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Summary record of the 875th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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impossible to say in advance that the text in which the treaty had been drafted should necessarily prevail, for the defects of that text might be the source of the difficulty.

34. Consequently, although he appreciated the point raised by Mr. Verdross, he did not feel able to accept his suggestion. The question of comparison of the authentic texts in the various languages was covered by the provisions of articles 69 and 70, particularly those on preparatory work and on the circumstances of the conclusion of the treaty.

35. With regard to the larger question raised by Mr. Rosenne, he was reluctant to introduce into article 69 a reference to the comparison of texts as one of the principal means of interpreting a treaty. While it was true that the interpreter normally undertook such a comparison, it would be going too far to give that process the status of a criterion for the determination of an interpretation according to law. To erect comparison into one of the means of legal interpretation set out in article 69 would imply that it was no longer possible to rely on a single text as an expression of the will of the parties until a difficulty arose and that it was necessary to consult all the authentic texts for that purpose; such a procedure would have a number of drawbacks and would, in particular, involve practical difficulties for the legal advisers of the newly independent States, who did not always have staff familiar with the many languages used in drafting international treaties.

36. In conclusion, he proposed that articles 72 and 73 should be referred to the Drafting Committee for consideration in the light of the discussion; that Committee would take into account the drafting suggestions which had been made and to which he had not referred in detail.

37. Mr. VERDROSS said that if the Commission did not accept his proposal, anyone reading the second sentence of paragraph 4 would wonder what would happen if it was not possible to adopt a meaning which reconciled the texts. While agreeing with Mr. Rosenne and Mr. Ago that the language in which the treaty had been drawn up would be taken into account in application of the rule laid down in article 70, he proposed, in order to overcome the difficulty, that the words " as far as possible " should be deleted.

38. Mr. CASTRÉN observed that if the words " *autant que possible* " were placed after the word " *concilier* " in the French text, as he had proposed in his first statement, the difficulty referred to by Mr. Verdross would be greatly reduced.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would examine the problems arising from the use of the words " as far as possible ".

40. Mr. EL-ERIAN said he agreed with the Special Rapporteur's proposal that articles 72 and 73 should be combined.

41. For the reasons given by the Special Rapporteur, he preferred the term " text " to " version ". The former term was that used in the Charter and in the conventions adopted by diplomatic conferences on the basis of the Commission's drafts. Moreover, he was convinced that its use did not detract from the unity of the treaty.

42. He agreed with the Special Rapporteur that it would be going too far to treat comparison of the authentic texts in different languages as a general rule of interpretation. Much depended on the circumstances of each individual case. The texts in the various languages could be examined as part of the preparatory work and, in case of ambiguity, it would be possible, under the provisions of paragraph 4 as proposed by the Special Rapporteur, to attempt to remove the ambiguity by reconciling the various texts.

43. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer articles 72 and 73 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

It was so decided.[11]

44. The CHAIRMAN said that having learned that Mr. Lachs had been detained in Warsaw by illness, he had requested the Secretariat to send him a letter expressing the Commission's best wishes for his quick recovery.

The meeting rose at 12 noon.

[11] For resumption of the discussion of the combined article, see 884th meeting, paras. 42-49.

875th MEETING

Wednesday, 22 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. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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 text of articles submitted by the Drafting Committee.

ARTICLE 63 (Application of successive treaties relating to the same subject-matter) [26][1]

2. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 63 should be revised to read:

[1] For earlier discussion, see 857th meeting, paras. 1-95, and 858th meeting, paras. 1-35.

" *Application of successive treaties relating to the same subject-matter* "

" 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

" 2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

" 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 41, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

" 4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

" 5. Paragraph 4 is without prejudice to article 67, or to any question of the termination or suspension of the operation of a treaty under article 42 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty. "

3. Comparing the new text with that approved in 1964[2] he said the Commission would note that the phrase " of treaties having incompatible provisions " had been replaced by the phrase " of successive treaties relating to the same subject-matter " in the title. Similar phraseology was used in the new paragraph 1. In paragraph 2, apart from drafting changes, the principal modification was the substitution of the words " or that it is not to be considered as inconsistent with " for the words " or is not inconsistent with ". Paragraph 3 had been recast in positive form and some drafting changes introduced.

4. In the course of the discussion at the 857th and 858th meetings, the question had been raised of transferring sub-paragraph (*a*) of paragraph 4 to paragraph 3, but the Drafting Committee had rejected the suggestion on the ground that the provisions of paragraph 5 should be applicable to the situation covered in paragraph 4 (*a*), namely, that in which all the parties to the earlier treaty were also parties to the later treaty.

5. No change had been made in the fundamental rules set out in sub-paragraphs (*b*) and (*c*), though some changes of phraseology had been introduced in the interests of precision.

6. Paragraph 5 had been recast so as to indicate clearly that questions of State responsibility, of termination or suspension by reason of breach, or *inter se* agreements on modification were completely reserved.

7. The CHAIRMAN put to the vote the Drafting Committee's text of article 63.

Article 63 was adopted by 18 votes to none.

8. Mr. ROSENNE, speaking in explanation of his vote, said that, in 1964,[3] he had voted in favour of the article on the application of incompatible treaty provisions, then article 65, while maintaining the reservation he had expressed earlier[4] concerning the relationship of that article with article 41. He had to maintain that reservation in the light of the comments he had made at the second part of the seventeenth session[5] concerning article 41 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty).

ARTICLE 64 (The effect of severance of diplomatic relations on treaties) [60][6]

9. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 64 be revised to read:

" *The effect of severance of diplomatic relations on treaties* "

" The severance of diplomatic relations between parties to a treaty does not in itself affect the legal relations established between them by the treaty. "

10. The new text consisted of the rule originally set out in paragraph 1 but with the insertion of the words " in itself " before the words " affect the legal relations ". The Drafting Committee considered that paragraph 2 of the 1964 text, which had dealt with the disappearance of the means necessary for the application of the treaty, should be dropped, as should paragraph 3, which had dealt with the question of the separability of treaty provisions.

11. Sir Humphrey WALDOCK, Special Rapporteur, amplifying the explanations given by the Chairman of the Drafting Committee, reminded members of the discussion that had taken place on article 64 at the 858th meeting in the light of the observations made by governments and analysed in his sixth report (A/CN.4/186/Add.3). Following that discussion, the Drafting Committee had sought to frame a simple rule which, instead of making a specific reference to the impossibility of performance resulting from the severance of diplomatic relations, a reference which would have unduly enlarged the scope of the article, laid down that, in principle, severance did not affect the legal relations established between the parties by a treaty. A State wishing to invoke supervening impossibility of performance would have to make out a case in accordance with the conditions laid down in article 43. The Drafting Committee considered that the new text reflected the general point of view in the Commission.

[2] A/CN.4/L.107; see also 857th meeting, preceding para. 1.

[3] *Yearbook of the International Law Commission, 1964*, vol. I, 755th meeting, para. 20.

[4] *Ibid.*, 742nd meeting, para. 56.

[5] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, para. 95.

[6] For earlier discussion, see 858th meeting, paras. 36-111.

12. Mr. EL-ERIAN said he had accepted the new text in the Drafting Committee on condition that the words " in itself " were inserted. He had indicated during the discussion in the Commission itself that the severance of diplomatic relations, while not in itself or *ipso facto* affecting the legal relations established by the treaty, might lead to the suspension of the application of the treaty or of certain of its provisions if it resulted in the disappearance of the means necessary for the application of the treaty, or if the treaty in question was of such a nature as to make its continued implementation incompatible with the severance of diplomatic relations. He still adhered to that view, but as it had proved impossible to devise a text that would put the matter in the proper perspective, he would support the general statement of the rule in the form now proposed.

13. Mr. BARTOŠ said that he would vote for article 64 because he favoured the principle enunciated in the Drafting Committee's text. He wished to point out, however, that the severance of diplomatic relations sometimes occurred under conditions which precluded the performance of treaties. He considered that in such a case the treaty was in force, but not applicable.

14. The CHAIRMAN, speaking as a member of the Commission, said that he would not vote in favour of the text, but would abstain. He was not, in fact, sure of the correctness of the rule stated in article 63, and still had some doubts regarding its scope. Certain treaties were undeniably affected by the severance of diplomatic relations and their performance was inherently incompatible with a state of severance.

15. Mr. AMADO said he would have thought that the expression " in itself " would have satisfied Mr. Yasseen.

16. The CHAIRMAN, speaking as a member of the Commission, said that that expression was certainly an improvement, but it did not altogether satisfy him.

17. Mr. RUDA said that, in view of the subject-matter of the draft articles, article 64 was not logically necessary, but he considered it useful and would vote for the Drafting Committee's text.

18. He pointed out that in the Spanish title of the article, the words " *en los tratados* " should be replaced by " *sobre los tratados* ".

19. Mr. de LUNA supported Mr. Ruda's observation concerning the Spanish title.

20. Mr. TSURUOKA pointed out that the English expression " does not affect " had been translated in the French text of article 64 as " *est sans effet* ", although the verb " to affect " was translated differently in other articles. The expression " *être sans effet* " was certainly elegant, but would it not be possible to say " *n'affecte pas* " ?

21. Mr. BARTOŠ said he thought that there was a difference between " to have a legal effect " and " to affect ". The severance of diplomatic relations might affect friendly relations between States, but legal relations, as such, continued to be in force, even if hampered by certain difficulties. What the Drafting Committee had tried to do was to make it clear that the severance of diplomatic relations did not have any legal effect.

22. Mr. REUTER said that the English verb " to affect " did not exactly correspond to the French verb " *affecter* "; the French verb had a pejorative shade of meaning, whereas the English was purely causal. In the present case, the situation was simpler, since the negative form " does not affect " corresponded perfectly to the French expression " *est sans effet* ".

23. With respect to the observation of Mr. Bartoš, if the text was viewed in the context of the draft articles, the phrase " *être sans effet* " undoubtedly meant " to have no legal effect on legal relations ". The Commission had not taken any decision on the question whether a *de facto* situation had legal implications.

24. Sir Humphrey WALDOCK, Special Rapporteur, said he was satisfied with Mr. Reuter's explanation, and considered that the Drafting Committee's text of article 64 could now be put to the vote.

25. Mr. AGO pointed out that the expression " *n'affecte pas* " had been used in the French text of other articles. Care should be taken to ensure that the same terms were used throughout, since otherwise problems of interpretation might later arise.

26. Mr. TSURUOKA explained that he had raised the question of translation not so much with reference to that particular article, as because of his concern that a uniform vocabulary should be used throughout the draft.

27. The CHAIRMAN put article 64 to the vote.

Article 64 was adopted by 17 votes to none, with 1 abstention.

28. Mr. PESSOU said that although he had voted with the majority, he did not find the text completely satisfactory, since it called for superhuman self-restraint on the part of the parties, who would be required to refrain from breaking off their legal relations despite the fact that they had terminated their diplomatic relations.

ARTICLE 65 (General rule regarding the amendment of treaties) [35][7]

29. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed that the title and text of article 65 should be revised to read:

" *General rule regarding the amendment of treaties* "

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

30. The first sentence of the English text was identical with that of 1964, but the word " *amendé* " had been substituted for the word " *modifié* " in the French text.

31. The words " If it is in writing " had been eliminated from the second sentence as well as the reference to the established rules of an international organization. Those changes resulted from the decisions already taken on those two points.

32. Mr. de LUNA said that the Spanish text would be more idiomatic if the words " *a menos que el tratado disponga otra cosa* " were placed at the beginning of the second sentence.

[7] For earlier discussion, see 859th meeting, paras. 1-50.

33. Mr. RUDA said that, while he agreed that that arrangement would be more elegant, it might create difficulties both in that particular article and in others. It would be better, therefore, to follow the English original so as to keep the three languages uniform.

34. Mr. AGO drew attention to a discrepancy between the French and English texts: where the French read " *à moins que* ", an expression which was usually translated in the Commission's text by " unless ", the English read " except in so far as ".

35. The CHAIRMAN, speaking as a member of the Commission, agreed that there was a slight difference in meaning which ought to be eliminated.

36. Mr. de LUNA said that in his opinion elegance should be sacrificed for the sake of using the same expression as in English.

37. Mr. REUTER proposed the formula: " *sauf dans la mesure où le traité en dispose autrement* ".

38. Mr. de LUNA said that the phrase " *excepto en la medida en que el tratado disponga otra cosa* " would be acceptable for the Spanish text.

39. Sir Humphrey WALDOCK, Special Rapporteur, referring to the point of substance raised by previous speakers, said that the English text was correct and exactly expressed the Commission's intention that, in general, the rules laid down in part I would apply unless the treaty provided otherwise.

40. Mr. BRIGGS said that the divergence between the English and French texts had not been noticed by the Drafting Committee at the sixteenth session. He agreed with the Special Rapporteur that the expression " except in so far as " was the right one.

41. The CHAIRMAN put to the vote the Drafting Committee's text for article 65, as amended in the French and Spanish texts.

Article 65 was adopted by 18 votes to none.[8]

ARTICLE 66 (Amendment of multilateral treaties) [36][9]

42. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text:

" *Amendment of multilateral treaties* "

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

(*a*) the decision as to the action to be taken in regard to such proposal;

(*b*) the negotiation and conclusion of any agreement for the amendment of the treaty.

" 2. Every State entitled to become a party to the treaty shall also have the right referred to in paragraph 1 (*b*).

" 3. Unless the treaty otherwise provides, the amending agreement does not bind any State already a party to the treaty which does not become a party also to the amending agreement; and article 63, paragraph 4 (*b*) applies in relation to such State.

" 4. Unless the treaty or the amending agreement otherwise provide, any State which becomes a party to the treaty after the entry into force of the amending agreement shall:

(*a*) be considered as a party to the treaty as amended;

(*b*) be considered as bound by the unamended treaty in relation to any party to the treaty not bound by the amending agreement. "

43. Changes of both substance and drafting were proposed. The text of paragraph 1 of the Special Rapporteur's revised text (A/CN.4/186/Add.4) had been modified to make it clear that it related only to the parties and that every party was entitled to be notified of any proposal to amend a multilateral treaty and to participate in the decision on the action to be taken. The reference to the established rules of an international organization that had appeared in the 1964 text had been dropped because of the Commission's decision not to deal with that subject in its draft articles. In paragraph 1 (*a*) the words " if any ", which appeared in the Special Rapporteur's revised version, had been deleted. Paragraph 1 (*b*) now referred to the negotiation as well as to the conclusion of any agreement for the amendment of the treaty because it was thought that every party should be entitled to take part in that process.

44. Paragraph 2 of the Drafting Committee's text was entirely new. It had been inserted because, under paragraph 1, the right to take part in the negotation and conclusion of an amending agreement was restricted to the parties. When, however, a large number of States had taken part in an international conference convened to draw up a multilateral treaty which might provide for its entry into force on the deposit of a relatively small number of ratifications, it was desirable that every State entitled to become a party to that treaty should also have the right to participate in the negotiation and conclusion of an amending agreement.

45. The Drafting Committee had not attempted to define the phrase " entitled to become a party ", a point that would have to be considered by the Commission when it reviewed the whole draft.

46. Paragraph 3 (formerly paragraph 2) had been reworded, and it would be noted that there was now a specific reference to paragraph 4 (*b*) of article 63.[10]

47. The new text of paragraph 4 had been particularly difficult to formulate. In the course of its work, the Drafting Committee had consulted the Secretariat on United Nations practice in regard to the amendment of multilateral treaties. The essential element in the new text was that unless the treaty or the amending agreement otherwise provided, any State becoming a party to the former after the entry into force of the amending agreement would be deemed a party to the treaty as amended except in relation to any State party to the treaty that was not bound by the amending agreement.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text for article 66 contained some

[8] For later amendments to the text of article 65, see 893rd meeting, paras. 49 (French text only) and 53.

[9] For earlier discussion, see 859th meeting, paras. 51-100, and 860th meeting, paras. 1-32.

[10] For the text of article 63, see above, para. 2.

important changes resulting from the discussion at the 859th and 860th meetings and more particularly from his own concern about the restrictive character of the 1964 text of paragraph 1 (A/CN.4/L.107). That text seemed to place the amendment of a multilateral treaty entirely in the hands of the parties, although it was a well-known fact that that was contrary to modern practice, especially in the case of multilateral treaties drawn up by a large number of States. It was more usual to invite the States which had taken part in the adoption of the text or which were entitled to become parties to participate in the negotation and conclusion of an amending agreement. After carefully examining the matter, the Drafting Committee had come to the conclusion that the formula now being proposed in paragraphs 3 and 4 should meet the kind of problems which were constantly arising in practice and of which the United Nations had had considerable experience in connexion with the amendment of League of Nations treaties. The Drafting Committee considered that the Commission ought to try and fill the gaps in its 1964 text in that regard. Insufficient consideration had hitherto been given to the very real problems involved.

49. Mr. AGO pointed out with reference to paragraph 2 that the English word " entitled " had been translated into French by " *qui peut* ". In other words, the French text referred to a physical possibility, whereas the English referred to a legal title. Would it not be possible in French to use the expression " *ayant qualité* " ?

50. In paragraph 3 of the English text, he doubted whether the word " also " was really necessary.

51. With regard to paragraph 4 of the French text, the Commission had always used the phrase " *amendant ce dernier* ", not " *l'amendant* ", and it ought to adhere to that formula.

52. Mr. REUTER proposed, in reply to Mr. Ago's first observation, that the French text should read " *Tout Etat habilité . . .* ".

53. Mr. JIMÉNEZ de ARÉCHAGA said that a further point of substance had occurred to him since the text now before the Commission had been prepared in the Drafting Committee, of which he was a member. That point concerned the relationship between article 66, paragraph 2, and the provisions of article 6, paragraph 2 (A/CN.4/L.115), under which a two-thirds majority might be required for the adoption of a text. If States which had signed but not ratified the treaty or States not parties to the original treaty were to be given the right of participating in the negotiation and conclusion of an amending agreement, a situation might occur in which the parties to the original treaty were prevented from amending an instrument binding upon them owing to lack of support by States not bound by the original treaty. The point called for examination because it was in view of that possibility that the Commission had decided during the second part of its seventeenth session[11] not to include a parallel right in article 40, which dealt with termination or suspension of the operation of treaties by agreement.

54. Mr. TUNKIN said that he appreciated the point raised by Mr. Jiménez de Aréchaga but did not see how those States which had attended the first conference and had participated in the formulation of the treaty to be amended could be excluded from the second, or amending, conference. Those States to which the treaty was open were interested in the negotiation and conclusion of a new treaty, to which they might become parties.

55. Mr. de LUNA said that the question raised by Mr. Jiménez de Aréchaga was extremely interesting from the standpoint of principle. From the practical standpoint, however, he fully shared the opinion of Mr. Tunkin. He knew from experience that a conference to amend a treaty was often convened precisely for the purpose of making certain adjustments in the text of the treaty in order to attract the ratification of States which had participated in the first conference but which had not become parties to the original treaty.

56. He favoured the Special Rapporteur's approach, although it might involve occasional difficulties arising out of the two-thirds majority rule laid down in article 6, paragraph 2. In the case of a multilateral treaty of general interest, it was of importance to the international community that the treaty should not remain confined to a small group of States but should attract the accession of the largest possible number of States entitled to participate in it.

57. Mr. BARTOŠ said that there were certain points in the Drafting Committee's text which seemed to him obscure.

58. Paragraph 3 stated a general principle applicable in international law: States which had not approved the amendment to a treaty were bound by the earlier treaty, unless the treaty otherwise provided. It also stipulated, however, that article 63, paragraph 4 (*b*), would apply in relation to such States.

59. Further, under article 66, paragraph 4 (*b*), a State which became a party to the treaty after the entry into force of the amending agreement, was considered as bound by the unamended treaty in relation to any party to the treaty not bound by the amending agreement. But the initial phrase in paragraph 4, namely: " Unless the treaty or the amending agreement otherwise provide " had to be taken into account. In other words, sub-paragraph (*b*) had to be interpreted in the light of that introductory phrase. There was therefore a conflict between the two provisions, which had certainly not been the Drafting Committee's intention.

60. It was in fact stipulated that article 63, paragraph 4 (*b*), applied as between the States in question, without reference to the provisions of the amending agreement. If, however, article 66, paragraph 4 (*b*) was to be applied, that had to be done within the context of paragraph 4 as a whole. The Commission was therefore faced with an interpretation of a situation which it had not intended and which was inconsistent with the principle stated in the first part of paragraph 3.

61. A question then arose: what was the situation between the parties which had participated in the amending agreement but which had not become parties to the treaty after its entry into force? What were their relations with States which had not accepted the amendment, according

[11] See *Yearbook of the International Law Commission, 1966*, vol. I, part I, 829th meeting, para. 62, and 841st meeting, para. 58.

to the text of the unamended treaty, and with those which had accepted that amendment?

62. In his opinion, paragraphs 3 and 4 did not deal with situations which gave rise to frequent difficulties of interpretation.

63. Mr. TSURUOKA said that he had intended to draw the Commission's attention to one of the points just raised by Mr. Bartoš. Paragraph 4 (*b*) was rather difficult to understand in the context of article 66 and even in the over-all context of the articles relating to the amendment of multilateral treaties. Assuming that a country accepted the amended treaty without accepting the original treaty, it would find itself, as a result of that sub-paragraph, bound against its will by the original treaty; that was obviously unacceptable. It should at least be made clear that the consent of the State in question was necessary for paragraph 4 (*b*) to produce its effect.

64. Mr. JIMÉNEZ de ARÉCHAGA said that, although the situation he had mentioned would not occur frequently in practice, the Commission should recognize that it was manifestly illogical. To take the example of a treaty signed by fifteen States but ratified by only two of them, if the two latter States found the provisions of the treaty intolerable and decided to amend them, it would be absurd to allow States not parties to the treaty to block the amendment. In the hypothetical case he had mentioned, a two-thirds majority of the States participating in the second conference could consist entirely of States which were not parties to the treaty. It would be inadmissible for the only two States which were actually bound by the treaty to be prevented from amending it by States not so bound.

65. He had no objection to the adoption of paragraph 2, but thought it essential to include a proviso to the effect that the votes of the States mentioned in that paragraph would not be taken into account in determining the two-thirds majority stipulated in article 6, paragraph 2.

66. With regard to the point raised by Mr. Bartoš and Mr. Tsuruoka, one solution would be to delete paragraph 4 (*b*) and to leave the whole matter to be governed by article 63 (Application of successive treaties relating to the same subject-matter). The question whether the ratification of the amending agreement affected the original treaty would depend on the circumstances, as stated in article 63.

67. Mr. TUNKIN said that situations of the type mentioned by Mr. Jiménez de Aréchaga were theoretically possible, but could in practice be solved by means of other provisions of the draft articles, such as those on termination and on *inter se* agreements. The overriding principle, however, should be recognition of the right of all States interested in the treaty to participate in any negotiations for the conclusion of an amending agreement.

68. The fact that certain States had participated in the formulation of the original treaty, or that the treaty was open to them, clearly indicated that such States had an interest in the matter. The only acceptable rule, therefore, was that set forth in paragraph 2, despite any complications which might arise from the operation of other provisions and which could be solved by means of the rules embodied in other draft articles.

69. Mr. Bartoš had raised a valid point with regard to paragraph 4. The words " or the amending agreement " in the opening clause were not logically relevant to sub-paragraph (*b*). He therefore suggested that those words should be deleted from that clause and that the words " unless the amending agreement otherwise provides " should be added to the end of sub-paragraph (*a*).

70. Consideration should also be given to the point raised by Mr. Bartoš and Mr. Tsuruoka regarding paragraph 4 (*b*). A State which became a party to the treaty after its amendment should not necessarily be bound vis-à-vis States which were not parties to the amending agreement.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that he shared Mr. Tunkin's views on paragraph 2. The difficulties mentioned by Mr. Jiménez de Aréchaga should not be exaggerated. In normal circumstances, all States which were parties to the original treaty would wish to have treaty relations with States which were entitled to become parties but which had not yet ratified the treaty. In the vast majority of cases, it could only be advantageous for the second conference to be attended by the largest possible number of the States entitled to participate in the treaty. In such cases, it could safely be assumed that the proposed amendments were intended precisely for the purpose of attracting a wider participation in the treaty.

72. The dangers which Mr. Jiménez de Aréchaga had mentioned could be met by the parties terminating the treaty and concluding a new treaty to their own liking. If the Commission were to fail to adopt a provision on the lines of paragraph 2, it would be flying in the face of existing practice. The provisions in question accurately reflected the existing practice in respect of the large majority of multilateral treaties.

73. It was not possible to delete sub-paragraph 4 (*b*), because sub-paragraph 4 (*a*), if left on its own, would imply that a State which became a party to the treaty after the entry into force of the amending agreement had no treaty relations with those parties which had not accepted the amending agreement. The only point which had not been covered in sub-paragraph (*b*) was the possibility of giving such a State a choice in the matter; provision should perhaps be made for the State to say whether or not it wished to be a party to the unamended treaty in relation to those parties which had not accepted the amending agreement. The Drafting Committee should consider that problem.

74. Paragraph 4 was intended to deal with difficulties which occurred frequently in practice and which raised delicate problems for depositaries. The Secretariat had informed the Drafting Committee that it was quite common for a State to deposit an instrument of ratification without specifying clearly whether the ratification also covered the amending agreement.

75. He suggested that that paragraph should be referred back to the Drafting Committee for consideration in the light of the discussion.

76. Mr. JIMÉNEZ de ARÉCHAGA suggested that paragraph 2 should also be referred back to the Drafting Committee. He favoured the idea, embodied in that paragraph, of protecting the rights of signatories to the

treaty, provided that the rights of the parties were not affected. The point was an important one and the other escape clauses in the draft articles were not sufficient. Termination could not provide a solution in those cases where the States parties to the treaty did not wish to terminate it. Nor could an *inter se* agreement provide a solution, because, under article 67, such agreements were subject to certain stringent conditions which might not be fulfilled in a particular case.

77. Unless the point were given due consideration, he believed the article would attract criticism.

78. The CHAIRMAN suggested that, since the various paragraphs of article 66 were interconnected, the whole article should be referred back to the Drafting Committee.

It was so decided.[12]

ARTICLE 67 (Agreements to modify multilateral treaties between certain of the parties only) [37][13]

79. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for 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 conclude an agreement to modify the treaty as between themselves alone if:

(*a*) the possibility of such an agreement 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 parties in question shall notify the other parties of their intention to conclude the agreement and of the modifications to the treaty for which it provides. "

80. Paragraph 1 was identical with the 1964 text (A/CN.4/L.107), except for two minor drafting changes in the English text of paragraph 1, in which the words " enter into " had been replaced by the word " conclude " and the words " such agreements " in sub-paragraph (*a*) had been replaced by " such an agreement ", thus bringing that text into line with the French. In the French text of sub-paragraph (*b*) (*ii*), the words " *une dérogation serait incompatible* " had been replaced by " *il ne peut être dérogé sans qu'il y ait incompatibilité* ".

81. Paragraph 2 had been discussed at length by the Drafting Committee and the text now proposed included two important changes: first, the parties to the *inter se* agreement were required to notify the other parties of their intention to conclude the amending agreement, instead of making the notification after the conclusion of such agreement; secondly, it was laid down that the notification must not only indicate the intention to enter into an amending agreement but must also specify " the modifications to the treaty for which it provides ".

82. Sir Humphrey WALDOCK, Special Rapporteur, explained that the purpose of that last provision was to indicate that notification should be made at a time when the proposals for *inter se* amendment had reached an advanced stage, since those proposals had to be formulated as provisions.

83. Mr. AGO said that he apologized for having to raise at that stage a point of substance he had been unable to make during the general discussion. The purpose of article 67, paragraph 1, was to lay down the conditions which had to be fulfilled in order to conclude an *inter se* agreement modifying a multilateral treaty where the treaty itself made no reference to the possibility of such agreements. While it was reasonable to deal separately with the case in which that possibility was provided for in the treaty, it would be strange if, because such provision was made in the treaty, the modification could go so far as to prevent the other parties from enjoying their rights or performing their obligations under the treaty, or if it would render impossible the effective execution of the objects and purposes of the treaty. In his opinion, the conditions laid down in sub-paragraphs (*b*), (*i*) and (*ii*) should also be fulfilled when the treaty provided for the possibility of an *inter se* amending agreement.

84. Mr. AMADO said that he was awaiting with interest the reactions to the important point just made by Mr. Ago.

85. He noted that in sub-paragraph (*b*) (*i*) the French expression " *porte atteinte* " had been used to translate the English " affect "; that expression would also be appropriate in article 64.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Ago had been discussed in 1964[14] but the Commission had taken the view that it was not possible to introduce into the draft articles, as it were, statutory conditions which would have the effect of altering the agreement of the parties. Bearing in mind the sovereignty of the States parties to the treaty, the provisions of paragraph 1 should remain as they were.

87. Mr. AGO said he appreciated the Special Rapporteur's concern that the will of the parties should be respected where they had included provisions regarding *inter se* agreements in the treaty. Normally, however, the parties would not include any specific provision in the treaty concerning the limits within which the right to conclude such agreements could be exercised; in such a case, the agreements in question should be subject to the conditions laid down in sub-paragraphs (*b*) (*i*) and (*ii*).

88. Sir Humphrey WALDOCK, Special Rapporteur, said that the French text clearly had to be adjusted to bring it into line with the English. Where the substance of paragraph 1 was concerned, he remained unconvinced by the arguments put forward by Mr. Ago. If the parties had made express provision for *inter se* agreements in the original treaty, it could safely be assumed that such

[12] For resumption of discussion and decision on article 66, see 883rd meeting, paras. 24-71.

[13] For earlier discussion, see 860th meeting, paras. 33-93.

[14] See *Yearbook of the International Law Commission, 1964*, vol. I, 764th meeting, particularly para. 78.

agreements would not be prejudicial to the parties. In any event, and regardless of any possible effect on the rights of the parties, the express provisions of the treaty must prevail. If the parties had not laid down any conditions for the conclusion of *inter se* agreements and had expressly given licence for the conclusion of such agreements, he failed to see why the Commission should make mandatory the conditions set forth in sub-paragraphs (*i*) and (*ii*) of paragraph 1 (*b*).

89. The Commission's object in including article 67 had been to prevent arbitrary and illegitimate *inter se* agreements, by dealing with those cases in which the parties had not made any provision for such agreements.

90. Mr. AGO proposed that the words " the possibility of such an agreement " in paragraph 1 (*a*) should be replaced by " the possibility of such a modification ", which would be rather more precise and more in keeping with the wording of sub-paragraph (*b*): " the modification in question . . . ".

91. Mr. BRIGGS said he agreed with the Special Rapporteur and supported the retention of article 67 as proposed by the Drafting Committee; paragraph 1 of that article provided a satisfactory answer to an important practical problem which had caused great difficulties in the past. There could be no justification for imposing rigid conditions on the conclusion of *inter se* agreements when that possibility had been considered by the parties themselves.

92. He would be prepared to accept Mr. Ago's suggestion that the words " such an agreement " in paragraph 1 (*a*) should be replaced by " such a modification ".

93. Mr. de LUNA said he supported Mr. Ago's proposal. If the Commission did not accept that proposal, another solution would be to drop sub-paragraph (*a*) and insert the words " Unless the treaty otherwise provides " at the beginning of paragraph 1. But he would prefer the solution proposed by Mr. Ago.

94. Mr. AMADO pointed out that from a practical standpoint there was a certain time-lag, a stage that had to be completed between the agreement to modify the treaty and the modification itself.

95. Mr. REUTER said it was his understanding that Mr. Ago had wished to draw attention to the fact that article 67 made agreements to modify a multilateral treaty *inter se* subject to stricter conditions when the possibility of concluding such agreements was not envisaged in the treaty than when it was. Two problems arose in that connexion, that of the possibility of concluding such agreements and that of the conditions to be met by such agreements. Under article 67, if the possibility was provided for in the treaty, the Commission did not stipulate any conditions, whereas if that possibility was not so provided for, the Commission laid down certain conditions. That anomaly could perhaps be remedied by adding to sub-paragraph (*a*) some such words as " in which case the modification is made in accordance with the conditions laid down in the treaty, or, if the treaty does not prescribe any conditions, in accordance with those laid down in sub-paragraphs (*b*) (*i*) and (*ii*); or ".

96. The CHAIRMAN, speaking as a member of the Commission, said that his view of paragraph 1 was the same as Mr. Ago's. The fact that the treaty provided for the possibility of such an agreement was not sufficient to exempt that agreement from all limitations or conditions.

97. In paragraph 2, the words " *qu'il apporte* " in the French text should be replaced by " *qu'elles envisagent d'apporter* ".

98. Mr. VERDROSS said that he appreciated Mr. Ago's concern. The point was, however, already covered by article 59, which stated that a treaty could not create any obligations for a third State without that State's consent.

99. Sir Humphrey WALDOCK, Special Rapporteur, emphasized that the case under consideration was one in which the States parties to the treaty had dealt with the question of *inter se* agreements and had expressly authorized the conclusion of such agreements. If the parties wished to lay down conditions for the conclusion of such *inter se* agreements, they could do so in the treaty. The treaty provisions on the subject would have to be applied and interpreted in good faith in accordance with articles 55 and 69 of the draft articles. It was out of the question for the Commission to write into the treaty the stringent conditions set forth in sub-paragraphs (*i*) and (*ii*) of paragraph 1 (*b*), which might well be inconsistent with the terms of the treaty.

100. Mr. TSURUOKA said that he doubted whether the rule enunciated in paragraph 2 conformed to current international practice and whether it was correct. The other parties might be interested in the conclusion of any *inter se* agreement, whatever its nature; it was in their interest to know what was happening, even if the treaty authorized the conclusion of such agreements. Was it really the Commission's intention to state a rule which afforded such inadequate protection of the interests of the other parties? The initial reservation " Except in a case falling under paragraph 1 (*a*) ", should be replaced by " Unless the treaty otherwise provides ". Parties desirous of concluding an *inter se* agreement modifying the treaty would thus not be exempted from notifying the other parties of their intention unless the treaty authorized the conclusion of such agreements without notification of the other parties.

101. Mr. BARTOŠ said that he was opposed to article 67, particularly because of the conflict between paragraphs 1 and 2. Even if the possibility of concluding *inter se* agreements was provided for in the treaty, it should not be left to the parties availing themselves of that possibility to decide whether they should notify the other parties of their intention or not. By making an exception of the case provided for in paragraph 1 (*a*), paragraph 2 laid down a rule which might prejudice the interests of the other parties.

The meeting rose at 1.5 p.m.