diplomacy, which called for the publication and registration of treaties; notification was in a sense an anticipation of that formality. The rule that *inter se* agreements must be notified was in conformity with general public international law; it did not place a limitation upon the right of States to conclude treaties but was rather a condition of good relations among States. In that respect, he adhered to the views which he had expressed in 1964.[10]

78. It should be left to the Drafting Committee to settle the question whether notification should relate to the conclusion of the *inter se* agreement or to an intention to conclude such an agreement which had not yet been put into effect.

79. The CHAIRMAN, speaking as a member of the Commission, said that article 67 related to treaties which regulated on a multilateral basis relations that were essentially bilateral. In the case of those treaties, there were neither practical nor theoretical objections to the conclusion of *inter se* agreements. It was permissible for two States or a group of States, because they were bound together by closer ties, to conclude an *inter se* agreement for the purpose of more extensive co-operation between themselves than that established by the multilateral treaty. But the existence of a multilateral treaty necessarily had certain consequences. All the parties to that treaty might have an interest in the protection of certain principles. Although it was possible to conclude *inter se* agreements, freedom in that respect was not absolute; it was subject to rules which it was the purpose of article 67 to define. It was therefore useful and indeed necessary to require the notification of *inter se* agreements, except perhaps where such agreements were authorized by the treaty itself; as a general rule, however, notification was very desirable, mainly in order to safeguard the interests of the other parties.

80. If the notification was to serve a useful purpose, it must be made before the *inter se* agreement was concluded. From that point of view, the new formula proposed by the Special Rapporteur represented a genuine improvement. Notification of the intention to conclude an *inter se* agreement might lead to the opening of discussions, or to the submission by the other parties of observations, that might have a favourable influence on the States wishing to conclude the agreement. Prevention was always better than cure.

81. Sub-paragraph (*iii*) was useful and did not overlap with sub-paragraph (*ii*); the difference between them was the difference between implied and express prohibition.

82. Mr. ROSENNE said he could accept paragraph 1 subject to minor drafting changes.

83. With regard to paragraph 2, he agreed with the Chairman that, for notification to have any real value, it should come as early as was consistent with practical exigencies. Admittedly, it might seem rather vague to refer to the " intention " to conclude an *inter se* agreement, but a formula of that type was much to be preferred to one which would call for notification only after the conclusion of the *inter se* agreement. It would not even be sufficient to require notification of the signing of the *inter se* agreement, because it was expressly provided in some agreements that they entered into force upon signature. The Drafting Committee would have to consider the best formulation for paragraph 2.

[9] United Nations, *Treaty Series*, vol. 15, p. 296.

[10] *Yearbook of the International Law Commission, 1964*, vol. I, 754th meeting, paras. 84 and 86, and 764th meeting, para. 85.

84. Mr. JIMÉNEZ de ARÉCHAGA said that he also favoured the requirement of early notification. It might not be essential in the case of *inter se* agreements of the type mentioned by Mr. Bartoš, such as regional agreements and agreements for closer relations such as those authorized in the 1961 Vienna Convention. In those cases the possibility of such *inter se* agreements was normally provided for in the main treaty and the matter was thus covered by the opening proviso of paragraph 2, " Except in a case falling under paragraph 1(*a*) ".

85. Early notification was, on the other hand, very necessary in the other type of *inter se* agreement, for bringing up to date an earlier treaty, when it had not been possible to include in the negotiations all the parties to the earlier treaty. In cases of that type, it was possible that the *inter se* agreement might affect, if not the rights, at least the interests, of another State party to the original agreement. Early notification to that State would enable it to take some action in the matter. It could protest if it considered that its rights were affected, it could ask to participate in the negotiations for the new agreement, it could ask to be allowed to accede to the new agreement, or it could initiate the procedure for general amendment laid down in article 66, paragraph 1.

86. Mr. CASTRÉN said that the Special Rapporteur's redraft of paragraph 2 laid down a very modest requirement, which did not prevent or hinder the conclusion of *inter se* agreements. The Commission could leave all the other problems open, in particular those relating to the possible right of objection or of participation in the procedure. The paragraph simply provided that the other States had the right to give their views on the desirability or the lawfulness of the *inter se* agreements; as pointed out by Mr. Jiménez de Aréchaga and the Chairman, they could also propose negotiations, a proposal which might or might not lead to the convening of a conference with the participation of a larger number of States than those which had originally contemplated the conclusion of the agreement.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that there appeared to be general agreement to retain the contents of paragraph 1, subject to drafting suggestions for the consideration of the Drafting Committee.

88. With regard to paragraph 2, he did not believe that it involved a major question. However, the Commission attached importance to article 67 and by specifying fairly strict conditions in paragraph 1, had recognized that *inter se* agreements could represent a potential threat to the interests of the other parties to the original agreement. The purpose of the provision on notification was precisely to protect those interests and in its 1964 discussions, the Commission had recognized that the States concerned would be confronted with a *fait accompli* if, in order to be informed, they had to wait for the *inter se* agreement to be registered with the United Nations Secretariat and published by it in accordance with Article 102 of the Charter. It generally took a very long time for a treaty to be published in pursuance of that Charter provision.

89. The parties should therefore be notified before the treaty came into force, so that they could take steps to invoke any possible responsibility which might arise from a violation of their rights, or endeavour to change the situation before it was too late. The provisions of paragraph 2 should be kept flexible so that the parties notified of the intention to conclude an *inter se* agreement could endeavour to secure a change in the terms of the agreement under discussion.

90. With regard to the wording of paragraph 2, he could not support Mr. Ago's suggestion that the text of the *inter se* agreement should be notified before the initiation of the process necessary to make it into a treaty. The wording which he himself proposed was not as vague as had been suggested. The reference to the " intention " to conclude an *inter se* agreement was supplemented by the requirement that the other parties should be notified not only of that intention but also of the nature of the provisions of the *inter se* agreement. Clearly, therefore, the notification would take place at a time when the negotiations and drafting of the *inter se* agreement had reached a fairly advanced stage. His redraft of paragraph 2 would thus not require the notification of political discussions of a preliminary kind.

91. He had the impression that there was a slight majority in the Commission in favour of making paragraph 2 somewhat stricter than in 1964.

92. He proposed that article 67 be referred to the Drafting Committee for consideration in the light of the discussion.

93. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 67 to the Drafting Committee as proposed by the Special Rapporteur.

*It was so agreed.*[11]

## Second Seminar on International Law

*(resumed from the 847th meeting)*

94. Mr. RATON, Legal Adviser to the United Nations Office at Geneva, said that as the Second Seminar on International Law would be ending that day, he wished, on behalf of the Director-General of the United Nations Office at Geneva, to thank the Commission for the assistance it had given in the work of the Seminar. He also wished to convey the gratitude of the participants to those members of the Commission who had consented to give lectures as well as to all those who had generously contributed to the success of the Seminar in other ways. The Director-General would be organizing a third Seminar next year, and hoped he could again count on the co-operation and public spirit of the members of the Commission.

95. The CHAIRMAN, speaking on behalf of the Commission, expressed appreciation of the initiative taken by the United Nations Office at Geneva and said he hoped that all the participants in the Seminar had benefited from their stay in Geneva and would help to strengthen the ties between the Commission and the world of international law as a whole at both the theoretical and the practical level.

The meeting rose at 12.50 p.m.

[11] For resumption of discussion, see 875th meeting, paras. 79-101 and 876th meeting, paras. 1-10.