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Summary record of the 866th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) [38]

Article 68 [38]

Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

The operation of a treaty may also be modified:

(*a*) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible;

(*b*) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or

(*c*) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties.

101. The CHAIRMAN invited the Commission to consider article 68, for which the Special Rapporteur had proposed a new title and text reading:

" *Modification of a treaty by subsequent practice*

" The operation of a treaty may be modified by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. In the case of a multilateral treaty, the rules set out in article 67, paragraph 1, apply to an alteration or extension of its provisions as between certain of the parties alone. "

102. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the light of the discussions both in the Commission and in the Drafting Committee, it was very likely that articles 69 to 71 on interpretation would be moved up to an earlier position in the draft, so as to be placed closer to the article on *pacta sunt servanda*. As a result, article 68 would in all probability ultimately be placed after the articles on interpretation, a fact which should be borne in mind when discussing its provisions.

103. Government comments on the 1964 text of article 68 had not been very numerous but those which had been made, and his own reflections, had led him to propose considerable changes in the wording of the article. In the first place, as explained in paragraph 4 of his own observations (A/CN.4/186/Add.5), he had dropped the word " also " from the opening phrase, in response to a valid point raised by the Government of Israel. As indicated in paragraph 6 of his observations, following another comment by the Government of Israel, he had also dropped sub-paragraph (*a*), the provisions of which were not as complete as those of article 63, which contained an adequate formulation of the rules regarding the effect of a subsequent treaty.

104. He had, however, been unable to accept the suggestion by the Government of Israel that sub-paragraph (*b*) should also be dropped on the ground that it was indistinguishable in its practical effects from the provisions of article 69 on the interpretation of a treaty in the light of subsequent practice in its application; he had explained his reasons at length in his fifth report (A/CN.4/186/Add.5 paras. 8, 9 and 10). In bilateral treaties, the dividing line between interpretation and modification was somewhat blurred and the distinction was not very important in practice, but the position was quite different in the case of multilateral treaties. In the case of multilateral treaties which operated bilaterally, it was possible for a number of States to apply the treaty in a certain way in the relations between themselves, but other States which did not carry out the same practice were not bound by that *inter se* interpretation. It was therefore essential to give separate treatment to the two different problems of modification and interpretation.

105. Three governments, including that of the United Kingdom, had proposed the deletion of sub-paragraph (*c*). The first reason given by the United Kingdom Government was the difficulty of determining the exact point of time at which a new rule of customary law could be said to have emerged; but customary law could not be ignored, whatever the difficulties of establishing the exact situation in a particular case.

106. As explained in his own comments, he had been impressed by the United Kingdom Government's second objection, which was based on the need to take into account the will of the parties, and by the Israel Government's comment regarding the connexion between sub-paragraph (*c*) and the provisions of article 69 on interpretation. He therefore proposed that sub-paragraph (*c*) be dropped, on the understanding that the Commission would consider the question of covering its contents in article 69.

107. In the light of those considerations, he had prepared a new draft of article 68 which consisted of the opening phrase and the contents of sub-paragraph (*b*) of the 1963 text, and a new second sentence to take into account the problem of *inter se* modification of multilateral treaties.

The meeting rose at 1 p.m.

866th MEETING

Thursday, 9 June 1966, at 11 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. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Also present: Mr. Golsong, Observer for the European Committee on Legal Co-operation.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

ARTICLE 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) *(continued)*[1]

[1] See 865th meeting, para. 100.

1. The CHAIRMAN invited the Commission to continue its consideration of article 68.

2. Mr. CASTRÉN said he agreed with the Government of Israel and the Special Rapporteur that there was some overlapping between sub-paragraph (*a*) and other provisions of the draft, especially article 63. Furthermore it was clear that if all the parties to a treaty had the right to terminate it by concluding another treaty on the same subject, as provided in article 41, they could also modify the treaty in that way. Consequently, sub-paragraph (*a*) might be regarded as superfluous.

3. But a draft on the law of treaties should cover all the principal ways of modifying a treaty, not only those which operated implicitly but, first and foremost, those which operated directly. While, therefore, he would be reluctant to agree to the deletion of sub-paragraph (*a*), he was not opposed to redrafting it and inserting a reference to article 63, as the Special Rapporteur had suggested.

4. The new wording proposed by the Special Rapporteur for sub-paragraph (*b*) was very satisfactory. In particular, the addition of the second sentence was fully justified. The safeguards provided in article 67 for modifications by agreement *inter se* should be generally applicable, and should therefore also apply under article 68.

5. With regard to sub-paragraph (*c*), for the reasons he had already stated in connexion with sub-paragraph (*a*) and in spite of the comments of certain governments and of the Special Rapporteur, he thought that it should be retained where it was. As the Special Rapporteur had suggested in paragraph 13 of his report, the words " in their mutual relations " could be added at the end of the sub-paragraph.

6. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's proposal to delete sub-paragraph (*a*), the contents of which were already covered by the provisions of other articles, in particular by article 63.

7. He also supported the Special Rapporteur's rewording of sub-paragraph (*b*) and the introduction of the additional sentence dealing with *inter se* modification by subsequent practice among some of the parties, with the valuable reference to the guarantees established in article 67.

8. It was important to retain in an independent article the idea that a treaty could be modified by the subsequent practice of the parties, as held by the International Court of Justice in the *Case concerning the Temple of Preah Vihear*;[2] and by the Arbitral Tribunal in the arbitration between France and the United States regarding the interpretation of an Air Transport Services Agreement, in its award of 22 December 1963, cited in paragraph (2) of the commentary to article 68 in the Commission's report on its sixteenth session.[3]

9. Some concern had been expressed that a very wide admission of the possibility of modification by subsequent practice might have the result that any State official, even a minor official, could alter what had been agreed in a formally ratified treaty. It should therefore be made clear in the commentary that the subsequent practice referred to in article 68 must be a subsequent practice " of the parties ". Since " party " was defined in article 1 *(f)(bis)* as " a State which has consented to be bound by a treaty and for which the treaty has come into force ", it followed that the subsequent practice capable of modifying a treaty must be attributable to the State through the acts or omissions of those officials competent to bind the State on the international plane, taking into consideration the nature of each treaty and the possibility of subsequent express or tacit confirmation by the competent authority of the State, as provided for in article 4 *(bis)*.

10. He supported the Special Rapporteur's proposal for the deletion of sub-paragraph (*c*), but suggested that discussion of that sub-paragraph be postponed until the Commission came to consider article 69, paragraph 1 (*b*), on which there were a number of government comments and on which the Special Rapporteur would be submitting his proposals.

11. Mr. AGO said he was in favour of the proposal made by the Special Rapporteur at the end of his report.[4] The wording of the only paragraph of article 68 that would remain under that proposal was satisfactory. There was one change to the French text that he would suggest however—and Mr. Reuter agreed—which was that the words " *établissant leur accord* " be replaced by the words " *dans la mesure où elle fait apparaître leur accord* ".

12. Mr. ROSENNE said he was prepared to accept the Special Rapporteur's proposals for the deletion of sub-paragraphs (*a*) and (*c*), but would have no objection to a postponement of the decision on the second of those two provisions.

13. On sub-paragraph (*b*) he reserved his position until the Commission had considered article 69; he was not yet convinced of the need for its retention, even in its modified form.

14. Subject to those remarks, he wished to make two suggestions regarding the wording proposed by the Special Rapporteur. First, he would suggest that the words " subsequent practice of the parties " be replaced by the expression used in article 69, " subsequent practice of all the parties ", and secondly, that the two sentences proposed by the Special Rapporteur be made into two separate paragraphs, since they dealt with different topics.

15. Mr. TUNKIN said that modification must be kept separate from interpretation; he was strongly opposed to any broadening of the concept of interpretation which would make it possible to disguise the modification of a treaty as an interpretation of its provisions.

16. He supported the Special Rapporteur's proposal to drop sub-paragraph (*a*), the contents of which could be regarded as covered by article 63.

17. Sub-paragraph (*b*) dealt with the crucial problem of the effects of subsequent practice on the provisions of the treaty. It was an undoubted fact that treaties were developed and their operation modified by practice.

[2] *I.C.J. Reports 1962*, page 6.

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

[4] See also 865th meeting, para. 101.

For subsequent practice to have the effect of modifying treaty provisions, however, two conditions were necessary. First, the practice must provide evidence of an agreement to modify or develop the treaty provisions. Secondly, such an agreement should comprise all or nearly all the parties to the treaty.

18. Another delicate problem was that of deciding, for the purposes of the provisions of sub-paragraph (*b*), whether a distinction should not be drawn between the essential provisions of a treaty and the secondary or minor provisions. Perhaps the Commission should adopt a cautious approach to that problem and indicate that the key provisions of a treaty could not be amended by subsequent practice. He merely wished to raise that problem: he had himself no ready answer to offer.

19. With regard to the Special Rapporteur's redraft of paragraph (*b*), the proposed second sentence seemed to him to go too far if it meant the acceptance of modification by the practice of certain of the parties. The *inter se* modification of a treaty had been surrounded by safeguards, set forth in article 67, but not all those safeguards were practicable in the case covered by sub-paragraph (*b*); in particular, the requirement of notification to all the other parties could not be complied with in the case of modification by subsequent practice. The parties to a treaty could thus find themselves in a situation in which some of them had modified certain of the provisions of the treaty on an *inter se* basis, while the other parties remained unaware of the fact until a very late stage.

20. He was prepared to accept the deletion of sub-paragraph (*c*). The problem it dealt with could be covered by amending the wording of sub-paragraph (*b*); in fact, the idea of a customary norm was already present in sub-paragraph (*b*). However, he would not oppose the suggestion that the Commission defer its decision on sub-paragraph (*c*) until it had considered article 69.

21. Mr. de LUNA said he supported the Special Rapporteur's proposal to delete sub-paragraph (*a*). That would have the advantage of avoiding certain awkward problems, such as that of treaties which could not be amended merely by agreement of the parties. For example, the treaties on the protection of minorities, concluded after the First World War, specified that a majority decision of the Council of the League of Nations was necessary for their amendment.

22. The Special Rapporteur's proposal to confine article 68 to the problem of incompatibility reduced the article to the well-accepted rule of interpretation, that a subsequent expression of the will of the parties superseded a prior expression of that same will. He therefore supported the first sentence of the Special Rapporteur's redraft.

23. With regard to the second sentence, he shared Mr. Tunkin's doubts. If the subsequent practice amounted to an *inter se* agreement, such an agreement should logically be treated in the same manner as an *inter se* amending agreement under article 67. The problem arose, however, that, in the event of modification by subsequent practice, no notification was possible, so that the Special Rapporteur had confined the reference to the provisions of paragraph 1 of article 67. He had naturally not found it possible to make reference to paragraph 2, which dealt with notification.

24. He did not consider that the contents of sub-paragraph (*c*) could properly be transferred to article 69. Modification and interpretation should be kept separate. He could accept the deletion of paragraph (*c*), because any attempt at an adequate formulation of its provisions would involve dealing with certain extremely difficult problems, including that of the relationship between a treaty and a norm of general customary international law which emerged after its conclusion. The case could occur of the parties to a treaty contributing to the formation of a new customary rule of international law, without any intention to derogate from the *lex specialis* embodied in the treaty provisions, and it must be remembered that *lex specialis derogat legi generali.*

25. Mr. BRIGGS said he accepted the Special Rapporteur's recommendation for the deletion of sub-paragraphs (*a*) and (*c*) but agreed with Mr. Jiménez de Aréchaga that it would be better to postpone a decision on sub-paragraph (*c*) until the Commission had dealt with the provisions of article 69 on inter-temporal law.

26. He disagreed, however, with the proposal to retain the provisions of sub-paragraph (*b*). The problem dealt with in that sub-paragraph was already implicit in paragraph 3 (*b*) of article 69. The method of dealing with the problem was the same in both provisions; the difference was only one of degree in that, whether the result was arrived at by way of establishing the " agreement " of the parties under article 68 (*b*) or by establishing their " understanding " under article 69, paragraph 3 (*b*), the change was achieved by stretching the meaning of the terms of the treaty rather than by way of modifying its terms. It was important to note that under article 68 the treaty as such was not modified or amended by paragraphs (*a*), (*b*) or (*c*), although its " operation " or " application " might be.

27. The rule expressed in both cases was that the treaty must be interpreted and applied in the light of the subsequent practice of the parties, and it was essential to refer to " all " the parties in article 68, if the article was to be retained. The word already appeared in article 69, and for modification as for interpretation the concurrence of all the parties was logically necessary.

28. Furthermore if, contrary to his view, the Commission decided to retain sub-paragraph (*b*) as the only provision of article 68, then the second sentence proposed by the Special Rapporteur should be dropped.

29. Mr. TSURUOKA said he was in favour of deleting the whole of article 68.

30. Everyone seemed to be agreed on sub-paragraph (*a*) and he had nothing to add.

31. Sub-paragraph (*b*) was the only one that would remain, under the Special Rapporteur's proposal. If the modification of the operation of the treaty as provided for in that sub-paragraph was based on the agreement of all the parties, whether that agreement was established by practice or expressed in some other manner, the case was already covered by article 65, dealing with the amendment of treaties by agreement between the parties, which agreement was not necessarily in written form.

As to modification of a treaty or of its operation by agreement *inter se*, it was clear that it must satisfy the conditions stated in the article dealing with that subject.

32. With regard to sub-paragraph (*c*), the word " binding " could be interpreted in two ways. If it meant that the parties were really bound to observe the rule of customary law, then that rule was a rule of *jus cogens* and the case was already covered by another article. If, on the other hand, it meant that derogations from the rule of customary law that had emerged were permitted, then obviously the treaty would stand, since derogation was allowed.

33. There would be nothing startling about a decision to delete article 68 entirely, because rights and obligations under a treaty derived from the agreement of the parties and agreement was just as necessary for their modification; but that question was already settled by other provisions of the draft.

34. From the doctrinal point of view he agreed that there was a distinction, as made by Mr. Briggs, between the operation and the existence of a treaty; but in practical life the distinction was too subtle. Even if practice showed that the parties all agreed to modify the operation of a treaty, one of them might still subsequently assert that it had not accepted the modification. The security of treaty relations between States demanded clear and precise rules; article 68 might increase doubt and uncertainty.

35. The CHAIRMAN, speaking as a member of the Commission, said that sub-paragraph (*a*) was unnecessary, because the rule it contained was already stated in other articles.

36. Sub-paragraph (*b*) reflected an obvious fact, namely, that a treaty could be modified not only by the tacit or formal agreement of the parties, but also by their subsequent practice in the application of the treaty. That practice could not be considered as an interpretation; it introduced something new, widened or restricted the field of application of the treaty's provisions, and was equivalent to a modification. He attached great importance to the distinction between the interpretation and the modification of treaties, since they were two operations of a different kind, as he had emphasized during the first reading. For the same reason, he would be opposed to the transfer of sub-paragraph (*b*) to the section on interpretation.

37. No doubt, as Mr. Tsuruoka had said, the content of sub-paragraph (*b*) was already partly covered by article 65. That article might perhaps apply to the modification of a treaty by subsequent practice, but the emphasis was clearly on written agreements. It seemed useful therefore to retain a provision on the concordant practice of the parties in the application of the treaty as a means of modifying it.

38. As drafted in 1964, sub-paragraph (*b*) was not entirely in conformity with the general structure of the draft where multilateral treaties were concerned. In article 67, the Commission had provided certain safeguards by laying down that *inter se* derogations from multilateral treaties must satisfy certain conditions. In his opinion the modification of multilateral treaties by subsequent practice should be subject to the same conditions. In cases where a derogation by written agreement was not permitted, it should not be permitted, without formal agreement, by the indirect method of subsequent practice.

39. The Special Rapporteur's proposal was therefore fully justified. The rule proposed should have its place in the section of the draft relating to the modification of treaties; it should certainly not be linked with the interpretation of treaties.

40. Sub-paragraph (*c*) touched on a general problem of capital importance, the competition between sources of international law, that was to say the written law of treaties as opposed to the unwritten law, especially custom. The situation was not entirely clear in positive law. It could not be said that one particular source took precedence over another or that a treaty always took precedence over custom. It was the substance of the rules themselves which must decide the issue. There were customary rules of transcendent importance and most of the rules of *jus cogens* originated in custom. For instance, there was no general treaty condemning slavery, but it could be said that the basis of the rule against slavery, which was unquestionably a rule of *jus cogens*, was established custom. Thus it was not the source itself which decided the hierarchy of international rules of law. It was a question that ought to be settled, and sub-paragraph (*c*) did not seem to settle it completely.

41. Sub-paragraph (*c*) did not really clarify the conditions in which custom took precedence. It related to a new rule of customary law—though the word " customary " appeared to have been translated in the French text by the word " *international* "—" binding upon all the parties ". To what extent was it binding? Was there a rule of *jus cogens* which took precedence over the provisions of a treaty, or were there rules of equal force? Why should precedence be given to the new rule if it was not absolutely clear that the parties had wished to derogate from their formal agreement by their practice and by the rule to whose formation they had contributed? In his opinion it was not the emergence of the new rule, but the tacit will of the parties which could terminate or modify a previous treaty.

42. He wondered whether the problem ought to be solved in the draft, and if so how. As he still had certain doubts, he could not express an opinion for the time being and thought, like Mr. Jiménez de Aréchaga and Mr. Tunkin, that the Commission should perhaps wait a while before taking a position, not only on sub-paragraph (*c*) but on the problem as a whole.

43. Mr. EL-ERIAN said that the whole of article 68 ought to be retained in the section dealing with the modification of treaties. Admittedly the content of sub-paragraph (*a*) was covered in article 63 on the application of treaties having incompatible provisions. but there a subsequent agreement between the parties was treated from the standpoint of its effects on the operation of the treaty. Some members believed that articles 66 to 67 would suffice since the conditions and procedure for the modification of multilateral treaties were laid down in those articles; but they still did not cover implied modification.

44. The Special Rapporteur had rightly pointed out that the dividing line between interpretation and

modification might not always be clear-cut but from the legal standpoint, it was important to keep the two processes distinct.

45. He agreed with Mr. Tunkin that safeguards were needed in sub-paragraph (*b*): not all subsequent practice established by the parties would necessarily have general application. Some provision on that point would have to be inserted in the draft articles.

46. He noted that Mr. Castrén, the Chairman and to some extent Mr. Tunkin found sub-paragraph (*c*) acceptable, though Mr. Tunkin had indicated that its content could be covered in sub-paragraph (*b*). In article 62, on rules in a treaty becoming generally binding through international custom, the Commission had provided for the effects of such rules on third States and it would be only logical in article 68 to deal with the matter from the point of view of their effect on the parties to the treaty themselves. In order to bring sub-paragraph (*c*) into line with article 62, the word " general" should be inserted before the word " rule " so as to make clear that the rules of a treaty modified in that manner would become binding on all States in the community of nations, including those that had not taken part in the formation of the customary rule in question.

47. The argument that the whole of article 68 really belonged to the section on interpretation was untenable. That section should be moved so that it preceded the sections on the application and on the modification of treaties. The emergence of a new rule of customary international law could not affect the rules concerning interpretation set out in the Commission's draft. As Judge Huber had argued in the *Island of Palmas* case,[5] a treaty had to be interpreted by reference to the rules of interpretation in existence at the time of its conclusion, and also in the light of the subsequent evolution of the law and the bearing that that might have on the rights of third parties.

48. Mr. AGO said he feared the Commission might be causing some confusion in article 68, probably because it was juxtaposing two different questions: the practice followed in applying the treaty and, what was much more important, the emergence of a new customary rule of general international law. He would prefer that the article should deal with one question only; practice in the application of the treaty establishing the agreement of the parties to modify or extend the operation of the treaty itself.

49. In reality, the Commission was considering the very simple case of modification of a treaty by consent of the parties. The only difference was that, instead of modifying the treaty by means of another treaty or another express agreement, the parties did so tacitly by their practice in its application, but there was still consent by the parties. It was true that practice could either merely provide elements for interpreting a treaty or justify its actual modification, but once practice modified a treaty, that showed that the parties were in agreement on the matter.

50. The emergence of a rule of customary law raised quite a different problem. He had been rather concerned to hear the idea put forward that the mere emergence of a customary rule of general international law would automatically entail modification of a treaty which contained different rules. He agreed that the customary rule of general international law could, in certain exceptional cases, be a rule of *jus cogens* and in that case, for which the Commission had made provision, the rule would affect the life of the treaty, which would cease to exist. In all other cases, however, there was nothing to prevent the parties from settling their mutual relations, and continuing to do so, in a different manner from that prescribed by the rule of customary law. Consequently, if the parties agreed to modify the treaty so as to bring its provisions into conformity with the new rule of customary law, they were at liberty to do so; otherwise, the emergence of a new customary role of general international law would have no effect on the existence of the treaty.

51. Mr. AMADO said that even where there was a rule of customary law, there was nothing to prevent States from reaffirming their agreement.

52. Mr. TSURUOKA said that, in his opinion, article 65 dealt with the amendment of treaties in a very general manner, and it was impossible to say that it emphasized one means of modification rather than another.

53. As the final stage of drafting had been reached, it might perhaps be necessary to point out to the Drafting Committee a certain lack of uniformity between the English and French texts. For instance, the French word " *application* " was used to correspond sometimes to the English word " operation "—for example, in the title of part II, section VI, and in articles 49, 54 and 68—and sometimes to the English word " application "—for example, in the title of part III and in article 56; also in article 63, paragraph 5, the word " applying " was rendered in French by " *exécute* ".

54. Mr. TUNKIN said he was convinced that the only issue that need be covered in article 68 was the modification of a treaty by subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions. On that point he agreed with Mr. Ago.

55. He agreed with the Chairman about the relationship between article 68 and article 65, which provided for a formal agreement between the parties, and that view was reinforced by the procedure laid down in articles 66 and 67.

56. The importance of practice in the context of article 68 justified a separate article but he was radically opposed to the view that sub-paragraph (*b*) was no more than a matter of interpretation. Such an approach was exceedingly dangerous and would jeopardize the stability of treaties by throwing doubt on their status once a practice established by the parties had come into existence. Mr. de Luna was quite right in arguing that when it came to interpretation it was the provisions of the instrument themselves that had to be examined; subsequent practice might deviate from the letter of the treaty.

[5] *United Nations Reports of International Arbitral Awards*, vol. II, p. 845.

57. If sub-paragraph (*b*) were retained, no reference should be made to *inter se* modification of multilateral treaties through the development of practice, as great caution was needed because of the difficulty of establishing whether or not an actual agreement regarding modification had come into being between certain parties.

58. Mr. ROSENNE said that he feared the consequences of being over-subtle about the underlying doctrinal issues, as that could adversely affect the texts of the articles themselves. He doubted whether the Commission should include in its draft an article of any kind concerning the controversial problem of the relationship between customary and treaty law. It should not attempt to go any further than the firm rule approved at the previous meeting in regard to one type of customary law, namely *jus cogens*, in article 53 (*bis*). Generally speaking, he agreed with the Chairman that rules of *jus cogens* usually derived from custom or appeared to have done so.

59. The second theoretical issue that had been brought to the fore, particularly by Mr. Reuter, though not in sufficiently broad terms, was whether an article should be included in the draft on rules of inter-temporal law and if so, whether it could be limited to conflicts between treaties in time, a matter partially covered in article 63, and whether inter-temporal conflicts as between customary and treaty law could be left aside. Personally he did not think that the Commission should attempt to formulate rules for that very complex branch of law in a draft on the law of treaties designed for a diplomatic conference.

60. Some members had touched on the fringes of another problem, namely, obsolescence and desuetude which constituted a kind of recognition of a further ground or cause of termination, not as yet expressly provided for in the draft articles. Obsolescence and desuetude might be an aspect of the problem posed by *inter se* agreements to modify. All members seemed to admit that in one way or another obsolescence or desuetude could be used as a means of bringing a treaty to an end, and *a fortiori* as a means of modifying it. The conclusions finally reached on that issue would help resolve at least one of the difficulties that had arisen over sub-paragraph (*b*).

61. Mr. TSURUOKA said that, according to Mr. Yasseen and Mr. Tunkin, article 65 referred mainly to written agreements. Either, then, that should be stated, or the Commission should refer to " express or tacit agreement ". Otherwise, the word " If " at the beginning of the second sentence of article 65 would be meaningless and should be deleted. It was essential to be clear. The articles could either refer to the two possibilities one after the other, or deal with the question in a general manner first and then distinguish between two separate phases, in different paragraphs or different articles. If there were already differences in interpretation within the Commission, the confusion would be much greater when interpretation was on a world-wide scale.

62. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that although doubts had been expressed about various aspects of the problems raised in article 68, at least the discussion had served to clarify the position of members. Clearly, there was very little support for retaining sub-paragraph (*a*), and personally he subscribed to the view that, if article 63 could be satisfactorily revised, that should suffice.

63. Opinion was divided on retaining sub-paragraph (*b*) which was the only one that he believed ought to be kept in the section on modification. Some members had contended that it should be dropped altogether because the point could be covered in article 69 and because the dividing line between interpretation and modification by a subsequent practice was not sufficiently marked. As far as bilateral treaties were concerned, the point was not very important because, with only two parties modifying a treaty *inter se*, it did not matter whether the process was designated as interpretation or modification. But instances could be imagined when it was really impossible to regard the practice as not amounting to a modification of the treaty, and the *Case concerning the Temple of Preah Vihear* was such a one. In that case the treaty had laid down a perfectly clear criterion for a boundary, namely the line of the watershed, intended to apply not in one place alone but throughout the length of the boundary. In a given area there had been an unquestionable deviation from that criterion and if that was not an instance of " modification " rather than " interpretation ", the words would no longer have their true meaning.

64. In any event, where multilateral treaties were concerned, the distinction between modification and interpretation must be kept clear. He had been impressed by Mr. Tunkin's judicious comments, but his question as to whether anything should be said about *inter se* agreements, and his suggestion that a distinction be drawn between the essential and other provisions of a treaty, raised extremely delicate issues. While appreciating the reasons that lay behind those comments, as a draughtsman he would shrink from the task of having to cover the points in the text of sub-paragraph (*b*). Nor was it even certain that the attempt would be justified.

65. The Commission must take a position on the problem of *inter se* modification by subsequent practice so as to ensure that the provision, if any, in article 68 was consistent with the comparable provision in article 69. As he had indicated in his sixth report, there was a difference between the texts of the two articles as approved in 1964 and it was not wholly accidental. It had been due to some uncertainty at the sixteenth session as to whether it would be correct in the context of article 68 to require the agreement of *all* the parties to a modification affecting the operation of a multilateral treaty by subsequent practice.

66. The other view was that, for any modification by subsequent practice of a multilateral treaty regarded as an entity, the agreement of all the parties would be needed. That would be consistent with the provision concerning the amendment of multilateral treaties according to which an *inter se* arrangement was only permissible for modifying the operation of the treaty as between the parties to the arrangement if the conditions laid down in article 67 were met. He had not yet reached a final conclusion as to how or whether that problem should be dealt with, but it could be referred to the Drafting Committee for examination in connexion

with general matters concerning the rules applicable to the modification of multilateral treaties.

67. As far as sub-paragraph (*c*) was concerned, he was firmly of the opinion that it ought to be dropped. Whatever the Commission decided to do in regard to the relationship between customary and treaty law, it was certainly inappropriate to deal with it in the somewhat perfunctory manner adopted in sub-paragraph (*c*). At the sixteenth session the Commission had scratched the surface of the subject without really coming to grips with it, and the general view had been that it would be wiser not to embark upon a general examination of the relationship between different sources of international law, although specific aspects of the question might have to be taken into account in certain articles of the draft.

68. A number of members would prefer to leave aside the whole question of the bearing of the inter-temporal law on article 68 until the Commission had examined the section on interpretation. He could endorse that standpoint but, owing to the divergence of opinion in the Commission itself and among governments and delegations, his final conclusion in respect of article 69 was that the issue should be left aside. The choice lay between a fairly comprehensive provision or a general formula that would not take the matter very far. Further consideration of sub-paragraph (*c*) could be deferred until the Commission had discussed the section on interpretation and the Drafting Committee had received clearer instructions.

69. Subject to those considerations article 68 could now be referred to the Drafting Committee.

70. The CHAIRMAN suggested that article 68 be referred to the Drafting Committee as proposed by the Special Rapporteur.

It was so agreed.[6]

The meeting rose at 1 p.m.

[6] For resumption of discussion, see 876th meeting, paras. 11-64.

867th MEETING

Friday, 10 June 1966, at 11 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Tabibi, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

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

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 55 (*Pacta sunt servanda*) [23][1]

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the only change the Drafting Committee wished to propose in article 55 was to the opening words in the English text where the words " A treaty " had been amended to read " Every treaty ". No change was needed in the French or Spanish versions. The English text would thus read:

> " Every treaty in force is binding upon the parties to it and must be performed by them in good faith. "

3. The CHAIRMAN put to the vote article 55 with the amendment to the English text proposed by the Drafting Committee.

Article 55 was adopted by 14 votes to none.

ARTICLE 56 (Non-retroactivity of treaties) [24][2]

4. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new title and new text for article 56, reading:

> " *Non-retroactivity of treaties* "
>
> " Unless it otherwise appears from the treaty, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. "

5. The article had now been reduced to a single paragraph and the provision contained in paragraph 2 of the 1964 text (A/CN.4/L.107) concerning the binding force of a treaty that had ceased to exist, had been dropped.

6. Sir Humphrey WALDOCK, Special Rapporteur, added that during the discussion of article 56 at the present session, the view had been expressed that paragraph 2 of the 1964 text was closely linked with article 53, on the legal consequences of the termination of a treaty. The Drafting Committee, after examining the relationship between the two provisions, had concluded that paragraph 2 of article 56 was unnecessary and might be misunderstood.

7. The CHAIRMAN, speaking as a member of the Commission, said he had no objection to the article so far as its substance was concerned, but the English and French texts were not fully concordant.

8. Mr. AGO said that what had happened was that, in the second line of the French text, the word " *antérieur* " had been omitted after the word " *fait* ".

9. The CHAIRMAN put to the vote the Drafting Committee's text for article 56, subject to correction of the French version.

Article 56 was adopted by 12 votes to none, with 1 abstention.

10. Mr. BRIGGS, speaking as a member of the Commission, said that he had been forced to abstain on article 56, which went too far in excluding past acts, facts or situations. He had in mind particularly treaties

[1] For earlier discussion, see 849th meeting, paras. 2-78.

[2] For earlier discussion, see 849th meeting, paras. 79-91, and 850th meeting, paras. 1-84.