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Summary record of the 752nd meeting

Topic:
Law of Treaties

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752nd MEETING

Thursday, 25 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Law of Treaties
(continued)

[Item 3 of the agenda]

ARTICLE 62 C (Most-favoured-nation clauses) (proposed by Mr. Jiménez de Aréchaga)

1. The CHAIRMAN invited Mr. Jiménez de Aréchaga to introduce his proposal for an additional article dealing with most-favoured-nation clauses, which read:

"*Article 62 C*

"*Most-favoured-nation clauses*

"1. Nothing provided in articles 61, 62 A or 62 B affects or diminishes in any way the rights or privileges which a State may be entitled to invoke, deriving from the provisions of treaties entered into by other States, by virtue of the operation of most-favoured-nation clauses.

"2. When treaty provisions granting rights or privileges have been abrogated or renounced by the parties, such provisions can no longer be relied upon by a third State by virtue of a most-favoured-nation clause."

2. Mr. JIMÉNEZ de ARÉCHAGA said that when he had first raised the question of the most-favoured-nation clause, he had realized that the Commission as a whole was not at that time prepared to insert a substantive provision on the subject in its draft. Hence he had not intended to press the point until, perhaps, the second reading of Part II. However, certain important changes had been introduced into the structure of the draft, and in view of the wording adopted by the Drafting Committee for articles 61, 62, 62 A and 62 B,[1] it had become not only advisable, but indispensable to insert a provision exempting most-favoured-nation clauses from the operation of those articles.

3. The Special Rapporteur had said that he had not covered the matter because there was a clear difference between stipulations in favour of third States and the most-favoured-nation clause, the difference being that in the latter case there was a second treaty containing the clause, and that second treaty applied normally. He could not disagree with that analysis of the difference between the two situations. However, the school of thought which considered that in such circumstances a collateral agreement existed had succeeded to a large extent in introducing its views into the draft concerning stipulations in favour of third States. The broad and general terms in which articles 61, 62 A and 62 B had now been drafted tended to blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause.

4. It might perhaps be claimed that the most-favoured-nation clause referred to future treaties, whereas a collateral agreement referred to an existing treaty. He did not believe that any valid criterion could be based on that distinction: it was perfectly possible to enter into a collateral agreement accepting rights to be provided for in a future treaty and it was also possible for the most-favoured-nation clause to refer to the past and to enable a State to obtain benefits provided for in an existing treaty.

5. The impossibility of establishing a clear distinction between the two cases meant that articles 62 A and 62 B could be read as being applicable to most-favoured-nation clauses, unless some saving provision were introduced. Without such a provision, the articles in question would have the unintended effect of seriously affecting and even abolishing a useful practice which was the cornerstone of most modern trade and customs agreements.

6. For instance, article 61, as drafted, stated categorically that "A treaty applies only between the parties" — a statement which was not literally true since, by virtue of the operation of the most-favoured-nation clause, a treaty concluded between two States could also govern relations between one of them and a third State.

7. Article 62 A stated in paragraph 1 that "A State may exercise a right provided for in a treaty to which it is not a party" only if the parties "intended the provision to accord that right". But through the most-favoured-nation clause, a State not a party to a treaty could exercise a right provided for in the treaty, even if the parties had not had that intention.

8. The most serious difficulties, however, arose from the provisions of article 62 A, paragraph 2, and article 62 B. Article 62 A, paragraph 2, if not expressly made inapplicable to most-favoured-nation clauses, could be interpreted as ruling out the unconditional form of such clauses. The Commission could be considered as taking the position that before a State could exercise, by virtue of the most-favoured-nation clause, the rights or privileges accorded under another treaty to another State, it must first comply with any conditions, or duty to compensate, imposed on that State. The Commission would thus find itself at variance with the prevailing trend, which was that, in the event of silence on the point, the most-favoured-nation clause operated unconditionally, automatically and without any compensation.

9. Article 62 B would also seriously upset the operation of the most-favoured-nation clause. Its application would be an inducement to discontinue that useful practice, because rights or privileges extended to a State under the operation of the clause might be freely revoked or amended between the parties to the treaty governing them, not only without the consent of the State benefiting from the clause, but even without consultation of that State.

[1] See 750th meeting, paras. 62-63.

10. In order to avoid those undesirable results, paragraph 1 of his proposal made it clear that the provisions of articles 61, 62, 62 A and 62 B did not in any way affect or diminish rights invoked by virtue of the operation of the most-favoured-nation clause. That paragraph took the form of a saving clause, very similar to the Special Rapporteur's draft or article 64, relating to principles of a treaty extended to third States by formation of international custom (A/CN.4/167). The provisions of the paragraph were not very ambitious and made no attempt to cover the substantive problems raised by the most-favoured-nation clause; they merely reserved the question. He did not believe that an explanation in the commentary would be sufficient to achieve that result: it was not good policy for the Commission to draft unduly wide and equivocal provisions and to try to protect itself against unintended interpretations by explanations in a commentary. The articles should speak for themselves without ambiguity.

11. Paragraph 2 of his proposal contained the only substantive rule in the article. It stated the generally accepted rule that the provisions from which a third State might benefit by virtue of the operation of the most-favoured-nation clause could be freely abrogated or renounced by the parties without the beneficiary's consent or even knowledge. The point was an important one and had been the subject of a clear ruling by the International Court of Justice in the case concerning *Rights of nationals of the United States of America in Morocco*.[2] The purpose of paragraph 2 of article 62 C was to state that ruling, which of course reversed the rule laid down in article 62 B. The words were taken almost literally from the judgment of the International Court of Justice. Some writers had observed that in certain cases it might be possible for a State to claim that the rights enjoyed under the most-favoured-nation clause survived the termination of the treaty granting them. Such a possibility did exist, since under the rule *pacta sunt servanda* States could agree on the consolidation of rights which had originated in that clause. But in the light of the Court's decision, the subsistence of rights in such a case would not be the effect of the most-favoured-nation clause, but the result of an additional agreement superimposed on the clause. The Court had made it clear that since the essential purpose of most-favoured-nation clauses was to maintain a régime or non-discrimination, any rights or privileges enjoyed by a State by virtue of the operation of the clause would lapse upon the termination of the treaty which established those rights and privileges.

12. Mr. CASTRÉN said that although the idea expressed in the proposed article 62 C was certainly correct, he wondered whether it was really appropriate to devote a special article to the most-favoured-nation clause and whether it might not be enough to mention that clause in the commentaries on articles 62 A and 62 B. In commenting on his proposal, Mr. Jiménez de Aréchaga had said that, through the most-favoured-nation clause, a State not a party to a treaty could exercise a right provided for in that treaty even if the parties had not had that intention. But since the right of the third State in that particular case derived from the clause and from the treaty containing the clause, it could hardly be claimed that the parties to the treaty had had a contrary or more restricted intention. Besides, it could be said that when two States concluded a treaty containing such a clause, they recognized that the provisions of the treaty could be abrogated without the consent of the State benefiting from the clause. Those conclusions followed from the very nature of the most-favoured-nation clause and were supported by the general practice of States. Consequently, neither paragraph 1 nor paragraph 2 of the proposed article was necessary.

13. Mr. ROSENNE said that Mr. Jiménez de Aréchaga had made a convincing case for including a provision reserving the question of the most-favoured-nation clause. The expression "most-favoured-nation clauses" used in the title, although awkward, could be retained, since it was taken from the authoritative English text of the judgment of the International Court of Justice in the case concerning *Rights of Nationals of the United States of America in Morocco*.

14. He was in favour of including a saving provision on the subject of most-favoured-nation clauses, if only because that was the best way of testing the reactions of governments on the matter.

15. The title of the article should be amended, for it was too ambitious as it stood; and the article itself should be shortened to a single paragraph simply reserving the question of the most-favoured-nation clause. He suggested that it be redrafted to read.

"Non-application of articles to most-favoured-nation clauses

"Nothing in articles 61 to 62 B affects the operation of provisions in treaties granting most-favoured-nation rights to States which are not parties to those treaties and in particular the power of the parties to revoke or amend such treaties at any time without the consent of the States claiming the benefit of those provisions."

16. He added that most-favoured-nation clauses were not confined to treaties dealing with commercial and economic matters; they also appeared in other treaties.

17. Mr. de LUNA thanked Mr. Jiménez de Aréchaga for having drawn the Commission's attention to the problem of the most-favoured-nation clause. The very arguments he had put forward, however, had clearly shown that there was nothing in common between stipulations in favour of third parties and the operation of the most-favoured-nation clause. There was no analogy between the two situations; any attempt to draw such an analogy would be like seeing a similarity between a brush and an elephant because neither of them could climb trees.

18. The effect of the most-favoured-nation was not that the provisions of a treaty became applicable to a third State: the State invoking the clause did not

[2] *I.C.J. reports*, 1952, pp. 187, 191, 192, 204.

become a party to the treaty which provided for the rights and privileges it invoked.

19. Whatever language was adopted for articles 61, 62 A and 62 B, it should be made perfectly clear that they did not apply to the operation of the most-favoured-nation clause.

20. Sir Humphrey WALDOCK, Special Rapporteur, said he was not convinced that, from the strictly legal point of view, there was any real need, to include the proposed article 62 C. The situation arising from the operation of the most-favoured-nation clause was radically different from that envisaged in articles 62 A and 62 B. He conceded that the change in drafting adopted at the previous meeting for those two articles, which now made reference to rights and obligations " arising " from a treaty for a non-party State, provided some grounds for the misgivings expressed by Mr. Jiménez de Aréchaga. But even article 61, the most categorical of the group of four articles considered at the last two meetings, clearly did not apply to the situation created by the most-favoured-nation clause: rights and obligations arising from the operation of that clause derived from the clause itself and not from the other treaty.

21. Accordingly, if any saving provision were to be introduced at all, it would have to state that nothing in the draft articles related to the operation of the most-favoured-nation clause. If the Commission wished to introduce a saving provision of the kind suggested by Mr. Rosenne, it should be further shortened so as to state simply that nothing in articles 61 to 62 B affected the operation of the most-favoured-nation clause.

22. Mr. YASSEEN said that he appreciated the force of the arguments advanced by Mr. Jiménez de Aréchaga, but was not convinced. It was not sound practice to reserve something which did not need to be reserved. Under the system of the most-favoured-nation clause, everything was governed by the treaty containing the clause; the other treaty was only the condition for the operation of the arrangements made by the parties to the first treaty. But that condition could be fulfilled otherwise than by a treaty: it might be fulfilled by *de facto* most-favoured-nation treatment. Consequently, if the Commission tried to deal with the whole problem, its draft might become too cumbersome. The ideas expressed in the two paragraphs of the proposed article were correct, but the same conclusions would be reached if the article was not included.

23. Mr. TABIBI thanked Mr. Jiménez de Aréchaga for having drawn attention to a very important question, which was particularly complex in the context of treaties other than trade agreements.

24. When the Commission had taken its final decision on articles 61, 62 A and 62 B, he would favour the addition of a small paragraph to the effect that nothing in those articles affected the operation of the most-favoured-nation clause. Such a paragraph would be useful and would certainly do no harm.

25. Mr. BRIGGS said he did not favour the inclusion of article 62 C. There was really nothing in the draft articles which could affect the operation of the most-favoured-nation clause. However, if the majority of the Commission agreed to include a saving clause, it should be as brief as possible, as suggested by the Special Rapporteur.

26. Mr. TUNKIN said that Mr. Jiménez de Aréchaga had raised a very important point. Although the obligations and rights arising from the most-favoured-nation clause was different from those arising from stipulations in favour of third parties, he thought that Mr. Jiménez de Aréchaga had shown the possible usefulness of including a short saving provision, in order to prevent articles 61 to 62 B from being interpreted as in any way affecting the operation of most-favoured-nation clauses.

27. He considered that a short saving clause might be included on a tentative basis; when the Commission came to the second reading of the draft articles, it would see whether the provision was necessary.

28. The CHAIRMAN, speaking as a member of the Commission, said he was uncertain whether it would be desirable to introduce a provision on the most-favoured-nation clause into the draft. Mr. Jiménez de Aréchaga had certainly raised an important problem, and if the Commission wished to deal with it fully, provisions other than those proposed might perhaps be needed. For example, a treaty containing a most-favoured-nation clause might also provide that once a certain treatment had been obtained, it could not thereafter become less favourable, even after termination of the treaty with the third State which had introduced the improvement.

29. A very short and very general reference would probably do no harm, but it should not be allowed to destroy the logical coherence of the draft. The most-favoured-nation clause was a clause with a variable content wich changed with the conclusion of other treaties. The legal effect of the clause derived from the treaty containing it, not from the other treaties, so it was perhaps an unnecessary precaution to state that the articles relating to the effects of treaties on non-party States did not affect the operation of the most-favoured-nation clause.

30. Mr. BARTOS said that the most-favoured-nation clause was a very important and very commonly used institution, which might operate to the advantage of a State or to that of its nationals, or even sometimes to that of certain persons, as under the Convention relating to the Status of Refugees.[3] As Mr. Yasseen had pointed out, the clause was not always linked to a contract, and its effect sometimes depended on a *de facto* situation. Whereas the basis of the legal effect of a treaty on a third State was its accession or consent — sometimes even certain conduct on its part — the legal basis of the most-favoured-nation clause was twofold: on the one hand a treaty and on the other a situation (not

[3] United Nations *Treaty Series*, Vol. 189, p. 150.

necessarily another treaty). Consequently, the subject was difficult to fit into the system proposed by the Special Rapporteur and accepted by the Commission.

31. Mr. Jiménez de Aréchaga had been right to raise the problem, however. The institution of the most-favoured-nation clause deserved examination. But if the Commission decided to deal with it in the draft articles, it would have to include much more elaborate provisions, calculated to facilitate the application of the clause.

32. Mr. PAL supported the inclusion of a brief saving provision to make it clear that articles 61 to 62 B did not in any way affect the operation of the most-favoured-nation clause. Although it might not be necessary to include elaborate provisions on the clause in the draft articles, some reservation of that type was clearly needed.

33. Mr. AMADO complimented Mr. Jiménez de Aréchaga on his proposal. Few international lawyers had not pondered on the very peculiar nature of the most-favoured-nation clause. Its peculiarity lay in the indeterminate relationship established and the fact that the clause produced certain effects without any precise expression of the will of the parties concerned. True to the attitude he had always adopted in the Commission, he could not accept the proposed article or even the formula suggested by the Special Rapporteur. The clause existed, and it had certain links with the law of treaties; but it was not a matter directly pertaining to the Commission's draft.

34. Mr. ELIAS agreed with Mr. de Luna and the Special Rapporteur that the problem dealt with in article 62 C was completely different from that of the effects of treaties on non-party States.

35. With regard to the inclusion of a brief saving clause, he thought it would not do justice to so important a subject, unless a very long commentary were attached.

36. His own view was that there was no need for a provision concerning the most-favoured-nation clause in the draft articles and that the matter could be adequately dealt with in the commentary. If the majority favoured the inclusion of an article, he thought it should be tentative and be accompanied by an elaborate commentary explaining the whole subject.

37. Mr. JIMÉNEZ de ARÉCHAGA said that the question at issue was not whether stipulations in favour of third States were different from most-favoured-nation clauses, but whether the Commission was regulating the former in such broad terms that the latter would be affected. Mr. de Luna had said that the one type of clause was as different from the other as a brush from an elephant; but if a provision in the draft articles were so framed as to apply to all objects with hair, it could be construed as applying both to a brush and to an elephant, regardless of the fact that the two were so obviously different from one another. As drafted, articles 61 to 62 B could be construed as covering the case of most-favoured-nation clauses. The Chairman's argument that the articles on third States were obviously not applicable to most-favoured-nation clauses, since such clauses did not involve any third State, might prove too much. On the view taken by the Chairman and some other members of the Commission, a collateral agreement was always necessary under articles 61 to 62 B, so that the third State was a party to a second agreement, just as in the case of most-favoured-nation clauses. That was why Anzilotti had dealt with one of those questions immediately after the other.[4]

38. The discussion which had taken place had been very useful, however, because it had shown that the Commission did not intend to cover the most-favoured-nation clause in those articles of its draft. It had dispelled any possible doubts, and his proposal for an additional article 62 C had therefore ceased to be indispensable; in the circumstances, it was now easy for him to withdraw it.

39. The CHAIRMAN, speaking as a member of the Commission, said that if States A and B concluded a treaty containing a most-favoured-nation clause and if State A then concluded another treaty with State C whose effect was to bring into operation the most-favoured-nation clause in the first treaty, it could not be said that there was a legal connexion between the two treaties. It could only be said that the content of the first treaty was established according to the content of the second. Mr. Jiménez de Aréchaga had done the Commission a great service by drawing its attention to the problem. He should not withdraw his proposal too hastily, for the Commission might wish to deal with the matter, not in the articles concerning the effects of treaties on non-party States, but in some other part of its draft.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he fully agreed with the Chairman. If the Commission were to deal with the most-favoured-nation clause, it should do so separately. The subject was an important one and might even be examined as a topic separate from the general law of treaties. Any consideration of the question of the most-favoured-nation clause would require a careful study of Customs unions and of the GATT system, and would be a major undertaking whch could clearly not be envisaged during the present session.

41. He wished to make it clear that he had not suggested the introduction of a saving provision concerning the most-favoured-nation clause. He did not consider that a provision of that kind had any place in the part of the draft under discussion. The subject could appropriately be dealt with in the commentary on article 61 or article 62 or in the introduction to the Commission's report; the latter course would be in conformity with the Commission's practice in regard to policy decisions.

42. Mr. RUDA said that his position from the outset had been that the subject of the most-favoured-nation clause was not related to that of the effect of treaties on third States. From the stricly legal point of view, those were two completely separate questions. The discussion

[4] Anzilotti, D., *Cours de droit international* (Trans. Gidel), Paris, 1929, Tome I, pp. 413-439.

had nevertheless shown that the question of the most-favoured-nation clause called for thorough study by the Commission. However, there seemed to be no place for provisions on that question either in Part I of the draft, dealing with the conclusion, entry into force and registration of treaties, or in Part II, dealing with the invalidity and termination of treaties. It was even possible that the subject could best be dealt with apart from the law of treaties.

43. Mr. BARTOŠ said that in deciding whether it should insert an article on the most-favoured-nation clause in the part of the draft under consideration, the Commission should bear in mind that the clause might also relate to a treaty which had not yet been concluded or to a situation which had not yet arisen. Thus the question did not depend on the application of the rule *pacta tertiis nec nocent nec prosunt* as envisaged by the Commission.

44. Another difficulty was that there were two entirely different types of most-favoured-nation clause: the conditional and the unconditional. If it adopted any provision on the clause at all, even in the simplest and most general terms, the Commission would be in danger of prejudging a matter to which it had not given the necessary study.

45. The CHAIRMAN noted that the members of the Commission seemed inclined not to insert any article on the most-favoured-nation clause in the section under consideration. An article constituting a proviso to the preceding articles would appear to be providing for exceptions, whereas the members of the Commission seemed to be convinced that there were no exceptions to be provided for.

46. Nevertheless, as the Commission was preparing a detailed draft on the birth, life and death of treaties, it was necessary to consider whether the application of the most-favoured-nation clause was not a case of the automatic modification of treaties by the operation of an external circumstance and, consequently, whether the Commission should not deal, in another section of its draft, with the effects of that clause in regard to the treaty containing it.

47. Mr. JIMÉNEZ de ARÉCHAGA said that perhaps that question should be considered by the Special Rapporteur when he came to review the whole draft.

48. Sir Humphrey WALDOCK, Special Rapporteur, said he was not an expert on the subject, but he suspected that closer study would show that it should be dealt with separately. In any event the Commission would not be able to take it up at the present session. Rousseau certainly dealt with the matter in his treaties,[5] but had recognized that the legal basis of most-favoured-nation clauses was entirely different from that of stipulations in favour of third States.

49. Mr. BRIGGS said he did not believe that the Commission should undertake the detailed study of special types of clause in a general draft on the law of treaties.

50. Mr. VERDROSS agreed with Mr. Briggs. The most-favoured-nation clause was a special type of clause appearing in certain treaties: if the Commission proposed to make a study of that clause, it would also have to study all the other types of special clause.

51. Mr. YASSEEN said that the issue was not the content of treaties. A treaty was a technical instrument in which States could include whatever they chose. But the most-favoured-nation clause was not an ordinary clause: it was a self-contained system, a general condition much used in practice, which affected the actual operation of the treaty. Hence it might perhaps be advisable to deal with it in the draft convention.

52. Mr. ROSENNE said that apart from arguments put forward by Mr. Jiménez de Aréchaga, the points made in the discussion had alone been sufficient to convince him of the need to include in the draft a short article reserving the question of most-favoured-nation clauses. The matter would be subject to review at the second reading. At some later stage the General Assembly could, if necessary, state whether it wished the Commission to codify rules on most-favoured-nation clauses.

53. Mr. TUNKIN said there was general agreement in the Commission that the operation of most-favoured-nation clauses would not be affected by the provisions laid down in the draft and there would be no harm in saying so in a short article. Indeed, such a course would have the advantage of drawing the attention of governments to the matter and possibly eliciting some observations and even recommendations from them. Certainly the Commission was in no position at present to tackle the substantive issues, which involved numerous economic considerations.

54. Mr. AMADO said he favoured the Special Rapporteur's suggestion that the subject should be referred to in the introduction to the Commission's report on the law of treaties. In that way, the Commission would show its interest in the problem, which was unquestionably an important one, while at the same time emphasizing that it did not come within the scope of the codification of the law of treaties. In a treaty, one party dealt with another, whereas under the most-favoured-nation clause the ultimate beneficiary was an ill-defined and mysterious entity.

55. Sir Humphrey WALDOCK, Special Rapporteur, suggested a statement concerning most-favoured-nation clauses be inserted in the introduction to his third report.

It was so agreed.

Section II: Modification of treaties redrafted by the Special Rapporteur

56. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's wishes he had redrafted articles 67 to 69, which had formed

[5] Rousseau, C., *Principes généraux du droit international public*, Paris, 1944, Tome I, pp. 64 *et seq.*

section II of his original draft (A/CN.4/167/Add.1). The redraft read :

"*Section II — Modification of treaties*

"*Article 67*

"*Procedure for amending treaties*

"1. The amendment of a treaty is effected by the conclusion and entry into force of another instrument modifying its provisions.

"2. The rules laid down in Part I apply to such instrument except in so far as the treaty or the established rules of an international organization may otherwise provide.

"*Article 68*

"*Amendment of multilateral treaties*

"1. Every party to a multilateral treaty has the right, subject to the provisions of the treaty,

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

"(*b*) to take part in the conclusion of any instrument drawn up for the purpose of amending the treaty.

"2. An instrument amending a treaty does not bind any party to a treaty which does not become a party to that instrument, unless it is otherwise provided by the treaty or by the established rules of an international organization.

"3. The effect of an amending instrument on the obligations and rights of the parties to the treaty is governed by articles 41 and 65.

"4. The application of an amending instrument as between the parties thereto may not be considered as a breach of the treaty by any party to the treaty not bound by such instrument if it signed, or otherwise consented to, the adoption of the text of the instrument.

"5. If the bringing into force or application of an amending instrument between some only of the parties to the treaty constitutes a material breach of the treaty vis-à-vis the other parties, the latter may terminate or suspend the operation of the treaty under the conditions laid down in article 42.

"*Article 69*

"*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 application of the treaty as between themseles alone if

"(*a*) such agreements are expressly contemplated 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;

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

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

"2. Any proposal to conclude such an instrument must be notified to all the parties to the treaty."

57. The CHAIRMAN invited the Commission to consider article 67 as redrafted by the Special Rapporteur.

ARTICLE 67 (Procedure for amending treaties)

58. Sir Humphrey WALDOCK, Special Rapporteur, said members would notice that he had omitted subparagraph (*b*) of his original article 67, leaving it to be implied that the other parties must consider in good faith what action should be taken on a proposal for the amendment of a treaty. The rule laid down in the article applied both to bilateral and to multilateral treaties.

59. Mr. VERDROSS suggested that the words "conclusion and" should be deleted from paragraph 1. It was obvious that there could be no entry into force without conclusion of the instrument.

60. Mr. RUDA noted that the Special Rapporteur had changed the titles of section II and of article 67 in such a way as to remove any idea of revision. That was commendable, but the English text now contained the words "modification" in the title of section II, "amending" in the title of article 67 and "amendment" in paragraph 1 of that article, whereas in the French and Spanish texts the same word (*modification, modificación*) was used throughout. He asked the Special Rapporteur to explain what he considered to be the difference between the English terms "modification" and "amendment".

61. Sir Humphrey WALDOCK, Special Rapporteur, said that the terms "modification" and "amendment" were used rather loosely, and sometimes, but not always, as synonyms. It might be said that "modification" had a somewhat broader meaning and was appropriate for *inter se* agreements when the alterations introduced a change in the operation of the treaty between the States concerned without amending the treaty in the ordinary sense of that term.

62. The CHAIRMAN, speaking as a member of the Commission, said he thought that "modification" was a more neutral term and probably also implied more important changes than "amendment", which seemed to have a narrower meaning.

63. Mr. RUDA observed that in Spanish the word *modificación* was not a legal term, although it was used — wrongly — in the United Nations Charter. The correct word was *enmienda* (amendment), and in the the light of the Special Rapporteur's explanations that word should be used in the Spanish text and its equivalent in the French.

64. Mr. LIANG, Secretary to the Commission, suggested that the language used in both paragraphs of article 67 was too sweeping, because it seemed to imply that the modification of some of the provisions of a treaty necessarily resulted in a new instrument, which he did not think was the case. For example, if the proposed amendments to the United Nations Charter concerning an increase in the membership of the Security Council and the Economic and Social Council were adopted, the process of amendment would be confined to a few specific provisions and would in no sense mean that a new Charter would come into being.

65. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think that the text of article 67 was open to the objection raised by the Secretary. Its wording meant that the amendment of a treaty would lead to another act by the parties, but one which would not cancel the original treaty.

66. The criticism which might with justice be made of paragraph 1 was that it did not cover all the possibilities. One way in which amendment could take place was by the development of a subsequent practice by agreement between the parties.

67. Mr. CASTRÉN said that the Special Rapporteur's redraft of article 67 to 69 was a great improvement on the original text and he found it acceptable, apart from some matters of form. With regard to the substance, there was only one point that worried him, but after considerable hesitation he had come to the conclusion that the Special Rapporteur's solution was perhaps the best: he was referring to the modification *inter se* of multilateral treaties, now dealt with in article 69. It could well be argued, as some speakers had done during the first reading, that a proposal to modify a treaty of general effect would often, or nearly always, result in a modification that applied only among some of the parties. Consequently, the two kinds of modification could be dealt with in the same article and the same rules laid down for both.

68. On the other hand, the draft articles could hardly prohibit special arrangements among some of the parties which wished to exclude the other parties from those arrangements *ab initio*, provided that there was no violation of the treaty and no impairment of the enjoyment of the rights which the parties not included in the arrangement derived from the original treaty, which would of course remain in force as between the two groups of States. He therefore approved of the way in which the Special Rapporteur had settled those problems in articles 68 and 69. He also approved of the deletion of the original article 67, which had been of little or no practical value and which most of the members of the Commission had apparently thought it best to omit. He had no comments on the new article 67.

69. The CHAIRMAN, speaking as a member of the Commission, said he could not approve of the content of article 67, which gave the impression that the only means of amending a treaty was to conclude and bring into force another instrument in writting. It was true that the Commission had decided only to codify the law of treaties in written form, but there were other forms of international agreement which could be used to amend a written treaty. It was not only by an instrument in writting that such a treaty could be amended. An amendment might very well be oral, and there could be a perfectly genuine oral agreement. Hence some very general expression, such as " another agreement " should be used.

70. Mr. EL-ERIAN said he could not commit himself on the substitution of the word " modification " for the word " revision ". Nor could he understand why the word " amendment " should be used in articles 67 and 68, but the word " modification " in article 69.

71. He rather regretted the disappearance of subparagraph (*b*) of the original article 67, but welcomed the deletion of the proviso " Subject to the provisions of the treaty " which had given rise to some objection.

72. Mr. BRIGGS said that the redraft of articles 67 to 69 was a great improvement on the original. He hoped that the word " amendment " would be used in the English version and its equivalents in the French and Spanish texts.

73. Referring to the suggestion that the words " conclusion and " should be deleted, he said he would prefer to delete the words "and entry into force ", because that stage would be covered by the word " conclusion ".

74. With regard to the Chairman's remark, he said that if the words " may be effected " were substituted for the words " is effected ", it would be clear that another instrument was not always necessary. It might possibly be found desirable to modify article 67 in such a way as to show that there were different ways of amending treaties, but that the present articles dealt only with amendment by a subsequent instrument.

75. Mr. TUNKIN said that the redraft was superior to the original, but paragraph 1 in the new article 67 was excessively stringent and did not correspond to accepted practice. There was no reason why a treaty should not be amended by a less formal procedure or through custom accepted by all the parties as meaning a modification of the treaty. In his opinion, the rule should be stated in a more flexible form indicating that a treaty could be modified by any procedure by common agreement between the parties.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission would have to consider whether a reservation should be included in the article concerning amendment by means of a change in subsequent practice, which was a form of tacit agreement and raised issues of interpretation. To deal with the matter in the article itself might be a departure from the structure of the draft articles since the Commission had decided that its draft articles would not deal with oral agreements.

77. He had used the word " instrument " in paragraph 1, in the sense of another treaty, inasmuch as an amendment became a new international agreement which, by virtue of the definition laid down in article 1,[6] was a treaty.

78. Mr. BARTOŠ said that, in the main he approved of the text of article 67, but he had a few comments to make on the form. With regard to paragraph 1, he agreed with Mr. Verdross that the words " conclusion and " should be deleted, but for both practical and theoretical reasons he would oppose the deletion of the words " modifying its provisions "; it was necessary to distinguish between the amendment of a treaty and its replacement by another amended or revised treaty.

[6] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 161.

79. As to the idea of "another instrument", he was inclined to agree with the Special Rapporteur rather than the Chairman. The Commission, when discussing Part I of the draft articles, and prompted by the regulations on the registration of treaties, had decided to disregard oral treaties entirely [7] and not to take sides in the argument on whether, since the entry into force of the United Nations Charter, oral treaties were still recognized in international law. The word "instrument" should therefore be retained, but with the proviso that it was the treaty itself that entered into force; the "instrument" might sometimes be merely evidence of the treaty's existence.

80. Paragraph 2 also raised a question of doctrine, namely, whether a treaty containing provisions that differed from the rule laid down in paragraph 1 could debar the parties from resorting to another method of amending an earlier treaty by a later one: should the new instrument be based on the rules concerning amendment laid down in the previous treaty? It might also be asked whether "the established rules of an international organization" were of such overriding force that States could not make any other arrangement. In the case of a treaty concluded within such an organization, naturally discipline required that the members should observe its rules. But if only two States members of an international organization were concerned, and the organization proposed, recommended or laid down a procedure governing relations among its members, the point was open to doubt.

81. Lastly, article 67, which was linked with articles 68 and 69, raised the question of the meaning of the term "multilateral treaties". The Commission had defined a "general multilateral treaty", but it had not given a general definition of a "multilateral treaty". Did articles 68 and 69 constitute exceptions to article 67 with regard to all multilateral treaties, including not only those that where not really of "general interest", but also all the others that were only tripartite or had very limited effects between certain States?

The meeting rose at 1 p.m.

753rd MEETING

Friday, 26 June 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Later: Mr. Herbert W. BRIGGS

Yearbooks and Summary Records of the Commission

1. Mr. PAREDES said that the essential part of the considerable amount of work done by the Commission was not so much the formulation of definitive rules of law, which governments might or might not accept, as the high-level exchange of views on legal questions and the trend to be followed in dealing with them. He therefore wished to thank the Secretariat, which had begun to distribute the *Yearbooks* containing the records of the debates, and hoped that the Spanish text of the summary records for 1963 would be issued shortly. If governments were expected to state their views, they must be given all the necessary material on which to base them.

2. The Commission's provisional summary records, however, were drafted in such a way that the speaker did not recognize his own statements; either the text made him say the opposite of what he had really said, or it stressed subsidiary points at the expense of essentials. That might be because the summary records were drafted in English and French and then translated into Spanish, or because the précis writers did not have the thorough knowledge of law required. In any event, it was essential that the Chairman should assert the speaker's right to correct the summary record, so as to ensure that it reproduced the thoughts he had expressed.

3. The CHAIRMAN said that the précis writer's work was not easy. Summarizing was a most difficult task, and the subjects dealt with by the Commission were highly technical. Besides, the members of the Commission represented different legal systems and different schools of thought, and not everyone could be expected to be familiar with all of them. Furthermore, although the speakers themselves knew what they considered important or secondary in their statements, their listeners might well gain quite a different impression. Members of the Commission usually spoke extempore, which was as it should be, but as a result, their mode of expression might not be so clear as their thinking, so that it was necessary to restrict the right to correct the summary records to some extent. If members entirely rewrote the summary of their own statements, some of the subsequent statements by other speakers might lose their point.

4. He himself had noted a very considerable improvement in the summary records. But members of the Commission should nevertheless have the broadest possible right of correction, and the Secretariat had never had any idea of contesting it.

5. Mr. ROSENNE pointed out that volume I of the English text of the Commission's *Yearbooks* for 1962 and 1963 had been distributed only the previous day; he hoped that the delay in publication would be further reduced in the future. It was essential for governments to have the *Yearbooks* as early as possible.

6. Associating himself with the Chairman's remarks about the summary records, he said that as far as the English text was concerned they reported, in a generally accurate manner, difficult debates on what were sometimes esoteric subjects.

7. Mr. BRIGGS said he was glad that volume I of the *Yearboks* for 1962 and 1963 had appeared. It was important that those publications should be issued as early as possible so that they could be consulted by governments in preparing their comments on the Commission's drafts.

[7] *Ibid.*, p. 163, para. (10).