# UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

Second session

Vienna, 9 April-22 May 1969

## OFFICIAL RECORDS

*Summary records of the plenary meetings and of the meetings of the Committee of the Whole*

UNITED NATIONS

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## INTRODUCTORY NOTE

This volume contains the summary records of the plenary meetings and of the meetings of the Committee of the Whole held during the second session of the Conference. The summary records of the first session will be found in a separate volume, and a third volume contains the documents of both sessions of the Conference.

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The summary records of the plenary meetings were originally circulated in mimeographed form as documents A/CONF. 39/SR.6 to SR.36, and those of the Committee of the Whole as documents A/CONF.39/C.1/SR.84 to SR.105. They include the corrections to the provisional summary records that were requested by delegations and such editorial changes as were considered necessary.

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* For the text of General assembly resolution 2166 (XXI) convening the Conference, the agenda and the rules of procedure, see the *Official Records* of the first session.

[1] In the case of the plenary meetings, the titles of the articles used in the table of contents and in headings in the summary records are those proposed by the Drafting Committee.

## SUMMARY RECORDS OF MEETINGS OF THE COMMITTEE OF THE WHOLE



[2] In the case of the meetings of the Committee of the Whole, the titles of the articles used in the table of contents and in headings in the summary records are those proposed by the International Law Commission, except when the article is a new proposal.

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Excmo. Sr. Eduardo Suárez, Embajador en el Reino Unido.

*Suplente*

Sr. Sergio González Gálvez, Subdirector General Adjunto de Organismos Internacionales en la Secretaría de Relaciones Exteriores.

*Secretario de la Delegación*

Sr. Marcelo Vargas Campos, Tercer Secretario del Servicio Exterior Mexicano.

*Secretaria*

Srta. Margarita Dieguez Armas, Secretaría de Relaciones Exteriores.

**Monaco**

*Représentants*

M. Jean-Charles Rey *(chef de la délégation).*

M. Constant Barriera, directeur du Service du contentieux et des études législatives.

Mr. Jean-Charles Marquet.

M. Hugo Hild, consul général à Vienne.

M. Jean Raimbert, adjoint à la direction du Service du contentieux et des études législatives.

Mme Monique Projetti, adjointe juridique au Service du contentieux et des études législatives.

**Mongolia**

*Representatives*

Mr. Ludevdorjiin Khashbat, First Secretary, Permanent Mission to the United Nations *(Chairman of the Delegation).*

Mr. Gendengiin Nyamdo, Legal Department, Ministry of Foreign Affairs.

**Morocco**

*Représentant*

M. Taoufiq Kabbaj, ministre plénipotentiaire, conseiller juridique du Ministère des affaires étrangères.

**Nepal**

*Representatives*

H.E. Mr. Pradumna Lal Rajbhandary, Ambassador to the Federal Republic of Germany.

Mr. Ramanand Prasad Sinha, Law and Justice Secretary of His Majesty's Government of Nepal.

**Netherlands**

*Representatives*

H.E. Mr. H. F. Eschauzier, Ambassador Extraordinary and Plenipotentiary *(Chairman of the Delegation).*

Mr. A. M. Stuyt, Professor of International Law at the Catholic University, Nijmegen.

Mr. G. W. Maas Geesteranus, Assistant Legal Adviser, Ministry of Foreign Affairs.

Mr. P. H. J. M. Houben, First Secretary, Permanent Mission to the United Nations.

**New Zealand**

*Representative*

Mr. F. A. Small, Deputy Permanent Representative and Counsellor, Permanent Mission to the United Nations.

**Nigeria**

*Representatives*

H.E. Mr. Taslim O. Elias, Attorney-General of the Federation *(Chairman of the Delegation).*

Mr. J. D. Ogundere, Legal Adviser, Federal Ministry of Justice *(Deputy-Chairman of the Delegation).*

*Secretary of the Delegation*

Mr. G. Idiaro.

**Norway**

*Representatives*

H.E. Mr. Erik Dons, Ambassador *(Chairman of the Delegation).*

Mr. Bjarne Solheim, Head of Division, Royal Ministry of Foreign Affairs.

*Alternate*

Mr. Knut Taraldset, First Secretary, Embassy at Vienna.

**Pakistan**

*Representatives*

H.E. Mr. Enver Murad, Ambassador to Austria *(Chairman of the Delegation).*

Mr. M. A. Samad, Legal Adviser, Ministry of Foreign Affairs *(Alternate Chairman of the Delegation).*

Mr. K. M. A. Samdani, Solicitor, Ministry of Law.

**Panama**

*Representantes*

Excmo. Sr. Narciso E. Garay *(Jefe de la Delegación),* Embajador Extraordinario y Plenipotenciario, Asesor Jurídico del Ministerio de Relaciones Exteriores.

Excmo. Sr. Irvin J. Gill, Enviado Extraordinario y Ministro Plenipotenciario, Encargado de Negocios *ad-interim* en Austria.

*Secretaria de la Delegación*

Srta. Patricia Recuero, Secretaria Ejecutiva Segunda, Departamento de Asesoría Jurídica del Ministerio de Relaciones Exteriores.

**Peru**

*Representantes*

Excmo. Sr. Luis Alvarado *(Jefe de la Delegación),* Embajador.

Excmo. Sr. Juan José Calle y Calle, Embajador.

Sr. Enrique Lafosse Benedetti, Ministro en el Servicio diplomático.

*Secretario de la Delegación*

Sr. Alejandro San-Martín, Primer Secretario.

**Philippines**

*Representatives*

H.E. Mr. Roberto Concepcion, Chief Justice, Supreme Court of the Philippines *(Chairman of the Delegation).*

H.E. Mr. José D. Ingles, Under-secretary of Foreign Affairs *(Deputy-Chairman of the Delegation).*

Mr. Vicente Abad Santos, Dean, College of Law, University of the Philippines.

Mr. José Ira Plana, Officer-in-Charge, Office of Legal Affairs, Department of Foreign Affairs.

Mr. Estelito P. Mendoza, Professor, College of Law, University of the Philippines.

**Poland**

*Représentants*

M. Eugeniusz Wyzner *(chef de la délégation),* vice-directeur du Département juridique et des traités, Ministère des affaires étrangères.

M. Jerzy Osiecki, premier secrétaire de la représentation permanente auprès de l'Office des Nations Unies et des institutions spécialisées à Genève.

Mr. Andrzej Makarewicz, chef de section, Département juridique et des traités, Ministère des affaires étrangères.

M. Stanislaw Nahlik, professeur à l'université de Cracovie.

M. Mieczyslaw Paszkowski, conseiller au Département juridique et des traités, Ministère des affaires étrangères.

*Représentants suppléants*

Mme Stanislawa Sapieja-Zydzik, conseiller au Départenment juridique et des traités, Ministère des affaires étrangères.

Mme Alicja Werner, conseiller au Département juridique et des traités, Ministère des affaires étrangères.

*Experts*

Mme Maria Frankowska.

Mme Renata Szafarz.

**Portugal**

*Representatives*

H.E. Mr. Guilherme de Castilho, Ambassador to Austria *(Chairman of the Delegation).*

Mr. Luís Crucho de Almeida, Faculty of Law, University of Coimbra.

Mr. Manuel Sá Nogueira, Counsellor of Embassy.

**Republic of Korea**

*Representatives*

H.E. Mr. Yang Soo Yu, Ambassador Extraordinary and Plenipotentiary to Austria *(Chairman of the Delegation).*

Mr. Won Ho Lee, Counsellor, Embassy to Austria.

Mr. Kwang Je Cho, Chief, Treaty Section, Bureau of International Relations, Ministry of Foreign Affairs.

Mr. Dong Ik Lee, Assistant to the Section Chief, Treaty Section, Bureau of International Relations, Ministry of Foreign Affairs.

**Republic of Viet-Nam**

*Représentants*

M. Pham-Huy-Ty *(chef de la délégation),* ministre plénipotentiaire, chargé d'affaires à l'ambassade en Belgique.

M. Tran-Minh-Cham, chef du Service des archives et bibliothèques, Ministère des affaires étrangères.

**Romania**

*Représentants*

S.E. M. Gheorghe Pele *(chef de la délégation),* ambassadeur extraordinaire et plénipotentiaire à Vienne.

M. Gheorghe Saulescu, directeur, Département des traités, Ministère des affaires étrangères.

M. Alexandru Bolintineanu, chef de la Section de droit international, Institut de recherches juridiques, Académie de la République socialiste de Roumanie.

M. Gheorghe Secarin, conseiller juridique en chef, Ministère des affaires étrangères.

M. Ioan Voicu, deuxième secrétaire, Ministère des affaires étrangères.

**San Marino**

*Représentants*

S.E. M. Giorgio Giovanni Filipinetti *(chef de la délégation),* ministre plénipotentiaire, chef de la délégation permanente auprès de l'Office des Nations Unies à Genève.

M. Wilhelm Muller-Fembeck, consul général à Vienne.

Mme Clara Boscaglia, chef de cabinet du Secrétaire d'Etat aux affaires étrangères.

M. Jean-Charles Munger, chancelier de la délégation permanente auprès de l'Office des Nations Unies à Genève.

**Saudi Arabia**

*Representative*

H.E. Mr. Aouney W. Dejany, Ambassador, Ministry of Foreign Affairs.

**Senegal**

*Représentants*

M. Abdoulaye Diop, conseiller à la Cour suprême.

M. Ibra Deguène Ka, chef de la Division de l'O.N.U., Ministère des affaires étrangères.

**Sierra Leone**

*Representatives*

Mr. Prince E. Bankole Doherty, Principal Secretary, Ministry of External Affairs.

Mr. Pierre Perkin Boston, Senior Crown Counsel, Law Officers Department.

**Singapore**

*Representative*

Mr. Francis T. Seow, Solicitor-General of the Republic.

**South Africa**

*Representatives*

H.E. Mr. Johannes Van Der Spuy, Ambassador Extraordinary and Plenipotentiary to Austria *(Chairman of the Delegation).*

Mr. John Dudley Viall, Law Adviser, Department of Justice.

Mr. Charles Brothers Hilson Fincham, Under-Secretary, Department of Foreign Affairs.

Mr. Peter Hugh Philip, Minister-Counsellor, Embassy at Vienna.

**Spain**

*Representante*

Excmo. Sr. Federico de Castro *(Jefe de la Delegación),* Catedrático de la Universidad de Madrid, Presidente de la Sección de Derecho Internacional del Consejo Superior de Asuntos Exteriores.

*Suplente*

Sr. Santiago Martínez Caro, Secretario de Embajada, Director de la Asesoria Jurídica Internacional del Ministerio de Asuntos Exteriores, Profesor de la Universidad de Madrid.

*Consejeros*

Sr. Antonio Poch, Ministro Plenipotenciario, Director de Tratados y Convenios Internacionales, Ministerio de Asuntos Exteriores, Catedrático de Derecho Internacional.

Sr. José Luiz Lopez-Schümmer, Consejero de Embajada, Director de Organizaciones Políticas Internacionales, Ministerio de Asuntos Exteriores.

Sr. Juan Ignacio Tena Ibarra *, Secretario de Embajada, Jefe de Asuntos Generales del Gabinete Técnico de la Subsecretaría de Política Exterior, Ministerio de Asuntos Exteriores.

Sr. Ramón Villanueva-Etcheverría, Secretario de Embajada, Jefe de Registro de Tratados y Acuerdos Internacionales, Ministerio de Asuntos Exteriores.

Sr. Juan Antonio Yañez-Batnuevo, Secretario de Embajada, Ministerio de Asuntos Exteriores.

Sr. Julio González Campos, Profesor de la Universidad de Madrid.

* Asumió las funciones de representante en ausencia del Jefe de la Delegación.

**Sudan**

*Representatives*

H.E. Mr. Ahmed Salah Bukhari, Ambassador to Austria and Italy *(Chairman of the Delegation).*

Mr. El Hassin El Hassan, Legal Counsel at the Attorney-General's Office.

Mr. Mohamed El Makki Ibrahim, Ministry of Foreign Affairs.

**Sweden**

*Representative*

Mr. Hans Blix, Special Legal Adviser, Ministry of Foreign Affairs *(Chairman of the Delegation).*

*Alternate*

Mr. Hilding Eek, Professor, University of Stockholm.

*Adviser*

Mr. Sven-Otto Allard, Second Secretary, Embassy at Vienna.

*Adviser and Secretary of the Delegation*

Mr. Peder Tötnvall.

**Switzerland**

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M. Paul Ruegger *(chef de la délégation),* ambassadeur plénipotentiaire.

M. Rudolf L. Bindschedler *(suppléant du chef de la délégation),* ambassadeur plénipotentiaire, jurisconsulte du Département politique, professeur à l'université de Berne.

Mlle Françoise Pometta, collaboratrice diplomatique, Division des organisations internationales, Département politique.

M. Jean Cuendet, collaborateur diplomatique, Service juridique, Département politique.

**Syria**

*Représentant*

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**Thailand**

*Representatives*

H.E. Mr. Manu Amatayakul, Director-General, Treaty and Legal Department, Ministry of Foreign Affairs *(Chairman of the Delegation).*

Mr. Sathit Sathirathaya, First Secretary, Embassy at The Hague.

*Alternate*

Mr. Kwanchai Lulitananda, Attaché, Embassy at Vienna.

**Trinidad and Tobago**

*Representatives*

H.E. the Hon. Arthur N. R. Robinson, Minister of

External Affairs *(Chairman of the Delegation from 9 to 21 May).*

Mr. Errol Roopnarine, Solicitor General *(Chairman of the Delegation from 9 to 23 April).*

Mr. Terrence Baden-Semper, Head, Legal Division, Ministry of External Affairs *(Alternate Chairman of the Delegation).*

**Tunisia**

*Représentants*

M. Hamed Abed *(chef de la délégation),* sous-directeur au Secrétariat d'Etat à la Présidence.

M. Hassine Dahmani, sous-directeur au Secrétariat d'Etat à la Présidence.

**Turkey**

*Représentant*

S.E. M. Cahit S. Hayta *(chef de la délégation),* ambassadeur, conseiller supérieur, Ministère des affaires étrangères.

*Représentant suppléant*

M. Fikret Bereket, directeur général adjoint, Département de l'Organisation des Nations Unies et du régime des détroits, Ministère des affaires étrangères.

*Conseillers*

M. Mehmet Güney, conseiller juridique, Ministère des Affaires étrangères.

M. Fikret Üçcan, deuxième secrétaire, ambassade à Vienne.

**Uganda**

*Representative*

Mr. M.B. Matovu, Senior State Attorney, Attorney-General's Chambers.

**Ukrainian Soviet Socialist Republic**

*Representatives*

Mr. Ivan Ivanovich Korchak, Principal Arbitrator of the State Court of Arbitration, Council of Ministers *(Chairman of the Delegation).*

Mr. Konstantin Samenovich Zabigailo, Professor, Kiev State University.

*Adviser*

Mr. Nicholay Petrovich Macarevich, Second Secretary, Ministry of Foreign Affairs.

**Union of Soviet Socialist Republics**

*Representatives*

Mr. Oleg Nikolaevitch Khlestov, Director of the Treaty and Legal Department, Ministry of Foreign Affairs *(Chairman of the Delegation).*

Mr. Felix Nikolaevitch Kovalev, Expert Consultant to the Treaty and Legal Department, Ministry of Foreign Affairs. *(Deputy-Chairman of the Delegation).*

Mr. Anatoly Nikolaevitch Talalaev, Professor, Moscow State University.

Mr. Evgeni Trofimovitch Usenko, Professor, Moscow Academy of External Trade.

*Advisers*

Mr. Dmity Vasilievitch Bykov, Counsellor of the Treaty and Legal Departement, Ministry of Foreign Affairs.

Mr. Vladimir Georgievitch Boyarshinov, Treaty and Legal Department, Ministry of Foreign Affairs.

Mr. Albert Vasilievitch Dmitriev, First Secretary, Embassy at Vienna.

*General Secretary of the Delegation*

Mr. Boris Ivanovitch Jiliaev, Ministry of Foreign Affairs.

*Secretary*

Miss Tatiana Petrovna Zemliakova, Ministry of Foreign Affairs.

**United Arab Republic**

*Représentants*

M. Ismat Abdel Meguid *(chef de la délégation),* ministre plénipotentiaire, directeur du Département des relations culturelles, Ministère des affaires étrangères.

M. Mohamed Said El-Dessouki *(suppléant du chef de la délégation),* conseiller au Département juridique, Ministère des affaires étrangères.

M. Ali Ismail Teymour, premier secrétaire au Département des Organisations internationales, Ministère des affaires étrangères.

*Conseiller*

Mme Aziza Mourad Fahmi, attaché au Département juridique, Ministère des affaires étrangères.

**United Kingdom of Great Britain and Northern Ireland**

*Representatives*

Sir Francis Vallat, Director of Studies in International Law, King's College, University of London *(Chairman of the Delegation).*

Mr. I. M. Sinclair, Legal Counsellor, Foreign and Commonwealth Office *(Deputy-Chairman of the Delegation).*

Mr. D. G. Gordon-Smith, Legal Counsellor, Foreign and Commonwealth Office.

Mr. P. G. de Courcy-Ireland, First Secretary, Foreign and Commonwealth Office.

Mr. D. H. Anderson, Assistant Legal Adviser, Foreign and Commonwealth Office.

*Adviser and Secretary of the Delegation*

Miss C. C. A. Wheatley, Third Secretary, Foreign and Commonwealth Office.

**United Republic of Tanzania**

*Representatives*

H.E. Mr. E. Seaton, Judge of the High Court *(Chairman of the Delegation).*

Mr. J. S. Warioba, State Attorney.
Mr. A. M. Hyera, Third Secretary, Ministry of Foreign Affairs.

**United States of America**

*Representatives*

H.E. Mr. Richard D. Kearney, Ambassador, Office of the Legal Adviser, Department of State *(Chairman of the Delegation).*
Mr. John R. Stevenson, Partner, Sullivan and Cromwell, New York.

*Alternates*

Mr. Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs, Department of State.
Mr. Bruce M. Lancaster, United States Consulate General, Stuttgart.
Mr. Herbert K. Reis, Assistant Legal Adviser for United Nations Affairs, Department of State.

*Advisers*

Mr. Robert E. Dalton, Attorney Adviser, Office of the Legal Adviser, Department of State.
Mr. Ernest C. Grigg, Adviser, Political and Security Affairs, United States Mission to the United Nations.
Mr. Robert B. Rosenstock, Adviser, Legal Affairs, United States Mission to the United Nations.

**Uruguay**

*Representantes*

Sr. Eduardo Jiménez de Aréchaga *(Jefe de la Delegación),* Professor en la Universidad de Montevideo.
Sr. Angel Lorenzi, Embajador en Austria.
Sr. Alvaro Alvarez, Ministro Consejero en Bonn.

**Venezuela**

*Representantes*

Excmo. Sr. Ramón Carmona *(Jefe de la Delegación),* Embajador.
Sr. Luis A. Olavarría, Encargado de Negocios *a.i.* en Austria.
Sr. Adolfo Raúl Taylhardat, Ministro Consejero, Embajada en Roma.

**Yugoslavia**

*Representatives*

Mr. Aleksandar Jelic, Minister plenipotentiary, Director of Department for International Law Affairs in the State Secretariat for Foreign Affairs *(Chairman of the Delegation).*
Mr. Milan Marković, Professor, Belgrade University.
M. Dragutin Todorić, Counsellor in the State Secretariat for Foreign Affairs.
Mr. Miodrag Mitić, First Secretary in the State Secretariat for Foreign Affairs.

**Zambia**

*Representatives*

Mr. Lishomwa Muuka, Deputy Permanent Representative to the United Nations *(Chairman of the Delegation).*
Mr. Vishakan Krishnadasan, International Law Adviser.

**Observers for specialized agencies and intergovernmental organizations**

**(a) Specialized and related agencies**

INTERNATIONAL LABOUR ORGANISATION

Mr. C. W. Jenks, Principal Deputy Director-General.
Mr. F. Wolf, Legal Adviser.

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Mr. Georges Saint-Pol, Legal Counsel.

UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Mr. Hanna Saba, Director.
Mr. Claude Lussier, Deputy Director.

INTERNATIONAL CIVIL AVIATION ORGANIZATION

Mr. P. K. Roy, Director, Legal Bureau.

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT
and
INTERNATIONAL DEVELOPMENT ASSOCIATION

Mr. A. Broches, General Counsel.
Mr. Paul C. Szasz, Legal Department.

WORLD HEALTH ORGANIZATION

Mr. F. Gutteridge, Chief, Legal Office.
Mr. Georges-Gustave Meilland.

UNIVERSAL POSTAL UNION

M. Zdeněk Caha, Sous-Directeur général, chef de la Division juridique, administrative et d'information.

INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Mr. Thomas S. Busha, Legal Officer, Legal Division.

**International Atomic Energy Agency**

Mr. Werner Boulanger, Director, Legal Division.
Mr. D. A. V. Fisher, Director, Division of External Liaison.
Mr. Viktor Khamanev, Senior Officer, Legal Division.

**(b) Intergovernmental organizations**

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

Mr. B. Sen, Secretary of the Committee.

UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY

Mr. J. Voyame, Second Deputy Director.
Mr. C. Masouyé, Senior Councillor, Head, External and Public Relations Division.
Mr. R. Harben External Relations Officer.
Mr. I. Thiam, External Relations Officer.

COUNCIL OF EUROPE

Mr. Heribert Golsong, Director of Legal Affairs.
Mr. H. P. Furrer, Administrator in the Legal Directorate.

GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

Mr. D. P. Taylor, Assistant Director-General, Department of Conference Affairs and Administration.
Mrs. Paulette Lundgren, Economic Affairs Office, Conference Affairs Division.

LEAGUE OF ARAB STATES

Mr. Guirguis Jaccoub Salib, Directeur, Département juridique.

**Expert consultant**

Sir Humphrey Waldock, Professor of Public International Law, Oxford University, Special Rapporteur on the law of treaties, International Law Commission.

## OFFICERS OF THE CONFERENCE AND ITS COMMITTEES

### President of the Conference

Mr. Roberto Ago (Italy).

### Vice-Presidents of the Conference

The representatives of the following States: Afghanistan, Algeria, Austria, Chile, China, Ethiopia, Finland, France, Guatemala (for 1969), Guinea, Hungary, India, Mexico, Peru, Philippines, Romania, Sierra Leone, Spain (for 1968), Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia.

### Committee of the Whole

*Chairman:* Mr. Taslim Olawale Elias (Nigeria).
*Vice-Chairman:* Mr. Josef Smejkal (Czechoslovakia).
*Rapporteur:* Mr. Eduardo Jiménez de Aréchaga (Uruguay).

### Credentials Committee

*Chairman:* Mr. Eduardo Suárez (Mexico).
*Members:* Ceylon, Dominican Republic, Japan, Madagascar, Mexico, Switzerland, Union of Soviet Socialist Republics, United Republic of Tanzania,* United States of America.

### Drafting Committee

*Chairman:* Mr. Mustafa Kamil Yasseen (Iraq).
*Member:* Argentina, China, Congo (Brazzaville), France, Ghana, Japan, Kenya, Netherlands, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

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* Elected at the second session to replace the representative of Mali, who was absent.

## SECRETARAT OF THE CONFERENCE

Mr. C. A. Stavropoulos, Legal Counsel of the United Nations *(Representative of the Secretary-General of the United Nations).*
Mr. A. P. Movchan, Director, Codification Division, Office of Legal Affairs *(Executive Secretary of the Conference).*
Mr. G. W. Wattles, Principal Officer, Office of the Legal Counsel *(Deputy-Executive Secretary).*
Mr. N. Teslenko, Deputy Director, Codification Division, Office of Legal Affairs *(Deputy Executive Secretary).*
Mr. J. F. Scott, Office of Legal Affairs.
Mr. S. Torres-Bernárdez, Office of Legal Affairs.
Mr. E. Valencia-Ospina, Office of Legal Affairs.

## NOTE

For the reports of the successive Special Rapporteurs on the law of treaties and the discussion of the topic in the International Law Commission, see the *Yearbooks of the International Law Commission* for the years 1949 to 1966.

# SUMMARY RECORDS OF THE PLENARY MEETINGS

## SIXTH PLENARY MEETING

*Wednesday, 9 April 1969, at. 3.25 p.m.*

*President :* Mr. AGO (Italy)

### Opening of the second session of the Conference

1. The PRESIDENT declared open the second session of the United Nations Conference on the Law of Treaties.

2. He welcomed all the participants and wished them success in their work.

3. He said that the Conference was about to take up the most difficult part of its task. In 1968, delegations had known that at the end of first session they would have a long pause for reflection : hence the discussions could be of an exploratory character, particularly on the more controversial points, and the positions adopted could be more or less provisional. That approach was no longer possible and it would be necessary to adopt definitive positions.

4. As the first servant of the Conference, he felt bound to remind participants that, although they were naturally responsible for protecting the legitimate interests of their countries, they also had a responsibility towards the international community as a whole; for it had to be remembered that the Conference was a kind of legislative body for the international community.

5. To a casual observer, the draft before the Conference might give the appearance of being a draft convention like any other. But in fact a convention on treaties was bound to have a very special character. Its purpose would not be to regulate transient interests relating to a specific situation, but rather to define and reformulate the general rules by which the conclusion and the life of treaties would be governed in the future. To use a metaphor, the Conference was called upon to lay down the rules of the game rather than to play the game itself. The task before it was therefore much too vital to the future of all for any participant to allow his special interests to influence his course of action. Particular problems would be examined at the appropriate time and place, and it was quite natural that everyone should then endeavour to solve them in the manner he found most appropriate. But the Conference's sole concern must be to settle general problems that were vital to the orderly development of international affairs. The intention was that treaty rules should replace the customary rules which for centuries had governed the legal relations of the international community; that rules established by general agreement should define, clarify and supplement the old rules and adapt them to the new requirements of the community of States. It was essential that the new rules, because they brought greater certainty and corresponded more closely to contemporary opinion, should contribute to the security of international legal relations.

6. Participants should therefore realize that the purpose was not to cause one point of view to triumph at the expense of another, to obtain majorities or to seek victories that would only be apparent. Every effort must be made at the appropriate moment to reach agreement. What the Conference had to do was to secure a universal consensus for the rules which were being formulated and, if possible, for each of those rules individually.

7. The Conference should therefore arm itself with patience, goodwill, and a determination to go as far as possible in making concessions in order to meet the views of others. Above all, it should be borne in mind that it was essential that the Conference should succeed. Great harm would be done to the international community if so many years of preparation, discussion and effort were to lead to nothing and if the result of the Conference were to leave the most fundamental rules of international legal relations in an even greater state of uncertainty than before.

8. At the beginning of the session, the Committee of the Whole would meet to consider the articles left pending at the first session; as everyone knew, they were the most difficult ones, but under the skilful leadership of Mr. Elias, its Chairman, the Committee should be able to surmount the obstacles before it. An equally strenuous task awaited the Drafting Committee under the able guidance of its Chairman, Mr. Yasseen. In addition, many informal meetings would be necessary for negotiations, for reconciling different points of view, and to facilitate agreement.

9. When the Committee of the Whole had completed its work, the Conference would consider the draft convention article by article; but it would no longer be possible to postpone decisions, and the Conference would have to assume its ultimate responsibility. Moreover, there was little time at its disposal.

10. He hoped that when the last stage of the Conference's work had been completed, he would be able to congratulate it on the result which could, and indeed must, be a success without parallel in the history of international law.

**Methods of Work and procedures of the second session of the Conference**

11. The PRESIDENT said that a proposed schedule for the work of the Committee of the Whole had been submitted by the delegations of Ghana and India (A/CONF.39/L.2). If there were no objection, he would take it that the Conference agreed to adopt that proposal.

*It was so agreed.*

12. The PRESIDENT drew attention to the memorandum by the Secretary-General on methods of work and procedures of the second session (A/CONF.39/12) and in particular to paragraphs 13 and 14, which gave details of the working hours and working days of the Conference. If there were no objection, he would assume that the Conference approved of those arrangements.

*It was so agreed.*

13. The PRESIDENT said that it was also suggested in the memorandum that the drafting of the preamble should be entrusted to the Drafting Committee, which would submit the text directly to the plenary. If there were no objection, he would take it that the Conference approved of that procedure.

*It was so agreed.*

14. The PRESIDENT drew attention to the suggestion in the memorandum that, towards the close of the Conference, the Secretariat should submit a text of the Final Act to the Drafting Committee, which would then report on it to the plenary. If there were no objection, he would take it that the Conference approved of that procedure.

*It was so agreed.*

The meeting rose at 3.40 p.m.

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## SEVENTH PLENARY MEETING

*Monday, 28 April 1969, at. 10.45 a.m.*

*President:* Mr. AGO (Italy)

**Tribute to the memory of General René Barrientos Ortuño, President of the Republic of Bolivia**

*On the proposal of the President, representatives observed a minute's silence in tribute to the memory of General René Barrientos Ortuño, President of the Republic of Bolivia, who had met his death in an air crash.*

1. Mr. ROMERO LOZA (Bolivia) thanked the Conference for its tribute to the memory of General Barrientos Ortuño. The Bolivian Government would be informed of that gesture of sympathy without delay.

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966**

REPORTS OF THE COMMITTEE OF THE WHOLE

2. The PRESIDENT suggested that the Conference express by acclamation its gratitude to Mr. Elias, Chairman of the Committee of the Whole, for the firmness, flexibility and courtesy he had shown in carrying out the difficult task entrusted to him.

3. He invited the Conference to take up the various articles of the convention, with a view to producing a convention on the law of treaties which satisfied all as fully as possible. It was not a question of one group triumphing over another, but of ensuring the success of the Conference.

4. Mr. KHLESTOV (Union of Soviet Socialist Republics) referred to the way in which the work of the Committee of the Whole had ended and to the fate of several proposals submitted by certain delegations. Unfortunately, the basic views of some groups had not been taken into consideration. The Conference still had some time left in which to discuss matters and make its work as effective as possible. The Soviet Union delegation was anxious to do all it could to ensure the success of the Conference. It therefore very much hoped that the President would act boldly so as to enable the Conference, with the participation of certain groups, to use what little opportunity remained to bring the task of codification of the law of treaties to fruition. The Conference must above all achieve positive results. He therefore requested the President to attempt, with the participation of the representatives of certain groups, to secure the adoption of certain basic views which had been rejected. The Soviet Union delegation would be understanding and would strive to assist the President in his task.

5. The PRESIDENT assured the representative of the Soviet Union that he would do everything possible to guarantee the success of the Conference.

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE

6. The PRESIDENT invited the Chairman of the Drafting Committee to introduce the texts of articles 1 to 6 approved by the Committee of the Whole, the drafting of which had been reviewed by the Drafting Committee.

*Statement by the Chairman of the Drafting Committee on articles 1-6*

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Committee of the Whole had approved the texts of a whole series of articles, but no titles, except for article 1. The Drafting Committee therefore had two tasks: with regard to the texts adopted by the Committee of the Whole, it had to co-ordinate and review their wording under rule 48 of the rules of procedure of the Conference; with regard to the titles, it had to draft them in the light of the amendments concern-

ing titles which had been referred to it by the Committee of the Whole.

8. The Drafting Committee had already considered the texts of articles 1 to 6 as approved by the Committee of the Whole, as well as the titles of those articles and the titles of Parts I and II and of Section 1 of Part II.

9. With respect to the titles, the Drafting Committee had made the following changes : in the English version of the title of article 1 it had deleted the word " the " before " scope ". In the light of an amendment submitted by Gabon (A/CONF.39/C.1/L.42), it had simplified the title of article 4. It had also shortened the title of article 6 by deleting the words " to represent the State in the conclusion of treaties " after the words " full powers "; it had found those words superfluous, since the section containing article 6 was entitled " Conclusion of treaties ".

10. With regard to the wording of the articles themselves, the Drafting Committee had made some changes. For example, in article 2, paragraph 1 (*c*), it had replaced the words " designating a person " by the words " designating a person or persons ", since in practice a State designated several persons to represent it; and in article 6, paragraph 1 (*b*), it had replaced the words " to dispense with " by " not to require representatives to produce ". The purpose of that change was to make it clear that no one could avail himself of sub-paragraph (*b*) in order to act on behalf of a State in respect of the conclusion of a treaty unless he had the status of a representative of that State.

11. The Ghanaian representative had submitted a proposal (A/CONF.39/L.7) to redraft article 6, paragraph 1 (*b*). The amendment clarified the text and the Drafting Committee had therefore accepted it.

12. The PRESIDENT invited the Conference to consider the texts of the articles approved by the Committee of the Whole.

*Article 1* [1]

*Scope of the present Convention*

The present Convention applies to treaties between States.

13. Sir Francis VALLAT (United Kingdom) said that article 1 provided that the convention applied only to treaties between States. His delegation accepted that limitation, but wished to stress that it did not imply that treaty law did not govern treaties concluded between States and other subjects of international law or between such other subjects of international law, whatever their status or character. Article 3 of the draft convention emphasized that point.

14. Among the classes of treaties which did not fall within the scope of the present convention were agreements concluded between States and international organizations or between two or more international organizations. Agreements of that nature were however, increasing both in number and in importance. For that reason, the United Kingdom delegation welcomed whole-heartedly the text of the draft resolution presented by the Committee of the Whole which recommended the General Assembly to refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations. If that resolution was adopted [2], it would be a matter for the International Law Commission and the General Assembly to determine what priority that topic should have in the Commission's future work programme. It was to be hoped that it would be accorded a reasonable degree of priority so that the work undertaken by the Conference could be completed. Also, in studying that topic, the Commission should work in close co-operation with the international organizations themselves, since their experience and knowledge of particular problems provided an indispensable basis for its work.

*Article 1 was adopted by 98 votes to none.*

*Article 2* [3]

*Use of terms*

1. For the purposes of the present Convention:

(*a*) " treaty " means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) " ratification ", " acceptance ", " approval " and " accession " mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) " full powers " means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) " reservation " means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) " negotiating State " means a State which took part in the drawing up and adoption of the text of the treaty;

(*f*) " contracting State " means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) " party " means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) " third State " means a State not a party to the treaty;

(*i*) " international organization " means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

[1] For the discussion of article 1 in the Committee of the Whole, see 2nd, 3rd and 11th meetings.

[2] The resolution was adopted at the 32nd plenary meeting.

[3] For the discussion of article 2 in the Committee of the Whole, see 4th, 5th, 6th, 87th and 105th meetings.

An amendment was submitted to the plenary Conference by Belgium (A/CONF.39/L.8).

15. Mr. ESCUDERO (Ecuador) said he noted that the Drafting Committee proposed the title " Use of terms " for the article. That might give the impression that the paragraphs of the article contained definitions. The Committee should review the matter and modify the title to show clearly that it was not a question of definitions, particularly in paragraph 1 (*a*), to which the Ecuadorian delegation had proposed a substantive amendment.

16. Mr. YASSEN, Chairman of the Drafting Committee, explained that the purpose was not to give definitions valid in all cases, as was clear from the introductory phrase of paragraph 1 reading " for the purposes of the present Convention ". The article merely gave the meaning of certain terms used in the convention in order to help those who would later have to interpret it.

17. The PRESIDENT said that a similar article was to be found in all conventions codifying international law and its purpose was not to give definitions. The wording used was designed to prevent the danger to which the Ecuadorian representative had just drawn attention. It would therefore be better not to depart from the text used in other conventions. If those who later interpreted the text noted differences between the convention on the law of treaties and other conventions, they would ask themselves what had been the reasons for those differences, and that might lead to difficulties of interpretation. For example, it might be deduced that the intention in the Convention on Diplomatic Relations had been to give definitions; but that was certainly not so. The Drafting Committee might therefore look at the matter again.

18. Mr. DENIS (Belgium) introduced his delegation's amendment to article 2, paragraph 2 (A/CONF.39/L.8). It was purely a drafting amendment. The expression " are without prejudice to the use " did not seem appropriate : it would be better to employ a more neutral expression such as " do not affect the use ".

19. The PRESIDENT said he wondered whether the expression " *qui peut leur être donné* " in the same paragraph should not be in the plural. It appeared to mean the use and the meanings which might be given to the terms in question in the municipal law of a State.

20. Mr. DENIS (Belgium) said that everything depended on what idea it was intended to express. It was possible that only the meanings which might be given to the terms in the municipal law of any State had been intended.

21. The PRESIDENT said that in any event the Conference could not vote forthwith on article 2, which might be altered subsequently in the light of decisions taken by the Conference on various articles, in particular the final clauses. He suggested that the Drafting Committee should review the text of the article in the light of the comments.

*It was so agreed.*[4]

[4] For further discussion and adoption of article 2, see 28th plenary meeting.

*Article 3* [5]

*International agreements not within the scope of the present Convention*

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(*a*) The legal force of such agreements;

(*b*) The application to them of any of the rules set forth in the present Convention to which they would be subject, in accordance with international law, independently of the Convention;

(*c*) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

*Article 3 was adopted by 102 votes to none.*

*Article 4* [6]

*Treaties constituting international organizations and treaties adopted within an international organization*

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

22. Sir Francis VALLAT (United Kingdom) said that his delegation approved the text of article 4 as adopted by the Committee of the Whole and presented by the Drafting Committee. The article dealt with the important topic of treaties which were constituent instruments of an international organization or were adopted within an international organization. It was surely right that, in seeking to crystallize the law concerning treaties between States, the Conference should preserve the particular rules which governed the adoption or framing of treaties within international organizations. The United Kingdom delegation would accordingly wish to emphasize the significance it attached to the phrase " without prejudice to any relevant rules of the organization ". At the first session of the Conference his delegation had proposed (A/CONF.39/C.1/L.39) the addition of the words " and established practices " after the word " rules " in order to make it clear that the term " rules " was not to be understood in too restrictive a sense. His delegation had not pressed that amendment to the vote because, as the Chairman of the Drafting Committee had pointed out at the 28th meeting of the Committee of the Whole, the Drafting Committee had taken the view that the term " rules " applied both to written rules and to unwritten customary rules. It was in the light of that understanding of the concluding phrase of article 4 that the United Kingdom delegation would vote in favour of the article.

[5] For the discussion of article 3 in the Committee of the Whole, see 6th, 7th and 28th meetings.

[6] For the discussion of article 4 in the Committee of the Whole, see 8th, 9th, 10th and 28th meetings.

An amendment had been submitted to the plenary Conference by Romania (A/CONF.39/L.9).

23. Mr. GROEPPER (Federal Republic of Germany) reminded the Conference that during the debate on article 4 at the 9th meeting of the Committee of the Whole his delegation had expressed certain doubts, first, as to the actual usefulness of the article and, secondly, as to the reservation it contained, which had appeared to it unduly broad. Article 4 dealt with two very different classes of treaty which did not involve the application of the same rules of the convention. The text of the article as adopted by the Committee of the Whole at the first session of the Conference made it possible for the Federal German delegation now to support the provision.

24. Speaking from a more general point of view, he observed that the draft adopted by the International Law Commission and later by the Committee of the Whole contained no provision stipulating the extent to which the convention had the character of *jus dispositivum,* in other words how far the parties to a particular treaty might derogate from it by mutual agreement. During the debate in the Committee of the Whole several speakers had asserted that the rules of international law always had the character of *jus dispositivum* unless they were peremptory norms of *jus cogens.* The convention on the law of treaties would therefore have the character of *jus dispositivum* where it did not codify *jus cogens.* He referred the Conference in particular to the statements made on article 4 by the representatives of Sweden and Switzerland at the 8th and 9th meetings of the Committee of the Whole respectively, and to the statements by the Expert Consultant and the United Kingdom representative during the discussion of article 63 at the 74th meeting of the Committee of the Whole.

25. The text of the draft convention might, however, give rise to doubts on that head. In many places it was stated that certain articles would apply to a particular treaty only if the treaty did not otherwise provide or if the parties did not otherwise agree. Moreover, there was article 4, which made a general exception for the constituent instruments of international organizations and treaties adopted within an international organization. It might be inferred that the States parties to the convention would not be free to derogate by mutual consent from any provisions of the convention which did not expressly contain a derogation clause. Actually, that kind of restriction existed only in respect of the rules in the convention codifying *jus cogens*; but the International Law Commission itself had stated in its commentary to article 50 that the majority of the general rules of international law did not have the character of *jus cogens.* It could not be asserted, therefore, that in the absence of a derogation clause, and by the very fact of its absence, a rule in the convention was a rule of *jus cogens.* On the contrary, it was recognized that any derogation was possible, even if there was no clause to that effect, unless it was established that the rule in question codified *jus cogens.*

26. In that case, it might be asked whether special restrictions or the general restriction in article 4 were in fact necessary. His delegation's answer was that they were necessary, since those clauses, though in theory not essential, would nevertheless help to clarify the convention and make it easier to apply. The Federal German delegation would therefore vote in favour of article 4 and the other derogation clauses.

27. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the wording of article 4 did not seem to be quite clear, for the proviso " without prejudice to any relevant rules of the organization " at the end of the article logically applied only to " any treaty adopted within an international organization ", not to " the constituent instrument of an international organization ", since, at the time when such a constituent instrument was drawn up, there were as yet no rules of the organization. The Drafting Committee might review the text and consider the possibility of saying, for instance, " without prejudice to any relevant rule of an international organization ".

28. In any case, his delegation assumed that, independently of the relevant rules of the international organization concerned, the provisions of Part V of the convention on the law of treaties which were of a *jus cogens* character would still be applicable.

29. The PRESIDENT said he was not sure whether the USSR representative's remarks related only to the drafting. It was true that at the time when a constituent instrument was drawn up the relevant rules of the organization concerned did not yet exist, but it was also possible that certain rules might be laid down at the actual time of the drawing up of a constituent instrument. The convention on the law of treaties related not only to the creation of treaties, but also to their life in the future. The constituent instrument of an international organization might conceivably contain rules of interpretation which were at variance with those laid down in the convention, and the last phrase of article 4 (" without prejudice to any relevant rules of the organization ") would then apply to the constituent instrument and not merely to any treaty subsequently adopted within the organization. The proposed text was therefore flexible enough to apply to all possible cases, and it might be undesirable to make it more precise.

30. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he would not press his suggestions, in view of the need to retain a certain flexibility. He wished to emphasize, however, that the relevant provisions of the convention that were of a peremptory character would be applicable in all cases.

31. Mr. VOICU (Romania) said he wished to propose a purely drafting amendment, the purpose of which was to avoid repetition of the words " organization " and " international ". Article 4 would then read: " The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within such organization without prejudice to any of the relevant rules of the organization. "

32. The PRESIDENT said that the Romanian amendment would be referred to the Drafting Committee.

33. Mr. BILOA TANG (Cameroon) said he agreed with the United Kingdom's representative's remarks on

written and customary rules. The Cameroonian Government would consider itself bound by customary rules only to the extent to which they were accepted by an overwhelming majority of States, even if they were supposed to constitute peremptory norms of international law. His delegation would support article 4 subject to that reservation.

*Article 4 was adopted by 102 votes to none, with 1 abstention.*[7]

*Article 5* [8]

*Capacity of States to conclude treaties*

1. Every State possesses capacity to conclude treaties.

2. Members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

34. Mr. WERSHOF (Canada) said that his delegation had very serious reservations, both from a political and from a strictly legal viewpoint, about paragraph 2 of article 5, dealing with the treaty-making capacity of members of a federal union.

35. The question had been considered by the International Law Commission as early as 1950, and from the very beginning it had given rise to prolonged controversy. At the 779th meeting of the International Law Commission, the Special Rapporteur had proposed that any provision concerning capacity to conclude treaties should be dropped altogether.[9] In the event, of the twenty-five members of the Commission, only seven had approved the provision now appearing in paragraph 2 of article 5 of the draft convention on the law of treaties.

36. At the first session of the Conference, two votes had been taken on that provision and in both cases the Committee of the Whole had retained it by only a small majority.[10]

37. It was thus evident that article 5, paragraph 2, had always given rise to divergent views among eminent jurists and had never obtained even a simple majority of votes from the jurists or delegations expressing an opinion upon it.

38. Moreover, the provision as formulated was not only unsatisfactory from the strictly legal viewpoint; it was also outside the scope of the convention which the Conference was drafting.

39. The provision had originally been included in the International Law Commission's draft articles when the draft had been intended to cover the treaty-making capacity not only of States but also of other subjects of international law, including international organizations. Subsequently, however, the Commission had decided to confine the draft articles to treaties between States, but the provision concerning the treaty-making capacity of members of a federal union had been retained. The International Law Commission had used the word " State " in two different senses in the two paragraphs of article 5. At the first session, the Conference had recognized that the word " State " in the sense in which it was used in article 1 and in article 5, paragraph 1 meant an independent sovereign State and, recognizing that members of a federal State were not States in that sense, the Committee of the Whole had deleted the word " State " from article 5, paragraph 2. Consequently a provision concerning the capacity of those entities to conclude treaties was as much beyond the scope of the convention, as defined in article 1, as would be any provision on the treaty-making capacity of an international organization or of any other entity which was not an independent sovereign State.

40. Furthermore, the question arose whether article 5, paragraph 2, formulated a desirable legal principle which was in the interest of orderly treaty relations. Without questioning the relevance of the provisions of federal constitutions whereby certain federal States permitted, within the limits of their constitutions and subject to various forms of federal control, component parts of the federation to conclude agreements with sovereign States, his delegation nevertheless thought that the corresponding provision, as formulated in article 5, paragraph 2, was dangerously incomplete. There were two prerequisites, both of which must exist together, if a component unit of a federal State was to have effective treaty-making capacity : the capacity must be conferred by the federal State, and must have been recognized by other sovereign States. With respect to the first condition, paragraph 2 of article 5 assumed, quite incorrectly, that the constitution was alone determinative. That did not take into account the practice of certain federal States, both on the municipal and the international planes, whereby the constitution was continuously amended by means of judicial decision. Furthermore, paragraph 2 of article 5 said nothing about who was to be responsible for any breach by a member of a federal State of its treaty obligations. It might be argued in reply that the convention on the law of treaties expressly excluded from its field of application all questions of State responsibility; nevertheless, there existed, independently of the convention, a series of rules of international law governing the responsibility of sovereign States for the breach of their treaty obligations, whereas no similar rules existed in respect of treaties concluded by members of a federal State. The discussion of that issue in the International Law Commission showed the absence of any consensus among jurists on the point.

41. Again, article 5, paragraph 2, was also incomplete in the sense that, although it stated that treaty-making capacity must be admitted by the federal constitution and within the limits it laid down, it did not say that only the federal State was competent to interpret its own constitution. There would therefore be a risk of introducing a completely unacceptable practice whereby one Member State of the United Nations might presume to

[7] The Drafting Committee did not propose any change in the text of article 4. See 29th plenary meeting.

[8] For the discussion of article 5 in the Committee of the Whole, see 11th, 12th and 28th meetings.

[9] See *Yearbook of the International Law Commission, 1965*, vol. I, p. 23.

[10] See 12th meeting of the Committee of the Whole, para. 47, and 28th meeting, para. 40.

interpret the constitution of another Member State which happened to be a federal State. In federations where the constitution was entirely written and dealt expressly with treaty-making, the danger might be relatively small, but it would be real and very serious in situations like that of Canada, where the constitution was largely unwritten and where constitutional practice was as important as the written documents. The failure of paragraph 2 of article 5 to deal with that problem was probably its most important defect.

42. Some representatives had said that the practice of treaty-making by certain members of federal unions existed, and should therefore be mentioned in the convention. It was true that, within the limits of their constitutions and subject in almost every case to some form of federal control, certain federal States did permit their member units to conclude some types of international agreement; that practice had long been accepted in international law and there was no need to confirm it by adopting paragraph 2 of article 5. His delegation did not query either the legality or the desirability of those practices. Indeed Canada, whose Constitution did not provide for such action by its provinces, had nevertheless authorized, by means of blanket agreements between Canada and other sovereign States, the conclusion of various agreements between its provinces and such States. But State practice did not support the particular and defective formulation of the rule as proposed in paragraph 2, which would authorize other States to interpret the constitution of a federal union.

43. The only satisfactory remedy for the dangerous inadequacies of that provision was the deletion of the paragraph. It was to be hoped that non-federal States would not seek to impose upon federal States a rule which particularly concerned the latter and to which the large majority of federal States were opposed. The deletion of article 5, paragraph 2, would in no way impair the existing rights of the members of any federal State, whereas many federal States had indicated at the first session that a provision of that nature was unnecessary and undesirable.

44. His objections related only to paragraph 2 of article 5; his delegation recognized that many delegations attached considerable importance to paragraph 1, and it did not intend to oppose that provision. Paragraph 1 related to sovereign States, whereas paragraph 2 concerned entities which the Conference, by deleting the term " State " from paragraph 2 at the first session, had already decided were not sovereign States. Paragraph 1 and paragraph 2 were thus completely independent of each other, as was evident from the fact that, both in the International Law Commission and in the Committee of the Whole, paragraph 2 had always been put to the vote separately. In those circumstances, his delegation requested, under rule 40 of the rules of procedure, that article 5, paragraph 2, should be put to the vote separately. If that request were granted, his delegation would vote against paragraph 2, and it hoped that that paragraph would not obtain the majority necessary for its inclusion in the convention. In the unlikely event of a separate vote on paragraph 2 being refused, it would then be his delegation's view that the whole article should be deleted, since the dangers of paragraph 2 greatly outweighed the advantages of paragraph 1.

45. Mr. MARESCA (Italy) pointed out, in connexion with paragraph 2, that all the rules embodied in the convention were based on the concept of legal personality and that only entities possessing legal personality had the capacity to conclude international treaties. The members of a federal union by definition were not subjects of international law, whereas the members of a confederation were.

46. The Italian delegation had some doubts as to the legal basis of paragraph 2, which it did not regard as indispensable. Admittedly, the members of certain federal unions could conclude international agreements, but the scope of those agreements was limited, for they were local or provincial in character. That capacity was not derived from rules of international law, and if paragraph 2 were deleted, the members of such federal unions could continue to conclude agreements of that kind.

47. Furthermore, the expression " if such capacity is admitted by the federal constitution " was not clear: did it mean the written constitution or the *de facto* constitution which was continually renewed? The term might give rise to serious disputes, for it was a well-known fact that States were not willing to admit any discussion with other States concerning their constitutions.

48. A dangerous legal situation might arise if a federal union opposed the conclusion of a treaty by one of its members and that member refused to accept the objection. There had been examples of such situations in diplomatic history.

49. He would be in favour of deleting paragraph 2.

50. Mr.WARIOBA (United Republic of Tanzania) said that during the first session of the Conference his delegation had supported the Austrian amendment (A/CONF.39/C.1/L.2) which clarified the text of paragraph 2 as drafted by the International Law Commission. His delegation had opposed the deletion of that paragraph, in the hope that the Drafting Committee would improve its wording; but the Drafting Committee had not changed the text, and the Tanzanian delegation had therefore abstained in the vote on the paragraph.

51. Paragraph 2 could give rise to serious difficulties. In the event of a dispute, certain States might become involved in an attempt to try to revise the constitution of a particular State, and that would be undesirable.

52. Mr. KEARNEY (United States of America) said that, at the 12th meeting of the Committee of the Whole, the United States delegation had expressed the view that article 5 was unnecessary. In the first place, paragraph 1 of the article merely stated something which was implicit in articles 1 and 2 of the convention. Nevertheless, since certain delegations had indicated that they were very anxious to retain that provision, the United States had decided not to oppose its adoption.

53. Paragraph 2 raised different problems, for it provided that the treaty-making capacity of members of a federal State was determined by reference to the federal

constitution. But federal constitutions were internal law and their interpretation fell within the exclusive jurisdiction of municipal tribunals of federal States. If the Conference adopted article 5, paragraph 2, there would be at least an implication that a State contemplating the conclusion of a treaty with a member of a federal union might assume the right to interpret for itself the constitution of the federal State.

54. A number of federal States represented at the Conference had expressed the view that the retention of paragraph 2 would cause them considerable difficulties. The United States, which was a federal State, fully understood those problems. On the other hand, no State had proved, either at the first or at the second session, that the insertion of paragraph 2 was necessary to avoid difficulties.

55. Moreover, paragraph 2 left far too many questions unanswered. In view of the constitutional differences between federal States, it would not always be clear when paragraph 2 was applicable. His delegation believed that the paragraph would sooner or later cause difficulties, not only for federal States, but also for other states seeking to enter into treaty relations with members of federal States.

56. In 1965, the International Law Commission's Special Rapporteur, who was now acting as Expert Consultant to the Conference, had proposed the deletion of the special rule concerning federal States. The proposal was sound, not only for the reasons he had stated, but also on the basis of the analysis made by the Canadian representative.

57. The Canadian representative had asked for a separate vote on paragraph 2; the United States delegation supported that request. If the majority approved the request, the United States delegation would vote against the retention of paragraph 2. If, however, the Canadian representative's request was rejected, the United States would be obliged to vote against article 5 as a whole.

58. Mr. GONZALEZ GALVEZ (Mexico) said that, from the doctrinal point of view, there was no need to include a provision on the capacity of States to conclude treaties, for that capacity was an essential attribute of international personality and was implicit in articles 1 and 2 of the convention. Moreover, it had to be recognized that the inclusion of article 5, paragraph 2, would create dangers for certain States, whereas its deletion would not affect the position of those countries which allowed their entities to conclude treaties in certain circumstances. The Mexican delegation would therefore vote for the deletion of article 5 as a whole. Nevertheless, it supported the proposal for a separate vote on the two paragraphs, since paragraph 2 appeared to be the one which had the most serious shortcomings.

59. Mr. GROEPPER (Federal Republic of Germany) said that article 5, paragraph 2 was of particular importance to Germany as a federal State, and he must therefore explain his Government's position once more, though his delegation had already expressed its opposition to the inclusion of article 5 at the first session.

60. In virtue of article 1 the convention applied solely to treaties between States. The components of a federation, even if the law conferred upon them a certain capacity to conclude international agreements — as was the case in the Federal Republic of Germany — could not be assimilated in general to States, and that applied just as much to the sphere of treaty law as to general international law.

61. To explain his opposition he would observe that if a member of a federal union acted in regard to international treaties beyond the limits admitted by the federal constitution, the provisions of articles 7 and 43 would hardly be applicable since that would not be merely the breach of a constitutional provision, but an act under international law performed by an entity not possessing the legal capacity to perform that act. The act would therefore be null and void. That example showed that article 5, paragraph 2, conflicted with article 1. His argument was supported by Helmut Steinberger's " Constitutional Subdivisions of States or Unions and their Capacity to conclude Treaties: Comments on Article 5, Paragraph 2 of the ILC'S 1966 Draft Articles on the Law of Treaties." [11]

62. Furthermore, even if a component of a federation was competent to act internationally, the interpretation of the federal constitution might lead to controversy involving the interpretation of the constitution by a third State or an international tribunal, which would be highly undesirable and might have incalculable consequences. The risk of such a situation arising would be increased by the inclusion of a general clause on federal unions of the kind laid down in article 5, paragraph 2.

63. Lastly, the text of article 5, paragraph 2, as adopted by the International Law Commission and by the Committee of the Whole at the Conference's first session, by its use of the term " federal union " introduced a notion which was vague and hard to interpret. According to its commentary, the International Law Commission had used the term in the sense of a federal State. But it was hard to determine what constitutions were truly federal. It was doubtful whether the term " federal union " in the sense of " federal State " covered all forms of federal State.

64. Although his delegation was against the inclusion of article 5, paragraph 2 in the convention, it was not in any way contesting the capacity of components of a federation in international matters within the limits and in the form laid down in the constitution of the federation to which they belonged. The rejection of paragraph 2 would in no way impair that capacity.

65. Mr. NASCIMENTO E SILVA (Brazil) said that the Federative Republic of Brazil was composed of twenty-two states, corresponding to the provinces of the former Empire. Article 5, and paragraph 2 in particular, was therefore of direct interest to Brazil. The article used the word " State " with two different meanings, namely as a subject of international law and as a member of a federal union.

[11] See *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 425.

66. At the Conference's first session the vote on paragraph 2 had not been conclusive and most of the States directly concerned, in other words the federal States, had opposed the inclusion of a paragraph of that kind. However, owing to the opposition of States which were not directly concerned by the problem, the Austrian amendment (A/CONF.39/C.1/L.2) had been rejected. The delegation of the Federal Republic of Germany had voted against paragraph 2 and had pointed out that the *Länder* possessed only very limited treaty-making capacity. At the 12th meeting the representative of the Byelorussian Soviet Socialist Republic had stated that paragraph 2 was " consonant with the legislation and practice of the Byelorussian SSR ". The Brazilian delegation was not competent to interpret the treaty-making capacity of other States, but its understanding was that when the Byelorussian SSR signed treaties it did so under paragraph 1, not under paragraph 2. It was inconceivable that a State which had signed the United Nations Charter and had participated in international conferences on an equal footing with other States could be regarded in the same way as the components of a federal union or *Länder* with very limited rights. The provinces or units of a federal union could not be members of international organizations or sign treaties such as the convention on the law of treaties.

67. The only acceptable interpretation of paragraph 2 was that national tribunals alone, normally the Supreme Court, were competent to interpret the formula " within the limits laid down " in the constitution. It was unthinkable that a foreign Government should give an opinion on matters of internal legislation, since that would represent an intervention in the domestic affairs of a State.

68. Article 41, paragraph 2, of the United Nations Convention on Diplomatic Relations [12] provided that " all official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed ". That article clearly showed that no foreign Government could conclude treaties with units of a federal union unless it first went through the Ministry for Foreign Affairs of the federal union.

69. The conditions laid down in paragraph 2 regarding the question of the capacity of members of a federal union to conclude treaties depended on the national constitution as interpreted by the national courts and were thus purely a matter of domestic law.

70. Paragraph 2 was therefore out of place and undesirable. The Brazilian delegation would request a roll-call vote on the substance and form of article 5, paragraph 2.

71. Mr. DE LA GUARDIA (Argentina) reminded the Conference that during the first session, his delegation had opposed article 5, although it raised no difficulties for Argentina as a federal State, since under its Constitution the members of the Federation were not entitled to conclude treaties.

72. His delegation considered that although paragraph 1 concerned one of the fundamental rights of a State, namely its capacity to conclude treaties, that was not a question of the law of treaties. The provision was therefore unnecessary in the convention on the law of treaties.

73. With regard to paragraph 2, he thought that although the Committee of the Whole had decided to delete the word " States ", the paragraph still dealt with a strictly constitutional matter which had no place in the convention. The provision conflicted with articles 1 and 2 (*a*) of the draft.

74. The members of some federal unions doubtless had capacity to conclude treaties under their federal constitutions, but the deletion of paragraph 2 of article 5 would in no way affect that capacity, which derived from domestic law, not from international law.

75. The Argentine delegation would therefore vote against article 5, paragraph 2, if the two paragraphs were voted on separately, but if that paragraph was adopted by the Conference, it would be forced to vote against the article as a whole.

76. Mr. MAKAREWICZ (Poland) said that the Conference, in judging the usefulness of certain provisions, must bear in mind that the convention contained many which simply restated the existing law; that was perfectly natural, since the main purpose of the convention was to codify the law of treaties. The fundamental rules must find a place in a convention of that kind, and article 5 was merely one example of such a rule. It was clear that the omission of any one of those rules was bound to leave a serious gap in the work of codification.

77. Treaty-making was one of the oldest and most typical rights of States; it was an attribute of sovereignty and it was unquestionably within the competence of States. It was therefore essential to reaffirm such a fundamental principle in article 5, paragraph 1. The argument that the provision was unnecessary because its purport could be inferred from articles 1 or 2 seemed quite unjustified. The fact that the article on the scope of the convention and the article on use of terms were not inconsistent with article 5 was no reason for questioning the usefulness of the latter article. All those articles used similar phraseology, but each dealt with a different problem.

78. Article 5, paragraph 1, was in harmony with the principles laid down in the United Nations Charter, in particular with the principle of the sovereign equality of States; it was an essential ingredient of the convention. Furthermore, his delegation believed that the fundamental principle stated in paragraph 1 should be suitably reflected in other articles of the convention, including its final clauses. Every State possessed treaty-making capacity, and should therefore be entitled to become a party to the convention on the law of treaties. His delegation hoped that some way would be found of making the convention open to all States.

79. The Polish delegation regarded paragraph 2 of article 5 as a logical corollary to paragraph 1. It reflected the well-known fact that States were not all uniform in

[12] United Nations, *Treaty Series*, vol. 500, p. 120.

structure, and that besides unitary States there were federal States whose political structures varied considerably. From the point of view of international law, some federal unions might be in the same category as unitary States by virtue of the fact that they had only one central political authority representing all the constituent parts of the union in its international relations, whereas other federal unions might allow their component states some rights in that respect. The International Law Commission had rightly refrained from going into the matter in detail and had included all States with a non-unitary structure under the single term " federal unions ". It had wisely laid down the fundamental rule that only the constitution could say whether the members of a federal union had treaty-making capacity. From the point of view of international law, that question could only be settled by the domestic law of the federal State concerned, and other States could do no more than take cognizance of that decision. It was therefore difficult to understand the apprehensions of certain delegations that article 5, paragraph 2, was " trespassing beyond the boundary between international law and domestic law ".

80. The Polish delegation favoured the retention of paragraph 2, which was an integral part of article 5, and would vote for article 5 as approved at the first session of the Conference.

The meeting rose at 1 p.m.

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## EIGHTH PLENARY MEETING

*Monday, 28 April 1969, at 3.35 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 5* (Capacity of States to conclude treaties) *(continued)*

1. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said his delegation strongly supported both paragraphs of article 5. Paragraph 1 set forth the capacity of every State to conclude treaties. Paragraph 2 recognized the capacity of members of a federal union to conclude treaties if that capacity was admitted by the federal constitution; that provision acknowledged a fact of international society and gave expression to a rule of contemporary international law.

2. The Ukrainian SSR was a member State of the Union of Soviet Socialist Republics. It was a particular feature of the USSR that it constituted a single State while at the same time comprising fifteen sovereign republics, one of which was the Ukrainian SSR. Those republics had freely formed the Union and, in so doing, had not relinquished their sovereignty. Their sovereignty was confirmed by the USSR Federal Constitution and also by the separate constitutions of the federated republics. Within the framework of the Union, each republic had all the attributes of a sovereign State and enjoyed full sovereign rights.

3. The Ukrainian SSR had 50 million inhabitants; it had its own Constitution and its own government machinery, including organs for foreign relations; it had its own laws on such matters as Ukrainian citizenship. The legislative provisions on all those subjects could not be amended without its consent. The position was, of course, the same with regard to the other fourteen federated republics.

4. The Ukrainian SSR was a party to numerous bilateral and multilateral treaties. It had ratified over one hundred major multilateral treaties, dealing with a wide variety of forms of international co-operation, and including such treaties as the Universal Postal Union and International Telecommunication Union Conventions. An important legal point was that a treaty signed by the Ukrainian SSR was valid and effective only within the territory of the Ukrainian SSR. Neither the USSR itself nor any of its fourteen other federated republics had any legal responsibility in the matter. Naturally, both the USSR authorities and those of the fourteen other federated republics had the greatest respect for commitments undertaken by the Ukrainian SSR and if the need arose, would whole heartedly co-operate in carrying out those commitments.

5. The legal capacity of federated republics to conclude treaties had thus a solid basis both in law and in fact. The federated republics had all the necessary cultural, economic and other qualifications to act as parties to treaties, to discharge their duties and to exercise their rights as parties.

6. Paragraph 2 could not, of course, affect the interpretation of the internal law of a State, including a State with a federal constitution. It was for the federal constitution in each case to determine whether a member of the federal union concerned had the capacity to conclude treaties, and to define the limits of that capacity. The purpose of paragraph 2 was to make it clear that, where a federal constitution so empowered a component member of a federal union, no objection could be made by another party to the participation in the treaty by that component member. The anxieties which had been expressed by certain delegations with regard to article 5 were therefore unfounded.

7. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that he had only a few additional comments to make on the subject of paragraph 2, since his delegation's position in support of both paragraphs of article 5 had been explained in detail in the Committee of the Whole at the first session.

8. Paragraph 2 gave expression to an international practice which had developed more particularly since the Second World War; a number of governments of component members of federal unions had participated

in many international treaties since that time. The provisions of paragraph 2 were in keeping with those developments and would be useful in the future.

9. The wording of paragraph 2 was the outcome of prolonged and careful work and reflected a measure of compromise. At the first session, certain delegations had experienced difficulties regarding the use of the expression " States members of a federal union ". In order to avoid those difficulties, the text as approved by the Committee of the Whole now referred to " members of a federal union ", without using the term " State ".

10. Paragraph 2 made it clear that the essential prerequisite of the capacity to conclude treaties was, for a member of a federal union, that such capacity should be admitted by the federal constitution. It did not derive from international factors; it was the result of a process within the federal union itself. It was for the constitutional law of the federal union to determine whether the treaty-making capacity existed, and, if so, to define the limits of that capacity. Also, as had been pointed out by the Brazilian representative, the provisions of the constitutional law, or of the fundamental or organic law of the federal union which recognized that capacity, could only be interpreted by the competent bodies of the federal union. There was thus no reason for the concern which had been expressed during the discussion. Constitutions or constitutional acts existed in the various federal unions, such as the United States of America, the Federal Republic of Germany, Argentina, Brazil and others. He fully understood and appreciated the position of the Canadian delegation, which had pointed out that in its country certain constitutional practices were also important. The carefully drafted and flexible wording of paragraph 2 should cover all the various situations which could arise. As a result of Lenin's enlightened policy on the question of nationalities, the constitution and the laws of the USSR made provision for the right of all Union Socialist Republics to conclude treaties. The question of the treaty-making capacity of those members of the Union was determined by the laws of the USSR and would not result from the convention on the law of treaties. Since paragraph 2 would thus serve to avoid any misunderstandings in the matter and to solve practical difficulties, his delegation strongly favoured its retention in article 5.

11. The fears which had been expressed by some delegations on the question of international responsibility were totally unfounded. The convention on the law of treaties would not affect in any way the rules on the subject of the international responsibility of States under article 69. There was no attempt to prejudice that issue, which would remain unaffected by the adoption of article 5.

12. Mr. KRISHNA RAO (India) said that his delegation would vote against paragraph 2 of article 5 for the reasons it had stated at the eleventh meeting of the Committee of the Whole.

13. The statement that a member of a federal union might possess the capacity to conclude treaties was correct, since some component units of federal States did in fact conclude treaties with sovereign States. The convention on the law of treaties, however, was not exhaustive; in accordance with article 1, it did not cover a treaty concluded between international organizations, or between an international organization and a State. Nor did it deal comprehensively with the issues arising from treaties concluded between sovereign States and the members of a federal union. Since, therefore, it concentrated only on treaties concluded between States, it ought not to attempt to deal with the question of treaties concluded between States and members of a federal union. If it did, it would have to deal not only with the capacity of members of a federal union to conclude treaties, but with a number of other consequential questions.

14. Article 5 did not cover all aspects of treaties between members of a federal union and States. It did not say who would issue full powers; it did not say how the consent of the members of a federal union would be expressed; it made no provision for the settlement problem of the responsibility of members of a federal union in terms of article 62; and it left aside the problem of the responsability of members of a federal union for breach of a treaty obligation. The whole area was one in which it would be unwise to formulate any rule of international law because it was essentially a matter regulated exclusively by the internal law of each federation. Paragraph 2 might give the impression that a State could claim the authority of international law in seeking to interpret the constitution of another State, a development which could amount to intervention of the most serious kind.

15. Any attempt to deal with such matters would involve entering into the question of the relations between the members of the federal union and the federal government, relations which were governed essentially by internal law. The International Law Commission had not examined those matters and the Conference did not have the time to go into them.

16. For those reasons, paragraph 2 should be dropped. The treaty-making capacity of members of a federal union would continue to be determined by the constitution of the federal union. That capacity could then be recognized by any sovereign State which decided to conclude a treaty with it. Without in any way affecting the treaty-making capacity of members of a federal union, the deletion of paragraph 2 would serve to avoid the difficulties in international law to which he had referred.

17. His delegation's position was not based on internal considerations. India was a Federal Republic and treaty-making was exclusively a matter for the Federal Government. Under the Constitution of the Federal Republic, the component units did not possess any treaty-making capacity, but India could conclude a treaty with a member of a federal union, if the constitution of that union permitted. His delegation would like that matter to be regulated in each case on a bilateral and practical basis, rather than on the basis of international law.

18. His delegation was therefore opposed to paragraph 2, but supported the principle embodied in

paragraph 1, which recognized and declared the capacity or every State to conclude treaties.

19. Mr. BINDSCHEDLER (Switzerland) said that Switzerland was a State with a federal Constitution. At the first session, his delegation had supported paragraph 2, but after re-examining the whole question it had now arrived at the conclusion that it would be preferable not only to drop that paragraph but to delete article 5 altogether, for reasons which he would explain.

20. It had never been intended that the convention on the law of treaties should lay down rules on the position and capacity of subjects of international law. But article 5 attempted to deal with one small aspect of that broad and difficult question. Article 5 could very well be left unsaid. To omit it would not in any way affect the capacity of States to conclude treaties, or the similar capacity of a member of a federal union, where such capacity was recognized by the federal constitution.

21. Whether or not a component unit of a federal union constituted a State was a much debated question in legal theory. If it was not considered to be a State, its capacity to conclude treaties would be fully safeguarded by article 3, which expressly declared that none of the provisions of the convention on the law of treaties would affect the legal force of an international agreement concluded between a State and another subject of international law, or between such other subjects of international law. Since, moreover, the convention did not include any provisions on the subject of the treaties of international organizations, there was no reason to refer to the treaties of members of federal unions either. It would be illogical to deal with one type of subject of international law, other than States, and not with another.

22. Again, to omit article 5 would not affect the present position in international law, which was that international law referred the matter to municipal law. It was for the constitution of a State to determine whether one of its component units had the capacity to conclude treaties. Should any clarification be needed in that respect, it was exclusively for the central authorities of the federal State to interpret the constitution of the State. On that point, the wording of paragraph 2 could give rise to misunderstandings, as had already been pointed out by the Canadian representative. Constitutional law comprised not only the letter of the constitution but also the practice of the federal authorities in its application and interpretation, and constitutional practice could, and often did, depart from the letter of the written constitution. The reference in paragraph 2 of article 5 to " the federal constitution " could therefore give rise to ambiguity.

23. In Switzerland, in accordance with the Federal Constitution, the Cantons had certain very restricted powers with regard to the conclusion of international agreements. Those powers referred in the first place to matters which were within the competence of the Cantons by virtue of the Federal Constitution. In the second place, they related to certain agreements for co-operation with neighbouring subordinate territorial entities of countries having a frontier with Switzerland; in that case, the Canton concerned dealt exclusively with the subordinate local authorities and not with the Government of the neighbouring country. In both categories of cases there was a very strict control by the Swiss federal authorities. In the first case, it was the Federal Government itself which conducted the negotiations on behalf of the Canton concerned; in the second, the Canton conducted the negotiations with the foreign local authority, but subject to confirmation by the Federal authorities. There were numerous instances of agreements by Swiss Cantons with foreign countries which had been declared void by the Swiss federal authorities. Naturally, the adoption of article 5 would not change that legal situation in any way, but his delegation would prefer that the article should be dropped.

24. Finally, there was a practical reason for dropping the whole article and not just paragraph 2. If paragraph 2 only were deleted, and paragraph 1 were retained, it might later be argued *a contrario* that the Conference had thereby meant to deny the capacity of a member of a federal union to conclude treaties. And although there was no such intention, a mistaken conclusion of that kind might perhaps be reached by the process of interpretation.

25. Mr. BELYAEV (Byelorussian Soviet Socialist Republic) said that article 5, paragraph 2, reflected the realities of international life and such norms of contemporary international law as the inalienable right of peoples and nations to self-determination and sovereign equality. Its inclusion in the draft convention would have a favourable effect on the development of treaty practice. He could not agree with those who had expressed the fear that the inclusion of the paragraph might lead to interference in the internal affairs of federal States, since paragraph 2 merely stated the right of members of federal unions to conclude treaties if that capacity was conferred upon them by the federal constitution.

26. The Byelorussian SSR, like the other republics of the Soviet Union, was a sovereign State which had voluntarily united with the other republics to form the Union of Soviet Socialist Republics. It had its own Constitution, its own territory, the frontiers of which could not be altered without its consent, its own population and its own supreme legislative executive and judicial organs. In virtue of that sovereign status, the Byelorussian SSR was a subject of international law and counted among its sovereign rights that of concluding and participating in international treaties on a basis of absolute equality with other subjects of international law. Thus, it was a founder Member of the United Nations, a member of many specialized agencies, and a party to over one hundred bilateral and multilateral treaties. His delegation therefore fully supported article 5 in the form in which it had been approved by the Committee of the Whole.

27. Mr. BAYONA-ORTIZ (Colombia) said that at

the first session of the Conference his delegation had opposed the deletion of article 5, paragraph 2, in the belief that the paragraph was in the interests of members of federal unions. It had now become clear, however, that the majority of delegations representing such unions, for both legal and political reasons, considered paragraph 2 neither necessary nor desirable. It was even maintained that paragraph 1 was redundant because its provisions followed directly from article 1. Consequently to delete the entire article would in no way affect the convention and would help to avoid problems which might arise from a mistaken interpretation of paragraph 2. For those reasons, and particularly in view of the statements just made by the representatives of Switzerland and India, as well as for the reasons previously put forward by the delegations of Canada, the United States, the Federal Republic of Germany and Mexico, his delegation would vote against the retention of article 5. If that proposal were rejected, it would support the request by Canada for a separate vote on paragraph 2 and would vote against that paragraph.

28. Mr. ALVAREZ TABIO (Cuba) said it was a matter of history that there were certain federal unions which authorized their member states to conclude international treaties within the limits permitted by their constitutions. Also, there was no rule of international law which prevented member states of a federal union from being given the capacity to conclude treaties with third States. The fact that, under article 1, the provisions of the convention would apply to treaties between States did not prevent the convention from establishing an exception to that general rule, in order to satisfy the demands of existing situations recognized by the United Nations.

29. The rule in paragraph 2 had been carefully drafted and respected the sovereign will of multi-national States by leaving the decision regarding capacity to the provisions of their federal constitutions. Consequently, his delegation could see no reason for not including article 5 in the convention and would vote for it.

30. Mr. ALVAREZ (Uruguay) said he had been particularly impressed by the points made by the Canadian representative in regard to paragraph 2.

31. At the first session of the Conference, his delegation had opposed paragraph 2 and it would now vote against it for two main reasons. First, not only was it an unjustified intervention in the domestic affairs of States, but it implied that international law surrendered to internal federal law one of its most important functions, that of determining the subjects of international law having capacity to conclude treaties. In reality, the *jus contrahendi* of a member of a federal State was not determined just by the constitution of that State; it depended also on whether other States would consent to conclude treaties with it.

32. Secondly, it would be dangerous to adopt paragraph 2 because then everything would depend on the provisions of the constitution of the federal State. A federal State would have a considerable advantage over a non-federal State since, by creating political subdivisions under cover of that provision, it could bring a large additional number of subjects of international law into conferences and multilateral treaties, thereby seriously upsetting, in its own favour, the balance of votes and parties. His delegation therefore supported the Canadian proposal for a separate vote on paragraph 2 so that it could vote against that paragraph.

33. Mr. BRAZIL (Australia) said that as a federal State, Australia had a direct interest in paragraph 2, and was one of a number of federal States which had supported the deletion of paragraph 2 at the first session.

34. His delegation did not deny that some members of federal States possessed the capacity to conclude treaties in certain instances. It did maintain, however, that the retention of paragraph 2 could create difficulties for some other federal States, whereas it had not been demonstrated that its deletion would occasion any real problems.

35. Some speakers had claimed that, since it would be for the internal authorities of a State to interpret the constitution, there was no need for concern, but that point was not clearly stated in paragraph 2. Moreover, there were other problems latent in paragraph 2, such as that just mentioned by the Uruguayan representative, namely, that of the role that international law should play in the determination of the treaty-making capacity of a member of a federal State.

36. Consideration of one aspect of the paragraph was likely to expose in a clearer light other problems which had not been apparent at first sight. Thus, at the first session, the Committee of the Whole had adopted an amendment to delete the phrase " States members of a federal union ". and substitute for it the phrase " Members of a federal union ". That amendment had taken account of the fact that members of federal unions were normally not States for purposes of international law, but at the same time it had merely served to underline the inconsistency between article 5 and article 1.

37. Although the problems raised by article 5 were real and complex, their solution was simple: to delete paragraph 2. That would expedite the task of the Conference, which was to draw up a convention dealing with treaties between States. The International Law Commission had truncated the original article 5, but it had not gone far enough; the Conference should complete what the International Law Commission had begun and delete paragraph 2. He supported the Canadian proposal for a separate vote on paragraph 2.

38. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that in principle, internal sub-divisions, whatever their title, did not possess international personality and therefore did not possess the capacity to conclude treaties. If the federal constitution granted such capacity to members of a federal union, such members might conclude treaties but only within the limits laid down by the constitution, so that their capacity was a capacity under internal law, not under inter-

national law. The limits of the capacity of a state member of a federal union could be interpreted only in accordance with internal law. His delegation therefore considered that paragraph 2 constituted an implicit attack on internal law, on the constitutional autonomy of States and thus on the sovereignty of States.

39. Again, paragraph 2 might open the door to the interpretation of the constitution of a federal union by a foreign State anxious to enter into treaty relations with a member state of the union. To speak in the convention of the capacity of a member state of a federal union to conclude treaties would constitute a serious risk, since it might encourage such member states to try to acquire that capacity to the detriment of national unity. It would therefore be more prudent to make no mention in the convention of any capacity of member states of federal unions to conclude treaties, it being understood that any federal union had the right to confer that capacity on its member states.

40. His delegation supported the request for a separate vote on paragraph 2.

41. Mr. GALINDO-POHL (El Salvador) said that paragraph 2 of article 5 stated that the members of a federal union possessed capacity to conclude treaties when such capacity was admitted by the federal constitution " and within the limits there laid down ". Both unitary and federal States acted in the international sphere within constitutional limits and yet no reference was made to those limits in paragraph 1 of article 5.

42. The text of article 43, as approved by the Committee of the Whole at the first session, limited the defect of consent which might be invoked by reason of the violation of a provision of internal law regarding competence to conclude treaties, to cases in which " that violation was manifest and concerned a rule of its internal law of fundamental importance ". The same article stipulated that a violation was manifest " if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith ". It was his delegation's understanding that article 43 applied equally to members of a federal union and to unitary States. Although article 5, paragraph 2, used the words " members of a federal union " instead of the term proposed by the International Law Commission, namely, " States members of a federal union ", the title of article 5, which covered both paragraphs, was " Capacity of States to conclude treaties", and article 1 said " The present convention applies to treaties between States ". Article 5 was concerned with capacity, and article 43 with competence, to conclude treaties. Both referred to internal law, but approached it in a different way. Whereas article 43 was couched in measured terms, it was obvious that paragraph 2 of article 5 was much less cautious.

43. International law admitted that members of a federal union possessed capacity to conclude international treaties if such capacity was established by the federal constitution. The international legal capacity of members of a federal union was the result of two factors: the permissive rule of international law and the corresponding rule of internal law which authorized a member of a federal union to conclude international agreements. The unconstitutional consequences of the exercise of that authorization were regulated, on the international plane, as far as competence was concerned, by article 43, and any other mention of limits as to capacity laid down by internal law would involve an inequality between the treatment of members of federal unions and that of other States.

44. Limits established by federal constitutions did of course exist, but to mention them expressly would lead to a lack of balance if they were not also mentioned in relation to other States for which they also existed. And if express reference were made to constitutional limits as defining the international legal capacity of members of federal unions, that could mean turning internal constitutional problems into a subject for international debate. Before the adoption of the compromise solution for article 43, the International Law Commission had stated in paragraph 8 of its commentary to that article that " any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs ". Article 43 sought to prevent international obligations from being affected by the complex problems of internal law; but that wise attitude was not maintained in article 5, paragraph 2, which amounted more to an invitation to examine and discuss on the international plane regulations and problems of internal law.

45. Legal doctrine, under the generic term " international legal capacity ", distinguished between " capacity " in the strict meaning of the term, which was the capacity recognized by international law of specific entities, not exclusively sovereign States, to enter into treaty obligations, and " authority ", which related to the recognition of that capacity by internal law. According to that terminology article 5, paragraph 2, as far as international legal capacity was concerned, referred rather to the authorization received by members of a federal union from the federal constitution to enter into international obligations. Paragraph 2 might then read: " Members of a federal union may conclude treaties when they are so authorized by the federal constitution ". But if it were desired to retain the wording used in the draft convention, paragraph 2 could be shortened to read: " Members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution ". Since the purpose of article 5 was to determine the capacity of States to conclude treaties, it must be strictly limited to that objective, and that could be achieved by the wording he had suggested, which entailed the deletion of the last part of paragraph 2 of article 5.

46. His delegation could not support the present wording of paragraph 2 and, unless it were amended, preferred to see it deleted, as the Canadian representative had proposed.

47. Mr. STREZOV (Bulgaria) said that article 5 raised

two distinct problems. Paragraph 1 laid down the capacity of every State to conclude treaties, which was an undeniable right, based on the sovereignty of States. Very few delegations had cast doubts on the need to include paragraph 1. Paragraph 2, on the other hand, created a problem which should be dealt with within the framework of the convention, for treaties concluded between members of federal unions and other States were a reality of contemporary international life, and the convention on the law of treaties should therefore apply to such instruments. The objection that paragraph 2 would open the door to interference in the domestic affairs of federal States was unfounded, since references to municipal law were often found in international law, without thereby providing a means of interference. The Bulgarian delegation therefore supported article 5 as a whole.

48. Mr. JACOVIDES (Cyprus) said that Cyprus neither was nor was likely to become a federal State, so that the issue raised in article 5, paragraph 2, did not affect it directly. Nevertheless, it was convinced that the adoption of such a provision might enable States to assume the right to interpret the constitution of a federal State for themselves, and that would constitute interference in the domestic affairs of the federal State. Moreover, it regarded as untenable the proposition that a federal constitution, which represented the domestic law of a federal State, could in itself determine matters relating to international law.

49. For those reasons, and because of the practical problems that might arise if such a provision were included in the convention, Cyprus would vote for the deletion of paragraph 2, as it had done during the first session, although it would support paragraph 1, which was based on the principle of the sovereign equality of States.

50. The PRESIDENT invited the Conference to vote first on paragraph 2 of article 5.

*At the request of the representative of Brazil, the vote was taken by roll-call.*

*Malta, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Monaco, Mongolia, Morocco, Nepal, Poland, Romania, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Afghanistan, Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, Central African Republic, Cuba, Czechoslovakia, Ecuador, France, Gabon, Hungary, Indonesia, Iraq, Ivory Coast, Kuwait, Madagascar.

*Against:* Malta, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Singapore, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Zambia, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Burma, Cameroon, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Costa Rica, Cyprus, Denmark, Dominican Republic, El Salvador, Ethiopia, Federal Republic of Germany, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, India, Iran, Ireland, Israel, Italy, Jamaica, Japan, Liberia, Liechtenstein, Luxembourg, Malaysia.

*Abstaining:* Saudi Arabia, Senegal, Sierre Leone, Sudan, Thailand, Tunisia, United Republic of Tanzania, Cambodia, Congo (Brazzaville), Finland, Kenya, Lebanon, Libya.

*Article 5, paragraph 2, was rejected by 66 votes to 28, with 13 abstentions.*

51. The PRESIDENT invited the Conference to vote on article 5, as thus amended.

*Article 5, as thus amended, was adopted by 88 votes to 5, with 10 abstentions.*

52. Mr. MERON (Israel), explaining his delegation's vote, said that article 5 dealt with two entirely distinct matters. Paragraph 1 contained a general declaratory statement on the capacity of States to conclude treaties, which was indisputable and obvious. Indeed, that proposition followed logically from article 1 of the draft.

53. Paragraph 2, on the other hand, dealt with the complex and delicate matter of the capacity of members of a federal union to conclude treaties with foreign States. The paragraph laid down a single criterion for such treaty-making capacity, that of the provisions of the federal constitution. Arguments could be advanced for and against the advisability of dealing with the subject in the convention; his delegation, however, had shared the doubts expressed by the International Law Commission concerning the paragraph and the need for a provision of that kind. In particular, it was concerned at the inadequacy of the sole criterion proposed by the Commission, for although the text of the constitution of a federal State was extremely important, it represented only a part of that State's internal law and could not be considered in isolation from such other important factors as the constitutional practice, the jurisprudence of the constitutional courts, and the over-all framework of legal relations and administrative arrangements between the federal State and its constituent members. For those reasons, and in view of the many serious objections advanced by the delegations of federal States, Israel had voted against paragraph 2, although it had supported paragraph 1.

54. Mr. HAYTA (Turkey) said that his delegation's vote in favour of paragraph 2 should not be interpreted as a wish to allow interference in the domestic affairs of federal States. It wished to place on record its assumption that the fact that the majority of the Conference had decided against the inclusion of paragraph 2 did not affect the capacity of any member of a federal union to conclude treaties, if that capacity was admitted by the federal constitution and within the limits there laid down.

55. Mr. BILOA TANG (Cameroon) said he wished to explain his delegation's vote on paragraph 2. Cameroon was a federal State which, in drawing up its constitution only some ten years previously, had carefully

delimited the rights and duties of members of the federal union and those of the federal State itself. The right of members of the federal union to conclude treaties was not admitted in the constitution, and all negotiations had to be conducted through the federal Ministry of Foreign Affairs. Those considerations had led his delegation to doubt the advisability of including paragraph 2, because it might open the door to interpretations of his country's constitution by foreign States or international organizations. His delegation had therefore voted against paragraph 2.

*Article 6* [1]

*Full powers*

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) He produces appropriate full powers; or

(*b*) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispenses with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ.

56. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had accepted the Ghanaian amendment (A/CONF.39/L.7) to paragraph 1(*b*) of article 6, in the belief that it clarified the text.

57. The PRESIDENT invited the Conference to vote on article 6.

*Article 6 was adopted by 101 votes to none, with 3 abstentions.*

*Article 7* [2]

*Subsequent confirmation of an act performed without authorization*

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

[1] For the discussion of article 6 in the Committee of the Whole, see 13th and 34th meetings.

An amendment was submitted to the plenary Conference by Ghana (A/CONF. 39/L.7).

[2] For the discussion of article 7 in the Committee of the Whole, see 14th and 34th meetings.

An amendment was submitted to the plenary Conference by Romania (A/CONF.39/L.10).

58. Mr. YASSEEN, Chairman of the Drafting Committee, said that since it was clear from sub-paragraphs 1(*b*) and 2(*a*), (*b*) and (*c*) of article 6 that full powers need not be produced by a person before he could be considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty, the Drafting Committee had considered that the use of the word " *pouvoirs* " in the French text and " *poderes* " in the Spanish text might lead to confusion, and had therefore replaced them by the words " *autorisation* " and " *autorización* " respectively. The Drafting Committee hal also replaced the words " as representing his State " by the words " as authorized to represent a State ". That was because in some cases a State might be represented by a person who was not a national of that State. A corresponding change had been made in the other language versions of the text. The Drafting Committee wished to make it clear that the word " confirmed " in the last part of article 7 applied equally to express confirmation and to tacit confirmation.

59. The PRESIDENT asked the Chairman of the Drafting Committee whether his Committee had considered the amendment proposed by Romania (A/CONF.39/L.10), to insert the words " the competent authority of " between the words " confirmed by " and the words " that State ".

60. Mr. YASSEEN, Chairman of the Drafting Committee, said that the effect of the Romanian amendment would be to restore the original wording of the International Law Commission. The Drafting Committee had found that only the State could determine which was the competent authority in such a matter, and that competent authority differed in different States. Consequently, the Drafting Committee considered that it was sufficient to refer to confirmation by the State, instead of by the competent authority of the State.

61. Mr. SECARIN (Romania) said that his delegation wished to maintain its amendment (A/CONF.39/L.10), in order to restore the wording of article 7 as drafted by the International Law Commission and already accepted by the Committee of the Whole. His delegation considered that it was important to make clear that only the competent authority could complete the act in question when it had been performed by a person not competent to do so under the terms of article 6. The Drafting Committee's text was not as clear as the International Law Commission's text. Since sub-paragraph 1(*c*) of article 2 made it clear that the competent authority had power to conclude treaties, it must therefore be the competent authority of a State only that had the power to confirm an act performed without the required authorization, in order to give it legal effect. The International Law Commission's text was more closely in accordance with the provisions of articles 2 and 6, and with other relevant articles of the convention. Moreover, the Committee of the Whole had adopted that text by 87 votes to 2, with one abstention. The Romanian

delegation proposed that that text be retained as the final version of article 7, and hoped the Drafting Committee would agree to reconsider the question.

62. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not intended to make any change in the substance of article 7. It had considered that the change in wording was a purely formal change, which lightened the text and removed unnecessary wording. It was the State itself that determined the authority competent to perform a certain act. To say that confirmation must be by a State was the same as saying that it must be by the authority that the State considered competent for that purpose, but there was no necessity to specify that in the text.

63. The PRESIDENT asked the Chairman of the Drafting Committee if the Drafting Committee was willing to reconsider the text.

64. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee would reconsider the text if the Conference so wished.

65. The PRESIDENT suggested that the Conference vote on article 7 and that the Drafting Committee subsequently consider the two versions of the text and decide which was to be preferred. It was his own understanding that the meaning was exactly the same in both cases.

66. Mr. SECARIN (Romania) said he had no objection to that procedure.[3]

*Article 7 was adopted by 103 votes to none, with two abstentions.*

*Article 8* [4]

*Adoption of the text*

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

67. Mr. YASSEEN, Chairman of the Drafting Committee, said that the only change that the Drafting Committee had made to the text of article 8 was a change of wording affecting the French and Spanish texts only. As in paragraph 1(*a*) of article 2, the French word " *rédaction* " had been replaced by the word " *élaboration* ", and a corresponding change had been made in the Spanish text.

68. The Drafting Committee had asked him to emphasize that it was for the Conference to decide whether or not it wished the adoption of the text of a treaty at an international conference to be by a majority of two-thirds of the States participating in the Conference, as provided by the present text of article 8, or by a majority of two-thirds of the States present and voting. The difference was important, because the first-mentioned rule permitted those absent or abstaining from the voting to prevent the adoption of a text. That was a substantive question which must be decided by the Conference and not by the Drafting Committee.

69. Mr. PINTO (Ceylon) said that in the Committee of the Whole his delegation had introduced an amendment to article 8 (A/CONF.39/C.1/L.43) to add the following new paragraph: " 3. The adoption of the text of a treaty by an international organization takes place by action of a competent organ of such organization according to its rules. "

70. His delegation considered that since article 8 appeared to offer an exhaustive enumeration of methods of adopting a treaty, it might be desirable to include a reference to the new but increasingly used technique of the adoption of a treaty by action of the competent organ of an international organization. It was not clear whether article 4, which stated that the application of the convention to a treaty adopted within an international organization would be " without prejudice to any relevant rules of the organization " applied also to the process of adoption of treaties within an organisation, since article 4 might have been intended to apply to such treaties only after they had come into existence, instead of to their formulation within the organization concerned. It should be made clear whether the prior process of adoption was also subject to the proviso in article 4 regarding the relevant rules of the organization.

71. At the 99th meeting of the Committee of the Whole, the Chairman of the Drafting Committee had said that the amendment by Ceylon was not necessary because the adoption of a treaty within an organization was already covered by article 4 in the sense he had already explained. On the understanding that that interpretation of the scope of article 4 was correct, the delegation of Ceylon would vote for article 8 as it stood, without any specific reference to the adoption of treaties within international organizations.

72. Mr. GONZALEZ GALVEZ (Mexico) said that, with regard to the question of the two-thirds majority raised by the Chairman of the Drafting Committee in relation to paragraph 2 of article 8, the Mexican delegation considered that the words " participating in the Conference " should be replaced by the words " present and voting ". In accordance with United Nations practice, the majority should be the majority of those present and voting; absentees and abstentions should not be taken into account. He supported the view expressed by the representative of the Secretary-General at the 84th meeting of the Committee of the Whole. The question was certainly a matter of substance on which the Drafting Committee was not competent to take a decision.

[3] The Drafting Committee considered it unnecessary to make any change in article 7. See 29th plenary meeting.

[4] For the discussion of article 8 in the Committee of the Whole, see 15th, 84th, 85th, 91st and 99th meetings.

An amendment was submitted to the plenary Conference by Mexico and the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.12).

73. Sir Francis VALLAT (United Kingdom) said he agreed with the view expressed by the representative of Mexico. The Chairman of the Drafting Committee had called attention to a point of some importance; the question was one of substance, and the Drafting Committee had been correct in treating it as such. Paragraph 2 as at present drafted could lead to difficulties in the adoption of the text of a convention at some future conference. He believed that the requirement of a majority of two-thirds of the States participating in a conference for the adoption of the text of the resulting convention was too restrictive, since it might be difficult even to get a majority of two-thirds of those present and voting. The conference might then come to nothing, unless the same high majority of States participating decided to apply a different rule. It was questionable whether the difficulty could be avoided by means of rules of procedure drawn up in advance of the conference. In his view the result might be to tie the hands of conveners of future conferences unduly.

74. He therefore supported the Mexican representative's view that it was better to refer to the two-thirds majority of those present and voting instead of those participating in the conference.

75. Sir Humphrey WALDOCK (Expert Consultant) said he had understood the representative of the Secretary-General to have stated that he would interpret the article, as proposed, to mean that under United Nations practice it would still be possible to apply the rule that abstentions would not count in calculating a two-thirds majority. That was a question of substance. The article as drafted by the International Law Commission had been intended to give some protection to minority elements in a conference, particularly at the opening stages, before the adoption of the rules of procedure. A two-thirds majority of the States participating in the conference could, if it so wished, decide that abstentions would not be included in calculating a two-thirds majority. Not to include all the States concerned in calculating the vote for the rules of procedure would water down the protection given by the clause. The question was a matter of substance for Governments to decide, in consultation with those with experience of the working of international conferences. In deciding, they would wish to bear in mind that the idea behind the provision was the protection of minority elements.

76. The PRESIDENT said the problem was a serious difficulty of substance; the Conference must decide whether it preferred the restrictive rule that would result from the text proposed, or a more flexible rule. At the present Conference a substantial number of States, though participants in the Conference, were absent, and their absence had the effect of changing the figure for the majority of two-thirds required for the adoption of each article. The second part of paragraph 2 provided a safeguard permitting a conference to decide on some other majority if it so wished. However, even with that safeguard, if the rule laid down in the existing text were adopted, every conference must take two steps. First, it must decide in advance whether or not it wished the text to be adopted by a majority of two-thirds of those present and voting; otherwise the rule requiring the majority of two-thirds of all of the participants would apply. Secondly, in order to change the rule, it would be necessary to obtain at least once a two-thirds majority of the participating States. The question was one of great importance for future conferences convened to adopt treaties.

77. Mr. RUEGGER (Switzerland) agreed that the question was one of the greatest importance for the practice of international conferences convened either under the auspices of the United Nations or by other authorities. One major example of conferences convened under other auspices was that which had resulted in the adoption of the four Geneva Conventions of 12 August 1949. Since matters of such universal importance might be affected, the conference should be cautious of binding all future international conferences by strict rules. The Conference should take more time to reflect on the matter, and seek to find a more flexible and less restrictive formula.

78. Mr. YASSEEN (Iraq) said that his delegation supported a text that would reflect the practice of the United Nations. It was the practice of conferences convened by the United Nations to adopt texts by a majority of two-thirds of those present and voting. To require a majority of two-thirds of all the participants would make it very difficult to adopt a text. Furthermore, if a majority of two-thirds of all participants was required in order to change the rule in special circumstances, that would make it very difficult to make such a change if it were necesary for any reason. Consequently, Iraq would support a text reflecting United Nations practice.

79. Mr. ESCUDERO (Ecuador) said he supported the view expressed by the representative of Mexico, and endorsed by the representative of the United Kingdom, that the text should reflect the practice of the United Nations. In any case, the expression " participating in the conference " was not altogether clear. It was not sufficient to specify that the majority should be two-thirds of those present and voting at the conference, since a large number of votes would be involved; the text should make it clear that the rule applied to those present and voting when the vote in question was taken at the conference.

80. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the text of article 8 was the result of much hard work by the International Law Commission, and represented a general consensus. The principle of unanimity had many advantages and had been applied with considerable success. However, when the text of article 8 had been drafted, it had been pointed out that in many international organizations, particularly those within the United Nations system, a two-thirds majority rule was applied. The text as it now stood reflected the two elements that unanimity was desirable if possible, and that in practice

it might be necessary to require a two-thirds majority. It had already been approved by the Committee of the Whole, and any re-examination of the text would require a two-thirds majority of the present Conference.

81. He did not believe that the text of paragraph 2 of article 8 could have the effect of harming the activities of other organizations; the problem of agreements drafted within international organizations was adequately covered by article 4.

The meeting rose at 6.15 p.m.

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## NINTH PLENARY MEETING

*Tuesday, 29 April 1969, at 10.35 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 8* (Adoption of the text) *(continued)*

1. Mr. ESCHAUZIER (Netherlands) said that article 8, paragraph 2 did not in any way affect the established practice in the organizations in the United Nations system or the current voting procedures in those organizations or in conferences held under the auspices of the United Nations or its subsidiary bodies.

2. Article 8 did not deal with treaties drawn up within an international organization. Such treaties were covered by the general provision in article 4 of the conventions, as the International Law Commission had stated in paragraph (6) of its commentary to article 8.

3. Article 8, paragraph 2 dealt with conferences convened outside existing bodies. The participants in such conferences would not necessarily have rules of procedure from the beginning. In the initial phase of their work the participants would therefore have to agree on certain principles, including a voting procedure for the adoption of the text of the treaty. It would thus appear that stringent provisions with regard to the required majority were warranted. The participants were of course free to depart from the provision in article 8, paragraph 2 and adopt more flexible rules of procedure, but it was in the interests of the participants in the conference to adhere to the rule stated in article 8, paragraph 2, unless the participating States decided by a two-thirds majority to apply different rules. The participants in a conference might also wish to adopt the standing rules of procedure applicable to most United Nations conferences, but there was no inherent link between article 8, paragraph 2, and what was known as United Nations practice.

4. It would therefore be wrong and harmful to replace the expression " participating in the conference " in paragraph 2 by the words " present and voting " and to interpret it in the sense of rule 37 of the rules of procedure of the Conference on the Law of Treaties, which provided that " representatives who abstain from voting shall be considered as not voting ".

5. The Netherlands delegation would therefore vote for the existing wording of article 8, paragraph 2.

6. Mr. GONZALEZ GALVEZ (Mexico), introducing the amendment by Mexico and the United Kingdom (A/CONF.39/L.12), said that certain representatives, in particular those of India and Iraq, had said they were in favour of replacing the word " participating " by the words " present and voting ".

7. A number of States were regarded as participating in the Conference, though their delegations were absent or did not participate in the voting. The rule stated in the amendment was based upon the practice of the United Nations and the specialized agencies, which was a standing practice save in such exceptional cases as the election of members of the International Court of Justice, where at the time of the vote account was taken of the number of States participating.

8. The representative of Ecuador had asked at the previous meeting that an addition should be made to the amendment by Mexico and the United Kingdom to the effect that it meant present and voting " when the vote in question was taken at the conference ". That was implied in the text of the amendment, but the Drafting Committee might consider the point in order to make the wording of the new text clearer, should the amendment be adopted.

9. Mr. ALVAREZ (Uruguay) said that the Conference had the choice between two formulas, that of " States participating in the conference " and that of " States present and voting ". On mature reflection, the Uruguayan delegation was in favour of the latter.

10. The International Law Commission had stated in paragraph (5) of its commentary to article 8 that the formula " participating in the conference " took account of the interests of minorities, which might be quite a substantial group. He himself believed that a formulation of that kind had three drawbacks. First, it was too rigid. Secondly, it was at variance with the provisions of the United Nations Charter, with the general practice followed within the United Nations, and in particular at all codification conferences, and with the rule laid down in rule 36 of the rules of procedure of the present Conference concerning decisions on matters of substance. Article 18 of the Charter provided that decisions of the General Assembly on important questions should be made by a two-thirds majority of the members present and voting, and United Nations practice and the rules of procedure of codification conferences had adhered to that rule. Thirdly, it presented the inevitable danger that as a result of absenteeism, deliberate or not, States might frustrate every effort to achieve practical results.

11. The " States present and voting " formula proposed by Mexico and the United Kingdom (A/CONF.39/

L.12) was a way of avoiding the drawbacks he had just listed. It was flexible; it took into account the provisions of the Charter and United Nations practice; and above all, it gave States the guarantee that if they were present during the debate and participated actively in the work — something which depended solely upon themselves — they could make their voice heard.

12. If the formula governing the work of a conference as important as the Conference on the Law of Treaties was a good one, why should it not be adopted rather than a more rigid formula which would be likely to impede the development of international relations? The formula had prevailed for more than twenty years without substantial objection and would thus become a principle governing all international conferences unless some express provision was made to the contrary.

13. The formula " States present and voting " also provided an inducement to all States to be present and to take an active part.

14. For all those reasons, the Uruguayan delegation was in favour of the formula proposed by Mexico and the United Kingdom.

15. Mr. MATINE-DAFTARY (Iran) said that in his view the question of the meaning of the word " participating " in paragraph 2 was of great importance.

16. The International Law Commission had not explained in its commentary why it had preferred to use the term " participating ", but it had said in paragraph (4) that " when the General Assembly convenes a conference, the practice of the Secretariat of the United Nations is, after consultation with the States mainly concerned, to prepare provisional or draft rules of procedure ". That was in fact the procedure the Secretariat had followed for the Conference on the Law of Treaties. The members of the International Law Commission had considered that the decision concerning the rules of procedure was normally taken at the beginning of a conference by the States participating in it and it would hardly be conceivable that participants would absent themselves and abstain at that particular time when the point at issue was a matter vital to the conference's work. Some members of the International Law Commission had rightly considered that a rule providing for a two-thirds majority was essential in order to afford sufficient protection to States which were in a minority at a conference.

17. The Conference was therefore faced with two formulas, namely " participating " and " present and voting ", and it must make its choice.

18. Mr. MARESCA (Italy) said that the rule stated at the beginning of paragraph 2 was a rule of common sense. A treaty could not be adopted at an international conference unless it had obtained a two-thirds majority; a simple majority would be quite inadequate. On the other hand, the term " States participating " in paragraph 2 of the text approved by the Committee of the Whole was ambiguous. A State might be invited to a conference, and even appoint the members of its delegation, but abstain from actually participating in the conference's work. A State, too, might not be present on the day the convention was officially proclaimed. His delegation believed that States in such cases could not be regarded as participating States.

19. He supported the amendment by Mexico and the United Kingdom which embodied a well-known rule to be found in the constitutions of many States.

20. Paragraph 2 laid down that every international conference was free to choose its procedure, but placed limits upon that freedom. The Conference on the Law of Treaties was a United Nations conference and could not ignore the procedure followed within the United Nations.

21. Mr. KOULICHEV (Bulgaria) said that he was against the amendment by Mexico and the United Kingdom. The sponsors of the amendment were afraid that the rule of the majority of two-thirds of the States participating might give rise to difficulties in carrying out the task of codifying international law, for example by enabling a minority of States to prevent the adoption of a treaty. His delegation was not sure that such apprehensions justified abandoning the very sensible voting procedure provided for by the existing wording of paragraph 2. The great merit of that formula was that it provided adequate protection for States which were in a minority at the conference and thus encouraged all participants to seek solutions that would take into account the interests of the great majority of members on the basis of a general agreement. The procedure thus prevented the taking of decisions by a minority of participants in the conference, as would be possible if the rule of the majority of two-thirds of the States present and voting was adopted. Such a formula was particularly necessary in the international regulation of matters of vital importance to States, such as disarmament. In dealing with other matters, a voting rule of that kind might appear too rigid. But in such cases the residuary nature of the rule in paragraph 2 would leave participants in the conference entirely free to choose a more appropriate voting rule. Paragraph 2 covered cases in which the States concerned had not reached agreement on the question before the conference began, and laid down the procedure which the conference should then follow in order to reach a decision on voting procedure, while leaving to States the sovereign authority to establish the voting rule applicable for the adoption of the text of the treaty.

22. His delegation thought that the practical importance of paragraph 1 of article 8 should not be overestimated. In most cases, the major codification conventions of modern times were drafted at conferences convened by international organizations. The voting rule, which was subject to approval by the conference, was generally suggested by the international organization, and the acceptance of that rule by the conference had never yet given rise to any great difficulty.

23. His delegation did not therefore think that the application of the present text of article 8, paragraph 2, was likely to produce any undesirable effects in that connexion, and it would therefore vote for the present wording of paragraph 2.

24. Mr. RUEGGER (Switzerland) said that article 8, paragraph 2, dealt with a matter which had so far been more a question of international practice or of procedure at international conferences than of law.

25. His delegation fully understood that the International Law Commission should have thought it desirable to remove a factor of procedural uncertainty by mentioning the rule applied by organizations of the United Nations family.

26. The application in principle of the two-thirds majority rule was in accordance with a trend that had now gone so far as to appear irreversible. His delegation had not wished to submit any amendment on the point, but it would prefer the absolute presumption in favour of the two-thirds majority rule to be less automatic, and it would therefore be in favour of a much more flexible formula.

27. It should be possible to adopt certain articles dealing with problems which were less important from the point of view of State sovereignty by a simple majority instead of by a two-thirds majority. Moreover, such a procedure often helped to contribute to the development of international law.

28. That had been the practice followed, for example in the case of the 1949 Geneva Conventions — the three revised Conventions and the new Convention — for the Protection of War Victims. If those Conventions had had to be adopted by a two-thirds majority, a large number of their provisions, which had subsequently been adopted by the whole international community, would undoubtedly have had to be deleted.

29. It was true that the general rule provided that States might decide to apply a rule other than the two-thirds majority rule. But once the text of article 8 had been adopted it would be more difficult to depart from that rule. He thought that the amendment by Mexico and the United Kingdom improved the present wording of paragraph 2 and his delegation would vote for it.

30. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had been much preoccupied with the questions of the sovereignty of each conference to determine its voting procedure and rules of procedure. At one time, the Commission had even considered that it should not lay down any rule at all, except to state in the most general terms that it would be a matter for the States concerned to decide the voting rule. But it had come to the conclusion, for the reasons stated in the commentary, that it would be desirable to lay down some residuary rule so that a conference which began its work without rules of procedure would find in the residuary rule a ready-made means of proceeding.

31. When the Commission had used the phrase " participating in the conference " it had not meant to lay down a rigid rule that that must include every State attending the Conference. The Commission had not intended to deprive a conference of the right to decide how to deal with certain problems, such as abstentions. The rule was not intended to have such a rigid effect, but since many delegations had interpreted it in that way, the Conference must overcome the difficulty.

32. Article 8 laid down two rules: one concerned the vote on the adoption of the text, and the other — the real residuary rule — dealt with the possibility of applying a rule other than the two-thirds majority rule. The point of substance related to the expression " unless by the same majority they shall decide to apply a different rule ". That again was a matter for the Conference. He had gained the impression that many representatives thought that, since the Commission's text could imply that abstentions might not be left out of account in calculating the two-thirds majority, the voting rule for the adoption of the text was too strict for a conference drawing up a treaty, and he was largely of that mind. It was, however, for the Conference to decide whether the other rule, about the majority by which it might be decided to apply a different rule, should be strict or flexible.

33. The Drafting Committee should examine the effect of any change in the rule on the interpretation of paragraph 1. It was necessary to know whether an abstention was or was not to be counted in establishing unanimity.

34. It was very difficult to define what was meant by an international conference; his impression was that the majority of the representatives who had spoken on the problem had started from the hypothesis that the article was concerned only with large international conferences, in particular conferences convened by international organizations or organizations of the United Nations family. But in fact paragraph 2 might also cover conferences in which a comparatively small number of States participated, and that should be borne in mind in considering the decision to be taken.

35. Mr. ESCUDERO (Ecuador) said that the words " present and voting " were ambigous and might lead to confusion. His delegation's view, which it had put forward at the previous meeting, was that the amendment submitted by Mexico and the United Kingdom should be changed to include the words " when the vote in question was taken at the conference " after " present and voting ".

36. Replying to the Mexican representative's comment on his suggestion, he agreed that the clause he wished to add was implied in the word " voting "; but the wording of a legal text should be particularly precise. The Drafting Committee might consider his suggestion, which was purely one of form, if the amendment by Mexico and the United Kingdom was adopted.

37. Mr. WARIOBA (United Republic of Tanzania) said that the intention of the amendment to article 8 (A/CONF.39/C.1/L.103) which his delegation had presented in the Committee of the Whole had been to make the majority rule more flexible. It had been criticized as making it possible for a conference to decide to adopt the text of a treaty by simple majority. The Drafting Committee, to which the amendment had been referred by the Committee of the Whole, had refused to take a decision on the ground that it was a matter of substance; the amendment had therefore been

put to the vote in the Committee of the Whole at the 91st meeting without further debate. The Tanzanian delegation, while not fully convinced of the merits of having such a rigid rule as that in paragraph 2 of article 8, had decided not to vote against the article but to abstain. However, the suggestion made by the representative of Mexico at the previous meeting had produced a spontaneous reaction against the rigidity of the rule.

38. One of the main objections to the Tanzanian amendment had been that it might lead to a decision being taken by simple majority. But under its provisions a conference could also decide to require a three-quarters majority or even unanimity. Even if the decision was to apply the simple majority rule, he could not see anything wrong in that. If the interests of the minority were strictly safeguarded at the time of the adoption of the various provisions, the act of adoption itself would be largely a procedural matter.

39. With regard to the specific proposals that had been made, he thought that the present practice within the United Nations family was both restrictive, in the sense that it would prevent a conference from deciding on its own procedure, and inherently dangerous. The " present and voting " formula adopted in United Nations bodies might be undesirable in the case of a subject of such importance that it would be desirable to obtain a sizeable majority of all the participants. The formula was also dangerous in the sense that the text of a treaty could be adopted by a majority, of whatever size, of a handful of the participants.

40. His delegation was therefore more convinced than ever that a conference should be left to decide its own procedure. A decision should be taken on the substantive question of whether or not article 8 ought to be made more flexible. If the Conference decided that the majority rule should be made flexible, the delegation of Tanzania would request that its amendment be revived and referred to the Drafting Committee along with the other proposals.

41. Sir Francis VALLAT (United Kingdom) said that to require a majority of two-thirds of the States participating in a conference would make the adoption of the text of a multilateral treaty much more difficult than under current United Nations practice. It would be well to reflect on the consequences which would follow if the rule stated in article 8, paragraph 2 were to apply to the adoption of the convention on the law of treaties. A treaty of more fundamental importance in international law and for relations between States was hard to imagine. If the rule was applied, the temporary absence of delegations from the venue of the conference, or from the conference hall itself, the number of abstentions — all would combine to create the most serious consequences with respect to the possible adoption of the text. Even if all the articles of the convention were adopted by a two-thirds majority of the members present and voting, a number of abstentions at the time of the vote on the convention as a whole could prevent it from being adopted. If the rule was unsatisfactory for the present Conference it was equally unsatisfactory for future conferences. It would be strange if the present Conference, after having provided in its rules of procedure for a two-thirds majority of the States present and voting, should now lay down a more stringent rule for future conferences. The wording of paragraph 2 proposed by the International Law Commission had of course been intended to protect minorities. But in seeking to protect minorities the task of adopting texts of multilateral treaties should not be rendered so difficult as to put a brake on future development.

42. It was for those reasons that the United Kingdom delegation had joined the delegation of Mexico in sponsoring the amendment (A/CONF.39/L.12). If the principle of that amendment was accepted, it would of course be for the Drafting Committee to decide on the precise wording. It might, for example, wish to take into account the points made by the representative of Ecuador. While the United Kingdom delegation was not wedded to the precise text of the amendment, it felt that the Conference should express a view on the point of principle involved.

43. The PRESIDENT observed that various interpretations could be placed on the text, as the Expert Consultant had pointed out. The International Law Commission had of course not intended to propose a wording so rigid as to require a majority of two-thirds of the States registered at the Conference; the text was nevertheless open to that interpretation. Accordingly, the Conference must make its position clear with respect to the two proposals before it. Moreover, the delegation of Ecuador had presented a sub-amendment to the joint amendment submitted by Mexico and the United Kingdom, suggesting the use of the expression " present and voting when the vote in question was taken at the conference ". That formula presented translation problems and it did not seem that the point needed stressing, since that practice had always been followed in the United Nations. He asked the representative of Ecuador whether he insisted on on pressing his proposal.

44. Mr. ESCUDERO (Ecuador) said that he had merely made a suggestion in order to clarify the wording of the amendment by Mexico and the United Kingdom. He did not think that repetition was necessarily superfluous in a legal text, but he would accept the President's decision so as not to cause difficulties.

45. Mr. GALINDO-POHL (El Salvador) said that the purpose of the Ecuadorian sub-amendment to the amendment by Mexico and the United Kingdom was to make it quite clear that the reference was to States present and voting at the actual moment of the vote in question. That was no doubt the intention of the amendment by Mexico and the United Kingdom, but the text of paragraph 2, as changed by that amendment, did not bring that intention out sufficiently clearly, since it referred to " the States present and voting in the conference ". The act of adoption took place at a precise and clearly established time. He therefore proposed that the words " in the conference " be deleted, so that paragraph 2 would read: " The adoption

of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule ".

46. Mr. GONZALEZ GALVEZ (Mexico) and Sir Francis VALLAT (United Kingdom) said they accepted the Salvadorian representative's proposal.

47. The PRESIDENT said that the Conference still had to take a decision on the Tanzanian proposal. That proposal went somewhat further than the wording proposed by Mexico and the United Kingdom, since its intention was to replace the words " unless by the same majority they shall decide to apply a different rule " by the words " unless it is decided during the conference to apply a different rule ". The latter wording did not, however, indicate by what majority and in what manner the conference could decide to adopt a different majority.

48. Mr. WARIOBA (United Republic of Tanzania) said that it would be a question of a rule of procedure, and that under his proposal an international conference would be free to decide by a simple majority to adopt the text of a treaty by the same majority.

49. Mr. CARMONA (Venezuela) said that the Tanzanian amendment (A/CONF.39/C.1/L.103) had been rejected at the 91st meeting of the Committee of the Whole by 51 votes to 27, with 16 abstentions. It was therefore hard to see why the plenary Conference should have to vote again on the same amendment.

50. The PRESIDENT said that, while it was true that there had been a vote on that amendment, any delegation was free to resubmit a rejected amendment to the plenary.

51. He invited the Conference to vote on the amendments to article 8, beginning with the Tanzanian amendment, which was furthest from the Drafting Committee's text.

*The Tanzanian amendment was rejected by 62 votes to 11, with 23 abstentions.*

52. The PRESIDENT put to the vote the amendment by Mexico and the United Kingdom (A/CONF.39/L.12), with the change suggested by the Salvadorian representative.

*The amendment was adopted by 73 votes to 16, with 10 abstentions.*

*Article 8, as amended, was adopted by 91 votes to 1, with 7 abstentions.*

*Statement by the Chairman of the Drafting Committee on articles 9-13*

53. The PRESIDENT invited the Chairman of the Drafting Committee to introduce the texts of articles 9, 9 *bis*, 10, 10 *bis*, 11, 12 and 13 approved by the Committee of the Whole, the drafting of which had been reviewed by the Drafting Committee.

54. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made no changes in the International Law Commission's titles of articles 9, 10, 11, 12 and 13 in the English, French and Spanish versions. A few drafting changes had been made in the titles of the Russian version of those articles.

55. Article 9 *bis* was new. It originated in two amendments submitted respectively by Belgium (A/CONF.39/C.1/L.111) and by Poland and the United States (A/CONF.39/C.1/L.88 and Add.1). The Drafting Committee had based the title of the article on the titles proposed in those two amendments.

56. Article 10 *bis* was also new, and derived from an amendment submitted by Poland (A/CONF.39/C.1/L.89). The Drafting Committee had retained the title proposed in that amendment, but had corrected the French translation, which had been inaccurate.

57. With regard to the texts of the articles, the Committee had merely made a few drafting changes. In particular, in article 9, sub-paragraph (*a*), it had replaced the word " *rédaction* " by the word " *élaboration* " and the word " *redacción* " by the word " *elaboración* " in the French and Spanish versions respectively. The same change had already been made in article 8. In article 9 *bis*, it had changed the order of the terms " approval ", " acceptance " and " accession " so that they followed the order in which those terms were enumerated in article 2, paragraph 1 (*b*). The Drafting Committee had also added the conjunction " or " at the end of paragraph 1 (*b*) of article 10, in order to make it clear that that paragraph did not call for the fulfilment of all the conditions laid down in the various sub-paragraphs. The same change had been made at the end of sub-paragraph (*a*) of article 10 *bis*.

*Article 9* [1]

*Authentication of the text*

The text of a treaty is established as authentic and definitive:

(*a*) By such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(*b*) Failing such procedure, by the signature, signature *ad referendum* or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

58. Mr. WARIOBA (United Republic of Tanzania) introduced an amendment to article 9 (A/CONF.39/L.11), reversing the order of the two sub-paragraphs of the article. The amendment would bring the text of the article into line with that of the article immediately following, article 9 *bis*, and would result in a clearer expression of the rule. It would also, as the Expert Consultant had advocated, result in a suitable consolidation of the means of authenticating the text of a treaty. Although the amendment might seem a substantive one, his delegation hoped that it would simply be referred to the Drafting Committee.

[1] For the discussion of article 9 in the Committee of the Whole, see 15th and 59th meetings.

An amendment was submitted to the plenary Conference by the United Republic of Tanzania (A/CONF.39/L.11).

59. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had already examined the matter raised in the amendment by the United Republic of Tanzania, and had finally decided in favour of the text now before the Conference.

*The amendment by the United Republic of Tanzania (A/CONF.39/L.11) was rejected by 47 votes to 20, with 30 abstentions.*

*Article 9 was adopted by 98 votes to none, with 3 abstentions.*

*Article 9* bis [2]

*Means of expressing consent to be bound by a treaty*

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

60. Mr. DENIS (Belgium) introduced an amendment (A/CONF.39/L.13) which he said was purely a matter of drafting. The words " exchange of instruments " should be replaced by the words " exchange of letters or notes ", since the expression " exchange of instruments " was traditionally kept for the exchange of instruments of ratification, whereas the case covered by article 9 *bis* was in fact the exchange of letters or notes. In the French text the word " *moyen* " should be replaced by the word " *mode* " which was the word customarily used; moreover, it was used in the title of the article.

61. Mr. NAHLIK (Poland) stressed the importance of article 9 *bis,* which his delegation had submitted in the form of an amendment (A/CONF.39/C.1/L.88 and Add.1) at the first session of the Conference and which the United States delegation had co-sponsored. At the 15th meeting of the Committee of the Whole he had given the reasons for adopting an article to serve as an introduction to the provisions on the various means by which a State could express its consent to be bound by a treaty.

62. The International Law Commission had devoted three of its draft articles — articles 10, 11 and 12 — to the various means of expressing consent to be bound by a treaty; but they did not exhaust the matter, since they left out treaties concluded by an exchange of instruments. In such cases it was simply the act of exchange that should be regarded as constituting the expression of the consent of the parties to be bound by the agreement. Such agreements were certainly to be considered as treaties, since they were " in written form " and " embodied in two or more related instruments ", within the meaning of article 2, paragraph 1 (*a*) of the convention. As treaties of that type were becoming more and more frequent, the Polish delegation had thought it useful, at the first session of the Conference, to propose the inclusion of a new article 10 *bis* (A/CONF.39/C.1/L.89) [3] governing the case of such treaties and to mention that special type of treaty in article 9 *bis* in addition to all the others.

63. Article 9 *bis* did not however expressly mention all the means that could be used for expressing a State's consent to be bound by a treaty. In international law States were free to use procedures suited to any given case, and practice introduced new forms and new procedures from time to time.

64. There was one in particular which had great importance for the new African and Asian States, namely the declarations often made by such States after having acceded to independence, to the effect that they still considered themselves bound by some of the treaties concluded by the former colonial Power, in respect, for example, of the territory which had become an independent and sovereign State. Since there were as yet no detailed rules on succession in respect of treaties, declarations of that kind constituted a distinct means of expressing consent to be bound by a treaty. The International Law Commission's preparatory work on the question of State succession confirmed that view. And the final clause of article 9 *bis* " or by any other means if so agreed " would allow such declarations to be taken into consideration as one of the means of expressing consent to be bound by a treaty.

65. The Belgian amendment (A/CONF.39/L.13) to replace the words " exchange of instruments " by the words " exchange of letters or notes " would surely not improve the text, since it would unduly restrict the article's scope. The exchange of letters or notes was certainly the most frequent case of its kind but it was not the only one, since there might be an exchange of memoranda, aide-mémoires, and so on. It would be better, therefore, to keep the words " Exchange of instruments ".

66. There was no need to replace the word " *moyen* " by the word " *mode* " in French text of article 9 *bis,* since " *moyen* " was used throughout the convention. He had no objection, however, to the amendment being referred to the Drafting Committee.

67. Sir Humphrey WALDOCK (Expert Consultant) said he agreed generally with the Polish representative's comments, but he would hesitate go quite so far in the delicate question of State succession. He hoped that the Conference would not make any assumptions about the status of the declarations to which the Polish representative had alluded, so far as State succession was concerned.

68. Mr. MOLINA ORANTES (Guatemala) said that articles 9 *bis* and 10 had been very fully discussed at the first session. Guatemala had stated its support of a residuary rule to be applied where the States concerned had not defined the means of expression by which they consented to be bound by a treaty, since consent to a treaty should, in its view, be expressed by ratification. In Guatemala the procedure by which international treaties were ratified was to some extent of a mixed type,

[2] For the discussion of article 9 *bis* in the Committee of the Whole, see 15th, 18th and 59th meetings.

An amendment was submitted to the plenary Conference by Belgium (A/CONF.39/L.13).

[3] For text, see 17th meeting of the Committee of the Whole, para. 64.

involving both legislative and executive action. The executive alone did not commit the people. The legislature was not always in a position to endorse beforehand a text in course of negotiation of which it had no cognizance. It was for such purely constitutional reasons that the Guatemalan delegation would not be able to support articles 9 *bis* and 10.

69. At the first sessions of the Conference some delegations had advocated a simplification of the means of expressing consent to be bound by a treaty in view of the growing number of treaties in simplified form. He did not believe that too general a view should be taken, since in any event account must be taken of the object of the treaty, and legislative control was exercised in different ways, depending whether it was an agreement, for example, on compulsory arbitration, which in Guatemala had to be approved by a majority of two-thirds of the Congress, or an agreement on satellites, which could be approved merely by simple majority.

70. Mr. MARESCA (Italy) said he fully supported the Belgian amendment, which in fact was similar to proposals made by the Italian delegation to the Drafting Committee at the first session.

71. Mr. YASSEEN, Chairman of the Drafting Committee, said that he regarded the first part of the Belgian amendment, whereby the words " exchange of instruments " would be replaced by the words " exchange of letters or notes ", as a substantive change, because it would restrict the scope of the article as approved by the Committee of the Whole. It was therefore for the Conference to take a decision on the matter.

72. On the other hand, the Drafting Committee would be prepared to examine the second part of the Belgian amendment.

73. Mr. DENIS (Belgium) said that he had submitted his delegation's amendment on the understanding that article 9 *bis* related solely to cases of exchanges of letters or notes, but the discussion had shown that there might be other cases. He therefore withdrew the first part of his amendment.[4]

74. The PRESIDENT said that the second part of the Belgian amendment (A/CONF.39/L.13) would be referred to the Drafting Committee.[5] He invited the Conference to vote on the text of article 9 *bis*.

*Article 9* bis *was adopted by 100 votes to none, with 3 abstentions.*

*Article 10* [6]

*Consent to be bound by a treaty expressed by signature*

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(*a*) The treaty provides that signature shall have that effect;

(*b*) It is otherwise established that the negotiating States were agreed that signature should have that effect; or

(*c*) The intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

(*a*) The initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

(*b*) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

75. Mr. ESCHAUZIER (Netherlands) asked for a separate vote on the words " or was expressed during the negotiation " at the end of paragraph 1 (*c*). An oral proposal to delete those words had been made at the first session.[7] He thought those words should be deleted because they might cause confusion by implying that the representative of the State could himself express the intention " to give that effect to the signature ", or that he could alter his full powers.

76. He also asked that a separate vote be taken in due course on the same words in article 11, paragraph 1 (*d*), which raised the same difficulties.

77. Mr. BINDSCHEDLER (Switzerland) asked for a separate vote on paragraph 2 (*a*) of article 10, and said that he would vote against that sub-paragraph. Initialling could never express consent to be bound and could never have the same legal force as signature. The provision was meaningless and would only cause confusion over the procedure for the conclusion of treaties.

78. Mr. YASSEEN, Chairman of the Drafting Committee, said that the objection raised by the Netherlands representative had been carefully considered by the Drafting Committee. Its members had taken the view that paragraph 1 (*c*) could not refer just to any statement by the representative of a State, but only to the fact that the intention of the State to give the requisite effect to the signature had been expressed during the negotiation. The Drafting Committee had therefore thought it unnecessary to alter the wording of the provision.

79. Mr. MATINE-DAFTARY (Iran) said that the consent of a State to be bound by signature was an exception to the rule, and should therefore be treated very strictly, like all exceptions. He agreed with the Netherlands representative that paragraph 1(*c*) should end with the words " full powers of its representative ". As they stood, the concluding words made the provision too flexible and might be a source of misunderstanding.

80. Mr. EUSTATHIADES (Greece) said that he endorsed the comments of the Netherlands and Iranian representatives. Nevertheless, the need might arise during the negotiations for recourse to the exception provided for in paragraph 1 (*c*), and in that case the representative would have to have the requisite full powers, which would not necessarily be his initial full powers. The concluding words of paragraph 1 (*c*)

[4] But see next meeting, para. 2.

[5] The Drafting Committee came to the conclusion that it could not accept the amendment. See 29th plenary meeting.

[6] For the discussion of article 10 in the Committee of the Whole, see 17th and 59th meetings.

[7] See 17th meeting, para. 47.

should therefore be deleted, as the Netherlands representative had suggested, and the words " the full powers " should be replaced by the words " full powers ".

81. Sir Humphrey WALDOCK (Expert Consultant) pointed out that the question of full powers was covered more fully in article 6. Article 10, paragraph 1 (*c*) related to the case of an agreement in simplified form where a State's practice might be to follow a simple procedure, and where it might be stated during the negotiations that a signature was to be binding. Such cases were extremely common, and he did not think that the provision should give rise to difficulties.

82. The PRESIDENT invited the Conference to vote on the words " or was expressed during the negotiation " in article 10, paragraph 1 (*c*).

*The words in question were retained by 54 votes to 26, with 19 abstentions.*

83. Mr. EUSTATHIADES (Greece) said that his proposal to replace the words " the full powers " by the words " full powers " would only have applied if the concluding words of paragraph 1 (*c*) had been deleted. In view of the result of the vote on those words, he withdrew his proposal.

84. The PRESIDENT put paragraph 2 (*a*) to the vote separately, as requested by the Swiss representative.

*Article 10, paragraph 2* (a), *was retained by 74 votes to 15, with 12 abstentions.*

*Article 10 was adopted without change by 95 votes to 1, with 5 abstentions.*

85. Mr. HAYTA (Turkey) said that he had abstained in the vote on article 10 in view of the comments made by the Turkish representative at the 17th meeting of the Committee of the Whole on the question of consent to be bound by a treaty.

The meeting rose at 1.15 p.m.

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## TENTH PLENARY MEETING

*Tuesday, 29 April 1969, at 3.15 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the articles approved by the Committee of the Whole.

*Article 10* bis [1]

*Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty*

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

(*a*) The instruments provide that their exchange shall have that effect; or

(*b*) It is otherwise established that those States were agreed that the exchange of instruments should have that effect.

2. Mr. DENIS (Belgium) said that his delegation's amendment to article 10 *bis* (A/CONF.39/L.14) had a connexion with its amendment to article 9 *bis* (A/CONF.39/L.13) which he had withdrawn at the previous meeting. Upon reflexion, however, he now felt that both amendments should be considered by the Drafting Committee, since they would improve the wording of the two articles without restricting in any way their provisions of substance. The terms " letters " and " notes " covered the memoranda, aides-mémoires and notes verbales to which the Polish representative had referred. Surprise had been expressed that ratification, accession, exchanges of letters and so forth should be placed on the same footing, and it had been asked whether, in the case of exchanges of letters, it was not the signatures, rather than the exchange, which constituted the means of expressing consent. Part of the reply to that question was of course the fact that notes exchanged were as often as not unsigned and that their reciprocal delivery was in such cases the means of expressing consent.

3. The PRESIDENT said that, if there were no objection, he would consider that the Conference agreed to refer the Belgian amendments to article 9 *bis* and 10 *bis* (A/CONF.39/L.13 and L.14) to the Drafting Committee, for that Committee to take them into account in the drafting of those articles, without changing the substance.[2]

*It was so agreed.*

*Article 10* bis *was adopted by 91 votes to none.*

*Article 11* [3]

*Consent to be bound by a treaty expressed by ratification, acceptance or approval*

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(*a*) The treaty provides for such consent to be expressed by means of ratification;

(*b*) It is otherwise established that the negotiating States were agreed that ratification should be required;

(*c*) The representative of the State has signed the treaty subject to ratification; or

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[1] For the discussion of article 10 *bis* in the Committee of the Whole, see 17th, 18th and 59th meetings. An amendment was submitted to the plenary Conference by Belgium (A/CONF.39/L.14).

[2] The Drafting Committee came to the conclusion that it could not accept the amendments. See 29th plenary meeting.

[3] For the discussion of article 11 in the Committee of the Whole, see 18th and 61st meetings.

(*d*) The intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

*Article 11 was adopted by 94 votes to none.*

*Article 12* [4]

*Consent to be bound by a treaty expressed by accession*

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) The treaty provides that such consent may be expressed by that State by means of accession;

(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

4. Mr. MUUKA (Zambia) said that his delegation had endeavoured, through informal negotiations, to find a wording which would broaden the provisions of sub-paragraph (*b*) so as to facilitate accession to multilateral treaties by the largest possible number of States. Since those negotiations had not led to any promising results and it had become clear that any proposal by his delegation would only meet the same fate as the proposal for an article 5 *bis,* it had decided not to put forward any proposal for the present.

5. Mr. USENKO (Union of Soviet Socialist Republics) said that his delegation would oppose article 12 as it now stood.

6. A progressive approach to the question of accession to treaties demanded that participation in multilateral treaties, particularly general multilateral treaties, should be open to the largest possible number of States, in accordance with the principle of universality and in furtherance of the general aims of co-operation between States with different political, economic and social systems.

7. The present text of article 12 was a reflection of the reactionary trend which hindered the development of co-operation between States, encouraged the creation of closed groups of States, and endeavoured to discriminate against socialist countries and developing countries. The statement in sub-paragraph (*b*) that the agreement of the negotiating States was required in order that a State could become a party to the treaty by means of accession was an attempt to give legal expression to the reactionary trend to which he had referred, in that it would have the effect of limiting international co-operation and of promoting discrimination against socialist countries and developing countries. His delegation would therefore vote against article 12. If article 12 were rejected, that would not leave a gap in the convention, since a compromise formula could doubtless be found which would prove acceptable to all.

8. Mr. DE CASTRO (Spain) said that his delegation maintained its position with regard to article 5 *bis* and would therefore vote in favour of article 12. It would again urge the Conference, as it had already done at the 89th meeting of the Committee of the Whole, to adopt a declaration or resolution on the principle of universality.

9. Mr. HARASZTI (Hungary) said that article 12, in so far as it stated that it was possible to become a party to a treaty by accession, expressed a unanimously accepted principle of international law and reflected State practice. Nevertheless, there were certain treaties which ought to be open to accession by all States. During the discussion on the proposed article 5 *bis,* his delegation had given its reasons for sponsoring that proposal, and those reasons applied equally to the right of States to accede to treaties. Consequently, unless that right of accession were recognized in article 12, his delegation would not be able to vote in favour of the article.

*Article 12 was adopted by 73 votes to 14, with 8 abstentions.*

*Article 13* [5]

*Exchange or deposit of instruments of ratification, acceptance, approval or accession*

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

(*a*) Their exchange between the contracting States;

(*b*) Their deposit with the depositary; or

(*c*) Their notification to the contracting States or to the depositary, if so agreed.

10. Mr. DENIS (Belgium) said he would like to have some clarification of the meaning to be attached to the concluding words of the article, " if so agreed ". It was difficult to see what those words covered bearing in mind the opening proviso " Unless the treaty otherwise provides ", which implied that the article contained a residuary rule. Moreover, it was not clear whether the words " if so agreed " referred to the notification or to the time at which the consent of a State would be considered to have been established, or to both.

11. Sir Humphrey WALDOCK (Expert Consultant) said that the three cases set out in sub-paragraphs (*a*), (*b*) and (*c*) constituted three alternatives. The first two referred to the more usual methods of establishing consent. The third dealt with the rather more special notification procedure, and the purpose of its concluding words " if so agreed ", was to indicate that sub-paragraph (*c*) would not apply unless it were so decided. However, the words were not absolutely necessary and, if any ambiguity resulted from their inclusion, he thought they could be dispensed with. Those words

[4] For the discussion of article 12 in the Committee of the Whole, see 18th and 105th meetings.

[5] For the discussion of article 13 in the Committee of the Whole, see 18th and 61st meetings.

had however been included in the text of article 13 from the outset by the International Law Commission itself.

12. Mr. YASSEEN (Iraq) said that, personally, he was inclined to share the view of the Expert Consultant that the words " if so agreed " could safely be dropped.

13. Sir Francis VALLAT (United Kingdom) said that he was in favour of retaining the words " if so agreed ", which clearly referred only to the provisions of sub-paragraph (*c*). The provisions of sub-paragraphs (*a*) and (*b*) would apply in any circumstances, but those of sub-paragraph (*c*) would apply only if so agreed between the States concerned, and it was appropriate to make the position clear in that respect.

14. Mr. ESCUDERO (Ecuador) suggested the insertion in the Spanish version of the conjunction " *o* " at the end of sub-paragraph (*a*), as had already been done at the end of sub-paragraph (*b*). That would make it absolutely clear that the three sub-paragraphs envisaged three separate and distinct cases.

15. Sir Humphrey WALDOCK (Expert Consultant) said that, in the English version, the conjunction " or " at the end of sub-paragraph (*b*) made it perfectly clear that there were three alternatives; there was no need to insert the word " or " at the end of sub-paragraph (*a*). The suggestion relating to the Spanish text should be referred to the Drafting Committee; but he would point out, that there were many other articles in which the same form of drafting had been used.

16. Mr. EUSTATHIADES (Greece) said he strongly urged that the wording of article 13 should be retained unchanged. There was no need to insert the conjunction " or " at the end of sub-paragraph (*a*); the text as it stood made it clear that it dealt with three alternatives. The first two, in sub-paragraphs (*a*) and (*b*), referred to the normal rule, which was reflected in the title of the article; that title, however, did not cover the exceptional case mentioned in sub-paragraph (*c*).

17. It would be possible to improve the wording of article 13 by breaking it up into two paragraphs. The first would deal with the normal cases set forth in sub-paragraphs (*a*) and (*b*); the second would deal with the exception in sub-paragraph (*c*) and could be worded to read: " If so agreed, the notification to the contracting States, or to the depositary, of the instruments of ratification, approval or accession shall establish the consent of a State to be bound by a treaty." He was not making any formal proposal, however, as he did not wish to burden the Drafting Committee with a new task. He was prepared to accept the text as it stood, with the retention of the concluding words " if so agreed ", which were necessary.

18. Mr. DENIS (Belgium) said that he had not proposed the deletion of the words " if so agreed ", but had merely asked for clarification of their meaning and effect. He had the impression that article 13 had been intended to serve the dual purpose of setting out the procedures whereby instruments were communicated and at the same time determining the moment at which consent was established. The drafting could perhaps be improved by dissociating the two ideas. The present text, with the qualification " if so agreed " for sub-paragraph (*c*), described the position in so far as the choice of procedure was concerned. As for the moment at which consent was established, the rule surely was that, unless the treaty otherwise provided, it was, according to the case, (*a*) the moment when the instruments were exchanged between the contracting States, (*b*) the moment when they were deposited with the depositary, or (*c*) the moment when they were notified.

19. Sir Humphrey WALDOCK (Expert Consultant) said that if the words " if so agreed " did create the misunderstanding which the Belgian representative had in mind, they should, in his opinion, be deleted. They would seem to have been included because sub-paragraph (*c*) referred to rather special methods which were becoming very common in current practice.

20. The PRESIDENT said that the matter was one which could be dealt with by the Drafting Committee. He invited the Conference to vote on article 13.

*Article 13 was adopted by 99 votes to none, with 1 abstention.*[6]

*Statement by the Chairman of the Drafting Committee on articles 14-18*

21. Mr. YASSEEN, Chairman of the Drafting Committee, said that, in order to bring it into line with the titles of articles 9 *bis*, 10, 10 *bis*, 11 and 12, the Drafting Committee had amended the title of article 14 to read " Consent to be bound by " instead of " Consent relating to ". At the beginning of paragraph 1, it had deleted the words " to the provisions " after " without prejudice ", since those words were not to be found in the similar expressions in articles 23 *bis* and 62; in the Spanish version the words " *de lo dispuesto en* " had been added. In the English text, the Drafting Committee had replaced the expression " made plain " in paragraph 2 by " made clear " in order to bring it into line with the usual terminology of the convention.

22. In the title of article 15, the Drafting Committee had deleted the words " of a State " after the word " obligation ", in order to simplify the wording, since it was obvious that it referred to an obligation of a State.

23. In the title of Section 2, the Drafting Committee had adopted an amendment by Hungary (A/CONF.39/C.1/L.137) to delete the words " to multilateral treaties " after the word " reservations ", since the adjective " multilateral " did not modify the noun " treaty " in the definition of a reservation given in article 2, paragraph 1 (*d*); that did not, of course, prejudice the question of reservations to bilateral treaties.

24. The Drafting Committee had also made a few minor drafting changes in articles 16, 17 and 18, of

[6] No change was made by the Drafting Committee.

which he need mention only two. First, in order to make the text of article 16 a little clearer, it had reworded sub-paragraph (*b*) to read " the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or ". The second was to article 18. The text approved by the Committee of the Whole for paragraph 2 of that article referred to the formulation of a reservation " on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval ". However, neither article 16 nor article 2, paragraph 1 (*d*) referred to the formulation of a reservation without adopting the text of a treaty; the Committee had therefore deleted the words " on the occasion of the adoption of the text " in article 18, paragraph 2.

*Article 14* [7]

*Consent to be bound by part of a treaty and choice of differing provisions*

1. Without prejudice to articles 16 to 20, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

*Article 14 was adopted by 99 votes to none.*

*Article 15* [8]

*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(*a*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(*b*) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

25. Mr. WYZNER (Poland) said that article 15 referred to two situations where a State was obliged to refrain from acts which would defeat the object and purpose of the treaty. In its present wording, sub-paragraph (*a*) was somewhat restrictive, since signature, it would seem, was not the only way in which a State could express its intention to be bound by a treaty. Such an intention could also be expressd by an exchange of notes or other instruments, as had been pointed out by several Latin American representatives. If the principle of good faith in the observance of treaties was to be fully implemented, some reference to that possibility should be included in sub-paragraph (*a*). His delegation had therefore submitted an amendment (A/CONF.39/L.16) for the insertion, after the words " it has signed the treaty ", of the words " or has exchanged instruments constituting the treaty ".

26. The PRESIDENT put the Polish amendment to the vote.

*The Polish amendment (A/CONF.39/L.16) was adopted by 65 votes to none, with 36 abstentions.*

*Article 15, as thus amended, was adopted by 102 votes to none.*

27. Mr. BILOA TANG (Cameroon) said he would like to have some clarification from the Expert Consultant of the meaning of the words " not unduly delayed " in sub-paragraph (*b*). After how long a time would entry into force be considered to have been " unduly delayed "?

28. Sir Humphrey WALDOCK (Expert Consultant) said that that was a question which could only be answered in the light of the circumstances of each case.

*Article 16* [9]

*Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) In cases not falling under paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

29. Mr. OTSUKA (Japan) said that his delegation, in conjunction with the delegations of the Philippines and of the Republic of Korea, had submitted an amendment (A/CONF.39/C.1/L.133/Rev.1) to the Committee of the Whole at the first session in the hope of improving the proposed rules on reservations by providing for machinery to test the compatibility of a proposed reservation to a treaty with the object and purpose of that treaty. Its amendment had, however, failed to obtain the support of the majority in the Committee of the Whole. His delegation now feared that the new rules embodied in article 16 and article 17 might lead to undesirable situations which would have the effect of permitting virtually any reservation that any party wished to make.

30. In view of those considerations, his delegation would have to abstain from voting on articles 16 and 17. Should those articles be adopted by the Conference, his delegation sincerely hoped that the future parties to the convention would develop a sound practice in the application of those articles, in order to ensure the maximum measure of integrity for future multilateral treaties.

31. Mr. WERSHOF (Canada) said that his delegation

[7] For the discussion of article 14 in the Committee of the Whole, see 18th and 61st meetings.

[8] For the discussion of article 15 in the Committee of the Whole, see 19th, 20th and 61st meetings.

An amendment was submitted to the plenary Conference by Poland (A/CONF.39/L.16).

[9] For the discussion of article 16 in the Committee of the Whole, see 21st, 22nd, 23rd, 24th, 25th and 70th meetings.

wished to make a statement of its understanding of the effect of articles 16 and 17.

32. At the 25th meeting of the Committee of the Whole on 16 April 1968 [10], the Expert Consultant, replying to questions put by the Canadian representative at the previous meeting in connexion with articles 16 and 17, had said:

> His answer to the first question was that a contracting State could not purport, under article 17, to accept a reservation prohibited under article 16, paragraph (*a*) or paragraph (*b*), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance. The second question was, where a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (*c*), could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes. Each contracting State remained completely free to decide for itself, in accordance with its own interests, whether or not it would accept the reservation.[10]

33. His delegation was prepared to vote for articles 16 and 17 on the understanding that the passage he had just quoted was a correct interpretation of the international law on the formulation of reservations and the acceptance of and objection to reservations.

34. Mr. BRAZIL (Australia) recalled that his delegation's attitude towards the complex problem of reservations had been stated at the 22nd and 24th meetings of the Committee of the Whole. It was still not convinced that the present articles 16 and 17 were a satisfactory solution to that problem; it would prefer the inclusion of a clause providing for some machinery of control, such as had been proposed by the Japanese delegation. His delegation would therefore have to abstain from voting on articles 16 and 17.

35. Mr. BILOA TANG (Cameroon) said that his delegation attached great importance to the right of every State to formulate reservations to a treaty, provided they were not incompatible with its object and purpose. It was therefore prepared to vote for articles 16 and 17.

*Article 16 was adopted by 92 votes to 4, with 7 abstentions.*

*Article 17* [11]

*Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs of this article and unless the treaty otherwise provides:

(*a*) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(*c*) An act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

36. Mr. KOVALEV (Union of Soviet Socialist Republics) said that the position of his delegation was that every State had a sovereign right to formulate reservations to a treaty and that it was unnecessary for such reservations to be accepted by other States. That view was fully in accordance with the trends of contemporary international law and with the principle of the widest possible participation of States in multilateral treaties. He noted that the attitude of the majority of delegations, expressed in two votes, differed from that of his own, and he did not therefore think it appropriate to reopen the debate on the whole problem of reservations. But his Government reserved the right to defend its point of view when drawing up future multilateral treaties.

37. To his delegation it seemed both wrong and dangerous to admit such a clause as paragraph 4 (*b*), which provided that " an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State ". Paragraph 4 (*b*) could have the effect of terminating the majority of existing treaties to which reservations and objections had been made. The principle stated in it was confirmed neither by accepted international practice nor by the frequently quoted advisory opinion of the International Court of Justice of 28 May 1951.[12]

38. In the interests of good sense and the stability of treaty relations, he would therefore appeal to the Conference to reverse the decision it had taken at the first session. He would not repeat the arguments

[10] See 25th meeting of the Committee of the Whole, paras. 2 and 3.

[11] For the discussion of article 17 in the Committee of the Whole, see 21st, 22nd, 23rd, 24th, 25th, 72nd and 85th meetings.

An explanatory memorandum (A/CONF.39/L.3) on the question of reservations to multilateral treaties, proposing an amendment to article 17, paragraph 4 (*b*), was submitted to the plenary Conference by the Union of Soviet Socialist Republics.

[12] See *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports, 1951*, p. 15.

advanced by his delegation at that session, but they were set out at length in the Soviet delegation's explanatory memorandum on the question of reservations to multilateral treaties (A/CONF.39/L.3), at the end of which would be found his delegation's amendment to article 17, paragraph 4 (*b*), to replace the word " precludes " by the words " does not preclude " and to insert the word " definitely " before the word " expressed ".

39. Mr. WYZNER (Poland) said that while his delegation generally supported the articles on reservations approved by the Committee of the Whole, it had serious doubts as to the propriety of the rule laid down in paragraph 4 (*b*) of article 17. That rule had been subjected to a most interesting analysis in the explanatory memorandum by the USSR delegation on the question of reservations to multilateral treaties (A/CONF.39/L.3). The presumption that a State objecting to a reservation to, say, one out of one hundred possible articles of a treaty, did not wish that treaty to enter into force between itself and the reserving State, was both unjustified and, from a juridical point of view, illogical. The natural presumption was in favour of the binding force of the remaining ninety-nine articles to which no reservation had been formulated.

40. Furthermore, the rule establishing a presumption in favour of the non-existence of treaty relations between the reserving and the objecting State found no support in the contemporary practice of States. Out of some forty-seven instruments printed in the United Nations *Treaty Series* containing objections to reservations, only three contained declarations to the effect that the objecting State did not consider the whole treaty as being in force between itself and the reserving State. Twenty-seven of those instruments expressed objections to reservations made in connexion with the 1958 Geneva Conventions on the Law of the Sea [13], and six instruments to reservations made in connexion with the 1961 Vienna Convention on Diplomatic Relations.[14] Almost all the objections related to reservations made by more than one State.

41. If paragraph 4 (*b*) of article 17 were applied in all those cases, the conclusion would have to be drawn that the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations were not in force between a significant number of States parties to the treaties. That made it clear that such a provision was not in keeping with the interest of sound treaty relations in general.

42. The Polish delegation was unable to support paragraph 4 (*b*) of article 17, in its present form and would vote in favour of the USSR amendment.

43. Mr. SUAREZ (Mexico) said that in the Committee of the Whole his delegation had declared itself satisfied with paragraph 4 (*b*) of article 17 and had voted for it. Upon further reflexion, however, it now considered that the text approved by the Committee of the Whole was inadequate and it would accordingly vote for the USSR amendment.

44. The Mexican delegation's present position was based on its view that the two principles governing the question of reservations and objections to reservations should be reconciled. The first principle was the freedom of sovereign States to enter into contracts, which meant that a contract was binding on a State only to the extent that the State concerned wished to be bound by it. The second principle was that of the integrity of multilateral treaties, the corollary of which was the prohibition of all reservations. That principle had been abandoned, in its absolute form, in order to allow the majority of States to accede, even partially, to as many multilateral treaties as possible. Obviously no State should be allowed to formulate a reservation which was incompatible with the object and purpose of a particular treaty. Only when a State's objection to a reservation was based on that specific ground would the treaty as a whole cease to be in force between the objecting State and the reserving State. Otherwise, the effect of an objection should fall only on those elements of the treaty to which a reservation had been formulated.

45. Viewed in that context, paragraph 4 (*b*) was unduly severe. The effect of even a minor reservation would be that the treaty would not come into force between the reserving and the objecting State. The best solution would be to ensure that the treaty remained binding on the States concerned except for the provisions to which a reservation had been formulated. A State often objected to a reservation not because of the legal effects which its objection would produce, but for other reasons. Recognition of that fact was implied in article 19, paragraph 3, which dealt with cases where a State expressly declared that it wished to continue to be bound by a treaty.

46. A State objecting to a reservation could, of course, declare that it was no longer bound by the treaty as between itself and the reserving State. Any such statement of intention should not be capricious or arbitrary and should only be made if the reservation destroyed the basic structure of the treaty. That assumption had been recognized by the International Law Commission in paragraph 1 of article 17, where it was stated that a reservation expressly authorized by a treaty did not require any subsequent acceptance by the other contracting States. The provision simply meant that, where a reservation was authorized, the reserving State was merely availing itself of a right which could not be restricted or denied by an objection.

47. An objection to a legitimate reservation should not be allowed to deprive a treaty of its effects when its application could be beneficial to both the reserving and objecting State. That had happened in the past and it was in order to avoid it happening in the future that the Mexican delegation had now decided to support the USSR amendment.

48. Mr. NETTEL (Austria) requested a separate vote

[13] See *Multilateral Treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No. E68.V.3), pp. 322, 323, 327, 328 and 333.

[14] *Ibid.*, pp. 45-47.

on the words " the limited number of the negotiating States and " in paragraph 2. He said he was in favour of their deletion, since there was nothing to indicate what constituted a limited number of States within the meaning of the article.

49. Mr. BOLINTINEANU (Romania) said that his delegation maintained its view that paragraph 4 (*b*) required rewording along the lines proposed in the USSR amendment. An objection by a contracting State to a reservation should only affect those provisions with respect to which the reservation had been formulated, unless a contrary intention had been definitely expressed by the objecting State. The solution proposed in the present text of paragraph 4 (*b*) was inconsistent with the usual practice of States, which was not to prevent the entry into force of the remainder of a treaty simply because an objection had been lodged in connexion with a reservation. An objection to a reservation should be interpreted in accordance with the principle *ut magis valeat*.

50. One argument adduced in support of paragraph 4 (*b*) was that the present text would be more appropriate where an objecting State inadvertently failed to state its contrary intention and thus prevented a treaty from coming into force, although that had not been its intention. That argument was not convincing. The possibility of such a thing happening would be avoided by providing that a contrary intention must be definitely expressed. Adoption of the Soviet Union amendment would safeguard the purpose of reservations, which was to ensure that as many States as possible participated in multilateral treaties.

51. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that his delegation supported the Soviet Union amendment to paragraph 4 (*b*) for the following reasons. First, it preserved a proper respect for the principle of the sovereign equality of both the reserving and the objecting State by recognizing not only the right to formulate a reservation to a treaty but also the right to object to a reservation. Secondly, it allowed the objecting State to decide whether or not the treaty as a whole should come into force between itself and the reserving State. At the same time it presumed that in principle the treaty should come into force, since there was no reason to presume that a reservation to a particular provision affected the integrity of the treaty. Thirdly, it was a rule consistent with the progressive development of international law since it would allow more States to become parties to general multilateral treaties of interest to the international community. It thus reaffirmed the principle of universality.

52. When the question had been discussed in the Committee of the Whole at the first session, no fundamental objections had been raised to the principle of the reversal of the presumption. It had been argued that such a reversal would impose an excessive obligation upon States, and that an objecting State might inadvertently enter into relations with the reserving State through the treaty to which the reservation had been formulated, when in fact the objecting State wished to avoid such relations. But it was for the State to which a reservation had been communicated to determine its position and to decide whether it wished to object to the reservation and, if so, whether the treaty as a whole, except for the provisions to which the reservation had been formulated, should remain in force between itself and the reserving State. The formulation of reservations incompatible with the object and purpose of a treaty was prohibited under article 16 (*c*). It would therefore be better to start from the presumption that those parts of a treaty to which reservations could not be formulated were in force between the objecting and the reserving State.

53. In the light of those views, the Ecuadorian delegation would vote in favour of the Soviet Union amendment.

54. Mr. WERSHOF (Canada) said that his delegation could not agree with the arguments adduced in support of the USSR amendment. The present text of paragraph 4 (*b*) had been proposed by the International Law Commission and approved by the Committee of the Whole at the first session. Amendments similar to the USSR amendment had been rejected after a lengthy debate.

55. The combined effect of articles 16 and 17 as approved by the Committee of the Whole was already quite wide and sufficiently flexible. The Canadian delegation would therefore vote for article 17 in its present form. When a contracting State objected to a reservation, it was reasonable that its objection should preclude the entry into force of a treaty as between itself and the reserving State.

56. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that article 17 restricted the principle of universality and limited the participation in multilateral treaties of a large number of States. The concept on which it was based might perhaps have been justified at a time when the international community had been about a quarter of its present size. With the creation of the United Nations, which now numbered over one hundred States, the interests of all must be taken into account. A State which formulated a reservation to a treaty should not be precluded from participation in the treaty as a whole if it accepted the main provisions of the treaty. That view had been supported by the International Court of Justice in the advisory opinion it had delivered in 1951 and by the United Nations General Assembly in its resolution 598 (VI).

57. The principle most consistent with present practice was that the effect of a reservation did not automatically invalidate a treaty between the objecting and the reserving State. The Conference should not now endorse the concept expressed in paragraph 4 (*b*) of article 17, which had become obsolete and was fraught with discriminatory elements.

58. His delegation would therefore vote against paragraph 4 (*b*) and in favour of the Soviet Union amendment.

59. Mr. CARMONA (Venezuela) said that his delegation supported the USSR amendment to para-

graph 4 (*b*). Venezuela had made a reservation to article 6 of the 1958 Convention on the Continental Shelf and the Netherlands had objected to that reservation,[15] which related only to the question of the division of the continental shelf by the median line. In February 1969 the International Court of Justice [16] had decided that such a reservation was not incompatible with the basic principles of the Convention. If the present wording of sub-paragraph 4 (*b*) were maintained, the result in the case he had referred to would have been that the Convention on the Continental Shelf would not be in force between Venezuela and the Netherlands, although it contained matters of concern to both countries, and it was in the interests of the international community as a whole that it should be applied. In his view, it should be left to the free will of the objecting State to decide whether or not it wished the treaty as a whole to remain in force between the two States concerned.

60. With respect to paragraph 2 of article 17, it would be remembered that, at the 84th meeting of the Committee of the Whole, France had withdrawn a number of amendments on the same lines, and it would hardly be logical to reject the principle concerned as a general rule for the convention, while retaining it in an article concerning reservations where it would be more harmful.

61. It appeared that the International Law Commission had been concerned over the right of veto which sometimes applied to a treaty concluded between a small number of States. In such treaties as those governing the European Common Market or the Latin American Common Market, the consent of all the States concerned was necessary for the economic union envisaged to be realized. Such treaties reserved the right of any of the States not to accept a given decision, and opposition to a decision would make its acceptance impossible. But if that principle were accepted as it stood, it would amount to reintroducing the old principle of requiring unanimity in the conclusion of treaties, which had fortunately been abandoned in recent years. It would therefore not be sufficient to delete the words " the limited number of the negotiating States and ", as proposed by the Austrian representative, because that would still leave the door open to a veto. The whole of paragraph 2 should be deleted, and he therefore asked that a separate vote be taken on that paragraph, in order to make clear the decision of the Conference on that point.

62. Mr. RUEGGER (Switzerland) said he was not surprised that so many difficulties had arisen over the thorny problem of reservations. With regret he must confess that his delegation was as puzzled now as it had been at the first session about paragraph 3 of article 17, regarding which he would refer to his delegation's statement at the 21st meeting of the Committee of the Whole. Switzerland still considered that it would be better, instead of attempting to resolve that particular problem in the convention, to delete paragraph 3.

63. The discussion at the present meeting and at the previous one had emphasized the need for legal machinery to resolve the problems that might arise, since it was obvious that difficulties would occur that could not be solved in advance.

64. Mr. HUBERT (France), referring to the proposal by the Austrian representative to delete from paragraph 2 the reference to " the limited number of the negotiating States ", said that in the Committee of the Whole, France had withdrawn its amendments concerning restricted multilateral treaties in order to facilitate the work of the Conference. Its withdrawal of those amendments did not mean that the French delegation had changed its views, and in the light of that withdrawal, it much regretted the proposal to delete the provisions drafted by the International Law Commission. The objection that the article lacked precision was not convincing, since many other articles lacked precision, but had nevertheless been accepted because they were regarded as necessary. The whole of paragraph 2 should be retained in the convention as it stood.

65. The French delegation appreciated the force of the arguments put forward by the Soviet Union representative concerning paragraph 4 (*b*), and would vote for the Soviet Union amendment.

66. Mr. RATTRAY (Jamaica) said that article 17 could not apply until the criteria regarding reservations in article 16 had been met. Furthermore, if a reservation was permitted, article 18 provided that it must be communicated to the other contracting parties, and that if any State objected to such a reservation, it must communicate its objection to the other contracting parties. Consequently, there was every opportunity for any contracting party to become aware of the content of a reservation, and to state its position regarding such reservation. The question was whether, when a State objected to a reservation, it should take the additional step of indicating whether or not it considered itself to be bound by the treaty as a whole in relation to the State making the reservation. His delegation was prepared to accept either the Soviet Union's formula or that proposed by the International Law Commission. Article 18 provided an appropriate opportunity for a State to explain an objection and to say whether, in the light of the nature of the reservation concerned, it considered itself bound by the treaty in relation to the reserving State. Consequently he would not vote against the Soviet Union proposal, but at the same time he was prepared to accept the International Law Commission's draft.

67. Mr. NĚMEČEK (Czechoslovakia) said that his delegation maintained the view it had expressed at the first session that all States should strive to ensure that contractual relations should be as extensive as possible. It would not further that aim to have a provision in the convention which automatically precluded the existence of treaty relations between two States if one of them objected to a reservation made by

[15] *Ibid.*, p. 333.

[16] See *North Sea Continental Shelf, Judgment, I.C.J. Reports, 1969*, p. 3.

the other. It was desirable to avoid misunderstandings that might have serious legal consequences, and his delegation would therefore support the USSR amendment.

68. Mrs. ADAMSEN (Denmark) said she regretted that her delegation could not agree with the Austrian proposal to delete the reference in paragraph 2 to a limited number of negotiating States. On the contrary, in her delegation's view, the very fact that a limited number of States concluded a treaty was sufficient reason to apply a veto rule, regardless of the object and purpose of the treaty.

69. Denmark was a party to many treaties concluded by a small number of States, and was likely to conclude many more such treaties in the future. Consequently, it was important for her Government that the future convention on the law of treaties should include a rule that a reservation to such treaties required acceptance by all parties. Denmark would therefore vote for paragraph 2 of article 17 as submitted to the Conference.

70. Mr. SHUKRI (Syria) said that at the first session his delegation had proposed an amendment to paragraph 4 (*b*) (A/CONF.39/C.1/L.94), providing that an objection by another contracting State to a reservation would not *ipso facto* preclude the entry into force of the treaty as a whole, but only the application of the provision to which the reservation referred, unless the other party expressed a desire to cancel the treaty *in toto*. Like the Soviet Union and Poland, Syria considered that that formula was more consistent with international practice. Since any State lodging a reservation must do so within the limits laid down in article 16, there did not appear to be any sound legal argument against restricting the effects of such reservations. Not to limit the effect might lead to abuses, since it would enable a contracting party arbitrarily to preclude the entry into force of the whole treaty merely on account of a reservation to a minor provision. The Conference should reflect on the confusion that could result with regard to existing treaties to which reservations had been attached, and which nevertheless still remained in force between the reserving and objecting States.

71. For those reasons Syria supported in principle the Soviet Union amendment as an improvement to paragraph 4 (*b*). It would vote for that amendment, and if it was not adopted would abstain from voting on article 17 as a whole.

72. Sir Humphrey WALDOCK (Expert Consultant), referring to paragraph 2, said that there was an element of compromise in the drafting of the articles on reservations as a whole. When the International Law Commission had begun its work on those articles, many States had had strong misgivings concerning the whole notion of a flexible system of reservations. In drafting those articles, the Commission had had to take into account the various points of view on the question as a whole in order to arrive at a text that had some prospect of general acceptance. The Commission had regarded one point as essential in order to arrive at a compromise, and that was the rule in paragraph 2 which limited the flexible system for some types of treaty.

73. Paragraph 4 (*b*) also formed part of the general structure of the articles on reservations directed towards arriving at a text that would have the best chance of winning general agreement. The International Law Commission had taken the view that, if the rule had been expressed conversely, so as to put the onus on the objecting State to say that the treaty was to come into force, that might be some encouragement to the free making of reservations; and also that perhaps the logical intention to attribute to a State was an intention not to have treaty relations with the reserving State. That had certainly been the classical position in the past and it was thought perhaps that that was the intention that should be attributed to the objection. Furthermore, an objection might be made with the aim of trying to persuade the reserving State to withdraw its reservation, but the pressure to withdraw it would be only slight if the treaty was to come into force in any case. Those were the kind of considerations that seemed to justify the formulation of a rule of that kind.

74. However, as some representatives had pointed out, the problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear. The Commission had discussed various possible ways of formulating the rule; it had not considered that any great question of substance was at issue. The aim had been to find what was the normal intention to attribute to a State. It would appear that the views of members of the Commission and of delegations had been evolving over the past seven or eight years. What was required now was to determine the general sense of the Conference regarding the rule it would prefer to include in the convention.

75. Sir Francis VALLAT (United Kingdom) said that he wished to explain his delegation's vote on article 17. The United Kingdom had voted for article 16 because it supported the principle that a reservation should not be formulated if it was incompatible with the object and purpose of a treaty. His delegation did not feel that article 17 followed the application of that principle to its logical conclusion. The article opened the door too wide and was too flexible, and consequently the United Kingdom would abstain from voting on article 17 as a whole. That was because his delegation did not wish to raise objections if the Conference as a whole liked article 17 as it stood.

76. The same applied to the Soviet Union amendment; if the Conference preferred that text, the United Kingdom would raise no objections, and would accordingly abstain from voting on the amendment.

77. The PRESIDENT said that he would invite the Conference to vote first on the Austrian amendment for the deletion of the phrase " the limited number of negotiating States and " in paragraph 2.

*The Austrian amendment was rejected by 75 votes to 6, with 18 abstentions.*

78. Mr. TAYLHARDAT (Venezuela) said that in view of the result of that vote his delegation withdrew its request for a separate vote on paragraph 2.

79. The PRESIDENT invited the Conference to vote on the USSR amendment to paragraph 4 (*b*).

*The USSR amendment (A/CONF.39/L.3) was adopted by 49 votes to 21, with 30 abstentions.*

80. Mr. ROMERO LOZA (Bolivia) said that he had voted for the Soviet amendment because Bolivia considered that an objection to a secondary clause of a treaty should not preclude the entry into force of the treaty as a whole between the reserving and objecting States. He wished to make it clear, however, that, although such a reservation would not affect the entry into force of the treaty as between the two parties concerned, it would still apply with respect to the article concerned.

81. Mr. USENKO (Union of Soviet Socialist Republics) said that he agreed with the representative of Switzerland that paragraph 3 should be deleted; it was already covered by the provisions of article 4. He therefore asked for a separate vote on paragraph 3.

82. The PRESIDENT invited the Conference to vote on paragraph 3.

*Paragraph 3 was adopted by 61 votes to 20, with 18 abstentions.*

*Article 17 as a whole, as amended, was adopted by 83 votes to none, with 17 abstentions.*

The meeting rose at 6.35 p.m.

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## ELEVENTH PLENARY MEETING

*Wednesday, 30 April 1969, at 3.15 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 17* (Acceptance of and objection to reservations) *(continued)*

1. The PRESIDENT invited any representatives who wished to do so to explain their votes on article 17 at the previous meeting.

2. Mr. STEVENSON (United States of America) said his delegation wished to make clear what it understood to be the meaning of the term " object and purpose " as used in articles 15, 16 and 17 and in various subsequent articles. At the first session, his delegation had co-sponsored an amendment (A/CONF.39/C.1/L.126 and Add.1) to replace the words " object and purpose " in article 16, sub-paragraph (*c*) by the words " character or purpose ", because it had been uncertain whether the traditional reference to the object and purpose of the treaty was intended to cover the concept of the nature and character of a treaty. The amendment had been referred to the Drafting Committee, which had not considered it proper to change the expression " the object and purpose of the treaty ", which had been used by the International Court of Justice and was to be found in many legal texts.

3. His delegation noted that the International Court of Justice, in its advisory opinion on the Genocide Convention, had used the term " object and purpose " in summarizing its conclusions on the admissibility of reservations, thus setting up the criterion of compatibility with the object and purpose of the treaty. In reaching its conclusions, however, the Court had emphasized that the kind of reservation that might be made was governed by the " special characteristics " of the Convention; the Court had stated that " The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties ".[1] In the light of that opinion, the United States understood the expression " object and purpose of the treaty " in its broad sense as comprehending the origins and character of the treaty and the institutional structure within which the purpose of the treaty was to be achieved.

4. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had voted in favour of article 17, although the wording and content of some of its provisions, such as paragraphs 3 and 4 (*c*), left much to be desired. In particular, his delegation wished to state categorically that it did not regard paragraph 5 as *lex lata*. The provision clearly represented a progressive development of international law, but it was not a wholly satisfactory one. His delegation had no doubt concerning the existence of the principle of acquiescence in international law and would have been quite prepared to accept that principle instead of paragraph 5; on the other hand, there was no rule or principle in customary law under which a reservation would be regarded as accepted by a State merely by reason of its silence or of the passage of time. Indeed, in the Committee of the Whole his delegation had consistently refrained from supporting amendments advocating acquiescence through the mere passage of time, and it therefore had considerable doubts as to the desirability or workability of paragraph 5.

*Article 18* [2]

*Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing

[1] *I.C.J. Reports, 1951*, p. 23.

[2] For the discussion of article 18 in the Committee of the Whole, see 23rd and 70th meetings.

and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

*Article 18 was adopted by 90 votes to none.*[3]

*Article 19* [4]

*Legal effects of reservations*

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

(*a*) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(*b*) Modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the reservation has the effects provided for in paragraphs 1 and 2.

5. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made no change in the title of article 19 proposed by the International Law Commission. It had, however, altered the wording of paragraph 3 so as to take into account the USSR amendment (A/CONF.39/L.3), which the Conference had incorporated in article 17, paragraph 4 (*b*) at the previous meeting.

6. Mr. HADJIEV (Bulgaria) said that, at the first session, the Bulgarian, Romanian and Swedish delegations had submitted an amendment (A/CONF./39/C.1/L.157 and Add.1) with a view to reformulating paragraph 1 of article 19 in more precise terms. The amendment had been referred to the Drafting Committee which, however, had not taken it into account. His delegation was convinced that it would be desirable to incorporate such an amendment, and proposed that it should be referred once again to the Drafting Committee. If the amendment were adopted, it would not only eliminate some unnecessary repetition from the text, but would have the advantage of stressing the bilateral relationship which the reservations machinery established between the reserving State and the State accepting the reservation.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had considered the amendment, but had decided not to incorporate it in the text of article 19. Nevertheless, if the Conference so wished, the Drafting Committee was prepared to review the text.

8. The PRESIDENT suggested that the Conference should vote on the text before it, on the understanding that the Drafting Committee would again consider the amendment submitted by the Bulgarian delegation.

9. Mr. WERSHOF (Canada) asked whether the Conference would have an opportunity to reconsider the text of article 19 in the event of the Drafting Committee deciding to incorporate the amendment, which some delegations regarded as substantive.

10. The PRESIDENT said that, if the Drafting Committee decided to alter the text after the vote, the article would be resubmitted to the Conference.

*Article 19 was adopted by 94 votes to none.*[5]

*Article 20* [6]

*Withdrawal of reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative in relation to another contracting State only when notice of it has been received by that State.

11. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not altered the title of article 20, but had considered that paragraph 2 did not indicate clearly enough the State in relation to which the withdrawal of a reservation became operative. It had therefore replaced the last phrase of that paragraph by the words " the withdrawal becomes operative in relation to another contracting State only when notice of it has been received by that State ".

12. The PRESIDENT drew attention to the two amendments to article 20 submitted by the Hungarian delegation (A/CONF.39/L.17 and L.18).

13. Mrs. BOKOR-SZEGÓ (Hungary) said that her delegation's amendment to paragraph 1 (A/CONF.39/L.17) related to drafting only and was designed to bring that provision into line with article 18, where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing. The Hungarian delegation had submitted a similar amendment (A/CONF.39/C.1/L.178) during the first session, but the Drafting Committee had not taken that suggestion into account, although it had not given any reasons for its decision.

14. The Hungarian proposal to include a new para-

[3] For a subsequent change in the text of article 18, see 29th plenary meeting.

[4] For the discussion of article 19 in the Committee of the Whole, see 25th and 70th meetings.

[5] For further discussion of article 19, see 29th, 32nd and 33rd plenary meetings. The title and text of the article were amended.

[6] For the discussion of article 20 in the Committee of the Whole, see 25th and 70th meetings.

Amendments were submitted to the plenary Conference by Hungary (A/CONF.39/L.17 and L.18).

graph 2 (A/CONF.39/L.18) had been submitted in the belief that, if a provision on the withdrawal of reservations was included, it was essential that there should also be a reference to the possibility of withdrawing objections to reservations, particularly since that possibility already existed in practice. The proposal to amend paragraph 3 followed logically from the proposed new paragraph 2. Paragraph 3 restated the provisions of paragraph 2 as revised by the Drafting Committee at the first session, with the addition of a new sub-paragraph (*b*), to make it clear that the withdrawal of an objection to a reservation became operative only when notice of it had been received by the State which had formulated the reservation concerned; her delegation believed that, whereas the withdrawal of a reservation affected the existing relations between the reserving State and the other parties, withdrawal of an objection directly concerned only the objecting State and reserving State. If the amendment were adopted, the title of article 20 would have to be changed.

15. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at the first session, the Drafting Committee had not incorporated the Hungarian amendment to paragraph 1 on the ground that it was a substantive proposal on which a decision should be taken by the Conference.

16. Mr. PINTO (Ceylon) said that the International Bank for Reconstruction and Development had suggested in its second written statement (A/CONF.39/7/Add.2, paragraph 10) that the words " or organization " should be inserted after the words " of a State " in article 20, paragraph 1. He believed that that was a useful amendment, which would eliminate the apparent inconsistency between the text of article 17, paragraph 3, as adopted by the Conference at the previous meeting and article 20, paragraph 1 as submitted by the Drafting Committee. He therefore suggested that the Drafting Committee should consider inserting the words " or organization " in paragraph 1.

17. Mr. MAAS GEESTERANUS (Netherlands) supported that suggestion.

18. Mr. BRAZIL (Australia) noted that the title of Section 2 of Part II which had been " Reservations to multilateral treaties " in the International Law Commission's draft, had been abbreviated to " Reservations ", without any reference to multilateral treaties. The Chairman of the Drafting Committee had stated at the previous meeting that the deletion had been made in order to avoid prejudging the question of the possibility of entering reservations to bilateral treaties. The Australian delegation did not wish to engage in a discussion of that theoretical question, but wanted to ascertain whether its understanding that articles 16 and 17 applied only to multilateral treaties was correct. If so, it might be best to revert to the title proposed by the International Law Commission.

19. The PRESIDENT said that, personally, he had been surprised to hear that the Drafting Committee had entertained the idea of reservations to bilateral treaties. As a law student, he had been taught that that idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation. He had interpreted the abbreviation of the title of Section 2 as an admission that the applicability of reservations only to multilateral treaties was self-evident. If there were any doubt on the matter, the Drafting Committee would do well to revert to the title proposed by the International Law Commission.

20. Mr. YASSEEN, Chairman of the Drafting Committee, said that some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties. The deletion of the reference to multilateral treaties from the title of Section 2 did not, however, mean that the Drafting Committee had decided that reservations to bilateral treaties were possible. The purpose of the deletion had merely been not to prejudge the question in any way.

21. Speaking as the representative of Iraq, he said he fully shared the President's view that any change proposed to a bilateral treaty represented a new offer and could not be regarded as a reservation.

22. The PRESIDENT asked whether the Drafting Committee agreed that the procedures set out in the articles in Section 2 related only to multilateral treaties.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said he was not in a position to confirm that statement on behalf of the entire Drafting Committee, which had not been unanimous on the point.

24. The PRESIDENT said that, independently of the principle involved, the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties.

25. Mr. BRAZIL (Australia) said that his delegation was satisfied with the explanation given by the President.

26. Mr. MARESCA (Italy) said that diplomacy, of which treaties were the solemn conclusion, was a written art: the most eloquent oratory was of no avail unless the provisions agreed upon were satisfactorily written down. All the component parts of the convention must be governed by that fundamental requirement of diplomatic style. Reservations must of course be formulated in acceptable terms, and all representatives who had experience of drafting in ministries of foreign affairs were well aware of the difference between the general idea of a reservation and its actual written formulation. That consideration applied equally to the converse operation of the withdrawal of a reservation; reservations might be regarded as the disease of treaty-making, and the withdrawal of reservations as the convalescence and cure.

27. The relations between a reservation and an objection to a reservation was the same as that between a claim and a counter-claim. The extinction of a claim, or the withdrawal of a reservation, was counterbalanced by the extinction of a counter-claim or the

withdrawal of an objection to a reservation, which was equally a diplomatic and legal procedural stage in treaty-making.

28. His delegation therefore whole-heartedly supported both the Hungarian amendments.

29. Mr. CASTRÉN (Finland) said that his delegation, too, supported the Hungarian amendment to paragraph 1 (A/CONF.39/L.17), particularly since Austria and Finland had submitted a similar amendment (A/CONF.39/C.1/L.4 and Add.1) during the first session. His delegation also agreed with the idea and content of the second Hungarian amendment (A/CONF.39/L.18).

30. Sir Francis VALLAT (United Kingdom) said he considered that both the Hungarian amendments were substantive, and should be voted on by the Conference. His delegation could support the amendment to paragraph 1, in the belief that clarity of action in that respect was desirable.

31. The United Kingdom also considered it useful to lay down a procedure for the withdrawal of objections to reservations, and could therefore support the Hungarian proposal for a new sub-paragraph 3 (*b*). On the other hand, it believed that the last phrase of the proposed new paragraph 2 was superfluous, in view of the differing nature of reservations and objections to reservations; the consent of the reserving State was self-evidently not required for the withdrawal of the objection, and an express provision to that effect might suggest that there was some doubt on the point. His delegation would therefore support both the Hungarian amendments if the concluding phrase were omitted from the proposed new paragraph 2.

32. Mr. VEROSTA (Austria) said that his delegation agreed with the Australian representative that it might be inadvisable to drop the reference to multilateral treaties from the title of section 2.

33. His delegation could support both the Hungarian amendments.

34. The PRESIDENT suggested that the words " in writing " might be inserted after the word " withdrawn " in the new paragraph 2 proposed by the Hungarian delegation.

35. Mrs. BOKOR-SZEGÓ (Hungary) said that her delegation could accept that suggestion and the United Kingdom proposal to delete the words after " at any time " from the new paragraph 2.

36. The PRESIDENT invited the Conference to vote on the Hungarian amendment to paragraph 1 (A/CONF.39/L.17).

*The amendment was adopted by 92 votes to none, with 3 abstentions.*

37. The PRESIDENT invited the Conference to vote on the Hungarian proposal for a new paragraph 2 and paragraph 3 (A/CONF.39/L.18).

*The proposal was adopted by 93 votes to none, with 3 abstentions.*

38. Mr. WERSHOF (Canada) said that his delegation had abstained in the vote on the second Hungarian amendment (A/CONF.39/L.18) because paragraph 3 of the Hungarian draft was based on the text approved by the Committee of the Whole at its 70th meeting, whereas the Drafting Committee had since improved that wording. It would be a pity if that improvement were to be lost merely because the Hungarian amendment had been submitted before the Drafting Committee's text. His delegation's abstention had not been prompted by the substance of the Hungarian amendment.

39. Mr. YASSEEN (Iraq) said that his delegation had abstained from voting on the first Hungarian amendment because the inclusion of the words " in writing " introduced an unnecessary additional condition into a procedure which should be facilitated as much as possible. It had abstained from voting on the second Hungarian amendment because it considered the new paragraph to be self-evident and therefore redundant.

40. The PRESIDENT suggested that the problem raised by the Canadian representative could be solved simply by requesting the Drafting Committee to align the text of the Hungarian amendment with the wording submitted by the Drafting Committee.

*It was so agreed.*

41. The PRESIDENT invited the Conference to vote on article 20, as amended.

*Article 20, as amended, was adopted by 98 votes to none.*[7]

*Statement by the Chairman of the Drafting Committee on articles 21-26*

42. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 21 to 26 constituted Section 3 of Part II and Sections 1 and 2 of Part III.

43. Section 3 of Part II consisted of articles 21 and 22. Article 22 in the International Law Commission's draft had been entitled " Entry into force provisionally ". The amendments made by the Committee of the Whole to the text of article 22 had led the Drafting Committee to alter that title to " Provisional application ". It had accordingly changed the title of Section 3 to read: " Entry into force and provisional application of treaties ".

44. Section 1 of Part III consisted of articles 23 and 23 *bis*. Article 23 *bis* was a new article [8] which the Drafting Committee had entitled " Internal law and observance of treaties ".

45. Section 2 of Part III consisted of articles 24, 25 and 26. The Drafting Committee had not altered the titles of articles 24 and 26. It had, however, changed the title of article 25 to " Territorial scope of treaties ", a change based on the wording of an amendment by the Ukrainian SSR (A/CONF.39/C.1/

[7] For subsequent changes in the title and text of article 20, see 29th plenary meeting.

[8] See 72nd meeting of the Committee of the Whole, paras. 29-33.

L.164). It had also altered the Spanish title but had left the French title unchanged because it corresponded to the new English title.

46. The Drafting Committee had made very few changes, all of them strictly of a drafting character, to the texts of articles 21 to 26. He would only mention one of those changes. The earlier English version of article 23 *bis* began with the words " No party may invoke the provisions ... ". The Drafting Committee had considered that it would be more appropriate to begin the text of the article with the words " A party may not invoke the provisions ... " rather than with the words " No party ". Corresponding changes had been made in the other language versions.

*Article 21* [9]

*Entry into force*

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

47. Mr. KEARNEY (United States of America) said that, as the Conference was about to adopt article 21 on entry into force, it was a matter for gratification to learn that the Treaty for the Prohibition of Nuclear Weapons in Latin America had entered into force on 25 April 1969 with its ratification by Barbados. That development was an example of the high participation by the Latin American States in the control of armaments. His country was proud to have been associated with that effort by countries of the Western Hemisphere and wished to pay a warm tribute to them for that historic achievement.

48. Mr. SINCLAIR (United Kingdom) said he noted with satisfaction that the new paragraph 4 of article 21 contained the substance of an amendment which had been proposed by his delegation (A/CONF.39/C.1/L.186). In recording his approval of article 21 on entry into force, he wished in turn to express his country's deep satisfaction at the news of the entry into force of the Treaty for the Prohibition of Nuclear Weapons in Latin America, which represented an important advance in the field of arms control and disarmament, and he congratulated the Latin American Governments concerned in that great and historic enterprise, with which the United Kingdom had been glad to be associated.

49. Mr. SUAREZ (Mexico) said he sincerely appreciated the good wishes extended by the United States and United Kingdom delegations at the entry into force of the treaty, known as the Treaty of Tlatelolco, which was the work of all the Latin American countries and which was evidence of their love of peace and sense of international solidarity.

50. Mr. KHLESTOV (Union of Soviet Socialist Republics) requested the Drafting Committee to find a better Russian translation for the words " in such manner " in article 21, paragraph 1; the one given in the present version was unsatisfactory.

51. The PRESIDENT said that the necessary correction would be made to bring the Russian text into line with the others.

*Article 21 was adopted by 99 votes to none.*

*Article 22* [10]

*Provisional application*

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(*a*) The treaty itself so provides; or

(*b*) The negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

52. Mr. MOLINA ORANTES (Guatemala) said that his delegation opposed article 22. Guatemala's Constitution precluded its Government from contracting international obligations by means of treaties unless such treaties were first approved by the Legislature. That was in order to ensure that such obligations did not conflict with Guatemala's internal legislation or vital interests. Legislative approval meant that there was no such conflict and that consquently the treaty could be ratified by the Executive and enter into force.

53. The provisional application provided for under article 22 would have the effect of creating obligations for the signatory State without the prior approval of the legislature; although the government might subsequently decide not to participate in the treaty, the obligations created during the period of provisional application would have given rise to legal relations whose validity would be questionable, and that might lead to objections on the ground of their unconstitutional character.

54. Because of those constitutional considerations, his delegation could not vote for article 22 in the form proposed by the Committee of the Whole.

55. Sir Francis VALLAT (United Kingdom) said that his delegation approved of article 22 as proposed by

[9] For the discussion of article 21 in the Committee of the Whole, see 26th and 72nd meetings.

[10] For the discussion of article 22 in the Committee of the Whole, see 26th, 27th and 72nd meetings.

the Committee of the Whole, subject to the following comments.

56. It was his delegation's understanding that the inclusion of the phrase " pending its entry into force " in paragraph 1 did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States. A régime where a treaty had entered into force definitively between certain States, but was nonetheless being applied provisionally by other States, was not unknown in international practice.

57. Another point arose in connexion with paragraph 1. There were instances in international practice where the text of a general multilateral convention had been adopted but where the necessary number of ratifications required for entry into force had not subsequently been forthcoming. If that situation occurred, certain of the negotiating States, but not necessarily all of them, might come together and agree that the treaty or part of the treaty should be applied provisionally between them. Accordingly, it was his delegation's understanding that paragraph 1(*b*) of article 22 would apply equally to the situation where certain of the negotiating States had agreed to apply the treaty or part of the treaty provisionally pending its entry into force.

58. Lastly, he wished to point out that the last sentence of paragraph (3) of the International Law Commission's commentary to article 23 stated: " The words 'in force' of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21 ". At the first session, the Drafting Committee had redrafted article 22 in terms of provisional application rather than of provisional entry into force. It was his delegation's understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes which had been incorporated into the International Law Commission's text.

59. Mr. VEROSTA (Austria) said that his delegation fully realized that the present closely-knit structure of international relations might require the immediate application of a treaty, and Austria accordingly supported article 22 in its amended form. However, careful study revealed an aspect that appeared to have been overlooked in the text, although it had been referred to several times during the discussion on the article. That aspect related to the time-limit between the moment when the provisional application began, and the moment of final acceptance of the treaty.

60. His delegation considered that provisional application of a treaty was an exception to the rule, and ought not to become an established legal institution offering a State the possibility of making use of the advantages of a treaty while at the same time giving it the opportunity of ending its application of the treaty unilaterally at any time, in contradiction to the obligations under article 15.

61. The Austrian delegation therefore suggested that article 22 be amended by the inclusion of a new paragraph 3 providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time-limit regarding its final acceptance of the treaty. The rather vague term " adequate time-limit " might be objected to, but a prior determination of what the time-limit ought to be would be difficult, since it would vary from case to case. His delegation believed that the amendment it had suggested did not imply any obligation regarding a final acceptance of the treaty, but clearly established an obligation to take a position regarding acceptance as soon as possible. It would help to ensure stable and unambiguous legal relations.

62. Mr. MATINE-DAFTARY (Iran) said that paragraph 2, which was not part of the International Law Commission's original text, went beyond the scope of provisional application. It referred to the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.

63. Sir Humphrey WALDOCK (Expert Consultant) said that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.

64. At the first session, the Committee of the Whole had introduced paragraph 2 into article 22 in order to cover the case where a State, after a treaty had begun to be applied provisionally, ultimately decided that it did not wish to become a party to the treaty at all. The Committee of the Whole had taken the view that, in that event, provisional application would have to end.

65. The PRESIDENT said that it was difficult to understand the opening proviso of paragraph 2, " Unless the treaty otherwise provides ". If a State which was applying a treaty provisionally decided that it did not wish to become a party to the treaty, the provisional application of the treaty would have to end, regardless of any provisions of the treaty itself. It would seem very strange for a treaty to provide that it would apply provisionally to a State which was not, and would not become, a party to it.

66. Mr. YASSEEN, Chairman of the Drafting Committee, said that paragraph 2 resulted from an amendment adopted at the first session by the Committee of the Whole; its text must be read in conjunction with that of paragraph 1. The faculty afforded by paragraph 1 was open to States that wished to become parties to the treaty at some time. A State which had accepted the provisional application of a treaty could, however, decide later that it did not wish to become a party; upon that intention being notified to the other States concerned, provisional application would cease.

67. Mr. REDONDO-GOMEZ (Costa Rica) said that the provisions of article 22 gave expression to a new practice which should be commended on grounds of flexibility. Much as his delegation would have wished to contribute to that new practice by supporting

article 22, it would be obliged to abstain from voting on it because of constitutional difficulties. The Constitution of Costa Rica contained explicit provisions to cover such a situation where treaties concluded within the framework of the Central American Common Market were concerned; but there was no similar constitutional provision to cover the case in general international law.

68. Mr. JAGOTA (India) said that his delegation would have had no difficulty in accepting article 22 in the proposed text, but the United Kingdom and Austrian delegations had now raised a number of new and weighty points, which deserved careful consideration. If article 22 were pressed to a vote, his delegation would vote for it on the understanding that there was a basic distinction between it and article 21; article 21 dealt with entry into force, whereas article 22 dealt with provisional application and not provisional entry into force.

69. His delegation agreed with the first two points of interpretation made by the United Kingdom representative. The first was that the words " pending its entry into force " in paragraph 1 would not exclude the possibility of entry into force for some States and not for other States. The second was that the words " the negotiating States " in paragraph 1 (*b*) should be taken to cover also " some negotiating States ".

70. He could not, however, agree with the United Kingdom representative's third point of interpretation, that the obligations of article 23 would also apply to the case mentioned in article 22. The paragraph in the International Law Commission's commentary to which that representative had referred related to an article 22 which had been drafted in terms of " entry into force provisionally ", whereas the text of article 22 now under discussion dealt with " provisional application ". The rule in article 23 applied only to a " treaty in force ". He was inclined therefore to agree with the Austrian representative that any obligations that might arise under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*). It would probably be desirable to lay down some time-limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.

71. Mr. MATINE-DAFTARY (Iran) said that, despite the explanations of the Chairman of the Drafting Committee, he still had misgivings regarding the text of paragraph 2. It was essential to clarify that text, which seemed to enable a State to withdraw from a treaty which it had signed and perhaps ratified.

72. Mr. BILOA TANG (Cameroon) said that he had been impressed by the remarks of the representative of Guatemala. The constitutional law of Cameroon did not contain any provisions specifying that certain categories of treaties could enter into force, provisionally or otherwise, without the approval of Parliament. He would therefore be obliged to abstain from voting on article 22.

73. Mr. EUSTATHIADES (Greece) said that the principle embodied in article 22 responded to the necessities of international practice. But the difficulties to which the Guatemalan representative had drawn attention were not purely academic. The provisions of article 22 could lead to a conflict between international law and the constitutional law of a State and thereby give rise to delicate situations.

74. He fully agreed with the second point raised by the United Kingdom delegation and thought that the text of paragraph 1 (*b*) should de reworded so as to cover provisional application by agreement among some negotiating States only.

75. He also supported the Iranian delegation's request that the text of paragraph 2 should be made clearer. The provisions of paragraph 2, which were intended as a safety valve, could paradoxically give rise to insecurity. They raised the question whether the intention expressed by a State that it did not wish to become a party to the treaty would be taken as final. Actually, in a parliamentary system, it was possible for a government to change its mind and to express a different intention at a later stage. Accordingly, under the provisions of paragraph 2, a State which had accepted the provisional application of a treaty would be able to suspend that application by expressing the intention not to become a party, although that intention need not be final.

76. Mr. ALVAREZ (Uruguay) said that he had serious objections to the idea of the provisional application of a treaty before it entered into force. Either a treaty was in force, in which case it was applied, or it was not in force, in which case it was not applied.

77. Furthermore, provisional application conflicted with his country's Constitution, under which a preponderant part in forming the will of the State was given to the Legislature, whose consent was essential for the entry into force and application of every international agreement that had been concluded by the Executive.

78. He realized, however, that the constitutional system of his country was one thing, while international practice in the provisional application of treaties — which was most important and could not be disregarded — was something else. Perhaps the solution for countries which, like Uruguay, had a constitutional system incompatible with the international practice in question was not to sign or conclude treaties which contained provisions stating that they would be applied provisionally once they had been signed.

79. He wished to point out, however, that paragraph 2 had not been contained in the International Law Commission's original draft but had been based on amendments by Belgium (A/CONF.39/C.1/L.194) and Hungary and Poland (A/CONF.39/C.1/L.198) at the first session. The Belgian amendment in particular had proposed the addition of a new paragraph 3 to

article 22 to read: " Unless otherwise provided or agreed, a State may terminate the provisional entry into force with respect to itself, by manifesting its intention not to become a party to the treaty. " Both the Belgian amendment and the amendment by Hungary and Poland had been adopted by the Committee of the Whole by 69 votes to 1, with 20 abstentions. For those reasons, his delegation was prepared to vote for article 22.

80. Mr. WERSHOF (Canada) said that his delegation would support article 22 for the same reasons as those advanced by the representative of Uruguay. At the first session, the Drafting Committee had worked out the present text of that article, which had been adopted by the Committee of the Whole without any formal change. It seemed to his delegation that there was nothing in article 22 which would force a country which for constitutional reasons could not contemplate becoming bound provisionally by a treaty to get into such a position.

81. One representative had expressed the view that the word " party " in paragraph 2 might be confusing, but the answer to that objection was surely to be found in the definition of " party " in article 2 (*g*), namely, " a state which has consented to be bound by the treaty and for which the treaty is in force ". It seemed quite clear that a country which had merely undertaken to apply a certain treaty provisionally was not yet a " party " to that treaty.

82. Mr. REDONDO-GOMEZ (Costa Rica) said that article 22 established a special régime for the purpose of giving greater flexibility to international law, which had not previously contained any provision to regulate the consequences of the provisional application of a treaty. It was a similar situation to that which arose in private law in connexion with so-called pre-contractual instruments where a kind of specific relationship was established between a contract and the instruments preceding it. His delegation, however, still hesitated to support article 22, since it did not consider it sufficiently clear.

83. Mr. MARESCA (Italy) said it was well known that in international practice there were certain kinds of treaties which, if the parties so agreed, could enter into force before reaching their final stage of perfection. The purpose of article 22 as merely to reflect that practice and to provide the necessary element of flexibility to regulate present international treaties.

84. Paragraph 1 in no way prevented States whose constitution did not permit the provisional entry into force of a treaty from becoming parties to treaties which provided for provisional entry into force. Plenipotentiaries could be assumed to know their country's laws and could decide during the negotiations whether their country could be bound provisionnally by a treaty. However, paragraph 2, which had not been drafted by the International Law Commission, did give rise to certain difficulties. The first part of it was obviously in need of some clarification, since it stated something which was either unnecessary or contradicted the second part, while the second part raised a serious problem concerning the termination of the provisional application of treaties. In particular, was termination to take effect *ex tunc* or *ex nunc*? In order to permit the application of paragraph 1, which was in conformity with current practice, the Drafting Committee should be asked to reflect further on paragraph 2.

85. Mr. BAYONA ORTIZ (Colombia) said that his country's Constitution was similar to that of several other Latin American countries, so that his delegation might be expected to have the same objections to article 22 as those raised by several previous speakers. However, after studying article 22 carefully his delegation had decided that those objections were more apparent than real.

86. As the Canadian representative had pointed out, article 22 did not force the parties to a treaty to agree to its provisional entry into force. Whether a country would wish to permit such provisional entry into force would, as the Italian representative had said, depend on the attitude taken by its plenipotentiaries at the preliminary negotiations. Any State which negotiated a treaty was free to say whether it wished that treaty to be applied provisionally before its final entry into force. His own country could not agree to such provisional application, but since article 22 was sufficiently flexible and did not impose any obligation with respect to provisional application, his delegation was prepared to vote for it. He hoped, however, that the Drafting Committee would try to work out a more satisfactory text.

87. Mr. WYZNER (Poland) said that earlier speakers had pointed out that the idea of adding a new paragraph 2 to article 22 had originally been proposed at the first session by the delegations of his country, Hungary and Belgium. The general question of provisional application was a fact of international life which had to be taken into account. He fully understood that certain countries might have constitutional difficulties in accepting that idea; nevertheless, it was impossible to forbid countries to conclude treaties provisionally if they so wished. For that reason, article 22 was perfectly logical, since it filled what would otherwise be a gap in the proposed convention.

88. Paragraph 2 was the result of amendments which had been adopted by overwhelming majorities in the Committee of the Whole at the first session; perhaps, however, it involved a certain element of risk as far as the security of treaty relations was concerned. As that paragraph read now, the termination of a provisional application would take effect at the very moment when a State notified other parties of its intention to discontinue its provisional application. In other articles dealing with the question of the application of treaties, the Conference had provided for at least one year's notice. In the interests of the security of treaty relations, therefore, a matter of the utmost importance, it might be advisable to provide for a time-limit which would be acceptable to delegations, and he accordingly suggested that paragraph 2 be amended to read: " . . . the provisional application of a treaty . . . shall be terminated six months after that

State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty ". He hoped the Drafting Committee would consider that suggestion, so that after further consultations the Conference could take a quick decision and adopt article 22.

89. Sir Humphrey WALDOCK (Expert Consultant) said that he had been surprised at the degree of anxiety to which paragraph 2 had given rise during the discussion, since to him that paragraph seemed to offer a protection to the constitutional position of certain States rather than the contrary. The practice of provisional application was now well established among a large number of States and took account of a number of different requirements. One was where, because of a certain urgency in the matter at issue, particularly in connexion with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future. If the treaty was one which had to come before a parliament, for example, there might be a certain delay in securing its ratification which would deprive it of some of its value. States might also resort to the process of provisional application when it was not so much a question of urgency, as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.

90. As drafted, article 22 did not seem to involve any real risks to States which might have very strict constitutional requirements because, as had already been pointed out, there was no need for the State concerned to resort to the procedure of provisional application at all. On the other hand, there were many States which did have important constitutional requirements but which also had a very general practice of entering into treaties in simplified form. In those cases, the practice of provisional application had been found highly convenient. Paragraph 2 offered a perfect safeguard, since if a treaty was brought before parliament and it became apparent that parliamentary approval was not likely to be forthcoming, the government could change its decision and terminate the treaty.

91. The Polish representative had suggested that the interests of States might be further safeguarded by introducing into paragraph 2 some element of notice; as Expert Consultant and former Special Rapporteur, however, he personally was unable to see all the bogeys which had been evoked during the debate.

92. Mr. MATOVU (Uganda) said that the provisions of article 8 made it clear that a majority of States might conclude a treaty over the heads of a minority of States, so that where there was no unanimity the majority would be able to impose their will on the minority. He endorsed the observations of the representative of Guatemala. Under the Constitution of Uganda every treaty must be ratified by the Cabinet, but article 22, as proposed, would have the effect of tying the hands of the Government. His delegation could support it if it was made clear that a State participating in the negotiation of such a treaty would always be at liberty to reserve its position despite the provisions of article 16 and 17.

93. He wished to ask the Expert Consultant if he would agree to amending the text of paragraph 2 of article 22 to read: " Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall not take place or shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. " That amendment involved adding the phrase " shall not take place ". The reason was that the termination referred to would be later in time, which would mean that the State was first bound but was later able to withdraw from the obligation. The purpose of the amendment was to permit the State to say " No " at the initial stage, before it was bound.

94. Sir Humphrey WALDOCK (Expert Consultant) said that he was not sure what was the object of the suggested addition. He could not easily conceive that a provisional application should not take place if a State notified the other States between which the treaty was being applied provisionally of its intention not to become a party. Was it being suggested that a State might in bad faith, as it were, try to apply a treaty provisionnally, and almost in the same breath inform other States of its intention not to become a party? The Drafting Committee had not attempted to provide for such a situation because it had not envisaged the possibility.

95. The PRESIDENT asked the representative of Uganda whether, in view of that explanation, he wished to press his amendment.

96. Mr. MATOVU (Uganda) said that the question was really a drafting problem and he would suggest that it be referred to the Drafting Committee.

97. The PRESIDENT said that the Drafting Committee would consider the suggestion.

98. Mr. KHLESTOV (Union of Soviet Socialist Republics) asked whether the President intended to put the amendment by Poland, to include in the article a reference to the period of six months, to the vote.

99. The PRESIDENT said he had understood the representative of Poland to have made a suggestion rather than a formal proposal.

100. Mr. WYZNER (Poland) said that he would be satisfied if his suggestion were referred to the Drafting Committee and if that Committee subsequently reported on it to the Conference.

101. The PRESIDENT invited the Conference to vote on article 22.

*Article 22 was adopted by 87 votes to 1, with 13 abstentions.*[11]

[11] The Drafting Committee did not propose any change in the text of article 22 (see 28th plenary meeting). For a further statement on the article, see 29th plenary meeting.

102. Mr. YU (Republic of Korea) said that he had abstained from voting on article 22. While the practical need for the article was understandable, the legal definition of the provisional application of a treaty was not really clear to his delegation, and furthermore, the article might place his Government in a difficult position because of constitutional considerations.

103. Mr. GALINDO-POHL (El Salvador) said that although article 22 raised certain problems for his delegation, he had voted for the article.

104. El Salvador considered that its Constitution took precedence over all treaties, and moreover certain kinds of treaties — formal treaties — required ratification by the Legislature. Nevertheless, he had voted for the article in recognition of the importance of the international practice involved. It was certain that no representative of El Salvador would invoke the provisions of the article in relation to formal treaties, because its constitutional law did not permit an affirmative answer to the hypothetical questions in the article. However, the provisions of the article could be applied to certain treaties of a less formal character with respect to which the Executive had constitutional authority to bind the State.

105. Mr. VEROSTA (Austria) said that he had stated during the debate that in order not to delay the work of the Conference he was prepared to vote for article 22 on the clear understanding that the Drafting Committee would take into account the suggestions put forward during the discussion by several delegations. He realized that a lot was being asked of the Drafting Committee, since those suggestions might involve questions of substance. However, since the text of article 22 in its final form had been made available to the Conference only such a short time before the debate, delegations had not been fully prepared to take a firm position. He therefore hoped that the Drafting Committee would take full account of the comments made during the discussion.

106. The PRESIDENT said he could assure the representative of Austria that the Drafting Committee would take due note of his request.

The meeting rose at 6.20 p.m.

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## TWELFTH PLENARY MEETING

*Tuesday, 6 May 1969, at 10.40 a.m.*

*President:* Mr. AGO (Italy)

### Tribute to the memory of Mr. Zakir Husain, President of the Republic of India

*On the proposal of the President, representatives observed a minute's silence in tribute to the memory of Mr. Zakir Husain, President of the Republic of India, who had died on 3 Mai 1969.*

1. Mr. DADZIE (Ghana), Mr. OGUNDERE (Nigeria), Mr. TABIBI (Afghanistan), Mr. LATUMETEN (Indonesia), Mr. MATINE-DAFTARY (Iran), Mr. KHLESTOV (Union of Soviet Socialist Republics), Mr. SINHA (Nepal), Sir Francis VALLAT (United Kingdom) on behalf of all the Western European delegations, Mr. GONZALEZ GALVEZ (Mexico), Mr. PINTO (Ceylon), Mr. KEARNEY (United States of America), Mr. TEYMOUR (United Arab Republic), Mr. WERSHOF (Canada) and Mr. JACOVIDES (Cyprus) paid tributes to the memory of the President of the Republic of India.

2. Mr. KRISHNA RAO (India) said he was deeply moved by the expressions of sympathy from the delegations of Asia, America, Africa, Western Europe and the socialist countries. He would certainly communicate them to the Government and people of India.

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 23* [1]

*Pacta sunt servanda*

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

3. Mr. ALVAREZ TABIO (Cuba) said he did not propose to submit an amendment to article 23, since he had become convinced that the text produced by the Drafting Committee now seemed to satisfy the Conference. However, the Conference was not unanimous in regard to defining the scope of the *pacta sunt servanda* rule, as the debate in the Committee of the Whole at the first session had shown.

4. His first concern was the precise meaning of the words " treaty in force ". Since article 23 came immediately after the provisions relating to the entry into force of treaties, it would seem that it simply referred to a treaty concluded in accordance with the formal requirements laid down in Part II of the draft articles. If that was so, the words " in force " were superfluous, because they added nothing new. It was obvious that no one could be required to perform a treaty unless it was in force. The words " treaty in force " must therefore mean something more. In point of fact, the expression " in force " referred not only to the obligations incumbent upon the parties during the process of concluding the treaty but also to the obligations deriving from the conditions essential for the very creation of treaties, particularly the requirement

[1] For the discussion of article 23 in the Committee of the Whole, see 28th, 29th and 72nd meetings.

An amendment was submitted to the plenary Conference by Yugoslavia (A/CONF.39/L.21).

of freedom of consent. The International Law Commission had clearly recognized that, since in paragraph (3) of its commentary to article 23, it had stated that the words gave expression to an element which formed part of the rule and that, having regard to other provisions of the draft articles, it was necessary on logical grounds to include them. Those provisions related to the causes of the invalidity and termination of treaties, among other matters. The Commission had therefore thought it necessary to specify that it was to treaties in force " in accordance with the provisions of the present articles " that the *pacta sunt servanda* rule applied. The Commission was referring to all the articles of the convention on the law of treaties and not merely to the provisions of Part II concerning the conclusion and entry into force of treaties.

5. But it was interesting to consider another aspect of the text of article 23, namely the question of " good faith ". The inclusion of that principle in the *pacta sunt servanda* rule created a link between that provision and Article 2 (2) of the United Nations Charter, which established the principle of good faith. Three conclusions were to be drawn from that link with the Charter: that there was a limit to the *pacta sunt servanda* rule, namely good faith; that the onus of fulfilling the obligations imposed by good faith was subordinate to the fact that those obligations had been contracted in accordance with the Charter; and that no one was required to perform a treaty which contradicted the principles laid down in the Charter.

6. Seen in that light, the rule in article 23 had clearly defined limits which would prevent abuse. Performance in good faith did not merely mean abstaining from acts which might prevent the treaty from being carried out; it also presupposed a fair balance between reciprocal obligations.

7. In short, the rule would strengthen legal security, but it must be a security whose purpose was to achieve the ideal of justice mentioned in the Preamble to the Charter, which spoke of establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ". It should be noted that justice was placed highest in the scale of values established by the Charter. A treaty to which consent had been extorted by unjust coercion could not be protected by the *pacta sunt servanda* rule.

8. His delegation would therefore vote in favour of article 23, since in the form in which it was worded it tended to remove all the defects attached to the *pacta sunt servanda* rule. The Cuban delegation understood the words " treaty in force " as meaning " valid treaty ", in other words a treaty freely consented to, having a licit object and with a just cause.

9. Mr. ESCUDERO (Ecuador) said that the *pacta sunt servanda* rule formed part of the general principles of law referred to in Article 38, paragraph 1 (*c*) of the Statute of the International Court of Justice. The rule had existed from the very earliest times, and in those days it had derived its mandatory character from purely religious considerations; later, it had taken a more ethical form, that of good faith. But that had not prevented treaties from being concluded or disregarded on the redoubtable and overriding grounds of " reasons of State ".

10. In fact, although the rule was certainly part of general international law, it could not be regarded as a rule of *jus cogens,* since it admitted of exceptions. The first suggestion that an exception to that principle was contained in the *rebus sic stantibus* clause was to be found in the thinking of St. Thomas Aquinas; the circumstances surrounding the conclusion of a treaty could alter, and so entail its revision.

11. At the first session of the Conference, the Ecuadorian delegation, along with others, had proposed (A/CONF.39/C.1/L.118) that the word " treaty in force " be replaced by the words " valid treaty ", so that the term used would indicate both the formal and the substantive conditions which gave a treaty its full validity. The most imperative of those substantive conditions were that the treaty must have been freely consented to and that it must have been concluded in good faith. But the Chairman of the Drafting Committee, in reporting the Committee's decision on that amendment at the 72nd meeting,[2] had said that the Drafting Committee had regarded it " as a drafting amendment which it had not thought it advisable to adopt ". The logical inference was that there was no fundamental difference in meaning between "treaty in force " and " valid treaty ".

12. There was however good reason for insisting that the rule should be reduced to its proper proportions. If it was to be recognized as a fundamental rule, there would have to be an equally forceful statement that the element of good faith was essential in all the stages of the preparation and conclusion of treaties. That should have caused the International Law Commission to state a rule, antecedent to the *pact sunt servanda* rule, that would have embodied as a *sine qua non* of the validity of treaties good faith and the free consent of the contracting parties, on the ground that it would be no less unjust to require good faith in performing treaties but not in concluding them than to require it in the conclusion of treaties but not in their performance. That was a higher philosophical principle which was the very basis of the law of treaties.

13. Part V of the draft convention contained provisions about the invalidity, termination and suspension of the operation of treaties. Those provisions were mainly of a procedural nature, but even so, they ought to derive from a rule of substantive law having just as much authority as the *pacta sunt servanda* rule since good faith and the free consent of the contracting States were also essential ingredients of the validity of treaties.

14. Reference had been made to Article 2 (2) of the United Nations Charter in connexion with that rule; but the principle laid down in that Article could only be invoked by way of analogy, since the reference was solely to the obligations imposed by the Charter on Member States.

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[2] Para. 34.

15. Some speakers had mentioned the reference in the Preamble of the Charter to " respect for the obligations arising from treaties ". But it should be noted that the Preamble referred to the establishment of the conditions under which justice and respect for the obligations arising from treaties could be maintained. And those conditions could only be that treaties must not be unjust and must not have been imposed by force or by fraud, for instance. Seen in that light, the Preamble of the Charter was a major pronouncement condemning unjust treaties and stating that they should be regarded as invalid.

16. The inevitable conclusion to be drawn from that was that at least the preamble to the draft convention on the law of treaties should state the principle that good faith and the free consent of the contracting States were the foundation of the validity of treaties.

17. Those views had alrealy been expressed by his delegation during the discussion in the Committee of the Whole. In the light of the interpretative statement he had just made, his delegation would vote in favour of article 23.

18. Mr. PASZKOWSKI (Poland) said that in his view the principle that treaties were binding upon the parties and must be performed in good faith should be stated as precisely as possible because of its fundamental importance. As the Italian representative had said at the 29th meeting of the Committee of the Whole, the mere statement " *pacta sunt servanda* " would be enough.

19. It was not easy, however, to render the Latin into other languages, and that had led to the lengthy debates on article 23 and the amendments submitted to it in the Committee of the Whole. Nevertheless, viewed in the context of the convention as a whole, the wording used by the International Law Commission was satisfactory, as it properly emphasized the fundamental nature of the obligation to perform treaties in good faith.

20. There was obviously no such obligation in the case of treaties which were null and void, but the relevant provisions concerning invalidity, termination and suspension of the operation of treaties were set out elsewhere in the convention. Article 23 did not therefore need any further qualification, and the Polish delegation would vote for the text of the article as submitted by the Drafting Committee.

21. Mr. JACOVIDES (Cyprus) said he approved of the text of article 23 as now submitted to the Conference, on the understanding that the *pacta sunt servanda* rule had the meaning given to it by the delegation of Cyprus in the Sixth Committee of the General Assembly and in the Committee of the Whole at the 72nd meeting. It was clear that the principle stated in article 23 was subject to all the rules of international law concerning invalidity, termination and so forth stated in the draft convention, in other words that it was subject to all the rules under which it was generally recognized that a treaty was not " in force ". It was only when the *pacta sunt servanda* principle was thus delimited that it should take its due place in the over all structure of the law of treaties.

22. Mr. SMEJKAL (Czechoslovakia) recalled the statement made by the Czechoslovak representative at the 29th meeting of the Committee of the Whole with regard to the proposal to replace the words " treaty in force " by the words " valid treaty " in article 23. Czechoslovakia had been one of the co-sponsors of that proposal (A/CONF.39/C.1/L.118).

23. His delegation would not press the proposal that article 23 should be amended in that way and would vote for the text submitted by the Drafting Committee, on the understanding that a treaty " in force " meant exclusively a treaty concluded in accordance with the fundamental principles of international law.

24. Mr. MOE (Barbados) said he had no objection to the inclusion in the convention on the law of treaties of a principle expressing the importance attributed to the *pacta sunt servanda* rule, which, in fact, simply transferred to international law the elementary rule of municipal law that every person must perform his contracts.

25. In the form given to it by the International Law Commission, however, and in the form finally submitted by the Drafting Committee the *pacta sunt servanda* rule had two particular aspects : it referred to treaties " in force " and it stated that such treaties must be performed " in good faith ".

26. The element of good faith was certainly essential in almost every aspect of international relations, but he could not quite see what legal meaning the phrase " in good faith " had in the context of article 23. If a treaty was not being performed, the question arose whether that was so under the terms of the treaty or in accordance with the relevant articles of the convention. Further, when article 23 was read together with article 39, it was clear that the obligations of a party to a treaty which sought to impeach its validity subsisted until, after the application of the relevant procedural provisions, it was decided that those obligations had terminated. During the whole period, which might be a very long one, while the decision was pending, could it truly be said that the party in question would be performing the treaty "in good faith "?

27. He feared that legally the phrase " in good faith " was devoid of real meaning. There were many who considered it essential to state in a legal rule the need to observe treaty obligations " in good faith ", yet refused " in good faith " to subject disputes on those matters to impartial and independent adjudication. His delegation, like some other delegations, believed, however, that good faith should be referred to in the preamble to the convention on the law of treaties, in other words at the point where the aim of the convention was stated.

28. It would have been safer to omit the words " in force ", as indeed the International Law Commission had at first been inclined to do, so as to prevent any misunderstanding about the expression " treaty in force ". Without those words article 23 would cover all international agreements concluded between States within the meaning of article 2; furthermore, as under article 15 certain obligations had to be fulfilled even

before the treaty entered into force, provisionally or definitively, the *pacta sunt servanda* rule would apply to the obligations under article 15 just as it did to those incurred under the treaty itself.

29. In his delegation's view, it would be enough if article 23 read: " Every treaty is binding upon the parties to it and must be performed by them ". In fact, the Latin maxim " *pacta sunt servanda* " used as the heading for article 23 was clear and unambiguous and would have made an admirable text. In any case, the delegation of Barbados accepted the rule, which should unquestionably be stated in the convention on the law of treaties.

30. Mr. SOLHEIM (Norway) reminded the Conference that the International Law Commission had stated in paragraph (3) of its commentary that " from a drafting point of view, it seemed necessary to specify that it is treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applies," and that " the words ' in force ' of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21 ".

31. The title and the text of article 22 as originally drafted by the International Law Commission concerned entry into force provisionally. However, the text had been considerably changed in the previous year by the Committee of the Whole, though the original title had been kept. Since then, the title had also been changed and now read " provisional application ".

32. Article 23 as now worded stated that " every treaty in force is binding upon the parties ". Article 22, adopted at a previous meeting, used the expression " party to the treaty ", which had not been used in the International Law Commission's draft of article 22. It was true that the word " party " had been given a special meaning in the convention under article [2], paragraph 1 (*g*), but it was necessary to be careful and to take into consideration all the different elements of interpretation, so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.

33. It was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application, and the Norwegian delegation believed that no other intention could be inferred from the text as it now stood.

34. In other words, his delegation considered that the words " in force " used in article 23 covered treaties applied provisionally under article 22 as well as treaties which entered into force definitively under article 21.

35. Mr. MATINE-DAFTARY (Iran) said it would have been better if the word "treaty " had not been qualified and if the text had simply conformed to the Latin phrase used for the title of article 23.

36. The Iranian delegation, though concurring in the arguments put forward by the sponsors of amendments during the first session and the interpretative statements made at that meeting, requested the inclusion in the preamble of a formal declaration specifying the scope of the principle, which was stated in the United Nations Charter.

37. Mr. DE CASTRO (Spain), replying to the arguments put forward by some representatives that the words " in force " related also to validity, said that quite clearly the expression " in force " in its strict sense meant no more than the fact of being in force, as was apparent from Article 37 of the Statute of the International Court of Justice. The expression therefore referred to treaties which definitely had legal effects, in other words, treaties whose application was not subject to certain conditions.

38. Consequently the text of article 23 did not in itself cover the conditions for validity. Moreover, that restrictive interpretation might be regarded as corroborated by article 2, paragraph 1 (*a*), where the definition of the word " treaty " did not mention the obligation of validity, and by Part V, which dealt with the invalidity of treaties. Treaties might be in force inasmuch as they were being performed, but they might be void and not binding upon the parties because their provisions were at variance with the basic rules of international law.

39. In accordance with the distinction which existed between the legal effects of a treaty and its validity, article 23 appeared to refer only to the legal effects of treaties and to leave aside their validity.

40. His delegation therefore thought it should be made clear that article 23 covered treaties which were both in force and valid. The convention was an organic whole and it should be emphasized that the treaties which must be performed in accordance with article 23 were those which fulfilled the conditions for validity and were not vitiated by the grounds for invalidity set out in Part V.

41. Finally, his delegation thought that the criterion of good faith should be applied not only during the performance of the treaty but also at the preceding stage — despite the deletion of sub-paragraph (*a*) of article 15 — and at the subsequent stage, when the treaty was no longer in force.

42. Mr. BAYONA ORTIZ (Colombia) said that the *pacta sunt servanda* rule and the principle of good faith ensured the stability of international relations and peace and solidarity among men.

43. The International Law Commission had succeeded in setting out the *pacta sunt servanda* rule and the principle of good faith in a clear and simple manner. But the drafting of article 23 gave rise to some difficulties.

44. The Norwegian representative had pointed out that if articles 22 and 23 were taken together it might be wondered whether the *pacta sunt servanda* rule and the principle of good faith were also valid for treaties being applied provisionally.

45. In his delegation's view, it should be made clear that article 23 also related to treaties which were being applied provisionally. It therefore formally proposed as an oral amendment that the words " or being applied

provisionally " should be inserted after the words " in force ".

46. Mr. ROMERO LOZA (Bolivia) said that, at the 72nd meeting of the Committee of the Whole, his delegation had supported article 23, on the understanding that the expression " treaty in force " meant a treaty that was valid in accordance with the provisions of the convention. That interpretation must be emphasized, because it would be inadmissible for the *pacta sunt servanda* rule to be applied to treaties in force even though such treaties had been imposed in violation of the rules of freedom of consent or by the threat or use of force.

47. The amendment co-sponsored by his delegation (A./CONF.39/C.1/L.118) had not been adopted by the Committee of the Whole, and several representatives had pointed out that there might be valid treaties which were not in force. That situation might indeed arise, but it was also possible that some treaties might be in force and yet might not comply with the essential conditions laid down by the United Nations Charter and by various articles of the draft convention.

48. It should be specified that States could not be required to perform treaties, even treaties in force, if those treaties did not fulfil the essential conditions for validity.

49. His delegation would vote for article 23, in the light of the statement he had just made concerning its interpretation.

50. Mr. MARKOVIC (Yugoslavia), submitting his delegation's amendment (A/CONF.39/L.21), said that article 23 was a key article of the convention and constituted a peremptory norm or at least a norm akin to a rule of that nature. It was therefore desirable that the wording of the article should be precise and that, in particular, it should cover treaties applied provisionally, the subject of article 22. It was questionable, however, whether article 23 actually covered that kind of treaty. With the original wording of article 22, which referred to provisional entry into force, the present formula in article 23, which used the expression " in force ", might perhaps have been acceptable. But the fact that article 22 had been redrafted, made it necessary to alter the text of article 23 as well. Moreover, that was apparent from paragraph (3) of the commentary to article 23, in which the International Law Commission had pointed out that the words " in force " also covered treaties which were in force provisionally.

51. The amendment submitted by his delegation would eliminate the possibility of any arbitrary interpretation of the last part of article 22. His delegation would of course also be in favour of a separate article if the Conference so decided.

52. Mr. REDONDO-GOMEZ (Costa Rica) said that his country was firmly convinced that the principle of good faith as applied to international obligations was not only a factor of special importance in establishing lasting peace between States but could also lead to the creation of a new type of international society in which the essential purposes of justice could be achieved through the law.

53. In his country, the principle of good faith had ceased to be a mere abstract concept and had become one of the most important factors in its survival as an independent community and as a sovereign State. In fact, article 12 of its Constitution expressly prohibited the establishment of a national army as a permanent institution.

54. His delegation thought that good faith was an element which applied to the conclusion as well as to the performance of international conventions, and it would therefore have been desirable for both those aspects to be covered by article 23. However, in view of the objections raised by representatives who were opposed to replacing the words " in force " by the word " valid ", his delegation thought that the retention of the present text in no way affected the reservations of the delegations which had sponsored the amendment (A/CONF.39/C.1/L.118), for there was no reason to believe that good faith had ceased to be a fundamental factor in the conclusion of treaties; moreover, the provisions concerning the possibility of revising unequal treaties or treaties imposed by force were derived by implication from the idea on which article 23 was based.

55. His delegation would therefore vote in favour of article 23, which it considered satisfactory.

56. Mr. SINHA (Nepal) said he did not share the concern expressed by certain delegations about the words " in force ". It was obvious from international law and practice that a treaty in force was a valid treaty. A treaty which conflected with a peremptory norm of general international law was void *ab initio,* as stated in article 50, and consequently was excluded from the field of application of article 23. In the opinion of his delegation, the rule in article 23 was one of the most just norms of the law of treaties. The Drafting Committee had been right not to depart from the International Law Commission's text, which was both simple and precise. His delegation would therefore vote in favour of the present text of article 23, on the understanding that the rule in question was subject to the principle of *jus cogens* and the doctrine of *rebus sic stantibus* and also applied to treaties which were in force provisionally.

57. Mr. SAULESCU (Romania) said that his delegation thought, as the International Law Commission had indicated in paragraph (5) of its commentary, that the *pacta sunt servanda* rule should be inserted in the actual preamble to the convention.

58. In the opinion of his delegation, the *pacta sunt servanda* principle applied to valid treaties, in other words treaties whose conclusion and performance were in conformity with the principles and rules of international law and which therefore by their substance encouraged a mutual respect for national sovereignty and independence, for the equal rights of States and for non-interference in matters within the domestic jurisdiction of States. It was equally obvious that the principle was just as applicable to treaties which were in force

provisionally as to treaties which had entered into force definitively.

59. The *pacta sunt servanda* rule was one of the mainstays of international treaty relations and it was from that principle that the obligation on the parties to take all appropriate steps to carry out a treaty was derived.

60. In the light of that statement concerning its interpretation of article 23, his delegation would vote for it.

61. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said his delegation was in favour of article 23 as submitted by the Drafting Committee, because the fact that a treaty was binding upon the parties and must be performed in good faith was an essential condition for the achievement of the basic aim of international law, which was the maintenance of peace and the development of international relations. The Ukrainian delegation also supported the Yugoslav amendment (A/CONF. 39/L.21) because it added to the *pacta sunt servanda* rule a new element which would usefully supplement that norm of international law by specifying that it held good equally for treaties applied provisionally — the subject of article 22 already adopted by the Conference.

62. Mr. ROSENNE (Israel) said he was in favour of article 23 in the form submitted by the Drafting Committee. His delegation doubted the usefulness of the Yugoslav amendment (A/CONF.39/L.21); indeed, it might endanger the stability of treaties and even the very principle stated in article 23. It would be remembered that the text of article 22 had been changed at the first session so as to show clearly that the provisional application of a treaty was in every case the result of agreement between the parties. It would not therefore be wise to adopt a provision which might throw doubt on the validity and applicability of such an agreement.

63. The PRESIDENT noted that all delegations were in favour of article 23 as submitted, and that no one doubted the soundness of the Yugoslav and Colombian amendments. In the light of the interpretative statements just made, it was obvious that the expression " treaty in force " also covered treaties applied provisionally and that the same was true of the expression " in good faith ". It should be borne in mind, however, that article 23 was of a declaratory nature which would be somewhat impaired if it included points of detail, as proposed in the amendments in question. Since all delegations were agreed on the way in which article 23 was to be interpreted, perhaps the sponsors of the amendments would agree to withdraw them. He suggested that the meeting should be suspended to enable the delegations concerned to hold consultations.

*It was so decided.*

*The meeting was suspended at 12.25 p.m. and resumed at 12.30 p.m.*

64. Mr. TODORIC (Yugoslavia) said that, after consulting several delegations, his delegation agreed that its amendment should be referred to the Drafting Committee, which might submit it as a separate article. Article 23 could thus be put to the vote without change.

65. Mr. BAYONA ORTIZ (Colombia) supported the Yugoslav representative's suggestion.

66. Mr. WERSHOF (Canada) said the Yugoslav proposal was of some importance. It might perhaps be better if the text of the proposed new article were first submitted to the Conference, before being referred to the Drafting Committee.

67. The PRESIDENT pointed out that the new article would in any event have to be submitted to the Conference. It would be better, however, if the Drafting Committee examined it and submitted a revised text to the Conference. He therefore suggested that the amendments should be referred to the Drafting Committee and that the Drafting Committee's text of article 23 should be put to the vote.

*It was so agreed.*

*Article 23 was adopted by 96 votes to none.*[3]

*New article proposed by Luxembourg*

68. The PRESIDENT invited the Conference to consider the new article proposed by the Luxembourg delegation (A/CONF.39/L.15), which was to be inserted immediately after article 23. The article read:

> The parties shall take any measures of international law that may be necessary to ensure that treaties are fully applied.

69. Mr. HOSTERT (Luxembourg) explained that the purpose of his amendment (A/CONF.39/L.15) was to remind States that they must take any measures of internal law that might be necessary to ensure that treaties were fully applied. The proposed article would come immediately after article 23, on the *pacta sunt servanda* principle, and would become article 23 *bis;* the existing article 23 *bis,* which prohibited States from invoking internal law to justify failure to perform treaties would then become article 23 *ter.*

70. The comments by the Luxembourg Government [4] showed that the proposed amendment had been based on article 5 of the Treaty of Rome [5] establishing the European Economic Community. Under that provision, member States were required to take all appropriate measures to ensure that the obligations arising out of the Community's laws were carried out. It might perhaps be argued that a rule based on the system of law created by the Treaty of Rome could not be carried over into a convention codifying the law of treaties; but it had to be borne in mind that the system of law in question included not only provisions of a quasi-federal type, but also obligations incumbent upon States, and it was more particularly to those provisions that article 5 of the Treaty applied; it had amply proved its usefulness.

71. The Luxembourg delegation would like to see a

[3] The Drafting Committee reported that it did not recommend the adoption of the Yugoslav proposal. See 28th plenary meeting.

[4] See *Yearbook of the International Law Commission, 1966,* vol. II, p. 311.

[5] United Nations, *Treaty Series,* vol. 298, p. 17.

similar rule included in the convention on the law of treaties. The very nature of the provisions of certain treaties made it impossible for them to be carried out, even when they had entered into force between States, unless appropriate measures of internal law were taken. For example, treaties for the harmonization of certain national laws and regulations could be put into force only through parliamentary action. Articles which were not sufficient in themselves would be supplemented and made more explicit by rules of internal law. Other treaties embodying provisions directly creating rights and obligations for individuals — a possibility expressly accepted in an advisory opinion of the Permanent Court of International Justice [6] — could not be applied by the courts unless they had been published in proper form. There were few treaties which did not require parliamentary approval or publication in an official gazette. Many treaties prepared under United Nations auspices would remain a dead letter if the States parties did not put them into operation. Further, the number of treaties was constantly growing, as could be seen from the United Nations *Treaty Series;* that was firstly because the international community had become larger, and secondly because, as a result of the growing interdependence of States, more and more problems had to be solved on a regional, or even a world-wide, basis. The State's exclusive field of jurisdiction had contracted as a result, and nationals of a State were increasingly governed by rules of law that were international in origin and based on treaties. Again, though the problem of carrying out treaties was one common to all States, it could obviously be solved in different ways, even in countries connected by close ties. Among the member States of the European Economic Community some, such as Luxembourg, adopted and applied treaties as international and contractual law, whereas others incorporated them in legislative instruments and transformed them into internal law. Those difference were even more striking when it came to States with different economic, social and constitutional systems.

72. The Luxembourg delegation therefore believed that, in codifying the law of treaties, the international community could not hold itself entirely aloof from the question of the subsequent fate of treaties. Any such omission would be regrettable at a time when the life of States and peoples was increasingly governed by rules of law that were international and originated in treaties. The amendment might prove useful and might help to strengthen respect for treaties. The effective application of international instruments would then no longer be delayed for lack of adequate internal measures of implementation.

73. It might be objected that the amendment was outside the scope of the convention because it referred to internal law. But some articles already adopted by the Committee of the Whole contained references to national law, for example article 43 and article 23 *bis,* which would become article 23 *ter.* The mere fact that it referred to internal law should not, therefore, be adequate grounds for rejecting the amendment. Another objection might be that the Luxembourg amendment would be better placed in a future convention on State responsibility. But carrying out a treaty through national legislation was essentially a matter for the law of treaties and affected State responsibility only consequentially; the article had, therefore, a logical place in the convention. The same objection had been raised at the first session in connexion with article 23 *bis,* which prohibited States from invoking internal law to justify failure to perform a treaty, but it had not been taken into account by the Committee of the Whole.

74. The new article 23 *bis* would come as a separate article after article 23, which stated the *pacta sunt servanda* principle. The addition of a paragraph to article 23 would have weakened the fundamental importance of that provision. Again, it would not have been appropriate to present the Luxembourg amendment as the logical consequence of the performance of treaties in good faith, since it was seldom deliberate bad faith but rather mere inertia which stood in the way of carrying out treaties in internal law. A positive obligation to carry out treaties should logically precede the question of justifying failure to perform; for that reason, the former article 23 *bis* should become article 23 *ter.*

75. Mr. GALINDO-POHL (El Salvador) said that in his delegation's view article 23, which provided that every treaty in force was binding upon the parties to it and must be performed by them in good faith, was sufficient to ensure the observance of treaty obligations. By virtue of that rule, any State should be able to adopt the measures — financial, administrative, technical or legal — required to ensure the performance of a treaty. No difficulty would be encountered where the national rules were in keeping with the rules of international law. It might, however, happen that the rules of national law conflicted with the provisions of a treaty, although such questions ought to be studied and settled during negotiation or at the time of ratification. However, once concluded, the treaty must be performed. In countries such as El Salvador in which constitutional law took precedence over treaty provisions, the courts might be called on to give their opinion and might declare the provisions of a treaty unconstitutional. It was a sphere within the exclusive jurisdiction of the nation's highest courts. States could therefore hardly be asked to undertake, in as specific a manner as was proposed by the Luxembourg amendment, to take measures of internal law to ensure that treaties were fully applied. For that reason, the amendment, although its aim was praiseworthy and intended to promote international law, was unacceptable in practice. The rule set out in article 23 was sufficient to bind the contracting State and to guarantee the performance of international obligations.

The meeting rose at 1 p.m.

[6] See advisory opinion concerning the *Jurisdiction of the Courts of Danzig* (Series B, No. 15, p. 17).

## THIRTEENTH PLENARY MEETING

*Tuesday, 6 May 1969, at 3.10 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*New article proposed by Luxembourg* (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the new article proposed by Luxembourg (A/CONF.39/L.15).

2. Mr. MARESCA (Italy) said that the Luxembourg proposal raised three questions. The first was wheter the proposed article had a rightful place in the structure of a convention on the law of treaties. The convention was a body of rules of international law which considered the State as a subject of international law. Nevertheless, those rules did not ignore internal law. A number of articles referred to the Head of State or the Head of Government, thereby establishing a link with internal law, since it was for that law to define the status of such persons. Article 43 precluded the State from invoking a provision of its internal law for the purpose of avoiding the observance of the provisions of a treaty. Paragraph 2, which the Conference had rejected, of the International Law Commission's draft of article 5, had also referred to municipal law. The all-important article 23, by requiring a State to perform treaties in good faith, clearly imposed on a State the obligation to adapt its internal law for the purpose of implementing a treaty to which it was a party. The Luxembourg proposal therefore fell within the framework of the convention on the law of treaties.

3. Secondly, the Luxembourg proposal would not create any disturbance in the relationship between international law and municipal law, because it did not attempt to settle doctrinal disputes on the subject. If the doctrine were accepted that international law became an integral part of municipal law, the Luxembourg proposal would not affect the position at all; if, however, the doctrine of the primacy of municipal law were accepted, the Luxembourg proposal would be both apposite and valuable.

4. Thirdly, the proposed rule would be useful in practice. It would help Foreign Ministry officials in their task of impressing on various national authorities the need to observe existing rules of international law. From his own experience, he could state with confidence that an explicit article in the convention on the law of treaties on the lines of the new article proposed by Luxembourg would be very helpful. To give just one example, on the occasion of an incognito visit to Italy by a foreign Head of State whose retinue had attracted excessive attention from press photographers, leading to incidents, a press photographer had claimed damages from a security guard in the retinue of the visiting Head of State, and he (Mr. Maresca) had had the greatest difficulty in convincing the Italian judge that the security guard was entitled to full immunity from judicial process under the rules of customary international law. It would have been much easier if he had been able to invoke a treaty provision, such as that contained in the Luxembourg proposal, to uphold the application of the rules of international law on the internal plane.

5. Mr. KEARNEY (United States of America) said that he wished to take the opportunity offered by the discussion on the Luxembourg proposal to explain at the same time his delegation's position on article 23 *bis*. There was a hierarchy of differing legal rules in the internal legislation of most States. Generally, constitutional provisions were given primacy. Statutes, resolutions and administrative provisions, all of which might be authoritative, might have different weights. Treaty provisions, when viewed as internal law, necessarily had to be fitted into that hierarchy.

6. Each State was entitled to determine which legal formulation had greater internal authority in case of conflict among internal enactments and article 23 *bis*, as approved by the Committee of the Whole in no way abridged that right. Nor did it affect internal procedures for determining the primacy of internal law, whether by a decision based on the relationship in time between various legislative measures, or by a court decision on constitutional issues. It merely provided that no party to a treaty might justify internationally its failure to perform an international treaty obligation by invoking provisions of its internal law. His delegation believed that that rule, which was consonant with international practice in general and with United States international practices in particular, merited adoption by the Conference, and it would therefore vote for article 23 *bis*.

7. The Luxembourg proposal, on the other hand, did not appear to add anything to article 23 *bis* and might well disturb the balance between the provisions of articles 23 and 23 *bis*. His delegation could not therefore support it.

8. Mr. BINDSCHEDLER (Switzerland) said that the Luxembourg proposal codified a long standing rule of customary international law. It was not strictly necessary from the legal point of view, because its substance was already covered by the requirement, expressed in article 23, that the parties to a treaty must perform its provisions in good faith.

9. On the other hand, it would be useful because of its educational value, particularly for parliaments. It was quite common for a country to ratify a convention and for the convention to enter into force, but for the responsible authorities of the country to neglect to take the necessary measures to give effect to the convention in the internal legal order. That situation was generally not the fault of the government, which was well aware of its international obligations, but of the legislature.

10. An example of that situation was provided by the 1949 Geneva Convention relative to the Treatment of Prisoners of War,[1] by article 129 of which the States Parties undertook " to enact any legislation necessary

[1] United Nations, *Treaty Series*, vol. 75, p. 135.

to provide effective penal sanctions " to punish certain grave breaches of the Convention. The article was not self-executing and the States Parties needed to enact amending legislation in order to carry it out. Many years after the Convention's entry into force a number of States had still not enacted the necessary legislation and Switzerland itself had taken ten years to amend its penal code accordingly.

11. Another example was provided by the International Labour Conventions; those responsible for supervising the implementation of those Conventions had often noted that countries which had ratified the convention were not applying them in all respects because the necessary implementing legislation had not been enacted.

12. Consequently, although he could not regard the proposed new article as absolutely necessary from the legal point of view, he would support it.

13. Mr. CARMONA (Venezuela) said that either the rule contained in article 23 *bis* and in the Luxembourg proposal was useless or it constituted a violation of State sovereignty. If a State ratified a treaty, it was under an obligation to perform it and he failed to see what useful purpose would be served by the provisions of the proposed new article.

14. There were two systems for implementing a ratified treaty. In many English-speaking countries, special legislation was needed for the purpose, but in other countries, such as Venezuela, the ratification of a treaty had the effect of incorporating its provisions in the municipal law of the country, and those provisions thereby became effective on a par with national legislation, provided they did not violate the Venezuelan Constitution, which had primacy over all other legislation.

15. If the purpose of the Luxembourg proposal was to oblige a State to apply a treaty without parliamentary approval having first been obtained for its ratification, the proposal conflicted with the fundamental principle of State sovereignty.

16. Mr. ESCUDERO (Ecuador) said that in Ecuador, a treaty which had been ratified became part of internal law. No treaty could be ratified without prior adoption of the necessary legislation by Parliament.

17. The Luxembourg proposal was not consistent with the principle of national sovereignty and seemed to be based on a distrust of States and a fear that they would not perform their treaty obligations in good faith. It did not take the form of a mere recommendation and could not therefore be approached purely from the educational standpoint, as the Swiss representative had suggested. The terms in which it was couched were clearly imperative in character; they specified that the parties to a treaty " shall take any measures of internal law that may be necessary to ensure " that it was fully applied. Under Article 2 (7) of the Charter, the United Nations was not authorized " to intervene in matters which are essentially within the domestic jurisdiction " of a State. That basic principle of the Charter applied to the realm of treaties also, and a rule such as that proposed by Luxembourg could not therefore be incorporated in the convention on the law of treaties. The matter should remain governed by the provisions of article 23 on performance in good faith; the implementation of treaties was a matter of State sovereignty and should be left to the legal conscience of States.

18. Sir Francis VALLAT (United Kingdom) said that the Luxembourg proposal must be viewed in the context of the convention as a whole and of article 23 and the existing article 23 *bis* in particular. As had been pointed out in paragraph (1) of the International Law Commission's commentary to article 23, the *pacta sunt servanda* rule was " the fundamental principle of the law of treaties ". Nothing should be done to weaken the force of that basic principle and his delegation therefore felt bound to express some hesitations about the Luxembourg proposal.

19. It was of course desirable to stress the link between international law and internal law so far as the observance of treaties was concerned. But article 23 *bis* already focused attention on the heart of the problem, which was not so much the manner in which States ensured that their treaty obligations were fulfilled, but rather that States should not be permitted to invoke the provisions of their own internal law as a justification for failure to perform a treaty.

20. He also had some doubts as to the substance and implications of the Luxembourg proposal. The article would touch on one aspect of the method by which States gave effect to treaties. At least to some extent that was a question of internal law depending on State constitutions. But the legal position varied in different countries. In some countries, the constitution provided that a treaty, once it had been ratified, became part of the law of the land; in others, the constitution might require the enactment of a general approving law, giving legal effect to the treaty in internal law, before an instrument of ratification could be deposited; in yet others, there was a mixed régime where the nature of the treaty determined what measures of internal law had to be taken.

21. In the United Kingdom, a variety of methods was employed to ensure that treaties were fully applied; the choice of method depended in part on the nature of the treaty and its impact upon existing internal law. There were many treaties to which full effect could be given in the United Kingdom simply by administrative measures. Other treaties required for their effective implementation the amendment or modification of existing internal legislation and, in those cases, the policy was to ensure that the necessary amending legislation was enacted by Parliament before the ratification. There again, however, a variety of legislative techniques were possible and the choice among them depended partly on the nature of the treaty. Thus, where it was clearly intended that certain provisions of a treaty were to have direct internal effect as part of the internal law of each of the parties to a treaty, it was possible to ensure by act of the United Kingdom Parliament that those provisions did have that effect. Other delegations would no doubt be confronted with different problems, depending on the provisions of the constitutions of their countries or the practices which their governments had

adopted to ensure that full effect was given to treaty obligations under their internal law.

22. His delegation fully understood and respected the motives underlying the Luxembourg proposal, but would not be able to support it for the reasons of presentation and substance which he had mentioned.

23. Mr. KOULICHEV (Bulgaria) said that his delegation was not convinced that the inclusion of the new article proposed by Luxembourg was really necessary in order to guarantee the observance of the *pacta sunt servanda* principle. The essence of that principle was that States must perform in good faith their obligations under treaties which were in force and had been lawfully concluded. International law, however, generally left to the parties complete freedom, within the framework of the provisions of the treaty, regarding the choice of the means to be used to carry out their treaty obligations. It was true that treaties such as the International Labour Conventions expressly laid on States parties an obligation to bring their internal law into line with the provisions of the conventions, but in the majority of cases international treaties did not contain any provisions on the steps to be taken in the internal legal order for the purpose of carrying out treaty obligations.

24. The Luxembourg proposal would not be very useful for the purposes of strengthening the *pacta sunt servanda* principle, since that principle, by definition, already covered the adoption of the necessary internal measures to which the proposal referred. On the other hand, it could become a source of unnecessary disputes. The smallest discrepancy between the internal law of a State and the provisions of a treaty could give rise to controversy, even in the absence of any concrete subject of dispute.

25. For those reasons, his delegation would oppose the Luxembourg proposal as being unnecessary.

26. Mr. NASCIMENTO E SILVA (Brazil) said that, in his delegation's opinion, article 23 as adopted at the previous meeting adequately covered all the problems that might arise. The Brazilian Constitution, like those of most Latin American countries, required that all treaties should be approved by Parliament and that only after such approval could the Executive ratify the treaty. Thus, the new article proposed by Luxembourg could apply only after the treaty had been ratified, and the problem of sovereignty would not arise.

27. The Luxembourg delegation had doubtless had excellent reasons for introducing its proposal, particularly considering the variety of constitutional systems represented at the Conference, but the proposal now seemed superfluous.

28. Mr. WERSHOF (Canada) said that, although his delegation appreciated the intentions of the Luxembourg delegation, it could not support its proposal, for the reasons given by earlier speakers, particularly by the United Kingdom representative. It was well known that a number of treaties, some of them multilateral, contained specific provisions requiring the contracting parties to enact internal legislation. Canada was a party to some such treaties, but considered it unnecessary to include a general rule to that effect in the convention.

29. Mr. HOSTERT (Luxembourg) said he was glad that so many representatives considered that the substance of the Luxembourg amendment was already embodied in article 23; indeed, his delegation had submitted its proposal largely because it had not been absolutely sure that that was the case. Since however a number of representatives believed that the addition of the new article would cause confusion, his delegation would withdraw its proposal, on the understanding that the substance of it was already covered in article 23.

## ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

30. The PRESIDENT invited the Conference to resume its consideration of the articles approved by the Committee of the Whole.

*Article 23* bis [2]

*Internal law and observance of treaties*

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 43.

31. Mr. SAMAD (Pakistan) said that, at the first session, his delegation had introduced an amendment to article 23 (A/CONF.39/C.1/L.181), the purpose of which had been to add to the principle *pacta sunt servanda* the additional principle that no party to a treaty might invoke the provisions of its constitution or its laws as an excuse for its failure to perform the international obligation it had undertaken. A number of delegations had agreed that that was a generally recognized principle in international law, and the Committee of the Whole at its 29th meeting had approved the Pakistan amendment by 55 votes to none and referred it to the Drafting Committee, together with the International Law Commission's text of article 23. The Drafting Committee had recommended that the Committee of the Whole adopt the International Law Commission's text of article 23 without any addition, but that the Pakistan amendment should be embodied in a new article immediately following article 23. The Committee of the Whole had approved articles 23 and 23 *bis* without a formal vote at its 72nd meeting, but no title had then been given to article 23 *bis;* his delegation was glad that the Drafting Committee had proposed a title which corresponded closely to the one that it had intended to propose itself. His delegation therefore commended article 23 *bis* to the Conference.

32. Mr. CARMONA (Venezuela) said that the International Law Commission had at different times taken different views on the important question of the relationship between international and municipal law.

[2] The principle contained in an amendment by Pakistan (A/CONF.39/C.1/L.181) to article 23 was approved at the 29th meeting of the Committee of the Whole. At the 72nd meeting the Drafting Committee recommended that the admendment should be embodied in a separate article numbered 23 *bis*.

Sir Hersch Lauterpacht's view had been that municipal law took precedence over international law. A reaction had subsequently taken place, when Sir Gerald Fitzmaurice had advanced the opposite thesis, that international law prevailed over municipal law. A third position, which might be regarded as a compromise, had later emerged in the Commission, which had agreed upon the formula set out in the present article 43; under that article, international law prevailed over internal law, unless the violation of internal law invoked as a ground for invalidating consent was manifest.

33. During the discussion of article 43 at the first session, that formula had been supplemented by two amendments. One, by Peru and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.288 and Add.1) stated that violation of a provision of internal law must be of fundamental importance and manifest. The other, submitted by the United Kingdom delegation (A/CONF.39/C.1/L.274), went even further along the same lines. An amendment by Japan and Pakistan (A/CONF.39/C.1/L.184 and Add.1), which would have restored the original thesis that international law prevailed over internal law even when a violation of the internal law was manifest, had been rejected by 56 votes to 25, with 7 abstentions. The other two amendments to which he had referred had been approved and the compromise thus reached had seemed to provide a generally satisfactory solution to the problem of the relationship between the two branches of law.

34. The delegation of Pakistan had, however, submitted its amendment (A/CONF.39/C.1/L.181) to article 23 before article 43 had been discussed. Throughout its lengthy debate on article 23 the Committee of the Whole had naturally been preoccupied by the extremely important question of the principle of *pacta sunt servanda,* so that it would not be unfair to claim that insufficient attention had been devoted to the Pakistan amendment. Moreover, although the principle contained in that amendment had been approved by 55 votes to none, there had been 30 abstentions, and when the new article 23 *bis* had been approved, its wording had been left in abeyance until a decision had been taken on article 43. The Drafting Committee had brought article 23 *bis* into line with the wording of article 43.

35. The Conference now had before it two articles which repeated each other. In the opinion of the Venezuelan delegation, article 23 *bis* was at best redundant and in fact conflicted with article 43, since it introduced the idea of the precedence of municipal law over international law. The only solution seemed to be to delete article 23 *bis* and to retain article 43, which was a clear, well-considered provision, unanimously adopted by the International Law Commission.

36. Mr. DE LA GUARDIA (Argentina) said the Argentine delegation wished to make a brief statement similar to that it had made in the Committee of the Whole during the first session on the subject of article 23 *bis.* There was a type of treaty — and Argentina was a party to a number of such treaties in force — which contained the so-called " constitutional clause ", according to which certain matters governed exclusively by the constitution of the State remained outside the scope of the provisions of the treaty, under the terms of the treaty itself. In such cases, the relevant constitutional rules might be invoked with respect to the treaty. They could not of course be invoked by the State " as justification for its failure to perform the treaty ", to use the words of article 23 *bis;* it was the treaty itself which authorized a State to invoke the rule of internal law.

37. But since that possibility did not emerge clearly from the wording of article 23 *bis,* which could be wrongly interpreted, his delegation felt obliged to make that statement for inclusion in the summary record, and would abstain from voting on the article.

38. Mr. MATINE-DAFTARY (Iran) said that the Iranian Constitution provided that all treaties must be approved by Parliament. He could not vote for article 23 *bis,* because it conflicted with article 43.

39. The PRESIDENT said he was surprised that some representatives should consider that article 23 *bis* conflicted with article 43 because their constitutions required parliamentary approval of all treaties; they should remember that article 23 *bis* referred only to treaties already in force.

40. He invited the Conference to vote on article 23 *bis.*

*Article 23* bis *was adopted by 73 votes to 2, with 24 abstentions.*

*Article 24* [3]

*Non-retroactivity of treaties*

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

41. Mr. ALVAREZ TABIO (Cuba) said that at the first session his delegation had submitted an amendment (A/CONF.39/C.1/L.146) to article 24, in order to bring the text more closely into line with the International Law Commission's commentary. Its amendment had been referred to the Drafting Committee, but had not been taken into account in the text before the Conference.

42. The Cuban delegation would not insist on its amendment, since it was satisfied by the explanations given by the Chairman of the Drafting Committee. However, since the situation had changed as a result of the introduction of the new article 77,[4] Cuba wished to make clear its position concerning the intertemporal law, because there was a clear contradiction between the two articles. In article 24 the convention had established a flexible and balanced rule to solve problems relating to the intertemporal law, whereas article 77 applied to the convention the principle of absolute non-retroactivity, by completely excluding from its temporal application the principles and rules of international law codified in the convention.

[3] For the discussion of article 24 in the Committee of the Whole, see 30th and 72nd meetings.

[4] This article was approved by the Committee of the Whole at its 104th meeting.

43. In paragraph (3) of its commentary to article 24, the International Law Commission had stated: " If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date ".

44. That opinion provided a completely unambiguous solution to the problem of the intertemporal law, but it was contradicted by article 77, which precluded the application of the provisions of the convention, whatever their nature or authority, to treaties concluded before the entry into force of the convention. Thus the satisfactory rule laid down in article 24, which was in conformity with the International Law Commission's interpretation, was robbed of all its force by article 77.

45. True, article 77 included a general reservation relating to " any rules set forth in the present Convention to which treaties would be subject, in accordance with international law, independently of the Convention ", but those words indicated the real aim of the article, which was to restrict the codifying effect that all were agreed the convention should have. The effect of article 77 would be that the rules of international law laid down in the convention would have full authority in the future — which went without saying — but could only be applied to prior agreements if such agreements were subject to those rules independently of the convention. Article 77 deprived the convention of its inherent authority to govern continuing treaties, which as such was governed by the rules of international law consolidated in the convention. Furthermore, it did not settle the question whether a prior treaty was governed by those rules, when in fact the aim should be to ratify their immediate effect, since there was no doubt about their authority once the convention had entered into force.

46. The peremptory rules of the convention had full authority with respect to all treaties in force, whatever their date of entry into force, not only on purely logical grounds based on the principle of the hierarchy of rules, but also for reasons of substance directly related to the notion of what was just at a given moment for the international community, particularly with respect to the rules in articles 48, 49, 50 and 61. Any treaty conflicting with those peremptory rules was both illegal and inadmissible; it was not permissible to question whether those peremptory norms were or were not part of international law before the entry into force of the convention, from which they derived indisputable authority.

47. Article 24 itself did not fully resolve the problem of the intertemporal law; it laid down that the provisions of a treaty did not bind a party in relation to any act or fact which had taken place or any situation which had ceased to exist before the date of the entry into force of the treaty, but it said nothing about the rule to be applied to a treaty relationship which began before the entry into force of the treaty, but continued to exist after that event. Apparently it was implied, although that was not stated, that the principle of non-retroactivity was not violated by applying the provisions of the treaty to a prior situation which was not terminated. That was certainly the assumption made by the International Law Commission, as indicated by the commentary to which he had already referred. That was how the Cuban delegation interpreted the legal effect of article 24 and it would vote for it accordingly.

48. Mr. NETTEL (Austria) asked for a separate vote on the phrase " or is otherwise established " in the opening proviso of article 24.

*The phrase " or is otherwise established " was adopted by 78 votes to 5, with 12 abstentions.*

*Article 24 was adopted by 97 votes to none, with 1 abstention.*

*Article 25* [5]

*Territorial scope of treaties*

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

*Article 25 was adopted by 97 votes to none.*

49. Mr. BILOA TANG (Cameroon) said that his delegation approved of the content of article 25, but wished to state on behalf of its Government that Cameroon reserved the right, when necessary, to interpret for itself the term " territory ", which was rather loosely used in the article, in respect of so-called " overseas territories ".

*Article 26* [6]

*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 incompatible 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 56, 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 to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

[5] For the discussion of article 25 in the Committee of the Whole, see 30th, 31st and 72nd meetings.

[6] For the discussion of article 26 in the Committee of the Whole, see 31st and 91st meetings.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 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.

50. Mr. PINTO (Ceylon) said that the terms " earlier treaty " and " later treaty " had been discussed briefly at the 85th meeting of the Committee of the Whole, when the United Kingdom representative had drawn attention to the lack of clarity in the use of those terms, and had asked which of the dates associated with the emergence of a treaty should be used to determine which was the earlier and which the later instrument. The Ceylonese delegation had concluded that the crucial date for that purpose should be the date when the text of the new treaty had been finally and formally established. The Expert Consultant had confirmed that view at the 91st meeting of the Committee of the Whole when he had explained that the relevant date should be that of the adoption of the treaty and not that of its entry into force and that the underlying notion was that, when the second treaty was adopted, a new legislative intention was formed, which should be taken as intended to prevail over the intention expressed in the earlier treaty.

51. His delegation concurred with that explanation and thought that it might have been desirable to clarify the position in the text of article 26, perhaps by adding a sentence to the effect that the date of the adoption of the text was relevant in determining which was the later treaty. That notion might be taken into account by the Drafting Committee, and later by the Conference, in considering the new article 77. His delegation would not, however, make any formal proposal to that effect.

52. Mr. KEARNEY (United States of America) said that in the Committee of the Whole his delegation had supported an amendment by Japan (A/CONF.39/C.1/L.207) to delete the words, " or that it is not to be considered as incompatible with," in paragraph 2. That was because the United States considered that, when a treaty contained a clause providing that it should be deemed not to be incompatible with another treaty, the first duty of the interpreter was to try to reconcile any conflicting provisions of the two treaties, rather than to give one precedence over the other. The United States had feared that the present wording of paragraph 2 might encourage interpreters to ignore or pass over lightly their primary duty of reconciling conflicting provisions.

53. His delegation now understood, from a discussion of the point with the Expert Consultant, that the International Law Commission had intended the text as a second line of defence, to be invoked when an interpreter had already tried, and failed, to reconcile two treaties, and was accordingly obliged to give one priority over the other. He wished to make it clear that his delegation would vote for article 26 on the understanding that that was the interpretation to be given to paragraph 2.

54. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that some of the provisions of article 26 were not sufficiently clear. For example, despite considerable discussion in the Drafting Committee and the Committee of the Whole, the term " provisions . . . compatible with those of the later treaty " in paragraph 3 was still open to different interpretations. Thus, if a bilateral agreement were concluded between two States which subsequently became parties to a general multilateral treaty relating to the same subject-matter, and the terms of the bilateral treaty were more advantageous to both States than those of the multilateral treaty, the question arose whether the provisions of the earlier treaty were compatible with those of the later one. The Soviet delegation understood the passage in question to mean that, if the earlier treaty was not terminated by the conclusion of the later treaty, the provisions of the earlier treaty, the effects of which were no less favourable than those of the later treaty, should continue to apply.

55. Furthermore, under paragraph 4 (*b*), situations might theoretically arise in which a State might assume certain obligations under one treaty and undertake conflicting obligations in concluding a treaty on the same subject with another State. The Soviet delegation's interpretation of paragraph 4 (*b*) was that nothing in that paragraph should be regarded as giving a State the right to conclude a treaty which conflicted with its obligations under an earlier treaty concluded with a State which was not a party to the later treaty.

56. In view of those imprecisions and difficulties of interpretation, his delegation would abstain in the vote on article 26.

57. Mr. BINDSCHEDLER (Switzerland) said that at the 31st meeting of the Committee of the Whole, his delegation had made a statement concerning the non-applicability of Article 103 of the United Nations Charter to non-members of the United Nations. Switzerland had no wish to dispute the importance and value of Article 103 of the Charter, but believed it was necessary to repeat, for inclusion in the summary record, that as it was not bound by the Charter, its signature of the convention being prepared would have to be made subject to a reservation concerning Article 103.

58. Mr. FUJISAKI (Japan) said he wished to refer, like the representative of the United States, to the words " or that it is not to be considered as incompatible with " in paragraph 2 and to remind the Conference that Japan had submitted an amendment (A/CONF.39/C.1/L.207) in the Committee of the Whole proposing the deletion of those words. Although the Drafting Committee had not accepted that amendment, the Japanese delegation still considered that, when treaty A specified that it was not to be considered as incompatible with treaty B, the intention of the parties was to set down a common understanding on the way in which the two treaties were to be interpreted as being compatible with each other, and that therefore the possibility of one of the treaties prevailing over the other should not, *prima facie,* arise. That was the primary meaning of the expression " not to be

considered as incompatible with " when it was employed in a treaty; it did not mean that one treaty was subject to another, as was obviously the case when the other expression in the article — " is subject to " — was used.

59. The PRESIDENT invited the Conference to vote on article 26.

*Article 26 was adopted by 90 votes to none, with 14 abstentions.*

*Statement by the Chairman of the Drafting Committee on articles 27-29*

60. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 27, 28 and 29 constituted section 3 of Part III.

61. The English title of article 29 had given rise to some difficulty. The title in the International Law Commission's draft, " Interpretation of treaties in two or more languages ", was somewhat ambiguous, since it was not clear whether the words " in two or more languages " applied to the treaties or to their interpretation. The Drafting Committee had solved the problem by inserting the word " authenticated " after the word " treaties " in the English version. Corresponding changes had been made in the French, Russian and Spanish versions.

62. With respect to the text of the articles, the Drafting Committee had noted that the Russian and Spanish versions of paragraph 1 of article 27 did not correspond exactly with the English and French versions, which brought out the meaning of the paragraph more clearly. It had therefore amended the Russian and Spanish versions accordingly.

63. The Committee had found the opening phrase of paragraph 4 of article 29 ambiguous. The words " Except in the case mentioned in paragraph 1 " could refer to either of the two possibilities mentioned in paragraph 1. The Committee had therefore amended the opening phrase to read " Except where a particular text prevails in accordance with paragraph 1 " in order to make it quite clear that the reference was to the second part, beginning with the words " unless the treaty provides . . . ".

*Article 27* [1]

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

64. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation was basically in agreement with article 27 and would vote for it in its present form. It felt, however, that the term " agreement " as used in paragraph 2 might be open to divergent interpretations. In the view of his delegation, the term was to be interpreted as meaning written agreements approved by all the parties to the treaty in connexion with its conclusion. The bulk of the preparatory work, which, as correctly stated in article 28, was a supplementary means of interpretation, would otherwise come under the principal rules of interpretation. That would not only upset the systematic order between articles 27 and 28 but would also cause considerable uncertainty and difficulty in practice. However, the point was not one of substance, particularly since paragraph (13) of the International Law Commission's commentary to articles 27 and 28 spoke of " documents " in relation with paragraph 2, thus making it clear that the Commission had had written agreements in mind when it had adopted that paragraph. It was on that understanding that his delegation had refrained from submitting an amendment in that sense at the present stage of the Conference.

63. On the other hand, his delegation was of the opinion that subsequent agreements between the parties regarding the interpretation of a treaty, as mentioned in paragraph 3, did not have to be in written form. It was confirmed in that opinion not only by constant State practice but also by the fact that paragraph 3 treated subsequent agreements and subsequent pratice on an equal footing.

66. His delegation also considered that the " relevant rules of international law applicable in the relations between the parties " which, under paragraph 3, had to be taken into account in the interpretation of treaties, were to be understood as referring not only to the general rules of international law but also to treaty obligations existing for the various parties. Not only should treaties be interpreted, wherever possible, so as to be in conformity with international law, but that method of interpretation should be followed, wherever treaties could be interpreted so as to be consistent with the treaty obligations of parties to it, in order to avoid conflicting treaty obligations. It was in that sense that his delegation understood the reference in paragraph 3 (*c*) to any relevant rules of international law applicable in the relations between the parties.

*Article 27 was adopted by 97 votes to none.*

[1] For the discussion of articles 27 and 28 in the Committee of the Whole, see 31st, 32nd, 33rd and 74th meetings.

*Article 28* [8]

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

67. Mr. NAHLIK (Poland) said that articles 27 and 28 were a successful combination of three possible approaches to the question of interpretation, namely the textual, the intentional and the functional approach. They thus constituted a coherent and well-balanced part of the convention. However, a useful change could perhaps be made in article 28, for the following reasons.

68. Recourse to the so-called " historical " interpretation, as suggested in the article, could certainly be made in any case in which the meaning conveyed by the text, even with the help of the other means mentioned in article 27, was either " ambiguous or obscure " or could lead to something " absurd or unreasonable ". But whenever recourse was had to such interpretation, it could not be known in advance whether or not the result would be to confirm the meaning conveyed by the application of the means indicated in article 27. In most cases it probably would, but it could not be presumed that such would be the case. At any rate, the " confirmation " of the meaning conveyed in application of article 27 and the " determination " of the meaning when it was left ambiguous or obscure, should not be considered as two different possibilities. If the meaning of the text was perfectly clear, it stood in no need of further confirmation and the work of the interpreter, in looking for such confirmation, would be juridically superfluous. It would therefore be more logical to delete the reference to "confirmation " and to amend the article to read:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to determine the meaning of the provision or provisions of that treaty when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

69. He suggested that the point be referred to the Drafting Committee for further consideration.

70. Mr. YASSEEN, Chairman of the Drafting Committee, said that great care had been taken in drafting article 28 in the formulation approved by the Drafting Committee. The conditions for recourse to preparatory work had been laid down in the International Law Commission's text, provision having been made for confirmation, in specific cases, of the meaning resulting from the application of article 27. The suggestion put forward by the representative of Poland related to a point of substance and affected the balance achieved between the various positions taken on the question of interpretation. It was therefore for the Conference itself to take a decision on it.

71. The PRESIDENT said that it would be most unfortunate if the phrase " in order to confirm the meaning resulting from the application of article 27 " were deleted. Its retention could certainly do no harm. He hoped that the representative of Poland would not press his suggestion.

72. Mr. ROSENNE (Israel) said that although he felt some sympathy for the views expressed by the representative of Poland, he thought that the conclusions he had drawn were not correct and that the Polish position might be better met by an amalgamation of articles 27 and 28. However, that possibility had already been discussed in the International Law Commission, the Committee of the Whole and the Drafting Committee. The suggestion that the Drafting Committee should consider the Polish proposal was tantamount to asking for the whole question to be reopened, and he therefore associated his delegation with the President's suggestion.

73. Mr. REDONDO-GOMEZ (Costa Rica) said he agreed with the President and the representative of Israel. Article 28 should be left in its present form, which appeared to meet with general approval.

74. Mr. NAHLIK (Poland) said that he had merely suggested a possible change, but would not press the point.

*Article 28 was adopted by 101 votes to none.*

*Article 29* [9]

*Interpretation of treaties authenticated in two or more languages*

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

75. Mr. HYERA (United Republic of Tanzania) said that, perhaps because of an oversight by the Drafting Committee, the last phrase in paragraph 2 read " or the parties so agree " instead of " or the parties in some other manner so agree ". The earlier phrase

[8] See footnote 7.

[9] For the discussion of article 29 in the Committee of the Whole, see 34th and 74th meetings.

" if the treaty so provides " implied that there was already an agreement, but the parties could have agreed in some manner other than in the treaty.

76. The PRESIDENT said that the point made by the representative of Tanzania would be considered by the Drafting Committee.[10]

*Articles 29 was adopted by 101 votes to none.*

77. The PRESIDENT said that the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties. The section on interpretation had been condensed into a few formulas which had been adopted unanimously by the Conference. When the section had first come before the International Law Commission, many had felt that it might be unwise for the Commission to embark on a codification of so difficult a subject. He himself had taken a more optimistic view and was most grateful to the Conference for having proved him right. He wished to pay a particular tribute to the Expert Consultant whose patience and hard work had contributed so much to the gratifying result achieved.

The meeting rose at 5.20 p.m.

[10] No change was made by the Drafting Committee.

## FOURTEENTH PLENARY MEETING

*Wednesday, 7 May 1969, at 10.45 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Statement by the Chairman of the Drafting Committee on articles 30-37*

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 30 to 34 constituted Part III, section 4, of the draft convention (Treaties and third States) and articles 35 to 37 Part IV (Amendment and modification of treaties). Part IV had contained an article 38, entitled " Modification of treaties by subsequent practice ", which had been deleted by the Committee of the Whole.[1] The Drafting Committee had made only a few changes in the titles and texts of articles 30-37.

2. In the text of article 31, the Drafting Committee, in the light of an observation in the Committee of the Whole, had deleted the word " third " before the word " State ". It had also put the verb " accept " in the present tense in the concluding part of the sentence.

[1] See 38th meeting of the Committee of the Whole, para. 60.

3. The Drafting Committee had slightly altered the text of article 34, as approved by the Committee of the Whole following the adoption of the amendments submitted by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226). In that text, the words " recognized as such " qualified only " a customary rule of international law ", but the Drafting Committee had found, when considering the Mexican amendment, that the intention had been to mention in article 34 the sources of law specified in Article 38 of the Statute of the International Court of Justice, and to apply the word " recognized " not only to customary rules but also to the general principles of law. The words " recognized as such " had therefore been placed at the end of the sentence. The title of the International Law Commission's text no longer fitted the wording approved by the Committee of the Whole, which referred both to international custom and to general principles of law. The Drafting Committee had therefore amended the title to read: " Rules set forth in a treaty becoming binding on third States as rules of general international law. "

4. The PRESIDENT invited the Conference to consider articles 30 to 37, as approved by the Committee of the Whole and reviewed by the Drafting Committee.

*Article 30* [2]

*General rule regarding third States*

A treaty does not create either obligations or rights for a third State without its consent.

*Article 30 was adopted by 97 votes to none.*

*Article 31* [2]

*Treaties providing for obligations for third States*

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the State expressly accepts that obligation.

5. Mr. PHAM-HUY-TY (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/L.25), said that the establishment of an obligation for a State which was not a party to a treaty was an important matter. Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation. The words " expressly accepts " could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards. It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only. His delegation regarded

[2] For the discussion of articles 30 and 31 in the Committee of the Whole, see 35th and 74th meetings.

An amendment to article 31 was submitted to the plenary Conference by the Republic of Viet-Nam (A/CONF.39/L.25).

any other form of acceptance as inadequate. It had therefore proposed the addition of the words " in writing " after the words " that obligation ".

6. Sir Francis VALLAT (United Kingdom) said that he appreciated the reasons for the amendment by the Republic of Viet-Nam, but he thought it ran counter to the fundamental principle of international customary law underlying the convention, namely that States were free to bind themselves otherwise than by written treaties. Acceptance of the amendment would represent a departure from that principle and would restrict the freedom of States to accept contractual obligations otherwise than in writing. The United Kingdom delegation was therefore unable to vote in favour of the amendment.

7. Mr. NASCIMENTO E SILVA (Brazil) said he agreed with the United Kingdom representative.

8. Mr. YASSEEN (Iraq) said that he had some sympathy with the argument which the United Kingdom representative had advanced against the amendement. However, the situation was an exceptional one, because article 31 concerned the obligations arising for a third State as a result of treaties concluded by other States. All appropriate safeguards had to be provided in such a case. The International Law Commission had realized that, since it had inserted the word " expressly ". But he was not certain whether that word was sufficient, and his delegation would therefore vote in favour of the proposed amendment.

*The amendment by the Republic of Viet-Nam (A/CONF.39/L.25) was adopted by 44 votes to 19, with 31 abstentions.*

*Article 31, as amended, was adopted by 99 votes to none, with 1 abstention.* [3]

*Article 32* [4]

*Treaties providing for rights for third States*

1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

9. Mr. USENKO (Union of Soviet Socialist Republics), introducing the amendment submitted by Hungary and the USSR (A/CONF.39/L.22), said that article 32 established a rule whereby a right arose for a State from a provision of a treaty when the parties to that treaty were prepared to accord it that right, and the State assented thereto. There was, however, an important exception to that rule which was not mentioned either in article 32 or in any other article in the convention. It was the rights of States enjoying most-favoured-nation treatment, with which the amendment was concerned. It would be recalled that under the terms of a treaty containing a most-favoured-nation clause, each of the States parties to that treaty was obliged to accord the other parties forthwith the rights and privileges it accorded or would accord to other States with regard to the matters covered by the treaty, independently of the consent of the parties to the treaty.

10. There was no doubt that the most-favoured-nation system was a source of State rights arising from treaties to which the States concerned were not parties, and such an eminent jurist as Anzilotti, after reviewing the various cases in which rights could arise for third States, wrote: " Of particular importance in international relations is what is known as the most-favoured-nation clause, by virtue of which a State acquires the right to claim for itself the advantages stipulated in conventions concluded by other States. " [5] In Karl Strupp's " Dictionary of International Law ", treaties on most-favoured-nation treatment were even described as " typical " treaties granting rights to third States. [6] It was a characteristic and most important exception to the rule stated in article 32. The most-favoured-nation clause had an important place in agreements concluded between States and might be said to serve as a basis for world-wide international economic relations.

11. Besides, the most-favoured-nation system was the only possible basis for the grant of the preferences which the developed countries must accord unlaterally to the developing countries under the decision taken by the United Nations Conference on Trade and Development (UNCTAD). Most-favoured-nation treatment was the basis for preferences in the sense that preferences represented more favourable treatment than most-favoured-nation treatment. If there was no most-favoured-nation treatment it was impossible to determine what a preference was, because there was no basis for comparison. Tha was why UNCTAD had supported the most-favoured-nation principle at its session in 1964 and had confirmed it during its second session at New Delhi. The principle was applied not merely in international economic relations, but in other agreements connected with other spheres of international life.

12. The question arose whether article 32 could not be interpreted as directed against States enjoying most-favoured-nation treatment, because most-favoured-nation treatment created rights for a third State independently of the consent of the parties to the treaty, whereas article 32 provided for the grant of those rights only with their consent. The matter had

[3] An amended text was adopted at the 28th plenary meeting.

[4] For the discussion of article 32 in the Committee of the Whole, see 35th and 74th meetings.

An amendment was submitted to the plenary Conference by Hungary and the Union of Soviet Socialist Republics (A/CONF.39/L.22).

[5] D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, 1955), vol. I, pp. 358 and 359.

[6] Karl Strupp, *Wörterbuch des Völkerrechts*, ed. H.-J. Schlochauer (Berlin, 1962), vol. III, p. 546.

arisen in the International Law Commission, which had expressed the unanimous opinion that article 32 was not to be interpreted as infringing the rights of States enjoying that treatment. [7] In its statement at the 35th meeting of the Committee of the Whole the USSR delegation had already observed that article 32 should only be adopted subject to that interpretation. No delegation had disputed that statement, which showed that the USSR delegation had soundly expressed the consensus of the Committee of the Whole.

13. The purpose of the amendment, therefore, was to insert into the convention a provision which had been approved unanimously by the International Law Commission when it drafted article 32 and confirmed by the Committee of the Whole when it considered the article. The amendment brought a clarification essential for avoiding any confusion in the future. The officials responsible for applying the convention could not be expected to inquire in each particular case in what way article 32 should be interpreted; they would not be able to do that without consulting the preparatory work. Consequently they must be given a clear text in the convention.

14. Some might perhaps object that the International Law Commission was currently engaged in drawing up a convention on the most-favoured-nation clause and that it would be better to await the results of its work. His delegation believed, however, that the question was so important that a provision stating that article 32 did not affect the rights of States which enjoyed most-favoured-nation treatment should be included in the convention. Delegations of Western countries had on occasion submitted amendments which the Soviet Union delegation considered as self-evident but it had not opposed them. His delegation hoped that all delegations would display a similar understanding and that the amendment would be referred to the Drafting Committee.

15. Mr. ŠMEJKAL (Czechoslovakia) explained that his delegation had at the outset not felt altogether sure that article 32 needed to be rounded off by means of a provision such as that proposed by Hungary and the USSR. The Czechoslovak delegation had had in mind especially the fact that the International Law Commission had confirmed without the least ambiguity that article 32 could not affect the application of the most-favoured-nation clause.

16. On mature reflexion, however, the Czechoslovak delegation had been convinced that the matter was of such importance that the International Law Commissions's opinion — which, moreover, had not met with any objection in the Committee of the Whole — should be incorporated in some way in article 32.

17. The wording proposed by Hungary and USSR could not in any way prejudge the results of the special study on which the International Law Commission was currently engaged. It merely involved taking note of a factual situation and created no difficulty of a theoretical nature. If drafting problems nevertheless arose, it should be possible, with the help of the Drafting Committee, to find a solution acceptable to all. The amendment would make article 32 clearer and would be exactly in keeping with the ideas already expressed by the representative of Czechoslovakia at the 35th meeting of the Committee of the Whole.

18. Mr. KHASHBAT (Mongolia) said that paragraph 1 of article 32, which accorded rights to third States subject to their assent, laid down a perfectly sound rule, but that rule raised the question of the rights of States enjoying most-favoured-nation treatment. It was a question affecting the interests of a number of States, most of them developing countries. It was of such importance that it had been discussed at length by the United Nations Conference on Trade and Development in 1964, and General Principle Eight of the Final Act of UNCTAD stated very clearly that the most-favoured-nation clause should be observed in international trade. [8] At the first session of the United Nations Conference on Trade and Development 78 delegations had voted for that principle and only 11 against it. Not a single delegation from a socialist or a developing country had cast a negative vote. That showed clearly that the vast majority of the members of the international community attached particular importance to the most-favoured-nation system and regarded it as one of the fundamental principles of the development of international relations.

19. Moreover, none of the States which had opposed the statement of the principle had challenged the importance of the clause; they had all raised purely formal and rather artificial objections, none of which had been sustained by UNCTAD.

20. The question was also the subject of a special study by the International Law Commission — a further proof of its importance. The Commission had already made it clear that article 32 of the draft convention on the law of treaties must in no case affect rights deriving from the most-favoured-nation system.

21. The Mongolian delegation therefore supported the amendment submitted by Hungary and the Soviet Union.

22. Mr. OTSUKA (Japan) said that, in his delegation's view, the question of most-favoured-nation treatment did not come within the scope of article 32. It was true that under the most-favoured-nation clause a third State X might appear to be a beneficiary of a right under a treaty concluded between two other States A and B. However, that status as a benificiary was more apparent than real, for the benefit accruing to State X did not arise from the treaty which contained the substance of the benefit in question but from the agreement which contained the most-favoured-nation clause. The treatment in question was extended to State X, which was only a third party to the treaty, by virtue of a provision in the agreement between

[7] See *Yearbooks of the International Law Commission, 1964*, vol. II, p. 176, para. 21, and *1966*, vol. II, p. 177, para. 32.

[8] See *Proceedings of the United Nations Conference on Trade and Development*, vol. I (Final Act and Report) (United Nations publication, Sales No.: 64.II.B.11), pp. 10 and 11.

States A and X and not by virtue of the treaty between States A and B. In fact, the treaty between States A and B did not provide for the treatment to be extended to the third State X.

23. The Japanese delegation therefore believed that the amendment by Hungary and the USSR had no relevance to article 32, and it would accordingly vote against that amendment.

24. Mr. BEVANS (United States of America) said that he would vote against the amendment by Hungary and the USSR. The insertion of the proposed new paragraph in article 32 would merely create confusion, in the sense that States would seek to avail themselves, under article 32, of rights which the provision in no way intended to accord them. Most-favoured-nation treatment was enjoyed by virtue of provisions specifically agreed to between the States parties to a treaty. Article 32, on the other hand, dealt with the rights and obligations of States which were not parties to a treaty. The proposed amendment was therefore unnecessary.

25. Mr. TABIBI (Afghanistan) said that the most-favoured-nation system was applied all over the world and in a number of different fields. Consequently its application should not be restricted; on the contrary, it should be encouraged. His delegation would therefore vote for the amendment.

26. Mr. RUEGGER (Switzerland) said that he believed, like the representative of Japan, and for similar reasons, that an express reference to the most-favoured-nation system — which was, of course, of the greatest importance — would be out of place in article 32, for methodological reasons, and also because it would mean taking up a special and quite separate topic. The benefit of most-favoured-nation treatment, which moreover was sometimes questionable, would not necessarily be claimed by the third State on every occasion. Furthermore, the wording proposed by the Drafting Committee for article 32 fully covered the legal situation, since article 32 laid down a general rule.

27. In the circumstances, although Switzerland had some sympathy with the arguments advanced by the Soviet Union delegation, he thought it might perhaps be sufficient if the President merely took note of the statements made by the USSR delegation at the 35th meeting of the Committee of the Whole, referred to in paragraph 21 (*d*) of the report of the Committee of the Whole (A/CONF.39/L.14), and at the present meeting, in order to dispel any doubts on the matter.

28. Mr. BOLINTINEANU (Romania) said that he considered the new paragraph proposed by Hungary and the USSR to be a useful addition to the provisions of article 32. It was a fact that the most-favoured-nation system had certain special features which gave it a legal status of its own, distinct from the machinery of the provisions relating to third States dealt with in article 32. However, the most-favoured-nation clause was sometimes erroneously regarded in practice and by writers as another form of the provisions in favour of third States. The amendment by Hungary and the Soviet Union drew attention to the fact that the most-favoured-nation clause gave rise to a special legal system differing from that applied under article 32, and thus the amendment would remove the possibility of any confusion between the two institutions. Consequently the Romanian delegation supported the amendment.

29. Mr. HARASZTI (Hungary) said he wished to make it clear that the sole purpose of the amendment he was proposing to article 32, jointly with the Soviet Union representative, was to prevent article 32 from being interpreted in a way that might hinder the application of the most-favoured-nation clause. He realized that some representatives considered that the amendment was not essential because articles 30 to 34 did not refer to the most-favoured-nations system. But as doubts might arise about the application of that system, the amendment was necessary because it would make the convention much clearer.

30. Mr. ROSENNE (Israel) said that, while not in any way wishing to under estimate the importance of the most-favoured-nations clause, he could not support the amendment because, firstly, it dealt with only part of the problem, and secondly, it prejudged the study of the topic to be undertaken by the International Law Commission, with the assistance of a Special Rapporteur who was in fact the Chairman of the Hungarian delegation, the United Nations Commission on International Trade Law, in accordance with decisions of the General Assembly and other competent bodies.

31. If however the Conference considered it essential to repeat the International Law Commission's reservation on the point in paragraph 32 of the introduction to the report on its eighteenth session, [9] one possible solution might be to reproduce the comments of the International Law Commission in the final act of the conference, either in the form of a resolution, or as a separate statement. As the sponsors of the amendment had emphasized the interpretative purpose of their proposal, a solution of that kind should satisfy them.

32. Mr. SMALL (New Zealand) said that a State derived its rights solely from the express provisions of a treaty to which it was a party, and not from other treaties. Consequently the amendment by Hungary and the Soviet Union was not strictly relevant to article 32.

33. As it was generally understood that article 32 in no way infringed the rights that States might derive from the most-favoured-nations system, a solution on the lines of that suggested by the representative of Israel would be preferable.

34. The PRESIDENT suggested that the meeting be suspended to enable delegations to consider the suggestions which had been made.

*The meeting was suspended at 12 noon and resumed at 12.10 p.m.*

[9] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 177, para. 32.

35. Mr. KHLESTOV (Union of Soviet Socialist Republic) said that representatives seemed to be unanimous in recognizing that the provisions of article 32 as submitted by the Drafting Committee did not affect the interests of States under the most-favoured-nation system. There were, of course, several ways of recording that unanimous interpretation, and the delegations of Hungary and the USSR would have preferred it to be expressly stated in the article. That, however, was more a matter or form than of substance. Subject to that interpretation, the delegations of Hungary and the USSR would not press for a vote on their amendment and would vote for article 32 without change.

36. The PRESIDENT invited the Conference to vote on article 32, it being understood that paragraph 1 did not affect the interests of States under the most-favoured-nation system. He noted that, subject to that reservation, Hungary and the USSR withdrew their amendment.

*Article 32 was adopted by 100 votes to none.* [10]

*Article 33* [11]

*Revocation or modification of obligations or rights of third States*

1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

*Article 33 was adopted by 100 votes to none.*

*Article 34* [12]

*Rules set forth in a treaty becoming binding on third States as rules of general international law*

Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law or a general principle of law, recognized as such.

37. Mr. KHASHBAT (Mongolia) introduced the amendment to article 34 submitted by his delegation (A/CONF.39/L.20). The amendment was designed simply to make the text more precise; if the last line read " general principle of *international* law)", that would avoid any possible confusion with internal law, which could not be a direct source of the law of treaties. Moreover, the use of that word would be consistent with the general system followed in the convention, in which the distinction between " internal " and " international " law was drawn wherever necessary; that was confirmed by the actual title of article 34, which expressly referred to " rules of general international law ".

38. Sir Francis VALLAT (United Kingdom), introducing his delegation's amendment (A/CONF.39/L.23), pointed out that article 34 was essentially a saving clause intended to prevent the preceding articles from being construed possibly as excluding the application of the ordinary rules of international law. Article 34 had never been intended as a vehicle for describing the origins, authority or sources of international law, and still less was it intended to open the door to doctrinal differences about the role of general principles of law in the structure of international law as a whole. Views on such matters differed and the Conference should avoid trying to deal with them in an article which should be serving an entirely different purpose.

39. Unfortunately, the text of the article had become heavy and complicated. The Drafting Committee had felt it was precluded from undertaking any substantial revision and the plenary Conference was now required to provide a satisfactory answer. The United Kingdom delegation believed that the drafting technique already used in article 3 and article 77 provided the clue to that answer, for those articles too had saving clauses designed to preserve the rules which would apply " in accordance with international law, independently of the treaty ".

40. If those words were adapted to the needs of article 34, as the United Kingdom amendment suggested, the rather controversial phrase " as a customary rule of international law or a general principle of law, recognized as such " would be deleted. The text would be simpler, the wording would be brought into line with the corresponding paragraphs of articles 3, 77 and 40, and it would be possible to avoid the difficulties which would inevitably arise from the adoption of the amendments submitted by Mongolia (A/CONF.39/L.20) and Nepal (A/CONF.39/L.27).

41. Mr. GALINDO-POHL (El Salvador) said that in its commentary the International Law Commission had stated that article 34 constituted a general reservation designed to preclude an excessively broad interpretation of articles 30 to 33 and to negative any possible implication from those articles that the convention rejected the legitimacy of the process whereby treaty rules might become binding on non-parties as customary rules of international law. However, the Commission had also pointed out that in none of those cases could it properly be said that the treaty itself had legal effects for third States.

42. His delegation considered that it would have been sufficient, in order to avoid interpretations of articles 30 to 33 that were incorrect or too broad, to explain the point in the commentary to those articles or to the articles relating to the process of drawing up a treaty.

[10] An amended text was adopted at the 28th plenary meeting.

[11] For the discussion of article 33 in the Committee of the Whole, see 35th and 74th meetings.

[12] For the discussion of article 34 in the Committee of the Whole, see 35th, 36th and 74th meetings.

Amendments were submitted to the plenary Conference by Mongolia (A/CONF.39/L.20), the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.23) and Nepal (A/CONF.39/L.27).

43. In any case, his delegation's views on the techniques of codifying international law did not permit it to accept the inclusion of an article whose sole object was to avoid possible errors of interpretation.

44. If article 34 was intended to cover a situation in which the obligation of third States resulted from a treaty, its inclusion in the convention would be justified. But the International Law Commission had stated categorically in paragraph (2) of the commentary that for third States the source of the binding force of the rules formulated in a treaty was custom, not the treaty. Consequently article 34 related to custom; but the Conference was called upon to codify treaty law, not customary law, and consequently the article went beyond the purpose that had been laid down for the Conference.

45. The International Law Commission had stated in the same paragraph of its commentary that it had not formulated any specific provisions concerning the operation of custom in extending the application of treaty rules beyond the contracting States. Article 34 did not state directly and explicitly that custom could extend the application of treaty rules to third States, but it implied and admitted that such a possibility could arise and that, consequently, any treaty, even a bilateral treaty, could be transformed into rules of customary law.

46. Many experts on international law held that the provisions of a treaty could become binding on third States; that was the meaning of article 34. The delegation of El Salvador considered, however, that it was not the rules of a treaty that could have that effect, but its content. As treaty rules, the provisions of a treaty could only produce effects between the parties, but the content of such provisions could give rise to a concordant practice on the part of third States if those States considered that the content of the rules was likely to enable them to solve certain problems of international relations. Such a distinction between treaty rules and their content was by no means merely academic. Sometimes rules were established that were said to be of mixed origin; in other words they were treaty rules as far as the contracting parties were concerned and customary rules in the case of third States.

47. Acts performed in applying a treaty could not be invoked as precedents for the creation of custom, since they arose out of compliance with treaty obligations. Nor could the signing of a treaty, whether or not it was followed by ratification, be invoked as a precedent. The treaty as such and as a set of rules could not serve as a precedent, in the technical sense of the term, for the formation of custom.

48. His delegation could not accept the view that treaties in force between only a few States representing a small fraction of the international community could be transformed into customary rules of international law and become binding on States which, for one reason or another, had not wished to accede to them. The issue was not whether a treaty of that kind had been ratified by a minority or majority of States, but rather to draw a distinction between the sources of obligations deriving from customary law and those deriving from treaties, and to oppose the tendency to extend the scope of treaty rules.

49. It was undeniable that some rules, such as those contained in the Conventions respecting the laws and customs of war on land and the Regulation of Vienna on the precedence of diplomatic representatives, had been confirmed by the practice of States which had not acceded to those international instruments. The point was that, for States parties to them, those Conventions gave rise to obligations, whereas for third States those obligations derived only from the practice which they themselves had introduced. Accordingly, although the content of those rules was the same, the source of their validity was different: for some States they were rules of treaty law, whereas for others they were custom.

50. In presenting its amendment (A/CONF.39/C.1/L.106) at the first session, the Syrian delegation had argued that for a rule to become binding upon a third State, that State must recognize it as a customary rule of international law.[13] But the Syrian amendment had not achieved the desired aim, for under present international law a general customary rule was binding on a State even if that State had not accepted it, and the intention of the amendment had apparently been that the obligatory character of a general custom depended on recognition by each State that it had that character. The Syrian delegation's intention was not clearly expressed in the Spanish version of article 34. In Spanish the impersonal expression " *reconocidos como tales* " did not relate to " third States "; for that purpose it would be necessary to use an active verb and say " *llegue a ser obligatoria para un tercer Estado como norma consuetudinaria de derecho internacional cuando aquél la reconozca como tal* ". But, even if that idea was clearly expressed, article 34 would create serious problems. The rule would be ambiguous because there were various forms of " recognition ", which could be express or tacit, by action or by omission. Moreover, the fact that custom developed rapidly in modern times compelled States to exercise greater caution with respect to a rule which might be binding on them without their consent.

51. His delegation supported the Mongolian amendment (A/CONF.39/L.20) because the addition of the word " international " clarified the text. Jurists, basing themselves on the reference to " the general principles of law recognized by civilized nations " in Article 38 of the Statute of the International Court of Justice, held that those principles, unless otherwise defined, were the general principles of internal law to be found in all systems of law which had attained a certain level of development. That uncertainty should therefore be dispelled and it should be clearly stated that it was a question of the general principles of international law.

52. The United Kingdom amendment (A/CONF.39/L.23) removed the proviso inserted in article 34 at the first session. However, by emphasizing that the reference was to rules which could become binding upon a third State " independently of a treaty ", the amend-

[13] See 35th meeting of the Committee of the Whole, para. 69.

ment implicity admitted that in such cases it was not a matter of the law of treaties.

53. His delegation regretted that the amendments by Finland (A/CONF.39/C.1/L.142) and by Venezuela (A/CONF.39/C.1/L.223), calling for the deletion of article 34, had been rejected at the first session.

54. His country did not recognize the extensibility of treaties, nor did it agree that the application of treaty rules constituted a precedent for the development of custom. Moreover, treaty rules could not be binding upon third States as customary law, because custom developed in its own way.

55. Mr. SINHA (Nepal) said he preferred the original wording of article 34 as drafted by the International Law Commission. The addition of the words " or a general principle of law recognized as such " made the text imprecise. The expression " general principle of law " in the context of article 34 did not seem to convey the generally accepted meaning of the term as embodied in the Statute of the International Court of Justice.

56. The general principles of law recognized by nations were not peculiar to international law and could also apply in internal law. The International Court had frequently referred to well-established principles, such as the rule that any judgement given by a court was *res judicata* and was therefore binding upon the parties to the dispute. It was obvious that international law applied many principles of internal law, such as those of good faith and abuse of rights.

57. The Nepalese delegation believed that a distinction should be drawn between those general principles of law which derived from internal law in general and constituted a separate source, and the principles of international law derived from custom or treaties.

58. His delegation had therefore submitted an amendment to article 34 (A/CONF.39/L.27) with a view to making the existing text clearer.

59. Mr. SHUKRI (Syria) said that article 34 as it stood was a mere statement of fact, for the rôle played by custom in extending the application of rules contained in a treaty beyond the contracting parties was undeniable. The rules contained in many general multilateral treaties, such as the Regulation of Vienna of 1815, the Declaration of Paris of 1856 and the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, had become generally accepted rules of customary law and had consequently been applied by third States.

60. Likewise, the scope of application of a number of international treaties formulating general principles of international law had been extended beyond the contracting parties by virtue of the recognition of those principles by third States.

61. The underlying factor in both cases was the recognition given by third States to the principles and rules contained in such treaties. Without that recognition by third States, any attempt to extend the binding force of a principle contained in a treaty beyond the contracting parties would not only infringe the fundamental rule, laid down in article 30 of the convention, that neither rights nor obligations were created for a third State; it would actually amount to the imposition of obligations on third States, and that would contravene the principle of the sovereign equality of States, the corner-stone of the structure of contemporary international law. That was why, at the first session, the Syrian delegation had submitted an amendment (A/CONF.39/C.1/L.106) which had been adopted by the Committee of the Whole.

62. The Syrian delegation did not think that the United Kingdom amendment (A/CONF.39/L.23) was an improvement on the existing wording, since it lacked clarity. What was meant by the words " that rule " which would be binding upon the third State in accordance with international law, independently of the treaty? The words " that rule " might imply a customary rule, a rule belonging to general principles of law. The idea behind the article was to state an exception to the rule that a treaty had legal force only for the contracting parties, and obviously the exception should be stated in the most unequivocal terms. If the United Kingdom amendment was intended to mean that " that rule " should be recognized as binding upon third States, then the text or article 34 should be kept, since it was clearer. If that was not the purpose of the amendment, it would run counter to the basic concept underlying article 34, namely that an obligation could be created only by consent.

63. Admittedly, it might be argued that the new formula would avoid the differences of opinion that might arise from the words " general principle of law " in the existing text. But that from of words was precisely the one used in Article 38 of the Statute of the International Court of Justice, and what was good for the Statute of the principal judicial organ of the international community was surely good for the law of treaties.

64. It might also be argued that the formula proposed by the United Kingdom delegation was in keeping with the formula adopted for article 77 of the convention. There was, however, a great difference between the two cases. Article 77 dealt with the non-retroactivity of the convention, whereas article 34 set forth a much wider rule, since it regulated the effect of treaties as custom-declaring instruments.

65. The Syrian delegation therefore preferred the Drafting Committee's text to the new wording proposed in the United Kingdom amendment. His delegation had no objection in principle to the Mongolian amendment (A/CONF.39/L.20).

66. Though his delegation appreciated the motive behind the Nepalese amendment (A/CONF.39/L.27), it could not support it.

The meeting rose at 1 p.m.

## FIFTEENTH PLENARY MEETING

*Wednesday, 7 May 1969, at 3.15 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 34* (Rules set forth in a treaty becoming binding on third States as rules of general international law) *(continued)*

1. Mr. CARMONA (Venezuela) said that, at the first session, both his delegation and that of Finland had submitted separate amendments for the deletion of article 34. Venezuela had done so because it contended that customary law was too vague a source of international law to be generally acceptable.

2. The question of customary law had been considered by the Permanent Court of International Justice in the *Lotus* case [1] and by the International Court of Justice in the *Asylum* case [2] and the *North Sea Continental Shelf* cases.[3] In all three it had been decided that there was no customary law which could be invoked. In paragraph 63 of its judgement in the *North Sea Continental Shelf* Cases, the Court had stated:

> . . . it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure among those in respect of which a right of unilateral reservation is not conferred, or is excluded . . .[4]

3. The Court had thus defined customary law a *jus cogens*. Accordingly only a peremptory norm of international law, or *jus cogens*, could become customary law. In that case no State would be free to enter a reservation to what was deemed to constitute customary law. If *jus cogens* and customary law were one and the same thing, then article 34 had no point since *jus cogens* was already covered by article 50. The two articles would either conflict or overlap. If, on the other hand, customary law was not *jus cogens*, then article 34 imposed upon States, against their will, a doubtful formula accepted by some, as in the *North Sea Continental Shelf* cases, and rejected by others. Venezuela could not accept a formula of that kind and could only agree to be bound by the rules of customary law that were acceptable to it as such. No customary law could be imposed on a State against its will. That had been made clear by the International Court of Justice in the proviso which concluded the first sentence of paragraph 73 of its judgement in the *North Sea Continental Shelf* cases. That sentence read: " With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected ".[5]

4. The Venezuelan delegation would accordingly vote for the deletion of article 34. If the Conference decided that the article should be retained, Venezuela would vote for the United Kingdom amendment (A/CONF.39/L.23).

5. Mr. BARILE (Italy) said that his delegation had carefully examined the various proposals submitted in connexion with article 34. It was unable to support the United Kingdom amendment because it was inconsistent with the spirit of article 34. That article envisaged the case where a rule incorporated in a treaty might constitute an historical event which could have such an impact on the legal conscience of the international community as to produce a new customary rule of the same or of similar content, which would be binding as a customary rule on all States. The other proposals to amend the article were in contradiction with the broad formula set out in Article 38 of the Statute of the International Court of Justice, which merely referred to international custom as evidence of a general practice.

6. The Italian delegation would therefore vote in favour of article 34 in its present form.

7. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that article 34 expressed an essential rule of international law and was framed as an exception to the maxim underlying articles 30 to 33, *pacta tertiis nec nocent nec prosunt*. The International Law Commission had made it clear in paragraph (2) of its commentary to article 34 that its provisions related to " cases where, without establishing any treaty relation between themselves and the parties to the treaty, other States recognize rules formulated in a treaty as binding customary law " and that " the source of the binding force of the rules is custom, not the treaty ".

8. Custom had been recognized as a source of international law by even the earliest writers. To be binding, it must satisfy two requirements; there must be evidence of prolonged and continuous repetition of the same acts, and there must be evidence that the acts in question represented the performance of an obligation or the exercise of a right, as the case might be. Those

[1] *P.C.I.J.*, Series A, No. 10.

[2] *I.C.J. Reports, 1950*, p. 125.

[3] *I.C.J. Reports, 1969*, p. 3.

[4] *Ibid.*, pp. 38 and 39.

[5] *Ibid.*, p. 42.

two requirements were to be found in Article 38, paragraph 1 (*b*), of the Statute of the International Court, which referred to international custom " as evidence of a general practice accepted as law ". It could thus be claimed that the " customary rule of international law " to which article 34 referred must satisfy four criteria: it must be of long standing, it must be applied in a uniform manner, it must reflect a general practice, and the practice must be " accepted as law ". That fourth criterion was especially important, since it meant that custom depended ultimately on the consent of States.

9. The enumeration of the sources of international law contained in Article 38, paragraph 1, of the Statute of the Court did not establish any hierarchy among those sources. In fact, custom could be said to have once been the only source of binding rules of international law. Later, certain rules originally embodied in general multilateral conventions had become established rules of customary international law, having satisfied with the passage of time the four criteria to which he had referred. There was thus a continuous interaction between treaty law and customary law. To take just two examples, the abolition of privateering by the Treaty of Paris of 1856 [6] and the outlawing of war as an instrument of national policy by the Briand-Kellogg Pact of 1928 [7] had later become rules of customary international law. The rules in the future convention on the law of treaties might well come to be accepted in due course by States — whether or not parties to it — as rules of customary law to be applied to all treaties, even those concluded before it came into force.

10. For those reasons, his delegation would vote in favour of article 34 as it stood and would oppose the United Kingdom amendment (A/CONF.39/L.23). The wording of that amendment had been taken from article 3 and had already been used elsewhere in the convention in an attempt to deal with another problem. The formula was obviously being overworked. Its language was in fact totally unsuited to article 34, where it would detract from the clarity of the provisions of the article by making their meaning dependent on the interpretation of such broad expressions as " so far as that rule would be binding " and " in accordance with international law ".

11. If there were a desire to broaden the scope of article 34 so as to cover in addition sources of international law other than custom, his delegation would not oppose it, but it would then suggest that the words " customary rule " be replaced by the words " general rule " and that the amendment by Nepal (A/CONF.39/L.27) be incorporated, so that the article would then read: " Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a general rule of international law ".

12. His delegation did not wish to make any formal proposal to that effect but merely put forward the idea as a suggestion for the Conference.

13. Mr. PASZKOWSKI (Poland) said that his delegation maintained the position it had taken at the first session of the Conference with respect to article 34. The article contained an indispensable provision which completed the section dealing with the position of third States with regard to rules formulated in a treaty. There would be a serious gap in the section and in the convention as a whole if such a provision were not included. The provision would make it impossible for a State to invoke its non-participation in a treaty as an excuse to evade the application of rules which were binding upon it as customary rules. Article 34 should be retained in the convention for that reason alone.

14. His delegation's understanding of the scope of article 34 was that a treaty concluded between certain States did not create either obligations or rights for a third State without its consent. There were, however, situations in which the binding force of rules formulated in a treaty extended beyond the contracting States. Rules formulated in a treaty concluded between certain States might subsequently become binding upon other States by way of custom. On the other hand, there were treaties which purported to state existing rules of customary law. Such rules were binding upon third States whether they were parties to the treaty or not. In such cases the real source of obligations for third States was customary law and not the treaty.

15. Article 34 might be redrafted in order to make it quite clear that it covered the two situations he had mentioned. All that was required was to substitute the word " being " for the word " becoming ".

16. His delegation supported the amendment by Mongolia (A/CONF.39/L.20), which provided a useful clarification.

17. Mr. MATINE-DAFTARY (Iran) said he agreed with the representatives of El Salvador and Venezuela that article 34 was unnecessary. He regretted that the proposal to delete it had not been adopted at the first session of the Conference. Article 38 of the Statute of the International Court of Justice covered much more clearly the point with which article 34 was concerned.

18. While the amendments submitted by Nepal (A/CONF.39/L.27) and the United Kingdom (A/CONF.39/L.23) were generally acceptable, he would rather see the article dropped from the convention altogether and would support any proposal to that effect.

19. Mr. MOLINA ORANTES (Guatemala) said that, at the first session, considerable opposition had been voiced to article 34. The discussion, however, had not removed the ambiguity of the provisions of that article, which lent themselves to two possible interpretations.

20. The first was that article 34 stated the rule that customary international law was binding all States, even if they had not expressly recognized it by treaty; the second was that it was an accepted principle of international law that a rule embodied in a treaty between two or more States could be invoked against a third

[6] *British and Foreign State Papers,* vol. XLVI, p. 26.

[7] General Treaty for Renunciation of War as an Instrument of National Policy: League of Nations, *Treaty Series,* vol. XCIV, p. 57.

State as a binding rule of law, on the grounds that treaty law provided indisputable evidence of the existence of a specific rule of customary law.

21. That doctrine had been put forward by some writers in connexion with the law on the utilization of international waterways; it had been claimed that repetition of a rule in a number of treaties provided evidence or proof of international practice which had all the material and psychological elements of a rule of customary law. That doctrine could lead to such claims as that to extend the application of the many conventions on diplomatic asylum which had been concluded by the Latin American countries to States in other continents which did not recognize that institution. It might also be invoked to assert as a rule of customary law applicable to third States a provision in a treaty between a number of countries which laid down three miles as the breadth of the territorial sea. If such were the interpretation to be placed on article 34, his delegation would strongly oppose it.

22. If, however, article 34 were to be given the first interpretation, its provisions would be superfluous. They would, moreover, fall outside the purposes of the convention on the law of treaties, which had been rightly termed a treaty on treaties, because its essential purpose was to codify the law applicable to agreements between States. It was true that in the case of some of the articles, the convention dealt with matters beyond the scope of the law of treaties, but in fact the articles in question merely reaffirmed unwritten rules which had for many centuries governed relations between States.

23. The reference to customary law in article 34 was both unnecessary and ill-advised. Although customary international law was applied by all States without exception, some areas of it were uncertain and controversial and were often invoked and applied by governments just to suit their political interests. States had always been careful to restrict their acceptance of customary law where such fundamental matters as sovereignty over national territory was concerned. An example was provided by the Constitution of Guatemala, which on the question of sovereignty over Guatemalan territory, acknowledged no other limitations of a binding character than those derived from law and treaty.

24. The United Kingdom amendment (A/CONF.39/L.23) had the merit of clarifying the text of the article so as to indicate that its sole and undoubted purpose was to acknowledge the validity of customary international law. Unfortunately, he could not support it because it still left the words " becoming binding " which could make for ambiguity.

25. For all those reasons, he formally proposed the deletion of article 34.

26. Mr. DE CASTRO (Spain) said that the provisions of article 34 were unnecessary in practice. The rule it embodied was not new and was so obvious in its logic as hardly to need stating. The purpose of the article was merely interpretative. Nevertheless, since the Conference had adopted such interpretative articles as 23 *bis* and 77, it might be dangerous to drop article 34. To delete it could give rise to the interpretation *a contrario* that the Conference had denied the effectiveness of rules of customary international law to the extent that they were reflected in treaties.

27. With regard to the various amendments which had been proposed, he thought that it would be extremely dangerous to attempt to make any last-minute changes to the text without the careful attention which the International Law Commission and the Committee of the Whole had been able to give to the article.

28. He was not in favour of deleting the reference to the general principles of law, as proposed by Nepal (A/CONF.39/L.27) and the United Kingdom (A/CONF.39/L.23). Those principles were recognized as a source of international law in Article 38, paragraph 1 (*c*) of the Statute of the International Court of Justice. Furthermore, the words " independently of the treaty " used in the United Kingdom amendment could be interpreted as denying that a treaty could provide evidence of customary international law, or that a treaty, in particular a general multilateral treaty, could serve to consolidate or crystallize the rules of customary international law. The latter point had been stressed by the International Court of Justice in its judgement in the *Northe Sea Continental Shelf* cases.

29. He could accept article 34 as it stood but would like some explanation of the discrepancy between the title of the article, which referred to " rules of general international law " and the text which spoke of " a customary rule of international law ". The fact that the adjective " general " had not been used might perhaps be intended to cover regional or local custom. Possibly the President of the Conference, or the Chairman of the Drafting Committee, could clarify that point.

30. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation associated itself with the arguments advanced by the representatives of El Salvador, Venezuela and other States against the inclusion of article 34 in the convention. Costa Rica would vote for the deletion of the article.

31. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the debate in the Conference on article 34 reflected the debate that had been taking place among international lawyers for some fifty years, ever since, in 1920, the formula " the general principles of law recognized by civilized nations " had been proposed by the United States jurist Elihu Root in the Advisory Committee of Jurists [8] and had then been included in Article 38, paragraph (3), of the Statute of the Permanent Court of International Justice of the League of Nations.[9]

32. At that time, the peoples of the world were barely beginning their struggle for independence, the colonialist system of exploitation prevailed throughout most of Asia and Africa and the peoples of those continents had been prevented from participating in the establish-

[8] See *Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th-July 24th 1920,* 15th meeting, p. 331, and annex 1, p. 344.

[9] League of Nations, *Treaty Series,* vol. VI, pp. 403 and 405.

ment of norms of international law, including the Statute of the Permanent Court of International Justice. Thus, the formula " the general principles of law recognized by civilized nations " reflected the unequal position of colonialized peoples; the sources of those general principles were not international treaties or international custom, but the internal law of the European powers, and even Roman law.

33. The old formula had been retained in the Statute of the International Court of Justice, but with one very important addition, for the opening sentence of Article 38 declared that the function of the Court was " to decide in accordance with international law such disputes as are submitted to it ". The introduction of that provision meant that the general principles of law referred to in paragraph 1 (*c*) of Article 38 were deemed to mean principles of international law. To deny that would be tantamount to asserting that the principles concerned were those of the internal law of individual States, since there was either internal law or international law; there was no supranational law which governed both fields.

34. No one could deny the existence of general concepts of law, but their meaning and content varied according to the different juridical systems. The Ukrainian jurist Koretsky, now a judge of the International Court of Justice, had contended that it was " inadmissible to approach concepts from a semantic point of view and to define by ' words ' the legal consequences of concepts, thereby imputing to them a certain content; in other words, it was inadmissible to proceed from the terminology to the principles of law. "[10] That contention had been fully justified during the present Conference, when analogies had been sought between the law of treaties and the internal law of individual States and it had been found that the analogies were often inappropriate. Accordingly, the use of the same terms in different legal systems was no ground for using norms of internal law in international relations.

35. To substitute " general principles of law " for principles of international law would mean giving primacy to principles of the internal law of individual States over such principles as the sovereign equality of States, the right of peoples to self-determination, non-interference in the domestic affairs of other States and other principles. Thus, the Austrian jurist Verdross had stated that the principles in question were recognized neither in international treaties nor in international customary law,[11] and that general principles of law were legal principles which had arisen, not out of international practice, but out of the internal practice of civilized States.[12] It was therefore obvious that to leave such wording in the convention on the law of treaties would open the door for certain States to impose the principles of their legal systems on other States. But that course was incompatible with the sovereignty of the latter States, as a number of representatives had pointed out during the first session. The traditional concept of " general principles of law " was directed against the social changes which were taking place in many countries and in the international sphere.

36. It was therefore important to state clearly in article 34 that the principles concerned were those of international law. That solution would be fully appropriate to the terminology of the convention, which referred either to " internal law ", as in articles 23 ***bis*** and 43, or to " international law ", as in articles 3, 50 and others. It would also help to promote the progressive codification or international law, which involved the elimination of all provisions contrary to the principles of the sovereign equality of States, great and small, irrespective of whether they were situated in Europe or in far distant countries. In the light of those considerations, his delegation would vote for the Mongolian amendment (A/CONF.39/L.20).

37. Mr. DE LA GUARDIA (Argentina) said that, in the Committee of the Whole, his delegation had voted for the amendments by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/C.1/L.223) to delete article 34, in the belief that that provision was out of place in the convention on the law of treaties, whatever its intrinsic value. Since those amendments had been rejected, however, the Argentine delegation had voted for the amendments by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226), because they improved the text.

38. His delegation had not changed its views; after listening to some of the statements made during the debate, it was more convinced than ever that the article was unnecessary, and it would vote for its deletion. If the article were retained, the Argentine delegation would prefer it to be kept as it had been submitted by the Drafting Committee, although it would have no serious objection to the introduction of the phrase as " so far as that rule would be binding upon it ", which was proposed in the United Kingdom amendment (A/CONF.39/L.23). His delegation could not, however, vote for the Mongolian amendment (A/CONF.39/L.20), because it represented a departure from the sources enumerated in Article 38 of the Statute of the International Court of Justice.

39. Mr. SINHA (Nepal) said he withdrew his delegation's amendment (A/CONF.39/L.27), but would ask for a separate vote on the words " or a general principle of law ". A reference to international customary law should be inserted in the title of the article, after the word " binding ".

40. Mr. EUSTATHIADES (Greece) said that his delegation had not attached a great deal of importance to article 34 at the first session, but the debate had shown that a number of representatives were greatly concerned with the question whether or not to retain an article reserving in a special case the rules of general international law.

41. The Greek delegation could not conceive of any

[10] V. M. Koretsky " General Principles of Law " in *International Law*, Kiev, 1957.

[11] A. Verdross, *Völkerrecht*, 1964, p. 147.

[12] See *Recueil d'études sur les sources du droit en l'honneur de François Geny*, vol. III, p. 386.

misinterpretation of the meaning of Section 4, even in the absence of a rule along the lines of article 34; the provisions of that section could not technically be regarded as affecting the basic problem of the sources of international law, and a correct interpretation of the convention would never lead to an attempt to find in the final provision of section 4 a " back-door " method of interfering with international practice and doctrine. The absence of such a provision, therefore, would not be a serious flaw in the convention, and the Greek delegation had not opposed proposals for the deletion of the article. Nevertheless, since the International Law Commission, which naturally considered questions with many implications with greater care than could a large conference, had stated in paragraph (3) of its commentary its reasons for including article 34 in the draft; and since a number of delegations at the second session seemed to attach special importance to the clause, although their interpretations of it differed widely, his delegation would not object to retaining the article. It would, however, prefer the ideas embodied in the United Kingdom and Nepalese amendments to be incorporated in the article.

42. The effect of both those amendments would be to delete from the article a reference to the general principles of law. That would be desirable because article 34 was a reservation, or a safety clause, which drew attention to the contribution of treaties to the formation of international custom and pointed out that the question of that contribution did not apply to Section 4, especially to article 30. In his delegation's opinion, however, general principles of law should not be mentioned in that context, for those principles logically could not arise out of treaties; general principles of law had their own separate existence, were the result of the coincidence of internal legal systems and, as soon as that coincidence ceased, became customary international law. Thus, although a treaty could play a part in the formation of custom, it could not contribute to the establishment of general principles of law.

43. The reference to general principles of law also raised a technical difficulty: in the French and Spanish texts, the last phrase of the article, " *reconnus comme tels* " and " *reconocidos como tales* ", respectively, was in the plural, so that the phrase covered both customary rules of international law and general principles of law, thus obscuring the issue concerning the nature of custom. The United Kingdom amendment would avoid any possible misinterpretations. The Greek delegation would suggest, however, that the word " general " be inserted before the words " international law " in the United Kingdom amendment.

44. Mr. MACAREVICH (Ukrainian Soviet Socialist Republic) said that the role of custom in extending the sphere of application of the effect of treaties beyond the contracting parties was generally recognized in the practice of treaty relations and the doctrine of international law. For example, a treaty concluded between a restricted number of States might formulate norms or establish a régime for a territory, river or lake which other States would gradually recognize as binding on them on the basis of custom. When that problem had been discussed during the first session, the Ukrainian delegation had voted against the proposals to delete article 34, and had voted for the Syrian amendment (A/CONF.39/C.1/L.106), which had clarified the text, and for the Mexican amendment (A/CONF.39/C.1/L.226) to add the words " or as a general principle of law " at the end of the article.

45. His delegation now wished to support the Mongolian amendment (A/CONF.39/L.20), the purpose of which was to make clear that " general principles of law " were to be understood as principles of international law. That amendment was entirely logical, for the Conference itself was concerned with the law of treaties as a branch of international law, and could not base itself on principles of the internal law of individual States. The Ukrainian delegation could not agree with the Argentine representative that the Mongolian amendment was not in keeping with Article 38 of the Statute of the International Court of Justice, since the opening clause of that article stated that the function of the Court was to decide, in accordance with international law, such disputes as were submitted to it; the " general principles of law " referred to in paragraph 1 (*c*) must therefore be understood to mean general principles of international law.

46. Mr. RUEGGER (Switzerland) said he wondered if it was really necessary for the Conference to divide itself sharply over article 34. At the first session his delegation had voted for the proposals by Finland (A/CONF.39/C.1/L.142) and Venezuela (A/CONF.39/L.223) to delete the article. However, since then it had been considerably improved by the Drafting Committee; in particular the title now added to it had made clear many points that could have given rise to doubt.

47. His delegation did not share the fears expressed by many regarding the references to customary law and to general principles of law. He did not believe there was any danger that through the adoption of the article there could be illicit extension of customary law. Whatever the Conference decided, custom would remain in the background in comparison with specific texts. That principle had been formulated in the preamble to the earliest convention codifying international law.

48. Nor did Switzerland share the misgivings expressed by some concerning the possibility that the reference to a general principle of law could be understood to relate to internal law, since the title made the meaning perfectly clear; it was also clear from Article 38 of the Statute of the International Court of Justice.

49. Switzerland was therefore prepared to vote for the text of article 34 as proposed by the Drafting Committee. Nevertheless, he recognized the practical wisdom of the United Kingdom proposal (A/CONF.39/L.23). That proposal made it clear that article 34 should be regarded merely as a safeguarding clause, and it seemed likely to meet many of the objections that had been raised. The Swiss delegation would therefore be prepared to accept the United Kingdom amendment, although he would like to suggest that the wording should be amended by deleting the words " becoming " and " upon ", so

that it would read " Nothing in articles 30 to 33 precludes a rule set forth in a treaty from binding a third State . . . ", since the rule would exist already for the third State. He agreed with the representative of Greece that the reference should be to general international law instead of to international law.

50. Sir Francis VALLAT (United Kingdom) said that he wished to withdraw his delegation's amendment (A/CONF.39/L.23), though with some regret, because it was clear that it could not gain a sufficient majority. His delegation was second to none in its admiration of the Statute of the International Court of Justice and respect for Article 38 of the Statute; in fact the United Kingdom believed that its amendment more accurately reflected the content of that Article.

51. It was important to note that in Article 38 of the Statute the first paragraph contained the words " in accordance with international law ", and that the succeeding paragraphs were subsidiary paragraphs. The United Kingdom amendment had used the wording of that Article of the Statute of the International Court of Justice; the problem with article 34 of the draft convention was that the words " a general principle of law " had created unnecessary difficulty. The United Kingdom would accordingly vote against those words; moreover, since it believed that if they were included, the article would introduce confusion into the convention, his delegation would vote against the article if those words were retained.

52. It also considered that the introduction of the word " international ", as suggested by Mongolia, would be a further departure from Article 38 of the Statute of the Court, and would vote against it.

53. The PRESIDENT said that some confusion seemed to have arisen in the discussion between two distinct ideas. The first was the notion that a certain obligation in a rule of a treaty could at the same time be an obligation deriving from a general principle of law, or from customary law, and that consequently it was binding on a third State. He did not believe that that was the notion the International Law Commission had had in mind when it had proposed the article. In his view, the article related to the quite different possibility that a rule originally embodied only in a treaty might subsequently, in the course of time, as one treaty followed another and other developments took place, become a rule of customary law, and that as a consequence a third State might later become bound by that customary rule which had had its first origins in a treaty. The correctness of that interpretation seemed clear from the wording of the title of the article, which referred to " Rules set forth in a treaty becoming binding on third States as rules of general international law ".

54. In the light of that interpretation, the whole problem of a general principle of law became less important, since a rule first established in a treaty might become a customary rule, but it could hardly become a general principle of law in the sense of Article 38 of the Statute of the International Court of Justice.

55. In accordance with the request by the representative of Nepal, he invited the Conference to vote separately on the words " or a general principle of law ".

56. Mr. CARMONA (Venezuela), supported by Mr. VEROSTA (Austria), said he thought a vote should first be taken on the question whether or not article 34 should be deleted.

57. The PRESIDENT said that the Conference was bound by rule 41 of its rules of procedure, which provided that amendments must be voted on before the proposal to which they related.

*The words " or a general principle of law " were rejected by 50 votes to 27, with 19 abstentions.*

58. The PRESIDENT said that, as a result of that vote, the amendment by Mongolia (A/CONF.39/L.20), which related to the words now deleted, must fall. He would accordingly invite the Conference to vote on article 34 as a whole, as thus amended.

*Article 34 as a whole, as amended, was adopted by 83 votes to 13, with 7 abstentions.*

59. Mr. HAYTA (Turkey) said that his delegation had abstained from voting both on the amendment to article 34 and on the article itself, for the reasons set forth in the Turkish delegation's statement at the 36th meeting of the Committee of the Whole.

60. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation had voted for article 34 on the understanding that a rule set forth in a treaty could become binding on a third State as a customary rule if the third State recognized that rule and accepted it as binding.

61. Mr. CARMONA (Venezuela) said that, on the express instructions of his Government, he must reserve its position in advance with respect to article 34. Venezuela could not accept the idea of a customary rule of international law becoming binding upon a third State, as provided in the article, except in so far as the State concerned had recognized and accepted such a rule.

62. Mr. BILOA TANG (Cameroon) said that the President's statement had confirmed his understanding of the intentions of the International Law Commission concerning article 34. His Government would formulate reservations regarding article 34, and he wished to associate himself with the statement by the Soviet Union representative as to the necessity of acceptance of the obligation by the third State concerned.

63. Mr. BADEN-SEMPER (Trinidad and Tobago) said that his delegation had voted for article 34. However, he assumed that the article would be referred back to the Drafting Committee, since it was necessary to make corresponding changes in the title to include a reference to " customary international law ". The delegation of Trinidad and Tobago would prefer the reference in the text to be to " a rule of customary international law " instead of to " a customary rule of international law ", and similar wording should be used in the title.

64. The PRESIDENT said that the Drafting Committee would take note of the suggestion by the representative of Trinidad and Tobago.

65. Mr. REDONDO-GOMEZ (Costa Rica) said that Costa Rica, like other Latin American countries, formed part of a legal system that was more developed than many rules of international law and he must state, with regret, that in any conflict that might arise between a customary rule of international law and the principles of inter-American law, Costa Rica could not accept the authority of the former.

66. Mr. SHUKRI (Syria) said that he had understood the representative of Nepal to have confined his amendment to the deletion of the words " or a general principle of law ", and had not intended also to delete the words " recognized as such ".

67. The PRESIDENT said that was also his understanding.

The meeting rose at 5.20 p. m.

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## SIXTEENTH PLENARY MEETING

*Thursday, 8 May 1969, at 10.50 a.m.*

*President:* Mr. TABIBI (Afghanistan)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the articles approved by the Committee of the Whole.

*Article 35* [1]

*General rule regarding the amendment of treaties*

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

*Article 35 was adopted by 86 votes to none.*

*Article 36* [2]

*Amendment of multilateral treaties*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, 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.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

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

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

*Article 36 was adopted by 91 votes to none.*

*Article 37* [3]

*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 a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(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 object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

*Article 37 was adopted by 91 votes to none.*

2. The PRESIDENT said that the Committee of the Whole had decided at the first session to delete article 38.[4] He therefore suggested that the Conference take up articles 39 to 42, forming Section 1 of Part V.

*Statement by the Chairman of the Drafting Committee on articles 39-42*

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had circulated a document (A/CONF.39/L.28) containing a communication from the Expert Consultant with regard to articles 41 and 42.

4. Before taking up Part V, the Drafting Committee

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[1] For the discussion of article 35 in the Committee of the Whole, see 36th, 37th and 78th meetings.

[2] For the discussion of article 36 in the Committee of the Whole, see 36th, 37th, 86th and 91st meetings.

[3] For the discussion of article 37 in the Committee of the Whole, see 37th, 86th and 91st meetings.

[4] See 38th meeting of the Committee of the Whole, para. 60.

had considered a point of terminology concerning the French version. It had been unable to find a French term which expressed all the connotations of the English word " termination ", which, in the French text of the draft convention, was rendered either by " *extinction* " or by " *fin* ". The Drafting Committee had considered that " *extinction* " was preferable to " *fin* " and had decided to use it in place of the latter term wherever the context permitted, in particular in article 39 and in the title of Part V. Apart from that change, which concerned only the French version, the Drafting Committee had retained the International Law Commission's title for Part V. It wished to make it clear that the word " termination " in the English version of the title and the corresponding words in the other languages were to be understood in a general sense as covering all the means of ending a treaty.

5. The Drafting Committee had made several changes in the titles and texts of the articles forming Section 1 of Part V. In article 39, paragraph 1, it had replaced the words " or the consent of a State " by " or of the consent of a State ", and in the French and Spanish versions the words " *ne peuvent être contestés* " (*no podrá ser impugnado*) by " *ne peut être contestée* " (*no podrá ser impugnada*), since the paragraph concerned the impeachment of the validity of the consent and not the impeachment of the consent itself.

6. In article 39, the Drafting Committee had also amended the first sentence of paragraph 2, the English version of which, as approved by the Committee of the Whole, had read: " A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present Convention. " That sentence, like its counterpart in the Russian version, seemed to cover only the termination of a treaty as a result of the action of a party, since the words " by a party " could refer not only to " denounced " and " withdrawn from " but also to " terminated ". The French and Spanish versions of the sentence, on the other hand, described the termination of a treaty in terms which did not mention the action of the parties, and therefore were wider in scope. The French expression " *un traité ne peut prendre fin* " and the Spanish version " *ningún tratado podrá darse por terminado* " seemed to reflect the intention of the Committee of the Whole better than the wording of the English and Russian versions. The Drafting Committee had therefore decided to bring the latter into line with the wording of the French and Spanish versions.

7. It had further considered that the French version of the first sentence of article 39, paragraph 2, could be simplified to read: " *L'extinction d'un traité, sa dénonciation ou le retrait d'une partie ne peuvent avoir lieu qu'en application des dispositions du traité ou de la présente Convention.* "

8. Corresponding changes had been made in the other language versions of the same sentence.

9. With regard to article 40, the Drafting Committee had decided that the concluding part should be brought into line with article 3 (*b*). It had therefore redrafted that part of the article to read: " [any obligation] . . . to which it would be subject, in accordance with international law, independently of the treaty ", and the title of the article to read: " Obligations imposed by international law independently of a treaty. "

10. In article 41, the Drafting Committee had inserted a reference to article 53 at the beginning of paragraph 1. That had been made necessary by the addition by the Committee of the Whole to article 53, paragraph 1, of a sub-paragraph (*b*) referring to a right of denunciation or withdrawal " implied from the nature of the treaty ".

*Article 39* [5]

*Validity and continuance in force of treaties*

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

*Article 39 was adopted by 90 votes to 1.*

*Article 40* [6]

*Obligations imposed by international law independently of a treaty*

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject, in accordance with international law, independently of the treaty.

11. Mr. SINCLAIR (United Kingdom) said that his delegation approved in substance the text of article 40 as presented by the Drafting Committee, but wished to make a few comments strictly related to questions of terminology.

12. Article 39, paragraph 1 laid down the general rule that " the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention ". Article 40 spoke only of the invalidity, termination or denunciation of a treaty, but that expression must be read in conjunction with later articles. Articles 43 to 47 set out various grounds which a State might invoke as invalidating its consent to be bound by a treaty. In the case of a bilateral treaty it must of course be conceded that if a State did invoke a defect in its consent to be bound and if the ground of invalidating its consent was, if necessary, upheld as the result of the aplication of the procedures envisaged in articles 62 and 62 *bis*, the result would be the invalidation of the treaty as a whole because the consent of one of the two States involved was vitiated.

[5] For the discussion of article 39 in the Committee of the Whole, see 39th, 40th, 76th, 81st and 83rd meetings.

[6] For the discussion of article 40 in the Committee of the Whole, see 40th and 78th meetings.

13. The position would be different in the case of a multilateral treaty. The State involved would have established incontrovertibly a defect in its consent to be bound by the treaty, but the result would not normally be the invalidity of the treaty as a whole; it would simply be that the consent of the particular State to be bound by the treaty would be invalidated. The treaty would still, however, be operative as between the remaining contracting parties.

14. A close analysis of the texts of articles 41 and 42 showed clearly that that was the effect of the various provisions set out in articles 43 to 47. Article 41, paragraph 2, used the expression " a ground for invalidating... a treaty ", but paragraphe 4 made particular reference to articles 46 and 47, which simply established grounds which a State might invoke as invalidating its consent to be bound by a treaty.

15. More significantly, article 42 established the conditions in which a State " may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 ". It was therefore clear from the reference to articles 43 to 47 that the expression " invalidity of a treaty " as used in article 40, or " invalidating a treaty " as used in articles 41 and 42, must be interpreted as including, in addition to the cases in which the treaty as a whole was invalid, those cases where it was the consent of one party alone to a multilateral treaty which was invalidated.

16. The United Kingdom delegation had wished to place on record its understanding of the terminology in order to prevent any misunderstanding.

17. Mr. ESCUDERO (Ecuador) said it would be better in the Spanish text to use the word " *retiro* " rather than " *retirada* ", which was more of a military term.

18. Mr. DE LA GUARDIA (Argentina) endorsed the Ecuadorian representative's comment.

19. Mr. BILOA TANG (Cameroon) reminded the Conference of the statements he had made in connexion with articles 4 and 35 and explained that his delegation would vote for article 40, on the understanding that the Cameroonian Government would not consider itself bound by the rules laid down in that article unless they were accepted by the overwhelming majority of States.

*Article 40 was adopted by 99 votes to none, with 1 abstention.*

20. Mr. STEVENSON (United States of America) said he wished to make his delegation's position clear as the Conference began the discussion of Part V of the draft convention.

21. Like a great many other delegations, the United States delegation had consistently taken the position throughout the Conference that an adequate procedure for the settlement of disputes arising under Part V was an indispensable element of the convention on the law of treaties. The convention could become an instrument of justice and peace only if it included such a procedure.

22. Article 62 *bis* provided a fair and simple procedure. It was a compromise between the positions of the delegations which had opposed any form of automatic arbitration and those which had insisted that the International Court of Justice should have compulsory jurisdiction in all disputes arising under Part V.

23. The United States delegation, like a very considerable majority of the delegations in the Committee of the Whole, had supported article 62 *bis* and trusted that a larger number of delegations would support it when it came before the plenary Conference.

24. He hoped that all delegations would understand that his delegation's positive vote on articles in Part V remained subject to the widely shared view that Part V must contain an adequate procedure for the settlement of invalidity disputes.

*Article 41* [7]

*Separability of treaty provisions*

1. A right of a party, provided for in a treaty or arising under article 53, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

25. Mr. CASTRÉN (Finland) said that at the first session his delegation had voted for the text of article 41. He thought, however, that the Committee of the Whole had gone too far by unnecessarily limiting the possibility of applying the principle of separability of treaty provisions. Article 41, paragraph 5 provided that in cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty was permitted. Article 50 dealt with treaties which conflicted with a norm of *jus cogens*. Since it was possible that a treaty might contain only one or two minor provisions which were in conflict with *jus cogens*, it would be preferable merely to declare the doubtful clauses void, if they were separable from the rest of the

[7] For the discussion of article 41 in the Committee of the Whole, see 41st, 42nd, 66th and 82nd meetings.

treaty, rather than to destroy the whole treaty. *Jus cogens* was a new principle and prudence was necessary if that principle was to be accepted by all within reasonable limits. His delegation's opinion appeared to be shared by several others. When the Finnish amendment (A/CONF.39/C.1L.144) to delete the reference to article 50 in article 41, paragraph 5, had been put to the vote in the Committee of the Whole, the result had been 39 against, 27 in favour and 17 abstentions. His delegation therefore requested a separate vote on the maintenance of the reference.

26. Sir Francis VALLAT (United Kingdom) said he supported the request for a separate vote on the words " and 50 " by the Finnish representative, whose intention was obviously to obtain the view of the Conference on whether separability of treaty articles, as permitted in many cases under article 41, should also be permitted where a separable provision of a treaty conflicted with a peremptory norm of international law. If the reference to article 50 was deleted, it would not of course affect the case in which the treaty as a whole offended against article 50. Article 41 would only apply where one provision, which could clearly be separated from the rest of the treaty, was in conflict with a rule of *jus cogens*. As he had already said at the 82nd meeting of the Committee of the Whole, the reference to article 50 in article 41, paragraph 5, was not essential and even entailed a danger, since it would enable a party to use a relatively unimportant conflict of a treaty provision with a peremptory norm of international law as a pretext for repudiating the entire treaty. Moreover, in view of the development of *jus cogens* in international law and the corresponding growth in complex treaty relations, the risk of a comparatively minor provision of a treaty conflicting with a peremptory norm would increase as time went on. If the Conference did not delete the reference to article 50, that article might prove to be a means of undermining treaties by attacking comparatively small and isolated portions of them, rather than a protection for the international community. It was easy to imagine the disastrous effect it might have, for example, in the realm of treaties on extradition, commerce, friendship and so on.

27. In explaining his vote on article 50 at the 80th meeting of the Committee of the Whole, he had said that the United Kingdom delegation reserved its position, pending the decisions to be taken on the separability of treaties in article 41 and on procedures in article 62. There was a close connexion between those articles, and the decision taken on article 41 would be a factor affecting his Government's attitude towards the convention on the law of treaties.

28. Mr. HAYTA (Turkey) supported the Finnish representative's request.

29. Mr. MARESCA (Italy) said that while his delegation supported article 41, it had a reservation to make. It could not agree to the idea that separability could be invoked unilaterally. Adequate procedures must be provided to guarantee that requests concerning the separability of treaty provisions were justified.

30. Mr. KOULICHEV (Bulgaria) said he understood the practical considerations which had prompted the Finnish proposal to make the principle of the separability of treaties applicable in the cases referred to in article 50. Nevertheless, that was not the kind of consideration which should prevail in the case in question. The rules of *jus cogens* were fundamental, and it was therefore difficult to imagine that treaty provisions which conflicted with one of them would be unimportant, thus justifying the application of the principle of separability. Nor did it seem conceivable that the parties to a treaty could infringe such a rule inadvertently; the bad faith of the parties would therefore be evident and the invalidation of the whole treaty would be a proper sanction in such a case. The Bulgarian delegation would therefore vote against the Finnish proposal.

31. Mr. ALVAREZ TABIO (Cuba) said that his delegation would vote for article 41 and against the Finnish proposal. The Cuban delegation entirely approved of the International Law Commission's commentary to paragraph 5. If one of the clauses of a treaty was incompatible with a norm of *jus cogens,* the treaty must be considered to be void in its entirety. The parties could then amend the treaty so as to render it compatible with the peremptory norms of international law.

32. Mr. KRISHNA RAO (India) said he had been surprised to hear the United States representative say that his delegation's acceptance of the provisions of Part V of the convention depended on the decision that the Conference would take on article 62 *bis.* Part V actually consisted of three groups of articles: first, articles 39 to 42, which set out general provisions; secondly, articles 43 to 61, which set out substantive rules; and thirdly, articles 62 to 68, concerning the settlement of disputes. Although it was true that there was an organic link between the three groups, it was not clear how acceptance of the second group could depend on the third. It was inaccurate to say that article 62 *bis* represented a satisfactory solution for Part V; the result of the vote on that article in the Committee of the Whole might be regarded as satisfactory for some and unsatisfactory for others.

33. The International Law Commission had referred to Part V in connexion with various articles, and it was interesting to refer to paragraph (13) of the commentary to article 59, which contained the following passage: " [The Commission] did not think that a principle . . . could . . . be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification . . . was to minimise those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; . . . having regard to the extreme importance of the stability of treaties to the security of international relations, it has attached to the present article . . . the specific procedural safeguards set out in article 62. " The Commission had not referred to article 62 *bis.* Every delegation was free to

give its views on an article and to state its own interpretation of it; but it could not invoke guarantees not contemplated by the Commission which had prepared the draft articles.

34. Mr. RATTRAY (Jamaica) said that frequent discussions had been held on the true nature of *jus cogens*, and the precise tenor of its rules had been difficult to determine. Everyone agreed, however, that *jus cogens* censured all really reprehensible conduct. Some delegations had proposed that the reference to article 50 at the end of article 41 should be deleted; but the Jamaican delegation considered that prohibition of separability in the case of treaties conflicting with a rule of *jus cogens* would enhance the significance of that term and facilitate the interpretation of the concept of *jus cogens*. It would thus be made evident that the infringement of those rules was so serious that it would suffice for one clause of a treaty to conflict with the principle for the entire treaty to be void. His delegation was therefore not in favour of deleting the reference to article 50 from paragraph 5 of article 41.

35. The PRESIDENT said that the representative of Finland, supported by the Uniter Kingdom representative, had asked for a separate vote on paragraph 5 of article 41. In accordance with rule 40 of the rules of procedure, he invited the Conference to vote for or against the retention of the words " and 50 ".

*The result of the vote was 63 in favour and 33 against, with 6 abstentions.*

36. Sir Francis VALLAT (United Kingdom) pointed out that, since the required two-thirds majority had not been obtained, the words " and 50 " were deleted.

37. Mr. JAGOTA (India), speaking on a point of order, asked the President to explain what the Conference had voted on. The representative of Finland had requested a separate vote on paragraph 5, but the result of the vote did not seem to be clear.

38. Mr. SINHA (Nepal) said that according to the result of the vote, the words " and 50 " should be retained in the text.

39. Mr. SEATON (United Republic of Tanzania) said that, in his opinion, the purpose of the Finnish proposal had been twofold: first, a separate vote on paragraph 5 and, secondly, an amendment to paragraph 5 to delete the words "and 50 ". In the normal course the vote was taken on an amendment before the basic proposal, but, in that particular instance, the request for a separate vote had also to be taken into account. In actual fact, the vote which had been taken had been on the retention of the words " and 50 ", not on the Finnish amendment to delete the words " and 50 ".

40. The PRESIDENT said that, in his opinion, the subject of the vote had been perfectly clear, namely the retention of the words " and 50 ". As the required two-thirds majority had not been obtained, the words had been deleted. But the Conference was master of its own procedure and it could decide by a vote whether it wished a second vote to be taken on the Finnish proposal.

41. Mr. JAGOTA (India) said that the representative of the United Republic of Tanzania had described the position correctly. If sixty-three delegations had voted for the retention of the words " and 50 " in article 41, paragraph 5, that meant that, so far as they were concerned, the Finnish proposal to delete those words had been rejected, not adopted, as some speakers claimed. A second vote should accordingly be taken, so that the Conference could know exactly where it stood.

42. Mr. CASTRÉN (Finland) said he had simply requested a separate vote on the words " and 50 " in article 41, paragraph 5. As a result of the vote the words had been deleted, since their retention would have required one more vote than had been obtained, as a two-thirds majority was necessary.

43. He was opposed to the idea of taking a second vote, a procedure to which the Conference had never had recourse. In any event, the principle that a second vote should be taken would have to be put to the vote first, and it would have to adopted by a two-thirds majority.

44. Sir Francis VALLAT (United Kingdom) pointed out that he had not proposed any amendment to article 41, paragraph 5, but, like the representative of Finland, he had requested a separate vote under rule 40 of the rules of procedure. The vote had been taken in a regular manner and the proper conclusion was that the words " and 50 " had been deleted from article 41, paragraph 5.

45. However, as some delegations were still in doubt, it would perhaps be wiser to postpone voting on article 41 as a whole for the time being.

46. Mr. LAMPTEY (Ghana) said he believed that the proposal had been to delete the words " and 50 " in article 41, paragraph 5. He knew of at least one delegation which had not taken part in the voting because it had not known exactly what was being put to the vote. He would therefore like a second vote.

47. The PRESIDENT said that of the two suggestions — to postpone the final vote on article 41 or to take a second vote on the Finnish proposal relating to paragraph 5 — he preferred the second, and he invited the Conference to vote forthwith on the principle that the Finnish proposal should be put to the vote a second time.

48. Sir Francis VALLAT (United Kingdom), speaking on a point of order, said that, in his opinion, such a vote would be a motion to reconsider, under rule 33 of the rules of procedure.

49. Mr. KRISHNA RAO (India) protested that it could not be a question of a motion to reconsider under rule 33 of the rules of procedure, since many delegations had not known what exactly they had been voting on. For all practical purposes, there had been no vote.

50. Mr. ESCUDERO (Ecuador) said that many delegations had thought they were voting for the retention of the words " and 50 " in article 41, paragraph 5, while many others had believed they were voting for their deletion. The normal parliamentary procedure, both in national parliaments and in the United Nations, in cases where confusion of that kind had arisen, was simply to take another vote. The President could call for a fresh vote without requesting the Conference to vote first on the principle of taking a second vote.

51. Mr. FATTAL (Lebanon) said it would not be a matter of taking another vote; the Conference would definitely be voting on the Finnish proposal for the first time.

52. The PRESIDENT said that, in accordance with the normal procedure laid down in rule 40 of the rules of procedure, he had put to the vote the proposal by Finland, supported by the United Kingdom, and had then announced the result of the vote. A second vote would undoubtedly be a motion to reconsider under rule 33. He suggested that the meeting be suspended to enable negotiations to be held.

*The meeting was suspended at 12.15 p.m. and resumed at 12.30 p.m.*

53. The PRESIDENT announced that the delegations of Finland and the United Kingdom agreed that the Conference should vote again on the words " and 50 " in article 41, paragraph 5, on the basis of rule 40 of the rules of procedure.

54. Mr. JAGOTA (India), speaking on a point of order, said the Finnish motion had been for a separate vote. That motion should be voted on first, in accordance with rule 40 of the rules of procedures the Indian delegation would vote against it. Only then should the vote be taken, if need be, on the words " and 50 ".

55. Mr. SINCLAIR (United Kingdom) said that an objection to the motion for a vote by division was not admissible at that stage of the debate. The delegations of Finland and the United Kingdom agreed that the vote should be taken again on the words " and 50 " in article 41, paragraph 5, but they might very well insist on asserting that the point at issue was a motion to reconsider, under rule 33 of the rules of procedure.

56. The PRESIDENT called for a vote on the words " and 50 " in article 41, paragraph 5. He said that the vote would be by roll-call: delegations supporting the retention of those words in article 41 should vote in favour; those supporting their deletion should vote against.

*Zambia, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Zambia, Algeria, Argentina, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Central African Republic, Ceylon, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Dominican Republic, Ecuador, El Salvador, Ethiopia, Ghana, Guatemala, Guyana, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Madagascar, Mongolia, Morocco, Nepal, Nigeria, Pakistan, Panama, Peru, Poland, Romania, Saudi Arabia, Sierra Leone, Spain, Sudan, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia.

*Against:* Australia, Austria, Belgium, Canada, Chile, China, Denmark, Federal Republic of Germany, Finland, France, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Portugal, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

*Abstaining:* Gabon, Israel, Malaysia, Mauritius, Republic of Korea, Republic of Viet-Nam, Senegal, Singapore, Tunisia.

*The words " and 50 " were retained in article 41, paragraph 5 by 66 votes to 30, with 9 abstentions.*

*Article 41 as a whole was adopted without change by 96 votes to none, with 8 abstentions.*

57. Mr. WERSHOF (Canada) said that at the 42nd meeting of the Committee of the Whole he had opposed article 41, paragraph 5. He had always thought it a mistake to include the words " and 50 " in that paragraph and he remained convinced that the prohibition of separability might have regrettable consequences for all. However, although the words " and 50 " had been retained in the paragraph by the necessary two-thirds majority, his delegation had felt that it should vote in favour of article 41 as a whole.

## Statement by the Observer for the Asian-African Legal Consultative Committee

58. Mr. SEN (Observer, Asian-African Legal Consultative Committee), speaking at the invitation of the President, said that since its creation in November 1966 the Asian-African Legal Consultative Committee had been dealing with major questions of international law of concern to the international community as a whole. It carefully examined the reports of the International Law Commission and made recommendations thereon to the Governments of the Committee's member countries. The Committee was also working on subjects which were before other United Nations organs such as the United Nations Conference on Trade and Development and the United Nations Commission on International Trade Law.

59. The Committee had been considering the question of the law of treaties since 1965, and some of the suggestions it had made at its recent sessions had been communicated to the Conference at its first session in 1968.[8] With a view to preparations for

[8] See document A/CONF.39/7.

the second session of the Conference, the Committee had invited a number of non-member States to participate in its tenth regular session at Karachi at the beginning of 1969; twenty-six Asian and African States had accepted. Ten other countries had said that they would give consideration to any recommendations the Committee might adopt at that session. Distinguished jurists from other regions had also attended the session as observers.

60. At the Karachi meeting it had been agreed that discussion should concentrate on articles 2, 5 *bis*, 12 *bis*, 16, 17, 62 *bis*, 69 *bis* and 76 and the final clauses of the draft convention. A full and constructive exchange of views had taken place. For example, in connexion with article 62 *bis*, the participants at the Karachi meeting had gone so far to envisage five different solutions, including an optional protocol, the choice of one compulsory method of settlement, the possibility of contracting out of the provisions of article 62 *bis* and the possibility of recognizing the compulsory jurisdiction of the International Court of Justice. The reports of the Karachi meeting had been transmitted to the Governments of Asian and African countries for information and consideration.

61. He reminded the Conference that the Committee was a consultative organ and as such it confined its activities to the scientific examination of legal problems. However, it was rendering increasing assistance to Governments in the region, and its activities now covered not only questions of public international law but also legal issues connected with economic problems of trade and commerce. Some of those questions would be on the agenda of the session which the Committee was to hold at Accra at the beginning of 1970.

The meeting rose at 1.10 p.m.

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## SEVENTEENTH PLENARY MEETING

*Thursday, 8 May 1969, at 3.20 p.m.*

*President:* Mr. BOULBINA (Algeria)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 42* [1]

*Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 or articles 57 and 59 if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

1. Mr. CARMONA (Venezuela) said that at the first session some delegations had considered that article 42, sub-paragraph (*b*), referred to a case of estoppel while others had viewed it merely as a *de facto* situation. In neither case, however, could that sub-paragraph be considered to lay down a rule of general international law, since its only practical application was in private municipal law, in cases where an individual had to be prevented from undoing what had manifestly been his original intention. The situation under international law, though analogous, was one which could never lead to the formulation of a peremptory rule, since the history of nations had presented too many widely different situations. The adoption of sub-paragraph (*b*) would prejudice young developing nations which had only recently achieved independence, since it would only bind them more closely to their former colonial masters and thus serve to perpetuate the injustices of the past.

2. It had been said that some such provision as that envisaged in sub-paragraph (*b*) was necessary in order to ensure the stability of international treaties. How far, however, was it necessary to go in that direction? To defend all existing treaties would only consolidate the *status quo* and safeguard privileges which had sometimes been obtained by coercion and force. The Conference, which was concerned with the progressive development of international law, could not and should not recognize unequal treaties which had been imposed upon weaker nations by the more powerful nations of a former era.

3. It had been alleged that acquiescence in the validity of a treaty, even for a comparatively short time, was sufficient to confirm it; acceptance of that principle, however, would represent an obstacle to the revision of unequal treaties and would therefore be a step backward in the field of international law. It had been argued that article 42 provided certain safeguards against bad faith on the part of States parties to a treaty, but he wondered whether it afforded any protection against those who had originally been guilty of bad faith. In his opinion, the article only served to erect barriers against the revision of illegal instruments and thus to close the door to any honourable solution of situations which were patently unjust because they had been imposed by the strong upon the weak.

4. Article 42 was divided into two parts: sub-paragraph (*a*) dealt with an express agreement concerning the validity of a treaty, while sub-paragraph (*b*) dealt with a tacit agreement. Sub-paragraph (*a*) involved a *de jure* question of the will of the State, while sub-paragraph (*b*) covered *de facto* cases where a State was considered to have acquiesced in the validity of a treaty. Sub-paragraph (*b*), however, involved a dangerous, subjective judgment; in several cases, in fact, the International Court of Justice, when

[1] For the discussion of article 42 in the Committee of the Whole, see 42nd, 43rd, 66th and 82nd meetings.

considering the question of acquiescence, had ruled that silence alone could not create a bond.

5. In the Latin American countries, the question of the validity of treaties tended to centre on the date of their independence, which had been 1810 for the South American countries and 1821 for Mexico and Central America. Following those dates, enormous tracts of land which had formerly belonged to Spain and Portugal had become available for exploitation. Since fatal dissensions might otherwise have ensued, the newly independent countries had exercised the right of eminent domain and had subjected themselves to the rule of law. Frontiers had become clearer in the course of time, but the question of State succession, throughout the developing world, was still very widely subject to the principle of *uti possedetis*. He suggested that, since States Members of the United Nations and of the present Conference were ruled by law and not by mere *de facto* principles, one of the main tasks of the International Law Commission should be to determine the true principle concerning State succession, a question which was wrongly prejudged in article 42, if not in article 69.

6. His delegation appealed to all delegations, particularly those of the new developing countries, to oppose the principle set forth in sub-paragraph (*b*), which would force them to accept and endorse the acts of their former overlords. His delegation proposed to ask for a separate vote on that sub-paragraph, since otherwise it would be compelled to vote against article 42 as a whole.

7. Mr. ALVAREZ TABIO (Cuba) said it would be illogical to admit that an instrument which was void from the outset could possibly be revalidated: only something which had been validly affirmed could be confirmed. The possibility of revalidation could only be conceived in the case of a treaty which had at first been validly concluded but had later been voided as a result of subsequent events. In that case, it was logical to allow for the possibility that the interested party could claim that it had been confirmed. Since the treaty was not void *ab initio,* it was presumed to be valid until the contrary was established. The whole dispute came within the scope of the autonomy of the will of the parties and there was no danger of any violation of the international public order.

8. In the case of a treaty that was void *ab initio,* on the other hand, the well-known maxim applied that an instrument which was radically void could not be validated either by the passage of time or by agreement. It was, for example, inadmissible that a party guilty of fraud or corruption should be allowed to invoke against the injured party the " own conduct " doctrine, according to which no one was permitted to benefit from his own blameworthy conduct. Under article 65, paragraph 3, the party to which the fraud or act of corruption was imputable was not permitted to claim as lawful acts performed in bad faith before the nullity had been invoked. It would thus be inconsistent with the provisions of article 65 to treat in article 42 certain cases of *ab initio* nullity in the same way as cases of mere voidability.

9. His delegation also objected to the presumption of tacit consent in sub-paragraph (*b*) in the case of silence or abstention by the injured party. That presumption based on conduct, with its ill-defined scope, gave too wide a margin for discretion in its application. Article 42, with the ambiguous formulation of sub-paragraph (*b*), did not provide any guidance for determining what type of conduct was to be construed as acquiescence. The position would be particularly grave if those provisions were to be applied to a treaty in respect of which one of the parties had not had any freedom of choice. Sub-paragraph (*b*) carried to its ultimate conclusions the so-called doctrine of " estoppel ", and would in effect impose on the injured party in a case of fraud or corruption an obligation to take some action. The provision in sub-paragraph (*b*) that failure by the injured party to act was to be construed as acquiescence, for the benefit of the party to which the fraud or corruption was imputable, appeared to be based on the legally unacceptable maxim that silence was equivalent to consent. In fact, in the public and administrative law of a great many countries, the contrary rule prevailed: where a decision rested with an authority, its silence was invariably interpreted as a rejection of the request or application and never as an acceptance. Sub-paragraph (*b*) did not even take into account the possibility that the State whose conduct was being interpreted might not have had any freedom of action in certain circumstances. Mere abstention or silence, in all circumstances, was considered as automatically equivalent to tacit consent.

10. His delegation could not accept article 42, not only because it gave unlimited scope to the " own conduct " doctrine, but also because of the ambiguous language in which it was couched.

11. Mr. SARIN CHHAK (Cambodia) said that the concept of good faith, which was explicitly set out in article 23, formed the very basis of the convention, and article 42 was intended to consolidate it. In paragraph (1) of its commentary, the International Law Commission had said that article 42 expressed the generally admitted and expressly recognized principle that a party was not permitted to benefit from its own inconsistencies, a principle based essentially on good faith and fair dealing.

12. A State lost the right to invoke a ground for invalidating a treaty if, after becoming aware of a possible cause of invalidity, it had expressly recognized that the treaty was valid, or if it had behaved in such a way as to be considered as having asquiesced in the validity of the treaty. In such a case, the State in question was not allowed to adopt a legal attitude incompatible with that which its previous behaviour had led the other parties to consider to be its attitude towards the validity of the treaty. In other words, an allegation by a State which conflicted with its previous behaviour could not be taken into consideration, because such an allegation was merely a subterfuge or a device used for a specific purpose. According to the Expert Consultant, the article under consideration involved a general principle of law, which would be applicable in any case even without such a provision.[2]

[2] See 67th meeting of the Committee of the Whole, para. 104.

13. Article 42, as drafted by the International Law Commission, fulfilled the dual purpose of guaranteeing the stability of international relations and providing protection against bad faith in the application of the rules stated in Part V. The article had received general support in the Sixth Committee of the General Assembly and had been unanimously approved by the International Law Commission. The previous year it had received substantial support in the Committee of the Whole. His delegation therefore supported the retention of article 42 in its present form.

14. Mr. BINDSCHEDLER (Switzerland) said that his delegation agreed in principle with article 42, except for one small detail. He regretted, for the reasons which he had stated at the 67th meeting of the Committee of the Whole, that it contained no reference to article 49. If, in a treaty containing an element of coercion, that element disappeared after a certain time, and if States agreed to continue to apply the treaty in future, there was no reason to forbid them to act in that manner. Professor Georges Scelle, a great master of international law and one of the most passionate opponents of the use of force in international relations, had stated that even certain treaties containing an element of force might be in the interests of the international community and should be accepted as an element of international legislation.

15. His delegation fully agreed with the principle set out in article 42 concerning acquiescence in the validity of treaties containing defects of origin. Such recognition of validity by acquiescence was a long established legal principle, it might even be said a principle of international law. The principle was just because it would be contrary to justice if a State could invoke invalidity or a defect in consent in relation to a treaty after applying that treaty for a more or less lengthy period of time or after freely and expressly consenting to it.

16. It had been said that the subject involved an analogy with civil law, which should be avoided. He agreed that prudence was needed in all such analogies, but there was no branch of public international law which was so close to internal law and presented so many analogies with it as the law of treaties, which had been developed on the basis of contract law, or more precisely of Roman law; such analogies were therefore quite admissible in the sphere of the law of treaties.

17. Further reasons supporting the principle of the recognition of validity by acquiescence were the principle of effectiveness, which still played a part in international law, the security and stability of law and international relations and the principle of good faith. It was inadmissible, and he was referring particularly to sub-paragraph (*b*), that a State should apply a treaty for a number of years and suddenly, for some reason, invoke a defect in consent. Such behaviour threatened the stability of the contractual system and the foundations of international law and was contrary to good faith.

18. He could not see any connexion between the principle involved and the struggle against colonialism; the principle was one which benefited all States, including the small and weak. The problem was of a legal nature and must be solved in accordance with legal criteria. His delegation was in favour of article 42 as a whole and would oppose a separate vote on sub-paragraph (*b*).

19. Mr. MOLINA ORANTES (Guatemala) said that his delegation strongly opposed the inclusion of the principle of acquiescence or estoppel in sub-paragraph (*b*), and entirely shared the views just expressed by the Venezuelan representative.

20. Although he did not contest the existence in law of the doctrine which precluded a party from impeaching the validity of acts by which it had benefited, he was convinced that there were some acts which were legally void *ab initio;* such acts could never be rendered valid by a supposed acquiescence, which would merely perpetuate an injustice. Moreover, sub-paragraph (*b*) would deprive articles 49, 57 and 59 of all value.

21. The only argument which had been advanced in favour of sub-paragraph (*b*) was the supposed need to ensure the stability of treaties, even when such treaties suffered from fatal defects. But the existence of peace and justice in relations between States was much more important than the perpetuation of a *status quo* of convenience. He would therefore vote against the inclusion of sub-paragraph (*b*), and supported the Venezuelan request for a separate vote on that paragraph.

22. Sir John CARTER (Guyana) said that, at its 67th meeting, the Committee of the Whole had rejected an eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) to delete sub-paragraph (*b*) of article 42.

23. Two principal arguments had been put forward in support of the deletion of sub-paragraph (*b*). The first questioned the advisability of including in a convention of that type the notion of preclusion, which was indigenous to municipal legal systems and did not form a part of traditional international law; the second emphasized the danger of inferring consent from conduct. Those arguments were either of little relevance to the issue under dispute or were based on a misapprehension of the juridical issues involved.

24. In the first place, sub-paragraph (*b*) stated the principle that a party must not be permitted to benefit from its own inconsistencies in terms of implied consent and not in terms of preclusion, as had been asserted by two previous speakers. The confusion was due to the fact that the International Law Commission in its commentary appeared to have discussed the issue in the context of two decisions of the International Court, in the *Temple of Preah Vihear* case [3] and *The Arbitral Award made by the King of Spain* case,[4] both of which stated the principle negatively in terms of preclusion. But a careful reading of paragraph (4) of the commentary to article 42, particularly the last sentence, together with the remarks of the Special Rapporteur [5] would show that sub-paragraph (*b*) was not intended to state, and did not in fact state, the principle of preclusion.

[3] *I.C.J. Reports, 1962,* p. 6.

[4] *I.C.J. Reports, 1960,* p. 192.

[5] See *Yearbook of the International Law Commission, 1966,* vol. II, p. 7, para. 6.

25. It would be noted that the present sub-paragraph (*b*) was substantially the same as the one recommended for adoption by the Special Rapporteur, and it should be clear therefore that its drafting stated the principle that a party must not be allowed to approbate and reprobate for its own benefit positively in terms of implied consent. That fact could be more easily appreciated if the text of article 42 were compared with that of the corresponding article adopted by the International Law Commission in 1963.[6] The comparison showed that, whereas the text adopted by the Commission in 1963 had stated the principle in terms of preclusion, sub-paragraph (*b*) of the present article 42 addressed itself to a positive statement of the principle in terms of implied consent.

26. The second argument put forward against sub-paragraph (*b*) centred around the danger of accepting the notion of implied consent from conduct. But the International Law Commission appeared to have accepted the well-founded view that intention could be inferred from conduct, as could be seen from the formulation of various articles in the draft convention. Sub-paragraph (*b*) did no more than express the principle that consent might be inferred from conduct, a principle long established in international law, confirmed in the text of the Commission's draft articles, and reaffirmed by the Committee of the Whole and by the Conference itself by its adoption of various articles of the convention. In some instances where the principle had not been clearly stated, the Conference had rectified the omission, for example by amending the text of article 6, paragraph 1 (*b*) by the insertion of the words " the practice of the States concerned or from other circumstances ", and by accepting the explanation of the Chairman of the Drafting Committee that the word " confirmed " in article 7 included both express and tacit confirmation.[7]

27. His delegation therefore hoped that, in view of the importance of article 42 to the convention and to the security and stability of treaties, it would be adopted as it stood. His delegation would oppose the request for a separate vote on sub-paragraph (*b*), in view of the unity of the article and the difficulty of adopting one part without the other.

28. Mr. DE CASTRO (Spain) said that he had already expressed his reservations regarding sub-paragraph (*b*) and he concurred with the arguments put forward by the representatives of Venezuela, Cuba and Guatemala.

29. Article 42 dealt with a case of renunciation of a right or faculty, the right or faculty to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. If that renunciation were to apply to a treaty that was null and void, it would have the effect of validating an instrument which had no legal existence. The operation of the provisions of article 42 would thus bring into being a treaty without requiring due compliance with the various formal and substantive conditions specified in the convention on the law of treaties.

30. In the case of a treaty which was voidable because of a defect in consent, the provisions of sub-paragraph (*b*) would establish a presumptive waiver of the right to invoke the ground of invalidity, and waiver in such cases could not be presumed. In addition, the wording of sub-paragraph (*b*) was not at all clear. The reference to the " conduct " of the State concerned seemed to suggest that some positive act must be performed. At the same time, the term " acquiescence " could be taken as meaning that waiver could be implied from mere silence, or from the failure to resort to certain international authorities. Such a proposition was totally unacceptable to his delegation; much more than a mere abstention was required for it to be possible to say that confirmation had legally taken place. A clear and unequivocal expression of intention was essential.

31. The principle of good faith had been mentioned during the discussion, but it was not relevant to article 42. The negligence or bad faith of a party could not have the effect of bringing into being a new treaty. The question of good faith in connexion with the invalidity of a treaty was dealt with in article 65.

32. He supported the request for a separate vote on sub-paragraph *(b)*. His delegation would vote against that sub-paragraph and, if it were retained, it would have to vote against article 42 as a whole.

33. Mr. BAYONA ORTIZ (Colombia) said that article 42 would have the effect of restricting the application of a number of articles of the convention, in particular those of Part V dealing with invalidity, termination and suspension of the application of treaties.

34. Admittedly, the provisions of Part V were open to abuse, but the same was true of the provisions contained in sub-paragraph (*b*) of article 42, and abuse of those provisions could be a source of injustice.

35. The loss of the right to invoke a ground of invalidity was a very serious matter. It was understandable that such a right should be lost in the case envisaged in sub-paragraph (*a*), because the State concerned would then be expressly consenting to the application of the treaty. That sub-paragraph was therefore acceptable to his delegation. It was, however, a totally different matter to assert that the right could be lost as a result of the conduct of the State concerned. It was extremely difficult to determine the reasons why a State decided to act in a particular way, and even more difficult to determine its real intentions. Viewed in that light, the provisions of sub-paragraph (*b*) appeared not merely superficial but imprecise.

36. His delegation's serious misgivings about the wording of sub-paragraph (*b*) were not based on any special interest. His delegation's concern was to prepare a convention on the law of treaties that would be on an effective instrument laying down clear and precise legal rules which would contribute to international understanding. For those reasons, his delegation supported the request by the Venezuelan delegation for

[6] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 212, article 47.

[7] See 8th plenary meeting, para. 58.

a separate vote on sub-paragraph (*b*) and would vote against that sub-paragraph.

37. Mr. ROMERO LOZA (Bolivia) said that his delegation agreed that it was important to proceed with caution where provisions on the invalidity of treaties were concerned. At the same time, the stability of international relations might be upset by closing the door to the possibility of invoking the invalidity of a treaty that was vitiated, or by establishing procedures which would ultimately result in validating a treaty that was null and void from the start.

38. In paragraph (5) of its commentary to article 42, the International Law Commission had stated its view that the rule embodied in the article would not operate if the State in question " had not been in a position freely to exercise its right to invoke the nullity of the treaty ". For that reason it had stated that it " did not think that the principle should be applicable at all in cases of coercion of a representative under article 48 or coercion of the State itself under article 49 ", and had continued: " To admit the application of the present article in cases of coercion might, in its view, weaken the protection given by articles 48 and 49 to the victims of coercion ".

39. Nevertheless, sub-paragraph (*b*), by establishing a presumption of acceptance based on the conduct of the State, introduced a subjective and nebulous element which was capable of dangerous interpretations, to the detriment of States which had at one time been prevented from exercising their sovereignty or of rejecting provisions imposed upon them. The Bolivian delegation could not possibly accept the text of article 42 and had been instructed by its Government to formulate immediately its reservations to article 42 if it was adopted in its present form. His country did not consider itself bound to comply with the terms of the article.

40. Sir Francis VALLAT (United Kingdom) said that at the first session his delegation had already put on record its views on article 42 and it was therefore not necessary for him to dwell at length on his reasons for supporting the article as it now stood.

41. The discussion had turned on the question of the inclusion or exclusion of sub-paragraph (*b*), dealing with acquiescence by conduct. In his delegation's view, it was not possible to divide the provisions of article 42. The opening sentence, with its essential phrase " after becoming aware of the facts ", governed both sub-paragraphs (*a*) and (*b*). Neither the provisions of sub-paragraph (*a*) nor those of sub-paragraph (*b*) would apply unless the State concerned had become aware of the facts; that requirement provided the key to the whole article. It was connected with the essential element of good faith. If a State became aware of the facts, it was inadmissible that it should go on benefiting from the provisions of a treaty and still be allowed to dispute the validity of the treaty at a later stage. It was right and proper that if a State, either expressly or by its conduct, had in those circumstances affirmed the validity of the treaty, it should no longer be permitted to impugn that validity.

42. The deletion of sub-paragraph (*b*) would distort the application of the rule embodied in article 42. Without sub-paragraph (*b*), the article would be unsatisfying and it would be undesirable to retain it. His delegation therefore urged that article 42 be accepted as it stood.

43. Mr. CONCEPCION (Philippines) said he noted that there had not been any objection to the general principle contained in article 42. With regard to sub-paragraph (*b*), the main objection seemed to be that its wording was not sufficiently specific and, in particular, that the term " acquiescence " could lead to abuse in the interpretation and application of the rule in the article. He therefore suggested that sub-paragraph (*b*) be referred to the Drafting Committee, which could examine the possibility of making the wording clearer so as to specify that acquiescence must be evident or manifest. A drafting change of that kind would bring the provisions of sub-paragraph (*b*) more into line with those of sub-paragraph (*a*) and might allay the apprehensions of those delegations that had expressed misgivings during the discussion.

44. At the same time, the Drafting Committee could take into account the distinction between treaties that were void and treaties that were merely voidable. It was a fundamental principle, acknowledged in private law, that a void instrument could not be revalidated and he was not satisfied that, for purposes of international law, there should be any departure from that fundamental principle.

45. Mr. ALVAREZ (Uruguay) said he had serious misgivings regarding the vague and subjective character of the provisions of sub-paragraph (*b*). Similarly vague and subjective expressions were to be found in certain passages of the commentary to the article, such as the second sentence of paragraph (4) which read: " In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty ".

46. In any case, the terms of sub-paragraph (*b*) did not adequately reflect the basic idea which the Commission had recognized as underlying article 42 when it stated in the first sentence of paragraph (5) of the commentary " that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith ". The two elements mentioned in that sentence were not reflected in the text of sub-paragraph (*b*). That text established a questionable formal presumption which took no account of the real situation in any given case.

47. It must be remembered that the cases dealt with in article 42 were not clear situations in which a State benefited from a treaty, but doubtful situations in which it would be dangerous to make assumptions. Inevitably, the interpretation of the provisions of sub-paragraph (*b*) would be influenced by the interests of the State which invoked them. Those provisions raised a number of very difficult questions of interpretation, in particular the question whether silence or abstention should be construed as acceptance. In fact, they posed

a large number of problems without providing any solution for them.

48. His delegation considered that, although the principle in sub-paragraph (*b*) was legally admissible, the terms in which the sub-paragraph was drafted were unacceptable. He suggested that sub-paragraph (*b*) be referred to the Drafting Committee for rewording in clear and explicit terms, so as to make it possible for all States to accept article 42. In particular, he urged that the rewording should take into account the two elements to which he had referred: first, that the application of the rule in any given case would necessarily turn upon the facts, and secondly, that the governing consideration would be that of good faith.

49. He therefore supported the motion for a separate vote on sub-paragraph (*b*) and, if sub-paragraph (*b*) were not reworded as he had suggested, he would have to vote against it because its provisions could give rise to injustice.

50. Mr. DE LA GUARDIA (Argentina) said that his delegation would support the Venezuelan request for a separate vote on sub-paragraph (*b*) and would vote against that paragraph. If it were decided to retain sub-paragraph (*b*), Argentina would vote against article 42 as a whole.

51. Mr. RATTRAY (Jamaica) said that his delegation had explained his views on article 42 at the 67th meeting of the Committee of the Whole. Jamaica understood article 42 to state the principle that States were free to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty only under certain unambiguous conditions. The conduct of a State on the basis of which it might be regarded as having acquiesced in the validity of a treaty was subject to its having become aware of the facts. Thus, sub-paragraph (*b*) established a standard of proof and, if the conduct in question was open to a variety of interpretations and was therefore ambiguous, it would not constitute acquiescence for the purposes of article 42. Moreover, since the first session, more specific machinery for establishing the grounds of invalidity had been provided in articles 62 and 62 *bis*. Accordingly, the objection that sub-paragraph (*b*) would allow a party to decide unilaterally what conduct might be regarded as acquiescence was unfounded, and article 42 did not contain the ambiguities that had been alleged.

52. The PRESIDENT said that the Philippine representative's suggestion that sub-paragraph (*b*) be referred back to the Drafting Committee could not be accepted, since it gave rise to substantive questions which the Conference must settle for itself.

53. The delegations of Switzerland and Guyana had objected to the Venezuelan request for a separate vote on sub-paragraph (*b*). In view of those objections, under rule 40 of the rules of procedure, the motion for division would have to be put to the vote.

54. Mr. TAYLHARDAT (Venezuela) said that a request for a separate vote represented the right of every State to express its views on a part of a proposal. The Conference had never yet denied any such request, and he appealed to it not to set a precedent in that regard.

55. Sir John CARTER (Guyana) said that every delegation also had a right to object to a request for a separate vote.

56. The PRESIDENT invited the Conference to vote on the Venezuelan request for a separate vote on sub-paragraph (*b*).

*At the request of the Venezuelan representative, the vote was taken by roll-call.*

*Sierra Leone, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Spain, Thailand, Uruguay, Venezuela, Afghanistan, Argentina, Bolivia, Burma, Colombia, Congo (Brazzaville), Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Morocco, Nepal, Peru, Philippines.

*Against:* Sierra Leone, Singapore, South Africa, Sudan, Switzerland, Trinidad and Tobago, Tunisia, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Zambia, Algeria, Austria, Barbados, Belgium, Brazil, Cambodia, Cameroon, Central African Republic, Congo (Democratic Republic of), Dahomey, Denmark, France, Gabon, Ghana, Guyana, India, Indonesia, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mauritius, Monaco, Netherlands, Nigeria, Pakistan, Senegal.

*Abstaining:* Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Australia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Ceylon, Chile, China, Cyprus, Czechoslovakia, Ethiopia, Federal Republic of Germany, Finland, Greece, Holy See, Hungary, Iran, Iraq, Ireland, Israel, Libya, Mongolia, New Zealand, Norway, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia.

*The Venezuelan request of a separate vote on sub-paragraph* (b) *was rejected by 47 votes to 21, with 37 abstentions.*

57. Mr. REDONDO-GOMEZ (Costa Rica) said his delegation greatly regretted that the Conference had denied certain delegations the opportunity of having their views taken into account. Costa Rica wished to place on record its protest against that anti-democratic gesture.

58. The PRESIDENT invited the Conference to vote on article 42.

*Article 42 was adopted by 84 votes to 17, with 6 abstentions.*

59. Mr. BILOA TANG (Cameroon) said that his delegation had voted for article 42 because of the safeguards it provided. Nevertheless, his Government wished to express its view that the conduct referred to

in sub-paragraph (*b*) must be unambiguously determined and that the provision did not cover mere silence.

60. Mr. AMATAYAKUL (Thailand) said that in order to prevent his delegation's silence during the discussion of article 42 from being taken as implying its consent to the adoption of the article, he wished to state that his delegation maintained the view it had expressed at the 67th meeting of the Committee of the Whole and had therefore abstained from voting on the article.

61. Mr. BAYONA ORTIZ (Colombia) said that his delegation had voted against article 42 for the reasons it had given earlier in the meeting. It had intended to vote against sub-paragraph (*b*) but, since the request for a separate vote on that clause had been rejected, it had been obliged to vote against the article as a whole, without prejudice, however, to its views on sub-paragraph (*a*).

62. Mr. CARMONA (Venezuela) said he had received instructions from his Government to announce that the Republic of Venezuela would enter an express reservation in respect of article 42.

63. Mr. BIKOUTHA (Congo, Brazzaville) said that, in his delegation's opinion, the work of codifying the law of treaties should not be based on short-term political considerations or an selfish motives. His delegation had explained its views on article 42, especially on sub-paragraph (*b*), at the 67th meeting of the Committee of the Whole. It was not opposed to the principle laid down in sub-paragraph (*b*), but feared that the inclusion of the phrase " by reason of its conduct " might open the door to subjective and loose interpretations and, consequently, to abuse. It had therefore abstained in the vote on the article as a whole.

64. Mr. GALINDO-POHL (El Salvador) said that his delegation had voted against article 42, although it approved of the first part of it, because of the serious reservations it had to sub-paragraph (*b*). The Conference had, of course, exercised its right under the rules of procedure in rejecting the request for a separate vote on sub-paragraph (*b*), but his delegation could not help thinking that it had thereby shown a certain lack of flexibility. El Salvador had always upheld the view that it was inadvisable to deny delegations the opportunity of expressing their opinions by means of a separate vote on part of a text and thus to force them to vote against the whole provision. He would suggest that in future every effort be made to meet requests for separate votes.

65. Mr. SINHA (Nepal) said that his delegation had voted in favour of the Venezuelan motion for division and against article 42. Nepal supported a just and honourable international legal order, and did not want to be a party to any action which might create a possibility of that order being vitiated by coercion. Sub-paragraph (*b*) as now worded might open the door to legalizing treaties obtained by fraud and coercion, since even silence might be construed as acquiescence in the validity of an unjust treaty or in its maintenance in force or in operation.

66. U BA CHIT (Burma) said that his delegation approved of the first part of article 42, but had reservations concerning sub-paragraph (*b*). Since it had been given no opportunity to express its attitude towards that sub-paragraph, it had had no alternative but to vote against article 42 as a whole.

### Message from the President of India

67. The PRESIDENT said that the Indian delegation had requested him to convey to the Conference a message received from the President, Government and people of India.

68. The President had been deeply touched by the expressions of condolence and the kind references by delegations to the United Nations Conference on the Law of Treaties on the sudden passing of Dr. Zakir Husain, the late President of India. The President wished to convey to the Conference, both on his own behalf and on behalf of the Government and people of India, his grateful thanks for their sympathy in India's great loss. The Conference's condolences had been conveyed to the family of the late President, who also wished to express their thank to the Conference.

The meeting rose at 6 p.m.

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## EIGHTEENTH PLENARY MEETING

*Friday, 9 May 1969, at 3.15 p.m.*

*President:* Mr. ZEMANEK (Austria)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(resumed from the previous meeting)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Statement by the Chairman of the Drafting Committee on articles 43-50*

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 43 to 50 constituted Section 2 (Invalidity of treaties) of Part V of the convention.

2. The Drafting Committee had made several drafting changes in the titles prepared by the International Law Commission and in the texts adopted by the Committee of the Whole. Two of those changes affected all the language versions. The first related to the opening phrase of article 44, " If the authority of a representative to express the consent of his State ". As it had also done elsewhere, and in particular in article 7, the Committee had replaced the words " of his State " by the words " of a State ", since it was possible for a State to be represented by a person who was not a national of that State.

3. The second change related to article 46, on fraud. The article dealt with a situation which had some analogy with that envisaged in article 47, entitled " Corruption of a representative of a State ". The

Committee had considered that the texts of those two articles should have the same grammatical construction and so, without making any change in the terms of article 46, it had brought the structure of the article into line with that of article 47.

4. The other changes made by the Drafting Committee to Section 2 related only to questions of syntax or terminology affecting only one of the official languages of the Conference.

*Article 43* [1]

*Provisions of internal law regarding competence to conclude treaties*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

5. Mr. PINTO (Ceylon) said that he wished to make some comments on the drafting of articles 43, 44 and 45. All three provided for situations in which certain facts essential to the validity of the consent of one party did not exist, and for the change that occurred when, in such situations, the other negotiating State received knowledge of the non-existence of those relevant facts. In all three situations, the non-existence of the particular fact could nullify the consent of the other party and avoid its contractual obligation, but equally, in all three cases, it was declared that if the other negotiating State had knowledge of the non-existence of the relevant fact, it could not plead that its consent had been vitiated. The three articles, however, approached the question of knowledge of the vitiating factor in different ways.

6. Article 43 required that the violation of internal law should be " manifest ", or " objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith ". In that case, knowledge could thus even be presumed on the part of the other negotiating State. It was not necessary that the other negotiating State could be actually aware of the lack of internal authority. It was considered to have been informed of the lack of authority if that lack would have been " evident " to " any State ", presumably after some inquiry demanded by ordinary prudence, but not necessarily after an exhaustive inquiry and extensive efforts to secure authoritative interpretations of the other State's constitution and practice. The required standard of conduct or investigation was far from clear. No point of time was specified, while non-existence of the fact might be " manifest " either before or after the giving of consent.

7. Article 44 required that the " other negotiating State " be " notified " of the restriction on the representative's authority. Nothing short of a formal act of notification would suffice for the " other negotiating State " to be held to have received knowledge of the non-existence of the relevant fact. Moreover, the timing was important: it was stated that notification must have been received before consent was given.

8. Under article 45, it was enough that circumstances should be such as to put the other negotiating State on notice of a possible error for the validity of the latter's consent to be held affirmed. No formal act of notification appeared possible in that case, and indeed both parties could well have been misled by the same error. No standard of diligence, however, was specified, unlike the case provided for in paragraph 2 of article 43, and no point of time was indicated, unlike the case provided for in article 44.

9. Lastly, there was the question of the degree of importance of the information which, if received, would preclude a plea of invalidity. Article 43 dealt with cases where the non-existence of constitutional authority was of " fundamental importance ". Article 44 indicated no degree of importance regarding the " restrictions on authority " that a representative had failed to observe. Article 45 referred to a fact or situation that formed an " essential basis " of a party's consent. There did not appear to be any real difference between the standards implied by the phrases " fundamental importance " and " essential basis ". Some uniforme terminology should be found.

10. He wished to draw the Drafting Committee's attention to those differences of approach on three points: first, the manner in which the other negotiating State became aware that something was wrong on its partner's side; secondly, the time when such information was to be received in order to preclude invalidation of consent; and thirdly, where no formal act of notification was possible or called for, the standard of conduct or diligence of investigation expected from a State. If some uniformity of approach, terminology and drafting was possible, it might be helpful to make the necessary changes so as to avoid difficulties of interpretation in the future.

11. Those observations were offered solely with the intention of assisting the Drafting Committee in its continuing reappraisal of the convention.

12. The PRESIDENT said that the comments of the representative of Ceylon would be taken into consideration by the Drafting Committee.

13. Mr. WERSHOF (Canada) said that his delegation wished to make a general statement applicable to many of the articles in Sections 2 and 3 of Part V of the convention.

14. Quite apart from his delegation's doubts regarding the substance of some of the articles in those sections, certain of those articles would be unacceptable to the Canadian Government in the absence of a satisfactory clause on the settlement of disputes, such as article 62 *bis* as recommended by the Committee of the Whole.

15. If, therefore, the Canadian delegation voted in favour of all or most of the articles in Sections 2 and 3 of Part V, it would be doing so on the assumption

[1] For the discussion of article 43 in the Committee of the Whole, see 43rd and 78th meetings.

that the Conference would adopt a satisfactory clause on the settlement of disputes.

16. If that assumption proved to be incorrect, the Canadian delegation reserved the right to reconsider its position on the question of the adoption of the convention as a whole. Similar declarations had been made by his delegation at the first session during the examination of Part V in the Committee of the Whole.

17. Mr. KRISHNA RAO (India) said he wished to place on record his delegation's view that no condition could be attached to any article in Part V. Every sovereign State was of course free to sign or not to sign the convention on the law of treaties. The Conference had been convened in order to find a text that would prove acceptable to all.

18. Mr. BILOA TANG (Cameroon) said that, during the discussion on article 5, his delegation had opposed the inclusion of the former paragraph 2, which the Conference had rejected at the 8th plenary meeting, because of the complications which would result from the need for one State to interpret the constitution of another State. A similar difficulty arose in connexion with article 43, paragraph 1, which referred to a violation of the internal law of a State, which " was manifest and concerned a rule of its internal law of fundamental importance ". In order to apply that provision, a State party to a treaty would have to consider the provisions of the internal law of another State and determine which were of " fundamental importance ". For those reasons, he was in favour of dropping the concluding words of the paragraph, " and concerned a rule of its internal law of fundamental importance ", and he requested a separate vote on those words.

19. Mr. GONZALEZ GALVEZ (Mexico) said that his delegation wished to make a general comment on the " Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty " which the Committee of the Whole had submitted to the Conference for consideration in conjunction with article 49;[2] that article declared a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

20. It would be most incongruous if, after establishing the invalidity of treaties obtained by coercion of a representative, in article 48, or by coercion of the State by the threat or use of force, in article 49, and of treaties conflicting with a rule of *jus cogens,* in article 50, the Conference were to fail to specify that economic or political coercion constituted grounds of absolute nullity.

21. During the discussion at the first session on the nineteen-State proposal on the subject (A/CONF.39/C.1/L.67/Rev.1/Corr.1), it had been objected that the term " coercion " was very vague and hard to define, so that it was not possible to draw a distinction between lawful and unlawful pressure. It had also been objected that international relations would be impossible if countries were not allowed to exercise a minimum of pressure on each other.

22. International relations undoubtedly involved some element of pressure. For example, in a bilateral negotiation for the conclusion of a commercial treaty, it was normal for a State to withhold certain concessions in the hope of obtaining something in return for them. At the same time, it was possible to conceive of forms of economic pressure that were open to a State in the exercise of its sovereignty, but were obviously illicit. To take an example, it was doubtful whether it was legitimate for a State to bring pressure to bear by applying health or trade regulations in such a manner as to prevent the import of a certain product from a particular country while at the same time allowing the import of that product from another country in the same area. Such measures would be even more clearly illicit if it could be shown that the discrimination in question was intended to compel the exporting country to sign a treaty which had no connexion with the health or trade regulations in question. In the hypothetical example he had given, it would not be a valid reply to say that the State exerting the pressure had been acting within its sovereign rights; such a reply would perhaps have been admissible in the nineteenth century, but would now be incompatible with the letter and the spirit of the Charter, Articles 55 and 56 of which obliged Members to take joint and separate action to promote the solution of international economic and social problems. It would, moreover, run counter to the duty laid down by the Charter to perform international obligations in good faith, and it would be contrary to the general principle of law prohibiting what French legal doctrine referred to as " abuse of rights ".

23. The position was similar in the political field. It could of course be said that, throughout history, no dispute had been settled without some measure of pressure, but it had to be recognized that there were various types of pressure. No one would deny that the pressure exercised by Hitler on the President of Czechoslovakia to compel him to make certain territorial concessions had constituted a typical case of unlawful political coercion. In that well-known case, political coercion of the President as an organ of the State had been combined with physical coercion of the President as an individual, but one or other of those two grounds was sufficient to render void the agreement then imposed on Czechoslovakia.

24. He was not convinced by the argument that certain terms were not capable of clear legal definition and that it was therefore impossible to distinguish between lawful forms of pressure. As he had pointed out in another United Nations body, the fact that a term was vague, or that a principle was difficult to apply, was not sufficient reason for rejecting such terms or principles, since the political or judical organ entrusted with the application of the term or principle would not have any greater difficulties than those which faced any court of law in its daily work of applying legal rules. A great many important legal terms had only an

[2] For the text of this declaration, see 20th plenary meeting, para. 1.

approximate and imprecise meaning and required to be interpreted within reason, bearing in mind the time and place and the political, economic, social and legal circumstances in which they were applied. That argument was particularly important for those countries which, unlike Mexico, had indicated that their acceptance of the provisions of Part V was subject to the inclusion of a system for the compulsory settlement of disputes arising out of those provisions.

25. History provided many examples of notions which, at their inception, had seemed vague and imprecise, but which the passage of time, had been subsequently clarified, their scope and limits having been defined by practice. Thus, in the United States, the concept of " due process of law ", which had originated as a mere procedural safeguard, had ultimately developed into a whole system of political philosophy. In the course of that development, the meaning of that term had at times been extraordinarily fluid.

26. In international law, the expression " due diligence " was used in connexion with the duty of a neutral State to exercise vigilance in order to prevent its territory from being used to equip vessels for use against one of the belligerents. It appeared in the well-known Washington Rules, which had emerged from the famous *Alabama* case and which had exercised a considerable influence on the development of the law of neutrality on that point. But there was still no exact definition of the term " due diligence ".

27. The Charter of the United Nations itself provided another striking example. Article 4(1) made membership in the United Nations open to all " peace-loving States " which accepted the obligations of the Charter and which, in the judgement of the Organization, were able and willing to carry out those obligations. It would be extremly difficult to give any precise definition of the term " peace-loving State " and yet the political organs of the United Nations — the Security Council and the General Assembly — had applied that concept in more than seventy cases; in fact, on each occasion when a new Member was admitted.

28. In its judgement of 9 April 1949 in the *Corfu Channel* case the International Court of Justice had stated that " the present defects in international organization " — and, he would add, lack of precision in a term or in a rule — could not be invoked to justify failure to observe a legal rule. The relevant paragraph read: " The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." [3]

29. For those reasons, his delegation suggested that the Conference give careful consideration to the possibility of including in Part V a new article reading: " A treaty is void if its conclusion has been procured by economic or political coercion in violation of the principles of the Charter of the United Nations". That article would fill a gap in the convention and would be no more difficult to interpret and apply than the rules embodied in articles 48, 49 and 50, which had already been approved by the Committee of the Whole.

30. For those States that were members of the inter-American system, it was appropriate to recall that article 16 of the Charter of the Organization of American States prohibited the use by a State of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.[4]

31. Mr. EUSTATHIADES (Greece) said that, following the statements made by certain representatives, his delegation must declare that it reserved its position regarding Part V and on the convention as a whole until a satisfactory decision was reached on the procedure for the settlement of disputes. Such a declaration would normally not have been necessary, but in view of what had been said by other speakers, he was obliged to place it on record.

32. Mr. SOLHEIM (Norway) said that his delegation also wished to make a general statement with respect to the articles which the Conference was now considering. Its views on the question were, on the whole, the same as those expressed by the Canadian representative.

33. When voting in favour of, and even when abstaining on, some of the articles in Sections 2 and 3 of Part V, his delegation's votes would be given on the assumption that the convention on the law of treaties would contain a solution in respect of the settlement of disputes which was considered satisfactory by his delegation. If that should prove not to be the case, the Norwegian delegation's final position and vote on the convention on the law of treaties as a whole would certainly be influenced thereby.

34. Mr. KRISHNA RAO (India) said the Conference should return to the discussion of article 43. At both the present and the previous meetings, a number of statements had been made which related particularly to article 62 *bis* and were more suited to a general debate. Every delegation was of course free to adopt whatever attitude it found appropriate, but the Indian delegation was not bound by a statement made by another delegation. Nor was the Conference itself bound by the statements of individual delegations.

35. Mr. EL DESSOUKI (United Arab Republic) said that the French version of paragraph 1 would be clearer if the words *" qu'elle "* were inserted to make the end of the sentence read *" qu'elle ne concerne une règle de son droit interne d'importance fondamentale"*.

36. The PRESIDENT said that the representative of Cameroon had asked for a separate vote on the words " and concerned a rule of its internal law of fundamental importance ".

37. Mr. USENKO (Union of Soviet Socialist Republics) said he believed that the Cameroonian representative's request was based on a misunderstanding, because if those words were deleted, the door would be opened to

[3] See *Corfu Channel case, Judgment of April 9th 1949: I.C.J. Reports, 1949*, p. 35.

[4] United Nations, *Treaty Series*, vol. 119, p. 56.

the possibility that even secondary rules of internal law might be invoked. The Soviet Union delegation accordingly could not support the request for a separate vote.

38. The PRESIDENT said that he would invite the Conference to vote first on the request by the representative of Cameroon for a separate vote on the words " and concerned a rule of its internal law of fundamental importance ".

*The motion for a separate vote was defeated by 43 votes to 7, with 47 abstentions.*

*Article 43 was adopted by 94 votes to none, with 3 abstentions.*

39. Mr. MATINE-DAFTARY (Iran) said that his delegation had abstained from voting on the article for the reasons it had given at the 43rd meeting of the Committee of the Whole. The text of the article was not satisfactory to Iran.

40. Mr. KEARNEY (United States of America) said he wished to explain why his delegation had voted for article 43. To the extent that the article dealt with invocation on the international plane of provisions of internal law, the comments made in explanation of the United States vote on article 23 *bis* at the 13th plenary meeting were relevant and he would not repeat them. His delegation wished to emphasize that article 43 in no way affected the internal law of a State regarding competence to conclude treaties; it dealt solely with the conditions under which a State might invoke internal law on the international plane to invalidate the State's consent to be bound.

41. Mr. SMALL (New Zealand) said that his delegation had voted for article 43, and would vote for the rest of the articles in Part V if they remained unchanged. Although New Zealand had doubts regarding some of those articles, particularly article 47, whose advisability was not quite clear, it would vote for the articles in the expectation that adequate procedure would be provided in the final convention for the settlement of disputes relating to Part V. The reasons for his delegation's attitude had been explained at the first session of the Conference, and he would merely add that New Zealand's acceptance of the convention as a whole would depend essentially on the view it took of whether there was a proper balance between the whole of Part V and the adequacy of procedural safeguards for the settlement of disputes, in the final text of the convention.

42. He would be unable to vote for article 50 because of its nature, and the special relevance in that case of a proper procedural machinery. For the same reason his delegation had abstained from voting on article 41, which included a reference to article 50.

43. Mr. BLIX (Sweden) said that his delegation had voted for article 43 on the understanding that it did not cover the case of treaties concluded by *de facto* governments. It was generally acknowledged in doctrine and practice that *de facto* governments, in other words those exercising effective power but disregarding constitutional rules, could bind their States in international law by treaties, because any other rule would not be practical.

44. Mr. FATTAL (Lebanon) said he wished to raise a point of procedure. As the Conference only had eight working days left in which to deal with a very large number of articles, as well as the preamble and the final clauses, he would suggest that from now on the length of statements be restricted, particularly since many representatives were repeating what they had already said more than once.

45. The PRESIDENT said that he did not think the time had yet come to take such a step, but he hoped that representatives would take note of the remarks of the representative of Lebanon.

*Article 44* [5]

*Specific restrictions on authority to express the consent of a State* . .

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

46. The PRESIDENT invited the Conference to consider article 44. An amendment to that article had been submitted by Spain (A/CONF.39/L.26).

47. Mr. DE CASTRO (Spain) said that the Spanish amendment was in fact the same as that submitted by his delegation at the 44th meeting of the Committee of the Whole (A/CONF.39/C.1/L.288).[6] It was purely a matter of drafting, and he would accordingly suggest that the Drafting Committee reconsider the wording of article 44 in the light of his amendment, particularly the Spanish version of the article.

48. The PRESIDENT asked the representative of Spain if he wished the Drafting Committee to consider redrafting the article in the other language versions also.

49. Mr. DE CASTRO (Spain) said he would leave that to the Drafting Committee to decide.

50. The PRESIDENT suggested that the amendment by Spain should be referred to the Drafting Committee.

*It was so agreed.*[7]

*Article 44 was adopted by 101 votes to none.*

*Article 45* [8]

*Error*

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist

[5] For the discussion of article 44 in the Committee of the Whole, see 44th and 78th meetings.

An amendment was submitted to the plenary Conference by Spain (A/CONF.39/L.26).

[6] See also 78th meeting of the Committee of the Whole, paras. 18-20.

[7] The Drafting Committee did not recommend the adoption of the amendment. See 30th plenary meeting.

[8] For the discussion of article 45 in the Committee of the Whole, see 44th, 45th and 78th meetings.

at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

51. The PRESIDENT said that the United Kingdom amendment (A/CONF.39/L.19) had been withdrawn.

52. Sir Francis VALLAT (United Kingdom) said that the Conference had now come to a series of articles relating to error, fraud, corruption and so on, which, according to the provisions of the draft convention, established grounds which might be relied on by a State with a view to invalidating its consent or otherwise terminating a treaty or its participation in that treaty. His delegation had made it clear on earlier occasions that its attitude to the convention as a whole would largely depend on whether the reference to article 50 was retained in paragraph 5 of article 41, and whether, on the assumption that the series of articles referred to were retained, there would be satisfactory procedures for the settlement of disputes. The vote at the sixteenth plenary meeting on paragraph 5 of article 41 was therefore bound to have some effect on the United Kingdom's attitude; it would not by itself necessarily turn the United Kingdom against the convention, but it would be a material factor in determining its over-all attitude.

53. The Conference was now left with two major factors: the nature and content of the series of articles referred to, and the procedures governing their application. It had often been stated that many, if not all, of the articles merely put into writing existing principles or rules of international law, but his delegation very much doubted whether that was altogether true. Whether it was true or not, the articles undoubtedly contained a substantial element of progressive development, if only as regards their formulation and modalities and the procedures for their application. By any normal legislative standards the articles as drafted were in many respects broad and vague; such key words as " fraud " and " coercion ", difficult enough to interpret in municipal law, and not previously applied in international law, were left completely undefined. It therefore seemed most unwise to leave their interpretation and application to the discretion of individual States. It might be said that article 62 provided the necessary procedures to avoid that result, but unfortunately it was itself ambiguous as to the effect of an objection. Paragraph 3, which might have provided the necessary safeguards, merely reflected Article 33 of the United Nations Charter. Although that Article pointed in the right direction, experience had shown that it left the matter entirely to the choice of the individual State concerned; it clearly provided no safeguard.

54. The United Kingdom would have preferred to have the right ultimately to refer disputes as to the interpretation or application of the articles in question to the International Court of Justice, but that possibility had now been ruled out, as far as the convention was concerned. Article 62 *bis,* as adopted by 54 votes to 34 in the Committee of the Whole, now limited States to a final resort to arbitration. Though somewhat less than satisfactory, that was acceptable. However, it must be made clear that the United Kingdom required for itself, particularly in connexion with the series of articles referred to, the minimum protection of the right to resort to arbitration in the last analysis. The United Kingdom had no wish to impose that procedure on those who did not want that measure of protection, but equally it could not agree to the imposition of those articles on the United Kingdom without the minimum protection of resort to arbitration.

55. That was a reasonable position, since it was merely an application in the international field of elementary principles of justice universally recognized in internal law. The principle that no man should be " judge in his own cause " was applicable to provisions such as those referred to, some of which had a distinct tinge of criminal law. All his delegation asked was the common human right to a fair trial if differences could not be settled by negotiation or by other procedures falling short of arbitration.

56. He had spoken at some length because he thought it would be more appropriate to make a single statement on the whole series of articles referred to rather than to repeat the same views on successive articles. As the Conference could not yet take a final decision on the articles relating to settlement procedures adopted by the Committee of the Whole, his delegation would be obliged to abstain on those articles in that part of the convention which established substantive grounds of invalidity or termination, and which required for their effective application or interpretation the protection of satisfactory third-party procedures.

57. Mr. USENKO (Union of Soviet Socialist Republics) said he was surprised at the statements that had been made by some representatives, such as those of Canada and the United Kingdom. Surely the Conference was discussing article 45, not article 62 *bis*? Some speakers seemed to be examining the draft convention as a whole; he had the impression that the statements made were really an attempt to exert pressure on delegations that supported Part V of the convention but were opposed to article 62 *bis*. Questions such as those now being raised concerning article 62 *bis* should be considered when that article came to be examined. He would not deny that certain articles were interrelated, and that certain principles related to several different articles. For example, the principle of universality related to more than one article. If certain delegations did not respond to the appeal to proceed with the examination of the convention article by article, it was quite possible that other delegations might wish to return to a consideration of the principle of universality. As the representative of Lebanon had pointed out, the time remaining to the Conference was short; delegations must consider the texts of the articles in their proper order instead of embarking on general discussions of the draft convention as a whole.

58. The PRESIDENT invited the Conference to vote on article 45.

*Article 45 was adopted by 95 votes to none, with 5 abstentions.*

*Article 46* [9]

*Fraud*

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

*Article 46 was adopted by 92 votes to none, with 7 abstentions.*

59. Mr. VARGAS (Chile) said that he had abstained from voting on article 46 for the reasons he had given at the 45th meeting of the Committee of the Whole.

*Article 47* [9]

*Corruption of a representative of a State*

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

60. Mr. QUINTEROS (Chile) said that his delegation would vote against article 47 for the reasons stated at the 45th meeting of the Committee of the Whole, which had led Chile, Japan and Mexico to propose the deletion of the article.

*Article 47 was adopted by 84 votes to 2, with 14 abstentions.*

61. Mr. VARGAS CAMPOS (Mexico) said that his delegation, together with the delegations of Chile and Japan, had submitted an amendment (A/CONF.39/C.1/L.264 and Add.1) in the Committee of the Whole proposing the deletion of article 47. The Mexican delegation had argued at the 45th meeting that article 47 was unnecessary since a treaty signed by a corrupted representative was voidable under article 46, corruption being a form of fraud. In paragraph (1) of its commentary to article 47, the International Law Commission had pointed out that the draft articles on the invalidity of treaties provisionally adopted by the Commission in 1963 had not contained any provision dealing specifically with the corruption of a State's representative, and that the only provision of the 1963 text under which that might be subsumed was the article dealing with fraud. The Mexican delegation had therefore voted against article 47.

62. Mr. OTSUKA (Japan) said that his delegation had abstained from voting on article 47 as it still had some doubt whether the article should be included in the convention.

[9] For the discussion of articles 46 and 47 in the Committee of the Whole, see 45th, 46th, 47th and 78th meetings.

*Article 48* [10]

*Coercion of a representative of a State*

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

63. Mr. NETTEL (Austria), supported by Mr. BILOA TANG (Cameroon), asked for a separate vote on the word " personally " which, in his delegation's view, narrowed the scope of the article. For example, threats might be directed against the next-of-kin of the representative of a State.

64. The PRESIDENT invited the Conference to vote on the word " personally ".

*It was decided, by 46 votes to 16, with 35 abstentions, to delete the word " personally ".*

*Article 48, as thus amended, was adopted by 93 votes to none, with 4 abstentions.*

*Article 49* [11]

*Coercion of a State by the threat or use of force*

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

65. Mr. ESCUDERO (Ecuador) said that no article in the draft convention was as important to the future of mankind as article 49, which had been approved by a large majority in the Committee of the Whole at the first session of the Conference. At that time his delegation, together with those of thirteen other States, had introduced an amendment (A/CONF.39/C.1/L.289 and Add.1) to the effect that a treaty was void if its conclusion had been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. The purpose of the amendment had been to emphasize that certain principles which had already existed before 1945 as treaty law derived from international custom had been " embodied " in the Charter.

66. Ever since the end of the days of barbarism, it had been agreed that the use of force should be outlawed, but it was not until the First World War in 1914 that the conscience of mankind had been moved to take action and to create the League of Nations. The Covenant of the League required the Contracting Parties to accept obligations not to resort to war and to establish firmly " the understandings of international law as the actual rule of conduct among Governments." The "understandings of international law " must certainly have included the outlawing of the use of force, since without that principle there would have been no justification for the existence of international law itself. Under Article 10 of the Covenant, Members undertook " to respect and preserve as against external aggression the territorial

[10] For the discussion of article 48 in the Committee of the Whole, see 47th, 48th and 78th meetings.

[11] For the discussion of article 49 in the Committee of the Whole, see 48th, 49th, 50th, 51st, 57th and 78th meetings.

integrity and existing political independence of all Members of the League ". The same Article specified that, " in case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled ". Articles 11, 12 and 16 of the Covenant also prohibited the use of force and provided for sanctions. Subsequently a number of defensive agreements and treaties had been entered into by States on the basis of that principle. They had culminated in the signing of the Briand-Kellogg Pact of 1928,[12] in which the contracting States renounced recourse to war as an instrument of national policy. The date of the Briand-Kellogg Pact was clearly the date from which the principles of international law now embodied in the United Nations Charter had come into force. Between 1928 and the signing of the Charter in 1945, the prohibition of the use of force had become a peremptory norm of international law. That norm was now embodied in Article 2(4) of the Charter.

67. The true meaning of the provision in the Briand-Kellogg Pact under which States renounced recourse to war as an instrument of national policy was clear. It was that recourse to armed action, not war, was a legitimate instrument of international policy for the purposes of legitimate defence and the collective punishment of the aggressor. Legitimate defence was permitted by Article 51 of the United Nations Charter. In point of fact, the Briand-Kellogg Pact had provided the grounds for the sentences at the Nuremberg war crimes trials, since they dealt with " crimes against peace ", such as the threat or use of force which had been prohibited by the Pact of Paris of 1928.

68. Consequently, if the prohibition of the threat or use of force existed before the Nuremberg sentences, thoses sentences were valid; if it had not existed, they would have been void. The fact the prohibition already existed and that the sentences were therefore valid was a matter for which the United States, France, the United Kingdom and the Soviet Union, who set up and were represented on the Nuremberg Tribunal, were responsible.

69. The principles of international law mentioned in Article 49 of the convention had been observed in inter-American law since 1826. The principles of the prohibition of force, the non-recognition of territorial acquisitions obtained by force, and the peaceful settlement of international disputes had been laid down in the various instruments drawn up at the Congress of Panama of 1826, the first Congress of Lima of 1847, the Pact of Washington of 1856, the second Congress of Lima of 1864, the first Bolivar Congress of 1883, the first Pan-American Conference of 1889, the sixth Pan-American Conference of 1928, the Declaration signed by nineteen American countries in 1932, the seventh Pan-American Conference of 1933, the Inter-American Conference for the Consolidation of Peace of 1936, the eighth Pan-American Conference of 1938 and in the first and second consultative meetings of American Foreign Ministers of 1939 and 1940. The Seventh International Conference of American States, which had met in Montevideo in 1933, had drawn up the Convention on Rights and Duties of States, article 11 of which lair down that territorial acquisitions or special advantages obtained by force would not be recognized.[13]

70. Those principles of international law, embodied in the inter-American instruments referred to, had the character of regional *jus cogens* and had existed before the entry into force of the United Nations Charter. It was therefore only natural that article 49 should have been approved by an overwhelming majority in the Committee of the Whole. It remained for the Conference itself to set its seal of approval on a precept which would contribute effectively to the maintenance of peace in the world.

71. Mr. WARIOBA (United Republic of Tanzania) said that at the first session his delegation had been one of the sponsors of an amendment (A/CONF.39/L.67/Rev.1/Corr.1) for the inclusion in article 49 of a reference to " economic or political pressure ". In the hope of reaching a general compromise, that amendment had subsequently been withdrawn. The delegations which had opposed it had stated that their final acceptance of all the articles in Part V would depend on the development of some satisfactory machinery for the settlement of disputes. But he wondered whether it was really necessary for those delegations to keep repeating that their wishes must be met. His delegation would vote for article 49, not because it considered it completely satisfactory, but because it considered that the views of the largest possible number of delegations should be taken into account.

72. Mr. BINDSCHEDLER (Switberland) said that his delegation would abstain from voting on article 49 because, like the United Kingdom delegation, it doubted whether the principle set forth in the article was in accordance with the teachings of history and because its adoption might endanger the stability of the entire system of international law. His delegation, however, was in complete agreement with those of Ecuador and the United Republic of Tanzania in opposing the coercion of States by the threat or use of force.

73. Mr. JACOVIDES (Cyprus) said that his delegation attached the greatest importance to article 49, which it fully supported in its present form, as supplemented by the declaration condemning the threat or use of pressure in any form in the conclusion of a treaty.

74. His delegation had expressed its views at length at the 49th meeting of the Committee of the Whole. It considered that the final adoption of the article, which formed part of *lex lata,* was a landmark in contemporary international law. It hoped that treaty relations in the future would be governed by the provisions of article 49 and of the declaration which accompanied it, thus helping to promote the fundamental purposes of the United Nations.

75. Mr. VARGAS (Chile) said that his delegation would vote for article 49, which it regarded as the corollary to

[12] League of Nations, *Treaty Series,* vol. XCIV, p. 57.

[13] League of Nations, *Treaty Series,* vol. CLXV, p. 27.

Article 2(4) of the United Nations Charter and an important contribution to the maintenance of international peace and security. The Chilean delegation disagreed, however, with some of the interpretations given to the text of article 49 as approved by the Committee of the Whole. Article 77, on the non-retroactivity of the convention on the law of treaties, made it clear that article 49 applied only to treaties concluded after the entry into force of the convention. As far as doctrine was concerned, moreover, the only thing it was possible to maintain with any certainty was that the prohibition of the threat or use of force in international relations dated from the United Nations Charter. Before that, the Covenant of the League of Nations and the Pact of Paris, although they represented a clear advance on traditional international law, did not specifically and categorically prohibit the threat or use of force in the way that the Charter did. Consequently, even in the absence of a provision on the non-retroactivity of the convention on the law of treaties, article 49 could not apply to situations dating from before the Charter. His delegation also considered that the invalidity referred to in article 49 and in all the other articles in Part V should affect treaties concluded in the future, in accordance with the procedures laid down in the convention itself.

76. In the light of those considerations, which had been confirmed by the adoption of other rules, and especially of the fact that, in his delegation's view, the proposed convention would be incomplete unless it contained some provision stating that a treaty was void if its conclusion was procured by the threat or use of force, the Chilean delegation would vote in favour of article 49.

77. Mr. SHUKRI (Syria) said that his delegation would vote for article 49 on the understanding that the expression " threat or use of force " was to be understood in its broadest sense as including the threat or use of pressure in any form, whether military, political, psychological or economic. In a spirit of compromise, his delegation, like that of Tanzania, would not press any amendment to that article but would accept it in the spirit of the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty adopted by the Committee of the Whole at the first session.

78. Mr. HUBERT (France) said that his delegation had abstained in the votes on articles 45 to 48 because of its concern for the maintenance of the necessary balance between Part V of the convention and the clauses relating to the settlement of disputes. It would vote for article 49, however, since France attached the highest importance to the principle that there should be no resort to force in international relations.

79. Mr. HAYTA (Turkey) said that his delegation, while not opposed to the general aims of article 49, was unable to support it because it still had some doubts concerning the precise scope of the expression " the threat or use of force ".

80. Mr. EL DESSOUKI (United Arab Republic) said that his delegation would support article 49 in the spirit of the draft declaration which had been adopted by the Committee of the Whole at the first session.

81. Mr. TABIBI (Afghanistan) said that article 49 was one of the most important articles of the draft convention; in its present form, however, it was not entirely satisfactory to the smaller nations of Asia, Africa and Latin America. At the first session, the nineteen-State amendment, (A/CONF.39/C.1/L.67/Rev.1/Corr.1), of which his delegation had been a co-sponsor, had been withdrawn in favour of the draft declaration adopted by the Committee of the Whole. That draft declaration, however, contained a number of loopholes; in particular, the title made no mention of military coercion in addition to economic and political coercion. In view of the importance which article 49 had for the developing countries, therefore, he formally proposed, under rule 27 of the rules of procedure, that further discussion of article 49 be adjourned till the next meeting.

*The motion for the adjournment was carried by 58 votes to 11, with 29 abstentions.*

*The meeting rose at 5.50 p.m.*

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## NINETEENTH PLENARY MEETING

*Monday, 12 May 1969, at 11 a.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 49* (Coercion of a State by the threat or use of force) *(continued)*

1. The PRESIDENT said that since there were no further speakers on article 49, he would put the article to the vote.

*At the request of the representative of the United Republic of Tanzania, the vote was taken by roll-call.*

*Panama, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Congo (Brazzaville),

Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, Mexico, Monaco, Mongolia, Netherlands, New Zealand, Nigeria, Norway, Pakistan.

*Against:* None.

*Abstaining:* Switzerland, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, Belgium.

*Article 49 was adopted by 98 votes to none, with 5 abstentions.*[1]

2. Mr. ROMERO LOZA (Bolivia), explaining why his delegation had voted in favour of article 49, said that to have voted against it would have meant rejecting one of the fundamental principles underlying international co-existence. A provision that a treaty was void if its conclusion had been procured by the threat or use of force was the only way of safeguarding weak countries against treaties which were unjust or abitrary, or which prevented the satisfactory operation of factors conducive to economic development.

3. Article 62 *bis*, as approved by the Committee of the Whole, laid down adequate procedures for the application of article 49. The latter article applied, and would apply, not on the basis of certain specified dates, but on the basis of events which had taken place and which violated fundamental principles of international law.

4. By providing that a treaty was void if its conclusion had been procured in violation of principles of international law which had existed before the United Nations Charter and had been embodied in it, article 49 would make it possible to restore rights which had been unjustly infringed.

*Draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty*

5. Mr. TABIBI (Afghanistan) said he regretted to note that the present text of article 49, which the Conference had just adopted, did not reflect the views of the majority in the Conference as expressed at its first session in an amendment proposed by Afghanistan and many other delegations (A/CONF.39/C.1/L.67/Rev.1/Corr.1). That amendment, under which a treaty would be void if its conclusion had been procured by the threat or use of force, including economic or political pressure, was nothing more than a statement of what had become a principle of general international law, as laid down for example in Article 1(3), Article 55 and above all Article 2(4) of the United Nations Charter; in articles 15 and 16 of the Charter of the Organization of American States;[2] in the Declarations of the Conferences of the Heads of State or Government of Non-Aligned Countries made at Belgrade in 1961 and at Cairo in 1964; in the draft declaration on rights and duties of States prepared by the International Law Commission,[3] and so forth. However, in order to meet the objections of a number of delegations, the sponsors of the amendment, and in fact the large majority in the Conference which had supported the amendment had agreed not to vote on it in the Committee of the Whole and instead to seek a compromise, which took the form of a general declaration.[4] The sponsors of the amendment had accepted that compromise on the understanding that the precise scope of acts involving the use of force, whether military, economic or political, should be determined in practice by interpretation of the provisions of the Charter. The summary records of the Conference must be extremely clear on that point for the purpose of the future interpretation of article 49 as now worded.

6. His delegation was submitting a draft resolution to the Conference with a view to supplementing the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty, which the Committee of the Whole had adopted as a result of the compromise agreed to by Afghanistan and the other sponsors of the amendment he had mentioned (A/CONF.39/C.1/L.67/Rev.1/Corr.1). The text of the Afghan draft resolution as already circulated (A/CONF.39/L.32) had to be replaced by a revised version (A/CONF.39/L.32/Rev.1), which would be circulated shortly. He requested the Conference to postpone its consideration of the draft declaration approved by the Committee of the Whole until the Afghan draft resolution had been circulated in its revised form.

*It was so agreed.*[5]

## ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed)*

### *Article 50* [6]

*Treaties conflicting with a peremptory norm of general international law* (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

7. Mr. HUBERT (France) said he regretted to have to oppose an article which had attracted a large number

[1] See the statements by the representative of Ghana at the 23rd plenary meeting and by the representative of Morocco at the 34th plenary meeting.

[2] United Nations, *Treaty Series*, vol. 119, p. 56.

[3] For text, see *Yearbook of the International Law Commission, 1949*, pp. 287 and 288.

[4] See 57th meeting of the Committee of the Whole, para. 1.

[5] For the adoption of the draft declaration and the draft resolution, see 20th plenary meeting.

[6] For the discussion of article 50 in the Committee of the Whole, see 52nd-57th and 80th meetings.

of votes in its favour at the first reading and which, moreover, was actuated by the best intentions, to which his delegation paid a willing tribute. But in life intentions must give way to hard facts.

8. A glance at article 50 showed that it declared void, in advance and without appeal, an entire category of treaties but failed to specify what treaties they were, what were the norms whereby they would be voided, or how those norms would be determined.

9. The keynote of article 50 was imprecision; imprecision as to the present scope of *jus cogens,* imprecision as to how the norms it implied were formed, and imprecision as to its effects.

10. First, imprecision as to the present scope of *jus cogens.* One of the most curious features of *jus cogens* was the difficulty experienced by its most ardent champions in delimiting the notion. The International Law Commission itself had shown extreme caution in its commentary to draft article 50. In paragraph (3) it first gave a few examples suggested by " some " of its members, such as treaties contemplating an unlawful use of force contrary to the principles of the Charter, or contemplating the performance of any other act criminal under international law, or contemplating the commission of acts such as trade in slaves, piracy or genocide. The Commission went on to say that treaties violating human rights, the equality of States or the principle of self-determination " were mentioned ", but did not specifically say whether it had itself accepted the views thus expressed by some of its members. On the other hand, it frankly confessed in paragraph (2) that " there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* ". Thus the difficult problem had been left to the Conference to solve. The efforts that had been made were praiseworthy, but it was doubtful whether they had succeeded in allaying misgivings.

11. The lack of precision as to the way in which norms having the character of *jus cogens* came into being was not removed by the present wording of the article. What was meant by norms defined as norms " accepted and recognized by the international community of States as a whole "? Did that mean that the formation of such norms required the unanimous consent of all States constituting the international community, or merely the assent of a large number of States but not of them all? If the latter, how large was the number to be and what calculations would have to be resorted to before it would be admitted that it had been reached? Who would decide in the event of a dispute? If, as was to be hoped, a system of compulsory arbitration was adopted, the arbitrator would be saddled with that task, and he would have to have wider latitude to judge than he had in normal cases, since he would be called upon to make law, not merely to interpret existing law. And if compulsory arbitration had to be discarded, the dispute could run into the dead end of a conciliation procedure which might lead nowhere. It was impossible to view such a prospect without the gravest misgivings.

12. There was the same lack of precision, to say the least of it, as to the effects of article 50. It would make disputes a permanent feature of the law of treaties; yet in that law stability was essential, above all in the interests of new States, which needed a climate of security and confidence for their development. States would hesitate to commit themselves to treaties which might be brought to nothing by the emergence of some norm which was suddenly declared to be a peremptory norm. Not only legal instruments, but international relations themselves, would be undermined.

13. The Committee of the Whole had plainly perceived the danger, since it had adopted a provision on the non-retroactivity of the convention, in order to protect treaties concluded before its entry into force from being claimed to be invalid on the ground of *jus cogens.* That was a useful provision, which the French delegation supported. But its text was still open to differing interpretation. Moreover, it did not protect treaties concluded after the entry into force of the convention which an arbitrator or conciliator might hold to be in conflict with peremptory norms which in their view existed before the convention came into force, to say nothing of any new norms which might emerge under article 61 and might be such as to entail the invalidity of those treaties. There again, there were no adequate safeguards in the draft convention.

14. An attempt had been made to remove those grave cases of uncertainty by establishing a system for settling disputes arising from the application of article 50 as well as from the application of the other provisions in Part V of the convention. His delegation very much hoped that such a system would be adopted; but that would not suffice to eradicate the danger, precisely owing to the uncertainty of a text which was too absolute for such fluid content and too fluid to be expressed in such absolute terms.

15. In the face of such criticisms some speakers asserted that the notion of *jus cogens* was nothing more than the transference to the international system of notions of internal law such as public policy, public law or constitutional law. But, as one advocate of *jus cogens* had himself stated, there were substantial differences between the position of international society and that of national society.

16. Other speakers again had urged that to leave it to the courts and to practice to define the notion of *jus cogens* and to determine which norms were peremptory norms would simply be to follow the example set by States in framing the internal laws applicable to their nationals. But there, too, the comparison was basically unsound, for it was one thing to compel individuals to obey rules which progressively emerged until they gained the force of law and quite another to claim to impose on sovereign States obedience to norms which they might never have accepted or recognized.

17. In fact, if article 50 was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes,* then the result would be to create an international source of law subject to no control and lacking all responsibility. The result

would be to deprive States of one of their essential prerogatives, since to compel them to accept norms established without their consent and against their will infringed their sovereign equality. The " treaty on treaties " would then not be in conformity with the overriding treaty, the Charter, which recognized and guaranteed that sovereignty.

18. It had also been asserted that the incorporation of the notion of *jus cogens* into positive international law represented progress. That was the argument most likely to attract the French delegation's support provided that progress was real progress and not just innovation. But the French delegation was convinced that article 50 contained the seeds of insecurity in international relations and exposed international law to an ordeal which it would be wise to avoid. If it was simply a question of the examples cited by the International Law Commission in its report, then it would be possible to express an opinion in full knowledge of the facts. But the article went further, and his delegation for one was not prepared to take a leap in the dark, and to accept a provision which, because it failed to establish sufficiently precise criteria, opened the door to doubt and compulsion. His delegation believed that article 50 was essential neither to the success of the convention nor to the progress of international law, but might, on the contrary, place them in jeopardy. The French delegation would therefore vote against article 50.

19. Mr. BRAZIL (Australia) said that the doctrine of *jus cogens* in articles 50 and 61 was the most significant element of progressive development of international law contained in Part V. While his delegation did not dispute that treaties which conflicted with a fundamental rule of international public order should not be enforceable, the problem was the way in which the principle could be expressed and applied with the necessary precision.

20. In fact, the International Law Commission had chosen to invite the Conference to approve a doctrine of *jus cogens* of unspecified substantive content. It pointed out in paragraph (2) of its commentary that the majority of the general rules of international law did not have the character of *jus cogens,* adding in paragraph (3) that the emergence of rules of *jus cogens* was comparatively recent and recommending that it should be left to State practice and the jurisprudence of international tribunals to work out the full content of the doctrine. Later, in paragraph (4) of its commentary, the Commission had been more specific on the very difficult question of how the rules of *jus cogens* could be modified, and it envisaged that as most likely to be effected through a general multilateral treaty. The idea, however, that a list of the rules of *jus cogens* might be formulated in a protocol to the convention on the law of treaties had found no real support at the first session of the Conference.

21. In those circumstances, the Australian Government shared the difficulties of the French delegation in agreeing to become bound by a doctrine so imprecisely formulated, despite the improvements made to the wording of article 50 at the first session. On reflection, it found that it could not share the view expressed by some other delegations that the shortcomings of the present formulation would be remedied or at least made acceptable if an objective procedure for the settlement of disputes were adopted under the proposed article 62 *bis.* His delegation therefore reserved its position completely and would not be able to support either article 50 or article 61. Since the purpose of the Conference was to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained, it could not be satisfied with an imprecise doctrine of invalidity of treaties.

22. As to the other substantive articles in Part V, his delegation was able to support most of them, but that support was subject to the understanding that his delegation considered there was an organic connexion between those articles and the provisions of adequate procedures for the settlement of disputes.

23. Mr. ABAD SANTOS (Philippines) said that his delegation whole-heartedly supported the principle of *jus cogens.* The wording of article 50 was of course not perfect. For one thing, the fact that a treaty conflicted with a peremptory norm of international law should not necessarily render the whole treaty void if only some of its provisions conflicted with the norm in question. Another weakness was the drafting: in the second sentence of the article, the word " norm " appeared too often, and it could perhaps be simplified.

24. At any rate, article 50 was essential to the extent that the principle of *jus cogens* was vital for the international community; it was a principle which, in international law, reflected various principles of municipal law concerning public policy, good customs, morals, and so on. It had been argued that the principle of *jus cogens* was not defined in article 50; but good customs, morals and public policy were not necessarily defined in municipal law, and yet no insoluble difficulties had ever arisen in applying them in specific cases. It must be remembered that the Conference was concerned not merely with the codification of international law but also with its progressive development. An imperfect provision was better than no provision at all. His delegation considered that, in the present state of the development of international law, article 50 was satisfactorily worded, and it would vote in favour of it.

25. Mr. GROEPPER (Federal Republic of Germany) said that his delegation, like many others, recognized the existence of a category of peremptory norms of international law. It was definitely a new category in the structure of international law and its emergence called for reconsideration of the positivist theory and of the relations between the various sources of international law as enumerated in Article 38 of the Statute of the International Court of Justice.

26. The emergence of the notion of *jus cogens* in international law was a direct consequence of social and historical evolution, which had had a far-reaching influence on the development of international law. Technical interdependence and the multiplication of

links between States had produced a situation where the ordered coexistence of States became impossible not only in the absence of some sort of international public order but also for want of certain concrete rules from which derogation was not permitted. Examples which sprang to mind were rules such as the prohibition of the use of force in relations between States, non-intervention in domestic affairs, and various rules relating to human rights. Those were rules from which no State could derogate without upsetting the international order politically and legally.

27. However, the Government of the Federal Republic of Germany felt concern about article 50 because the notion of *jus cogens* had not yet been clearly defined and the article could therefore give rise to abuse of a kind detrimental to the principle of *pacta sunt servanda* and the interests of States. His delegation had considered from the outset that article 50 should embody criteria for identifying norms of *jus cogens* and some form of safeguard against the abuse to which it could give rise.

28. Safeguards were already provided in the procedural clauses for the settlement of disputes, namely articles 62 and 62 *bis*. His delegation had commented on those articles in the Committee of the Whole and would revert to the matter if necessary when they were examined by the plenary Conference.

29. With regard to criteria for identifying norms of *jus cogens,* his delegation noted with satisfaction that the Committee of the Whole had considerably improved the original wording of article 50. The present text, by adverting to universal recognition and acceptance by the community of States as such, confirmed what the International Law Commission had indicated in its commentary to article 50, namely that there were not many rules of *jus cogens.* The present version of the article meant that in order to show that a norm was peremptory, it would be necessary not only to establish that it was applied and recognized in relations between States but also that the community of States applied it as peremptory law. In view of those strict criteria, his delegation did not see any insuperable opposition between the notion of *jus cogens* and the principle of the sovereignty of States. Any State against which a rule of *jus cogens* was invoked could not only claim that the norm in question failed to meet the criteria laid down in article 50; it could also call on the State invoking it to prove that it was a peremptory rule.

30. His delegation was therefore prepared to vote in favour of article 50 as now worded, on the assumption that articles 62 and 62 *bis,* which offered the necessary safeguards against any abuse to which article 50 might give rise, would be adopted in the form approved by the Committee of the Whole.

31. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that, in accordance with the principle that all States were subject to a higher international order as members of the international community, the existence of certain norms of *jus cogens* in general international law was undeniable, and treaties which conflicted with those norms were void *ab initio*.

32. Article 50 stated a rule of *lex lata* and therefore represented an advance in the codification of existing law, for it would be absurd to think that *jus cogens* would only come into being with the entry into force of the convention on the law of treaties: that would be tantamount to saying that before its entry into force, States could commit with impunity all kinds of outrages in international relations, such as procuring the conclusion of a treaty by the use of force, and that because of the convention, international law had made great progress by prohibiting all international acts of that kind from one day to the next. By codifying the existing law, article 50 gave concrete form to a fundamental principle and delimited it.

33. His delegation found the definition contained in article 50 satisfactory and complete. In order to become *jus cogens* a norm had to fulfil two conditions: it had not only to be accepted, it had also to be recognized as such by the international community as a whole — not, be it noted, by a more or less numerous group of States, but by the international community as a whole. Moreover, the essential nature of the norm appeared from the expression " from which no derogation is permitted ".

34. The norms of *jus cogens* stated the limitations placed on State sovereignty by international law, for the theory that States, in exercise of their sovereign rights, could conclude treaties as they saw fit in violation of those peremptory norms was untenable, and it was quite apparent from the advisory opinion of the International Court of Justice on reservations to the Genocide Convention [7] that the norms of *jus cogens* were binding on all States, even if there was no contractual undertaking in respect of them.

35. In his delegation's view the norms of *jus cogens* could include certain fundamental principles such as prohibition of the use of force, the obligation to settle international disputes by peaceful means, non-interference in the internal affairs of States, sovereign equality and, in general, the principles set forth in Articles 1 and 2 of the United Nations Charter.

36. For the maintenance of international peace and security, all the members of the international community must abide whole-heartedly by article 50 and make compliance with that article 50 unconditional and universal. The article stated the present peremptory law, and it should apply to all treaties, of whatever kind, without any discrimination based on a desire to keep advantages obtained by the use of force or through violation of the law. One of the foundations of modern international law was the acceptance of the norms of *jus cogens* by the entire international community.

37. The category of rules whose peremptory character was accepted and recognized should, of course, be strictly limited to principles which were of paramount importance for the maintenance of legal stability in the international community.

38. The International Law Commission had attached such importance to the norms of *jus cogens* that it had envisaged that when parties concluded a treaty in

[7] *I.C.J. Reports, 1951,* p. 15.

violation of those norms, the instrument as a whole should be considered void *ab initio*. As was indicated in article 41, paragraph 5, the Conference had refused to accept the idea that only the part of the treaty which was incompatible with a norm of *jus cogens* should be void.

39. Certain treaties, especially the United Nations Charter, contained norms of *jus cogens*. He thought it was not sufficient to denounce treaties of that kind in order to evade the obligation to observe the rules of *jus cogens* referred to in them. It would be absurd, for example, if a State which withdrew from the United Nations or was excluded from it should consider that that fact exempted it from the obligation not to resort to the threat or use of force. The United Nations Charter, in Article 2 (6), provided that " The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

40. Since in its view the arguments advanced against article 50 were completely groundless and merely expressed the political interests of a few States which wished to continue to enjoy certain ill-gotten advantages, his delegation would vote in favour of article 50.

41. Mr. ALVAREZ TABIO (Cuba), said that however difficult it might be to identify a norm of *jus cogens*, there could be no doubt that it was necessary to recognize the peremptory nature of certain rules.

42. The objection had been made that it was not easy to agree on the norms which constituted *jus cogens*. Nevertheless, it was undeniable that, for example, the principles set forth in Article 2 of the United Nations Charter, in the Preamble, and in Article 1 were peremptory norms of general international law.

43. It had also been maintained that the risks inherent in determining and applying norms of *jus cogens* were such that it would not be desirable to embody that principle in the convention without first providing all necessary guarantees against possible abuse. But, in fact, the possibility of abuse arose not from the application of those peremptory norms but from the refusal to recognize them.

44. In his delegation's view, it was important to recognize that a treaty which violated the rules of *jus cogens* was void *ab initio*.

45. Moreover, the rules of *jus cogens* should be distinguished from other international rules on the basis of their content and effects, not of their source. General multilateral treaties, particularly the United Nations Charter, were undoubtedly the most frequent source of norms of *jus cogens*, but in some cases, such as the prohibition of the use of force, the Charter had limited itself to formulating those rules so as to provide a suitable framework for their effective application.

46. *Jus cogens* was developing and changing and the Drafting Committee had taken that aspect into account in its text since it had confined itself to recognizing the principle without listing the various norms which it covered.

47. In the light of those comments, his delegation would vote for article 50.

48. Mr. VOICU (Romania) said that during the discussion at the first session the existence of peremptory norms from which no derogation was allowed had been widely recognized.

49. The recognition of the concept of *jus cogens* confirmed the basic principles of international law. In his delegation's view, strict observance of those principles would tend to promote justice, peace and co-operation between States and to strengthen the rule of law in international relations.

50. His delegation whole-heartedly supported article 50 which reflected the degree of development reached by contemporary international law, made a considerable contribution to its progressive development and was based on the political and legal realities of the contemporary world. The article also had the undeniable merit of stating the legal consequences that resulted from the existence of peremptory norms in treaty law.

51. The article provided that violation of a rule of *jus cogens* made a treaty void, for if there was a danger that any derogation from a norm of *jus cogens* would undermine a universally accepted legal order, it followed that a treaty containing such a derogation could only be regarded as void *ab initio*. To admit that treaties contrary to the peremptory norms accepted and recognized by the community of States as a whole could be valid would be a threat to the international legal order and would consequently impede the operation of the whole system of peaceful co-operation and friendly relations between equal and sovereign States. Article 50 was therefore an essential part of the structure of the convention, in that it prevented the conclusion of treaties in conflict with a peremptory norm of general international law. Peremptory norms would be a means of strengthening the awareness of what was legally right in international life, and respect for *jus cogens* would promote the consolidation of the international rules of law, which was essential to the legal security of the international community and to the stability of treaty relations between States.

52. His delegation did not share the views of those representatives who wished to make the adoption of article 50 conditional on the establishment of the procedure provided for in article 62 *bis*. It would therefore vote for article 50 as it stood.

53. Sir Francis VALLAT (United Kingdom) said his delegation accepted that in any ordered international society there must be some basic rules from which States could not derogate by treaty. But it still had doubts as to the scope and content of article 50 and continued to be preoccupied by three major points.

54. Firstly, the article gave no indication as to the actual content of existing rules of *jus cogens*. As the effect of contravention of a peremptory norm was to render a treaty null and void, it would not be wise to leave the content of article 50 to be worked out in the future. Everyone would agree, of course, that a treaty to promote the slave trade would contravene a rule of *jus cogens*. But a few narrow examples of

that sort did not suffice to define the real content of the article, and the lack of agreement on the scope of *jus cogens* gave rise to genuine anxiety on the part of Governments.

55. Secondly, article 50 did not give absolutely clear guidance as to the manner in which rules of *jus cogens* emerged and could be identified. It was true that the text presented by the Drafting Committee was a considerable improvement on the original wording of article 50, but the phrase " a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted " remained very imprecise. It raised the question of the burden of proof, which might be crucial in a case where a rule of *jus cogens* was invoked by State A as a ground for invalidating a treaty with State B. If the latter was able to establish that it had not accepted and recognized the rule as a peremptory norm, that would clearly be a material factor which would surely weigh heavily in the balance.

56. Thirdly, the effect of article 50 was to render void the treaty as a whole. As a result of the decisions the Conference had taken on article 41, it would not even be possible to invalidate only the part of the treaty which conflicted with the rule of *jus cogens* and to leave the remainder of the treaty operative. The consequences of applying article 50 would therefore be extremely grave.

57. The United Kingdom delegation did not intend to submit any amendment to article 50 or to request a separate vote on any part of it. It recognized that a majority of delegations did not share its anxieties about the article and that they considered article 50 to be the keystone of the convention. His delegation would not, therefore, vote against the article but would abstain, partly for the reasons he had just mentioned, but mainly for the reasons he had given in connexion with article 45 at the previous meeting.

58. Mr. BILOA TANG (Cameroon) said the notion of *jus cogens* appeared completely revolutionary and was related to the extremely controversial concept of international public policy. It was, in fact, a somewhat vague notion, whose main usefulness was to make manifest the desire for a more orderly world. The International Law Commission had dealt with it in articles 50, 61 and 67, but the examples it had given in its commentaries, such as the prohibition of slavery and *pacta sunt servanda,* either added nothing new or referred to principles which were not even legal rules. The discussions in the United Nations, particularly in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, showed that it would have been impossible to find satisfactory wording to define most of the principles having the character of *jus cogens.* The obvious conclusion, therefore, was that most of the rules of *jus cogens* were merely tokens of a moral aspiration and were a political bone of contention, so that the greatest caution was required.

59. In the Committee of the Whole, the representative of Cameroon had expressed the hope that the new international law would reflect the new situation and that it would no longer be based solely on " the general principles of law recognized by civilized nations ". International law had been for far too long the law of a certain region, of certain Powers and of certain States. Those States were therefore strongly tempted to try to continue to define and determine the rules which should be considered as having the character of *jus cogens,* at the risk of compelling the small countries to cease acting as sovereign States even in matters of domestic policy, if the more powerful States so decided.

60. Since Cameroon hoped for a better international order and believed in the free will of States, his delegation considered that a norm of international law, if it was to be peremptory, must be recognized and accepted by the greater part, if not the whole, of the international community.

61. Mr. CAICEDO PERDOMO (Colombia) said that his delegation, having considered the problems raised by articles 50, 61 and 67 of the future convention, would vote in favour of article 50 as submitted by the Drafting Committee. The previous year's discussions and the work of the Conference had shown that *jus cogens* was essential to a developed international community. Few denied the existence of that notion, and all were subject to the superior norms of general international law. It was not an immutable and rigid notion, since it made it possible to eliminate obsolete rules and to introduce new rules reflecting the evolution of the international community. Its very flexibility was proof of its vitality.

62. Article 50, as submitted by the Drafting Committee, gave a very satisfactory presentation of the notion of *jus cogens.* It was an improvement on the International Law Commission's text, since it took account of the United States proposal (A/CONF.39/C.1/L.302) to insert the words " at the time of its conclusion" and of the comments of those delegations which sought a clearer definition of the words " peremptory norm of general international law ". The new text, while more precise, was worded with the same caution as that shown by the International Law Commission. Article 50 was thus a satisfactory solution to the problems posed by the introduction of the principle of *jus cogens*: it took account of the anxieties expressed by various delegations and reflected the general view held in the international community.

63. Some representatives had asked what principles the notion of *jus cogens* could be held to cover. If put in those terms, the problem was insoluble. The enumeration of peremptory rules would give *jus cogens* a restrictive connotation out of keeping with its flexibility and vitality. Contrary to what the French representative had said, the force of *jus cogens* lay in the fact that the actual norms remained uncertain and imprecise. Besides, the fact that the proposed wording took account of amendments submitted by delegations with different political and legal views was proof of the strength of the article and of its conformity with the wishes of the entire international community. The

Colombian delegation would therefore vote in favour of article 50.

64. Mr. HAYTA (Turkey) said that his delegation had stated its position on *jus cogens* at the 53rd meeting of the Committee of the Whole. Article 50 introduced a new rule into international law: it was the notion of public policy and it had been borrowed from internal law. Was such a transfer possible? And even if it were, was the corresponding rule clearly set out? Those questions had been discussed at length and his delegation was still unable to reply in the affirmative.

65. It had been said that it was a question of a hierarchy of legal norms in international law. But such a hierarchy presupposed a hierarchy among sources, which was not to be found in the international community where circumstances were different from those in which internal law was applied. International treaty relations were based on the consent expressed by sovereign States.

66. In his delegation's view, article 50 had another major disadvantage: its lack of precision. It did not make it possible to determine in what way a peremptory norm would be considered as being a rule of *jus cogens*. Moreover, the rule was not accompanied by adequate guarantees. No appropriate machinery for adjudication was provided for. As had already been stated many times, the rule was therefore liable to lead to serious disturbances in treaty relations between States and consequently in international life. His delegation therefore maintained its position on article 50. It wished to make it clear that Turkey could not consider itself bound by the provisions of article 50 as set forth in the Drafting Committee's text.

67. Mr. NAHLIK (Poland) said that the importance of the principles laid down in articles 50 and 61 had often been stressed. Not very long ago, the question had been raised whether international law contained any rules at all of a peremptory character which States could not contract out of by *inter se* agreement. Whatever the situation might have been in the nineteenth century and at the beginning of the twentieth, today there certainly existed an organized community of States, and, within it, a hierarchy of norms established by those States themselves. The rules occupying a higher level in that hierarchy must therefore prevail over any others. That view had frequently been expressed, and article 50 had been adopted the previous year by an overwhelming majority comprising States which represented all geographical regions, all political and social systems and all legal traditions. That left no further room for doubt as to the existence of norms of a peremptory character in international law.

68. That being so, if the convention on the law of treaties was to be complete, it should contain two provisions: first, a provision that any treaty violating a peremptory norm already in existence was void *ab initio*; and secondly, a provision that any treaty incompatible with a supervening norm of *jus cogens* would cease to be in force. Articles 50 and 61 met those two requirements. The two provisions were of particular importance to nations which had only recently regained their independence. It was perfecly understandable that they should be entitled to rid themselves of any remnants of the colonial régime, including those embodied in treaties.

69. There seemed to be little difficulty in answering the question which rules of international law were peremptory in character and how that character could be established. According to article 50, they were norms accepted and recognized by the international community of States as a whole. Recognition could be either express or implied, by treaty or by custom. A norm adopted by some States in a treaty could eventually become binding upon other States by way of custom; the Conference had reaffirmed that possibility by adopting article 34 of the convention.

70. The United Nations Charter provided a striking example of a case where States had expressly given one group of rules a hierarchical value superior to that enjoyed by any other rules. Besides the inherent importance of the main principles embodied in Articles 1 and 2 of the Charter, particular note should be taken of Article 103 of the Charter, since it expressly provided that the obligations of the Members of the United Nations under the Charter were to prevail over obligations they might have contracted under any other international agreement.

71. Most of the other norms of *jus cogens* had essentially the same aim as those expressed in the Charter. Their peremptory character flowed mainly from their very content, which would be meaningless if some States were permitted to derogate from them. The prohibition of slavery and genocide, and the right of peoples to self-determination, had been quoted as examples of such norms at the Conference and on other occasions, such as the conference of international lawyers specially convened to that effect in 1966. Thus there seemed little room for doubt about which particular norms of international law constituted norms of *jus cogens*.

72. He did not share the opinion expressed or implied by some other speakers that it would be advisable to establish a list of norms having a peremptory character. If such a list were included in the convention, it would not be in keeping with its character as an instrument of codification.

73. A special agreement dealing with the matter would not be advisable either. If it merely quoted examples of such norms, it would diminish the value of the norms not included in it. If it was intended to be exhaustive, it could easily become out of date, as ratification procedures were sometimes rather slow. Besides, the situation of States which, for one reason or another, did not feel inclined formally to become parties to any such agreement would be, to say the least of it, ambiguous.

74. His delegation strongly supported article 50 both in substance and in its present formulation. He did not think that the article, which was perfectly consistent with international law already in force, could properly be adduced as an excuse for an attempt to introduce into international law something so essentially new as

the principle of compulsory arbitration contained in article 62 *bis*.

75. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said he was glad to see that the International Law Commission had included in the draft convention an article to the effect that a treaty was considered void if it conflicted with a peremptory norm of *jus cogens*. It would indeed be difficult to maintain that there were peremptory rules of international law from which States might derogate by means of treaties. The rules set out in the Charter constituted a striking example of international norms of *jus cogens*. Those norms included the principles accepted and recognized by the international community of States as a whole and constituting the very basis of modern international law. Notable examples were non-intervention in the domestic affairs of States and respect for the sovereignty of States. There was a close connexion between the principles and norms of *jus cogens* which formed the basis of the international legal order and the moral aspirations of all peoples. Those rules were considered indispensable and it was impossible to make progress without them. In current practice, treaties incompatible with peremptory norms of general international law were considered void *ab initio*. Draft article 50 was acceptable to his delegation, which would vote in favour of it.

The meeting rose at 1 p.m.

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## TWENTIETH PLENARY MEETING

*Monday, 12 may 1969, at 3.30 p.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty* (resumed from the previous metting) [1]

1. The PRESIDENT invited the Conference to consider the draft declaration on the prohibition of the threat or use of economic or political coercion in concluding a treaty which had been recommended to the Conference by the Committee of the Whole in connexion with article 49. The draft declaration read:

*The United Nations Conference on the Law of Treaties,*

*Upholding* the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith,

*Reaffirming* the principle of sovereign equality of States,

*Convinced* that States must have complete freedom in performing any act relating to the conclusion of a treaty,

*Mindful* of the fact that in the past instances have occurred, where States have been forced to conclude treaties under pressures in various forms exercised by other States,

*Deprecating* the same,

*Expressing its concern* at the exercise of such pressure and anxious to ensure that no such pressures in any form are exercised by any State whatever in the matter of conclusion of treaties,

1. *Solemnly condemns* the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent;

2. *Decides* that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties.

2. Mr. TABIBI (Afghanistan) said that he wished first to introduce a draft resolution of a procedural nature submitted by his delegation (A/CONF.39/L.32/Rev.1), the purpose of which was to provide an organic link for the draft declaration on the prohibition of the threat or use of coercion. He particularly wished to point out that the word " military " had been inadvertently omitted from the title of the draft declaration when it was approved by the Committee of the Whole at the first session and should now be restored.

3. With regard to his own delegation's draft resolution he proposed, as a purely procedural change, that paragraph 1 be amended to read " *Invites* the Secretary-General of the United Nations to bring the declaration to the attention of all Member States of the United Nations and of those participating in the Conference as well as of the principal organs of the United Nations ".

4. The PRESIDENT said that the wording just proposed by the representative of Afghanistan would be submitted to the Drafting Committee for consideration.

5. Mr. MUTUALE (Democratic Republic of Congo) said that the word " force " as employed in the United Nations Charter and in article 49 of the draft covered all forms of force starting with threats and including, in addition to bombardment, military occupation, invasion or terrorism, more subtle forms such as technical and financial assistance or economic pressure in the conclusion of treaties. The principle of good faith was paramount at all stages of the conclusion of a treaty and in order that the obligations it embodied might be assumed in good faith, there must be no threat of force at the time of its adoption. His delegation therefore supported the draft declaration.

6. Mr. ALVAREZ TABIO (Cuba) said that his delegation shared the view that a restrictive interpretation of the expression " use of force " was incompatible with the spirit of the Charter. The concept of the use of force must cover all forms of pressure — military, political and in particular economic — and all such pressures must be condemned if inter-State relations and treaty law were to be established on a solid basis of equality. His delegation would therefore vote for the draft resolution submitted by Afghanistan.

7. Mr. SECARIN (Romania) said that article 49 was of primary importance for the progressive development

[1] See 57th meeting of the Committee of the Whole, paras. 1-4.

of international law, and its application would help to promote the rule of law and to strengthen co-operation among nations. Article 49 meant that all forms of coercion, whether military, political or economic, exercised at the time of conclusion of a treaty, automatically resulted in the nullity of the treaty. The draft declaration was a valuable instrument which would help to ensure the widest dissemination of the principle embodied in article 49 and his delegation would therefore vote both for the draft declaration and for the Afghan draft resolution.

8. Mr. TSURUOKA (Japan) said that at the 48th meeting of the Committee of the Whole, the Japanese representative had said that his delegation would be unable to support the nineteen-State proposal (A/CONF. 39/L.67/Rev.1/Corr.1) to add the words " including economic or political pressure " after the words " the threat or use of force " in article 49 of the Convention. The Japanese delegation had made it clear at that time that it was second to none in the support of the view that the exercise of political or economic pressure on another State in order to coerce it into concluding a treaty in violation of the principles of the sovereign equality of States and of freedom of consent must be universally condemned. It had nevertheless been unable to support the proposal in its original form as an amendment to article 49, for the very reason that the notion of " political and economic pressure ", however reprehensible it might be, had not yet been sufficiently established in law to be incorporated into the convention as a ground for invalidating a treaty.

9. His delegation had therefore welcomed the constructive initiative of the sponsors of the amendment in withdrawing it and replacing it by a declaration condemning " the threat or use of pressure in any form, military, political or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent ".

10. In the same spirit, his delegation was prepared to support the proposal by Afghanistan designed to secure wider publicity and dissemination for the declaration. He must point out, however, that the mere formulation of principles and an attempt to promote the purposes of the proposal by dissemination were insufficient for the attainment of its lofty ideals. It was essential that the norm stated in article 49 should be observed in all good faith and in all its strictness by every State without exception, regardless of political, economic, social or ideological differences, and regardless of its political, economic, social or ideological affinity. What was really needed was the will and determination on the part of all States to carry out that obligation. The Japanese delegation sincerely hoped that that will and determination would be truly reflected in the actual conduct of States in international relations of the present day.

11. Mr. NASCIMENTO E SILVA (Brazil) said that the declaration was a compromise text and should not be amended; the Drafting Committee could deal with the drafting changes that had been suggested. There might however, be some merit in including the Afghan proposal on dissemination of the declaration in the declaration itself.

12. Mr. SMEJKAL (Czechoslovakia) said that his delegation maintained the position it had taken at the first session of the Conference and fully supported the draft declaration since it stressed the importance of the basic principle of international law that no coercion, whether military, political or economic, could be exerted in any form by any State in connexion with the conclusion of a treaty.

13. His delegation also supported the Afghan draft resolution, particularly its operative paragraph 2 in which Member States were requested to give to the declaration the widest possible publicity and dissemination.

*The draft declaration was adopted by 102 votes to none, with 4 abstentions.*[2]

*The draft resolution submitted by Afghanistan (A/CONF.39/L.32/Rev.1) was adopted by 99 votes to none, with 4 abstentions.*[3]

14. Mr. WERSHOF (Canada) said that his delegation had voted for the draft declaration because the Canadian Government fully subscribed to the provisions of its operative paragraph 1.

15. Some representatives had expressed the view that the adoption of the draft declaration was consistent with their position that the word " force " in Article 2(4) of the United Nations Charter and in article 49 of the convention meant political or economic pressure as well as military force. The Canadian Government's position, as stated in the General Assembly and in other United Nations committees was that the word " force " as used in the Charter and in article 49 of the convention did not include political or economic pressure, but referred only to military force. His delegation wished to make that point clear.

16. Mr. HUBERT (France) said that the reasons mentioned by the Canadian representative had prompted his delegation to abstain in the vote on the draft declaration.

17. Mr. ESCHAUZIER (Netherlands) said that some delegations had linked the draft declaration with article 49 of the convention and had argued that the word " force " as used in that article should be interpreted as including political or economic pressure. While he respected their views, his Government's position was that the word "force " as used in Article 2(4) of the United Nations Charter and in article 49 of the convention referred to armed force alone. In fact, it could be argued that, if the term had been meant to cover economic or political coercion, there would have been no need for the draft declaration.

18. The Netherlands Government nevertheless dep-

[2] For the adoption of an amended title and text, see 31st plenary meeting.

[3] Certain changes were subsequently made by the Drafting Committee. See 31st plenary meeting.

recated the use of any pressure or form of coercion and recognized the paramount importance of the declaration and the need for its wide dissemination as proposed in the draft resolution just adopted.

## ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

*Article 50* (Treaties conflicting with a peremptory norm of general international law *(jus cogens))* *(resumed from the previous meeting)*

19. The PRESIDENT invited the Conference to resume its consideration of article 50.

20. Mr. KEARNEY (United States of America) said that although his delegation had voted for article 50 at the first session in the Committee of the Whole, it now regarded that article with some concern. There was nothing very radical in the basic concept of the existence of certain rules from which no derogation by way of treaty could be tolerated. However, the ultimate and most important question was how the existence, scope and content of a peremptory norm were to be recognized and established.

21. It was easy to say that *jus cogens* existed because a treaty promoting slavery or piracy was clearly unenforceable in existing international life, but it had taken many centuries to establish the universal agreement that now existed concerning the fundamental illegality of piracy; in earlier times, protracted conflicts and even wars had resulted from arguments over practices in that field. The elimination of the use or misuse of letters of marque and reprisal, for example, was a subject which had required a very long time before widely acceptable international rules could be worked out. In time, there had come to be a recognition on the part of most States that there was a rule prohibiting private vessels from engaging in hostilities on the high seas and that that rule was peremptory. From that time forward, States were no longer free to contract, by way of treaty, to engage in conduct violating the rule.

22. That was a process of development through community action which had needed a considerable time. Instant declarations and paper resolutions did not establish customary international law, much less did they give it a peremptory character. What was required to establish customary international law was a considerable body of established practice that supported the norm. To give a norm of customary international law a peremptory character, State practice must be unambiguous and, as set forth in the present text of article 50, its peremptory character must be accepted and recognized as a matter of legal obligation by the international community of States as a whole. That would clearly require, as a minimum, the absence of dissent by any important element of the international community.

23. In accordance with its understanding of the nature of the process that resulted in the establishment of a peremptory norm and the need for impartial determination of a claim that a particular treaty had been affected by such a norm, his delegation supported article 50.

24. Mr. KOULICHEV (Bulgaria) said that the concept of *jus cogens,* on which article 50 was based, had been so widely approved at the first session that it was regrettable that the text recommended by the Committee of the Whole had not received unanimous support. His delegation attached great importance to that text, which it considered one of the foundations of the future convention on the law of treaties, although it was prepared to give careful consideration to any suggestions for its possible improvement.

25. Among the objections put forward to article 50 was its very general character and lack of precision, as well as the inadequacy of its definition of *jus cogens.* His delegation, while fully aware of all the difficulties connected with the problem of identifying peremptory norms of general international law, had the impression that those difficulties, most of which were inherent in the identification of all customary norms of general international law to which *jus cogens* belonged, had been very much exaggerated by writers, as well as by some of the representatives who had spoken on the question during the debate. Although article 50 certainly left something to be desired from the point of view of the theory of international law, and even from the point of view of its practical application, in most cases the criterion it set up, which had been corroborated by practical experience, would serve to establish the peremptory nature of a given rule with sufficient certainty.

26. The rule set forth in article 50 had been studied with particular care both by the International Law Commission and by the Conference. In those conditions, it was significant that even those who criticized the present text of article 50, while recognizing the positive nature of the principle expressed in it, had been unable to make a more constructive contribution, except on certain points of detail, to the formulation of the rule. It must be admitted that the present text reflected a stage of development in international law beyond which it would be difficult for the Conference to go. The Conference should rather confine itself to noting the consequences which the undeniable existence of the rules of *jus cogens* had on the law of treaties, a task which was satisfactorily accomplished in articles 50, 61 and 67.

27. Much emphasis had been placed on the need for establishing some procedure for the objective settlement of disputes by determining whether treaties conformed with *jus cogens.* His delegation, however, was formally opposed to all attempts to subordinate the adoption of the rule of article 50 to the prior establishment of safeguards against abuses. The existence of norms of *jus cogens* was a reality which had its proper place in the convention on the law of treaties, independently of any procedure which might be provided in the convention for the settlement of disputes.

28. One argument which had been advanced against article 50 was that its lack of precision might open the door to abuses and so endanger the stability of contractual relations. His delegation was convinced that any such fear was exaggerated. There was no text in all the draft articles, no matter how clearly formulated,

which could not give rise to abusive interpretations and applications if the States which applied it failed to exercise good faith. Moreover, the concept of *jus cogens* was not the only one in international law, and especially in the law of treaties, which could be more easily illustrated by examples than given a precise definition. It should not be taken for granted that abuses would be inevitable. When another concept of contemporary international law, the general principles of law, had been mentioned in the Statute of the International Court of Justice, doubts had been expressed whether it was possible to identify the principles in question, and there had been fears of an abusive application. But the practice of States and international jurisprudence had shown that those fears were groundless and that the general principles of law had a definite place in international law. Moreover, the practical effects of the principles expressed by article 50 should not be exaggerated. It was easy to understand that few States today would decide to conclude a treaty which betrayed an intention to violate a norm of *jus cogens,* and thereby affront the conscience of the entire international community. In practice, conflicts between treaties and *jus cogens* would not occur very often.

29. Both in the practice and in the theory of international law article 50 could play a preventive role by attaching the sanction of nullity to any contractual violation of the rules which served the higher interests of the entire international community and from which no derogation was permitted. Thus, far from constituting a source of difficulties and abuses in relations between States, the rule in article 50 would help to strengthen the role of international law in those relations. For those reasons, his delegation fully supported article 50 as recommended by the Committee of the Whole.

30. Mr. RUEGGER (Switzerland) said that the attitude of his delegation to article 50, which many countries friendly to his own considered of the highest importance, had not changed since the first session. From the human or moral point of view, it was reassuring to hear so many similar statements concerning the priority which should be given to rules to safeguard respect for human rights. His own Government, for example, considered that the various Geneva conventions for the protection of war victims constituted a milestone in international law. Morality, however, was one thing, but law was another; even natural law, by virtue of a few convincing examples, did not authorize a leap into the unknown. If rules were to be established which went beyond international conventions and customary law, it was necessary to apply the principles which everywhere governed the creation and revision of constitutions.

31. As at present worded, article 50 would only be a source of uncertainty. How was it possible to ask even those parliaments which were most favourable to the development of international law to accept in advance norms which were not only vague, but were unaccompanied by the necessary safeguards for States? Article 50 stated that a peremptory norm of general international law was a norm accepted and recognized by the international community of States as a whole. But who was to express that universal consent, in other words, who was the international legislator? With all due respect for the United Nations General Assembly, he could not believe that one of its resolutions, perhaps adopted by only a small majority, could ever constitute *jus cogens.* And as the United Kingdom representative had pointed out, there was no sufficient indication as to how a rule could be declared to take priority over a treaty. Like the French representative, therefore, he regretted that he found it necessary to take a negative attitude to article 50 since in his view, if international law was to progress, there should be no departure from the firm, existing foundations of the law.

32. Mr. YASSEEN (Iraq) said that the international legal order already recognized a hierarchy of international rules. Those were rules which took priority over others, so that it could be said that the system provided for in article 50 was already a part of positive international law. No one would deny nowadays that a treaty for the legalization of slavery or procuring for immoral purposes was void *ab initio*; it would be void because the rules prohibiting those activities were rules of *jus cogens.* Although there might be some cases where the application of that system could present difficulties, such difficulties should not be invoked as a pretext for not recognizing the system as such, since the international community already possessed the appropriate means for solving them. Institutional deficiencies in international law ought not to be a reason for denying the existence of a system, which clearly already existed, namely, that which provided for the priority of *jus cogens* in the international juridical order.

33. In his opinion, to attempt to make the acceptance of article 50 dependent on the recognition of some compulsory means for solving disputes would be an obstacle to the institutional development of international law. The recognition of existing norms could provide valid and effective grounds for the future establishment of institutions which would defend those principles and norms. For those reasons, his delegation was in favour of article 50 as adopted by the Committee of the Whole at the first session.

34. Mr. TORNARITIS (Cyprus) said that he found article 50 acceptable and he would support it for the reasons stated by his delegation in the Sixth Committee of the General Assembly on a number of occasions, and more recently at the 53rd meeting of the Committee of the Whole. Difficulties could of course arise over the application of article 50, as with that of any legal provision, but he did not believe that those difficulties were insurmountable. In municipal law, the concept of " public policy " was not clearly defined and had been described as an " unruly horse " but ways and means had been found to tame it.

35. Article 50 constituted a firm progressive step in the process of codification of the law of treaties and the important principle it embodied deserved the full support of the Conference.

36. Mr. MARESCA (Italy) said that his delegation had given full consideration to the objections put forward against the rule embodied in article 50.

37. It had been said that the International Law Commission, by adopting article 50, had introduced a new and important concept into international law. In fact, the concept of *jus cogens* had been in existence for a long time before that Commission formulated article 50; it had deep roots in international law and derived its origin in part from concepts of natural law. During the past thirty years, the more extreme members of the positivist school had held that there was no international law outside treaty law. Other writers had, however, pointed out that international law consisted not only of treaty law but also of customary law; the rules of customary international law were based on the legal conscience of States and were binding even on States which had not participated in their formation. In the body of customary international law, there was a very small number of rules which admitted of no derogation and which were precisely the rules of *jus cogens*. It was a significant fact that the existence of such rules had been recognized as early as 1914 by Anzilotti, one of the greatest exponents of the positivist school of thought.

38. Since the rules of *jus cogens* were essentially customary rules, no definitive enumeration of them could be given; they were in process of historical formation and any attempt to enumerate them would restrict the possibilities of their future development. From his own experience, he could cite the example of the clause which he had had the honour of proposing for inclusion in the four Geneva Conventions of 12 August 1949 on the protection of prisoners of war, the sick and wounded and civilians in time of war. The clause, which had been included in all those four humanitarian Conventions, read: " No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article." [4] Similar rules could be cited, drawn from such important instruments as the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide.[5]

39. Rules of *jus cogens* were to be found essentially in the following three major categories: first, the rules intended to safeguard the fundamental rights of the human person; secondly, the rules concerning the prevention of the use of force and the maintenance of peace — a treaty whereby two or more States agreed to wage war could constitute a crime against peace; thirdly, the rules for the protection of the independence of States — a treaty on the lines of the eighteenth century agreements for the partition of Poland would now constitute a violation of a peremptory norm of international law. Those norms had certain factors in common. In the first place, they were norms of general international law acknowledged by the international community as a whole, that was to say they were based on the legal conscience of the whole of mankind. In the second place, they were in a sense the exception rather than the rule, with the consequence that a State which invoked a norm of *jus cogens* must establish the norm's existence and demonstrate that the norm invoked was recognized by the international community at large as a peremptory norm of international law.

40. The problem then arose of the method whereby it would be possible to determine whether a norm of *jus cogens* existed as such. His delegation considered that, in case of disagreement, that task could only be performed by an objective authority. It was essential that the convention should make provision for procedure to ascertain the existence of a norm of *jus cogens* and to settle any disputes that might arise on that issue. The existence of such a procedure was essential in order to give the norms of law the necessary degree of certainty. For those reasons, his delegation urged the Conference to adopt both article 50 and article 62 *bis*.

41. Mr. TALALAEV (Union of Soviet Socialist republics) said he had not found the objections to article 50 very convincing. The question whether a particular rule constituted a peremptory norm was perhaps not always absolutely clear, but in practice it was always possible to determine which norms were peremptory. All delegations agreed that there did exist rules of *jus cogens* and specific examples of such rules had been given during the discussion. In his delegation's view the peremptory norms of international law were, above all, the fundamental principles of contemporary international law. In particular, all leonine and similar unequal treaties which had been concluded in violation of the principle of the sovereign equality of States came under article 50. Unequal treaties and other treaties which violated that basic principle were illegal.

42. Article 50 recognized the existence of rules of international legality which were acknowledged by the whole community of States irrespective of their political or social systems. Those rules were equally binding upon all States and were criteria of international legality. That being so, article 50 was fully supported by his delegation.

43. Mr. RAMANI (Malaysia) said that, at the 56th meeting of the Committee of the Whole, his delegation had expressed reservations over the extremely ambiguous and imprecise language used in article 50 and its equally ineffective content. It had hoped that the text would have been improved but, unfortunately, the new text provided no assistance in determining what constituted a peremptory norm and what such a norm involved.

44. Apart from the claim to invalidity made by one of the parties to a treaty on the basis of article 50, another

[4] See articles 50 and 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, articles 51 and 52 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, articles 130 and 131 of the Geneva Convention relative to the Treatment of Prisoners of War and articles 147 and 148 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; *United Nations, Treaty Series,* vol. 75, pp. 62 and 64, p. 116, p. 238 and p. 388 respectively.

[5] United Nations, *Treaty Series,* vol. 78, p. 277.

more disturbing situation could arise. After a treaty had been properly negotiated and concluded by two States within the realities of their mutual relations, a third State which was a stranger to the treaty could, on the basis of article 50, choose to disregard the rights and obligations created by the treaty as between the parties. Such a situation was obviously unacceptable.

45. It had been suggested by a number of speakers that the provisions of the United Nations Charter contained some peremptory norms of international behaviour. The recent history of international relations, however, bristled with problems that had arisen precisely because of the disregard of such norms by some States, whereas other States claimed that they had in fact conformed with the norms in question. Article 50 would not help in any way to solve such problems: it would merely open another door to claims of invalidity of treaties, not only by the parties but also by others.

46. For those reasons, although his delegation favoured the principle of the recognition of *jus cogens,* it was unable to go the full length to which the article inevitably led. It would therefore be unable to vote in favour of article 50.

47. Mr. ESCHAUZIER (Netherlands) said that, although his delegation would vote for article 50, he was bound to place on record the fact that he shared in large measure the concern expressed by other delegations regarding the lack of clarity of the concept of *jus cogens* and the possibility of conflicting interpretations which could arise as a result. It was for that reason that, as stated at the first session, the Netherlands delegation attached particular importance to the procedure for invalidation on grounds of a violation of a rule of *jus cogens.* The adoption of a satisfactory procedure for the settlement of disputes, which meant particularly article 62 *bis,* was thus very relevant to article 50.

48. Mr. TYURIN (Byelorussian Soviet Socialist Republic) said that it was a characteristic of all times that changes in contemporary life led to changes in international law. The most important aims of contemporary international law were to consolidate world peace and security and to guarantee the freedom and independence of peoples, and it was those aims that had led to the emergence of the rules and principles of *jus cogens,* which were generally recognized and from which States could not depart in their bilateral or multilateral treaty relations. Among those important new principles were the prohibition of wars of aggression, the prohibition of the threat and use of force, the principle that disputes must be settled only by peaceful means and the principle of national self-determination. In addition to the establishment of the new rules, such long-recognized principles of international law as respect for State sovereignty, non-interference in the internal affairs of States, equal rights of States and conscientious observance of international commitments were being further developed and consolidated.

49. Article 50 was designed to ensure that treaties would not be used as a cover for actions contrary to the basic tenets of international law. Although the principle of strict observance of international obligations must be upheld, it must be realized that not all treaties were supported by international law. To be valid, they had to comply with the letter and spirit of the United Nations Charter, Article 103 of which stated: " In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail ". The clear provisions of that article of the Charter demonstrated the existence of principles of *jus cogens.*

50. There was no need to define the rules of *jus cogens* or to enumerate them in the present convention. The convention was intended to codify the law of treaties, not the rules of *jus cogens.* Article 50 dealt satisfactorily with the only problem which was relevant by stating the prohibition of any departure from the rules of *jus cogens.*

51. Mr. REDONDO-GOMEZ (Costa Rica) said that article 50 gave a satisfactory solution to the old dispute regarding the primacy of positive law over international morality or *vice-versa.*

52. It safeguarded the principle of security in legal relations by making a treaty applicable in the first instance; at the same time, it provided for the possibility that it might give way to a higher principle. Other delegations had stated fully and adequately the arguments in favour of article 50 and there was no need for him to reiterate them. He only wished to stress that article 50 was in keeping with a century-old tradition in his country, according to which the legal order — both internal and international — was based on higher moral principles.

53. Mr. ALVAREZ (Uruguay) said that, in the Committee of the Whole, his delegation had pointed out that the meaning and scope of article 50 as drafted by the International Law Commission were simple and that the article " would have relatively limited effects "; it had gone on to say that " the international community recognized certain principles which chimed with its essential interests and its fundamental moral ideas " and that " it was not enough to condemn the violation of those principles; it was necessary to lay down the preventive sanction of absolute nullity " of the treaty which constituted the " preparatory act " of that violation. At the same time, his delegation had stressed that it was important not to exaggerate the scope of the principle " either in a positive direction, by making of it a mystique that would breathe fresh life into international law, or in a negative direction, by seeing in it an element of the destruction of treaties and of anarchy. " [6]

54. In his delegation's view, the amendments submitted at the first session by Romania and the USSR (A/CONF. 39/C.1/L.258/Corr.1), by the United States (A/CONF.39/C.1/L.302) and by Greece, Finland and Spain (A/CONF.39/C.1/L.306 and Add.1 and 2) had all proved useful to the Drafting Committee and had

[6] See 53rd meeting of the Committee of the Whole, para. 48.

enabled it to improve the text of article 50 to a point which it would be very difficult to surpass. For those reasons, his delegation would support article 50 as it now stood.

55. Mr. DENIS (Belgium) said that his delegation would welcome the introduction into international treaty relations of an ethical principle such as that embodied in article 50, but it found the text difficult to accept even with the improvements made by the Committee of the Whole.

56. The purpose of the codification of the law of treaties was to provide stability and security in treaty relations, but unfortunately article 50 seriously jeopardized that security. Wherever the convention made an exception to the *pacta sunt servanda* rule, it had done so in clear, precise and detailed terms. Article 50 also constituted an exception to the *pacta sunt servanda* rule but, in that case, no such precaution had been taken because it had proved impossible to define the concept of *jus cogens*. The main reason was that, as had been pointed out by Professor Tunkin at the Lagonissi Conference on the subject in 1966, the concept was a new one.[7] It was in fact so new that the discussion on article 50 in the Committee of the Whole had provided no information of any certainty about the content of the rule or how it was to be applied in practice.

57. The concept of " public order " had been successfully applied in municipal law because municipal law constituted an organized legal order. The international legal order, however, was as yet unorganized and to incorporate the concept of *jus cogens* into it would therefore be premature. It would even be dangerous because of the possibility of abuse if the article were applied in situations outside the scope of international law. For those reasons his delegation had finally come to the conclusion that it must vote against article 50.

58. Mr. DIOP (Senegal) said that the text of the article had been substantially improved. There had been a large majority in favour of article 50 in the Committee of the Whole and the present discussion had shown that there was now overwhelming support for it. Nevertheless, his delegation still entertained some misgivings, because the discussion had shown that there remained differences of view with regard to the character of peremptory norms, norms which it had not been found possible either to define or to enumerate. His delegation could not be satisfied with the mere statement of the rule, if the meaning and content of the rule were to remain in doubt. Its concern could only be allayed if effective safeguards, and particularly procedural safeguards, were included in the convention. Article 62 was not enough: article 62 *bis* must also be included for the reasons stated by his delegation at the 43rd and 96th meetings of the Committee of the Whole.

59. His delegation's final attitude to article 50 would thus depend on the fate of article 62 *bis*. Since that article had not yet come before the Conference, his delegation reserved its position and would therefore not be able to vote in favour of article 50. It would abstain from voting both on that article and on article 61, just as it had done on paragraph 5 of article 41, in the hope that the principles contained in article 62 *bis*, which was a necessary complement to article 62, would finally be adopted by the Conference.

60. He wished to place on record that the Government of Senegal made its acceptance of Part V of the convention conditional upon the inclusion of adequate machinery, with sufficient safeguards, for the settlement of disputes.

61. Mr. EL-BACCOUCH (Libya) said that his delegation endorsed the idea contained in article 50, which constituted a step forward in the codification of international law.

62. It was generally recognized, both by jurists and by States, that there existed a number of fundamental norms of international law from which no derogation was permitted and on which the structure of international society was based. Although his delegation would have preferred a clearer wording for the article and would have favoured the use of the term " public order " instead of " *jus cogens* ", it would nevertheless vote in favour of the article, on the understanding that the terms " *jus cogens* " and " public order " were interchangeable.

63. His delegation construed the expression " a norm accepted and recognized by the international community of States as a whole " in a liberal manner. Actual unanimity on that issue was not essential; it was sufficient that a legal norm should be upheld by the overwhelming majority of States for it to have the character of *jus cogens*. On that understanding, his delegation would vote in favour of article 50 as submitted to the Conference.

64. Mr. VEROSTA (Austria) said that, in the vote on article 50 at the first session, his delegation had abstained. The formulation of the article had now been greatly improved, however, although a few points still required clarification and his delegation would accordingly vote for article 50 on the understanding that some necessary procedural machinery for the settlement of questions raised by the article would be set up. His delegation had been encouraged in that connexion by the evident support for article 62 *bis*.

65. The PRESIDENT invited the Conference to vote on article 50.

*At the request of the representative of France, the vote was taken by roll-call.*

*Morocco, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Morocco, Nepal, Netherlands, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia, Sierra Leone, Singapore, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania,

[7] Conference on International Law, Lagonissi (Greece), *Papers and Proceedings: II, The Concept of Jus Cogens in International Law* (Geneva, Carnegie Endowment for International Peace), p. 87.

United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Austria, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Madagascar, Mauritius, Mexico, Mongolia.

*Against:* Switzerland, Turkey, Australia, Belgium, France, Liechtenstein, Luxembourg, Monaco.

*Abstaining:* New Zealand, Norway, Portugal, Senegal, South Africa, Tunisia, United Kingdom of Great Britain and Northern Ireland, Gabon, Ireland, Japan, Malaysia, Malta.

*Article 50 was adopted by 87 votes to 8, with 12 abstentions.*

66. Mr. HAYES (Ireland) said that his delegation had abstained in the vote on article 50 not because it opposed the principle of *jus cogens* but because neither the International Law Commission nor the Conference had yet succeeded in devising a definition of *jus cogens* which would clearly identify at any given time the principles it comprised. It was obvious that there was no general agreement among delegations as to which principles comprised the total body of *jus cogens* at present and that the spontaneous growth of any such agreement in the future was unlikely as the content of *jus cogens* would clearly be subject to variations from time to time. The principle embodied in article 50 would prove unworkable in practice and would constitute a threat to the stability of treaty relationships unless associated with some independent and authoritative means of deciding whether a principle invoked by a party as *jus cogens* was in fact a peremptory norm.

67. His delegation considered the procedures set out in articles 62 and 62 *bis* adequate and if those articles were accepted, his delegation could support article 50. Pending acceptance of those articles, however, it had been compelled to abstain on article 50.

68. Mr. TSURUOKA (Japan) said that, as his delegation had stated at the 55th meeting of the Committee of the Whole, it believed it was natural for the community of nations to feel the need for peremptory norms of international law and it was therefore sound to establish the principle of *jus cogens*. The question was, what were peremptory norms of international law and who was to determine which norms were peremptory and were to be applied to a particular treaty while ensuring its consistent and universal application. Those questions were primarily of a legal nature and could not be left to be settled through the means to be established on an *ad hoc* basis between the parties to the dispute. Article 50, while allowing for subsequent modification, did not specify what the existing rules of *jus cogens* were and that was why his delegation had submitted a proposal (A/CONF.39/C.1/L.339) to provide for the settlement by the International Court of Justice of disputes relating to a claim under article 50 or article 61. Although that proposal had not been accepted, his delegation remained convinced that adoption of the concept of *jus cogens* should be linked with an assurance of adjudication by the highest legal organ of the community of nations and it was for that reason that it had been unable to vote for article 50.

69. He wished to place on record his delegation's position on article 50, which was that the parties to the convention on the law of treaties should be guided in the future by wisdom in the general application of the article to specific cases; in particular, they should develop sound State practice maintaining consistency and objectivity in applying strictly and scrupulously the requirements of a peremptory norm of general international law, that was to say " a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted ".

70. Mr. SINHA (Nepal) said his delegation was highly gratified that article 50, which embodied one of the most fundamental provisions in the whole convention, had been adopted by a substantial majority. He would nevertheless have liked to see the words " at the time of its conclusion " omitted, since they made the article slightly less definite, and a reference included in the article to particular uncontested norms of *jus cogens*, such as the renunciation of war and the suppression of slavery and piracy. A treaty violating the United Nations Charter or stipulating the practice of *apartheid* or racial discrimination would also be contrary to *jus cogens*.

*Statement by the Chairman of the Drafting Committee on articles 51-61*

71. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 51 to 61 constituted Section 3 of Part V of the convention.

72. Two amendments to the title of article 51 had been referred to the Drafting Committee by the Committee of the Whole at the first session. One, by the Republic of Viet-Nam (A/CONF.39/C.1/L.222/Rev.1) proposed that the title be amended to read " Termination of a treaty or withdrawal of the parties "; the other by Greece (A/CONF.39/C.1/L.314/Rev.1) was to change the title to " Termination of or withdrawal from a treaty by a party in virtue of the provisions of the treaty or by consent of the parties ". The Drafting Committee took the view that the Greek amendment reflected the content of the article and therefore proposed that the title be amended to read " Termination of or withdrawal from a treaty under its provisions or by consent of the parties ".

73. The introductory clause of article 51, as approved by the Committee of the Whole, read " A treaty may be terminated or a party may withdraw from a treaty ". The Drafting Committee considered that the wording

should be brought into line with the beginning of article 39, paragraph 2, and had therefore redrafted the introductory clause to read " The termination of a treaty or the withdrawal of a party may take place ". Another amendment to the text of article 51 concerned sub-paragraph (*a*) as approved by the Committee of the Whole which read " in conformity with the provisions of the treaty allowing such termination or withdrawal." In the Drafting Committee's view, the words " allowing such termination or withdrawal " were superfluous and it had therefore deleted them.

74. The Drafting Committee considered that the title of article 53 as proposed by the International Law Commission was not quite in line with the provisions of the article. It had therefore amended it to read " Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal ".

75. In the Drafting Committee's opinion the title of article 54 should be brought into line with the title it had proposed for article 51 and it had therefore amended it to read: " Suspension of the operation of a treaty under its provisions or by consent of the parties ".

76. It had deleted the words " allowing such suspension " in sub-paragraph (*a*) of article 54, in line with the similar amendment it had made to sub-paragraph (*a*) of article 51.

77. The title of article 55 in the International Law Commission's draft was " Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only ". The Drafting Committee had decided to delete the word " temporary ", since any suspension was by nature temporary, and to replace the word " consent " by the word " agreement ", the word used in the text of the article.

78. The Drafting Committee had noted that the French version of article 26, on the application of successive treaties relating to the same subject-matter, referred to " *traité antérieur* " and " *traité postérieur* ". That wording had not always been followed in article 56 as approved by the Committee of the Whole, where the words " *précédent*[e]" and " *subséquent* " [e]were used. The Drafting Committee had therefore made the necessary changes in both the title and the text of the article.

79. The Drafting Committee had considered that there was a lack of balance in the structure of paragraph 2 of article 59 as approved by the Committee of the Whole. While the introductory clause, read in conjunction with sub-paragraph (*a*), was clear enough, the same clause, when read in conjunction with sub-paragraph (*b*), did not clearly state the grounds on which a fundamental change of circumstances might not be invoked. The Committee had therefore decided to add the words " as a ground for terminating or withdrawing from a treaty " in the introductory clause of operative paragraph 2. The clause, as amended, covered both sub-paragraphs (*a*) and (*b*).

80. The title of article 60 as adopted by the International Law Commission read " Severance of diplomatic relations ", and was in conformity with the text of the article. The Committee of the Whole had subsequently inserted the words " or consular " after the word " diplomatic " in the text of the article and the Drafting Committee considered that the corresponding change should also be made in the title, as proposed by Hungary (A/CONF.39/C.1/L.334).

81. In article 61, the Drafting Committee had added the words " *(jus cogens)* " to the title, since they appeared in the title of article 50.

82. The text of article 61 remained unchanged except in the Spanish version; the Spanish-speaking members of the Drafting Committee had suggested that the words " *será nulo* " should be replaced by the words " *se convertirá en nulo* ". The change had been made after consultation with other Spanish-speaking representatives.

*Article 51* [8]

*Termination of or withdrawal from a treaty under its provisions or by consent of the parties*

The termination of a treaty or the withdrawal of a party may take place:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties after consultation with the other contracting States.

*Article 51 was adopted by 105 votes to none.*

*Article 52* [8]

*Reduction of the parties to a multilateral treaty below the number necessary for its entry into force*

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

*Article 52 was adopted by 105 votes to none.*

*Article 53* [9]

*Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal*

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

(*a*) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or

(*b*) A right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

83. Mr. BRAZIL (Australia) said that sub-paragraph 1 (*b*) of article 53 read " a right of denunciation or withdrawal may be implied by the nature of the

[8] For the discussion of articles 51 and 52 in the Committee of the Whole, see 58th and 81st meetings.

[9] For the discussion of article 53 in the Committee of the Whole, see 58th, 59th and 81st meetings.

An amendment was submitted to the plenary Conference by Iran (A/CONF.39/L.35).

treaty ". That particular element did not appear in the International Law Commission's text of the article; it had been originally inserted at the 59th meeting of the Committee of the Whole by the narrow vote of 26 to 25, with 37 abstentions. It had been proposed as an amendment (A/CONF.39/C.1/L.311) by the United Kingdom delegation, which had argued that a broadening of the availability of implied denunciation would lessen the likelihood of resort to the more drastic grounds of termination set forth in Part V. Having reflected on the matter, the Australian delegation doubted whether that in itself was a good reason for inserting a ground of termination in Part V. It now considered that the better approach was the one adopted in the original text, under which implied termination or denunciation depended upon the implied intention of the parties. The character of the treaty was only one of the elements to be taken into account. The Australian delegation therefore requested a separate vote on sub-paragraph 1 (*b*) of article 53.

84. Mr. DE LA GUARDIA (Argentina) said that he had consulted a number of Spanish-speaking delegations regarding the use of the word " *retirada* " in the Spanish version of articles 51 and 53. They had agreed that it would be better to say " *retiro* ", as had been suggested by the representative of Ecuador at the 16th plenary meeting in connexion with article 40.

85. The PRESIDENT said that the Drafting Committee would take note of the Argentine representative's observation.

86. Mr. ALVAREZ TABIO (Cuba) said his delegation opposed the motion for a separate vote on sub-paragraph 1 (*b*) of article 53. The article struck a proper balance between the subjective and objective elements involved in setting a term to treaties which contained no provision regarding termination, denunciation or withdrawal. Article 53, considered as a whole, made a positive contribution to the progressive development of international law by curbing the abusive practice of perpetual treaties, the purpose of which was to impose a policy enabling the strong to dominate the weak. A treaty of indefinite duration could now be brought to an end by application of the *rebus sic stantibus* clause implicit in all such treaties. History showed how circumstances could change fundamentally in a comparatively short period of time. Again, the right to withdraw from a treaty was a factual matter which was necessarily governed by the circumstances of each particular case, especially by reference to the character of the treaty.

87. At the first session, the Committee of the Whole had considered an amendment submitted by Spain, Venezuela and Colombia (A/CONF.39/C.1/L.307 and Add.1 and 2), which provided that " when a treaty contains no provision regarding termination, denunciation or withdrawal, any party may denounce it or withdraw from it unless the intention of the parties to exclude the possibility of denunciation or withdrawal appears from the nature of the treaty and the circumstances of its conclusion ". It had decided instead in favour of a United Kingdom amendment (A/CONF.39/C.1/L.311) under the terms of which, subject to reasonable notice of intent, the right of denunciation or withdrawal might be implied from the treaty. The treaties in question were by their very nature temporary. Neither the intention of the parties nor the *pacta sunt servanda* rule could affect the real position, and it was illogical and unnatural to deny the temporary character of certain types of treaties. If sub-paragraph 1 (*b*) were deleted, the right of denunciation or withdrawal would have to be inferred from a presumption based on circumstances which were not defined, which might include the nature of the treaty. If it was accepted that a presumed intention to terminate the treaty could be inferred from its nature, why not simply admit that some treaties were by nature temporary and that consequently the presumed intention of the parties to accept denunciation or withdrawal could be inferred from their temporary character?

88. He would remind the Conference that a separate vote on sub-paragraph 1 (*b*) had been requested at the 81st meeting of the Committee of the Whole. The sub-paragraph had then been adopted by 56 votes to 10, with 13 abstentions, and the article as a whole by 73 votes to 2, with 4 abstentions. The Cuban delegation therefore opposed the motion for a separate vote on sub-paragraph 1 of article 53 and requested that the motion be put to the vote.

The meeting rose at 6.20 p.m.

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## TWENTY-FIRST PLENARY MEETING

*Tuesday, 13 May 1969, at 10.50 a.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 53* (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal) *(continued)*

1. The PRESIDENT invited the Conference to continue its discussion of article 53. The representative of Australia had asked for a separate vote on article 53, paragraph 1 (*b*) and the representative of Cuba had opposed that request.

2. Mr. BRAZIL (Australia) said that, in his delegation's view, a separate vote on article 53, paragraph 1(*b*) would be reasonable; but since it was apparent that the majority of representatives at the Conference wished the sub-paragraph to be retained, the Australian delegation would not press for a separate vote on it so as not to hold up the Conference's work.

3. His delegation would abstain from voting on article 53 as a whole, since it preferred the original text submitted by the International Law Commission. Incidentally, the retention of sub-paragraph 1(*b*) would increase the importance of the question of the settlement of disputes occasioned by the application of the article. The Conference would recall the comments of the Expert Consultant in the final paragraph of document A/CONF.39/L.28 on the question whether " denunciation " should be mentioned in article 62. His delegation thought it would be better to state clearly that any dispute arising from the application of article 53 should be settled in accordance with the procedures laid down in articles 62 and 62 *bis*. The Conference might revert to that point when it came to consider those two articles.

4. Mr. MATINE-DAFTARY (Iran) introduced his delegation's amendment (A/CONF.39/L.35), to add at the end of paragraph 1(*b*) the words " or by all the circumstances involved ". In paragraph (4) of its commentary to article 53 the International Law Commission had pointed out that some of its members took the view that the existence of the right of denunciation or withdrawal was not to be implied from the character of the treaty alone. In the same paragraph the Commission stated: " According to these members, the intention of the parties is essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission ". It was not clear, therefore, why only the nature of the treaty was mentioned in paragraph 1(*b*). The words " or by all the circumstances involved ", should be added in order to take account of the Commission's views.

5. Mr. MARESCA (Italy) said that the provision in paragraph 1(*b*) enabling a party to invoke the nature of a treaty in order to denounce it or to withdraw from it held a danger for the stability of treaties. The provision was incompatible with the *pacta sunt servanda* rule.

6. Mr. MENDOZA (Philippines) said he had been ready to support the Australian representative's request for a separate vote on paragraph 1(*b*), not because of the actual wording of the sub-paragraph, but because he believed that in the ordinary way, and unless there was some really serious reason to the contrary, every delegation was entitled to request a separate vote.

7. Mr. DE CASTRO (Spain) said he supported the Iranian proposal, since the nature of the treaty and the circumstances of its conclusion had been mentioned in the amendment to article 53, paragraph 1, submitted in the Committee of the Whole by Spain, Venezuela and Colombia (A/CONF.39/C.1/L.307 and Add.1 and 2) as means of determining the intention of the parties.

8. The PRESIDENT invited the Conference to vote on the Iranian amendment.

*The result of the vote was 31 in favour and 23 against, with 43 abstentions.*

*The Iranian amendment (A/CONF.39/L.35) was not adopted, having failed to obtain the required two-thirds majority.*

*Article 53 was adopted without change by 95 votes to none, with 6 abstentions.*

9. Mr. TALALAEV (Union of Soviet Socialist Republics) said that his delegation had voted for article 53 on the understanding that the term " denunciation " as interpreted and applied by the Soviet Union related only to cases where clear provision was made for it and where it took place in conformity with the terms of the treaty itself. According to Soviet treaty practice, the provisions of article 53 related to other cases of unilateral termination of a treaty, namely abrogation and annulment.

### *Article 54* [1]

*Suspension of the operation of a treaty under its provisions or by consent of the parties*

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(*a*) In conformity with the provisions of the treaty; or

(*b*) At any time by consent of all the parties.

10. Mr. TALLOS (Hungary) said that his delegation had submitted its amendment (A/CONF.39/L.30) to bring article 54 into line with article 51. At the 58th meeting of the Committee of the Whole, during the Conference's first session, the representative of the Netherlands, introducing his amendment to article 51 (A/CONF.39/C.1/L.313), had pointed out that some treaties provided for quite a long period, sometimes up to twelve or eighteen months, after the date of ratification or accession before the treaty entered into force for the ratifying or acceding State. A State which had given its consent to be bound by the treaty should not be treated as a third State, for it had expressed a definitive wish to establish treaty relations with the other parties. The parties to the treaty should therefore not be able to negotiate the termination of the treaty without allowing the participation in those negotiations of all the contracting States.

11. Those considerations also applied to the case mentioned in article 54. The legal effects of the suspension of the operation of a treaty were, for the period of the suspension, the same as those of definitive termination. The Hungarian delegation therefore proposed that article 54, sub-paragraph (*b*) should be brought in to line with article 51, sub-paragraph (*b*) by adding the words " after consultation with the other contracting States ".

*The Hungarian amendment (A/CONF.39/L.30) was adopted by 66 votes to 4, with 29 abstentions.*

*Article 54, as amended, was adopted by 101 votes to none.*

[1] For the discussion of article 54 in the Committee of the Whole, see 59th and 81st meetings.

An amendment was submitted to the plenary Conference by Hungary (A/CONF.39/L.30).

*Article 55* [2]

*Suspension of the operation of a multilateral treaty by agreement between certain of the parties only*

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

12. Mr. DENIS (Belgium) observed that article 37, which dealt with modification by *inter se* agreements was akin to article 55, which dealt with *inter se* suspension of the operation of treaties. A change had been made in the French text of article 37, where the words " *accomplissement de leurs obligations* " had been replaced by " *exécution de leurs obligations* ". The same change should probably be made in article 55 and the two texts brought into line.

13. The PRESIDENT said that the Drafting Committee would consider the point.

*Article 55 was adopted by 102 votes to none.*

*Article 56* [3]

*Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(*a*) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(*b*) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

*Article 56 was adopted by 104 votes to none.*

*Article 57* [4]

*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

14. Sir Francis VALLAT (United Kingdom) said that his delegation supported article 57, but it wished to revert to two points which had been raised in the Committee of the Whole, when there had not been time to deal with them adequately. The first concerned the significance of the expression " invoke as a ground " and the second the question of separability involved in the expression " in whole or in part ". On both points, the various parts of article 57 contained discrepancies. His delegation had searched the records, particularly the report of the International Law Commission and the official records of the first session of the Conference, but had found no satisfactory explanation. Yet in its commentary to paragraph 1, the International Law Commission had itself emphasized the importance of the expression " invoke as a ground ", which it saw as " intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated ".

15. One of the changes proposed by the United Kingdom in its amendment (A/CONF.39/L.29) involved the insertion of the words " invoke the breach as a ground " in paragraphs 2(*a*) and 2(*c*). That would bring the text of those sub-paragraphs into line with paragraphs 1 and 2(*b*) and take away from the present text the implication that the parties or party should have a right to act " arbitrarily ".

16. It seemed clear, with regard to paragraph 2(*c*), that a party should not be entitled to suspend the operation of a treaty " arbitrarily ". It might be thought that different considerations applied to paragraph 2(*a*), which dealt with the case where the other parties acted by unanimous agreement. Experience showed, however, that there might be a difference of view between one party and all the other parties to a multilateral treaty. The other parties might be wrong, and there was no

[2] For the discussion of article 55 in the Committee of the Whole, see 60th, 86th and 99th meetings.

[3] For the discussion of article 56 in the Committee of the Whole, see 60th and 81st meetings.

[4] For the discussion of article 57 in the Committee of the Whole, see 60th, 61st and 81st meetings.

Amendments were submitted to the plenary Conference by the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.29) and Switzerland (A/CONF.39/L.31).

reason why they should be given the power to act " arbitrarily " under paragraph 2(*a*). That was especially true where the number of parties was small. Quite often the position under a multilateral treaty was very much like that under a bilateral treaty. It was principally for those reasons that his delegation was asking the Conference to rectify the text by inserting the phrase " invoke the breach as a ground " in paragraphs 2(*a*) and 2(*c*).

17. The second point also related to paragraphs 2(*a*) and 2(*c*), which again differed, for reasons which it was difficult to understand, from paragraph 1 and paragraph 2(*b*). In the latter paragraphs, separability was permitted, whereas in paragraphs 2(*a*) and 2(*c*) it was not. Yet separability might be just as desirable, indeed as essential, in the latter cases as in the former. There was no distinction of principle or substance involved, as article 41, paragraph 2 adopted a few days previously confirmed. Article 41 expressly prohibited a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty from being invoked otherwise than with respect to the whole treaty, except as provided in article 41, paragraphs 3 to 5, or in article 57. If two provisions in article 57 provided for separability by using the words " in whole or in part " and two others did not use those words, the conclusion seemed inescapable that separability would not be permissible in the case of the latter two provisions.

18. The United Kingdom delegation hoped that the Conference would approve the changes it had proposed. It did not claim that they were perfect in form, but if they were approved in principle they could be referred to the Drafting Committee.

19. His delegation supported article 57, but regarded it as an article which depended on the adoption of satisfactory procedures. As already explained in connexion with article 45 and other articles, it would abstain in the vote on article 57 and, for similar reasons, in the vote on articles 59 and 61.

20. Mr. RUEGGER (Switzerland) said that although his delegation supported article 57, as it had done in 1968, it was proposing an addition (A/CONF.39/L.31) which it thought essential. The Swiss delegation had submitted an oral amendment to that effect at the first session.[5]

21. His delegation had already urged in the discussion on article 50 that conventions relating to protection of the human person should be sacrosanct. Its amendment to article 57 was based on a number of considerations. First, the 1949 Geneva Conventions, which were virtually universal and, in his delegation's view, formed part of the general law of nations, prohibited reprisals against the persons protected. Second, in the spirit of those Conventions, encouragement was given in certain circumstances to the conclusion of *ad hoc* bilateral agreements expressing the wish of States not yet parties to the Geneva Conventions to observe some of their basic principles, including the prohibition of reprisals against the persons protected. Lastly, there were other equally important conventions concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general, and in no event should their violation by one party result in injury to innocent people.

22. Consequently, his delegation though it necessary to put a curb on the harmful effects which the provisions of article 57, paragraphs 2(*b*) and 3(*b*), could have on individuals. The absence of a proviso on the fundamental rules for the protection of the human person would be dangerous. The Swiss delegation therefore proposed that the Conference should adopt an additional paragraph for article 57, which would simply be a saving clause to protect human beings. If the Conference accepted the principle of such a clause, he would ask for paragraph 5 to be referred to the Drafting Committee, which had not so far considered the proposal in writing.

23. Mr. DIOP (Senegal) said he wished to make a suggestion affecting the terminology, which could be referred to the Drafting Committee. In paragraph 3(*a*) the term " *rejet* " in the French version should be replaced by the term " *dénonciation* ". Section 3, which contained article 57, was entitled: " Termination and suspension of the operation of treaties "; consequently, that section was concerned with treaties in force which were to be terminated or suspended. Article 57 laid down the procedure for the withdrawal from or denunciation of a treaty, and not, properly speaking, for repudiating it. Moreover, paragraph (9) of the International Law Commission's commentary to article 57 showed that those provisions clearly referred to denunciation.

24. The PRESIDENT pointed out that the Senegalese representative's oral amendment affected all the versions of article 57, not merely the French text.

25. Mr. DENIS (Belgium) said he supported the amendment by Senegal: technically, a treaty could only be " repudiated " by " denunciation ".

26. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation supported the United Kingdom amendment (A/CONF.39/L.29) and the Swiss amendment (A/CONF.39/L.31) to article 57.

27. Mrs. ADAMSEN (Denmark) said that at the 61st meeting of the Committee of the Whole, her delegation had supported the Swiss amendment to add to article 57 a paragraph concerning humanitarian conventions. She realized that from a strictly legal point of view it might be questioned whether such an addition was absolutely necessary, but her delegation considered that the principle concerned was of such fundamental importance that it should in any case be included in the convention on the law of treaties. Her delegation would therefore vote for the Swiss amendment.

28. The Danish delegation would also vote for the United Kingdom amendment (A/CONF.39/L.29), with which it was in full agreement.

29. Mr RATTRAY (Jamaica) said that, at the 61st meeting of the Committee of the Whole, his delega-

[5] See 61st meeting of the Committee of the Whole, para. 12.

tion had supported the principle in article 57 that a material breach of a treaty should be a ground that could be invoked for terminating the treaty or suspending its operation. But, in view of the fact that a material breach was defined in article 57, paragraph 3, as consisting in, *inter alia,* the violation of a provision essential to the accomplishment of the object or purpose of the treaty, and that article 41 of the convention, as approved, prohibited separability if the ground invoked for terminating or suspending the operation of a treaty related to essential clauses of the treaty, his delegation found it difficult to understand how it could logically be stated in article 57 that a material breach of a treaty could be invoked as a ground for terminating it in part only. Since the breach related to a provision essential to the accomplishment of the object or purpose of the treaty, the very basis of the treaty relationship, namely consent to the treaty, would have been removed.

30. His delegation had not received any satisfactory reply to that question of substance. Nothing in the new amendments which had been submitted (A/CONF. 39/L.29 and L.31) dispelled the doubts which were still felt by his delegation. Accordingly, it would be obliged to abstain on article 57, as it had already done in the Committee of the Whole.

31. Mr. NASCIMENTO E SILVA (Brazil) drew the attention of the Drafting Committee to the fact that the English version of article 57, paragraph 3, should refer to " this article " rather than " the present article ", since the word " present " was used only in the expression " the present Convention ".

32. His delegation supported the United Kingdom amendment (A/CONF.39/L.29), which would contribute to the stability of treaties. It also supported the Swiss amendment (A/CONF.39/L.31), which should be generally acceptable.

33. Mr. ESCUDERO (Ecuador) said he welcomed the Swiss delegation's initiative (A/CONF.39/L.31), but found the idea of " reprisals " too narrow. As a suggestion to be put before the Drafting Committee, he proposed that there should be a reference to a broader notion as well as to " reprisals ". For example, the passage might read: " . . . in particular, to rules prohibiting any form of persecution and reprisals against protected persons ".

34. Mr. ROSENNE (Israel) said he wished to comment on the United Kingdom amendment (A/CONF.39/ L.29). The first part of the amendment to paragraph 2(*a*) proposed the inclusion of the words " to invoke the breach as a ground ". In his view, invocation of a ground for suspending the operation of a treaty or for terminating it under Part V was in the nature of things a unilateral step, and he did not see how it would work on a multilateral basis. The words " by unanimous agreement " in that paragraph, an expression deliberately used by the International Law Commission and retained in the text before the Conference, seemed to him to provide adequate guarantees against arbitrary action.

35. On the other hand, the second part of the amendment to paragraph 2(*a*) — the addition of the words " in whole or in part " — improved the text. He therefore wished to know whether the United Kingdom representative would agree to a separate vote on his amendment: paragraph 1 of the amendment would then be treated as two quite distinct amendments, one of which would read " . . . to invoke the breach as a ground for suspending the operation of the treaty of for terminating it ", while the other would cover the addition of the words " in whole or in part ". Those two amendments would be put to the vote separately.

36. With regard to the expression " in whole or in part ", he said that in his opinion it did not refer to the principle of separability stated in article 41. On the contrary, it had been made very clear in the discussions in the International Law Commission that in cases of breach the injured State had complete freedom of action in deciding, when it invoked the breach as a ground for suspending the operation of the treaty or terminating it, what provisions of the treaty were to be terminated or suspended in operation.

37. His delegation supported paragraph 2 of the United Kingdom amendment, relating to paragraph 2(*c*).

38. He would be glad to support the Swiss amendment (A/CONF.39/L.31) in principle, subject to scrutiny by the Drafting Committee.

39. Sir Francis VALLAT (United Kingdom) said he had no strong views about how his delegation's amendment should be put to the vote; it would be for the President to decide.

40. In reply to the representative of Israel's point about the safeguards provided by the words " by unanimous agreement " in article 57, paragraph 2(*a*), he said that even when the parties acted by unanimous agreement, they might very well be guilty of an arbitrary act. The fact of their agreement was not a guarantee that their action was justified.

41. His delegation had not been referring to the principle of separability in article 41 in proposing the insertion of the words " in whole or in part " in article 57, paragraph 2(*a*); its reason for proposing that addition was that article 41 left it to article 57 to clarify the point, and it was therefore necessary to be especially precise in article 57.

42. Mr. CASTRÉN (Finland) associated his delegation with those which had supported the United Kingdom amendment and the Swiss amendment. The latter was especially important for the reasons explained by the representative of Switzerland.

43. Mr. EUSTATHIADES (Greece) said he supported the United Kingdom amendment, which added a valuable clarification to article 57. He was also in favour of the Swiss amendment and congratulated its sponsor on his initiative in submitting it. He had two comments to make on that particular amendment, which presumably had still to be referred to the Drafting Committee. In the first place, he recalled the proviso in article 40 of the convention reserving the general rules of international law; since many of the provisions of conventions of a humanitarian character formed part of general international law, article 40 already safeguarded a number of those conventions. But the con-

ventions in question, particulary the Geneva Conventions, went further and it was precisely in their case that the Swiss amendment was sound and necessary.

44. His second comment concerned a point of drafting. The Swiss amendment, which provided that " the foregoing paragraphs do not apply to provisions relating to... ", might be taken to mean that the denunciation procedure laid down in the Geneva Conventions, by which a treaty could be denounced without any specific reasons being given, was to be suppressed, whereas denunciation authorized under the Geneva Conventions might derive from considerations other than those connected with article 57. In order to clear up any misunderstanding on that score, it might be well to replace the phrase " The foregoing paragraphs do not apply to provisions... " by some such wording as " The provisions... contained in conventions... of a humanitarian character... shall be reserved ".

45. Mr. JAGOTA (India) said that his delegation preferred the Drafting Committee's text of article 57 to the text proposed by the United Kingdom. The United Kingdom representative had emphasized the distinction drawn in article 57 between paragraph 2(*a*) and 2(*c*), on the one hand, and paragraph 1 and paragraph 2(*b*) on the other. In the one case, a material breach was invoked as a ground for terminating a treaty or suspending its operation, whereas in the other it was not mentioned as a ground to be invoked for the same purpose. That distinction was not an oversight on the part of the International Law Commission but had been made advisedly for the reason stated in paragraphs (7) and (8) of the Commission's commentary to article 57. Where there was a material breach of a provision of a multilateral treaty the other parties would be entitled, as indicated in paragraph 2(*a*), by unanimous agreement either to suspend the operation of the treaty in its entirety or terminate it, taking such decisions for themselves and the defaulting State, or for all the parties to the treaty. Thus the distinction was duly specified between the case where one party invoked a material breach as a ground for terminating the treaty and the case where all the other parties exercised by unanimous agreement their right to terminate the treaty. There was no need to amend paragraph 2(*a*) and 2(*c*) of article 57 as drafted by the International Law Commission.

46. On the other hand, the second part of the United Kingdom amendment, proposing to add the words " in whole or in part " was acceptable to the Indian delegation, but only partly so. The words might conveniently be added in paragraph 2(*a*), but not in paragraph 2(*c*), which referred to special types of treaties, as pointed out in paragraph (8) of the Commission's commentary. He therefore supported the proposal for a separate vote on the two parts of the United Kingdom amendment.

47. The Swiss amendment was acceptable in principle. However, the Drafting Committee should consider the various suggestions which had been made, those by the representative of Greece in particular.

48. Mr. REDONDO-GOMEZ (Costa Rica) said he supported the Ecuadorian representative's suggestion.

49. Mr. ANDERSEN (Iceland) said he was in favour of the amendments to article 57.

50. Mr MARESCA (Italy) said the United Kingdom amendment considerably improved the text of article 57.

51. His delegation supported the Swiss amendment, since it fully recognized the overriding validity of humanitarian law.

52. The oral amendment by Senegal had certain advantages from the point of view of diplomatic style.

53. Mr. SEATON (United Republic of Tanzania), referring to paragraph 2(a), said that since the parties could decide unanimously on the measures to be taken, there was no need to state that they could invoke breach as a ground for suspending the operation of a treaty or terminating it. The United Kingdom amendment to paragraph 2(*a*) therefore introduced something that was unnecessary and did not improve the wording. That also applied to the amendment to paragraph 2(*c*).

54. Paragraphs 2(*a*) and 2(*c*) differed from paragraph 2(*b*) in that, in the case of paragraph 2(*b*), it was the party specially affected by the breach which would be able to invoke it as a ground for suspending the operation of the treaty and it was therefore that party which would perhaps have recourse to an arbitral tribunal or to adjudication; consequently, the party specially affected by the breach would act alone and would not have to take measures in agreement with the other parties.

55. With regard to the words " in whole or in part " in the United Kingdom amendment, he thought it would be rather unwise to provide that a party might consider the operation of a treaty to have been suspended in part in the event of a material breach of the treaty consisting, according to paragraph 3, in " a repudiation of the treaty not sanctioned by the present convention " or in " the violation of a provision essential to the accomplishment of the object or purpose of the treaty ".

56. His delegation would therefore vote against the United Kingdom amendments.

57. With regard to the Swiss amendment (A/CONF.39/L.31), his delegation appreciated the Swiss delegation's suggestion but wondered whether the amendment really served the purpose. If a party which violated a humanitarian treaty knew that the other parties would apply its provisions to its nationals, it might perhaps be encouraged to violate the treaty, believing itself to be protected against any sanction. Besides, the drafting of the Swiss amendment was vague; what was meant by the expressions " conventions and agreements of a humanitarian character " and " rules prohibiting any form of reprisals against protected persons "?

58. His delegation supported the Senegalese oral amendment.

59. Mr. GALINDO-POHL (El Salvador) said that the United Kingdom amendment brought paragraphs 1 and 2 of article 57 into balance and applied to multilateral treaties the system established in paragraph 1 for bilateral treaties.

60. His delegation supported the Swiss amendment, which was consistent with the humanitarian development

of international law, but it considered that the Ecuadorian representative's suggestion should be borne in mind.

61. The PRESIDENT put to the vote the phrase " in whole or in part " which the United Kingdom amendment (A./CONF.39/L.29) proposed to insert in paragraph 2(*a*).

*That phrase was adopted by 56 votes to 6, with 33 abstentions.*

62. The PRESIDENT put to the vote the remainder of the United Kingdom amendment to paragraph 2(*a*).[6]

*The result of the vote was 42 in favour and 24 against, with 32 abstentions.*

*That part of the United Kingdom amendment was not adopted, having failed to obtain the required two-thirds majority.*

63. The PRESIDENT called for a vote on the United Kingdom amendment to paragraph 2(*c*).

*The United Kingdom amendment to paragraph 2*(c) *was adopted by 45 votes to 17, with 34 abstentions.*

64. The PRESIDENT said that the suggestions regarding the Swiss amendment (A/CONF.39/L.31) referred to points of drafting. He thought the Conference should take a decision on the principle underlying the amendment and refer it to the Drafting Committee for modification in the light of the suggestions put forward during the discussion.

65. Mr. RUEGGER (Switzerland) said that he too thought that the Drafting Committee might study the various suggestions made with regard to his delegation's amendment. The Swiss delegation recognized the force of the Greek representative's argument concerning the application of article 40, but even something which was self-evident was better stated.

66. With regard to the comment about the possibility of a denunciation, his delegation wished to point out that some time might elapse between the performance of an act which provoked reprisals and the time when the denunciation could take effect.

67. The point raised by the representative of the United Republic of Tanzania had been considered by the 1949 Geneva Conference, which had concluded that reprisals against war victims should be entirely prohibited; moreover if the dangerous path of reprisals were followed, serious consequences might quickly ensue.

68. The PRESIDENT invited the Conference to vote on the principle embodied in the Swiss amendment (A/CONF.39/L.31).

*The principle was adopted by 87 votes to none, with 9 abstentions.*

69. Mr. STEVENSON (United States of America) said he was opposed to the oral amendment suggested by the Senegalese delegation. The Expert Consultant had indicated in his letter to the Chairman of the Drafting Committee (A/CONF.39/L.28) that in article 53 the term " denunciation " was used in the narrow sense of termination with the express or implied agreement of the parties.

70. If the Conference wished to replace the term " repudiation ", a word with a wider meaning, such as " termination ", would be preferable. But his delegation would vote in favour of retaining the word " repudiation ", so as to exclude the possibility of a problem of interpretation.

71. Mr WERSHOF (Canada) said that the Senegalese amendment seemed to concern a drafting point. It could therefore be referred to the Drafting Committee.

72. His delegation was nevertheless in favour of keeping the word " repudiation ".

73. The PRESIDENT said that the International Law Commission had considered the point and decided that the term " repudiation " was preferable to " denunciation ", since it considered that emphasis should be laid on a material rather than a formal act so as to cover all the means available to a State attempting to free itself of obligations under a treaty. The Commission had thus used the word " repudiation " quite intentionally.

74. Mr. YASSEEN (Iraq) said he wished to confirm what the President had said. It was difficult to talk of " denunciation of the treaty not sanctioned by the present convention ".

75. Mr. JAGOTA (India), said that, in the Expert Consultant's letter, it was stated that the term " denunciation " was used in article 53 only where the right to denounce arose from the agreement of the parties. Nevertheless, he would point out that the words " denunciation " or " denouncing " were used several times in the commentary to article 57, in respect of cases where one party decided to invoke a breach of the treaty as a ground for terminating it, and not in respect of cases where the parties decided by unanimous agreement to terminate a treaty.

76. His delegation agreed with the representatives of Iraq, Canada and the United States of America that the word " repudiation " should be retained in paragraph 3 (*a*).

77. Mr. SINHA (Nepal), explaining his delegation's vote, said that the United Kingdom amendment would have diluted the force of article 57, which provided a sanction if there was a material breach of a multilateral treaty. The requirement of the unanimous agreement of the parties for suspending the operation of a treaty or terminating it showed that the International Law Commission had wished to provide for a strong sanction by laying down that the operation of the treaty would be suspended in its entirety or the treaty terminated. His delegation had therefore abstained from voting on the first part of the amendment and had voted against the second part.

78. His delegation welcomed the Swiss amendment, which would establish a proviso with regard to con-

[6] See above, para. 35.

ventions which protected human rights. The Drafting Committee should nevertheless examine the wording of the amendment to see how it could be made more precise and explicit. The Nepalese delegation had therefore voted in favour of the principle expressed in the Swiss amendment.

79. He favoured the retention of the word " repudiation " in paragraph 3 (*a*).

80. Mr. DIOP (Senegal) said that his delegation's suggestion had been intended only for the Drafting Committee. In view of the explanations given by the President and the representative of Iraq, his delegation withdrew its proposal.

81. The PRESIDENT called for a vote on article 57 as a whole, as amended.

*Article 57, as amended, was adopted by 88 votes to none, with 7 abstentions.*[7]

The meeting rose at 1.10 p.m.

[7] For the adoption of a revised text of article 57, see 30th plenary meeting.

## TWENTY-SECOND PLENARY MEETING

*Tuesday, 13 May 1969, at 3.20 p.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 58* [1]

*Supervening impossibility of performance*

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

1. Mr. ESCUDERO (Ecuador) said that impossibility of performance might also result from the non-existence of an object that was thought by the parties to exist at the time the treaty was concluded; the point might perhaps be covered by article 45.

2. International law drew a distinction between the various kinds of error which invalidated consent: unilateral error, reciprocal error, common error and error in law. The problem he proposed to deal with concerned the common error which States sometimes committed when they drew up a treaty defining their borders. They assumed that certain geographical features existed and had based the frontier line on them, only to find later that they did not in fact exist and that their joint assumption that they did exist had been based on inadequate or defective maps which failed to give the true geographical position. Errors of that kind had been committed in the past, for example, in the Treaty of 1772 between Russia and Austria, the Treaty of 1783 between Great Britain and the United States, and the Treaty of 1819 between the United States and Spain.

3. While an error in a treaty invalidated the treaty under article 45, impossibility of performance resulting from the non-existence of the object that was thought by the parties to exist at the time the treaty was entered into led to a completely different result, namely, termination of the treaty. That second case was not covered by article 58 although in his delegation's view it ought to be mentioned in the convention.

4. The doctrine that the impossibility of performing a treaty was a ground for terminating or withdrawing from it had been accepted in inter-American law at the meeting of the Inter-American Council of Jurists in 1927, and at the Sixth Pan-American Conference held at Havana in 1928. Article 14 of the Convention on Treaties [2] adopted at the Havana Conference clearly stated that the impossibility of performing a treaty was a ground for terminating it. There was every reason to believe that impossibility of performance resulting from the non-existence of the object of the treaty was covered by article 14 of that Convention. But no provision for that contingency was made in article 58 of the convention on the law of treaties.

5. While his delegation did not propose to submit an amendment to article 58, it wished to make it clear that the article was incomplete and that inter-American law would continue to be governed in the matter by article 14 of the Havana Convention on Treaties.

6. The PRESIDENT invited the Conference to vote on article 58.

*Article 58 was adopted by 99 votes to none.*

*Article 59* [3]

*Fundamental change of circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

[1] For the discussion of article 58 in the Committee of the Whole, see 62nd and 81st meetings.

[2] See *The International Conferences of American States 1889-1928* (New York, Oxford University Press, for Carnegie Endowment for International Peace, 1931), p. 418.

[3] For the discussion of article 59 in the Committee of the Whole, see 63rd, 64th, 65th and 81st meetings.

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(*a*) If the treaty establishes a boundary; or

(*b*) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

7. Mr. SHUKRI (Syria) said that his delegation fully endorsed the inclusion of the *rebus sic stantibus* principle in the law of treaties, and agreed with the International Law Commission as to the conditions laid down in paragraph 1 of article 59 for the application of that principle. It nevertheless had some difficulty with regard to paragraph 2 (*a*), which excepted from the *rebus sic stantibus* principle treaties establishing a boundary.

8. In making that exception the International Law Commission, in its commentary to article 59, had apparently relied on the assumption that both States concerned in the *Free Zones* case [4] appeared to have recognized that case as being outside the rule. But the practice of two or more States in such a context and with regard to such a delicate matter should not be cited as a reasonable justification for a *de lege ferenda* rule such as that in paragraph 2 (*a*). Moreover, the Permanent Court of International Justice, which had heard the *Free Zones* case, had declined to pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights, although it had actually been asked to do so by one of the parties. The Court had not held that the principle was not applicable to that category of treaties.

9. Another important point was that the arguments adduced in the *Free Zones* case, and the opinions of certain jurists to which the International Law Commission had referred, had preceded the birth of the United Nations Charter, which pronounced the right of peoples to self-determination as essential to the development of friendly relations among States, one of the purposes of the United Nations. That point had been raised at the first session by the representative of Afghanistan in a question to the Expert Consultant who had replied that self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems.[5]

10. Such a clarification might have been satisfactory if the International Law Commission had not clearly stated in paragraph (11) of its commentary that the expression " treaty establishing a boundary " was a broader expression which would embrace treaties of cession as well as delimitation treaties. The Syrian delegation might have been prepared to accept that explanation if the idea of not applying *rebus sic stantibus* had been confined to delimitation treaties, but its misgivings were not allayed by the Expert Consultant's interpretation since the expression " establishing a boundary " had been drafted to cover treaties of cession. It could not be argued that the rights of the people of a ceded territory would not be decisively affected and that the peremptory norm of self-determination would be irrelevant at the present juncture.

11. His delegation felt strongly that illegal occupation or *de facto* possession of a territory remained illegal however long it lasted. Neither stability in international relations nor lasting peace could be expected if they were achieved at the expense of justice and the right of peoples to self-determination, nor could they be sought by maintaining colonial treaties under which territories had been ceded contrary to the wishes of the inhabitants. The *rebus sic stantibus* principle should therefore be made to apply to that category of treaty.

12. The Syrian delegation was consequently unable to accept the provisions of paragraph 2(*a*), because it did not wish to endorse the creation of a legal norm that contravened " *jus cogens* ".

13. Mr. WYZNER (Poland) said that the present wording of article 59 struck a proper balance. On the one hand it protected a party whose obligations under a treaty might become an undue burden as a result of a fundamental change of circumstances; on the other, it contained important elements preventing a possible abuse by parties to a treaty in invoking a fundamental change of circumstances in order to free themselves from their treaty obligations.

14. The International Law Commission had properly formulated article 59 as an objective rule of international law, while stressing its exceptional character. On the natural assumption that the rule implied the existence of good faith on the part of all the States involved, the Polish delegation considered that the present formulation of article 59 reconciled two conflicting elements, the dynamics of international life and the stability that was essential in every legal order. While it might be argued that stability was not an end in itself, its was nevertheless the most important factor in the case of treaties establishing boundaries. The problem of boundaries was closely connected with the most fundamental rights of States. It was for that reason that the Polish delegation maintained that no treaty establishing a boundary could be open to unilateral action on the ground of a fundamental change of circumstances.

15. History showed that the unfounded territorial claims of aggressor States had often had disastrous results, affecting not only the States directly concerned but a number of others as well. Poland, whose experience in that respect had been particularly bitter, strongly supported the exclusion of treaties establishing boundaries from the general application of the rule embodied

[4] *P.C.I.J.*, Series A/B, No. 46.

[5] See Committee of the Whole, 64th meeting, para. 28, and 65th meeting, para. 31. See also para. 52 below.

in article 59. It was convinced that the exception in paragraph 2(*a*) was essential to the maintenance of international peace and security, as provided for in the United Nations Charter. The provision was merely the direct consequence, in the field of the law of treaties, of the rule embodied in Article 2 of the Charter, which stressed the obligation to respect the territorial integrity of States. It left no room for any legal justification of territorial claims based on a fundamental change of circumstances, which might be raised by a potential aggressor.

16. Some delegations had expressed doubts with regard to unequal colonial treaties or treaties imposed by an aggressor State. The Polish delegation considered such treaties to be void *ab initio,* since they conflicted with norms of *jus cogens* and therefore did not fall under the provisions of article 59 which dealt with valid treaties only.

17. On the question of the relationship between article 59 and the principle of self-determination, his delegation shared the view expressed by the Expert Consultant at the 65th meeting of the Committee of the Whole.

18. The Polish delegation would therefore vote in favour of article 59 as approved by an overwhelming majority in the Committee of the Whole.

19. Mr. TABIBI (Afghanistan) said that his delegation supported the basic purpose of article 59 which was to recognize *rebus sic stantibus* as a cardinal principle of international law. The inclusion of that principle in article 59 strengthened the *pacta sunt servanda* rule and provided a means of terminating treaties which became too onerous to apply or hampered relations between States. However, the *rebus sic stantibus* doctrine was considerably weakened by the exceptions stated in paragraph 2(*a*) which, if adopted, would constitute endorsement of a number of colonial and unequal treaties concluded in the past by error, fraud, corruption of a representative of a State or coercion against the State or its representative. Paragraph 2(*a*) would at the same time weaken the rule of *jus cogens*. It was a fact of history that, ever since the First World War, and particularly since the signing of the United Nations Charter, the international community had been moving towards the emancipation of peoples and recognition of the right of self-determination and away from colonial and unequal treaties imposed against the free will of nations. His delegation's misgivings regarding paragraph 2(*a*) should be understood in that context.

20. No distinction could be drawn between boundary treaties and treaties establishing territorial status. Most boundary treaties dealt not with a geometric line but with territories and peoples, and in some cases determined the fate of a whole country. Recognition of colonial and unequal treaties imposed against the free will of nations and in violation of the right of self-determination must surely be wrong, and should not be accepted merely for the sake of the stability of treaties. Stability, particularly of boundary treaties, must indeed be preserved, but only in the case of lawful treaties accepted by the parties concerned. True to its traditional policy of peace and friendship with all nations, Afghanistan yielded to none in its respect for boundaries which had been legally established and accepted. It was opposed, as a matter of principle, to all colonial and unequal treaties maintained in violation of the principle of self-determination. That was why his delegation hoped that the Conference might still agree on a formula which safeguarded the legally established boundaries of States and did not endorse those imposed by force and coercion.

21. With a view to clarifying the purpose and meaning of paragraph 2(*a*) of article 59 he would venture to ask the Expert Consultant once again to explain what would be the effect of paragraph 2(*a*) on the operation of the right of self-determination of peoples and nations and on the operation of the rules in articles 45 to 50 in Part V of the convention, when it became necessary to apply them to boundary treaties.

22. The Conference must not lay down rules which might be interpreted as endorsing colonial and unequal treaties, nor should it provide for exceptions that ran counter to the fundamental principles of international law.

23. Mr. BAYONA ORTIZ (Colombia) said that the inclusion in the convention on the law of treaties of an article endorsing the *rebus sic stantibus* doctrine represented one of the most important steps taken by the International Law Commission in its efforts to contribute to the codification and progressive development of international law; in formulating article 59, the Commission had dealt with one of the most controversial questions known to international jurists.

24. The Commission's commentaries to its article were often as valuable as the articles themselves, and the commentary to article 59 was a case in point. In paragraph (1), the Commission noted that modern jurists had accepted somewhat reluctantly the doctrine of *rebus sic stantibus,* adding significantly: " Most jurists, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked ". His delegation's attitude towards the recognition of the doctrine of *rebus sic stantibus* in article 59 was based on that commentary. The observance of treaty commitments constituted an undisputed basis for international peace and coexistence, and no exception to that lofty principle could be justified unless it were intended to remedy an anomalous or unjust situation brought about by a fundamental change in the circumstances underlying those commitments. It was a safety valve, only to be used in cases where the parties to the treaty had not agreed upon a method to reform treaty provisions which had become obsolete and burdensome.

25. Other limitations were necessary if the doctrine of *rebus sic stantibus* was not to become a means of diluting the very essence of the international legal order. Examination of article 59 made it quite clear that the International Law Commission had formulated the article in such careful terms as to compel opponents of the doctrine to accept it in the

form in which it was now presented. It was no longer the old formula of Gentili and his followers, but a new conception which delicately balanced the needs both of justice and of the rule of law. The new elements introduced by the Commission were the two important requirements set forth in sub-paragraphs (*a*) and (*b*) of paragraph 1 for enabling a fundamental change of circumstance to be invoked as a ground for terminating or withdrawing from a treaty, and the exceptions set forth in paragraph 2, particularly sub-paragraph (*a*), relating to treaties which established boundaries. The Commission had thus included the *rebus sic stantibus* principle, despite the fact that there were some who disagreed with it and despite the lgitimate concern expressed by others at the risks involved for the international community if the security of treaties were undermined through an improper use of the article.

26. His delegation therefore accepted article 59 as responding to the needs of a world that was experiencing profound transformations which could sometimes lead to unjust situations or make it impossible to carry out certain treaty commitments. It did so, however, on the basis of the International Law Commission's commentaries, which laid such emphasis on the exceptional and restricted character of the rule relating to fundamental change of circumstances.

27. Those considerations led him to a matter which was also dealt with in paragraph (1) of the commentary: the concern felt by most jurists regarding the risks which the application of the doctrine of *rebus sic stantibus* " presents in the absence of any general system of compulsory jurisdiction ". It was a question which arose also in connexion with the other articles of Part V, but in the case envisaged in article 59 it was much more serious, because of the magnitude of the problems which could derive from an allegation of a fundamental change in circumstances as a ground for terminating or withdrawing from a treaty. His delegation therefore fully understood the attitude of those delegations which, at the first session, had reserved their position on article 59 until they knew the fate of the articles dealing with the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

28. The Colombian delegation, which was one of the sponsors of the proposal for article 62 *bis*, would not at that stage go as far as to make its vote in favour of article 59 conditional upon the adoption of article 62 *bis*. It wished, however, to draw attention to the importance for international tranquillity of adequate procedures for the peaceful settlement of disputes in the wide realm of the law of treaties.

29. Mr. FLEISCHHAUER (Federal Republic of Germany) said that a convention on the law of treaties would be incomplete without a provision on fundamental change of circumstances. Article 59, as approved by the Committee of the Whole, satisfactorily circumscribed the scope of application of the *rebus sic stantibus* rule in a careful and narrow manner.

30. His delegation welcomed the negative form in which paragraph 1 stated the conditions under which a fundamental change of circumstances could be invoked. That form of drafting of the operative part of the article showed that the rule must be interpreted restrictively and that the termination of, the withdrawal from or the suspension of a treaty on the ground of fundamental change of circumstances was an exceptional case. It also followed from that presentation of the rule that the State which invoked the fundamental change of circumstances carried the burden of proof and must establish the existence of the conditions stated in paragraph 1.

31. It had been suggested that paragraph 1 contained too many ambiguous terms, that it was imprecise, difficult to apply and above all open to abuse. While sympathizing with those misgivings, he could not see how article 59 could be drafted without referring to notions that were open to divergent interpretations. It was precisely for that reason that his delegation regarded article 59 as one of the articles which needed to be balanced by an automatically available procedure for the settlement of disputes; if article 62 *bis* failed to be adopted in the final vote, the particular risks involved in article 59 would be one of the weightier factors in the decision which his delegation would have to take in regard to Part V as a whole.

32. It was his delegation's view that, if a treaty contained special provisions to deal with a possible change of circumstances, those provisions would override article 59 as regards changes which were covered by the particular arrangement between the parties. Article 59, although it reflected customary international law in the sense of Article 38(1)(*b*) of the Statute of the International Court of Justice, or even one of the general principles of law within the scope of Article 38(1)(*c*), did not constitute a rule of *jus cogens*. The debates of the International Law Commission, the comments by Governments and the discusssions in the Committee of the Whole at the first session on article 59, all clearly demonstrated that the rule embodied in it did not fulfil the particular conditions laid down in article 50 for the definition of a rule of *jus cogens*. Since article 59 did not constitute *jus cogens*, the possibility of special contingency provisions in particular treaties was always open.

33. Before leaving paragraph 1, he would like to draw attention to what two writers had described as a " flaw in drafting " in article 59. In recent publications on article 59, those writers had pointed out that the wording " a fundamental change of circumstances . . . which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless . . . " might lead to the conclusion, if read literally, that a change which had been foreseen could be so invoked.[6] That result was certainly not intended and it should be fairly easy to remedy the wording so as to make the real intention clear.

[6] Olivier Lissitzyn, " Treaties and Changed Circumstances *(rebus sic stantibus)* " in *American Journal of International Law*, vol. 61 (1967), pp. 895 *et seq.*, and Egon Schwelb, " Fundamental Change of Circumstances: Notes on Article 59 of the Draft Convention on the Law of Treaties ", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. XXIX, pp. 39 *et seq.*

34. With regard to paragraph 2, he noted that the International Law Commission had discussed a proposal to include in the list of exceptions from the *rebus sic stantibus* rule a reference to changes in government policies, but had rightly decided not to do so. It had recognized in paragraph (10) of its commentary that circumstances quite outside the treaty might bring the principle of fundamental change into operation " if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty ". In his delegation's view, a change in government policy could conceivably fall under that rule and to that extent constitute grounds for bringing article 59 into operation.

35. Paragraph 3 had been added to article 59 by the Committee of the Whole as a result of the adoption of amendments by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333). His delegation welcomed that addition. The suspension of a treaty did less damage to the treaty than its termination, and wherever it was possible for States to protect their interests in respect of a defective treaty by mere suspension, provision should be made for such a possibility. His delegation believed that where a State which was confronted with a fundamental change of circumstances within the meaning of article 59 availed itself of the option of paragraph 3 and went no further than to suspend the treaty, an obligation for renegotiation arose for the other party or parties to the treaty. That obligation flowed not only from the underlying reason of article 59, paragraph 3, but also from the obligation of good faith. If that point were borne in mind, it would make it easier for States to resort to suspension followed by renegotiation, rather than proceed direct to the termination of the treaty.

36. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the rule in article 59 reflected existing international practice. The reasons which fully justified the inclusion of that article had been discussed at great length at the first session in the Committee of the Whole, particularly at its 65th meeting. In view of the different views which had been expressed by writers with regard to the *rebus sic stantibus* clause, its inclusion in the convention on the law of treaties constituted a positive factor and the text of paragraph 2 of article 59 which was now before the Conference was a very satisfactory one indeed.

37. The question had been asked to what extent the rule in article 59 covered the question of unequal treaties, treaties imposed by force, and treaties conflicting with the principle of self-determination. Clearly, those treaties were null and void under articles 49 and 50 of Section 2. Article 59, however, was placed in Section 3, a section which applied to treaties concluded in normal circumstances. As his delegation had already stated in connexion with the discussion of article 50, it strongly supported all the articles in Section 2, the provisions of which declared null and void unequal treaties and other similar treaties. Article 59, however, related not to treaties that were null and void but to treaties which had been properly and lawfully concluded; those treaties were governed by the *pacta sunt servanda* rule. They could only be terminated or suspended under the provisions of Section 3.

38. Some delegations had expressed doubts regarding paragraph 2(*a*), which excluded from the rule in paragraph 1 those treaties which established boundaries. He would not repeat all the convincing arguments which had been adduced at the 65th meeting of the Committee of the Whole in support of that provision, but would merely mention that, in reply to a question by the Afghan representative, the Expert Consultant had pointed out that the question of illegal and unequal colonial boundary treaties was covered by other articles of the convention.[7] The intention of the International Law Commission had clearly been to safeguard the application of lawful treaties that established boundaries. In paragraph (11) of its commentary to article 59, the International Law Commission had explained its reasons for including paragraph 2(*a*) and had stated that it had " concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. "

39. At the first session, the provisions of paragraph 2(*a*) had been discussed very fully and his own delegation had pointed out that article 59, like all the other articles in Section 3 of Part V, referred to legally concluded treaties; illegal and unequal treaties were dealt with in Section 2.[8] The doubts which had been expressed by certain delegations were therefore unfounded and his delegation would vote in favour of article 59.

40. Mr. KABBAJ (Morocco) said that the *rebus sic stantibus* principle, once so controversial, was now unquestionably a part of existing general international law, and it was right that the International Law Commission should have included it in article 59. But the *rebus sic stantibus* principle formulated in article 59 should have been made to apply to all international treaties; the exception laid down in paragraph 2(*a*) was all the more incomprehensible because the provision had been drafted in a negative form, and the *rebus sic stantibus* principle had been surrounded by such rigid conditions that it might well be asked what possible danger could be feared.

41. He agreed with the representative of Afghanistan that that exception considerably weakened the principle, and that it would be better either to delete paragraph 2(*a*) altogether or at least to change the wording. To begin with, it was imprecise, and might be interpreted as covering not only boundary treaties concluded with full respect for the principles of free consent, the sovereign equality of States, and other peremptory norms of international law, but also treaties resulting from violence, conquest or other circumstances precluding the free consent of the State concerned. Such a situation was clearly unjust, and if perpetuated would lead to insecurity in international relations. Admittedly other

[7] See 65th meeting of the Committee of the Whole, para. 31.

[8] *Ibid.*, para. 34.

provisions, such as those in articles 49 and 50, gave grounds for regarding such treaties as null and void *ab initio,* but it would be more logical to make it clear in paragraph 2 (*a*).

42. Secondly, the meaning given by the International Law Commission to the expression "if the treaty establishes a boundary " was so broad that it might be regarded as including treaties concluded in a bygone age when some States had taken it upon themselves to dispose of territories that did not belong to them, and decide what was to become of them and who they were to belong to. The International Law Commission had stated, in paragraph (11) of its commentary, that the exception laid down in sub-paragraph 2 (*a*) embraced treaties of cession as well as delimitation treaties, but many treaties of cession belonged to the colonial era, and could no longer continue after the changes that had taken place in ideas on international relations. The Permanent Court of International Justice had never intended to exclude treaties establishing a boundary from the application of the *rebus sic stantibus* principle, as might be supposed from its decision in the *Free Zones* case. In particular, it did not appear that the Court had intended that unjust or unequal treaties imposed by force should continue to govern treaty relations when they conflicted with the principles of the Charter and the rules of modern international law.

43. Consequently, sub-paragraph 2 (*a*) should be reconsidered so as to dispel any misunderstanding over the question of inequitable treaties. The Moroccan delegation must express strong reservations regarding sub-paragraph 2 (*a*) in its present form, and would vote against it.

44. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said it was obvious that circumstances could so change as to change the conditions of application of a treaty; that was the force of the doctrine *rebus sic stantibus.* However, change of circumstances could not be invoked with respect to a treaty establishing a boundary; such treaties must be accepted as exceptions to the general rule when the *rebus sic stantibus* principle was applied. The necessity for that was a natural consequence of the vital importance of treaties establishing a boundary. That had been recognized by the International Law Commission in paragraph (11) of its commentary to article 59, where it was stated that such treaties " should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions ".

45. The purpose of the convention, as the " treaty on treaties ", must be to help to develop treaty relations between States through the conclusion of equitable and mutually beneficial treaties. The development of such treaties would strengthen peaceful co-operation between States and peaceful relations in the world. Obviously everything that would help to achieve that aim should be included in the convention. As the International Law Commission had pointed out, to exclude sub-paragraph 2 (*a*) would make the rule in the article a possible source of dangerous frictions instead of an instrument of peaceful change. No one could agree to that. The Byelorussian delegation understood that the reference in article 59 was to equal treaties legitimately concluded.

46. His delegation regarded sub-paragraph 2 (*a*) as being in conformity with the Conference's purpose of drawing up an international legal instrument that could help the development of mutually beneficial legal treaties between States, and consequently strongly supported the article as it stood.

47. The PRESIDENT invited the Conference to vote on article 59.

*Article 59 was adopted by 93 votes to 3, with 9 abstentions.*

48. Mr. HAYTA (Turkey) said that, although his delegation was not opposed to the inclusion of the *rebus sic stantibus* principle, he had voted against article 59 for the reasons given on earlier occasions by Turkey, in particular at the 64th meeting of the Committee of the Whole.

49. Mr. BILOA TANG (Cameroon) said that his delegation had originally had doubts concerning paragraph 2 (*a*), but had changed its views in the light of the decision by the Organization of African Unity to adopt the principle that the boundaries inherited from the colonial period could not be changed, and also of the explanation given by the Expert Consultant at the 65th meeting of the Committee of the Whole, where he had stated that the International Law Commission " had not intended in paragraph 2 (*a*) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty ".[9] His delegation had accordingly been able to vote for article 59.

50. Mr. TABIBI (Afghanistan) said that he had voted against article 59, not because he was opposed to the doctrine of *rebus sic stantibus,* which was a cardinal rule of international law, but because of the exception to the rule contained in paragraph 2 (*a*); that exception might be misunderstood as endorsing illegal and unequal treaties of the colonial type. However, the arguments put forward during the discussion at both sessions of the Conference, the statement by the Expert Consultant already referred to, and the discussions of the International Law Commission all made it clear that the exception in paragraph 2 (*a*) did not endorse illegal and unequal treaties contrary to the right of self-determination, and could not provide a pretext for the formulation of rules in other international conventions under study in other organs of the United Nations to protect colonial treaties. The discussions at the present meeting showed that, although the exception in paragraph 2 (*a*) related only to legal treaties, it had been introduced for political motives.

51. Since the Expert Consultant was not himself present to reply, he would ask for the explanation the Expert Consultant had given at the 65th meeting of the Committee of the Whole to be read out, so that it would form part of the record of the present meeting.

[9] *Ibid.,* para. 31.

52. Mr. WATTLES (Deputy Executive Secretary) said that the passage referred to from the statement by Sir Humphrey Waldock at the 65th meeting of the Committee of the Whole read:

> 31. The reasons for including paragraph 2 (*a*) were given in the commentary. The Afghan representative had asked what was the relation between that provision, and self-determination, and illegal and unequal colonial boundary treaties. The answer had to be found in the present convention itself. The question of illegality was dealt with in the two articles treating of *jus cogens*. The question of self-determination was also covered in the commentary. In the Commission's view, self-determination was an independent principle which belonged to another branch of international law and which had its own conditions and problems. The Commission had not intended in paragraph 2 (*a*) to give the impression that boundaries were immutable, but article 59 was not a basis for seeking the termination of a boundary treaty.

53. Mr. SHUKRI (Syria) said that his delegation had abstained from voting on article 59 because it was opposed to paragraph 2 (*a*), although Syria fully supported the rest of the article.

*Article 60* [10]

*Severance of diplomatic or consular relations*

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

*Article 60 was adopted by 103 votes to none.*

*Article 61* [11]

*Emergence of a new peremptory norm of general international law* (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

54. Mr. RODRIGUEZ (Chile) said that the purpose of his delegation's amendment (A/CONF.39/L.34/Corr.1) was to give greater precision and clarity to article 61. The first change proposed, to replace the words " any existing treaty " by the words " any treaty existing at that time ", was intended to make explicit what was already implied in article 61, that the rule would apply to treaties existing at the time when a new peremptory norm of general international law emerged.

55. The second change proposed was to replace the words " becomes void and terminates " by the words " may be objected to with a view to its termination ". The purpose of that change was to avoid using as synonymous the expressions " becomes void " and " terminates ". For Chile, and for some other countries, the two terms were not synonymous, since nullity did not always coincide with invalidation through some circumstance arising subsequent to the conclusion of the treaty. Some delegations were able to accept that a subsequent ground could render a treaty void, but that view presented difficulties for others. The purpose of his amendment was to solve the problem of the two different approaches by avoiding a reference to nullity and referring only to the termination of the treaty, which led in practice to the same result.

56. Also, the second change proposed by Chile was intended to emphasize that in the case covered by in article 61 treaties could be terminated only by virtue of a prior procedure arising from an objection made by an interested party. The situation was one where a treaty became void on a ground arising later in time than the conclusion of a treaty, which could give rise to uncertainty or disagreement, such as the emergence of a new peremptory norm of general international law. It was therefore better to emphasize that an objection was needed to ensure that the termination of the treaty was admitted and recognized.

57. Mr. PINTO (Ceylon) said that his delegation had pointed out at the 55th meeting of the Committee of the Whole that the main advantage of including provisions of *jus cogens* in the convention was to express that timeless moral concept for the first time as a legal principle. The subjects dealt with in article 50, 61 and 67 did not lend themselves to precise statement, but his delegation did not regard that as a vital consideration. Many of the practical difficulties foreseen by certain delegations would probably turn out to be more apparent than real, while other such difficulties were likely to be solved by the adoption of machinery for the settlement of disputes, such as that proposed in article 62 *bis*.

58. But although his delegation gave that group of articles its unreserved support, there was one aspect of them, especially of articles 61 and 67, on which it would have welcomed greater clarity. From the procedural point of view, it was not clear who might bring an action for the application of those articles. At the first session, his delegation had suggested that articles 50 and 61 were unlikely to have any relevance to the performance of a treaty as between the parties. For instance, if a number of States agreed to engage in the slave trade, to decimate the population of another State, or to intervene in some lesser way in the internal affairs of that State, they would carry out their obligations because they wanted to, not because they considered themselves bound by a treaty which the international community regarded as void. Other members of the international community, on the other hand, particularly the State or States which suffered as a result of the treaty, might have a legitimate interest in the application of articles 50 and 61.

59. Ceylon therefore considered that any State, or at least any State party to the convention, should have the right to impeach a treaty on the ground that it conflicted with articles 50 and 61, and to initiate procedures for securing observance of the obligations which articles 67 imposed on delinquent States. That right

[10] For the discussion of article 60 in the Committee of the Whole, see 65th and 81st meetings.

[11] For the discussion of article 61 in the Committee of the Whole, see 66th and 83rd meetings.

An amendment was submitted to the plenary Conference by Chile (A/CONF.39/L.34/Corr.1).

seemed to be logical in view of the fact that contravention of articles 50 and 61 had implications which went beyond the relationship of the parties *inter se,* and it might be wise to recognize that right explicitly, since otherwise protracted procedural wrangles were likely to beset any attempt to bring an action to apply the *jus cogens* articles before an international tribunal.

60. Mr. ALVAREZ TABIO (Cuba) said that he had not intended to speak on article 61, since he agreed with the International Law Commission that it was a logical corollary of the principle contained in article 50, but the Chilean amendment (A/CONF.39/L.34/Corr.1) would change the substance of the article, particularly with respect to the emergence of a new peremptory norm of general international law.

61. The Conference had accepted the principle that there were rules of international law that were binding on all States, and the logical consequence must be that the emergence of a new peremptory norm of general international law must invalidate any existing treaty conflicting with that norm. General recognition of the unlawful nature of some types of agreement must have an immediate effect on such agreements, both for formal reasons deriving from the principle of the hierarchy of rules, and for reasons of substance directly related to the new message of justice conveyed by the new peremptory norm of international law. Any such new peremptory norm that emerged was the expression of a new view of justice in conformity with the climate of opinion prevailing at any given moment in the international community. Consequently any existing treaty that conflicted with the new peremptory norm must become not only illegal but inadmissible on general legal principles. Not only would it conflict with the peremptory norm of international law that emerged subsequently, but it would become inherently unlawful and immoral.

62. That argument was of special importance in establishing the inter-temporal effects of the new peremptory norm. Clearly a rule of law could not have retroactive effects. No one questioned that laws had effect from the time of their entry into force, and ceased to have effect once they were repealed. But the problem arose in relation to treaties which, because their effects were continuing, came under the authority of successive peremptory norms of international law. If a new treaty came into force under the authority of a given legal system, but its effects had not been terminated when new peremptory norms emerged that substantially changed the legal system, the conflict that would arise if it should be decided not to apply the new peremptory norm would be a question not of non-retroactivity, but of the continuing authority of the old legal system that had been replaced.

63. If, the new peremptory norm were applied to a continuing treaty, obviously there would be no violation of the principle of non-retroactivity, even though the treaty had entered into force before the emergence of the peremptory norm. That was because the problem related to rules that affected the legitimacy of the treaty, in other words, rules that represented a view of justice radically opposed to that formerly accepted.

64. His delegation was therefore unable to support the Chilean amendment because it represented a basic denial of the invalidating effect of norms of *jus cogens* emerging subsequent to the entry into force of a treaty. An existing treaty that conflicted with a peremptory norm of international law would not merely terminate, it would become void and terminate.

65. Mr. BINDSCHEDLER (Switzerland) said that his delegation would vote against article 61 for the same reasons as had led it to vote against article 50. But article 61 contained additional defects in connexion with the introduction of the *jus cogens* system into international law, which had not been apparent in article 50.

66. His delegation had wished to ask the Expert Consultant five questions to which it was unable to find an answer. First, how did a new peremptory norm of general international law emerge? Secondly, was a peremptory norm engendered by custom, by a treaty, or by both? Thirdly, to become a peremptory norm, did a rule have to be accepted by all the States of the international community, or only by a majority of those States and, in the latter case, by what majority? Fourthly, must a new peremptory norm contain an express declaration concerning its peremptory character, or did that character follow from the content of the new norm? Fifthly, was a peremptory norm valid only for the parties to a treaty or for all States? The Swiss delegation believed that the former presumption was correct.

67. No answers had been given to those questions throughout the lengthy debates on article 61. The answers should have been contained in the draft convention itself, since it was to become a kind of constitution for the international community governing future legislative procedure. To introduce the notion of peremptory norms of international law without providing any definition of those norms was calculated to give rise to serious legal dangers.

68. Mr. VALENCIA-RODRIGUEZ (Ecuador) said that article 61 was the logical counterpart to article 50 and both those substantive proposals should set out the principle of *jus cogens* precisely and categorically. Article 50 defined the meaning of *jus cogens* and article 61 described the inevitable effect of the existence of *jus cogens* rules. A treaty which conflicted with a peremptory norm was null and void *ab initio,* not merely voidable. The Chilean amendment (A/CONF.39/L.34/Corr.1), however, was an attempt to alter the categorical statement in the International Law Commission's draft of article 61, and would have the effect of weakening that clause, by introducing the much vaguer element of objection with a view to the termination of the treaty, instead of stating that the treaty was void, as laid down in article 50. The effect of the Chilean amendment would be to alter the very nature of article 61, by turning an objective and categorical statement into a procedural rule; that fundamental change was inadmissible, for procedural rules were set out in other articles of the convention. His delegation would therefore vote against the Chilean amendment.

69. Mr. DE LA GUARDIA (Argentina) said that his

delegation had no doubts whatsoever concerning the existence of the principle of *jus cogens* in international law and had therefore voted for article 50. It would also vote in favour of article 61, whatever its final text might be, although it shared the misgivings of other delegations concerning the content and number of rules of *jus cogens,* and the procedure by which they might emerge in the future and render existing treaties invalid. Argentina therefore considered that the Chilean amendment represented an important clarification of article 61, for every State must have an opportunity of invoking a new peremptory norm as a ground for the invalidation of a treaty.

70. The International Law Commission's text did not explain by what procedure a treaty became void automatically, and the incorporation of the Chilean amendment would lead more logically to the procedure set out in article 62.

71. Mr. DE CASTRO (Spain) said that the Chilean amendment would have the effect of introducing a substantive change, from the statement that a treaty conflicting with a peremptory norm was void to a provision of voidability. The act of objecting to a treaty would entail, first, the objection being made only by the party to whom the right of objection was available; secondly, since the right of objection was optional, it could be waived, that was to say the treaty could be confirmed expressly or tacitly; and thirdly, since the option was open to one party only, it could not be exercised by a third State.

72. The wording approved by the majority in the Committee of the Whole said that the treaty would be void; but the fact that a treaty was void did not mean that a request could not be made that it be declared void by declaratory action, which was not incompatible with the existence of invalidity *ipso jure*. The difference between the option to object to a treaty and the possibility of exercising the right of declaratory action was that in the latter case the action was not open to any party as a right which could be waived, that it could be exercised by a third party and further that if the validity of a treaty was referred to an international court or arbitral tribunal, the court or the arbitrators could *ex officio* declare invalid the provision of the treaty conflicting with a rule of *jus cogens*. If a treaty was really contrary to such peremptory norms as those relating to human rights, the prohibition of slavery or genocide, and even new peremptory norms, its invalidity was bound to be upheld by the international court or arbitral tribunal, because they could not regard as binding any provision which ran counter to the conscience of the international community.

73. The Chilean proposal to insert the words " at that time " after " existing " had at first sight seemed desirable, since it appeared to make clear that the rules of *jus cogens* were not applicable retroactively. But since the phrase referred to existing treaties, it was superfluous, because a treaty which no longer existed could not presumably be in conflict with any rule, since it had ceased to produce effects.

74. Mr. HARASZTI (Hungary) said that his delegation was opposed to the Chilean amendment. The Conference had already adopted article 50, under which no derogation was permitted from a peremptory norm of international law; it was self-evident that if a treaty which conflicted with a peremptory norm was void, a treaty would become void and would terminate if a new peremptory norm emerged during its existence. The International Law Commission's text was perfectly clear, but the Chilean amendment made it dependent on the will of one party whether an objection should be raised and, consequently, whether or not the treaty would be applied despite the emergence of a peremptory norm with which it conflicted. Such a provision would be contrary to the rule set out in article 50.

75. Mr. SMEJKAL (Czechoslovakia) said he endorsed the view expressed by the Hungarian representative.

76. Mr. BIKOUTHA (Congo, Brazzaville) said that the Chilean delegation's attempt to make a contribution to the progressive development of international law would not have the effect desired. Its amendment would vitiate the basic principle laid down in the International Law Commission's text, by stating that a treaty conflicting with a peremptory norm might be objected to at the will of one of the parties only, thus depriving article 61 of its mandatory character. Perhaps the Chilean delegation would reconsider its position and withdraw its amendment.

77. Mr. HUBERT (France) said that the arguments that his delegation had adduced against article 50 applied equally to article 61. In the latter case, however, his delegation found an additional cause for anxiety in the use of the word " emerges ". The dictionary definition of the French verb " *survenir* " implied something sudden and unexpected; such a term could not correctly be used to describe the necessarily gradual process of the formation of a peremptory norm; which needed some time to mature.

78. Mr. SEATON (United Republic of Tanzania) said that since the Conference, in adopting article 50, had agreed that a treaty conflicting with a peremptory norm became void, he could not understand why an existing treaty which was in conflict with a new peremptory norm might merely be objected to with a view to its termination. The Chilean amendment weakened, if it did not actually nullify, article 50, and the Tanzanian delegation could not support it.

79. Mr. RODRIGUEZ (Chile) said that his delegation had voted for article 50 in the belief that that provision established an outstandingly important principle of public international law. The purpose of its amendment to article 61 was to clarify the terms of the clause and to avoid disputes concerning the application of the article. The amendment was in no way intended to circumscribe or restrict the principle of *jus cogens*. Since, however, a number of delegations appeared to have misunderstood the tenor of the amendment and considered that it might have effects contrary to those contemplated by its sponsor, his delegation would withdraw it.

80. The PRESIDENT invited the Conference to vote on article 61.

*At the request of the French representative, the vote was taken by roll-call.*

*Ecuador, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, Ghana, Guatemala, Guyana, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesatho, Liberia, Libya, Madagascar, Mauritius, Mexico, Mongolia, Morocco, Nepal, Netherlands, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Republic of Korea, Romania, Saudi Arabia, Sierra Leone, Singapore, Spain, Sudan, Sweden, Syria, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark.

*Against:* France, Liechteinstein, Luxembourg, Monaco, Switzerland, Turkey, Australia, Belgium.

*Abstaining:* Gabon, Greece, Ireland, Japan, Malaysia, Malta, New Zealand, Norway, Portugal, Republic of Viet-Nam, Senegal, South Africa, United Kingdom of Great Britain and Northern Ireland, Austria, Chile, Dominican Republic.

*Article 61 was adopted by 84 votes to 8, with 16 abstentions.*

81. The PRESIDENT suggested that the Conference should defer its discussion of articles 62 and 62 *bis*, annex I and articles 63 and 64, in order to allow time for negotiations with a view to reaching a compromise solution.

*It was so agreed.*

The meeting rose at 5.55 p.m.

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## TWENTY-THIRD PLENARY MEETING

*Wednesday, 14 May 1969, at 10.55 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 49* (Coercion of a State by the threat or use of force) *(resumed from the 19th plenary meeting)*

1. Mr. DADZIE (Ghana) said he had been absent when the vote was taken on article 49 at the 19th plenary meeting, and his delegation had therefore been unable to indicate that it supported the article.

*Article 61* (Emergence of a new peremptory norm of general international law) *(jus cogens) (resumed from the previous meeting)*

2. Mrs. ADAMSEN (Denmark), explaining her delegation's votes on article 61 and other articles of Part V of the draft convention dealing with the invalidity, termination and suspension of the operation of a treaty, said that from the outset the Danish delegation had hesitated about article 61 and other provisions of Part V. In the Committee of the Whole, it had abstained in the voting on several of those provisions, and had even voted against one of them, being of the opinion that those articles represented a considerable danger for the stability and security of treaty relations between States. But the danger would be sufficiently eliminated by the establishment of the kind of automatic procedure now provided in article 62 *bis* for the settlement of disputes arising from the application of Part V. Consequently, in the plenary Conference, her delegation had been able to vote not only in favour of article 61 but also in favour of the other articles of Part V, with the expectation that article 62 *bis* would be adopted by the Conference, either in its present form or, provided it laid down an equal satisfactory guarantee for the security and stability of treaty relations, in a different form.

3. It therefore followed that the position which Denmark would ultimately adopt with regard to the convention as a whole would depend on the results achieved by the Conference in respect of the procedure for the settlement of disputes.

4. Mr. HAYES (Ireland), explaining his delegation's vote on article 61, said it had abstained for the reasons it had given after the vote on article 50.

5. Mr. RODRIGUEZ (Chile) said that his delegation had abstained from voting on article 61, not because of the ideas which the article contained, but because it was not completely satisfied with the drafting.

*Statement by the Chairman of the Drafting Committee on articles 65-69, 69* bis *and 70*

6. Mr. YASSEEN, Chairman of the Drafting Committee, introducing the texts of articles 65-69, 69 *bis* and 70, said that the drafting had been reviewed by the Drafting Committee, which had made very few changes.

7. In article 65, it had noted that, in paragraph 3, fraud, coercion and the act of corruption, which were the subjects of articles 46 to 49, were arranged in a different order from that in which they occurred in those four

articles. The Drafting Committee had therefore rearranged the terms in the order in which they occurred in articles 46 to 49, so that the concluding part of the sentence now read: " . . . paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable ".

8. With regard to article 67, which the International Law Commission had entitled " Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law ", the Drafting Committee had decided that the words " or termination " in the title were superfluous, since under article 61, if a new peremptory norm of general international law emerged, any existing treaty in conflict with that norm " becomes void and terminates ". That provision was also expressly reflected in article 67, paragraph 2. The Drafting Committee had therefore deleted the words " or termination " from the title of article 67.

9. In article 69, it had added the case of outbreak of hostilities to the cases of State succession and State responsibility, in accordance with the decision taken by the Committee of the Whole at its 76th meeting.[1]

10. Article 69 *bis* was a new provision, for which the Drafting Committee proposed the title: " Diplomatic and consular relations and the conclusion of treaties."

*Article 65* [2]

*Consequences of the invalidity of a treaty*

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(*a*) Each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(*b*) Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 46, 47, 48 or 49, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

11. Mr. ALVAREZ TABIO (Cuba) said that the Cuban delegation was not happy about the first sentence of article 65, paragraph 1. The sentence reproduced a rule which had been stated in article 39 of the International Law Commission's draft and had had a clear and precise meaning in the context of that article. There, the words " the invalidity of which is established under the present articles " had indicated that the grounds for invalidity listed in the substantive provisions of Part V were exhaustive. The present text of article 65 was ambiguous and might give the impression that there was no such thing as invalidity *ab initio* but that invalidity must be established by the procedures laid down in the convention.

12. The Cuban delegation considered it necessary to state that, as far as it was concerned, the phrase " the invalidity of which is established under the present convention " had the same meaning as the corresponding provision in article 39, namely that the invalidity of a treaty could be established only on the grounds laid down in Part V. It would not, however, request a separate vote on that point.

*Article 65 was adopted by 95 votes to 1, with 1 abstention.*

13. Mr. RUEGGER (Switzerland), explaining his delegation's abstention, reminded the Conference that, in the Committee of the Whole, the Swiss delegation had submitted an amendment (A/CONF.39/C.1/L.358) to paragraph 1, the intention of which had been to make it clear that what was involved was not invalidity *ipso facto*, and that the invalidity must be established through an invalidation.

14. The new text submitted by the Drafting Committee was certainly a great improvement on the initial text, but, for the reasons of principle given at the first session, his delegation had been obliged to abstain.

*Article 66* [3]

*Consequences of the termination of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

*Article 66 was adopted by 101 votes to none.*

*Article 67* [4]

*Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*

1. In the case of a treaty which is void under article 50 the parties shall:

(*a*) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(*b*) Bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 61, the termination of the treaty:

(*a*) Releases the parties from any obligation further to perform the treaty;

[1] Para. 30.

[2] For the discussion of article 65 in the Committee of the Whole, see 74th and 83rd meetings.

[3] For the discussion of article 66 in the Committee of the Whole, see 75th, 86th and 99th meetings.

[4] For the discussion of article 67 in the Committee of the Whole, see 75th and 82nd meetings.

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

*Article 67 was adopted by 87 votes to 5, with 12 abstentions.*

15. Mr. SINCLAIR (United Kingdom) said that his delegation had abstained in the voting on article 67 because paragraph 1 (*a*) dealt with questions of State responsibility which should be considered as coming within the scope of article 69.

16. Another point arose on paragraph 1 (*a*) : it provided that " in the case of a treaty which is void under article 50 the parties shall: (*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law ". But it might happen that a treaty which was void by virtue of article 50 contained other provisions that did not conflict with such a peremptory norm of general international law. As a result of the decision taken by the Conference on article 41, no separability was permitted where the treaty was void by virtue of article 50. Nevertheless, it was the understanding of the United Kingdom delegation that, with respect to those provisions of such a treaty which did not conflict with a peremptory norm of general international law, the provisions of article 65, rather than those of article 67, would apply.

17. Mr. GROEPPER (Federal Republic of Germany) said that his delegation had abstained in the voting for the same reasons as those given by the representative of the United Kingdom.

*Article 68* [5]

*Consequences of the suspension of the operation of a treaty*

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

(*b*) Does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

*Article 68 was adopted by 102 votes to 1, with 1 abstention.*

*Article 69* [6]

*Cases of State succession, State responsibility and outbreak of hostilities*

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

*Article 69 was adopted by 100 votes to none.*

*Article 69* bis [7]

*Diplomatic and consular relations and the conclusion of treaties*

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

*Article 69* bis *was adopted by 88 votes to 2, with 10 abstentions.*

18. Mr. SHUKRI (Syria) said that his delegation had abstained from the voting on article 69 *bis* because it had some misgivings about the words " or absence ", which might, in one case at least, inject the highly political question of recognition into the legal question of concluding treaties.

*Article 70* [8]

*Case of an aggressor State*

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

19. Mr. TSURUOKA (Japan) said that he wished to place on record his delegation's position. At the first session of the Conference his delegation had submitted an amendment in the Committtee of the Whole proposing that article 70 should be modified to read " The present Convention is without prejudice to any obligation in relation to a treaty which may arise for a State in consequence of a binding decision taken by the Security Council of the United Nations " (A/CONF.39/C.1/L.366). His delegation understood that the purport of article 70 was the same as that of the Japanese amendment, but in its present form the wording of article 70 was too ambiguous for his delegation to be able to support it. It would therefore abstain.

*Article 70 was adopted by 100 votes to none, with 4 abstentions.*

20. Mr. WYZNER (Poland) said that his delegation had voted for article 70 because it believed that an aggressor State must not be able, through the law of treaties, to gain any profit from the aggression it had committed. That was why the exception provided for in article 70 deserved to be fully supported. The Polish delegation was satisfied with the present wording of article 70, which made it clear that all measures taken in conformity with the United Nations Charter, especially those envisaged by the Security Council, were

[5] For the discussion of article 68 in the Committee of the Whole, see 75th and 82nd meetings.

[6] For the discussion of article 69 in the Committee of the Whole, see 76th and 82nd meetings.

[7] For the discussion of article 69 *bis* in the Committee of the Whole, see 81st meeting.

[8] For the discussion of article 70 in the Committee of the Whole, see 76th and 82nd meetings.

exempted from the general application of the convention on the law of treaties. On the other hand, that exemption was rightly limited to the case of an aggressor State, for any aggression was an extremely grave crime. The rule in article 70 covered two kinds of treaties, those which might be imposed upon an aggressor State and those previously concluded by an aggressor State, which might be terminated, suspended or modified regardless of the will of the aggressor State.

21. Mr. GROEPPER (Federal Republic of Germany) said that his delegation had abstained in the vote on article 70 for the reasons it had given at the 76th meeting of the Committee of the Whole.

The meeting rose at 11.35 a.m.

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## TWENTY-FOURTH PLENARY MEETING

*Wednesday, 14 May 1969, at 4.25 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Motion for immediate consideration of articles 62, 62* bis, *63 and 64*

1. Mr. SHUKRI (Syria) said that he was anxious to introduce a motion which he hoped would not cause any inconvenience to the President or to other delegations, for it was prompted solely by a desire to bring the Conference to a speedy and successful conclusion.

2. At the 22nd plenary meeting,[1] the President had suggested, and the Conference had agreed, that discussion of the crucial question of article 62 *bis* should be postponed in the hope that a compromise might be worked out to the satisfaction of all participants or to the overwhelming majority of them. The Syrian delegation had welcomed that decision. The Conference was deeply divided on article 62 *bis,* one side firmly believing in the automatic compulsory jurisdiction of a third party and the other convinced that, despite the praiseworthy underlying motives of compulsory jurisdiction, such a procedure should not at the present stage be imposed on States, which should be left to work out a settlement according to any agreed procedures, including arbitration and adjudication.

3. His delegation unfortunately did not feel optimistic about the prospects of a compromise, and time was running short. It therefore saw no reason to postpone the discussion any longer and formally moved that articles 62, 62 *bis,* 63 and 64 be discussed and voted on forthwith. That course would serve to dispel the tense atmosphere prevailing in the Conference and would help it to adopt a convention which could be signed by as many States as possible.

4. Mr. KRISHNA RAO (India) said he supported the Syrian representative's motion. He would point out that the programme of meetings in the *Journal* for 14 May did not mention articles 71 to 75, although the Drafting Committee had been asked to submit its texts of these articles for the current meeting. Delegations were fully prepared to discuss articles 62 and 62 *bis,* annex I and articles 63 and 64.

5. Mr. YAPOBI (Ivory Coast) said he was surprised at the statements of the two previous speakers. The usual practice was to set aside articles which raised particular difficulties and to deal first with less controversial provisions, in order to allow time for negotiations with a view to reaching a compromise solution. The Syrian motion could only lead to a hasty vote on article 62 *bis*, which was absolutely vital to the convention, and he therefore opposed it.

6. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he agreed with the Indian representative that the Conference should follow the programme set out in the *Journal* for 14 May and begin at once to consider articles 62 and 62 *bis*. The question at issue was obviously that of compulsory jurisdiction. A large number of delegations opposed to the introduction of that notion in the convention had for long endeavoured to find a compromise solution, but the intransigent attitude of the other side had remained unchanged; indeed, one delegation seemed to be determined to prevent a satisfactory solution. The Conference must proceed to discuss the question and vote on it in the short time available.

7. Mr. ESCHAUZIER (Netherlands) said that his delegation had been involved in unofficial consultations with the preceding speakers and respected their motives, although it held a different opinion. It would be regrettable if delegations were obliged to proceed forthwith to vote on articles 62 and 62 *bis* in the form in which they had been submitted, for there still seemed to be a limited possibility of compromise with regard to article 62 *bis*. Explorations in that direction were continuing, as all delegations must be aware. He would not formally oppose the Syrian motion, but felt bound to make a statement on behalf of the original sponsors of the amendment (A/CONF.39/C.1/L.352/Rev.3 and Add.1 and 2 and Corr.1) that had led to the adoption of article 62 *bis* in the Committee of the Whole.

8. The sponsors had reconsidered their position on many occasions in a spirit of compromise and in the light of objections to the compulsory arbitration clause. They could imagine a possible compromise if those opposing compulsory jurisdiction as now set out in article 62 *bis,* which applied to the whole of Part V of the convention, would be willing to consider accepting that jurisdiction in a more limited area of Part V by selecting a number of articles which they would be willing to submit to compulsory jurisdiction. If such an offer were put forward by the other side, he was

[1] Para. 81.

sure that the sponsors would consider it very seriously with a view to achieving a solution of a seemingly intractable problem, not so much by concession or compromise, which were bound to be unsatisfactory to both parties, but through a meeting of minds on restricted compulsory jurisdiction, which would still offer sufficient protection to those States which attached great importance to it, without, however, causing undue concern to those who had strong misgivings concerning compulsory jurisdiction applicable to the whole of Part V. He therefore appealed to those delegations to give serious consideration to an offer made in a spirit of sincere good faith and co-operation by the original sponsors of article 62 *bis*.

9. Mr. REDONDO-GOMEZ (Costa Rica) said that the limited time remaining at the Conference's disposal should be devoted to seeking a definitive solution on substantive differences, not to procedural discussions. He saw no point in voting at once on so controversial a matter as article 62 *bis*. In his experience as representative of his country to the United Nations, excellent solutions had sometimes been found at the eleventh hour. The Conference should therefore deal with the remaining non-controversial articles and leave more time for reaching a satisfactory solution that would be in the common interest.

10. Mr. KRISHNA RAO (India) said he could not agree with the representative of the Ivory Coast that to adopt the Syrian motion would be a departure from the usual practice. It had been agreed at the 22nd plenary meeting not to consider articles 62, 62 *bis*, 63 and 64 at the morning meeting on 14 May, but to continue with other articles, while trying in the meantime to reach a compromise solution. Proposals and counter-proposals had been advanced and rejected. The Netherlands delegation had made commendable efforts towards a genuine compromise, and various approaches, including the one the Netherlands representative had just described, had been discussed. Nevertheless, the question now before the Conference was not one of substance, but whether the articles in question should be discussed forthwith. Having complied with the President's suggestion that the discussion should be deferred, certain delegations were now convinced that the time had come to debate the issue in the Conference and to vote on the articles. Even the representative of the Ivory Coast had referred only to article 62 *bis* as being controversial, and the Conference should proceed now to discuss article 62.

11. Mr. MUTUALE (Democratic Republic of the Congo) said that, in view of the statements just made by the representatives of the Ivory Coast and the Netherlands declaring their willingness to negotiate with a view to reaching a compromise solution, the Conference should postpone the discussion of articles 62 and 62 *bis* and proceed with article 71.

12. Mr. DE CASTRO (Spain) said that the majority appeared to be in favour of proceeding first with the non-controversial articles in the hope that with a little more time it might be possible to reach a compromise solution on article 62 *bis*. Moreover, there were other subjects to be considered which were closely connected with article 62 *bis*, namely, the Final Clauses and the questions of reservations and universality. Those subjects were of such importance that a supreme effort must be made to reach agreement; and with that in view, his delegation had submitted a draft resolution and an amendment to the Final Clauses (A/CONF.39/L.38, A/CONF.39/L.39), which might make it possible to adopt a system of reservations in connexion with article 62 *bis* which would be satisfactory to all delegations. He therefore urged that the Conference follow the procedure suggested by the President and consider first the non-controversial articles.

13. Sir Francis VALLAT (United Kingdom) said that during the preceding week real and earnest attempts had been made to reach an agreed solution on articles 62 and 62 *bis*, and it was very discouraging for those delegations which had expressed their willingness to make concessions to be told now that they were being obstructive and intransigent. The inference he drew was that there might indeed be no point in further postponement of the discussion of articles 62 and 62 *bis*, but he would acquiesce in whatever procedure the President considered most suitable and least likely to engender heated discussion.

14. Mr. KEARNEY (United States of America) said that the idea of proceeding to an immediate discussion and vote on article 62 *bis* caused him some concern, since he was not yet entirely clear about all the proposals made in connexion with that article. On the other hand, he sympathized with those delegations who felt that the matter had already dragged on long enough, and suggested that the Conference fix a definite time, say the following day, at which to take up article 62 *bis*.

15. Mr. SHUKRI (Syria) said he felt obliged to point out that article 62 *bis* was not new; it had been proposed at the first session and discussed at length in the Committee of the Whole at the second session. He could see no advantage in a delay of a further few hours, since all delegations had already received their instructions by which they would be bound, and since the " package deal " which had been worked out as a compromise was definitely rejected by a number of the States participating in the Conference.

16. The PRESIDENT said he would put to the vote the Syrian motion that the Conference proceed immediately to discuss articles 62 and 62 *bis*.

*The Syrian motion was rejected by 49 votes to 31, with 25 abstentions.*

## ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

### *Statement by the Chairman of the Drafting Committee on articles 71-75*

17. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 71 to 75 constituted Part VII of the draft convention.

18. The Drafting Committee had not made any changes in the text of articles 71 although there had been some criticism of the term " parties ", which appeared in

the passage " the fact that a treaty has not entered into force between certain of the parties ". The Committee considered that the use of that term was justified in the context because the passage dealt essentially with a situation in which two States were parties to the same treaty but, for some reason, the treaty had not entered into force in the relations between those two States.

19. A change affecting all the language versions had been made in article 72, paragraph 1 (*b*), dealing with the functions of depositaries. In the text approved by the Committee of the Whole, the sub-paragraph read: " preparing certified copies of the original text and any further text in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty ". The Drafting Committee had considered that the meaning of the expression " original text " was clear; it obviously meant any official text prepared in one or more languages. The expression " any further text ", on the other hand, could lead to misunderstanding. The Committee had therefore decided to clarify the meaning by adding the words " of the treaty ".

20. The Drafting Committee had also noted a discrepancy between the Russian and Spanish versions of paragraph 1 (*b*) on the one hand, and the English and French versions on the other. In the English and French versions, the depositary was required to prepare the texts in the additional languages, whereas according to the Russian and Spanish versions, he was only required to prepare copies of such texts. The Committee had considered that the English and French versions reflected the intention of the Committee of the Whole and had therefore made the necessary corrections in the Russian and Spanish texts.

21. No change had been made in the text of article 73.

22. In article 74, some members of the Drafting Committee had criticized the wording of the concluding portion of the introductory clause of paragraph 1 as approved by the Committee of the Whole, which read " the error shall, unless they otherwise decide, be corrected." That wording could create the impression that the signatory States and the contracting States, after having noted the existence of an error in the text of the treaty, could decide not to correct it. In order to dispel that impression, the Drafting Committee had replaced the words in question by: " the error shall, unless they decide upon some other means of correction, be corrected ", and had made the necessary changes in the Chinese, French, Russian and Spanish versions. In addition, in the French version, the infinitive, instead of the present participle, had been used for the verbs which began each of the sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*).

23. In paragraph 1 (*b*), the word " separate " in the expression " separate instrument or instruments " had been deleted in all language versions; the adjective was unnecessary since the instrument or instruments in question must necessarily be separate from the treaty.

24. In article 74, paragraph 2, the Drafting Committee had noted that sub-paragraphs (*a*), (*b*) and (*c*), as approved by the Committee of the Whole, were not on the same footing. Whereas sub-paragraph (*a*) could be read with the opening clause of paragraph 2, that did not apply to sub-paragraphs (*b*) and (*c*), which had to be read with sub-paragraph (*a*). The Drafting Committee had therefore incorporated the text of sub-paragraph (*a*) in the opening clause and had made consequential changes in the drafting of the other two sub-paragraphs.

25. The Drafting Committee had not made any change in the text of article 75.

*Article 71* [2]

*Depositaries of treaties*

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

*Article 71 was adopted by 105 votes to none.*

*Article 72* [3]

*Functions of depositaries*

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

(*a*) Keeping custody of the original text of the treaty and of any full powers delivered to it;

(*b*) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

(*c*) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

(*d*) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

(*e*) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

(*f*) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

(*g*) Registering the treaty with the Secretariat of the United Nations;

(*h*) Performing the functions specified in other provisions of the present Convention.

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[2] For the discussion of article 71 in the Committee of the Whole, see 77th, 78th, 82nd and 83rd meetings.

[3] For the discussion of article 72 in the Committee of the Whole, see 77th, 78th and 82nd meetings.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

*Article 72 was adopted by 99 votes to none.*

26. Mr. GONZALEZ GALVEZ (Mexico) said that he wished to reply to the statement made at the 102nd meeting of the Committee of the Whole [4] by the representative of Guyana, who had referred to what he had called " the persistant refusal of the depositary " of the Treaty for the Prohibition of Nuclear Weapons in Latin America,[5] also known as the Treaty of Tlatelolco, " to accept Guyana's signature to a treaty whose provisions clearly entitled it to participate in that treaty ".

27. His Government had instructed him to place on record that Mexico, in its capacity as depositary of the Treaty of Tlatelolco, considered that it had faithfully carried out the provisions of that Treaty, more particularly so in the case of Guyana, bearing in mind especially that one of the signatory States had in due course notified the depositary of its objection to the signature of the Treaty by the Government of Guyana, which was not a signatory State; its objection was based on articles 25 and 28 of the Treaty itself. The Mexican Government had been obliged to consult all the other signatory States and had kept the Government of Guyana informed of the action it had taken. Some of the signatory States had not yet replied, however, despite repeated requests. It should also be pointed out that the replies so far received by the Mexican Government had revealed the existence of serious differences of opinion on the substance of the matter.

28. In the circumstances, the Mexican Government considered that the only correct procedure for a depositary Government was the one which it had itself followed and would continue to follow, in accordance with practice and more particularly in the light of article 72 of the convention on the law of treaties which the Conference had just adopted.

29. Mr. MAKAREWICZ (Poland) said that his delegation had voted in favour of articles 71 and 72 because it considered that those articles properly reflected the functions of the depositary in contemporary treaty relations. They took into account the new practice of designating more than one State as depositary. That practice, combined with acceptance of the " all States " formula, constituted an important step forward in overcoming the artificial obstacles in the way of the full application of the principle of universality in treaty relations. Articles 71 and 72 embodied proper safeguards for the impartial performance of the depositary's functions by confirming that the character of the relations between the depositary and the other States would not affect the obligation of a depositary to act impartially. That principle would make for smooth relations between the depositary and the other States and would be an important means of strengthening friendly inter-State relations.

30. It was his delegation's understanding that, where the object and purpose of the treaty were of interest to the international community of States as a whole, the expression " States entitled to become parties to the treaty ", which was used in several places in article 72, was a reference to all States.

31. Mr. TEYMOUR (United Arab Republic) said that his delegation had voted in favour of article 72 on the understanding expressed by it during the discussion of the article at the 77th meeting of the Committee of the Whole. It must be clearly understood that paragraph 1 (*d*) was to be construed restrictively. That principle had been confirmed by the General Assembly in its resolution 598 (VI) which explained that the depositary, " in connexion with the deposit of documents containing reservations or objections ", must carry out his functions " without passing upon the legal effect of such documents ".

32. Mr. WERSHOF (Canada) said that he had voted for article 72 on the understanding that paragraph 1 (*d*) had the meaning attached to it in the explanation given by the Expert Consultant at the 78th meeting of the Committee of the Whole,[6] an explanation which had been confirmed by the Legal Counsel, as representative of the Secretary-General, at the 83rd meeting.[7] His delegation attached the greatest importance to those considered statements regarding the practice of the Secretary-General on the points covered by paragraph 1 (*d*) and the meaning of the provisions of that paragraph.

*Article 73* [8]

*Notifications and communications*

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(*a*) If there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(*b*) Be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(*c*) If transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 72, paragraph 1 (*e*).

*Article 73 was adopted by 104 votes to none.*

[4] Para. 6.

[5] For text, see *Official Records of the General Assembly, Twenty-second Session, Annexes,* agenda item 91, document A/C.1/946.

[6] Para. 56.

[7] Paras. 55 and 56.

[8] For the discussion of articles 73 and 74 in the Committee of the Whole, see 78th and 82nd meetings.

*Article 74* [8]

*Correction of errors in texts or in certified copies of treaties*

1. Where, after the authentification of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(*a*) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(*b*) By executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(*a*) No objection has been raised, the depositary shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(*b*) An objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. (*a*) The corrected text replaces the defective text *ab initio*, unless the signatory States and the contracting States otherwise decide.

(*b*) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

*Article 74 was adopted by 105 votes to none.*

*Article 75* [9]

*Registration and publication of treaties*

1. Treaties shall, after their entry into force, be transmitted to the United Nations Secretariat for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

*Article 75 was adopted by 105 votes to none.*

*Proposed new article 76*

33. Mr. RUEGGER (Switzerland) asked at what stage it would be appropriate for his delegation to introduce its proposal for the addition of a new article 76 (A/CONF.39/L.33).

[9] For the discussion of article 75 in the Committee of the Whole, see 79th and 82nd meetings.

34. The PRESIDENT said that the Swiss delegation would be invited to introduce its proposal immediately before the Conference undertook the consideration of the final clauses.[10]

The meeting rose at 5.35 p.m.

[10] For the discussion of this proposed new article, see 29th plenary meeting.

## TWENTY-FIFTH PLENARY MEETING

*Thursday, 15 May 1969, at 10.45 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Statement by the Chairman of the Drafting Committee on articles 62 and 62* bis, *annex I to the convention, and articles 63 and 64*

1. Mr. YASSEEN, Chairman of the Drafting Committee, introduced the text submitted by the Drafting Committee for the articles in Part V, Section 4, and for annex I to the draft convention.

2. The International Law Commission had entitled article 62 " Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty ". Some representatives had suggested that the expression " in cases of invalidity " might give the impression that article 62 would apply only to cases in which the invalidity had already been established. To remove any chance of misunderstanding, the Drafting Committee suggested the title: " Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty ".

3. No change affecting all the language versions had been made to the text of article 62 itself, but the Drafting Committee considered it necessary to make the following point clear. Since denunciation was mentioned in certain articles in Part V, the Committee had considered whether it ought to be mentioned in article 62, paragraph 1. It had concluded that that was not essential, since it was quite clear from the Commission's text and commentary that paragraph 1 applied to all claims brought under the preceding articles in Part V.

4. Article 62 *bis* was a new provision, for which the Drafting Committee proposed the following title: "Procedures for conciliation and arbitration ". In paragraph 1 of the text of article 62 *bis* approved by the Committee

of the Whole the word " settlement " had been repeated three times in two lines; the Committee had revised the passage to read: " or if they have agreed upon some means of reaching a solution other than judicial settlement or arbitration and that means has not led to a solution accepted. . . "

5. No change affecting all the language versions had been made in articles 63 and 64.

6. The Drafting Committee had tried to improve the wording of annex I to the draft convention in several places. It had considered that the last two sentences of paragraph 3, which dealt with a new subject, namely the expenses of the conciliation commission and the facilities it might need, should form a separate paragraph, now paragraph 4 in the text submitted by the Committe. The position of the corresponding sentences concerning the arbitral tribunal had been changed and they now constituted paragraph 9 of the Drafting Committee's text.

7. The first sentence of the former paragraph 4, now paragraph 5 in the new text, provided that the conciliation commission might draw the attention of the parties to a dispute to any measures likely to facilitate an amicable settlement. Some members of the Drafting Committee had suggested that a clause should be added specifying that attention might be drawn to the measures in question at any time before the commission's report was deposited. The Committee had concluded that that was self-evident and that there was no need for an explicit statement.

8. The Committee had carefully examined the last phrase in the former paragraph 5, now paragraph 6. In the text approved by the Committee of the Whole it had been specified that if the conciliation procedures had not led to a settlement, " any one of the parties to the dispute may request the Secretary-General to submit the dispute to arbitration ". But it was not the Secretary-General who submitted the dispute to arbitration, it was the parties themselves, in accordance with the express terms of the annex. Further, a party to the dispute might well comprise several States, a situation covered in paragraph 2 of the annex. The expression " any one of the parties to the dispute " would give the impression that a request by a single one of the States comprising the party concerned might suffice to set the machinery in motion; but the request for arbitration must be made by all the States comprising the party acting by unanimous agreement. The Drafting Committee had therefore thought it better to word the provision as follows: " either of the parties to the dispute may submit it to arbitration through notification made to the Secretary-General to that effect ". The Committee had amended the first sentence of the following paragraph consequentially.

9. With regard to paragraph 7 of the text as approved by the Committee of the Whole, he reminded the Conference that he had stated at the 105th meeting of the Committee of the Whole that the Drafting Committee would consider whether some provision should be included in annex I regarding the taking of provisional measures by the arbitral tribunal, and on the question which body was competent to interpret the awards of the tribunal.[1] The Committee had considered that it should be specified — as was done in the new paragraph 10 of the annex — that the arbitral tribunal might, pending its final decision on the question, and at the request of any party to the dispute, indicate such measures as might be appropriate and ought to be taken in the circumstances of the case. Some representatives had suggested that a clause should be added to the paragraph stipulating that, nevertheless, the suspension of the operation of a treaty, in whole or in part, could only be prescribed to prevent irreparable damage. The Drafting Committee had decided that a clause of that kind involved a question of substance and that it was for the Conference itself to take a decision on it. The Committee had added in paragraph 10 a provision relating to the right of the tribunal to construe its award, modelled on the terms of Article 60 of the Statute of the International Court of Justice.

*Article 62* [2]

*Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty*

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 63 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 42, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

10. Mr. KRISHNA RAO (India) said that article 62 had already been examined in detail by the International Law Commission, which had considered the question from 1963 to 1966; by Governments, which had submitted observations on the subject; by the Sixth Committee of the General Assembly; and by the first session of the Conference, when more than eighty speakers had spoken in the Committee of the Whole. His own delegation had expressed its views at the 73rd meeting of the Committee of the Whole.

11. The International Law Commission, Governments

[1] See 105th meeting of the Committee of the Whole, para. 57.

[2] For the discussion of article 62 in the Committee of the Whole, see 68th to 74th, 80th and 83rd meetings.

and the Conference itself were anxious that treaty obligations solemnly entered into should be implemented in good faith. They must not be denounced unilaterally by a State which, for that purpose, arbitrarily asserted a ground for invalidating or terminating the treaty. Without such principles, there would be no security or stability in treaty relations.

12. In order to dispel the anxiety, which was shared by all, the Commission had proposed a three-fold solution. First, the convention as a whole revolved around article 23, which provided that a treaty in force was binding upon the parties to it and must be performed by them in good faith. Secondly, the provisions governing the invalidity, termination and suspension of the operation of treaties had been drafted with great care, with the result that the conditions for invoking the various grounds for invalidation and so forth had been defined as precisely and objectively as possible, as was shown by such crucial provisions as articles 50 and 61, 57 and 59. Thirdly, procedural safeguards had been laid down in article 62, under which no State could unilaterally terminate or suspend a treaty, since any State which invoked a ground for invalidating, terminating or suspending the operation of a treaty had to notify the other party or parties, in order to allow them an opportunity to examine the claim or ground invoked. In the event of an objection by the other party or parties, the dispute was to be settled by the means indicated in Article 33 of the United Nations Charter, which included arbitration and recourse to the International Court of Justice. If there was no objection within three months following the notification, the claimant State could take the measure it had proposed, but article 63 provided an additional procedural safeguard, namely that the claimant State must communicate its intention to the other party or parties by an instrument duly executed.

13. That being so, it might well be asked what would happen if recourse to the procedure indicated in Article 33 of the United Nations Charter achieved no positive result and the delinquent State was thus able to act as it wished and imperil treaty obligations. There again, the Commission, Governments, and the Conference itself had examined the question in detail. They had found that the present state of international opinion was unfavourable to the idea of compulsory jurisdiction, whether by arbitration or adjudication. The jurisdiction of the International Court of Justice continued of course to be optional, and the rules on arbitral procedure proposed by the Commission [3] had been adopted by the General Assembly in 1958 as model rules rather than as part of a convention. The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had been closely studying the question of dispute settlement procedures since 1964, but had not so far recommended any rules for compulsory arbitration or adjudication. The reasons why States were not yet ready to accept compulsory arbitration or adjudication were well known: such procedures entailed expenditure which had to be voted by legislatures; the necessary technical resources — the arbitrators and experts — were at present available mostly in the developed countries, with the result that the venue of arbitration would generally be in the West; and the institutional structure of the International Court of Justice still did not command universal respect. With time and experience, institutions would improve, but until they did it would be wise to allow States to resort to arbitration or to the International Court of Justice at their own choice rather than by compulsion.

14. The Commission had therefore considered that it should emphasize the general obligation of States under international law to settle their disputes by peaceful means, as laid down in Article 2(3) of the Charter. At the same time, it had thought it right to specify that if, after recourse to the means indicated in Article 33, the parties should reach a deadlock, it would be for each government to appreciate the situation and to act as good faith demanded. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

15. The International Law Commission, which consisted of twenty-five eminent jurists representing all the legal systems of the world, had expressed the opinion in paragraph (6) of its commentary that the procedure prescribed in article 62 would " give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty ".

16. The Indian delegation endorsed the Commission's reasoning and unreservedly supported the text of article 62 as proposed by the Commission.

17. U BA CHIT (Burma) said he wished to state his delegation's position on article 62 and indirectly on article 62 *bis*.

18. The Conference was deeply divided on the question of the settlement of disputes dealt with in those two articles. At the previous meeting, his delegation had voted for the immediate discussion of those articles, believing that a solution must be found as soon as possible.

19. Article 62 proposed by the International Law Commission was probably the best possible compromise on the method of settling disputes that might arise from the application of the provisions of Part V of the draft convention. Moreover, the Commission itself had reached the conclusion that the article represented the highest measure of common ground that could be found among Governments on the question.

20. The article in no way prevented those who favoured compulsory settlement of disputes from having recourse to arbitration or adjudication, either from the start or after the failure of other possible procedures. Since those States were already convinced that settlement by means of arbitration or adjudication was desirable, there was no need for any compulsion in their case. Consequently, article 62 in no way prejudiced their position.

[3] See *Yearbook of the International Law Commission, 1958*, vol. II, pp. 83-86.

21. Similarly, it would be wrong to impose compulsory settlement on those who opposed any such procedure but who might, voluntarily and by mutual agreement, have recourse to arbitration or adjudication when the nature and circumstances of the dispute so required. Their attitude was entitled to just as much respect as that of the advocates of compulsory settlement.

22. It was not perhaps unduly optimistic to believe that treaties might well be concluded between advocates and opponents of the compulsory settlement of disputes. The only thing that mattered was good faith in the performance of the treaty and in the settlement of any disputes which might arise. It was not in the interest of any States to lose its good name in that respect. The advantage which a State might obtain from arbitrarily invoking a ground for the invalidity or termination of a treaty would be very slight in relation to the damage it would suffer as a State which did not loyally fulfil its treaty obligations. For that reason his delegation did not believe that failure to provide for a means of compulsory settlement of disputes in the convention on the law of treaties would be as dangerous as some representatives claimed it would be.

23. On the other hand, there was some ground for fearing that the ease with which a party could have recourse to conciliation or arbitration under article 62 *bis*, with all costs borne by the United Nations, might give untoward encouragement to States to embark upon disputes on the slightest pretext, thus involving the United Nations in serious financial difficulties. What was even more important was that it would soon be found that States were renouncing diplomacy, negotiation and the effort to achieve mutual understanding and compromise; yet that was essential if States were to compose their differences in such a way that international peace and security, as well as justice, would not be endangered. His delegation attached more importance to the development of such a spirit in international relations than to the establishment of an automatic procedure for the compulsory settlement of disputes. For those reasons it would again vote for article 62 and against article 62 *bis*.

24. Mr. NAHLIK (Poland) said that in studying article 62, which was the first article in Section 4 of Part V of the draft convention, it was necessary to have in mind all the articles of Sections 2 and 3 of Part V, which dealt respectively with the invalidity of treaties, and with the termination and suspension of the operation of treaties.

25. The statements made by some representatives conveyed the impression that there were quite a number of provisions relating to the invalidity of or termination of a treaty and that some of them were essentially new.

26. As to the first point, he would remind the Conference of the general rule set forth in article 39 according to which only such grounds as were listed in the articles that followed could be invoked for invalidating, terminating or suspending the operation of a treaty. It followed logically that all such grounds must be expressly mentioned, as each of them was an exception to the general rule. It was common knowledge that no exception allowed of extensive interpretation.

27. Did those provisions really introduce anything essentially new? Of the nineteen articles in question, four — articles 51, 54, 55 and 56 — merely stated the obvious: either the treaty itself or the mutual consent of the parties might terminate a treaty or suspend its operation. Three articles — 44, 52 and 60 — confined themselves to ruling out the possibility of improperly invoking certain grounds. One article, article 61, was simply a logical corollary to another article, namely article 50. Thus there were only eleven articles stating a distinct ground in each case for invalidating or terminating a treaty. But of those eleven, article 43 merely restated a well-known practice of States; articles 45, 46 and 48 corresponded to old established principles inherent in any legal system; article 47 elaborated the principle stated in more general terms in article 46; article 49 was based on a principle which had been making its way in international law for quite some time, until it had found its present, mature expression in the United Nations Charter; article 50 dealt with a principle which, after the adoption of the Charter and of a number of other generally accepted norms, could no longer be doubted; articles 53, 57 and 58 referred to rules which were generally known in State practice and which furthermore had been formulated in a way that limited rather than extended already existing customary law. Only article 59 was to some extent new, in that it chose one of the possible approaches to the problem.

28. Thus none of the possible grounds listed in Part V, Sections 2 and 3 were as new as some representatives claimed they were. It was therefore not at all necessary to establish new procedures for cases of disagreement relating to any of those grounds. It would be logical to keep those procedures within the limits set by the present stage of development of the international community and international law. That being so, it was normal to refer to the provisions of Article 33 of the Charter, which were in fact the only ones to which all States could subscribe without hesitation. To go beyond those provisions would constitute too great a leap forward, which might seriously endanger the convention on the law of treaties; a large number of States would find it impossible for that reason to become parties to the convention. His delegation therefore strongly supported article 62 as submitted to the Conference, without its being supplemented in the manner proposed in article 62 *bis*. Article 62 by itself adequately reflected the present stage of development of the international community and international law.

29. Mr. STREZOV (Bulgaria) said that it was absolutely necessary that the convention should provide some effective procedure for settling disputes arising out of the application of provisions of Part V of the convention.

30. Article 62, which was thus a fundamental element in the convention, had been drafted with great care by the International Law Commission and had been approved by the Committee of the Whole of the Con-

ference. By establishing a procedure to be followed by any party claiming that a treaty was invalid or alleging some ground for terminating or suspending its operation, article 62 had the merit of giving the parties adequate protection against arbitrary unilateral decisions. It was also a realistic provision because, by referring to the means of settlement provide for in Article 33 of the United Nations Charter, it referred to a formula which took into account the legitimate interests of all States and had already proved successful in international practice.

31. Since his delegation was convinced that article 62 was a useful safeguard for the *pacta sunt servanda* principle and the stability of treaties, and that at the present stage in international relations and in the development of international law it would be neither wise nor useful to attempt to establish supplementary procedures of a compulsory and automatic nature, it would vote for article 62 as proposed by the Committee of the Whole.

32. Mr. YASSEEN (Irak) said that article 62 was indispensable in the draft convention. At the same time it was adequate for the purpose.

33. As drafted by the International Law Commission, article 62 met an essential need, since it guaranteed the stability of treaty relations. The *pacta sunt servanda* principle was sacrosanct: it was impossible for a State to free itself unilaterally from treaty obligations. Moreover, in invoking a ground of nullity or termination that was valid in international law, it was necessary to observe the provision of article 62, which was based on the undisputed international principle that all disputes should be settled by peaceful means. If the parties did not manage to settle their dispute by those means, the treaty remained in force, and the *status quo* was assured. That was the indispensable safeguard.

34. Furthermore, article 62 corresponded to the realities of international life: Article 33 of the United Nations Charter listed the peaceful means of settlement which should be resorted to, and, up to the present, that Article of the Charter had given satisfactory results. In the light of those facts, article 62 of the draft convention served its purpose.

35. His delegation would vote for the article.

36. Sir Francis VALLAT (United Kingdom) said he wished to explain why his delegation would vote for article 62.

37. If, as certain representatives argued, the world was not yet ready to adopt the necessary procedures for dealing with the legal questions that might arise out of the provisions codified by the convention on the law of treaties, there was good reason for asking whether the world was really ready for the degree of codification embodied in the draft convention. The advance in international law which the convention embodied called for a similar advance in procedures. Law required justice. The matter had now become one for governments, rather than jurists, to decide.

38. His delegation's position was that articles 62 and 62 *bis* with annex I, as submitted to the plenary Conference, constituted an organic whole. Both articles were indispensable in the context of the convention as a whole. They must also be read in conjunction with article 77. At that stage, his delegation, which was opposed to article 62 standing alone unaccompanied by article 62 *bis* and annex I, would vote for article 62 in the hope and expectation that article 62 *bis* and annex I would be adopted in due course.

39. Mr. HUBERT (France) said that, though his delegation would vote for article 62, it considered that article to be clearly inadequate and it would only approve it because it anticipated that the Conference would adopt article 62 *bis*.

40. Mr. KEARNEY (United States of America) said that he would vote for article 62 in the expectation that the procedures provided for in article 62 *bis* would be approved by a large majority of the Conference.

41. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation would vote for article 62. It considered that the article was satisfactory and took account of the present state of international relations.

42. His delegation would vote for that article in the hope that all the complex problems to be tackled by the Conference would be solved in due course in a satisfactory way.

43. The PRESIDENT invited the Conference to vote on article 62.

*At the request of the representative of India, the vote was taken by roll-call.*

*Monaco, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Monaco, Mongolia, Morocco, Nepal, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Malaysia, Malta, Mauritius, Mexico.

*Against:* None.

*Abstaining:* Turkey, Central African Republic.

*Article 62 was adopted by 106 votes to none, with 2 abstentions.*

44. Mr. DIOP (Senegal) said that his delegation had voted in favour of article 62 in the hope that article 62 *bis*, which was the necessary complement to it, would also be adopted by the Conference and that its provisions would apply wholly or partly to Part V of the convention.

45. Mr. N'DONG (Gabon) said that his delegation had voted for article 62, but on the assumption that article 62 *bis*, which was an essential complement to it, would be adopted, since article 62 was distinctly insufficient to safeguard international public order, and hence the security of treaty relations. If the plenary Conference rejected article 62 *bis*, his delegation would obviously have to reconsider its position with regard to the convention.

46. Mr. SINHA (Nepal), explaining his vote in favour of article 62, said that his delegation was fully convinced of the wisdom and value of the article, which was so worded as to enable the aims of the convention to be realized. Article 62 was a complete whole and provided for arbitral and adjudication procedure, since it expressly referred to Article 33 of the United Nations Charter.

47. With regard to article 62 *bis*, on which the Conference was deeply divided, and whose adoption could cause many States to refuse to accede to the convention, his delegation thought that after article 62 had been in operation for a while the time would then be opportune to take steps of the kind provided for in article 62 *bis*, if they proved necessary. Since article 62 *bis* went against the principle of universality, his delegation would be unable to vote in favour of it.

48. Mr. SPERDUTI (Italy) said that his delegation had voted in favour of article 62 in the hope that article 62 *bis* would also be adopted by the Conference.

49. The Conference had already adopted article 65, the first sentence of which read : " A treaty the invalidity of which is established under the present Convention is void ". That meant the invalidity would have to be duly established; thus a procedure should be laid down for determining the merits of the grounds invoked.

50. Article 62 was supplemented by article 63, paragraph 1 of which covered the case of a declaration of invalidity based on paragraphs 2 and 3 of article 62. But paragraph 2 of article 62 provided for the case where no objection was made to the notification, and paragraph 3 for the case where a dispute arose between the parties. The dispute would obviously have to be settled if article 63 was to operate.

51. His delegation thought that a procedure for the settlement of disputes between the parties should be indicated in the convention itself.

52. The procedure laid down in article 62 *bis* was essential, and his delegation would reconsider its position with regard to the convention if article 62 *bis* was not adopted.

53. Mr. SMALL (New Zealand) said that his delegation had been absent when article 62 had been voted on, but it supported the article.

54. Mr. YAPORI (Ivory Coast) said that his delegation had voted in favour of article 62, which was the complement to article 62 *bis*, in the expectation that the Conference would adopt article 62 *bis*.

55. Mr. KABBAJ (Morocco) thought that article 62 was necessary and sufficient. The safeguards laid down in paragraph 3 were satisfactory. Article 62 *bis* would establish a system on which the Conference was divided and which could not be applied by small States.

56. Mr. BILOA TANG (Cameroon) said that his delegation had voted in favour of article 62 in the hope that the complement to it, article 62 *bis*, would be adopted by the Conference.

*Article 62* bis [4]

*Procedures for conciliation and arbitration*

1. If, under paragraph 3 of article 62, the parties have been unable to agree upon a means of reaching a solution within four months following the date on which the objection was raised, or if they have agreed upon some means of reaching a solution other than judicial settlement or arbitration and that means has not led to a solution accepted by the parties within twelve months following such agreement, any one of the parties may set in motion the procedures specified in Annex I to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

*Annex I to the Convention*

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 62 *bis*, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows.

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within

[4] For the discussion of article 62 *bis* in the Committee of the Whole, see 80th, 92nd to 99th, and 105th meetings.

sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period.

Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner specified for the initial appointment.

3. The Commission thus constituted shall establish the facts and make proposals to the parties with a view to reaching an amicable settlement of the dispute. The Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

5. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute.

6. If the conciliation procedure has not led to a settlement of the dispute within six months following the date of deposit of the Commission's report, and if the parties have not agreed on a means of judicial settlement or an extension of the above-mentioned period, either of the parties to the dispute may submit it to arbitration through notification made to the Scretary-General to that effect.

7. When a notification has been made to the Secretary-General under the preceding paragraph, an arbitral tribunal consisting of three arbitrators shall be constituted. One arbitrator shall be appointed by the State or States constituting one of the parties to the dispute and one other arbitrator shall be appointed by the State or States constituting the other party to the dispute.

The two arbitrators chosen by the parties shall be appointed within sixty days following the date on which the notification is received by the Secretary-General.

The two arbitrators shall, within sixty days following the date of the last of their own appointments, appoint the third arbitrator, who shall be the chairman; the chairman shall not be a national of any of the States parties to the dispute.

If the appointment of the chairman or of either of the arbitrators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period.

Any vacancy shall be filled in the manner specified for the initial appointment.

8. The arbitral tribunal shall decide its own procedure. The tribunal, with the consent of the parties to the dispute, may invite any party to the treaty to submit its views orally or in writing. Decisions of the tribunal shall be taken by a majority vote.

9. The Secretary-General shall provide the tribunal with such assistance and facilities as it may require. The expenses of the tribunal shall be borne by the United Nations.

10. The arbitral tribunal may, pending its final decision on the question, and at the request of any party to the dispute, indicate such measures as may be appropriate and ought to be taken in the circumstances of the case.

The award of the tribunal shall be binding and definitive. In the event of dispute as to the meaning or scope of the award, the tribunal shall construe it upon the request of any party.

57. Mr. KRISHNA RAO (India) noted that the delegations which had insisted that the Committee of the Whole should vote on article 62 *bis,* arguing that that would be a method of " testing the temperature ", had adopted a totally different attitude in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, an organ concerned with the progressive development and codification of some of the most important legal principles embodied in the United Nations Charter. The Rapporteur of that Committee, the representative of Sweden, had stated at the 871st meeting of the Sixth Committee of the General Assembly in 1965 that " in seeking to codify and develop principles of that nature, it was not possible to work by majority rule. Customary international law was not created by majority rule, nor were conventions. " [5] And the representative of the United Kingdom had stated in the Sixth Committee shortly afterwards that " international law was not made by majority decisions, it had evolved as a result of general acceptance by States ".[6] That had been the notion that had prevailed when the terms of reference of the Special Committee had been drawn up by the General Assembly, since it had been stated there that the Committee should first try to reach general agreement.

58. The Indian delegation was certainly not asking the Conference to adopt the general agreement method *in toto.* But since it was a crucial matter, his delegation would have thought that those in favour of establishing a compulsory arbitration procedure would have spared no effort to secure general agreement. Unfortunately, that had not been the case and the Committee of the Whole had been called upon to vote immediately on a highly controversial provision, on which the International Law Commission had taken a contrary view.

59. In that context, the Afro-Asian States, which had willingly refrained from pressing their point of view in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States on crucial issues such as the right of legitimate defence against colonial domination, to mention only one example, could certainly take note of the methods employed to secure the adoption of article 62 *bis.* There were other contexts in which the temperature had not yet been tested, and the delegations of the Afro-Asian countries were impatiently looking forward to the opportunity for doing so.

60. The Indian delegation had opposed article 62 *bis* because it believed that it was not correct to decide

[5] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee,* 871st meeting, para. 7.

[6] *Ibid.,* 881st meeting, para. 16.

that in the future the two means of compulsory settlement provided for in that article should apply to all treaties. The application of such a procedure of compulsory settlement was a very far-reaching measure which was not justified in present circumstances.

61. In that connexion, it should be remembered that several plans for a compulsory settlement procedure had failed. Only six States were parties to the Revised General Act for the Pacific Settlement of International Disputes [7] despite the appeals by the General Assembly of the United Nations for widespread acceptance of that convention. Then there was resolution 268 D (III) in which the General Assembly had set up a Panel for Inquiry and Conciliation. Twenty years after the establishment of the Panel, less than twenty States of the 126 Members of the United Nations had been willing to nominate a member to the Panel. Yet the conciliation machinery in article 62 *bis* made provision for a similar procedure, namely the nomination of members of a commission by States.

62. The General Assembly at its twenty-second session had set up another fact-finding panel [8] on the initiative of the representative of the Netherlands. It was true that all those bodies had a wider field of competence, whereas the conciliation procedure under article 62 *bis* was confined to disputes arising out of the application of Part V of the convention. But the existing machinery was more than adequate if States wished to resort to conciliation procedures with regard to the field of application of Part V of the convention. Furthermore, those advocating a system of compulsory conciliation did not always believe in its efficacy. In that connexion, it was enough to recall that the representative of the United Kingdom had stated at the 816th meeting of the Sixth Committee of the General Assembly in 1963: " Although provision was made in numerous bilateral and regional treaties for conciliation commissions, the value of that method of settling inter-State disputes was somewhat questionable. " [9]

63. With regard to arbitral procedure, he recalled that the draft on arbitral procedure drawn up by the International Law Commission, which had been considered by the General Assembly at its tenth session in 1955, had been subjected to considerable criticism. The Special Rapporteur on that topic had stated when summarizing those criticisms in his report to the Commission that " the General Assembly took the view that the international Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, the codification of custom ".[10] The Commission had noted that it had been " clear from the reactions of Governments that this concept of arbitration, while not necessarily going beyond what two States might be prepared to accept for the purposes of submitting a particular dispute to arbitration *ad hoc* . . . did definitely go beyond what the majority of Governments would be prepared to accept in advance as a general multitateral treaty of arbitration to be signed and ratified by them, in such a way as to apply automatically to the settlement of all future disputes between them ".[11]

64. An article by a distinguished American lawyer on the time element in proceedings before arbitral tribunals and the International Court of Justice [12] showed that *ad hoc* arbitration took much longer than adjudication, and was also far more expensive. On that point, article 62 *bis* made the United Nations responsible for financing the compulsory settlement procedure. The Conference would be signing a blank cheque on behalf of the United Nations, and his delegation did not think it had the capacity to impose such a burden on the United Nations. Those delegations which had followed the work of the General Assembly's Fifth Committee would recall the statements made by the major Powers and others on the grave financial position of the Organization. His delegation understood that the representatives of France, the United Kingdom, the United States of America and the Union of Soviet Socialist Republics had submitted memoranda to the Secretary-General suggesting that budget ceilings be fixed for 1970 and 1971, yet some of those States were supporting a provision which could increase the United Nations budget by several million dollars each year. It was rather strange that while on the one hand efforts were being made to curtail United Nations expenditure on development, on the other the Conference was being asked to impose additional charges on the United Nations for the operation of article 62 *bis*. His delegation would appreciate a statement by the Secretariat on the financial implications of the procedures stipulated in article 62 *bis* and an indication from it as to whether the proposal was compatible with United Nations financial arrangements.

65. A pertinent question was whether the international community was ready for a provision for compulsory arbitration. The freedom of choice of the parties in settling a dispute must remain unfettered. That was the raison d'être of Article 33 of the Charter. The Charter also envisaged that legal disputes should be referred to the International Court of Justice, but article 62 *bis* made no mention of the Court and placed the emphasis on arbitration.

66. Recourse to the International Court of Justice would not entail any additional expenditure for the United Nations, unlike the system proposed in article 62 *bis*. Despite the disappointment felt at recent trends in the jurisprudence of the Court, his delegation considered that resort to unknown arbitrators might be an even more extreme step. It was true that the International Court of Justice did not command universal

[7] United Nations, *Treaty Series*, vol. 71, p. 101.

[8] General Assembly resolution 2329 (XXII).

[9] See *Official Records of the General Assembly, Eighteenth Session, Sixth Committee*, 816th meeting, para. 36.

[10] See *Yearbook of the International Law Commission, 1957*, vol. II, document A/CN.4/109, para. 7.

[11] See *Yearbook of the International Law Commission, 1958*, vol. II, p. 81, para. 14.

[12] Leo Gross, " The Time Element in the Contentious Proceedings in the International Court of Justice ", in *American Journal of International Law*, vol. 63, No. 1 (January 1969), pp. 74-85.

respect, whatever the reason, but it was no solution to build up arbitration machinery in order to avoid recourse to the Court. A better course would be the gradual restoration of confidence in the Court, so that States accepted its jurisdiction of their own free will.

67. Article 62 emphasized the duty of States to settle their disputes, while recognizing their freedom to choose whichever means of settlement they wished. That provision accorded with the basic concepts laid down in the United Nations Charter. Any restriction on that freedom of choice would be a grave and undesirable step.

68. With regard to the jurisdiction of the Court, he believed that only forty-three countries had accepted it and that only sixteen of them were developed countries of Western Europe and North America, which had a long experience of international arbitral and judicial procedures. Many of their declarations of acceptance of the Court's jurisdiction were accompanied by all kinds of reservations. It was surely for those States to set an example to others.

69. His delegation thought that if a choice had to be made between *ad hoc* arbitration and the International Court of Justice, the latter would be preferable. Despite the disappointment aroused by the Court's recent decision, his delegation regarded that principal organ of the United Nations, whose practice and procedures were well established, and which was now more representative of the main legal systems and different forms of civilization, as likely to serve the international community better than *ad hoc* arbitration.

70. The Indian delegation would therefore vote against article 62 *bis*.

71. Mr. RAMANI (Malaysia) said he did not believe that article 62 *bis* supplemented article 62. The Malaysian delegation supported the main principles embodied in article 62, but considered that article 62 *bis* in no way improved on those principles and that the mechanism devised in it even ran the risk of impeding the implementation of article 62. The arguments advanced by the representatives who were in favour of article 62 *bis* had not convinced his delegation that the article was acceptable. The Malaysian delegation upheld the ideal of tolerance and good-neighbourly relations among States. It considered that all States should try to understand each other's problems; they should be able to enter freely into treaty relations and, if necessary, to withdraw from them without recrimination and without damaging existing friendly relations. The Government of Malaysia was convinced that in a rapidly changing world those principles must serve as a basis for any treaty. When treaties ceased to subserve their objectives, States should undertake negotiations to amend them or terminate them.

72. It might well be asked whether article 62 *bis* would advance or impede the cause of good relations among States. Article 62 urged them to seek a solution through the means prescribed in Article 33 of the Charter. Article 62 *bis* was a kind of threat obliging States to resort compulsorily to involuntary legal procedures. It should be borne in mind that the International Court of Justice was the principal judicial organ of the United Nations and that it had been established by the Charter. It did not enjoy any jurisdictional competence which was not formally accepted by States. The United Nations was not a super-State; if it were, it would have been stillborn. The General Assembly had occasionally tried to set itself up as a world parliament, but had failed.

73. The principles of domestic jurisdiction, on which the new approach in article 62 *bis* was based, completely ignored the procedures provided for in the Charter, for it should be noted that, in referring to the peaceful settlement of disputes, the Charter used very circumspect language. The procedure proposed in article 62 *bis* was the very negation of the process of persuasion and conciliation, which should allow for a dialogue between States. Of course, the pursuit of an ideal was essential to international progress, indeed, to all human progress, but the hard facts must be borne in mind. Perhaps the objectives of article 62 *bis* were attainable in the near future, but the international community had enough real troubles today which it would ignore at its peril.

74. Mr. BIKOUTHA (Congo, Brazzaville) said that while article 62 *bis* clearly showed its sponsor's concern to find a solution to the judicial settlement of disputes, in his opinion, as had already been said, compulsory arbitration was a blank cheque and would be an obstacle to the free choice of methods. After several years of work, the International Law Commission had considered that article 62 represented the highest measure of common ground to be found among very divergent opinions. The weaknesses of the existing international legal system where the judicial settlement of disputes was concerned arose not from the system itself but rather from its application by judges who had not always been impartial. It must, however, be recognized that the Court was capable of handing down judgements entirely devoid of partiality. The delegation of Gabon had drawn attention to the difficulty encountered by some new States in finding competent jurists among their nationals, and his delegation entirely shared that view.

75. The sponsors of article 62 *bis* wished to make the convention a prototype of progressive law, but that must not prevent the Conference from considering practical matters. It must beware of unduly bold innovations, and his delegation had great difficulty in accepting the arguments put forward in favour of the article. It might have supported certain compromise proposals, such as that of Ghana, which actually had not been officially submitted, and the Saudi Arabian proposal for an optional protocol [13] which would form part of the convention. His delegation thought that article 62 *bis* did not by any means represent present-day realities and did not constitute a satisfactory method for the judicial settlement of disputes. It would therefore vote against the article.

76. Mr. TUFIGNO (Malta) said that his delegation was in favour of article 62 *bis*, which in his view was essential for the successful operation of the law of

[13] See 97th meeting of the Committee of the Whole, para. 7.

treaties. The law of treaties must formulate clear and precise rules which would make it possible to interpret and apply the provisions of a treaty in such a way as to eliminate uncertainties and not to enable States to choose the interpretation which best suited their interests. The absence of adequate machinery for reaching an impartial decision would be at variance with the very purpose of the law of treaties and would enable the strongest States to impose their will. The provisions of Part V were such that any dispute concerning their applicability might give rise to arguments not only on questions of law but also on questions of fact. His delegation had abstained on articles 50 and 61 not because it did not approve the principles embodied therein but because the articles contained uncertainties which could only be remedied by the introduction of compulsory arbitration to settle disputes arising from them. Speaking as a representative of a small State which had to rely on justice and fair play, he considered that a dispute arising between two countries on a provision of Part V of the convention should not become a tug of war in which obviously the weaker State would be the loser and the stronger State the winner.

77. Mr. AMATAYAKUL (Thailand) said he was disturbed by the fact that the entire system of international practice in respect of settlement of disputes might be changed by the inclusion of a clause on compulsory jurisdiction. In his opinion, the settlement of disputes did not give rise to any serious problems because, so far, important international conventions had been concluded without embodying any provisions for the compulsory settlement of disputes and had functioned smoothly. The principle of good faith was the keystone of all international relations, and if it was not sincerely observed it was doubtful whether the system of compulsory arbitration would prove effective. On the other hand, if the machinery for the settlement of disputes was accepted by the parties concerned, as had been provided by the International Law Commission in conformity with the United Nations Charter and the Statute of the International Court of Justice, the chances of upholding the principle of good faith and settling disputes would be enhanced.

78. It would indeed be regrettable if the very object of the Conference, namely standardization of the law of treaties, were to be jeopardized by the inclusion of a clause on compulsory jurisdiction, which could mean that countries which had followed United Nations practice hitherto would decline to ratify the convention. There would then be two sets of treaty rules in force in connexion with the problem of compulsory jurisdiction, which in fact was not a major problem. The result would be worse than if the reservation clause had been accepted, as his delegation had proposed (A/CONF.39/C.1/L.387). At the 98th meeting of the Committee of the Whole, the United States representative had rightly pointed out that the proposal for making settlement procedures optional went even further than the proposal by Thailand, since that procedure would not merely allow the parties to enter a reservation against the application of a compulsory settlement procedure, but would also make article 62 *bis* inapplicable unless a party had taken the affirmative step of declaring that it accepted the provisions of article 62 *bis*.

79. His delegation had done its utmost to offer a compromise solution, but in view of the difficulties that had arisen it would abstain in the voting on article 62 *bis*.

80. Mr. HU (China) said that some delegations had stated that their acceptance of Part V of the convention depended on the eventual adoption of article 62 *bis*. His delegation's position was different. China had been the victim of the régime of unequal treaties for a century and it did not wish to see its experience repeated elsewhere in the world. For that reason, his delegation strongly supported all the articles in Part V and wished to make it clear that its support was unconditional. In other words, whether the provisions of article 62 *bis* were included in the convention or not, his delegation would support the articles in Part V.

81. The inclusion of those articles was an important step towards the progressive development of international law. The Conference was not merely codifying existing rules of international law; in a sense it was ahead of its time, but it must proceed with caution. Certain safeguarding clauses should be provided lest some States might be tempted to invoke the articles in Part V in order to avoid inconvenient contractual obligations and thereby adversely affect the security of treaty relations.

82. In his delegation's view, article 62 was far from adequate and should be complemented by article 62 *bis*, which it would support.

83. Mr. NASCIMENTO E SILVA (Brazil) said that his delegation had already stated at the 96th meeting of the Committee of the Whole that its attitude towards article 62 *bis* was fairly flexible. In its view, the new article 77 was a sufficient safeguard against abuse of the compulsory jurisdiction clause in article 62 *bis*, since compulsory jurisdiction would not apply to treaties signed before the conclusion of the convention. So far as future treaties were concerned, the parties were at liberty to adopt other rules on the settlement of disputes; they could even stipulate that the provisions of the convention would not apply. For treaties in force, arbitration or recourse to the International Court of Justice was always possible and, in future, States which wished to have recourse to that body might include a provision to that effect in their treaties. Article 62 *bis* therefore did not hold any terrors.

84. His delegation had always declared itself against over-all arbitration clauses, but it had frequently had recourse to that system of settlement of disputes and regarded it as very useful in certain specific cases. His delegation had voted for article 62, which in its view represented the best solution and was in keeping with existing international relations. Article 62 *bis*, however, had obtained 54 votes against 34 in the Committee of the Whole, and that vote could not be ignored. Moreover, some delegations of Western countries, when voting for the articles in Part V, had said that those

articles were only acceptable to them if article 62 *bis* were adopted.

85. His delegation thought that article 62 *bis* was acceptable provided the final clauses as approved were not amended. In the Committee of the Whole, the proposal on the final clauses had obtained 60 votes to 26, in other words it had obtained a two-thirds majority. That vote too could not be ignored. Any attempt to introduce a new article to amend the final clauses, particularly an article which did not contain a reservation clause, would be unacceptable. Brazil, like the majority of Latin American countries, must submit the convention to its Parliament, and if the convention did not contain any reservation clause, Parliament might refuse to ratify it. In principle, Brazil was traditionally against the formulation of reservations, but every country was free to make reservations if it thought fit.

86. In general, Brazil was not over-enthusiastic about article 62 *bis*, but considering that the convention was an organic whole in which all the articles were interlinked, it would not raise any objection to that article.

The meeting rose at 1.5 p.m.

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## TWENTY-SIXTH PLENARY MEETING

*Thursday, 15 May 1969, at 3.15 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 62* bis (Procedures for conciliation and arbitration) *and annex I to the convention* (continued)

1. Mr. SECARIN (Romania) said that his delegation had already stated in the Committee of the Whole its reasons for supporting article 62 and for opposing the so-called supplementary machinery proposed in the form of article 62 *bis*.

2. The arguments put forward by the supporters of pre-established machinery to which one party to a dispute could resort independently of the other had demonstrated the complex character of the issues involved and had given his delegation additional reasons for supporting the International Law Commission's system set out in article 62, which was in keeping with the present stage of development of international relations and of international law. The flexible system which the Commission had adopted almost unanimously reflected the highest measure of common ground among governments and in the Commission itself. The International Law Commission had acted wisely and realistically in avoiding any formula for compulsory machinery that would tend to give one party a right of action against another.

3. The allegation by the critics of article 62 that there was a gap in the system embodied in the article was based on the assumption that one of the parties would be acting in bad faith. But experience showed that States were concerned to promote good faith in treaty relations and, despite all the difficulties of international life, those relations tended increasingly to strengthen the principles of morality, justice and the rule of law. No procedural system could avail against a party acting in bad faith.

4. It was always open to States to include an arbitration clause in a treaty; in doing so, they would take into consideration the special circumstances of the treaty and would accept the clause with foreknowledge of the type of disputes to be settled. If, however, the parties had not included an arbitration clause in their treaty, they had freedom of choice of peaceful means of settlement. They were under a legal obligation to make patient and responsible efforts in good faith to arrive at a peaceful settlement of their dispute.

5. If the hands of the parties were tied by adopting a pre-established system of procedure, they would no longer have the same freedom of choice with regard to means of settlement when they concluded a particular treaty, or when a dispute arose. There was also the danger that the existence of a pre-established procedure would encourage one of the parties to choose the line of least resistance and fall back immediately on that procedure, instead of making efforts to arrive at a peaceful settlement.

6. It had been claimed that under the provisions of article 62, a State would be both a judge and a party in its own dispute. That claim ignored both the fundamental differences between legal relations in private law and public law, and the differences between internal and international relations. Principles which were peculiar to private law could not be transferred bodily to the realm of international treaty relations. States were the best judges of the matters which concerned them and an amicable settlement based on the agreement of the parties and arrived at on the basis of the rules of international law was always preferable. Naturally, if the parties themselves decided to resort to adjudication or arbitration, they took the decision *in concreto* and bearing in mind the circumstances of the case.

7. The position with article 62 *bis* was completely different. It was proposed to include it in a treaty on treaties: the procedural machinery set forth in it would not apply to events or facts but to legal instruments — in fact to all treaties. It would be most unrealistic to establish in that way a procedure *in abstracto* and before the event.

8. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that his delegation had not been convinced by the arguments of the opponents of article 62 *bis* and would continue to support it. It did so because it believed that the International Law Commission's draft was lacking in balance.

9. The International Law Commission had carefully

codified the subject of the invalidity, termination and suspension of the operation of treaties and in so doing had introduced a number of new and in some cases revolutionary rules. Those rules, however desirable, involved real dangers for the stability of treaties and must be balanced by provisions on institutional machinery for the settlement of disputes. The system embodied in article 62, which merely referred to Article 33 of the Charter, adopted a traditional approach to the question of the settlement of disputes. That approach was totally inadequate when it came to applying original rules, sometimes of a revolutionary character, such as those to be found in Part V. It was therefore logical and necessary, without abandoning the provisions of Article 33 of the Charter, to endeavour to go beyond those provisions.

10. Some of the critics of article 62 *bis* had based their opposition to it on their objection, as a matter of principle, to compulsory adjudication. Compulsory adjudication was in fact beneficial to weak countries, whose independence it safeguarded and whom it protected against possible pressure by others. Moreover, provision for compulsory adjudication had been made in practice in the relations between many sovereign States.

11. In any case, it was an exaggeration to speak of compulsory adjudication in connexion with article 62 *bis*. Article 62 *bis* was merely intended to prevent a dispute leading to a deadlock which could constitute a threat to peace. Priority was still given to the application of Article 33 of the Charter; article 62 *bis* only came into play if a disagreement between the parties made it impossible to apply the provisions of Article 33 of the Charter.

12. Article 62 *bis* made provision mainly for conciliation under the auspices of the United Nations. That method of settlement, which was particularly flexible, was being used to an increasing extent because it was perfectly compatible with the character of the relations between sovereign States. Many States had accepted conciliation clauses and their acceptance did not imply any relinquishment of their sovereignty. In a sense, the task of conciliators under article 62 *bis* would not differ greatly from that which had devolved upon the Assembly of the League of Nations under Article 19 of the Covenant, which empowered the Assembly to " advise the reconsideration by Members of the League of treaties which have become inapplicable " and thereby conferred upon it competence to determine whether a treaty had become obsolete. No one had ever suggested that Article 19 of the Covenant in any way conflicted with the sovereignty of States Members of the League of Nations. It was only if the efforts of the conciliators were unsuccessful and no settlement was agreed upon by the parties that arbitration came into play under article 62 *bis*. The fact that the Secretary-General of the United Nations would participate in the initiation of the arbitration procedure offered adequate safeguards to all concerned.

13. His delegation strongly supported article 62 *bis* and would consider it a matter for regret if it were amended in any way in an effort to achieve a compromise; if any such amendment were made, his delegation would have to reconsider its position.

14. Mr. JELIC (Yugoslavia) said his delegation's view was that the convention on the law of treaties would be improved by the inclusion of strong provisions for the settlement of disputes in the event of the application of the provisions of article 62 not yielding any result. Even compulsory arbitration would be acceptable to his delegation. At the same time, it was a fact that compulsory arbitration was not acceptable to a considerable number of countries, and it would be bad policy to try to impose on those countries, even by a two-thirds majority, a solution which would make them reluctant to sign the convention.

15. The only possible course was to endeavour to reach a compromise solution. Between the system of article 62 and compulsory arbitration a whole range of possibilities lay open: all that was needed was the will to use them. The Conference was entitled to expect from the advocates and the opponents of compulsory arbitration that they should not persist in their irreconcilable attitudes but endeavour to find a compromise. The decision by the Conference at a previous meeting not to take a vote on article 62 *bis* before all possibilities of compromise had been exhausted was a clear indication of that desire. He therefore hoped that delegations would not find themselves obliged to vote for or against 62 *bis* in its present form, but would be given an opportunity to pronounce on a compromise solution.

16. Mr. N'DONG (Gabon) said that the Conference would fail in its purpose if it did not adopt a compulsory procedure for the settlement of disputes such as that embodied in article 62 *bis*.

17. The International Law Commission had suggested a timid procedure in article 62, which in fact referred to Article 33 of the Charter. Article 33 was in keeping with conditions prevailing at the time of the adoption of the Charter but it was now necessary to go further. Articles 23 and 27 of the Charter had already been amended in order to take into account the changing needs of the international community. It was essential, in the interests of the future success of the convention on the law of treaties, that the procedure set forth in article 62 *bis* should be included for the application of the various articles on invalidity, termination and suspension of the operation of treaties.

18. He wished now to clarify a point which had been raised during the discussion. The representative of Congo (Brazzaville) had referred to the statement by the Gabonese delegation at the 94th meeting of the Committee of the Whole, opposing the Spanish amendment (A/CONF.39/C.1/L.391). In fact, his delegation had pointed out that the Spanish amendment in question " would be harmful to newly-independent States like Gabon in that, for many years to come, they would not be in a position to appoint ' persons of recognized eminence ' for the purpose of article 1, paragraph 2 of the annex to the amendment ". In doing so, his delegation had merely drawn attention to existing conditions, but the dearth of " persons of recognized

eminence ", within the meaning of the Spanish amendment, had not prevented Gabon from joining the sponsors of article 62 *bis* and from subscribing to compulsory arbitration. In particular, at the regional African level, there should be no difficulty in finding suitable impartial arbitrators. The passage to which the representative of Congo (Brazzaville) had referred did not therefore provide any argument against adopting article 62 *bis*.

19. Article 62 *bis* had the advantage of flexibility, in that it made provision both for a diplomatic means of settlement, through conciliation, and for a judicial means of settlement, through arbitration. It was a necessary complement to article 62 in that it answered the question what would happen if resort to the means indicated in article 62 ended in deadlock. The article provided for arbitration to protect the weak and curb the ambitions of the strong. It would uphold the rule of law and prevent the rule of force.

20. It had been suggested that article 62 *bis* would allow violations of the sovereignty of States. He would like, therefore, to draw attention to the definition of arbitration contained in article 37 of the Hague Convention for the Pacific Settlement of International Disputes (Convention I) of 18 October 1907: " International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law ".[1] It would be seen from that definition that the essential basis for settlement by arbitration was the will of the parties to a dispute. A State which accepted compulsory arbitration renounced the exercise of its sovereign rights in that matter; since it did so of its own free will, there could be no question of any violation of sovereignty. A State could even renounce its sovereignty altogether for the purpose of joining a federation. It was high time to leave behind the retrograde notions of nationalism which could delay indefinitely the achievement of a peaceful international community.

21. It had also been objected that earlier codification conventions, such as the 1958 Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular relations, did not make provision for compulsory adjudication. The answer to that objection was that the convention on the law of treaties contained so many innovations that they must necessarily be accompanied by safeguards in the form of the key article 62 *bis* in order to protect the international legal order against abuses by powerful States.

22. Mr. ALVAREZ TABIO (Cuba) said that his delegation had already stated its position and could only add that it would maintain it regardless of circumstances. His delegation was not prepared to go any further than article 62 as already approved, and rejected as a matter of principle any kind of procedure not based on free choice. It would not accept any formula for general compulsory adjudication at a supra-national level which could be used to impose awards in disputes whose nature and scope could not be foreseen. His delegation would therefore vote against article 62 *bis* and its annex.

23. Mr. MUTUALE (Democratic Republic of the Congo) said that his delegation had used its best efforts during informal negotiations to endeavour to prevent a matter of such great importance to the convention on the law of treaties as article 62 *bis* from being decided by a majority vote. If the question was to be decided in that manner the convention would become a restricted multilateral treaty. That would represent a very limited achievement in return for the long years of work on the law of treaties. The Conference would thus have helped to discredit the whole idea of the codification of the law of treaties.

24. His country was a developing country; its development could not be achieved purely with its own resources and depended in great measure on co-operation with other States. His country was not at all opposed to the principle of compulsory international arbitration procedures, but it did not favour a formula which would submit to arbitration all future convention without any distinction. In its position as a developing country, the Democratic Republic of the Congo had signed a large number of treaties of all kinds and would undoubtedly continue to sign even more in the future. It was reluctant to accept a formula which would tie it to a pre-established procedure, and therefore did not view article 62 *bis* with favour. The most it could accept was compulsory conciliation.

25. Mr. ABAD SANTOS (Philippines) said that his delegation would vote for article 62 *bis,* or something substantially similar, since it represented a radical step towards the only satisfactory method of settling disputes, namely, compulsory adjudication. The solution provided for in article 62 was very inadequate, because the methods suggested in Article 33 of the United Nations Charter were merely optional and there was no way by which a State could be forced to submit to them. It had been claimed that those procedures were adequate for States which were inclined to use them, but unfortunately many States lacked the necessary inclination to do so. It had also been claimed that the community of States was not yet ready to accept a system of compulsory settlement; that was mere conjecture, however.

26. The reason behind the principle of compulsory settlement was a valid one and, as in the case of *jus cogens,* the Conference should not miss the opportunity to take a step forward in the right direction. The procedure provided for in article 62 *bis* was compulsory only if the parties had not agreed to some different procedure. What was compulsory was that they must settle their dispute. The parties were given the choice of the method of settlement and were not required to resort to the method of settlement provided for in article 62 *bis* if that was distasteful to them. Without article 62 *bis,* the legal order set up in the convention, providing for optional settlements, would provide for no settlement at all. All States were committed to the rule of law, but unless they also committed themselves to the

[1] J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907,* 3rd ed., p. 55.

principle of compulsory settlement, their original commitment would be no more than lip service paid to empty phrases. In the view of his delegation, any settlement of disputes which depended upon the whim of a State was intolerable and unacceptable.

27. Mr. ANDERSEN (Iceland) said he could not understand why such resistance was being offered to article 62 *bis*. His country had made a treaty with the United Kingdom on the subject of fishery limits, which was vital to Iceland, since 95 per cent of its exports consisted of fishery products. Nevertheless, there was a clause in that treaty to the effect that, if Iceland were to extend its fishery limits beyond 12 miles, which in his country's opinion was insufficient and, indeed, completely unsatisfactory, the United Kingdom could take the matter to the International Court of Justice. Iceland had agreed to that clause because it considered that the jurisdiction of the Court was a fundamental principle for States which believed in international justice and, consequently, that all peace-loving countries had a moral as well as a legal obligation to support article 62 *bis*. Recourse to the International Court seemed to be more appropriate than conciliation or arbitration, but since compulsory jurisdiction of the Court was not acceptable to the majority of the States represented at the Conference, Iceland was prepared to vote for article 62 *bis*.

28. Mr. KOULICHEV (Bulgaria) said that his delegation was firmly opposed to article 62 *bis*, since it doubted whether any system of compulsory arbitration could ever serve to resolve disputes of a political nature. At the present stage of international relations, any such system was unrealistic. In view of its universal character, the convention ought to be based on *lex lata* and be acceptable to all governments, as otherwise it would be merely a tool in the hands of a small group of States. His delegation, therefore, could not regard article 62 *bis* as a satisfactory compromise and would vote against it.

29. Sir Francis VALLAT (United Kingdom) said he wished to comment on some of the points raised earlier. First, many delegations would be unhappy if Part V did not contain satisfactory third party procedures. There had been continuing attempts to reach a compromise. The text of article 62 *bis* had been worked over by many delegations — probably every delegation had contributed something; it was in the truest sense a compromise. The vote in the Committee of the Whole and subequent discussions showed that the large majority of delegations were in favour of third party settlement procedures and it was no use trying to maintain that that was not so. Delegations should not be deceived into thinking that, if article 62 *bis* were rejected, that would be a satisfactory result in the eyes of the majority.

30. Secondly, some earlier remarks seemed to him to be entirely divorced from the reality of the situation; possibly he had misunderstood them. Some reference had been made to " gun-boat diplomacy " and " waving the big stick ", as though article 62 *bis* represented the modern version of those practices. If States, large or small, had the humility to submit to third party procedures, it was difficult to see how it could be a question of the " big stick ". It was rather the reverse: it was the substitution of legal methods for the outmoded methods of force and pressure. It was because of the fear that Part V might lead to unilateral " waving of the big stick " that article 62 *bis* was regarded as essential by the United Kingdom and many smaller States.

31. Thirdly, it had been alleged that article 62 *bis* was based on an ignorance of United Nations procedures and of the history of arbitration and judicial settlement. All representatives present had great experience of United Nations procedures and of both arbitration and judicial settlement. There was no such ignorance behind the drafting of the article.

32. Fourthly, it had been said that representative must keep their feet on the ground. But to which articles did that remark really refer? To article 50, whose content was completely unknown? To article 61, whose content was entirely in the future and concerned rules which had yet to emerge? Those were the articles which were in the clouds. Article 62 *bis* was the parachute which would bring the Conference back to earth again.

33. Some delegations had complained about the breadth of application of article 62 *bis*. Yet there had been no criticism of the breadth of application of articles 45 to 50, 57, 59 and 61. It was, however, maintained that article 62 *bis* must be narrowed. Its supporters were willing to examine any proposals, so long as the essential protection remained. There was surely no reason why in principle article 62 *bis* should be narrower than those articles to which it related or, indeed, than article 62.

34. It was true, as had been mentioned, that arbitration and adjudication had not been used to a great extent, but the number of members of the international community was not large and litigation was not to be expected every day. But the existence of those procedures themselves made States view their acts and responsibilities more closely and carefully. Experience showed that settlement through third party procedures was infinitely preferable to the results of an indefinite prolongation of a dispute.

35. Article 62 *bis* was reasonable and necessary, and represented the largest measure of common agreement. The vote on article 62 must be understood in the light of the fact that many delegations had voted for it in the hope that article 62 *bis* would be adopted.

36. Mr. MATINE-DAFTARY (Iran) said that his delegation did not share the doubts of those western representatives who had said that it would be difficult to adopt Part V of the convention unless provision was made for very strict procedural safeguards. After all, everything in the world was relative, and article 62 *bis*, while well formulated from the point of view of some countries, might be very dangerous for others. The developed, western countries already possessed efficient administrative machinery with which to tackle the problem of safeguards, but such machinery was unfortunately lacking in many of the developing countries. By the very nature of things, therefore, article 62 *bis*

tended to divide delegations into two groups, those which favoured it and those which opposed it, and both believed themselves to be in the right. In those conditions, he questioned the wisdom of putting the article to a vote. The Conference should rather work in the spirit of Article 33 of the United Nations Charter and try to produce a formula which would be acceptable to all.

37. Mr. MARESCA (Italy) said that his delegation considered article 62 *bis* an essential provision because it laid down a procedure for the settlement of disputes. International relations had to be governed by some form of procedure, a fact which ought to be recognized. Rules had already been accepted by the Conference with respect to the interpretation of treaties, *jus cogens,* prohibition of the use of force, fundamental change of circumstances and so forth. There was no reason why it should not also adopt rules for the settlement of disputes. Article 62 *bis* provided the proper machinery for settlement after all other means, including recourse to diplomatic channels, had been exhausted. It made available an objective procedure which allowed international law to develop naturally and to serve the cause of international co-operation. He appealed to the Conference to recognize the need for some sort of procedure for the settlement of disputes and hoped that article 62 *bis* would be adopted.

38. Mr. SAMAD (Pakistan) said that the arguments that had been adduced against article 62 *bis* compelled him to place the real issues involved in the article in the right perspective so that the fallacy of those arguments might become at once apparent.

39. First, all that had been said against compulsory procedures for the settlement of international disputes could be asserted against municipal law. Yet the fact remained that municipal law had long been in force in all civilized societies of the world. The representative of Malaysia had warned them against the danger of drawing a parallel between municipal and international law. But it was a fact that international law had all along been drawing and would continue to draw not only inspiration but also substance from municipal law. After all, States were merely international personalities, just as the individuals of a State were national personalities under the law of their land.

40. Secondly, it had been argued that the world was not yet ready for compulsory procedures. But the pace of the progress of mankind was swifter now than it had been in the past. Refusal to make any progress in the field of international relations would be a very sad reflection on the jurists of the world assembled at the Conference. Some had taken the view that it might be opportune at a later stage to introduce compulsory procedures in international law but not to-day. But why not do it now, in the interests of the stability of treaty relations and at a Conference engaged in the progressive development and codification of international law?

41. Thirdly, it had been said every State must trust in the sense of honour and self-respect of other States in the matter of the settlement of disputes rather than trust in a law which imposed compulsory procedures upon them. But laws were framed not for the law-abiding but for the delinquent. What should be done if the other State chose to be unreasonable and persisted in taking unilateral action? It was only then that compulsory procedures would be applied, as proposed in article 62 *bis,* in the interests of the weaker States in particular.

42. The delegation of Pakistan would therefore vote in favour of article 62 *bis,* which was an organic whole, as a step in the right direction in the present stage of development of international law.

43. Mr. YASSEEN (Iraq) said that article 62 *bis* would produce a complex system. It went beyond what could properly be recommended as a solution reflecting present-day international relations and one which would receive the broad support required for any initiative designed to bring about a drastic change. Those who felt that compulsory judicial settlement or arbitration were essential to the application of international law were unduly influenced by the analogy drawn with internal law; they were not taking into account the structural characteristics of the international community. International law had its own means of settling disputes; the procedure was laid down in Article 33 of the United Nations Charter. The basic concept was that States should in principle be free to choose a method for settling disputes while remaining bound by an essential obligation, that of refraining from the use of force in international relations.

44. The convention on the law of treaties would not have retroactive effect. Therefore States in favour of compulsory jurisdiction would not be in any difficulty if article 62 *bis* was not adopted. A decision on the settlement of disputes could be taken for each treaty and an agreed procedure selected, including recourse to arbitration or compulsory judicial settlement.

45. Mr. WYZNER (Poland) said that article 62 *bis* was unacceptable to his delegation for a number of reasons. First, the inclusion of rules which were already binding upon States should not be made dependent on acceptance of any pre-established procedure. Secondly, the article was contrary to contemporary international law and to the practice of States; the concept of compulsory jurisdiction had not been accepted in most of the earlier conventions codifying and progressively developing general international law. Thirdly, the codification of the law of treaties should not be used as a means of introducing the idea of compulsory jurisdiction, which lay outside the scope of the convention. Fourthly, the establishment of the procedure set out in article 62 *bis* would impose new and heavy burdens on the United Nations and its Member States. Fifthly, the idea of applying obligatory and automatic arbitration for all time to all treaties without exception, including those dealing with security, national defence and boundaries, was quite unrealistic. Finally, the proposed machinery would supersede the system of regional settlement of disputes which existed throughout the world; for instance, if one of the more than forty members of the Organization of African Unity requested that a dispute

involving the other Members of the Organization be submitted to a United Nations panel, that would have to be done, with the paradoxical result that strictly regional problems would be settled by international arbitrators, even against the wish of an overwhelming majority of the members of the regional group.

46. If article 62 *bis* were adopted, it would have a direct and negative bearing on the future of the convention as a whole, for no instrument containing unduly far-reaching ideas would ever attract a sufficient number of ratifications. Indeed, it was to be feared that even those States which so persistently defended article 62 *bis* might come to the ultimate conclusion that the convention was not acceptable to them. During the negotiation of the 1963 Convention on Consular Relations,[2] an influential group of States had pressed for the adoption of some far-reaching provisions which they declared to be a *sine qua non* of their participation in the Convention, but although nearly all their proposals had been adopted, they had still not become parties to the Convention. Strangely enough, many of those States were now among the most ardent supporters of article 62 *bis*. Another case was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[3] Some of the provisions of that instrument had been adopted only under the pressure of certain delegations, which had made their Governments' acceptance of the Convention conditional upon those clauses. The opposing delegations had reluctantly accepted the clauses in order to ensure the general application of the Convention, but now, fifteen years later, the States which had pressed these clauses had not yet become parties to the Convention.

47. The codification of the law of treaties should not be made dependent on the establishment of a compulsory jurisdiction, for disputes arising out of treaties had no particular features warranting the establishment of such jurisdiction; they were international disputes, like any others between States, and the principle that States must seek an early solution of any disputes in which they might be involved applied also to any that might arise in connexion with the application of the provisions of Part V of the convention. The only requirement imposed on the parties to a dispute under contemporary international law was that settlement was to be sought by peaceful means and in such a way that international peace and security were not endangered.

48. At the first session of the Conference, final consideration of article 62 *bis* had been deferred to the second session on the understanding that an effort would meanwhile be made to find compromise solutions acceptable to the great majority of the participants. It was obvious, however, that the advocates of article 62 *bis* had come to the second session without any great willingness to co-operate in seeking such solutions. Despite the sincere efforts of many delegations and despite dramatic appeals for the reconciliation of opposing views, the advocates of article 62 *bis* persisted in demanding unacceptable solutions and had gained a Pyrrhic victory in the Committee of the Whole.

49. The Polish delegation considered itself obliged to vote against article 62 *bis* and annex I. It was convinced that only through the rejection of that provision could the convention as a whole be saved, since only then could a generally acceptable compromise formula be evolved. If, however, article 62 *bis* were adopted, the Polish Government would not be in a position to accept the obligations arising out of its provisions.

50. Mrs. BOKOR-SZEGÓ (Hungary) said that the Conference should take into consideration the fact that strong opposition to article 62 *bis* had been expressed during the debate. That opposition was based, and rightly so, on the view that the provisions of the article were inconsistent with present-day international practice. Inclusion of the article might prevent a number of States from acceding to the convention and thus frustrate the desire of most States represented at the Conference that the convention should receive the broadest support.

51. The Hungarian delegation was firmly opposed to article 62 *bis* because it jeopardized a convention which had been carefully prepared first by the International Law Commission and then at two sessions of the Conference.

52. Mr. RAMANI (Malaysia) said that the United Kingdom representative had asked States to show humility and subject themselves to the legal procedures set out in article 62 *bis*. But that begged the whole question. What the Malaysian delegation had complained about at the previous meeting was the possibility of the other State being humiliated by the waving of the big stick of legal procedure.

53. The United Kingdom representative had gone on to say that many representatives had voted for article 62 in the expectation and hope that article 62 *bis* would be adopted. He would simply point out that many other representatives had voted for article 62 in the hope that article 62 *bis* would not secure a majority, or at least not the required majority.

54. Mr. BLIX (Sweden) said that Sweden took the view that, since the United Nations Charter contained a prohibition of the use of force, treaties extorted by force must not be rewarded by validity, and similarly, that there could be norms so fundamental to the international community that deviation from them by treaty could not be tolerated. International law was the law of the community, and there was no reason why the community should stamp the injunction *pacta sunt servanda* on contracts which it regarded as abhorrent.

55. However, his delegation was acutely aware that there was much disagreement as to what constituted a prohibited use of force, and what norms were so fundamental that no deviation from them could be tolerated. Such disagreement could well lead to differences in relation to specific treaties. Obviously there were also uncertainties connected with other concepts in Part V, and if there was no machinery automatically available to settle disagreements, there was a risk that the articles on invalidity might be abused. Consequently Sweden

[2] United Nations, *Treaty Series*, vol. 596, p. 261.

[3] United Nations, *Treaty Series*, vol. 249, p. 240.

was convinced that Part V of the convention must be coupled with automatically available procedures for the settlement of disputes. Or course, parties to disputes should always be free to choose by agreement in advance, or *ad hoc,* the methods of settlement they preferred. But that freedom was in no way restricted by articles 62 or 62 *bis.*

56. His delegation could not understand the criticisms of article 62 *bis* based on the grounds that the freedom of choice of parties as to methods of settling disputes was essential. That freedom already existed. Article 62 *bis* was designed to meet a situation which arose when the parties did not succeed in reaching agreement on a method of settlement. In fact article 62 *bis* could be regarded as a restriction on the freedom of a party unilaterally to keep a dispute open for ever. But it was not a restriction preventing parties from agreeing between themselves on methods of settlement. Indeed, contrary to the suggestion that the existence of automatically available machinery would provoke unconciliatory attitudes, it was likely to induce parties to reach agreement on methods of settlement of disputes, since obstruction would not pay.

57. The present convention did not embody the international law of the old States, but reflected the law accepted by all States. That was demonstrated by the votes cast at the Conference. Part V of the convention had been particularly welcomed by the new States. The procedures proposed in article 62 *bis* would assist therefore, not in upholding the old law, but in upholding the law accepted by the modern international community.

58. Various technical objections might be raised against article 62 *bis.* Some delegations might have preferred to transform the proposed conciliation commission into the arbitral tribunal, should conciliation fail. Sweden could not agree with that view, believing that the two functions were different. Others would have preferred to have three neutral umpires at the stage of arbitration. Many would have liked to see some role for the International Court of Justice, particularly in interpretation and the application of article 50. But although Sweden shared that view, it had supported the present structure of the machinery, which was more acceptable to the majority, although it was notable that the pleas for the use of the International Court of Justice had come from some of those delegations who had spoken most strongly against automatically available means of settlement. Sweden did not claim that article 62 *bis* was perfect, but it was convinced that the machinery proposed was of crucial importance if the progress achieved through the adoption of Part V was not to be undermined, and perhaps turned into a source of uncertainty in the treaty relations between States.

59. Article 62 *bis* would not impose heavy burdens upon States that were disinclined to accept arbitration. An article concerning the non-retroactivity of the convention, article 77, had been adopted by the Committee of the Whole, so that treaties concluded by States before the convention entered into force for them would not be subject to the procedures of article 62 *bis.* Furthermore, after the convention had entered into force for States, they would be free, in concluding future treaties, to agree upon other methods of settlement, or even to exclude the application of article 62 *bis* to such treaties. Therefore the contention that article 62 *bis* would be a straitjacket was unfounded. Nor was it correct to say that the article could lead to " involuntary legal procedures ". States would sign and ratify the present convention, including article 62 *bis,* of their own volition, just as they accepted the optional clause of the International Court of Justice of their own volition. There were many other conventions, including United Nations conventions, containing clauses of automatically available procedures for settlement of disputes, and such conventions were freely accepted by States. States reluctant to accept automatically available procedures must weigh the advantages that the substance of the convention might give them against the possible disadvantage that they saw in those procedures. Other States, on the contrary, might feel that the substance of some conventions might contain dangers for them if no automatically available procedures were provided for the impartial settlement of disputes.

60. At the previous meeting, the representative of India had stated that Sweden had expressed the view, in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, that international law was not created by votes; the representative of India had gone on to say that on crucial issues action should be by general agreement. Both views were correct. However, the problem was that Part V of the convention included certain rules regarded by some States as new and potentially dangerous to the stability of relations between States. Most of those States were prepared to accept those rules provided that they were coupled with safeguarding procedures, but not otherwise. Thus the problem was not one of the creation of an international legal procedure by vote, but one of seeking to include certain rules with the broadest possible measure of agreement. It was for that purpose that Sweden supported the procedures laid down in article 62 *bis,* and would vote for the article.

61. Mr. MANNER (Finland) said that his delegation supported the procedure of compulsory arbitration provided for in article 62 *bis* and would vote for the article. The Conference should work not only for the codification but also for the progressive development of international law, and the concept of progressive development was equally applicable to methods of international legal procedure. The very fact that so many States had expressed support for article 62 *bis* showed that a considerable body of opinion in present-day international legal thinking was in favour of compulsory jurisdiction, and the time might now have come to incorporate that principle into the convention.

62. Many representatives had stressed the practical difficulties of compulsory arbitration, particularly for small countries. His delegation did not consider such difficulties relevant but believed, on the contrary, that an optional procedure would not provide equal possibilities for all, and especially for the smaller States, to apply the provisions of the new law of treaties.

63. Mr. DE CASTRO (Spain) said that his delegation wished to explain its vote on article 62 *bis* by amplifying some of its earlier observations. Spain had always supported the idea of a jurisdictional or arbitral solution to the problem dealt with in article 62 *bis,* as a step in the progress and institutional development of the international community. Spain also considered that, for such a solution to be effective and acceptable to all States, it must be possible to establish a group of persons of absolute impartiality, and also to give the corresponding arrangements of an institutional character such authority that it could be said that the decision was in fact being left to the international community itself. It was with those aims in view that Spain had submitted a proposal (A/CONF.39/C.1/L.391) which had not, however, been voted upon by the Committee of the Whole. At that stage, Spain had abstained from voting on the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev. 3 and Corr.1 and Add.1 and 2) proposing the insertion of a new article 62 *bis* for two main reasons. First, it had not attracted sufficient general support, and secondly, the proposal was not entirely satisfactory either in substance or in drafting.

64. On the other hand, his delegation could not accept the view that Part V and article 62 *bis* were interdependent. The principle intimately linked with Part V was the principle of *pacta sunt servanda:* there could be no agreement unless there was true consent by the parties. Nevertheless, his delegation had given careful consideration to the fears voiced by many delegations about the situation that might arise if Part V were not linked with a compulsory system for the settlement of disputes; those fears must be regarded as one of the realities with which the Conference had to deal.

65. At the 104th meeting of the Committee of the Whole, during the discussion of the final clauses, Spain had drawn attention to the importance of dealing with the question of reservations. His delegation had also stated that, although there was no logical relationship, there was an important political relationship between the question of compulsory jurisdiction and the question of universality, or the " all States " clause, and it might still be possible to arrive at a generally satisfactory compromise on those two issues.

66. Accordingly, the Spanish delegation had decided, not without misgivings, to vote for article 62 *bis,* as an expression of good faith and of the fact that it was not opposed to the principle of compulsory jurisdiction. He must emphasize, however, that Spain's vote for article 62 *bis* was linked with the question of reservations to the convention. Obviously, the meaning and value of article 62 *bis* would vary considerably according to the drafting of the reservations clause. There could be either a general reservations clause, or a provision that certain parts of the convention were not open to reservations, or, as the Spanish delegation had proposed (A/CONF.39/L.39) the reservations clause could provide that a State might declare that it did not consider itself bound by certain of the provisions of annex I to the convention with respect to certain categories of disputes. Attention should also be drawn to the possibility of affirming the principle of universality, with regard to which his delegation had submitted a draft resolution (A/CONF.39/L.38).

67. The Spanish delegation would vote in favour of the principle of article 62 *bis,* although it had serious doubts about the drafting, because Spain considered that the whole question was bound up with the question of reservations. Spain took that position on the understanding that even after the adoption of article 62 *bis,* it might still be possible to resolve the doubts of many delegations by providing a satisfactory system of reservations. That would help to achieve what everyone hoped for, a general agreement that would prove to be the salvation of the convention on the law of treaties.

68. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation would vote against article 62 *bis,* for several reasons. First, from the legal point of view, the article went beyond Article 33 of the United Nations Charter, and none of the attempts to prove that its application would not infringe the right of States to choose means of settlement of disputes had been at all convincing. Secondly, the wording was obviously divorced from reality and, moreover, had been criticized on that ground both by the advocates of a compulsory settlement procedure and by its opponents; moreover, its financial implications clearly conflicted with United Nations practice. Thirdly, from the political point of view, it was so formulated as to provide a tool for exercising pressure on the developing countries against their interests.

69. With regard to the question of seeking a compromise, the Soviet Union had appealed for such a compromise from the outset of the Conference, in order to meet the vital interests of all participating States. For a long time, all its proposals had been ignored, but at last some of the western Powers had begun to talk of a compromise. A distinction should, however, be drawn between those countries: some, such as Sweden and the Netherlands, had made genuine efforts to reach a satisfactory solution, but others had followed in the wake of one State which had blocked all possibility of reaching agreement. Thus, no compromise could be reached, through the fault of that one delegation.

70. The Soviet Union delegation was sure that the principle of universality, which was generally acknowledged, had been rejected because of the activity of a certain group of delegations. A similar group was now trying to impose on the Conference a system of compulsory arbitration which was contrary to existing State practice. A convention containing a compulsory arbitration clause would clearly be unsatisfactory to a large number of States, and the Government of the USSR would be unable to support such an instrument.

71. Mr. STAVROPOULOS (Representative of the Secretary-General) said that the representative of the Soviet Union had raised the question of the financial implications of certain provisions of the annex to article 62 *bis,* pursuant to which the United Nations would be responsible for the expenses of the conciliation commission or of the arbitral tribunal contemplated in that annex. It was impossible to estimate the costs that would be involved until a case occurred that was

referred to conciliation or arbitration. Nevertheless, as contingent expenses were involved, it would be necessary for the General Assembly of the United Nations to undertake expressly to assume the responsibility for such expenditure.

72. If article 62 *bis* and its annex were adopted by the Conference, it would be necessary to place an item on the agenda for the next session of the General Assembly to enable the Assembly to reach a decision. That could be done by a resolution of the Conference requesting the Secretary-General to do so; if the Conference did not agree to such a resolution, the Secretary-General himself would have to place such an item on the agenda in order to clarify the issue, and at that time the question of how to calculate the expenses would have to be answered to some extent by giving the General Assembly an idea of their scale.

73. Mr. HAYTA (Turkey) said that his Government's attitude, which had remained consistent throughout, had been stated by him at the 92nd meeting of the Committee of the Whole. For the reasons he had there given he would vote against article 62 *bis* and for the same reasons he had abstained in the vote on article 62.

74. Mr. FATTAL (Lebanon) said that some representatives had asked why a mere reference to Article 33 of the United Nations Charter should not be sufficient.

75. The congenital weakness of Article 33 of the Charter was that it placed negotiation on the same footing as other procedures for the peaceful settlement of disputes, whereas negotiations was in fact only a preliminary procedure which should be compulsory in all cases. What happened in practice was that, under Article 33, States contented themselves with undertaking negotiations, and if those negotiations broke down, no further efforts were made and the treaty was unilaterally denounced. If negotiation had been considered only as a preliminary phase, then when it failed, the parties in dispute would have been obliged to have recourse to a proper procedure for settlement. Under such conditions, a mere reference to Article 33 of the Charter would have been sufficient.

76. Mr. KRISHNA RAO (India), thanking the representative of the Secretary-General for his statement, said that if article 62 *bis* were adopted, it would be the first time that a plenipotentiary conference had adopted an article which would have financial implications for the General Assembly. He wondered what the status of the article would be if the General Assembly declined to accept those financial implications.

77. Mr. YAPOBI (Ivory Coast) said he would like to remind the representative who had stated that the supporters of article 62 *bis* appeared to be totally ignorant of United Nations procedure, that the supporters of article 62 *bis* were, like that representative, experienced lawyers and distinguished representatives of their Governments. The attitude they had adopted to article 62 *bis* was based on the most rigorous cartesian logic; that was crystal clear and undeniable.

78. In order finally to remove all misunderstandings, it must be made absolutely clear that article 62 *bis* had been proposed not just by western States, by strong and wealthy nations, but that its supporters were in the main the little, weak countries. Support for the article had nothing to do with considerations of wealth, politics or sentiment.

79. His own country had suported article 62 because it represented an essential stage in the procedure for the friendly settlement of disputes arising in connexion with international agreements. But article 62 failed to achieve its specific objective. The Indian representative had asked what would happen if no result was achieved by the application of the provisions of Article 33 of the Charter and had himself replied that if such an impasse were reached, each State must act in good faith. That was what the Indian representative called being realistic and other speakers had maintained the same pretence. In his view, it was quite ridiculous and utterly unrealistic to expect that, if the provisions of Article 33 of the Charter did not lead to a satisfactory result, then an amicable settlement could be reached merely by relying on the parties to the dispute to act in good faith.

80. It had been suggested that article 62 maintained the *status quo* and thus helped to safeguard peace and stability. But if, because national interests were at stake, a country decided to invoke a formal defect in a treaty and, acting solely in accordance with its own wishes, refused to seek agreement under Article 33, it might claim that it was maintaining the *status quo;* that could hardly be described as safeguarding peace and stability.

81. It was inconceivable that the Conference should permit the small nations thus to be left at the mercy of the strong. His country knew from its own experience that love among nations was not the general rule; good faith was not enough, and without a police force there would be a return to the law of the jungle. The small countries desperately needed and yearned for safeguards and guarantees and that was why it was essential to adopt article 62 *bis.*

82. In his view, certain nations were determined that article 62 *bis* should not be adopted and it was by those nations that no real attemps at compromise had been made.

The meeting rose at 6.10 p.m.

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## TWENTY-SEVENTH PLENARY MEETING

*Friday, 16 May 1969, at 12.15 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 62* bis (Procedures for conciliation and arbitration) *and annex I to the convention* (continued)

1. Mr. SEATON (United Republic of Tanzania) said that his delegation had expressed its views on article 62 *bis* at the 72nd meeting of the Committee of the Whole at the Conference's first session. At the second session the representative of the United Republic of Tanzania had pointed out at the 98th meeting of the Committee of the Whole that a victory by the supporters of article 62 *bis* gained solely by parliamentary manœuvre would lack any real meaning. Despite all efforts to reach a compromise which might have been universally acceptable, it was now obvious that article 62 *bis* would be put to the vote in the form in which it had been submitted. That being so, the Tanzanian delegation could do no more than state that it would vote against the article.

2. Mr. KABBAJ (Morocco) said the Moroccan delegation was not basically opposed, from the purely legal point of view, to the actual principle of compulsory adjudication. But article 62 *bis,* on which the Conference was about to vote, introduced into the law of treaties a very complex system of compulsory and automatic settlement which developing countries such as Morocco would find difficult to apply owing to their scanty administrative, technical and financial equipment. Whereas the procedures provided for in article 62 furnished sufficient safeguards to remove all danger in the application of the provisions of Part V of the convention, article 62 *bis* would compel States to decide *a priori* and to agree automatically to submit differences relating to all treaties, whatever their nature, to compulsory adjudication. That would be an infringement of the sovereign equality of States, because they would not be able to judge with complete objectivity in what cases they could resort to some other arrangement, by agreement with the other parties.

3. It would have been possible to allay the apprehensions of the supporters of article 62 *bis* by inserting a provision strengthening article 62 and, in particular, paragraph 3 of that article; a provision might have been included, for example, stating that in no case could a State unilaterally take any kind of measure to set in motion its claim to invoke grounds for the invalidity, withdrawal or suspension of the operation of a treaty. The means provided for in Article 33 of the United Nations Charter, especially those which would attract the support of all countries, might also have been set out. It might thus have been possible — and that would have allayed the concern expressed by the Lebanese representative at the previous meeting — to specify that negotiations would be only a preliminary stage in the settlement procedure and that they would be followed by the other means laid down in Article 33 of the Charter. A provision that would prevent arbitrary action by States tempted to invoke the provisions of Part V of the convention and compel them to resort to the means for the pacific solution of disputes would thus provide wholly adequate safeguards for all. A provision of that kind might indeed be included in any arrangement giving a choice between resort to arbitration and resort to adjudication, in the form of an additional protocol to the convention.

4. The Moroccan delegation was making those suggestions in the hope of saving the convention on the law of treaties and of bringing about the consensus that was essential; it appealed to delegations to display a more understanding attitude towards the small States which were unable, for technical reasons, among others, to accept compulsory and automatic adjudication or arbitration.

5. The PRESIDENT asked the representative of Morocco whether his suggestions constituted a formal amendment.

6. Mr. KABBAJ (Morocco) said he left that point to the President to decide.

7. The PRESIDENT said he concluded that the Moroccan delegation was not submitting any formal proposal for the time being.

8. Mr. DE LA GUARDIA (Argentina) reminded the Conference that the Argentine representative had stated at the 95th meeting of the Committee of the Whole that his delegation regarded article 62 as a satisfactory means of settling disputes arising out of the application of Part V of the convention. His delegation had also stated on that occasion that it would assume a flexible attitude towards any proposals submitted for an article 62 *bis.*

9. From the strictly legal point of view, his delegation had in fact no basic objection to article 62 *bis.* Although the proposed arrangement was not ideal, it was nevertheless workable, particularly since article 77 provided a sound guarantee that the convention would not have retroactive effect.

10. Nevertheless, it was apparent that the wording proposed for article 62 *bis* was difficult for many delegations to accept. Even if the article were to be adopted by a majority, it would not represent a consensus. The Argentine delegation would therefore be unable to vote for article 62 *bis* and would abstain if it was put to the vote.

11. Mr. KHLESTOV (Union of Soviet Socialist Republics), speaking on a point of order, pointed out that over a hundred delegations had already given their views on article 62 *bis.* It might be wise at that stage to limit the time allowed to speakers for explanations of vote.

12. Mr. MUUKA (Zambia) said that, as soon as the Conference had been confronted with the question of a procedure for settling disputes arising out of the application of provisions of the Convention, the Zambian Government had stated that it supported the principle of compulsory arbitration. Zambia had voted for article 62 itself, in the belief that compulsory intervention by an impartial third party would strengthen that article and would further protect the important principles set out in Part V of the Convention. Those views were set out in the summary records of the

56th, 72nd and 96th meetings of the Committee of the Whole.

13. Unfortunately, as a number of delegations had already pointed out, article 62 *bis* as now drafted was unwieldy. In particular, it established settlement procedures which were so slow that they were unlikely to achieve the desired results.

14. More serious still was the existence of a very sharp division in the Conference over that article. Some representatives had seen fit to declare that unless article 62 *bis* was adopted, they would not sign the convention on the law of treaties. Similarly, some of the opponents of article 62 *bis* had threatened that they would not accede to the convention if the article was adopted. In those circumstances, did not wisdom dictate, even at that late hour in the work of the Conference, a continuation of the search for a compromise based, for example, on the enumeration of some of the important provisions of Part V? No one should blind themselves to the fact that, unless article 62 *bis* was acceptable to the great majority of the delegations to the Conference, its adoption would be but a Pyrrhic victory.

15. Accordingly, although Zambia continued firmly to support the actual principle of compulsory arbitration, it could not continue to support article 62 *bis,* because it did not meet the requirements necessary to make the convention a success.

16. The PRESIDENT asked the Zambian representative whether he was submitting a formal amendment to the Conference.

17. Mr. MUUKA (Zambia) said he would confine himself to appealing to all delegations which thought it possible to do so to reconsider their positions on the basis of the suggestions he had made.

18. Mr. OGUNDERE (Nigeria) said that his delegation would vote against article 62 *bis* because it was convinced that certain unofficial proposals with which it was associated offered a reasonable basis for a satisfactory settlement of the problem dividing the Conference, and that the adoption of article 62 *bis* in its present form would eliminate any prospect of achieving a negotiated settlement.

19. Mr. DADZIE (Ghana) said that when the Committee of the Whole had considered articles 62 and 62 *bis* at the first session, his delegation had stated its position unambiguously at the 74th meeting and had made it known that his Government, after lengthy consideration of the matter, had reached the conclusion that article 62 was incomplete and that it would be necessary to provide for a more effective system for the settlement of disputes. The position of his delegation had not changed.

20. However, Ghana was faithful to the attitude it had always adopted at international conferences of that kind, and his delegation had tried to be open-minded so as to help to bring about an acceptable compromise on that controversial question.

21. Contrary to its basic position, his delegation had voted against article 62 *bis* in the Committee of the Whole, in the belief that, at that stage in the Conference's work, the rejection of the article would facilitate the search for a compromise.

22. It had unfortunately not been possible to reach a compromise and, to be consistent with its position, his delegation should have voted in favour of article 62 *bis.* But it would abstain, not only out of courtesy to the countries with which Ghana had certain ties, but also because it still hoped that a compromise solution would be found that would command overwhelming support. His delegation would continue to devote itself to the search for such a solution. However, if an acceptable compromise meant that the majority should take a step towards meeting the minority view, it also required to an even greater extent that the minority should agree to take steps to meet the wishes of the majority.

23. His delegation hoped that, even after the vote on article 62 *bis,* it would still be possible to reconsider the matter if a solution could be devised that would meet with general or almost general agreement.

24. Mr. BRODERICK (Liberia) said that his delegation accepted in principle the procedure set out in article 62 *bis.* His delegation thought, however, that its Government should be left free to choose for itself the means it wished to use to settle disputes arising from the application of Part V of the convention.

25. His Government reserved the right to decide, according to circumstances and if no solution could be found by way of negotiation or by other means of peaceful settlement, whether it would submit a dispute to the International Court of Justice, to a conciliation commission or to an arbitral tribunal. For that reason, his delegation would abstain in the vote on article 62 *bis.*

26. Mr. KEARNEY (United States of America) said that his delegation had refrained from taking part in the debate so far because it had hoped, like many other delegations, that it would be possible to produce a proposal which would muster a large number of votes in the Conference on the difficult problem of the settlement of disputes. A number of proposals had been presented, but they had not received the majority support hoped for. It appeared necessary, therefore, to proceed to the vote. His delegation hoped that all those who considered it essential to have some adequate system for the settlement of disputes, with a view to eliminating the difficulties which might arise from the application of the convention, would support article 62 *bis.* Although it did have certain defects, the article nevertheless constituted a useful device which had been drawn up painstakingly and at the cost of much compromise. At the present stage, to abstain from voting on article 62 *bis* or to vote against it would presumably not simplify the task of finding suitable procedures for the settlement of disputes.

27. The PRESIDENT invited the Conference to vote on article 62 *bis* and annex I to the convention.

28. Mr. ESCHAUZIER (Netherlands) asked to be allowed to make a few comments before the vote was taken.

29. Mr. KHLESTOV (Union of Soviet Socialist Repu-

blics), speaking on a point of order, said that under rule 39 of the rules of procedure, when the President had announced the beginning of the voting, no representative was allowed to interrupt the voting procedure unless he was speaking on a point of order relating to the actual conduct of the voting.

30. The PRESIDENT confirmed that under rule 39 of the rules of procedure, the Netherlands representative could not speak except on a question connected with the voting.

31. Mr. ESCHAUZIER (Netherlands) said that it had not been his intention to speak on a point of order but to make a few comments on article 62 *bis*. Among other things, he had wished to express his sincere regret to the representatives of India, Nigeria and Ghana, with whom he had co-operated closely, at not having been able to reach an agreement. He would still like to make a few comments, but would refrain from doing so because of rule 39 of the rules of procedure.

*At the request of the representative of Australia, the vote was taken by roll-call.*

*Argentina, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Australia, Austria, Barbados, Belgium, Bolivia, Cameroon, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Costa Rica, Cyprus, Dahomey, Denmark, Dominican Republic, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Holy See, Honduras, Iceland, Ireland, Italy, Ivory Coast, Jamaica, Japan, Lebanon, Lesotho, Leichtenstein, Luxembourg, Madagascar, Malta, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Senegal, Spain, Sweden, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

*Against:* Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Czechoslovakia, Ethiopia, Hungary, India, Indonesia, Iran, Iraq, Kenya, Kuwait, Malaysia, Mongolia, Morocco, Nepal, Nigeria, Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Afghanistan, Algeria.

*Abstaining:* Argentina, Brazil, Ghana, Israel, Liberia, Libya, Singapore, Thailand, Trinidad and Tobago, Zambia.

*The result of the vote was 62 in favour and 37 against, with 10 abstentions.*

*Article 62* bis *and annex I to the convention were not adopted, having failed to obtain the required two-thirds majority.*

32. Mr. BADEN-SEMPER (Trinidad and Tobago), explaining why his delegation had decided to abstain on article 62 *bis*, said that during the last few days, sincere efforts had been made to arrive at a compromise which might have obtained wide support in the Conference. In spite of those efforts, the Conference had had to vote on a provision which failed to take into account the negotiations held. His delegation had not been prepared to vote in favour of a provision which might have divided the Conference and had threatened to exclude a large minority of the international community from a very important convention.

The meeting rose at 1 p.m.

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## TWENTY-EIGHTH PLENARY MEETING

*Friday, 16 May 1969, at 3.35 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 62* bis (Procedures for conciliation and arbitration) *and annex I to the convention* (continued)

1. The PRESIDENT invited representatives to continue their explanations of vote on article 62 *bis*.

2. Mr. BINDSCHEDLER (Switzerland) said that the explanation of his delegation's vote would have been the same had article 62 *bis* been adopted. Switzerland had voted in favour of article 62 *bis* only because it was better than nothing at all. It did not wish to become identified with the content of an article which was inadequate in a number of important respects, as the representative of Sweden had pointed out. First, there was the composition of the conciliation commission or arbitral tribunal. Under the article, the power of decision was left to a single person, the chairman. That might be satisfactory in interpreting technical conventions, such as air navigation agreements, but would hardly do for more important disputes. Secondly, the article would have led to the establishment of additional organs for which there was really no need. Thirdly, the procedure proposed for the settlement of disputes would have hampered the consistent development of international law; a particular arbitral tribunal might find that a specific norm constituted *jus cogens* while another tribunal might decide that the same norm constituted *jus dispositivum*.

3. Again, the article made no mention of the International Court of Justice. Had article 62 *bis* been adopted, the Court would have been quietly bypassed. Some of the Court's judgements might be open to criticism, but that did not mean that the institution itself should be condemned. It was, after all, a principal organ of the United Nations. Moreover, some thought should be given to the future. The Court had the advantage of being an institution whose composition was known. The States parties to its Statute were free to appoint the judges with the best qualifications; they could even amend the Court's Statute and rules of pro-

cedure. That might become necessary in the near future, since there were a number of gaps to be filled. Moreover, the Court provided an assurance of uniformity in case law, because it endeavoured to avoid inconsistency in its decisions.

4. Attempts had been made to reach a compromise on article 62 *bis,* but they had failed because the compulsory settlement of international disputes did not lend itself to compromise. Some States were in favour of it while others would accept it, but only for bilateral treaties and in specific cases; still others were opposed to compulsory settlement as a matter of principle. That was the present position, but he hoped that one day ideological and political differences would have narrowed sufficiently to allow a universally acceptable system to be established. Switzerland would continue to work towards that goal.

5. Mr. TOPANDE MAKOMBO (Central African Republic) said that he had abstained from voting on article 62 pending a decision on article 62 *bis,* of which his delegation had been a co-sponsor. Since article 62 *bis* had not been adopted, it had no cause to regret its abstention on article 62.

6. Mr. RUIZ VARELA (Colombia) said that the Conference's failure to adopt article 62 *bis,* of which his delegation had been a co-sponsor, was most regrettable. All that was left was the procedure laid down in article 62 with respect to the invalidity, termination, withdrawal from or suspension of the operation of a treaty.

7. The Colombian delegation had voted in favour of article 62 in the hope that article 62 *bis* would be adopted. It was clear now that political factors had once again been allowed to prevail over legal considerations. Article 62 was manifestly inadequate for the settlement of disputes arising from international treaties. Reference was made in the article to the conventional procedures for settlement mentioned in Article 33 of the United Nations Charter. The parties to a dispute would select whatever procedure they wished, no compulsory machinery being provided. The purpose of article 62 *bis* had been precisely to establish an automatic procedure for the settlement of disputes arising from treaties and to do so in a way which safeguarded the autonomy and sovereignty of the parties and, in particular, the stability of international relations based on treaties.

8. Some delegations had argued that it was still too soon for the international community to accept compulsory methods for the settlement of disputes arising from treaties. That was a surprising argument considering that the United Nations Charter, together with its Article 33, had been signed as long ago as 1945. Inter-State practice showed that the time had come to adapt the content, scope and practical application of Article 33 of Charter to the requirements of the present-day world.

9. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation had co-sponsored article 62 *bis* in the firm conviction that some practical and effective machinery was required for the settlement of disputes arising out of treaties. The article had not been adopted and it remained for him to express regret that the Conference had lost an opportunity to provide the international community with an instrument which would have contributed to the stability and harmony of relations between States.

10. Mr. TODORIC (Yugoslavia) said that his delegation had voted against article 62 *bis,* not because it objected to compulsory arbitration but because the article had failed to commend itself to a great many countries. Yugoslavia was convinced that the convention on the law of treaties should be the product of general agreement and that the machinery it provided for the settlement of disputes should be acceptable to as many States as possible. Only thus would the interests of the international community and the cause of friendly and peaceful co-operation among States be served, in accordance with the principles of the United Nations Charter.

11. Mr. FATTAL (Lebanon) said that there was no need to feel disappointed over the result of the vote on article 62 *bis.* Sixty-two States, representing every tendency except Marxism, had voted in favour of the article, a record figure compared with the number of votes cast for similar provisions at earlier Conferences. After all, sixty-three vote constituted an absolute majority in the United Nations General Assembly. The seed had been sown and would slowly bear fruit.

12. Mr. MOLINA ORANTES (Guatemala) said that his delegation had voted in favour of article 62 *bis* because the new text submitted to the Conference took account in a satisfactory manner of the comments by the Guatemalan representative at the 97th meeting of the Committee of the Whole on some questions of procedure. It was only because of those questions that his delegation had been obliged to abstain from voting at the Committee stage.

13. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he was very satisfied with the result of the vote on article 62 *bis*; thirty-seven countries, representing every different shade of social and other system, had voted against that article, and his own delegation, like the other delegations of socialist countries, had been among them. The rejection of article 62 *bis* now opened the way for serious negotiations for a compromise solution. It was clear that different countries attached great importance to different questions; for some it was the principle of universality, for others it was procedure, and there were yet other approaches. The present circumstances offered favourable opportunities for arriving at a compromise, and every delegation should consider how many steps it could possibly take towards achieving the complex solution which would lead to a generally acceptable convention on the law of treaties. It should be remembered that the convention represented twenty years' work by the International Law Commission, and two years' work in the General Assembly and the Conference.

14. Mr. N'DONG (Gabon) said that the votes of his

delegation in favour of the various articles dealing with the invalidity of treaties had of course been conditional upon the adoption of article 62 *bis*. Following the rejection of article 62 *bis*, his Government would find it difficult to subscribe to a convention which did not include sufficient safeguards on the procedure applicable to the settlement of disputes. The rejection of the formula for a compulsory procedure naturally left the door open to the manœuvres mentioned in articles 46 to 50, against which article 62 *bis* would have protected States. It was the whole future of international treaty relations that was thus threatened.

15. He therefore wished to place on record the fact that his delegation would be obliged to renconsider its position when the time came to vote on the convention as a whole.

16. Mr. MUTUALE (Democratic Republic of the Congo) said that his delegation had voted against article 62 *bis* for the reasons he had stated at an earlier meeting, not because his country belonged to any ideological camp, Marxist or other.

17. Mr. BILOA TANG (Cameroon) said that his delegation did not feel any regret or bitterness following the vote on article 62 *bis*. His delegation was one of those which felt that article 62, with its reference to Article 33 of the Charter, was not sufficient and that article 62 *bis* provided the essential complement to article 62. Article 62 *bis* reflected up-to-date concepts in international law. The fact that the machinery for the compulsory settlement of disputes had not always been used was no reason for discarding it. It was the duty of jurists not only to formulate the rules of law but, even more important, to ensure that they were applied. His delegation hoped that a satisfactory solution to the problem might still be found.

18. Mr. KEARNEY (United States of America) said that the United States had always supported all the articles in Part V; it had also proposed improvements, some of which had been accepted. But, in supporting those articles, not only at the first and second sessions in the Committee of the Whole, but before that in the Sixth Committee, and again before that in its comments to the United Nations on the draft articles, the United States had always made one point perfectly clear, which was that it could only accept articles such as those in Part V if the convention contained an adequate system for the impartial settlement of disputes.

19. He was gratified that so many other States, such a large majority, had agreed with the United States, as shown by the vote at the previous meeting. However, as a result of that vote, a minority of the Conference had deleted from the convention the safeguards which the United States had always regarded as essential, and as a consequence his delegation was faced with a difficult problem. Although it supported Part V, he did not see how in good conscience it could vote for any of the remaining articles in Part V in the absence of any satisfactory means of settling disputes.

20. His delegation could, of course, now begin to vote against the remaining articles in Part V, but he did not consider that that was a reasonable position to take, because it might be that the Conference had not yet exhausted all possible remedies to the situation; he would be reluctant to put himself in a somewhat similar position to that of many representatives who had stated at the previous meeting that they would vote against article 62 *bis* because they were in favour of an adequate method of third-party settlement of disputes. The United States had therefore decided to abstain from voting on the remaining articles in Part V, and would consequently be obliged to abstain also from voting on the excellent technical amendment to article 63 by the Federal Republic of Germany.

21. The United States would remain open to any suggestions for a reintroduction into the convention of adequate means for third-party settlement of disputes. The record showed, and most delegations would confirm, that the United States had laboured hard to find a solution acceptable to as broad a group of delegations as possible. At the present stage he was not aware that any such solution was still possible, but he would remain receptive to any proposal that might be made.

22. Sir Francis VALLAT (United Kingdom) said that his delegation fully shared the views just expressed by the United States representative.

23. Mr. KRISHNA RAO (India) said that what had happened at the previous meeting represented a victory for no one, and a defeat for no one. He was most grateful to the representatives of the Netherlands, Sweden, Nigeria, the United States of America and the Union of Soviet Socialist Republics, as well as to others who had participated in the search for a compromise in the past few days. He fully understood what had led the United States representative to make his last statement, although he himself would prefer not to refer to a majority or minority vote; he had never believed in a vote, and had always preferred to work towards a compromise.

24. He would appeal to the representatives of the United States of America and the United Kingdom not to give up hope of reaching an agreement; efforts should still be made to seek some formula that could win the approval of all sides at the Conference. Until that was achieved, it would be a mistake to give up. Even if the final result was failure, at least there would be the consolation of having tried, instead of just resorting to non-participation or abstention. Those delegations that did not like article 62 *bis* believed in a compromise solution, and would continue to work for such a solution.

25. Mr. YAPOBI (Ivory Coast), referring to the appeal by the representative of India, said that the Ivory Coast believed there was still time to find a solution that would enable all the States participating in the Conference to vote for a compromise formula and sign the convention. His delegation therefore felt no bitterness about what had happened over article 62 *bis*. However, if a compromise solution could not be found, the Ivory Coast would, to its regret, be unable to sign the convention, since its Government, and certain other African

Governments, considered that the guarantee required in relation to Part V of the convention was in fact the guarantee provided in article 62 *bis*.

26. He much regretted that at the previous meeting procedural grounds had been invoked to prevent the representative of the Netherlands from putting before the Conference, on behalf of those delegations which had sponsored the article, a compromise proposal concerning article 62 *bis*. Those delegations had decided during private consultations that if no solution could be found, the representative of the Netherlands would propose a strict limit to the application of article 62 *bis*, and that was what he had intended to do. The invocation of the rules of procedure on a technical point had prevented the possibility of reaching a solution. Nevertheless his delegation hoped that a solution might still be found, and would therefore continue to vote for the articles in Part V.

27. The PRESIDENT said that he believed that the procedure he had adopted at the preceding meeting with respect to the Netherlands request to make a statement had been entirely correct. He hoped, however, like the representative of the Ivory Coast and other speakers, that a solution might still be found to the problem of article 62 *bis*.

28. He invited the Conference to consider article 63.

*Article 63* [1]

*Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty*

1. Any act for the purpose of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties.

2. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

29. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation proposed (A/CONF.39/L.37) that article 63 be replaced by a text reading:

1. The notification provided for under article 62, paragraph 1, has to be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 62 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

30. Paragraph 2 of that text reproduced article 63 as adopted by the Committee of the Whole, except that it combined the two paragraphs into one.

31. The essential purpose of his amendment was to introduce a new paragraph 1 to make the written form mandatory for the notification provided for under article 62, paragraph 1, instead of only for instruments in pursuance of paragraphs 2 and 3 and article 62.

32. A proposal on those lines (A/CONF.39/C.1/L.349 and Corr.1) had been made by Switzerland in the Committee of the Whole but had been rejected after the Expert Consultant had confirmed that the notifications provided for in article 62, paragraph 1, should be carried out in accordance with article 73 on notifications. His delegation had since given careful consideration to the matter and had ascertained that nowhere in the convention, neither in article 62, paragraph 1 nor in article 73, nor under general international law, was there any express provision to the effect that notifications must be made in writing. It was true that notifications need not always be made in written form and that sometimes such a requirement might be going too far. On the other hand, international practice showed that there had been cases in which oral notifications had created uncertainties and difficulties for all the parties concerned. It was sufficient in that respect to refer to the well-known case of the Ihlen declaration.[2]

33. If a State invoked, under the provisions of the convention on the law of treaties, either a defect in its consent to be bound by the treaty or a ground for impeaching the validity of the treaty, for terminating or withdrawing from it or for suspending its operation, the situation called for the greatest possible clarity. The State receiving the notification provided for in article 62, paragraph 1, or the depositary through whom the notification was carried out, must know exactly where they stood. The very principle of *pacta sunt servanda* called for the greatest caution and the manifold political, financial, economic and technical interests which were at stake if the procedure provided for under article 62 was initiated made it unthinkable that any doubts should be permitted as to whether that procedure had been initiated, and, if so, on what precise grounds. His delegation therefore believed that the written form was essential for the notification provided for under article 62, paragraph 1.

34. His delegation did not believe, on the other hand, that for notifications under article 62, paragraph 1, an instrument of the solemn kind provided for under the present article 63 with regard to notifications under article 62, paragraphs 2 and 3, was necessary. Any written form should be allowed for the purpose of initiating the procedure — note verbale, memorandum or other instrument, even without a formal signature by the Head of State, Head of Government or Minister for Foreign Affairs; and specific full powers should not be required. For that reason, his delegation had refrained from simply extending the provisions of the present article 63 to the notifications under article 62, paragraph 1, and had proposed instead a new paragraph which simply required that the notification must be made in writing, leaving the precise form to the choice of the State concerned.

[1] For the discussion of article 63 in the Committee of the Whole, see 74th, 81st and 83rd meetings.

An amendment was submitted to the plenary Conference by the Federal Republic of Germany (A/CONF.39/L.37).

[2] See *P.C.I.J., Legal Status of Eastern Greenland* (Series A/B, No. 53).

35. The PRESIDENT invited the Conference to vote on the amendment to article 63 proposed by the Federal Republic of Germany, which had the effect of replacing the whole of article 63 by a new text.

*The amendment to article 63 proposed by the Federal Republic of Germany (A/CONF.39/L.37), was adopted by 68 votes to 1, with 29 abstentions.*

36. The PRESIDENT said that since the amendment entirely replaced the Committee of the Whole's text of article 63, the original text of article 63 automatically fell and could not be voted on.

37. Mr. ESCUDERO (Ecuador) said that he had voted against the amendment by the Federal Republic of Germany because he considered that paragraph 1 of that amendment was redundant. Paragraph 1 of the original text of article 63 included the words " through an instrument "; that must mean in writing, since he believed that there was no such thing as a verbal instrument.

38. Mr. YAPOBI (Ivory Coast) said he had abstained from voting on the amended version of article 63 for the reasons already given by the representative of Ecuador.

39. Mr. ABED (Tunisia) said that, as one of the sponsors of article 62 *bis*, he had abstained from voting on the amendment by the Federal Republic of Germany for the same reasons as those given earlier by the United States representative.

*Article 64* [3]

*Revocation of notifications and instruments provided for in articles 62 and 63*

A notification or instrument provided for in articles 62 or 63 may be revoked at any time before it takes effect.

*Article 64 was adopted by 94 votes to none, with 8 abstentions.*

40. Mr. BILOA TANG (Cameroon) said that he thought that the French version of article 64 should read " *avant qu'ils n'aient pris effet* " instead of " *avant qu'ils aient pris effet* ".

41. The PRESIDENT said that the Drafting Committee would take that comment into account.

*Statement by the Chairman of the Drafting Committee on articles 2, 31, 32 and 22 and on the proposal for a new article to be inserted between articles 23 and 23* bis.

42. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had considered, at the Conference's request, the amendment submitted by Belgium (A/CONF.39/L.8) to article 2, paragraph 2. The text proposed by the Committee to the Conference read:

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

43. The purpose of the Belgian amendment was to replace the phrase " are without prejudice to " by the words " do not affect ", but the Committee considered that the former term was more suitable in the context. The question whether an international convention might in the long run affect the terminology used by the legislators of a State concerned that State only, and the Committee therefore could not recommend the adoption of the Belgian amendment.

44. When considering the Belgian amendment, the Drafting Committee had reviewed article 2 as a whole and had noted that sub-paragraph 1 (*h*) provided that " 'third State' means a State not a party to the treaty ". It considered that the expression " third State ", rather than the periphrasis " a State which is not a party to a treaty ", should be used in articles 31 and 32 and had altered the wording of those two articles accordingly.

45. The Drafting Committee had also considered at the Conference's request some oral suggestions regarding article 22, and a new article proposed by Yugoslavia.

46. The Drafting Committee considered that the suggestions regarding article 22 would not be any improvement and it had not therefore proposed any change in the text of article 22 which the Conference had adopted at the 11th plenary meeting.[4]

47. The new article proposed by Yugoslavia (A/CONF.39/L.24) [5] was intended to be inserted between articles 23 and 23 *bis* and read " Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith ". The Drafting Committee considered that that was self-evident and that provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule. Contrary to the decision that had been taken in Vienna more than 150 years before, the Drafting Committee considered that it would be better not to state such an obvious fact. The principle of *pacta sunt servanda* was a general rule, and it could only weaken it to emphasize that it applied to a particular case. The Committee therefore did not recommend the adoption of the proposed new article.

*Article 2* (Use of terms)

48. The PRESIDENT invited the Conference to vote on article 2. [6]

*Article 2 was adopted by 94 votes to none, with 3 abstentions.*

*Article 31* [7]

*Treaties providing for obligations for third States*

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the

[3] Article 64 was approved by the Committee of the Whole without discussion. See 74th and 83rd meetings.

[4] For a further statement on article 22, see 29th plenary meeting.

[5] In its original form (A/CONF.39/L.21) this was an amendment to article 23. See 12th plenary meeting.

[6] For text, see 7th plenary meeting.

[7] For the discussion of articles 31 and 32, see 14th plenary meeting.

means of establishing the obligation and the third State expressly accepts that obligation in writing.

*Article 32* [7]

*Treaties providing for rights for third States*

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in corformity with the treaty.

49. The PRESIDENT said that the Conference had already adopted articles 31 and 32, but consequential redrafting had been made necessary by the definition of " third State " adopted in article 2, paragraph 1(*h*). He proposed that the Conference therefore decide to treat the texts of articles 31 and 32 as revised by the Drafting Committee as having been adopted.

*It was so agreed.*

The meeting rose at 4.50 p.m.

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## TWENTY-NINTH PLENARY MEETING

*Monday, 19 May 1969, at 10.30 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

*Article 62* bis (Procedures for conciliation and arbitration) *and annex I to the convention* (resumed from the previous meeting)

1. Mr. JAGOTA (India) said he had been instructed to emphasize or two points in the statement made at the 28th meeting by the Chairman of the Indian delegation, who was at present absent. Mr. Krishna Rao had appealed to certain delegations to adopt a constructive attitude towards the convention, even though some articles to which they attached great importance had not secured the necessary majority. He had expressed his gratitude to the representatives of the Netherlands, Sweden, Nigeria, the United States of America and the Union of Soviet Socialist Republics, who had striven to find a compromise solution, and had regretted that their efforts had not been successful. He had expressed the hope that participants in the Conference would continue to search for a compromise. In paying a tribute to those delegations, Mr. Krishna Rao had not intended to overlook the efforts made by other delegations, such as those of Ghana and Afghanistan, and by the President. Negotiations with a view to a compromise were continuing, and it was to be hoped that the Conference would soon be considering a proposal which would be acceptable to a large majority of States.

*Article 22* (Provisional application) *(resumed from the 11th plenary meeting)*

2. Mrs. WERNER (Poland) reminded the Conference that at the 11th plenary meeting [1] the Polish representative had suggested that paragraph 2 should be amended to read: " . . . the provisional application of a treaty . . . shall be terminated six months after that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty ". That suggestion had been intended to safeguard the interests of States which applied a treaty provisionally and were then faced with the case where one of them suddenly decided to terminate the provisional application. In that connexion, her delegation had thought that the amendment submitted by Yugoslavia (A/CONF.39/L.24) was also justified. It indicated clearly that the *pacta sunt servanda* principle laid down in article 23 was likewise valid for treaties applied provisionally. In international practice, treaties were often applied provisionally, and her delegation thought it necessary to provide suitable guarantees to safeguard the security of treaty relations.

3. Since those suggestions had not been accepted by the Drafting Committee,[2] she wished to state that, according to the Polish delegation's interpretation and in the light of the explanations given by the Chairman of the Drafting Committee, the *pacta sunt servanda* principle was fully applicable to the case where a treaty was applied provisionally; and that the principle of good faith should likewise prevail when the provisional application of a treaty was terminated. It was on that understanding that her delegation had voted in favour of article 22.

*Statement by the Chairman of the Drafting Committee on articles 4, 7, 10* bis, *18, 19 and 20*

4. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had examined the amendments relating to articles 4, 7, 10 *bis* and 19 referred to it by the Conference. In accordance with the Conference's instructions, it had also revised the text adopted by the Conference for article 20. After reviewing the articles, the Committee had made no changes except in article 20 and, consequentially, in article 18.

5. With regard to article 4 (Treaties constituting international organizations and treaties adopted within an international organization), the Conference had referred to the Drafting Committee [3] a Romanian amendment (A/CONF.39/L.9) to replace, in article 4, the expression

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[1] Para. 88.

[2] See 28th plenary meeting, para. 46.

[3] See 7th plenary meeting, paras. 31 and 32.

" within an international organization " by " within such organization " and, in the French text, the words " *de l'Organisation* " by " *de celle-ci* ". Although that amendment would have avoided repetition of the phrase " international organization " in the French text, it would not have made the article easier to understand since anyone reading the French version would have had to remember that " *celle-ci* " referred to " *une telle organisation* " which itself referred to " *une organisation internationale* ". Moreover, the expression " *une telle organisation* " was not very satisfactory in French. For those reasons, the Drafting Committee had decided to make no change in article 4.

6. In the case of article 7 (Subsequent confirmation of an act performed without authorization), the Conference had referred to the Drafting Committee [4] a Romanian amendment (A/CONF.39/L.10) whereby the last phrase of the article would have read: " unless afterwards confirmed by the competent authority of that State ". The Committee had decided not to adopt that amendment because it had considered that it was unnecessary, in an international matter, to say that States should act through their competent authorities.

7. The Conference had referred to the Drafting Committee [5] the text of article 10 *bis* which it had adopted; it had also referred to the Committee a Belgian amendment (A/CONF.39/L.14) to replace, in the introductory part of the article, the expression " treaty constituted by instruments exchanged between them " by the words " treaty concluded by an exchange of letters or notes ". A similar change was proposed in sub-paragraph (*a*). The amendment further proposed that in sub-paragraph (*b*) the word " those " before " States " should be replaced by the definite article " the ". The Committee had studied the Belgian amendment not only in the context of article 10 *bis*, but also in that of article 9 *bis*, the drafting of which it had been invited to review. The Committee had come to the conclusion that it could not accept that amendment, since it would have narrowed the scope of article 10 *bis*: the meaning of the expression " letters or notes " was more restricted than that of the term " instruments ".

8. The Conference had invited the Drafting Committee to reconsider a proposal submitted to the Committee of the Whole by Bulgaria, Romania and Sweden (A/CONF.39/C.1/L.157 and Add.1) to amend paragraph 1 of article 19.[6] The Drafting Committee had expressed appreciation of the concision and elegance of the wording proposed in that amendment; but some of its members had questioned whether the text would be as clear for a reader without expert knowledge as the text adopted by the Conference. The Committee had accordingly thought it best to leave the text unchanged.

9. When it adopted article 20 at the 11th plenary meeting the Conference had taken into account two amendments submitted by Hungary (A/CONF.39/L.17 and L.18) and a suggestion made orally during the discussion. After considering the text adopted, the Drafting Committee had taken the view that the expression " in writing " in paragraphs 1 and 2 might give rise to difficulties of interpretation. That expression was related to the verb " may ". It might therefore mean that, if a State intended to withdraw a reservation or an objection, it was permitted but not compelled, to do so in writing, which was obviously not the meaning that the Conference had intended to give to the text. In order to avoid any misunderstanding, the Committee had decided to delete the expression " in writing " in article 20 and to add to article 18 a paragraph 4 to the following effect: " The withdrawal of a reservation or of an objection to a reservation must be formulated in writing ".

10. The Drafting Committee had made two other changes in article 20. In the title it had added the words " and of objections to reservations ", and it had redrafted paragraph 3 (*a*) to read: " the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State ". The Committee had taken the view that the withdrawal of a reservation in relation to a contracting State might become operative immediately that State had received notice of it, without waiting for the notification to reach all the other contracting States.

11. Lastly, the Drafting Committee had considered that once the new paragraph 4 had been added, article 18 should be placed at the end of Part II, Section 2, since the article, was entitled " procedure regarding reservations " and thus applied to all the matters dealt with in that section. The Committee would transfer article 18 to the end of section 2 when it gave the articles of the draft convention their definitive numbers.

12. The PRESIDENT said that articles 18 and 20 now read:

*Article 18*

*Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

*Article 20*

*Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

[4] See 8th plenary meeting, paras. 61-66.

[5] See 10th plenary meeting, paras. 2 and 3.

[6] See 11th plenary meeting, paras. 6-10.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(*a*) The withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(*b*) The withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which has formulated the reservation concerned.

13. Articles 18 and 20 had already been adopted at the 11th plenary meeting. In the absence of any objection he would assume that the Conference approved the changes made by the Drafting Committee.

*It was so agreed.*

*Proposed new article 76*

1. Disputes arising out of the interpretation or application of the Convention lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Convention.

2. The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice, but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

3. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

14. The PRESIDENT invited the Swiss representative to introduce the new article 76 (A/CONF.39/L.33) proposed by his delegation.

15. Mr. RUEGGER (Switzerland) said that during the first session, at the 80th meeting of the Committee of the Whole, his delegation had submitted a proposal (A/CONF.39/C.1/L.250) to include in the convention a new article 76 dealing with a subject to which the Swiss Government attached great importance. On that occasion he had given the reasons for submitting the proposal, and he would accordingly now confine himself to certain additional arguments in support of the new article.

16. As the Swiss delegation had pointed out at the 103rd meeting of the Committee of the Whole, the Swiss proposal was different from that appearing in article 62 *bis* which had given rise to a lengthy debate. Article 62 *bis* laid down procedures relating to the provisions of Part V of the convention, whereas the new article 76 provided for the settlement of disputes arising out of the interpretation and application of the convention itself. If the special machinery for Part V was not adopted, despite the present efforts to that end, the proposed new article would obviously fill a gap.

17. It was hardly conceivable that there should be no reference either in the convention or in its annexes to the role of the International Court of Justice as the supreme mediator of the international community and the only body in a position to make decisions in accordance with uniform and consistent criteria. All too often there was a tendency to think that the adoption of a very detailed jurisdictional clause represented something revolutionary, in that it implied the relinquishment of sovereign prerogatives. That might be true up to a point, and for that reason the acceptance of compulsory adjudication should be a considered act. And that considered act had taken place not only in connexion with the acceptance of many multilateral agreements of lesser consequence, but also in connexion with the acceptance of international treaties of fundamental importance. Many States had agreed to be bound by compulsory clauses included in multilateral conventions such as the Convention on the Prevention and Punishment of the Crime of Genocide,[7] the Supplementary Convention on the Abolition of Slavery,[8] the International Convention on the Elimination of All Forms of Racial Discrimination,[9] and the 1965 Convention on Transit Trade of Land-locked States.[10]

18. Or again, there was the Constitution of the International Labour Organisation (ILO), which had a universal character which the convention on the law of treaties could not hope to achieve in the near future. That Constitution provided that any dispute relating to its interpretation should be referred for decision to the International Court of Justice. It was difficult to see how a legal conference such as the Conference on the Law of Treaties could refuse to consider invoking the jurisdiction of the Court in respect of the texts it had approved, when that jurisdiction was provided for in an instrument of as universal a nature as the Constitution of the ILO.

19. Immediately after the First World War, even before the adoption of the Covenant of the League of Nations, Switzerland had announced that it supported judicial settlement and arbitration. Although his country fully respected the position of those who did not share that point of view, it had learned from experience that it could achieve satisfactory results through the application of that principle when concluding bilateral agreements with other States. More recently, Switzerland had concluded further agreements providing for conciliation and arbitration procedures with certain African States, such as the Ivory Coast, Cameroon, Liberia, Niger and Madagascar, as well as with States in Latin America and Asia. Those precedents were an encouragement to Switzerland to continue to follow that course.

20. In 1958, at the time of the first great codification conference, it had been Switzerland which, after other proposals had failed to win approval, had spon-

[7] United Nations, *Treaty Series*, vol. 78, p. 277.

[8] United Nations, *Treaty Series*, vol. 266, p. 3.

[9] For text, see annex to General Assembly resolution 2106 (XX).

[10] United Nations, *Treaty Series*, vol. 597, p. 42.

sored the additional optional protocol,[11] in the desire that there should be some link, however tenuous, between law-making codification conventions and the supreme judicial authority called upon to apply the law. The Swiss delegation had noted with regret that that link had proved too weak. It was true, as one delegation had observed during the discussions, that the fact that a very small number of countries had so far signed the optional protocol was not a strong argument in support of compulsory jurisdiction. What the Swiss delegation had intended merely as a transitional formula had, despite its intentions, become a standard clause.

21. Hence much remained to be done — much more than had been achieved as yet in the case of bilateral agreements, for example. There were some who believed that very little progress was likely as long as the body to which reference was to be made was the International Court of Justice. In their opinion a point of crisis had been reached regarding the jurisdiction of the Court, despite the hope and enthusiasm aroused when the Statute had first been drawn up in 1921. Yet the idea of the compulsory jurisdiction of the International Court of Justice continued to gain ground in spite of everything, as was shown by the fact that in 1968 the United Kingdom had withdrawn most of the reservations that it had made previously when it had accepted the optional clause in Article 36 of the Statute of the Court. Again, the Swiss delegation had noted with great satisfaction that some delegations, including the Indian delegation, had stated during the debate on article 62 *bis* that they would prefer adjudication by the Court to arbitration. That was undoubtedly a promising sign. The strength of the Court lay more especially in the willingness of the States that would sign the convention to resort increasingly to the organ best equipped to settle a large number of disputes.

22. The criticisms made of the Court should be directed rather at the indifference of States and their reluctance to act. It was to those shortcomings that a remedy had to be found, since that was one of the conditions of future development. New cases should be brought before the Court, of which far too little use was made. The most distinguished jurists should not be discouraged from spending some time in the service of the Court. In the long run there was a danger that the Court might wither away, a development that none could desire. One of the tasks of the Conference, and of each individual State, was to support the International Court of Justice, for if it was desired that the law should be applied objectively, then there should also be support for the organ which existed for that purpose.

23. Mr. MENDOZA (Philippines) said he supported the new article 76 proposed by Switzerland and designed to include some machinery for compulsory adjudication in the convention. Such machinery must necessarily go hand in hand with the clear and comprehensive rules of law laid down in the convention.

24. To a large extent, article 62 *bis* would have served that purpose. It had not been adopted by the Conference, but in comparison with the votes which had been taken on similar questions at previous conferences, the numerical result of the vote on article 62 *bis* was heartening.

25. His delegation had not forgotten that the International Court of Justice had been the subject of unfavourable comments, at the second session as well as the first. Nevertheless, it was to be hoped that the Conference would not come to an end without having established some method of third party adjudication. In considering the proposed article 76, the Court should not be judged merely on the strength of one or two of its decisions but by the totality of the work it had so far accomplished under the jurisdiction — regrettably emasculated by reservations and non-accessions — which the framers of its Statute had conferred upon it.

26. It would not be idle to recall that the International Court of Justice was the principal judicial organ of the United Nations, that under Article 36 of its Statute it was vested with competence to consider the matters contemplated under the proposed article 76, and that at the present time it seemed to be principal source of uniform rules in international relations.

27. Mr. HADJIEV (Bulgaria) said he was firmly opposed to the Swiss proposal for a new article 76. At the 103rd meeting of the Committee of the Whole, his delegation had stated the reasons why it was opposed to the idea of the compulsory adjudication of disputes between the parties to a treaty. In his opinion, the wide range of means of peaceful settlement set forth in Article 33 of the Charter, to which the parties to a treaty could resort in order to settle their disputes, was perfectly adequate. Compulsory adjudication did not guarantee a just settlement. Nor, contrary to what its supporters claimed, did it guarantee that the interests of small and weak countries would be safeguarded. Furthermore, the fact that the Swiss proposal had been rejected by the Committee of the Whole [12] was certainly no accident.

28. Mr. MARESCA (Italy) said that at the moment when its work was drawing to a close, the Conference found itself compelled to go back to the very sources of legal problems.

29. The rules codified in the convention on the law of treaties were legal rules based solely on legal foundations. The most important characteristic of a legal rule was the guarantee which accompanied it, for if the rule was not accompanied by a guarantee it was not a legal rule. The guarantees in question were first of all indirect, involving the voluntary procedure by which rules were drawn up, the legal conscience of States, and their status as legal entities; but it was also necessary to resort to direct guarantees, since

[11] i. e. the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes adopted by the Conference on the Law of the Sea (for text, see United Nations, *Treaty Series*, vol. 450, p. 170).

[12] 104th meeting.

indirect guarantees might be lacking. Such direct guarantees were partly diplomatic procedures, especially negotiation, and partly non-diplomatic procedures such as arbitration and recourse to judicial bodies. All such direct guarantees were based on the agreement of the parties, failing which it would be impossible to institute any procedure at all.

30. The rules codified in the convention on the law of treaties could give rise to all kinds of legal problems. The Conference thus had a unique opportunity to solve the problem of procedure. However, while it already had reason to congratulate itself on having made tremendous progress in substantive law, progress with respect to procedure had so far been nil. In the event of a dispute concerning any part of the convention, at the present stage the convention provided no guarantee at all. Nevertheless, the work of codification undertaken by the Conference could not remain purely passive; there must be a willingness to extend it into the future. Could there be anything more "progressive" for the Conference than to provide procedural guarantees for the rules it was codifying? The Conference was confronted with a task of fundamental importance which it could not afford to shirk.

31. His delegation was grateful to the Swiss delegation for presenting the Conference with a draft article 76 which rested on a firm foundation. Paragraph 3 of the article proposed that the parties to a dispute should first attempt the traditional procedure of conciliation. If conciliation failed, they would resort either to arbitration or to the procedure before the International Court of Justice, which met every requirement.

32. It was quite wrong to disparage the International Court of Justice, which had crystallized the triumph of international law after both the First and the Second World Wars. If the Court had dashed certain hopes, the blame should be laid on lack of faith and the indifference of the parties.

33. In certain proposals made in 1961 and 1963, at the two great codification conferences already held at Vienna, the same liberal ideas had been advanced. Ultimately, both those conferences had been compelled to fall back on optional protocols, which had proved an illusion. It had to be remembered, too, that in 1963 as in 1961, at the very moment when the conferences concerned found themselves completely divided and in danger of leaving a real legal vacuum, they had not abandoned the attempt to reach a solution; article 37 of the 1961 Convention on Diplomatic Relations and article 34 of the 1963 Convention on Consular Relations, inadequate though they were, had saved both conferences.

34. The article 76 proposed by Switzerland provided a complete solution, which had the great virtue of combining some of the procedural solutions offered in article 62 *bis*. The article might prove to be the crowning success of the Conference. If it should not be adopted, however, it would still be necessary to fill the gap and to produce an article to put in the place of article 62 *bis*.

35. Mr. JAGOTA (India) said he regretted that he would be unable to vote for the new article 76 submitted by Switzerland.

36. Though that proposal left the parties to a dispute the choice between conciliation, arbitration and adjudication, its intention was nevertheless to establish the compulsory jurisdiction of the International Court of Justice as the general rule.

37. India, as was well known, had great respect for the Court. Admittedly it had on occasion confessed its disappointment at some of the Court's decisions, but he could cite many bilateral agreements and several multilateral conventions to which it was a party where there was a clause providing for the compulsory jurisdiction of the International Court of Justice. His country would not, however, be able to accept a procedure for the compulsory settlement of disputes relating to the convention on the law of treaties, if only because of the convention's scope. From the wording of draft article 76, paragraph 1, and the explanations by its sponsor, it was clear that those provisions would apply to the whole convention, and hence to disputes arising under Part V.

38. That being so, he would like to ask the President whether, since the Conference had decided at its 27th plenary meeting not to adopt any compulsory and automatic settlement procedure for disputes relating to Part V of the convention, the proposed article 76 could be put to the vote as it stood without infringing rules 33 and 41 of the rules of procedure, or should it only be put to the vote if disputes relating to the interpretation and application of Part V of the convention were excluded from its application?

39. Mr. ALVAREZ (Uruguay) said that his delegation was in favour of a procedure for compulsory recourse to adjudication for the pacific settlement of international disputes and it supported the Swiss proposal.

40. It was true that some of the advisory opinions and decisions of the Permanent Court of International Justice and the International Court of Justice were controversial from a legal point of view; but it was hard to find a single case in which, in a dispute between a small and a large State when the possibility of recourse to adjudication had not existed, the small State's point of view had prevailed.

41. Mr. TALALAEV (Union of Soviet Socialist Republics) said he was opposed to the Swiss proposal.

42. In any case, the provision it embodied had already been voted down. The proposed new article 76 provided for resort to compulsory adjudication for all disputes arising from the interpretation and application of the convention as a whole; its scope was therefore wider than that of article 62 *bis*. Since there was no article relating to the settlement of disputes arising from the application and interpretation of Part V, the result of the adoption of the Swiss amendment would be that such disputes would lie within the compulsory jurisdiction of the International Court of Justice.

43. Article 76 provided for compulsory recourse to the International Court of Justice, a judicial body which

had become discredited and could not be regarded as an adequate organ for the settlement of disputes.

44. Furthermore, close scrutiny of article 76, paragraphs 2 and 3 revealed that the resort to arbitration and conciliation procedures was in fact mandatory, not optional, since if those procedures failed, the parties would have to accept the compulsory jurisdiction of the International Court of Justice. Article 76 was, therefore, even less satisfactory than article 62 *bis*, and his delegation would vote against it. If certain delegations wished to establish a procedure to supplement article 62, the solution would have to be sought by way of compromise.

45. Mr. RUIZ VARELA (Colombia) said that his delegation supported article 76. At other legal conferences, in particular the Conference on the Law of the Sea, the Colombian delegation had been favourably disposed towards the inclusion of a formula similar to that in article 76.

46. The adoption of the provision proposed by Switzerland would undoubtedly ensure the success of the Conference. What purpose, after all, would be served by codifying the rules of international law unless the codification was accompanied by an adequate procedure for the settlement of disputes arising from the interpretation and application of those rules?

47. His delegation appealed to other delegations to appreciate the scope of article 76, which went some way towards filling the gap caused by the absence of article 62 *bis*.

48. The advantage of the Swiss proposal was that it provided for two other means to which the parties might decide to resort before compulsory recourse to the International Court of Justice, namely arbitration and conciliation.

49. Mr. GALINDO-POHL (El Salvador) said that the new article 76 brought to the convention an essential element of security. The interpretation and application of legal norms could undoubtedly give rise to disputes which could not always be settled by diplomatic negotiation.

50. Article 76 reflected a trend; its purpose was to consolidate and develop international law and it would indicate that the international community had become aware of its existence as an organic whole. The spirit underlying articles 76 and 62 *bis* was the same, but their scope was different.

51. Questions relating to the interpretation of the convention could be settled by the States which had accepted the optional clause for the compulsory jurisdiction of the International Court of Justice, but it would be much more satisfactory if the idea of compulsory recourse to the International Court of Justice were formally incorporated in the convention itself.

52. In any event, States could always make reservations to article 76, if it was adopted, but they would also at all times be able to withdraw their reservations.

53. Mr. TAYLHARDAT (Venezuela) said that the debates in the Committee of the Whole and the plenary Conference had shown that a number of States were firmly opposed to a system of compulsory jurisdiction. His own delegation, indeed, had emphasized on several occasions that the idea of recourse to compulsory jurisdiction had not yet been generally accepted. Venezuela was still opposed to compulsory arbitration and to recourse to the International Court of Justice.

54. For those reasons he would vote against the Swiss proposal, the final result of which would be to establish a system of compulsory adjudication for the settlement of disputes arising from the interpretation and application of the convention as a whole, and consequently of Part V.

55. The PRESIDENT, replying to the Indian representative, said he assumed that the reference was to the first sentence of rule 33 of the rules of procedure, which stated that " when a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides ", and to the fourth sentence of rule 41, which provided that " where the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote ". He himself believed that the point at issue was not a reconsideration of a matter which the Conference had already decided. Article 62 *bis* had referred only to one part of the articles of the convention, those relating to the invalidity, termination and suspension of the operation of treaties. Moreover, its purpose had been to establish a compulsory procedure first for conciliation and then for arbitration.

56. Article 76, however, proposed a procedure for disputes relating to the interpretation and application of the convention as a whole. The proposed procedure provided for the compulsory jurisdiction of the International Court of Justice and other procedures were permitted only as an exception to that principle.

57. The situation referred to in rule 41 of the rules of procedure was not relevant either. Some delegations might have voted against 62 *bis* because they had thought that the article did not go far enough or because they had been opposed to the idea of establishing a procedure for Part V but not for the other parts of the convention. Some delegations might also have voted against the idea of an arbitration or conciliation procedure because they preferred compulsory recourse to the International Court of Justice.

58. Thus it could not be held that the rejection of article 62 *bis* automatically entailed the rejection of the new article 76.

59. Mr. JAGOTA (India) said that he bowed to the President's ruling, although he could not agree with the arguments on which it was based.

60. His delegation wished to point out that the adoption of article 76 would mean that disputes arising out of the interpretation or application of Part V of the convention would automatically come within the jurisdiction of the International Court of Justice, and that if the parties wished to avoid compulsory recourse to the Court, they would have no option but to resort to arbitration or conciliation, both likewise compulsory.

61. For the reasons it had given in the debate on article 62 *bis*, his delegation would vote against article 76.

62. Mr. HAYTA (Turkey) said that his delegation would vote in favour of article 76 because it advocated the establishment of compulsory jurisdiction for the settlement of disputes arising out of the interpretation and application of all treaties.

63. The PRESIDENT invited the Conference to vote on the Swiss proposal.

*At the request of the representative of Switzerland, the vote was taken by roll-call.*

*Bulgaria, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Cambodia, Canada, Chile, China, Colombia, Costa Rica, Denmark, Dominican Republic, El Salvador, Federal Republic of Germany, Finland, France, Guyana, Holy See, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Pakistan, Panama, Philippines, Portugal, Republic of Viet-Nam, San Marino, Senegal, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Australia, Austria, Barbados, Belgium.

*Against:* Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Czechoslovakia, Ethiopia, Hungary, India, Indonesia, Iraq, Kenya, Kuwait, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Afghanistan, Albania, Brazil.

Abstaining: Central African Republic, Ceylon, Cyprus, Ecuador, Gabon, Ghana, Greece, Guatemala, Honduras, Iran, Israel, Ivory Coast, Jamaica, Lebanon, Liberia, Libya, Madagascar, Peru, Republic of Korea, Singapore, Spain, Trinidad and Tobago, Tunisia, Yugoslavia, Zambia, Argentina, Bolivia.

*The result of the vote was 41 in favour and 36 against, with 27 abstentions.*

*The Swiss proposal (A/CONF.39/L.33) was not adopted, having failed to obtain the required two-thirds majority.*

The meeting rose at 1 p.m.

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## THIRTIETH PLENARY MEETING

*Monday, 19 May 1969, at 4.5 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new article 76* (continued)

1. The PRESIDENT invited representatives who wished to do so to explain their votes on article 76.

2. Mr. PINTO (Ceylon) said that his delegation had abstained in the vote on the new article 76 proposed by Switzerland (A/CONF.39/L.33), but wished to make it clear that that vote should not be taken as implying any unwillingness to support the International Court of Justice. On the contrary, the Ceylonese delegation to the present Conference, to the Sixth Committee of the General Assembly and to other international conferences had expressed the view that the principal organ of the United Nations should be supported in appropriate cases. Although Ceylon was not a signatory of the optional clause in Article 36 of the Statute of the Court, it had frequently accepted the Court's compulsory jurisdiction with respect to disputes under certain multilateral agreements. And the Ceylonese Government, though it believed them to be wrong, did not share the general dissatisfaction with the Court which had followed some of its decisions.

3. His delegation had been unable to support the Swiss proposal only because of certain technical and practical difficulties in determining the real scope of the proposed new article, to which it would, however, continue to give serious thought. The phrase " disputes arising out of the interpretation or application of the Convention " could cover disputes under individual treaties where such a dispute also involved a dispute arising out of the interpretation and application of the convention itself. The implications of that possibility were not entirely clear, and it would seem that further close consideration would be required before a decision could be arrived at.

4. His Government would continue to support the idea of referring appropriate disputes to the International Court of Justice and also the principle contained in Article 36 (3) of the United Nations Charter, under which legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

5. Mr. RODRIGUEZ (Chile) said that his delegation had consistently subscribed to the view that adequate machinery should be established for the settlement of disputes between States parties to a treaty. It had done so in the conviction that something should be done to bring *de facto* situations into line with legal rules. Accordingly, Chile had supported the initiatives taken by Japan and Switzerland in the Committee of the Whole with a view to including in the convention a provision for the compulsory settlement of disputes under Part V. It had subsequently abstained from voting on article 62 *bis* because the article provided not only for arbitration but also for compulsory conciliation, a procedure which was not suitable for disputes relating to the invalidity, termination, withdrawal from or suspension of the operation of a treaty. His delegation had nevertheless voted for the article when it had been submitted to the plenary Conference for a decision, because it considered that some procedure for settling disputes under Part V ought to be included in the convention.

6. At the previous meeting the Chilean delegation had

voted for the Swiss proposal to include in the convention a new article 76 providing for compulsory adjudication in disputes arising out of the interpretation or application of the convention. It had done so in spite of its doubts concerning the scope of the article, which restricted compulsory adjudication to disputes arising out of the interpretation or application of the convention itself. It had taken that restriction to mean that article 76 would not apply to disputes relating to the interpretation or application of a treaty that was governed by the convention. In effect, disputes arising from the interpretation and application of many of the rules embodied in the convention would, because of their dispositive character, remain outside the scope of article 76.

## ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

### *Article 77* [1]

*Non-retroactivity of the present Convention*

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention shall apply only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that, since article 77 did not appear in the International Law Commission's draft, its title had been prepared by the Drafting Committee. In the English version of the text, the Committee had replaced the words " subject in accordance with international law " by the words " subject under international law ", a change required by the rules of English usage. The corresponding changes would have to be made in other articles of the draft where the phrase " subject in accordance with international law " appeared, particularly in articles 3 and 40. The Drafting Committee had made no change in article 77 which affected the text in all language versions.

8. The Drafting Committee had considered the question of the position of article 77 in the draft convention and had decided that it should be placed in Part I of the draft between articles 3 and 4, since it concerned a general question governing the convention as a whole. In the English and French versions, the verbs in article 77 should be in the present tense, as they were in the other articles of Part I.

9. Mr. ALVAREZ TABIO (Cuba) said that his delegation would be compelled to vote against article 77 for a number of reasons. At first glance, it might appear absurd that objections should be raised to a rule which was intended to express a universally recognized principle, for it was obvious that rules of law applied from the time of their entry into force and that, in the absence of any provision to the contrary, they were directed toward the future. Nevertheless, the principle of non-retroactivity was only one aspect of the problem of the application of international law in point of time; in addition to that principle, other problems arose for which it was necessary to seek a just solution.

10. In the first place, it was necessary to consider the conflicts which arose when the same legal situation fell under various rules which succeeded each other in time. It was then essential to avoid a situation where the legal order which had lapsed might superimpose itself on the new law. And from that point of view, the formula presented in article 77 was unacceptable, since it laid down the principle of non-retroactivity in inflexible terms, while excluding the problems raised by the inter-temporal law. As the International Law Commission had stated in paragraph (3) of its commentary to article 24: " The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date ".

11. Secondly, the object of article 77 was to regulate the temporal effects of a convention whose essential purpose was to consolidate generally accepted rules of customary law; in other words, it was not a question of non-retroactivity proper, but only of the application of pre-existing rules systematically arranged in a codification of the law of treaties. It could not be argued that the opening clause of the article recognized the existence of a prior international legal order, since the effectiveness of that legal order depended on the possibility that existing treaties might be subject to it. If that misleading clause were accepted, the rules of international law set forth in the convention would possess full authority with respect to treaties concluded after their entry into force, something which could only apply to prior legal situations which would be governed by them if they were subject to the rules " independently of the convention ". That phrase deprived the convention of any real force by denying it authority, as such, over a treaty which, because it retained its effects in time, came under the established substantive rules.

12. Thirdly, the problem became more acute in connexion with peremptory norms of international law, which now, under the convention, acquired indisputable authority. An example was the conflict which arose in determining the meaning of article 49 in the light of the inflexible norm in article 77. As the International Law Commission had stated in paragraph (1) of its commentary to article 49: " the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today ". Whatever differences of opinion there might have been concerning the state of the law prior to the establishment of the United Nations, most international lawyers firmly maintained that Article 2 (4), together with other provisions of the Charter, authoritatively stated modern customary law with respect to the threat or use of force. As the International Law Commission had pointed out in paragraph (1) of its commentary to article 50, the rule concerning the prohibition of the use of force, which was the rule in article 49, " in itself constitutes a conspicuous example of a rule in international law

[1] The proposed new article 77 was discussed in conjunction with the final clauses at the 100th to 105th meetings of the Committee of the Whole.

having the character of *jus cogens* ". Yet article 77 contained a general reservation which made the application of any rule of international law, whatever its character, subject to the condition that the treaty must be governed by it independently of the convention.

13. While article 49 recognized the authority of the convention to impose of itself the principle which it was codifying in relation to any treaty which was opposed to it, article 77 denied any such authority in the case of inter-temporal situations. Article 61, taken in conjunction with article 49, stated that any existing treaty that was opposed to a universally accepted norm of *jus cogens* became void and terminated, but article 77 weakened that principle by introducing doubts about the authority of that rule prior to the entry into force of the convention. In short, the convention was denying in one article what it already recognized in others. The contradiction could be resolved by applying the universally accepted rule of law that special law derogated from general law where it conflicted with it. But even then there would still remain a latent conflict, since an excessively wide margin was left for wrong interpretation.

14. Another question was what repercussions article 77 might have on codified general rules which contained an element of progressive development. For example, there was the case of estoppel; with respect to treaties concluded prior to the convention, would estoppel apply with the restrictions imposed upon it by the last clause in the first paragraph of article 42, or would it apply without considering that element of progressive development? In other words, would the doctrine of estoppel also apply to unequal treaties where consent had been obtained by coercion? Could it give validity and effect to a treaty which was void *ab initio?*

15. Article 77 carried the principle of non-retroactivity beyond what was reasonable and by denying the law of treaties as such any power to govern prior provisions which came under its authority, would maintain a persistent uncertainty with respect to the scope of certain customary rules of international law established in the convention.

16. The Conference, near the end of its task, seemed to be introducing an element whose practical effect would be to render inoperative the basic function of an instrument designed to affirm in unambiguous terms certain fundamental principles, not only of with respect to the law of treaties but also with respect to of international as a whole.

17. Mr. TORNARITIS (Cyprus) said that his delegation's views on article 77 had been expressed at the 103rd meeting of the Committee of the Whole. Rules of international law adopted for the first time through the convention on the law of treaties could not have retroactive effect, but it was self-evident that rules already in existence and incorporated in the draft convention should continue to be applicable to international agreements, whether the agreements were entered into before or after the adoption of the convention. Most of the substantive, as distinct from the procedural, rules set out in the convention fell into the latter category.

18. Mr. HUBERT (France) said that his delegation had voted in favour of article 77 in the Committee of the Whole and would do the same in the plenary Conference, on the following understanding: that article 77 was to be interpreted as meaning that a treaty concluded before the entry into force of the convention on the law of treaties in respect of a State party to the convention might be invalidated by virtue of the rules set forth in the convention but existing independently of it; on the other hand, if a case of voidability had been created by the said convention, for example in a case arising out of the application of a peremptory norm of *jus cogens,* a treaty concluded prior to the entry into force of the convention in regard to a State party to it was not voidable on that account.

19. The PRESIDENT invited the Conference to vote on article 77.

*Article 77 was adopted by 81 votes to 5, with 17 abstentions.*

20. Mr. ESCUDERO (Ecuador) said that he had been instructed to state, with regard to article 77, that it was his Government's understanding that the rules referred to in the first part of article 77 included the principle of the peaceful settlement of disputes set forth in Article 2 (3), of the United Nations Charter, whose *jus cogens* character conferred upon that rule a universal, peremptory force. Consequently, Ecuador considered that the first part of article 77 was applicable to existing treaties. It was therefore clear that article 77 contained the incontrovertible principle that when the convention codified rules of *lex lata,* the latter, being pre-existing rules, could be invoked and applied to treaties concluded before the entry into force of the convention, the instrument in which they were codified.

21. Mr. SMEJKAL (Czechoslovakia) said that his delegation had stated its position on article 77 at the 102nd meeting of the Committee of the Whole. His delegation had voted for article 77 not only because it contained a generally recognized principle of law but because it followed clearly from the article that non-retroactivity in no way affected the need to apply all the rules stated in the convention to which treaties would be subject under international law, and thus ensured that the principles of international law codified by the convention would be fully applied independently of the coming into force of the convention.

22. Those principles of international law necessarily applied to all treaty relations at the time they were established, for in such cases it was not possible to speak of the principle of non-retroactivity, only of the need to apply legal principles existing at the time of the establishment of the treaty obligations. Thus, for example, treaties whose conclusion had been obtained by the threat or use of force in violation of the principles of international law in force at the time of conclusion of those treaties were null and void.

23. Mr. BLIX (Sweden) said that his delegation, which had been a sponsor of the proposal just adopted as article 77, wished to explain its positive vote with a

clarification on one minor point. It was his delegation's understanding that, when applied to a multilateral treaty, the article meant that the convention would be applicable between States which participated in the conclusion of a multilateral treaty after the convention had come into force for them, although there might be other parties to the same multilateral treaty for which the convention had not come into force.

*Statement by the Chairman of the Drafting Committee on articles 44 and 57*

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had considered, at the request of the Conference, two amendments relating respectively to articles 44 and 57. It had decided to make no change in article 44 but had made a few changes in article 57.

25. Article 44 [2] was entitled " Specific restrictions on authority to express the consent of a State ". The Conference had adopted the Drafting Committee's text for that article but had referred to it a drafting amendment by Spain (A/CONF.39/L.26) to reword the article to read:

> The omission by a representative expressing the consent of his State to be bound by a treaty to observe a specific restriction imposed by his State on the authority granted to him for that purpose may not be invoked as invalidating the consent unless the restriction was notified to the other negotiating States prior to his expressing such consent.

26. The Drafting Committee had considered that the Spanish amendment gave rise to a number of drafting difficulties. In the French and English versions, the subject of the sentence was a long way from the verb and it did not seem possible to improve the translation of the original Spanish in that respect. The expression " his State " was perhaps somewhat unfortunate. It referred to the " representative ", but it sometimes happened in modern practice that a State was represented by a person who was not a national of that State. Finally, the word " imposed ", referring to " specific restriction " had created some misgivings. For those reasons, the Committee could not recommend the adoption of the Spanish amendment to article 44.

27. The new text proposed for article 57 read:

*Article 57*

*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(*a*) The other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) In the relations between themselves and the defaulting State, or

(ii) As between all the parties;

(*b*) A party specially affected by the breach to invoke it as ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(*c*) Any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(*a*) A repudiation of the treaty not sanctioned by the present Convention; or

(*b*) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

28. The Drafting Committee had originally submitted a text for article 57 [3] consisting of four paragraphs. At the 21st plenary meeting, the Conference had accepted a number of drafting changes proposed by the United Kingdom (A/CONF.39/L.29) and had adopted the principle contained in a Swiss amendment (A/CONF.39/L.31) which it had requested the Drafting Committee to consider in the light of the discussion. The Swiss amendment was to add a paragraph 5, reading:

> The foregoing paragraphs do not apply to provisions relating to the protection of the human person contained in conventions and agreements of a humanitarian character, in particular, to rules prohibiting any form of reprisals against protected persons.

29. The Drafting Committee had noted that paragraph 4 already began with the words " The foregoing paragraphs . . . ", and read: " The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach ". In view of the final words of paragraph 5, the Drafting Committee had assumed that it had not been the Conference's intention to remove the provisions of that paragraph from the scope of application of paragraph 4, and it had therefore replaced the words " The foregoing paragraphs " at the beginning of paragraph 5 by the words " Paragraphs 1 to 3 ". Bearing in mind the definitions given in article 2, the Drafting Committee had replaced the expression " conventions and agreements " by the word " treaties ", had substituted the word " provisions " for the word " rules ", and after inverting in the English version the order of the words " protected persons ", had added at the end of the paragraph the words " by such treaties ".

30. Mr. ROSENNE (Israel) said that it was his delegation's understanding that the meaning of the intro-

[2] For the discussion of article 44, see 18th plenary meeting.

[3] For this text, and the discussion of articles 57, see 21st plenary meeting.

ductory phrase in paragraph 2 (*a*) as now submitted by the Drafting Committee was that the other parties might by unanimous agreement suspend the operation of the treaty in whole or in part or terminate it in whole or in part.

31. The PRESIDENT said that, if there were no objection, he would take it that the Conference agreed to adopt article 57 as amended by the Drafting Committee.

*It was so agreed.*

*Draft resolution relating to article 1*

32. The PRESIDENT suggested that, if there were no objection, the draft resolution relating to article 1, contained in paragraph 32 of the report of the Committee of the Whole on its work at the first session (A/CONF.39/14), might be considered as unanimously adopted.

33. Mr. ROSENNE (Israel) said that if the draft resolution were put to the vote, his delegation would abstain because it was not convinced that the matter was really ripe for the further study contemplated by the resolution, and he did not wish to commit his delegation's position in case the matter should be discussed by the General Assembly.

34. Mr. BLIX (Sweden) said that his delegation had no objection to the substance of the draft resolution. A number of points of a drafting nature had, however, been made on behalf of the International Bank for Reconstruction and Development, which had not yet been considered by the Drafting Committee. He therefore moved that a decision on the draft resolution be postponed in order that he might have time to submit a drafting amendment.

35. The PRESIDENT said that the decision on the draft resolution would accordingly be postponed until the following day.[4]

**Election of a member of the Credentials Committee**

36. The PRESIDENT said that the Conference had to elect a member of the Credentials Committee to replace the representative of Mali, who was absent. He suggested that the representative of the United Republic of Tanzania would be a suitable replacement.

*It was so agreed.*

The meeting rose at 5 p.m.

[4] See 32nd plenary meeting.

## THIRTY-FIRST PLENARY MEETING

*Tuesday, 20 May 1969, at 11 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(resumed from the previous meeting)*

*Statement by the Chairman of the Drafting Committee on the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties and related resolution*

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that, at its 20th plenary meeting, the Conference had adopted a declaration on the " Prohibition of the threat or use of economic or political coercion in concluding a treaty " and a related resolution. As the Conference had requested, the Committee had reviewed the wording of the declaration and the resolution and was submitting a new text incorporating the drafting amendments it had made. It read as follows:

*Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties*

*The United Nations Conference on the Law of Treaties,*

*Upholding* the principle that every treaty in force is binding upon the parties to it and must be performed by them in good faith,

*Reaffirming* the principle of the sovereign equality of States,

*Convinced* that States must have have complete freedom in performing any act relating to the conclusion of a treaty,

*Deploring* the fact that in the past States have sometimes been forced to conclude treaties under pressure exerted in various forms by other States,

*Desiring* to ensure that in the future no such pressure will be exerted in any form by any State in connexion with the conclusion of a treaty,

1. *Solemnly condemns* the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent;

2. *Decides* that the present Declaration shall form part of the Final Act of the Conference on the Law of Treaties.

*Resolution relating to the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties*

*The United Nations Conference on the Law of Treaties,*

*Having adopted* the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties as part of the Final Act of the Conference,

1. *Requests* the Secretary-General of the United Nations to bring the declaration to the attention of all Member States and other States participating in the Conference, and of the principal organs of the United Nations;

2. *Requests* Member States to give the Declaration the widest possible publicity and dissemination.

2. With regard to the title of the declaration, the Committee had considered that in the phrase " threat or use of coercion " the word " coercion " alone should be kept since a threat was one form of coercion. Moreover, as operative paragraph 1 referred to pressure in any form, " whether military, political or economic " those three adjectives should be reproduced in the title in that order. Lastly, the word " treaty " after " conclusion of " should be in the plural, since the declaration related to the conclusion of treaties in general, not to the conclusion of a particular treaty.

3. With regard to the preamble to the declaration, the Committee had thought that the ideas formerly expressed in the fourth, fifth and sixth paragraphs might be expressed more concisely in two paragraphs.

4. In operative paragraph 1 of the declaration the Committee had inserted the word " whether " after the words " in any form " for reasons of style.

5. In the resolution the Committee had altered the wording of the preamble so as to incorporate the improvements it had made in the title of the declaration. It had also made some drafting changes in each of the language versions.

6. The PRESIDENT said that, in the absence of objections, he would regard the declaration on the prohibition of military, political or economic coercion in the conclusion of treaties and the related resolution as having been adopted.

*It was so agreed.*

## TEXT OF THE PREAMBLE SUBMITTED BY THE DRAFTING COMMITTEE

*Vienna Convention on the Law of Treaties*

*The States Parties to the present Convention,*

*Considering* the fundamental role of treaties in the history of international relations,

*Recognizing* the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

*Noting* that the principle of good faith and the *pacta sunt servanda* rule are universally recognized,

*Affirming* that disputes concerning treaties, like other international disputes, should be settled by peaceful means,

*Recalling* the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

*Having in mind* the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States and of the prohibition of the threat or use of force,

*Believing* that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

*Have agreed* as follows:

7. The PRESIDENT invited the Chairman of the Drafting Committee to introduce the text of the preamble to the convention prepared by that Committee.[1]

8. Mr. YASSEEN, Chairman of the Drafting Committee, said that, in accordance with the Conference's instructions, the Drafting Committee had drawn up a draft preamble. The draft was based on two proposals, one submitted by Mongolia and Romania (A/CONF.39/L.4) and the other by Switzerland (A/CONF.39/L.5 and Corr.1), and on suggestions transmitted directly to the Committee by the Australian delegation.

9. Some members of the Drafting Committee had suggested the addition of the following paragraph:

*Convinced* that the benefits of international co-operation should be ensured to all and that every State has the right to enter into international treaty relations.

10. Agreement could not, however, be reached on the inclusion of that paragraph.

11. Mr. HOUBEN (Netherlands), introducing the amendment (A/CONF.39/L.42 and Add.1) of which his delegation and the delegation of Costa Rica were co-sponsors, said that the sixth paragraph of the preamble submitted by the Drafting Committee, which listed some of the major principles of international law embodied in the Charter, should also expressly mention universal respect for, and observance of, human rights and fundamental freedoms for all.

12. There seemed to be no need to stress the growing importance of human rights in inter-State relations and as a subject-matter of international conventions. Respect for human rights was one of the main foundations of peace and justice. The United Nations Charter was based essentially on the recognition of the equal and inalienable dignity and rights of the human person. That notion appeared in particular in the second paragraph of the preamble to the Charter, in Article 1 (3), in Article 13 (1 *b*) and in Article 55 (*c*).

13. Since the proclamation of the Universal Declaration of Human Rights a large number of instruments had been adopted elaborating on the major principles in the Declaration, in particular, the International Convention on the Elimination of All Forms of Racial Discrimination,[2] the International Covenant on Civil and political Rights [3] and the International Covenant on Economic, Social and Cultural Rights.[4] The unanimous adoption of the last two instruments by the General Assembly was a milestone in the efforts of the United Nations to ensure universal respect for human rights. Other instruments relating to human rights had been adopted within regional organizations. In particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms [5] concluded at Rome within the framework of the Council of Europe, had become a living reality in intra-European relations.

14. The adoption of those instruments showed that the international community was becoming increasingly aware that effective respect for human rights must be

[1] Amendments were submitted by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1); Sweden (A/CONF.39/L.43); Ecuador (A/CONF.39/L.44); Switzerland (A/CONF.39/L.45).

Proposed texts for the preamble had been submitted to the Drafting Committee by Mongolia and Romania (A/CONF.39/L.4) and Switzerland (A/CONF.39/L.5 and Corr.1).

[2] For text, see annex to General Assembly resolution 2106 (XX).

[3] For text, see annex to General Assembly resolution 2200 (XXI).

[4] *Ibid.*

[5] United Nations, *Treaty Series*, vol. 213, p. 221.

ensured in State practice. The international community was coming increasingly to consider itself entitled to judge whether States were or were not respecting the norms of the most fundamental human rights. It was perhaps there above all that the area which, under Article 2 (7) of the charter, was essentially within the domestic jurisdiction of States was progressively narrowing. The importance of the relationship between the codification of human rights, their progressive development and the law of treaties scarcely needed stressing. It was to be noted that violation of fundamental human rights had probably been the example most frequently cited during the discussions on article 50. As certain human rights did indeed belong to the notion of *jus cogens,* the Conference would expose itself to justifiable criticism if it were not to embody in the preamble to the convention the principle of respect for human rights, the more so since other principles of international law had been included and certainly not all of them could be regarded as being likely to involve *jus cogens.*

15. It should also be borne in mind that the Conference had adopted the Swiss amendment to article 57 (A/CONF.39/L.31), the effect of which was that the provisions of that article concerning the right to invoke a breach as a ground for terminating a treaty or suspending its operation did not apply to treaties of humanitarian character.

16. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation had become a sponsor of the Netherlands amendment because respect for human rights was one of the Costa Rican nation's essential beliefs.

17. Mr. EEK (Sweden) said that his delegation served on the Drafting Committee and had participated in the work of the sub-committee on the preamble. Its amendment (A/CONF.39/L.43) did not mean that it disapproved of the Drafting Committee's text.

18. The seventh paragraph of that text contained a reference to the purposes of the United Nations, as set forth in Article 1 (1) of the Charter. One of the purposes enumerated in that paragraph of the Charter was not, however, included in the seventh paragraph of the Drafting Committee's text — the settlement of international disputes by peaceful means. That was because the Drafting Committee had thought that the settlement of international disputes by peaceful means was so important that it should be mentioned in a separate paragraph of the preamble. The principle had therefore found expression in the fourth paragraph.

19. His delegation nevertheless thought that in the fourth paragraph of the preamble the Conference should closely follow the wording of Article 1 (1), of the Charter, which provided that international disputes were to be settled by peaceful means and " in conformity with the principles of justice and international law ". His delegation's amendment was in keeping with the ideas the Drafting Committee had had in mind when drawing up the text of the preamble.

20. Mr. RUEGGER (Switzerland) said that his delegation's amendment (A/CONF.39/L.45) reflected a tradition exemplified in particular by the Conventions on the Law of the Sea and the Conventions on Diplomatic Relations and on Consular Relations. The Swiss delegation thought that consideration should be given to precedents and practice on the subject.

21. Admittedly, the Conference had succeeded in reducing a new and substantial part of customary law to writing; but gaps remained, so that occasionally it was still necessary, in the practice of international relations, to fall back on custom.

22. Mr. ALCIVAR-CASTILLO (Ecuador), introducing his delegation's amendment (A/CONF.39/L.44), said that the legal effect of preambles to international conventions had long been a subject of academic controversy. The opinion had finally prevailed that the preamble was to be considered as an integral part of the treaty, in other words that it became a source of legal obligations. That was his delegation's view of the preamble proposed to the Conference.

23. The third paragraph stated that the principle of good faith and the *pacta sunt servanda* rule were universally recognized; his delegation was glad to see that a distinction had been made between a principle and a rule. Good faith was a principle which governed contractual acts and which must inevitably be reflected in the intentions of the contracting parties, in the nature of the obligations contracted and in the right to insist that they be respected. In the past, the policy of powerful States had been to foster the belief that the *pacta sunt servanda* rule was sacrosanct, so as to consolidate their position of strength. The peremptory norms of international law which, regardless of the will of States, governed the international legal order, limited the legal effect of the *pacta sunt servanda* rule, and that fact was fully recognized in the preamble.

24. His delegation considered, however, that the third paragraph was incomplete. During the debate on article 2 in the Committee of the Whole, it had submitted an amendment (A/CONF.39/C.1/L.25/Rev.1) proposing, *inter alia,* the addition of the words " freely consented to " in the definition of the term " treaty ". The substance of that amendment had met with no objection, and it was therefore generally accepted that freedom of consent was a legal principle which governed contractual acts as a peremptory and fundamental rule. The only objection which had been put forward was that article 2 did not give general definitions, but specified the meaning given to certain terms in the convention. His delegation had accepted that argument at the time, but had reserved the right to revert to the matter when the preamble was discussed. It was convinced that the objection raised in connexion with article 2 was not valid in respect of the preamble, which dealt with general concepts. The purpose of the Ecuadorian amendment was to ensure that the universal recognition of the principle of good faith and the *pacta sunt servanda* rule also covered another legal principle, which unquestionably had mandatory force.

25. With regard to the Swiss amendment (A/CONF.39/L.45), he said that in the international sphere, custom had often been imposed by powerful States; there had

been certain unacceptable practices which it was still impossible to forget. But, with the development of treaty law as a source of general international law, especially after the international community had become legally organized through the League of Nations, customary practice tended to find its source in treaty rules, in other words treaty rules acquired a universal dimension as a result of custom. For those reasons his delegation accepted the Swiss amendment.

26. The Ecuadorian delegation also supported the Swedish amendment (A/CONF.39/L.43); it was of particular importance because it reproduced the rule set forth in Article 1 of the United Nations Charter. That rule had been included in the Charter as a result of the efforts of small States and despite the opinion of the Dumbarton Oaks experts who, on the pretext of political realism, had advocated the maintenance of international peace and security at any price, even at the expense of justice and international law.

27. His delegation further supported the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), which introduced the idea of the observance of human rights and fundamental freedoms.

28. He hoped that the text of the preamble, as well as the amendments submitted, would be adopted.

29. Mr. PELE (Romania) said that the preamble to an international convention was important, because it was from the preamble that the significance of the provisions and terms of the convention should become apparent. The draft preamble submitted by the Drafting Committee fulfilled that basic function. By its reference to the role of treaties in the history of international relations, the proposed text drew attention to the use which peoples had made of the agreements and conventions to which they had had recourse since the earliest stage of their existence as organized human communities. The development of international society had confirmed the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation between States, whatever their constitutional and social systems. That was bound to be the case, since a treaty was the outcome of the free exercise of the will of States as sovereign entities. It rested on the recognition of certain rules of international conduct, in the absence of which law and peaceful co-operation between States would be impossible. With that in mind, the preamble stated that the principle of good faith and the *pacta sunt servanda* rule were universally recognized.

30. The draft preamble emphasized a fact which was essential for treaty law as a whole, namely that the *pacta sunt servanda* rule represented the application of the principle of good faith to the performance of treaties. That principle held good at all stages in the existence of a treaty, including conclusion, entry into force, interpretation and termination.

31. Treaty relations between States could be built up on the solid foundation provided by the principles of international law embodied in the United Nations Charter. In essence, those principles were the equal rights and self-determination of peoples, the sovereign equality and independence of States, the prohibition of the threat or use of force, and non-interference in the domestic affairs of States. The international personality of States, and hence their capacity to conclude treaties and freely to consent to be bound by treaties, were inconceivable without the strict observance of those principles, which were of universal application. His delegation was convinced that the codification of treaty law would serve the cause of justice in international life and thus help to maintain international peace and security and develop friendly relations and co-operation among States.

32. His delegation noted with satisfaction that the draft preamble took into account certain ideas by which it had been guided when, jointly with the Mongolian delegation, it had proposed a draft preamble for consideration by the Drafting Committee (A/CONF.39/L.4). It nevertheless thought that the preamble should also embody the principe expressed in the text submitted by Mongolia and Romania, namely that every State, in conformity with the principle of the sovereign equality of States, had the right to participate in the conclusion of multilateral treaties of concern to the international community in general. The inclusion of that principle in the preamble would give the convention the breadth which, as an instrument of universal application, it ought to have. His delegation would nevertheless support the additional paragraph whose inclusion had been proposed by some members of the Drafting Committee, which stated that the benefits of international co-operation should be ensured to all and that every State had the right to enter into international treaty relations. In the light of what he had stated, the Romanian delegation approved the draft preamble submitted by the Drafting Committee; it was rich in substance and accorded well with the convention as a whole.

33. Mr. ALVAREZ (Uruguay) said he wished to refer to the considerations that had weighed with the Drafting Committee in drafting the proposed wording. The main point it had borne in mind was that the preamble formed part of the context of the convention and that it was of great importance for the purpose of interpreting the instrument. Consequently a natural legal link must be maintained between the preamble and the actual text of the convention by including only what was strictly necessary, and making a careful choice of the formulas and terms used. The text was accordingly based on the terminology used in the United Nations Charter. In addition, an effort had been made to provide a short, concise and objective text which would bring out as clearly as possible the true meaning of treaties as a source of international law, their importance in the development of international relations, and the significance of the work of codification and progressive development of international law. Consequently there had been a deliberate exclusion of any ideas which, however well-founded, were extraneous to the convention, or which might introduce an element of confusion into its interpretation and weaken the basic principles set forth, or which might be regarded as superfluous. In short, the aim had been to draft an eminently legal preamble for a convention whose content was eminently legal.

It was in the light of those considerations that the delegation of Uruguay had examined the amendments proposed.

34. With respect to the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), he said that the sixth preambular paragraph listed the principles of international law embodied in the United Nations Charter, which it had been considered appropriate to refer to for the purposes of the convention. The Drafting Committee had therefore followed the text of Articles 1 and 2 of the Charter, which were to be found in Chapter I, entitled " Purposes and Principles ". His delegation had no objection to the inclusion of the words " and of universal respect for, and observance of, human rights and freedoms for all ", but he wished to point out that those words appeared not in Articles 1 and 2 of the Charter but in Article 55, which was part of Chapter IX, " International economic and social co-operation ". It would be better to adhere to the language used in Articles 1 and 2, in order to keep a uniform terminology. He understood that the Drafting Committee had not wished to include that principle because it had no special link with the convention.

35. His delegation would support the Swedish amendment (A/CONF.39/L.43) because it corresponded to Article 1(1) of the Charter, which provided that international disputes should be settled not only by peaceful means, but also " in conformity with the principles of justice and international law ". The amendment introduced a constructive element into the preamble, and faithfully reproduced the language of the Charter.

36. The notion of free consent embodied in the amendment by Ecuador (A/CONF.39/L.44) was undoubtedly well founded, but it would be better to include it in a separate paragraph concerning the conditions governing the validity of treaties. It was a notion that was quite different in character from the principle of good faith and the *pacta sunt servanda* rule referred to in the third paragraph.

37. He regretted that his delegation would be unable to support the Swiss amendment (A/CONF.39/L.45). He did not believe the amendment reflected legal reality, and it would introduce an element of confusion into the preamble. Questions not expressly regulated by the provisions of the convention would continue to be governed by the general rules of international law, regardless of their source, in conformity with Article 38 of the Statute of the Iinternational Court of Justice.

38. Mr. MARESCA (Italy) congratulated the Drafting Committee on its text. All the amendments before the Conference had merits of their own and deserved careful examination.

39. His delegation supported the Swedish amendment (A/CONF.39/L.43), since it believed that it was essential that disputes should be settled by peaceful means and in conformity with the principles of justice and international law. If the Conference succeeded in agreeing on an article to replace article 62 *bis,* the situation would be clearer, but it would be as well to state that principle at the beginning in order to show that it was one of the essential elements in the structure of the convention.

40. There were reasons of tradition and of law, as well as practical reasons, to recommend the Swiss amendment (A/CONF.39/L.45). Tradition had its value and was embodied in such instruments as the Conventions on Diplomatic Relations and on Consular Relations. From the legal point of view, the rules of customary law were of cardinal importance; the Conference had tried to make rules that would cover everything, but even so it had left many matters aside. The rules of customary law existed, and it was desirable to state at the outset that those rules would continue to govern questions which had not been expressly regulated by the provisions of the convention. From the practical point of view, the competent departments in Ministries of Foreign Affairs would find it useful to be able to have recourse to the rules of customary law in cases where the convention gave no guidance. The final paragraph of the preamble to the convention would thus refer to certain rules which remained valid, and the Swiss amendment therefore deserved support.

41. Mr. KOULICHEV (Bulgaria) said the legal importance of the preamble to the convention should be stressed, since it set out the aims agreed upon by the parties when concluding the convention and recited in general terms some of the basic elements on which the law of treaties was based. It would therefore be of great importance for the interpretation of the convention.

42. The merit of the Drafting Committee's proposed preamble was that it laid stress on certain extremely important aspects of the law of treaties, and at the same time its arrangement followed that of the introductory texts of the major instruments of codification drawn up in recent years, such as the Convention on the Law of the Sea and those on Diplomatic and Consular Relations.

43. The draft preamble should, however, be completed by including the principle stated in the proposal by Mongolia and Romania (A/CONF.39/L.4), that every State had the right to establish international treaty relations. It was infortunate that that idea had not been accepted by the Drafting Committee, since it was a basic right of every State and a manifestation of the principle of the sovereign equality of States and of their right and duty to participate in international co-operation. The importance of that element to the law of treaties was evident and it should have a place in the preamble to the convention.

44. His delegation also considered that it should be affirmed in the preamble that the rules of customary international law would continue to govern questions not expressly regulated by the provisions of the convention. That idea had been embodied in the draft by Mongolia and Romania and was reproduced in the Swiss amendment.

45. The Bulgarian delegation had no objection to the amendments submitted by Sweden, by the Netherlands and Costa Rica, and by Ecuador.

46. Mr. DE CASTRO (Spain) said his delegation was highly satisfied with the draft preamble submitted by

the Drafting Committee. As each of the amendments had characteristics of its own, he would examine them in turn.

47. The purpose of the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) was to complete the list of the principles and rules of a *jus cogens* character listed in the sixth paragraph of the preamble. The new example given was an excellent one and his delegation had no objection to the amendment.

48. The Swedish amendment (A/CONF.39/L.43) was in conformity with the views and wishes of the international community, which held that to proclaim principles was not enough; they must be respected in practice and put into effect by means of appropriate procedures. The Spanish delegation supported the proposal.

49. His delegation could not accept the amendment by Switzerland (A/CONF.39/L.45). The intention in the amendment was apparently to exclude the principles of law referred to in Article 38 of the Statute of the International Court of Justice and also to modify what had already been adopted in article 77; for the reference in article 77 to customary law had been replaced by a reference to the rules of international law because it had been thought necessary to include a reminder of the existence of the general principles of law.

50. The amendment by Ecuador (A/CONF.39/L.44) widened the scope of the convention by a reference to " free consent ". The reference to that notion established a link between the preamble and Part V of the convention.

51. The paragraph which some members of the Drafting Committee had been in favour of adding [6] reproduced an idea put forward by Mongolia and Romania, and mentioned also in the draft resolution proposed by Spain (A/CONF.39/L.38). The Spanish delegation would be glad to see a reference to that principle either in the preamble or in the form of a resolution.

52. Mr. NYAMDO (Mongolia) said that his delegation had tried to participate to the utmost in the Conference's work and, in conjunction with the Romanian delegation, had submitted a draft preamble (A/CONF.39/L.4). It had noted with satisfaction, in reading the draft preamble submitted by the Drafting Committee, that the Committee had adopted almost all the basic ideas set out in the Mongolian and Romanian draft. The preamble was a very important element in a convention, since it gave an indication of the spirit and essential meaning of what had been agreed.

53. His delegation would also support the paragraphs which had not been included in the proposal in document A/CONF.39/L.4 and had been added by the Drafting Committee. In particular, the second paragraph of the preamble was very useful, for it accurately reflected the existing situation with regard to the development of treaty relations. International agreements were indeed an important source of international law. His delegation would not oppose the fourth paragraph of the preamble, since it had always considered that disputes should be settled by peaceful means.

54. Unfortunately, there was one question upon which the members of the Drafting Committee had not been able to agree, namely the right of every State to participate in international treaties. The proposed additional paragraph was a compromise solution, and his delegation of course preferred the wording in the draft preamble proposed by Mongolia and Romania, but it would nevertheless support the compromise formula.

55. So far as the amendments were concerned, his delegation was in favour of the Swiss proposal (A/CONF.39/L.45).

56. Mr. KEARNEY (United States of America) said he supported the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1). His delegation was also of the opinion that the wording of the preamble to the convention should be brought into line with that of the Charter, as proposed in the Swedish amendment (A/CONF.39/L.43).

57. He had been impressed by the logic of the Uruguayan representative's analysis and was convinced by his arguments. He was therefore unable to support either the Swiss amendment (A/CONF.39/L.45) or the amendment by Ecuador (A/CONF.39/L.44).

58. It was not clear to his delegation whether the additional paragraph mentioned by the Chairman of the Drafting Committee was formally before the Conference as an amendment to the proposed preamble. Some speakers appeared to be acting on that assumption. If that was indeed the case, his delegation would oppose the addition of the paragraph, because it considered it to be a political provision introduced from political motives. It added nothing to the text of the preamble and prejudged the whole question to which it related.

59. Turning to the last paragraph of the Drafting Committee's text, he said that it was his firm conviction that " the codification and progressive development of the law of treaties achieved in the . . . Convention will promote the purposes of the United Nations ". He hoped, in particular, that the Conference would solve the problems still to be overcome on the question of the settlement of disputes. In that connexion, it had been suggested at previous meetings that the United States had never really wanted the Conference to be a success and had never really worked towards that end. He wished to state most emphatically that such insinuations were completely baseless. The United States delegation had spared no effort to enable the Conference to solve the problem of the settlement of disputes. That was proof of its sincere interest in a successful Conference and Convention. It still hoped that the efforts to achieve a positive result, towards which it had consistently contributed, would be successful.

60. Mr. NASCIMENTO E SILVA (Brazil) said that the preamble submitted by the Drafting Committee, following a useful initiative by Mongolia and Romania (A/CONF.39/L.4), was most satisfactory.

61. However, from the very outset the Brazilian delegation had been surprised to find that the preamble contained no reference to customary international law,

[6] See above, para. 9.

a basic principle which was constantly mentioned in the preambles to international conventions. His delegation had been about to submit an amendment designed to remedy that oversight, only to find that Switzerland had already done so (A/CONF.39/L.45), as it had in 1961 in connexion with the Convention on Diplomatic Relations and again in 1963 in connexion with the Convention on Consular Relations.

62. Since customary international law had been mentioned in the preamble to those Conventions, it ought to be referred to in the convention on the law of treaties. The absence of any reference to it might create confusion when the convention was being interpreted in the future. If customary international law had not been mentioned in the earlier conventions, it might have been held that there was no need for a reference to it in the present convention. As it was such a reference was unavoidable.

63. Some representatives had argued that there were other sources of international law; reference had been made, for instance, to the 1928 Havana Convention on Treaties. The Havana Convention would continue to apply under article 26 of the convention on the law of treaties. Moreover, under article 34 of the convention on the law of treaties, the Havana Convention would also apply to the many States which had not yet ratified it.

64. He would also remind the Conference that, when article 77 was being discussed in the Committee of the Whole, the representative of Spain had observed that the expression " customary international law " was broad enough to encompass certain supplementary sources of law; the statute of the International Law Commission included among those sources the decisions of national and international courts. The Brazilian delegation considered that the Swiss amendment (A/CONF.39/L.45) should be adopted unanimously.

65. His delegation also supported the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) for the reasons that had led the Conference to adopt the Swiss amendment which now formed part of the convention as paragraph 5 of article 57.

66. Mr. YASSEEN (Iraq) said he had no objection to the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) and would vote for it. He would also vote in favour of the Swedish amendment (A/CONF.39/L.43).

67. With regard to the Ecuadorian amendment (A/CONF.39/L.44), the idea which it sought to emphasize was already implicit in the notion of good faith. Moreover, a whole series of articles of the convention were concerned with " consent " to be bound by a treaty. However, the idea was perhaps worth mentioning in the preamble itself and he would therefore vote in favour of the amendment.

68. The paragraph proposed in the Swiss amendment (A/CONF.39/L.45) had been included in the two codification conventions signed at Vienna in 1961 and 1963. The subject in question belonged to the general theory of law and the general principles of international law. There was no great objection to a reference to customary law in the convention on the law of treaties since there were precedents for it, but the wording proposed by Switzerland, which was that used in the two Vienna Conventions, was not sufficiently exact and precise. The word " expressly " was open to criticism, for the rules which applied were subject to interpretation and the questions which arose were settled either directly — in other words, " expressly " — or indirectly, in other words " implicitly ". An implicit rule was as valid as an explicit rule. The word " expressly " would be prejudicial to the convention since it would unduly limit its scope. The Swiss proposal should therefore be amended accordingly.

69. Mr. KHLESTOV (Union of Soviet Socialist Republics) said the Drafting Committee had made a constructive and positive contribution by setting out in the text of the preamble it had submitted to the Conference the most important of the principles on which the law of treaties relied, namely the principle of good faith, the *pacta sunt servanda* rule, the need to settle disputes by peaceful means, and so on.

70. In the same spirit, howerer, it should be possible to include in the preamble a mention of the principle of universality. He did not wish at that stage to rehearse afresh all the arguments in favour of inserting that principle, but he would stress that logic dictated the need to complete the preamble in that way so as to bring it truly into conformity with the purposes of the convention.

71. The Drafting Committee had submitted to the Conference, as it was bound to do, both the text approved unanimously by its members and a paragraph which only some of its members had been willing to accept. The Soviet Union delegation had no doubt that the paragraph had been submitted to the Conference because it was for the Conference to take the final decision. Consequently, the Conference must take a decision both on the text of the preamble submitted by all the members of the Drafting Committee and on the additional paragraph which would ensure that there was a reference to the principle of universality in the preamble to the convention on the law of treaties. His delegation thought that the paragraph might have been better drafted, but it was nonetheless acceptable as it stood.

72. He had no objection in principle to any of the amendments. The wording of the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), which proposed to reproduce in the text of the preamble the actual language of the Charter, might be brought even closer to the text of Article 1(3) of the Charter; it might read: " . . . and the need to promote and encourage respect for human rights and for fundamental freedoms for all ". The sponsors might perhaps be willing to bear that suggestion in mind.

73. With regard to the Swedish amendment (A/CONF.39/L.43), the reference might be simply to " the principles of international law ", since " justice " had already been mentioned in the fifth paragraph of the Drafting Committee's text of the preamble. There was, however, no real difficulty involved.

74. The Russian version of the Ecuadorian amendment

(A/CONF.39/L.44) called for certain corrections by the Soviet Union delegation, which it would transmit in due course.

75. The Swiss amendment (A/CONF.39/L.45) called for no comment.

76. He noted that the United States representative had assured the Conference of his delegation's desire for compromise and conciliation. The Soviet Union delegation, like many other delegations, considered that a reference to the principle of universality in the preamble to the convention was essential. A mention of the principle in the preamble would cause the Soviet Union delegation to take a certain position on the convention as a whole. A refusal by the Conference to include a mention of the principle would cause the Soviet Union to take a different position on the Conference's work of codification.

77. In the circumstances, he had no objection to an immediate vote on the various amendments (A/CONF.39/L.42, L.43, L.44 and L.45), subject to the drafting suggestions he had made, if their sponsors so wished, but he would ask the Conference to postpone the vote on the Drafting Committee's draft preamble as a whole and on the paragraph inserting a reference to the principle of universality in the preamble.

78. Mr. ROMERO LOZA (Bolivia) said he supported the principle underlying the Swiss amendment (A/CONF.39/L.45), but thought it was too restricted, since it gave the impression that questions which had not been expressly regulated in the convention would continue to be governed by the rules of customary law alone. It should be couched in broader terms.

79. His delegation would vote for the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), since Bolivia traditionally supported any proposal calculated to enhance the importance of fundamental freedoms.

80. It also very strongly supported the Ecuadorian amendment (A/CONF.39/L.44); the merits of the principle of freedom of consent were universally recognized. Since it had not been possible to state that principle expressly in article 2, it should be mentioned in the preamble.

81. His delegation would also vote for the Swedish amendment (A/CONF.39/L.43), the purpose of which was to secure closer co-ordination of the sources of international law.

82. Mr. SINHA (Nepal) observed that the conciseness and objectivity of the preamble submitted by the Drafting Committee harmonized perfectly with the convention itself. It was in conformity with the purposes of the United Nations Charter and gave due prominence to the rights and dignity of States, whether powerful or weak. It was well known that the preamble to a treaty contained the key to the interpretation of any obscure or ambiguous provisions. From that point of view the Drafting Committee's text of the preamble met all the conditions required for an introduction to the convention.

83. He wished to make a drafting suggestion for consideration by the Drafting Committee, though he was not submitting it as a formal amendment; in the last line of the second paragraph the phrase " whatever their constitutional and social systems " should be replaced by the words " irrespective of their constitutional and social systems ". The former phrase was not consistent with the dignity characterizing the remainder of the text and put the matter in a rather negative way, whereas the latter would be more suited to the context and was more positive.

84. All the amendments were useful. His delegation would vote for them, but, in any event, whether the amendments were adopted or rejected, it would vote for the text of the preamble submitted by the Drafting Committee. It would, however, have wished the principle of universality to be included in the preamble.

85. The PRESIDENT said that the Nepalese representative's suggestions would be referred to the Drafting Committee.

The meeting rose at 12.55 p.m.

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## THIRTY-SECOND PLENARY MEETING

*Tuesday, 20 May 1969, at 9 p.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

TEXT OF THE PREAMBLE SUBMITTED BY THE DRAFTING COMMITTEE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the preamble submitted by the Drafting Committee (A/CONF.39/18) together with the amendments by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), Sweden (A/CONF.39/L.43), Ecuador (A/CONF.39/L.44) and Switzerland (A/CONF.39/L.45).

2. Mr. ALVAREZ TABIO (Cuba) said that the Drafting Committee's text provided a good working basis for the preparation of the final wording of the preamble, but he had reservations regarding the last paragraph. His delegation could not agree that the purposes of the Charter to which it referred would be promoted by excluding the principle of universality. On the contrary it was a retrograde step which took the Conference further away from the fundamental objective of developing friendly relations among nations and achieving international co-operation.

3. Nor was his delegation convinced that the great task of codification undertaken in the convention would be fulfilled, since the inclusion of article 77 removed from the convention as such the authority to state with immediate effect the *lex lata* rules it contained.

4. His delegation supported the amendment by Ecuador (A/CONF.39/L.44) to include in the third paragraph a reference to the principle of freedom of consent. That principle was of paramount importance; fair and just treaty relations were not possible without it. His delegation also supported the amendment by Sweden (A/CONF.39/L.43) which embodied the principle that peace must be built on the foundations of justice and international law.

5. With regard to the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) he shared the views of other speakers that the reference to human rights and fundamental freedoms should be couched in the language of Article 1(3) of the Charter.

6. He was opposed to the Swiss amendment (A/CONF.39/L.45) since it would introduce an element of confusion. Paragraph 3 of article 27, which listed the sources to be used in interpretation, stated " there shall be taken into account, together with the context . . . any relevant rules of international law ". Since, according to paragraph 2 of that article, the preamble formed part of the context, the Swiss amendment (A/CONF.39/L.45) would have the effect of placing customary law above the other sources of international law.

7. Mr. NEMECEK (Czechoslovakia) said that his delegation would vote in favour of the Netherlands and Costa Rican, the Swedish and the Ecuadorian amendments. It warmly supported the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) to include a reference to the observance of human rights and fundamental freedoms. The precise wording should reflect the general agreement of the Conference, provided the essential idea was retained. His delegation also favoured the Swiss amendment (A/CONF.39/L.45), though it supported the suggestion put forward by the representative of Iraq at the previous meeting, that the adverb " expressly " should be dropped.

8. He hoped that the largest possible number of delegations would support the addition to the preamble of the suggested paragraph on the right of every State to enter into international treaty relations which had been advocated by some members of the Drafting Committee.[1] It would be lamentable if the Conference was unable to agree even on that modest formula, which reflected a generally accepted principle.

9. Sir Francis VALLAT (United Kingdom) said that his delegation would vote against the additional paragraph, if it were formally proposed, because it represented one more effort to raise, under the guise of " universality ", a blatant political issue which had been spoiling the atmosphere of the Conference for the past two weeks. And his delegation, for one, was not prepared to go on having that political poker thrust down its throat.

10. With regard to the amendments which had been submitted to the preamble, he agreed with what the United States representative had said at the previous meeting, except on one point: he personally considered that the Swiss amendment (A/CONF.39/L.45), affirming the rules of customary law, constituted a proper supplement to the preamble. At the same time, he agreed that the adverb " expressly " should be dropped.

11. Mr. NAHLIK (Poland) said that his delegation which, as a member of the Drafting Committee as well as of its sub-committee on the preamble, had participated in the formulation of the preamble, was among those in favour of the additional paragraph referred to by the Chairman of the Drafting Committee. The wording of the paragraph had been taken partly from the Australian suggestions concerning the preamble and partly from the proposal by Mongolia and Romania (A/CONF.39/L.4). So far as he could see, it contained nothing that could be regarded as unacceptable and he had accordingly been surprised to hear it referred to as a " political poker ". It referred to a right already adopted by the Conference in article 5, and since that right was of the first importance, the preamble would be incomplete if it did not contain a reference to it.

12. His delegation had no objection in substance to the amendments by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), Sweden (A/CONF.39/L.43) and Ecuador (A/CONF.39/L.44), although some of the elements they contained either stated the obvious or were less directly connnected with the law of treaties than those mentioned in the Drafting Committee's text. They should perhaps be referred to the Drafting Committee so as to avoid repetitions and to ensure that the wording of the Charter was used when referring to the principles it embodied.

13. He had no objection to the Swiss amendment (A/CONF.39/L.45) restating the rule that customary rules were subsidiary to the treaty rules established in the convention. The proposed paragraph, if adopted, should, however, be amended so as to refer explicitly to customary " international " law, not just to " customary " law, and the adverb " expressly " should be dropped.

14. His delegation would be obliged to reserve its position on the seventh paragraph of the preamble; the belief that the codification and progressive development of the law of treaties had been " achieved in the present convention " could not be properly expressed until the whole of the convention had been adopted by the Conference. For that reason, he agreed with the USSR representative and the other speakers who had suggested that the vote on the preamble be deferred until all the substantive provisions of the convention and the final clauses had first been disposed of.

15. Mr. BINDSCHEDLER (Switzerland) said that he would agree to delete the adverb " expressly " from the text of his amendment (A/CONF.39/L.45), as suggested by the representative of Iraq at the previous meeting.

16. Mr. HOUBEN (Netherlands) said that he had understood the USSR representative to suggest that,

[1] See previous meeting, para. 9.

in the amendment submitted by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), the language of Article 1(3) of the Charter should be used in preference to that of Article 55 *c*, on which it was in fact based.

17. There were several reasons for preferring the language of Article 55 *c* to that of Article 1(3) for the purposes of the amendment. Article 1 of the Charter set forth the purposes of the United Nations, and in paragraph 3 spoke of " promoting and encouraging " respect for human rights and for fundamental freedoms. The purpose of the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) was to include a reference to human rights and fundamental freedoms in the sixth paragraph of the preamble, which dealt with " the principles of international law embodied in the Charter ". In setting forth a principle of international law, it would be inappropriate to speak of " promoting and encouraging ". The principle of international law in the matter could only be that of the " universal respect for, and observance of, human rights and fundamental freedoms ", as set forth in Article 55 *c* of the Charter. In that context, his delegation attached much importance to the notion of " universal " respect and to the words " and observance of ". The sixth paragraph of the preamble referred in general terms to the " principles of international law embodied in the Charter " as a whole, and not to the purposes of the United Nations set forth in Article 1, or the principles set forth in Article 2. It was worth noting that the sixth paragraph of the preamble mentioned among the " principles of international law embodied in the Charter " that of " non-interference in the domestic affairs of States " in language which departed from that used in Article 2(7) of the Charter, and which was not based on any other provision of the Charter.

18. Furthermore, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had agreed on a specific formulation of the Charter principle relating to the " duty of States to co-operate with one another in accordance with the Charter ". In operative paragraph 2 (*b*) of that formulation, it was declared that " States shall co-operate in the promotion of universal respect for and observance of human rights and fundamental freedoms for all." That language had been taken from Article 55 *c* of the Charter and had been accepted by all the members of the Special Committee, including the USSR. The text of that formulation had been included in the Special Committee's report.[2]

19. He therefore appealed to the USSR representative to weigh carefully the reasons of the sponsors for using the language of Article 55 *c* of the Charter and to give that text his support.

20. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he would not insist on his suggestion for a different wording and would be prepared to vote on the language used in the amendment as it stood (A/CONF.39/L.42 and Add.1).

21. The PRESIDENT said he would now put the various amendments to the vote.

*The amendment by Ecuador (A/CONF.39/L.44) was adopted by 61 votes to 1, with 32 abstentions.*

*The amendment by Sweden (A/CONF.39/L.43) was adopted by 89 votes to none, with 3 abstentions.*

*The amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1) was adopted by 93 votes to none, with 3 abstentions.*

*The amendment by Switzerland (A/CONF.39/L.45), as orally amended, was adopted by 77 votes to 6, with 11 abstentions.*

22. The PRESIDENT asked whether any delegation wished to make a formal proposal regarding the additional paragraph referred to by the Chairman of the Drafting Committee.

23. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that, at the previous meeting, he had understood the Romanian representative to have proposed the inclusion of the additional paragraph as an amendment to the preamble, and his delegation also wished to sponsor that amendment. However, since efforts were at present being made to reach a compromise solution on a number of important points, he moved that the vote on that amendment, and also on the preamble as a whole, be deferred. It would only make the whole situation more complex if the Conference were to vote forthwith on the amendment and the preamble as a whole.

24. Mr. KEARNEY (United States of America) said that the Conference should proceed to vote both on the amendment to the preamble and on the preamble itself. Further postponement would make it difficult for the Conference to finish its work in time.

25. Mr. SECARIN (Romania) said that the preamble was an essential part of the convention as a whole and should therefore include the principles on which the general philosophy of the convention was based. The amendment, which it had proposed to the Drafting Committee, related to one of those principles and merited careful study. He therefore supported the motion for postponement of the vote.

26. Mr. SEATON (United Republic of Tanzania) said that the motion for postponement was reasonable, since the Conference had not yet disposed of an important issue mentioned in the convention.

27. Sir Francis VALLAT (United Kingdom) said that the motion for postponement should be put to the vote without debate. His delegation strongly opposed the motion since it would further delay the work of the Conference.

28. Mr. BRODERICK (Liberia) said he saw no reason why the preamble should be divided into two parts. If

[2] See *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 87, document A 6799, para. 161.

the proposed final paragraph was before the Conference, it should be voted on immediately.

29. The PRESIDENT invited the Conference to vote first on the motion to postpone the vote on the amendment to the preamble.

*The motion for postponement was rejected by 43 votes to 24, with 32 abstentions.*

30. The PRESIDENT invited the Conference to vote on the amendment to the preamble proposed by Romania and the Soviet Union.[3]

*The amendment to the preamble was rejected by 42 votes to 31, with 25 abstentions.*

31. The PRESIDENT invited the Conference to vote on the text of the preamble proposed by the Drafting Committee, as amended.

*The preamble, as amended, was adopted by 86 votes to none, with 11 abstentions.*

32. Mr. BLIX (Sweden) said that his delegation had abstained in the vote on the amendment by the Netherlands and Costa Rica (A/CONF.39/L.42 and Add.1), not because it was against the principle of universal respect for and observance of human rights and fundamental freedoms for all, but because it did not think that the principle of human rights was directly covered in the convention. The other principles enumerated in the sixth paragraph of the preamble were more closely related to some of the principles embodied in the convention.

33. His delegation had also abstained on the amendment by Romania and the Soviet Union because it referred to the " right " of any State to enter into international treaty relations. He could have supported the amendment had the word " capacity " been used instead.

34. Mr. DE LA GUARDIA (Argentina) said that he had abstained in the vote on the amendment by the Netherlands and Costa Rica for the reasons stated by the representative of Sweden.

35. Mr. BILOA TANG (Cameroon) said that his delegation had voted in favour of all the amendments to the preamble with the exception of the Swiss amendment (A/CONF.39/L.45), on which it had abstained because the amendment related to customary international law only.

36. With regard to the amendment by Romania and the USSR, he thought that the preamble was not the proper place for a reference to the principle of universality and his delegation had therefore abstained.

### *Draft resolution relating to article 1*
(resumed from the 30th plenary meeting)

37. The PRESIDENT invited the Conference to consider the draft resolution relating to article 1 which had been submitted by the Committee of the Whole, and the amendment thereto proposed by Sweden (A/CONF.39/L.46).

38. The draft resolution was worded as follows:

*The United Nations Conference on the Law of Treaties,*

*Recalling* that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

*Taking note* that the Commissions's draft articles deal only with treaties concluded between States,

*Recognizing* the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

*Recommends* to the General Assembly of the United Nations that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations.

39. Mr. BLIX (Sweden) said that at the first session of the Conference his delegation had proposed the draft resolution relating to article 1 submitted by the Committee of the Whole.[4] The operative part of his delegation's present amendment provided that the proposed study by the International Law Commission of the question of treaties concluded between States and international organizations should be undertaken in consultation with the principal international organizations. He had consulted a number of delegations on that point and they had considered the amendment useful. He therefore hoped that it would commend itself to the Conference.

40. He wished to make two drafting changes in the text of the amendment; the word " assuring " in the second preambular paragraph should be replaced by the word " ensuring " and the word " close " in the operative paragraph should be deleted.

41. Mr. PINTO (Ceylon) said he supported the Swedish amendment because it provided for co-operation between the International Law Commission and the international organizations.

42. Mr. GONZALEZ GALVEZ (Mexico) said that adoption of the Swedish amendment would not affect the priorities already agreed to by the International Law Commission regarding the topics in its programme of work.

43. Mr. USENKO (Union of Soviet Socialist Republics) said that the operative part of the Swedish amendment was fraught with serious danger and he would therefore vote against it. Article 26 of the statute of the International Law Commission already provided that the Commission " may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions." Under the Swedish amendment, the Commission would

[3] i. e. the proposed additional paragraph (see previous meeting, para. 9).

[4] See Committee of the Whole, 3rd meeting, paras. 5 and 75, and 11th meeting, para. 7.

be bound to consult the international organizations. Many international organizations were not universal in character but represented mainly the Western States. Those States would thus be in a position to exert pressure on the Commission and would, in fact, become consultant members.

44. In view of his delegation's position, he must ask for a separate vote on the operative paragraph in the Swedish amendment, which he would oppose. He had no objection to the two new preambular paragraphs it proposed.

45. Mr. YASSEEN (Iraq) said that he appreciated the Swedish delegation's desire for co-operation between the International Law Commission and the international organizations. However, that was already provided for in article 26 of the statute of the Commission, which had been drafted by the General Assembly itself.

46. Mr. WERSHOF (Canada) said that the representative of the USSR had perhaps exaggerated the position with regard to the Swedish amendment. In the first place, it was for the General Assembly to decide whether, and on what terms, to refer the topic to the International Law Commission. Secondly, while the Commission, under its own statute, would presumably consult the principal international organizations in one form or another when the Commission was engaged on a study that directly concerned the functioning of those organizations, the Swedish amendment could do no harm. Lastly, the suggestion that the Commission should consult the principal international organizations did not mean that it should invite them to take part in its work, as appeared to be suggested by the Soviet Union representative.

47. The Canadian delegation would therefore vote for the Swedish amendment; it had no objection to the request for a separate vote on the operative paragraph.

48. Mr. MARESCA (Italy) said that international organizations played an important part both in diplomatic law and in the law of treaties. Some international organizations were called upon, by their very nature, to contribute to the development of law — the Council of Europe was a case in point — and it would be wrong to ignore them. He hoped, therefore, that the Swedish amendment would be carefully considered by the Conference.

49. Mr. HUBERT (France) said that his delegation would abstain from voting on the draft resolution and the amendments thereto. The draft resolution formulated a recommendation to the General Assembly, which alone had competence to decide what topics should be submitted to the International Law Commission for study. The French delegation was not certain that the recommendation in the draft resolution ought to be made. The question of treaties concluded between States and international organizations or between two or more international organizations presented important and delicate problems. It might therefore be premature to refer the matter to the International Law Commission at the present stage.

50. The PRESIDENT said he would invite the Conference to vote first on the operative paragraph in the Swedish amendment (A/CONF.39/L.46), on which a separate vote had been requested.

*The operative paragraph in the Swedish amendment was adopted by 47 votes to 14, with 30 abstentions.*

51. The PRESIDENT invited the Conference to vote on the additional preambular paragraphs proposed in the Swedish amendment.

*The additional preambular paragraphs were adopted by 69 votes to none, with 24 abstentions.*

52. The PRESIDENT invited the Conference to vote on the Swedish amendment as a whole.

*The Swedish amendment as a whole was adopted by 64 votes to none, with 30 abstentions.*

*The draft resolution relating to article 1, as amended, was adopted by 85 votes to none, with 13 abstentions.*

### *Proposal for the reconsideration of article 19* (Legal effects of reservations) [5]

53. The PRESIDENT invited the Netherlands representative to introduce his proposal for the reconsideration of article 19.

54. Mr. MAAS GEESTERANUS (Netherlands) said that his delegation, together with those of India, Japan and the USSR had submitted an amendment (A/CONF.39/L.49), to the text of article 19. Paragraphs 1 and 2 of article 19 described the legal effects of a reservation which had been accepted, whereas paragraph 3 stated the effects of a reservation to which an objection had been made; the factual situation in the two cases was therefore quite different. The article had been adopted at the 11th plenary meeting, and the Drafting Committee, of which the Netherlands delegation was a member, had reworded the article that very day, shortly before the plenary Conference had taken its decision. The rewording had followed the adoption by the Conference of an earlier amendment in connexion with another article, but he and the other sponsors of the amendment believed that the Drafting Committee had made a mistake in altering the wording of paragraph 3.

55. Paragraph 3 as adopted by the Conference stated that the legal effects were the same whether a reservation had been accepted or not. That might indeed be so in cases where a reservation declared that the reserving State excluded an article from a treaty, and that idea might lie at the root of the drafting error. What had been overlooked, however, was another category of reservations, where the reserving State declared that an article of a treaty was acceptable provided it was interpreted in a particular way; in such a case, a State which objected to that interpretation could not hold the opinion that the legal effects of its

[5] For earlier discussion of article 19, see 11th and 29th plenary meetings.

objection should be the same as they would be if it accepted the special interpretation.

56. The sponsors of the amendment took the view that the Conference should revert to the original text submitted by the International Law Commission and state that, when an objection was raised, the legal effects were that the treaty might be in force between a reserving State and the objecting State, but that the clause covered by the reservation and the objection would not apply as between the two States to the extent of the reservation.

57. The amendment was merely a correction of a drafting error, and contained no substance other than the considerations he had just put forward.

58. Mr. WERSHOF (Canada) said that his delegation did not necessarily object to the four-State amendment, but wanted to have some clarification of the kind of procedure the Conference was following. As the Netherlands representative had pointed out, the Conference had adopted article 19 in the form in which it had been submitted by the Drafting Committee. The Conference now had before it a document (A/CONF.39/22) in which all the articles definitively adopted were reproduced and renumbered. The Canadian delegation was afraid that the way in which the four-State amendment had been introduced might create the impression that any delegation wishing to reopen the discussion of any article could do so merely by submitting amendments to the new document. It was to be hoped that that was not the case and that the sponsors were really asking the Conference, as an exceptional measure, to reconsider a decision already taken, in order to allow them to propose an amendment. At first sight, his delegation had no objection to the amendment itself, but it wished to draw attention to the fact that the procedure of its submission was most unusual.

59. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the error which now appeared in article 19 had probably occurred as the result of the adoption of a new principle concerning objections to reservations in connexion with article 17. The convention was now based on the presumption that a treaty entered into force between reserving and objecting States, except where an express declaration was made to the contrary. The Drafting Committee had therefore been quite right to alter the first part of paragraph 3 of article 19, which fully corresponded with the present situation of article 17 in view of the adoption of the USSR amendment (A/CONF.39/L.3) to the latter article. In doing so, however, the Drafting Committee had automatically changed the last part of paragraph 3 of article 19, with the result that the article now provided that the legal effects were the same whether or not an objection had been made to a reservation.

60. As the Netherlands representative had pointed out, the effects where a reservation was accepted and where an objection was made to a reservation might be the same, but there were other situations. In any case, the legal effects of an objection to a reservation would be that the provisions to which the reservation related would not apply as between the two States concerned to the extent of the reservation. That principle, which had appeared in the International Law Commission's text and in the text approved by the Committee of the Whole at its 70th meeting, had not been disturbed by the adoption of the USSR amendment (A/CONF.39/L.3) to article 17. Accordingly, the Drafting Committee had erroneously changed the last part of paragraph 3 of article 19, and if that text were retained, the convention would lack a clear provision on the legal effects of objections to reservations, by implying that those effects would always be the same as the effects of reservations which had been accepted.

61. The sponsors of the amendment thought it advisable to revert to the International Law Commission's text, taking into account the new approach resulting from the adoption of the USSR amendment to article 17.

62. The PRESIDENT asked the Chairman of the Drafting Committee whether the change in question had been made before or after article 19 had been adopted by the Conference.

63. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made the change before submitting the article to the Conference.

64. The PRESIDENT said that the question before the Conference was therefore one of reconsideration.

65. Sir Francis VALLAT (United Kingdom) said he did not wish to object to reconsideration if the proposal now before the Conference was indeed an improvement on the text which the Drafting Committee had submitted and which the Conference had adopted by 94 votes to none, with no abstentions. His delegation had realized that the four-State amendment was a reversion to an earlier text and had thought that the proposal would make very little difference; in the light of the explanations of the amendment, however, it had been disturbed by the introduction of a new category of reservations passing under the title of interpretative statements. If an interpretative statement was a reservation, article 19 should apply; if it was truly a statement of interpretation, it should not be caught by an article on reservations. That was his understanding of the position. If there was some particular problem, it should be dealt with expressly, not by means of a comparatively obscure amendment, introduced at that late stage. The Conference should adhere to a text which it had adopted virtually unanimously .

66. Mr. YASSEEN, Chairman of the Drafting Committee, suggested that the article be referred back to the Drafting Committee for possible rewording to dispel any doubts as to its meaning.

*It was so agreed.*

67. Mr. GONZALEZ GALVEZ (Mexico) moved the adjournment of the meeting under rule 27 of the rules of procedure.

*The motion for the adjournment was carried by 44 votes to 16, with 29 abstentions.*

The meeting rose at 11 p.m.

## THIRTY-THIRD PLENARY MEETING

*Wednesday, 21 May 1969, at 11.55 a.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposal for the reconsideration of article 19* (Legal effects of reservations) *(continued)*

1. The PRESIDENT said that at the previous meeting the Conference had requested the Drafting Committee to review the text of article 19. He asked the Chairman of the Drafting Committee what were the Committee's conclusions.

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had accepted the four-State amendment (A/CONF.39/L.49) to article 19, paragraph 3, so that the final phrase in paragraph 3, reading " the reservation has the effects provided for in paragraphs 1 and 2 ", had been replaced by the words " the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation ". It was necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted.

3. Sir Francis VALLAT (United Kingdom) said that the matter was a technical one and it was not easy to arrive at a correct decision. The text as adopted by the plenary Conference had been clear and its effects had been evident. As a result of the change made by the Drafting Committee, the question was whether article 19, paragraph 3 produced the following effect: if a reservation was formulated and if an objection was then made to that reservation, but the objecting State did not state that it wished to prevent the treaty's entry into force, would the treaty come into force for the two States concerned, with the exception of the provisions to which the reservation applied? If that was the effect of the provision, to what kind of reservations was it applicable? And what would the effect be if the reservation purported to modify, rather than to exclude, the application of a treaty provision?

4. In the view of the United Kingdom delegation, it was clear that the convention either operated subject to any reservations made, whether or not objections had been raised to those reservations, or did not operate at all. The convention could not be allowed to operate subject to an unresolved dispute as to the effect of a reservation to which objection had been made. That would lead to the kind of confusion which the States meeting in the Conference had been trying to avoid.

5. His delegation was not asking at that late stage in the Conference's work for a vote on the change made in article 19, paragraph 3. However, if the Conference had been asked to vote, the United Kingdom would have voted against the change.

6. The PRESIDENT said he construed the revised article 19 to mean that if a State made a reservation affecting a provision of a treaty and another State objected to that reservation without saying that it was opposed to the treaty's entry into force, the treaty entered into force between the two States, except for the provision to which the reservation had been made.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the President's interpretation was correct. It had to be remembered, too, that the question raised in article 19 should be kept distinct from the entirely different question of the formulation of reservations.

8. Sir Francis VALLAT (United Kingdom) said the explanations of the change made in article 19 on the lines of the four-State amendment (A/CONF.39/L.49) confirmed his opposition to it.

9. Mr. KEARNEY (United States of America) said he was still rather puzzled about the meaning of the words " to the extent of the reservation " which apparently would now be used in article 19, paragraph 3.

10. Mr. YASSEEN, Chairman of the Drafting Committee, explained that where, for example, a reservation formulated by a State affected only the first three paragraphs of an article, only those three paragraphs would not operate as between the reserving State which had raised an objection to that reservation without opposing the entry into force of the treaty.

11. Mr. USENKO (Union of Soviet Socialist Republics), speaking on a point of order, asked what decision the Conference was taking on the revised text of article 19.

12. The PRESIDENT noted that no formal objection had been made to the text of article 19, as revised by the Drafting Committee in accordance with the four-State amendment (A/CONF.39/L.49). He suggested that it should therefore be considered as having been finally adopted.

*It was so agreed.*

*Proposed new article*

13. Mr. PINTO (Ceylon) said he wished to introduce, on behalf of its twenty-two sponsors representing all regions of the world, the text of a new article (A/CONF.39/L.36 and Add.1), which was identical with that introduced by the Syrian representative at the 89th meeting of the Committee of the Whole (A/CONF.39/C.1/L.388 and Add.1).

14. The proposed article provided that

> Every State has a right to participate in a multilateral treaty which codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole.

15. He would not repeat the arguments which the supporters and opponents of that provision had already

had an opportunity of putting forward during the debate on the former article 5 *bis*,[1] but he would like to make certain comments.

16. It was the very essence of international law that any State could participate in developing and codifying norms intended to be of universal application and, in effect, to constitute international legislation. Unlike domestic law, international law was applied not by the action of a central authority with coercive powers, but simply by the consent of States. The logical consequence was that the community of States as a whole had an interest in ensuring the widest possible acceptance of norms of general international law by enabling the greatest possible number of States — all States, in fact — to participate in multilateral treaties, and indeed encouraging them to participate.

17. His delegation believed that the question whether the convention on the law of treaties should include a provision giving effect to the " all States " principle had nothing to do with the question of the recognition of States. There could be no possible doubt that participation by a State in a general multilateral treaty together with an entity which it did not recognize as a State could not mean that it accorded that entity the status of State in any way whatever. That was true regardless of whether the State concerned did or did not make an explicit declaration to that effect in the instrument in which it expressed its consent to become a party to a treaty. Indeed, very many of the States represented at the Conference were already, if only by their attendance at the Conference, parties to multilateral arrangements together with entities which they did not recognize as States. That could not be regarded in any way as a proof of recognition either in the legal or in the political sense.

18. It had been argued that even if it was logical to desire that all States should be able in principle to participate in general multilateral treaties, it would be politically and economically unrealistic at the present stage to state that principle in the convention. But a choice would then have to be made between two kinds of reality. Either it was accepted that there were certain entities so far kept on the fringe of the international community which it would nevertheless be desirable to see acting in conformity with the rules which that community considered it appropriate to adopt; that was the reality of a world governed by law, a world in which law would apply to all entities regardless of their political and economic systems. Or the decision was taken to abide by the transient reality of certain political situations which for the moment were accorded an importance disproportionate to their real significance.

19. Others claimed that the inclusion of an " all States " formula would oblige States to enter into relations with entities whose social system or political philosophy were contrary to accepted moral principles and would even be tantamount to condoning the crimes of which such entities might be guilty. But permission to States to participate in the establishment or development of international law should not be handed out like prizes for good behaviour; from a tactical point of view, it should rather be regarded as a means of converting the minority to the views of the majority and ensuring the widest possible application of the rules of law or, in other words, of safeguarding peace among the nations.

20. It was true that what was known as the " all States " formula might give rise to certain difficulties for depositaries, especially where the depositary was an international organization. But those were technical and mechanical problems which the Conference was certainly capable of solving.

21. In co-sponsoring the new article the Ceylonese delegation had purely practical and technical considerations in mind. It was in no way seeking to promote the acceptance of some particular entity or group of entities by the international community; nor did it wish to cause difficulties for any particular State. The difficulties which had been foreseen and had been adduced as arguments against the " all States " formula were largely illusory and did not weigh heavily in the balance against the usefulness of the " all States " formula to the community of States as a whole and to international law.

22. The rejection of the principle stated in the new article would be a signal failure on the part of the Conference and might even make the entire convention unacceptable to some States.

23. Speaking for the Ceylonese delegation alone, he wished to state that in its opinion the best should not be allowed to become the enemy of the good; if the Conference could not accept the principle of universality in the form of the proposed new article, his delegation would be prepared to co-operate with any other delegations anxious to reach an acceptable compromise on the point, provided that it did no violence to the basic philosophy underlying the principle of universality.

24. Mr. WYZNER (Poland) reminded the Conference that the President, when opening the second session, had drawn attention to the responsibility of the participants towards the international community as a whole. As the President had said on that occasion, the purpose of the convention was " to define and reformulate the general rules by which the conclusion and the life of treaties would be governed in the future ".[2] The Polish delegation fully shared the President's opinion in that respect. The Conference should adopt solutions which would promote the development of international relations, with a view to maintaining and reinforcing international peace and security. Such solutions could not take into account the short-term political interests of different States, which naturally underwent continuous change.

25. His delegation wished to stress the necessity of confirming in the convention the right of every State to participate in multilateral treaties which codified or progressively developed norms of general international

[1] See 89th, 90th, 91st and 105th meetings of the Committee of the Whole.

[2] See 6th plenary meeting, para. 5.

law, or the object and purpose of which were of interest to the international community as a whole. That was the formulation employed in the proposal jointly submitted by twenty-two States, including Poland (A/CONF.39/L.36 and Add.1).

26. In view of the close interdependence of all States in the contemporary world and their common responsibility for the destinies of humanity, his delegation believed that general multilateral treaties should be open to every State without exception. It was with that aim in view that the three-depositary formula had been introduced into some of the most important recent treaties relating to international peace and security and international co-operation in various spheres.

27. The convention on the law of treaties would be incomplete unless it laid down the principle of universality as a means of ensuring respect for the sovereign equality of States. That principle was the very foundation of contemporary international law and international friendly relations. It was not very long since the time when the creation of international law had been the work of only a small group of European States, which had reached arbitrary decisions on the destinies of the world and on the standards to be met by States or by what were called " civilized nations ". Colonialism, however, had been virtually eliminated and many States had attained independence.

28. Yet there were still countries which refused, for political and ideological reasons, to recognize the rights of certain States. In order to justify that policy they maintained that universal participation in general multilateral treaties was incompatible wih the right of every State to choose its treaty partners. That was a very unconvincing argument. Firstly, before the Second World War, the treaties referred to in the proposed new article had generally been open to all States, so the right to choose partners could not be regarded as a crucial or even a valid factor in the case of such treaties. Secondly, it might be asked whether the " old Vienna formula " really ensured freedom in the choice of partners. Its three elements represented over one hundred States, some of which did not recognize each other or lived in a state of continuous tension and conflict. Such States would certainly not choose each other as contracting parties if the choice really lay with them. A closer examination of the " old Vienna formula " showed that the only States excluded from it were certain socialist States. It was thus quite clear that the formula was purely political and discriminatory. Moreover, it did not take account of the provision of article 5, paragraph 1, of the convention, under which every State possessed capacity to conclude treaties.

29. It was not difficult to define the multilateral treaties to which the principle of universality should apply. The question had never given rise to any serious practical difficulties and, if any arose in the future, the proposed new article would provide a clear-cut solution to the problem. Both the categories of multilateral treaties mentioned in the proposal were described in terms of objective criteria. What was more, the terms employed in the article had a well-defined meaning in contemporary international law. The terms " codification " and " progressive development of international law " were not merely used but also defined in the statute of the International Law Commission, and the expressions " general international law " and " object and purpose of a treaty " were to be found in articles of the convention on the law of treaties that had already been adopted. It was therefore clear that the sponsors of the proposed new article were referring only to treaties whose universality derived from the character of the treaty and from its object and purpose.

30. For those various reasons the Polish delegation took the view that the confirmation of the principle of universality in the convention, as proposed in the new article, would serve the cause of the development of international relations and co-operation among States. It went without saying that the convention on the law of treaties itself must be open to all States.

31. His delegation wished to point out that the success of the Conference in general and its own attitude to the convention would depend on the way in which the problem of universality was solved. It therefore appealed to the delegations participating in the Conference to remember, when they took a decision on the matter, that they had a responsibility towards the international community of States as a whole.

32. Mr. STREZOV (Bulgaria) said that his delegation, which was one of the sponsors of the new article, considered that its adoption would fill a gap in the convention by introducing a principle in harmony with the requirements of international life.

33. Participation in general multilateral treaties should be open to all States without any discrimination. The rule of the universality of such treaties derived from certain basic principles of international law set forth in the Charter of the United Nations, such as the principle of the sovereign equality of States, the duty of States to co-operate with each other, and the principle of the self-determination of peoples. It would be unjust and contrary to the principles of law to attempt to make compulsory for all States the rules contained in treaties concerned with the codification and progressive development of international law, and at the same time to prevent some of those States from participating in that kind of treaty. It was completely unreasonable deliberately to exclude those States from treaties which, by reason of their very aim and object, were concluded in the interests of the international community as a whole. Some had advanced the pretext that there must be respect for the freedom of States to choose the partners with which they wished to establish treaty relations; it had been asserted that universality was contrary to the practice of the United Nations and that it would create practical difficulties in connexion with the recognition of States, the functions of depositaries of multilateral treaties, and so forth. The lengthy debates on the subject in the Committee of the Whole had clearly shown that those arguments were unfounded.

34. In the last analysis, the only real motive for such opposition, a motive that the opponents of the principle of universality were not bold enough to state, was that

certain powerful States did not wish to recognize the existence of certain socialist States; in other words, there was a policy of discrimination against those socialist States. Possibly that point of view might have considerable weight in the foreign policy of certain countries, but it had no bearing on international law and the principles of the Charter. It was unacceptable that, on the basis of an argument that had nothing to do with law and justice, the future convention on the law of treaties should fail to embody the principle of universality, which was of special importance in the development of international law and of co-operation among States.

35. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the proposed new article, of which his delegation was a co-sponsor, affirmed the principle of universality which was absolutely essential in contemporary international relations.

36. During the Conference, however, some delegations had expressed opposition to that principle, sometimes by drawing tendentious comparisons, as the United Kingdom representative had done. The delegation of the Byelorussian Soviet Socialist Republic did not propose to follow the United Kingdom representative's example, since the aim of the Conference was not to engage in polemics but to attempt to draft an international legal instrument acceptable to all States.

37. His delegation had always subscribed to the principles of international co-operation and mutual respect among States.

38. Representatives who were opposed to the adoption of a principle of universality had failed to adduce sound and valid arguments in support of their position, which was simply based on their current political views. Those States were adopting a dangerous attitude by discriminating against certain States, by refusing to take into account the consequences of the Second World War and by seeking to absorb sovereign States. The States which refused to recognize the changes that had taken place in the world ought to realize that life was an irreversible process and that no one could turn the wheel of history back.

39. The States which adopted a discriminatory policy by preventing certain States from being parties to conventions on general international law and to the convention on the law of treaties would themselves be unable to conclude treaties with those States under the convention. However, that discriminatory policy failed because of the economic interests of States and the relations between the economic powers. The German Democratic Republic, a free and sovereign State which had economic relations with States whose population represented more than two-thirds of mankind, was a case in point. The German Democratic Republic was in diplomatic and consular relations with many States. It had signed numerous international agreements and took part in the work of many international organizations. Every year the German Democratic Republic increased the volume of its international trade and developed its economic, cultural and technical relations with a great many States.

40. It would be illogical not to take that fact into account and the absence from the convention of a provision affirming the principle of universality would reduce its value and effectiveness and give it a discriminatory character.

41. The question of treaties was of great importance to the development of international relations, and the international community took a deep interest in the question of developing international relations, in which international law was of the first importance.

42. The maintenance of peace and the strengthening of the principles of international co-operation and peaceful co-existence were essential to mankind and one of the best ways of achieving those aims was to allow all States to participate in general multilateral treaties.

43. Moreover, international law governed relations at the international level and was therefore of a universal character. The existence of the principle of universality was undeniable; it was reflected in a number of international legal instruments, such as the United Nations Charter. The Preamble of the Charter stated, in its first paragraph, that the peoples of the United Nations were " determined to save succeeding generations from the scourge of war, which . . . has brought untold sorrow to mankind "; the reference was to mankind as a whole and not just to some nations. The Preamble also stated that the peoples of the United Nations were determined to re-affirm their faith in the " equal rights of men and women and of nations large and small ". That was a perfectly clear statement which concerned all States without exception. Again, the Preamble of the Charter expressed the determination of the peoples of the United Nations " to employ international machinery for the promotion of the economic and social advancement of all peoples ". It was therefore surprising that certain States should object to the adoption of the principle of universality, since some general multilateral treaties related precisely to the question of the economic and social advancement of peoples. Moreover, Article 1(2) of the Charter declared that one of the purposes of the United Nations was " to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples "; it made no mention of any limitations in that connexion. States which opposed the adoption of the principle of universality were therefore seriously in breach of the provisions of the United Nations Charter.

44. The principle of universality had been accepted in a series of other legal documents, such as the Nuclear Test Ban Treaty, and had also been accepted in General Assembly resolutions.

45. No legal objection could therefore be raised against the inclusion in the convention of a provision affirming the principle of universality.

46. The delegation of the Byelorussian SSR urged all delegations to vote in favour of the new article and thus to demonstrate their desire to contribute to the

development of relations among all States on a basis of justice and to take part in the consolidation of international peace and security.

The meeting rose at 1 p.m.

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## THIRTY-FOURTH PLENARY MEETING

*Wesdnesday, 21 May 1969, at 4.10 p.m.*

*President:* Mr. AGO (Italy)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Proposed new article* (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the new article which had been proposed by twenty-two States (A/CONF.39/L.36 and Add.1).

2. Mr. USTOR (Hungary) said that his delegation was among those which had submitted the proposal for a new article designed to introduce the principle of universality into the text of the convention on the law of treaties. That principle had failed to secure the necessary majority in the Committee of the Whole, although in his opinion it was a basic and valid principle of contemporary international law. The new article would apply mostly if not exclusively to multilateral treaties concluded for the purposes of the codification and progressive development of international law; it would confirm the incontestable right of all States to participate in the process of codification. If the codification of international law was considered to mean the codification of general international law, in other words, of the law which should prevail all over the world, then the requirement of universality logically followed *ex definitione*. His delegation attached the utmost importance to the recognition of that principle in a convention on the law of treaties and would consider it most deplorable failure if the Conference did not recognize that principle and embody it in the instruments to be adopted.

3. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation considered the proposed new article essential for six reasons. First, because the principle of the universality of general multilateral treaties had its source in the very character of contemporary international law; secondly, because that principle had acquired vital importance by reason of the increase in the number of multilateral treaties being concluded at the present time; thirdly, because the right of States to participate in such treaties was derived from a basic principle of contemporary international law, namely, the principle of state sovereignty, according to which no single State could refuse to grant other States the same rights as it enjoyed itself; fourthly, because that principle took on added importance in the light of the objective rules of international law stated in Part V of the draft articles; fifthly, because it was also a necessary consequence of the idea of international co-operation, which was one of the most important principles laid down in the United Nations Charter; and sixthly, because the right of all States to participate in general multilateral treaties followed from the very nature of such treaties.

4. Universal participation in general multilateral treaties did not necessarily imply recognition of all the other parties to them and the establishment of treaty relations between them. The arguments advanced by the opponents of universality, who for political reasons persisted in refusing to recognize the existence of certain States, had therefore no proper foundation either in law or in fact.

5. His delegation wished to make it clear that, unless the principle of universality was embodied in the proposed new article or in some other articles, it would be unable to support the convention as a whole.

6. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that all the considerations and arguments advanced for and against the principle of universality were based on a complex of legal, practical and, unfortunately, political problems. Obviously, neither side could ignore the arguments of the other. The Ukrainian delegation, which was in favour of inserting in the convention a statement of the principle of universality without any restrictions whatsoever, had carefully considered the arguments of the delegations which wished to limit that progressive principle, and had become a sponsor of the proposed new article which now, in its opinion, constituted a golden mean and did not seriously prejudice the position of either side.

7. The participation of all States in multilateral treaties was the only just solution and would open up wide prospects, not least for the convention itself, since it would thereby become an instrument expressing the will of all States, instead of being, at best, adopted by an arithmetical majority. Adoption of the principle of universality, moreover, would enable all States to make their contribution to the common cause of strengthening world peace, developing friendly relations among nations and securing international co-operation in accordance with the United Nations Charter. Admission of a State to participation in multilateral treaties was neither a reward for good behaviour or evidence of goodwill, nor evidence of approval of its political system or its social and economic structure; a treaty was the result of the coincidence of the will and interest of States.

8. In a number of spheres, the interests of some States did not coincide with those of others. That was perfectly natural, for example, in the economic sphere. But there were areas where the interests of all or nearly all States were identical; that fact was borne out by the existence of treaties on the partial prohibition of nuclear tests, on the non-proliferation of nuclear weapons, on the peaceful uses of outer space and, finally, the convention on the law of treaties. Thus, there could be no doubt

of the existence of treaties, the object and purpose of which were of interest to the international community of States as a whole. For example, European security was an object which could not be achieved without the participation of all the States concerned, and security as a whole was unthinkable unless all the States of Europe participated in its consolidation.

9. At the same time, his delegation understood the misgivings of those who had expressed the wish that participation in multilateral treaties should be unequivocally closed to régimes the very existence of which was illegal. But those misgivings were exaggerated, since the interests of illegal régimes could never by definition be compatible with the object and purpose of treaties which were of interest to the international community as a whole. For example, the interest of a racist régime would always be profoundly hostile not only to the interests of the people subjected to its rule, but to the entire international community.

10. The rules which had already been adopted by the Conference represented a balance of rights and duties in the sphere of the law of treaties. Only States could have rights and only States could carry out duties. The proposal of which the Ukrainian SSR was a sponsor referred not to régimes but to States, or the entities which possessed rights and were capable of assuming obligations. The Ukrainian delegation was sure that the Conference would listen to the voice of reason and adopt a principle which must have its lawful place in contemporary international law.

11. Mr. SMEJKAL (Czechoslovakia) said that the question of the universality of international multilateral treaties concerning general rules of international law, or involving the interests of all States, had been widely discussed during the first session of the Conference and all the arguments in its favour had already been presented. Now that the present session was drawing to a close, however, his delegation wished to emphasize one aspect of the problem which in its opinion deserved special attention.

12. In the interest of the peaceful development of international relations, all States should not only actually participate in creating international law in which international treaties were of paramount importance, but should also assume responsibility for ensuring respect for that law and for those obligations which were in the interest of all. It would be paradoxical if, instead of making greater efforts to persuade States to undertake obligations designed to improve their mutual relations, a situation should arise, merely as the result of certain bilateral relations, where the principle of universality was not reflected in the convention on the law of treaties. For those reasons, he appealed to all delegations to support the principle, which was in the interest of the international community as a whole.

13. Mr. SHUKRI (Syria) said that he wished to associate himself with what had been said by the preceding speakers in support of the principle of universality. No delegation, in fact, had pronounced itself against that principle, which made it all the more difficult to understand the failure so far to include a single article on it in the convention. Some delegations, indeed, had questioned the meaning of the term " every State ", although, ironically enough, they had found no difficulty in accepting that allegedly vague expression in a number of international treaties, such as the Nuclear Test Bar Treaty.

14. Another untenable argument was that the inclusion of an article on universality in the convention would introduce a political question which had no proper place at the present Conference. But since it was obvious, that every international legal question had some political aspects, he appealed to the Conference not to confuse the primarily legal question of the right of every State to participate in general multilateral principles with the primarily political question of the recognition of States. The fact that a State disliked the political or economic system of another State provided no legal ground for preventing that State from exercising its legitimate right of sovereign equality.

15. The right to conclude treaties was one of the aspects of State sovereignty. How was it possible to speak of the progressive development of international law through treaties while at the same time preventing certain States with populations of millions of people from participating in law-making treaties, in particular the convention on the law of treaties itself? In view of the impasse in which the Conference now found itself as the result of the stubborn refusal of some delegations to recognize the principle of universality, it was clear that the convention might fail to receive support from an important group of States. He appealed to all delegations, therefore, to make an effort to reach a satisfactory solution.

16. Mr. BOLINTINEANU (Romania) said that the principle of universality embodied in the proposed new article applied to a category of multilateral treaties which had their substantive source in the objective trends of inter-State relations, in the requirements of international co-operation, as set forth in the United Nations Charter, and in the fundamental principles of international law which governed such co-operation. The existence of multilateral treaties, which were open to the participation of all States, was confirmed by long practice, but the practice followed in the United Nations of restricting the universal application of treaties was hardly normal and reflected a discriminatory policy which was contrary to the principles governing international relations and the requirements for their further development. The lack of any juridical basis for that practice was illustrated, *inter alia,* by the fact that in certain cases it had been abandoned.

17. It should now be abandoned once and for all and the Conference could take the only decision necessary, namely to recognize the principle of universality in connexion with the multilateral treaties referred to in the proposed new article. Adoption of that article would fill a gap in the convention and provide a just solution to a particularly important problem concerning the rule of law in international relations. By acting in support of co-operation and realism, the Conference could thus ensure that the convention would contribute to the progressive development of international law.

18. Mr. BIKOUTHA (Congo, Brazzaville) said that he wished to express his country's concern at the systematic black-out which continued to be imposed on certain members of the international community with which his own country and many others maintained diplomatic relations. His delegation of course was not empowered to speak for any country other than his own, but felt that it was most unrealistic to consider history as static. For that was the only term to describe an approach which amounted to reducing every problem to the limited dimensions of contemporary events, which were unfortunately dominated by nationalistic passions. It was those passions which explained the marginal status which was given to certain geographical entities, although they had all the legal attributes of sovereign States.

19. His delegation was convinced of the need to formulate a convention on the law of treaties on sound foundations rather than on the narrow basis of certain transient political circumstances, and for those reasons it fully subscribed to the principle of universality. Although that principle might seem nebulous to certain other delegations, failure to adopt it could indermine the legal monument which the Conference hoped to erect and which represented the result of years of painstaking effort.

20. The PRESIDENT invited the Conference to vote on the twenty-two State proposal for a new article (A/CONF.39/L.36 and Add.1).

*At the request of the representative of the Federal Republic of Germany, the vote was taken by roll-call.*

*El Salvador, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Ghana, Hungary, India, Indonesia, Iraq, Kuwait, Mexico, Mongolia, Nepal, Pakistan, Panama, Poland, Romania, Sierra Leone, Sudan, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Zambia, Afghanistan, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Ceylon, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador.

*Against:* El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Honduras, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Lebanon, Liechtenstein, Luxembourg, Madagascar, Malaysia, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, Republic of Korea, Republic of Viet-Nam, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Austria, Australia, Barbados, Belgium, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Denmark, Dominican Republic.

*Abstaining:* Ethiopia, Holy See, Iran, Ivory Coast, Kenya, Libya, Morocco, Nigeria, Peru, Philippines, San Marino, Saudi Arabia, Senegal, Singapore, South Africa, Spain, Trinidad and Tobago, Tunisia, Chile, Congo (Democratic Republic of), Cyprus, Dahomey.

*The proposed new article (A/CONF.39/L.36 and Add.1) was rejected by 50 votes to 34, with 22 abstentions.*

*Draft declaration proposed by Spain*

21. The PRESIDENT invited the Conference to consider the draft declaration on participation in multilateral treaties (A/CONF.39/L.38), proposed by Spain.

22. Mr. DE CASTRO (Spain) said that his delegation had already recognized the importance of the principle of universality during the discussion on the proposal for an article 5 *bis* in the Committee of the Whole. In view of the obstacles, both technical and political, which that proposal had encountered, his delegation had suggested a solution which it hoped would attract general agreement not only on the subject-matter of article 5 *bis* but also on the problems arising from article 62 *bis* and on the question of reservations.

23. In the draft declaration, which his delegation had submitted in the form of a resolution (A/CONF.39/L.38), the preamble stressed the value of the principle of universality and its importance to international co-operation. It stated " that all States should be able to participate in multilateral treaties which codify or progressively develop norms of general international law or the object and purpose of which are of interest to the international community of States as a whole ", and then recommended to the General Assembly " that it consider periodically the advisability of inviting States which are not parties to multilateral treaties of interest to the international community of States as a whole to participate in such treaties ".

24. When he had announced his delegation's intention of submitting a draft resolution on those lines, he had indicated that it was intended as part of a general solution which, it was hoped, would ensure a substantial majority in favour of the convention. Since, however, his delegation's efforts had not met with sufficient support, he would not ask for the draft declaration to be put to the vote, but would again emphasize the importance of the contents of the draft and express the hope that, in more favourable circumstances, the ideas it contained would be recognized by all States.

25. His delegation was prepared to support any reasonable compromise solution that might be put forward for the outstanding issues before the Conference. Nevertheless, it wished to make it clear that it would vote in favour of the convention on the law of treaties even without an article 62 *bis* and without any reference to the principle of universality, because it considered that the draft submitted by the International Law Commission represented a great contribution to the progress of international Law.

*Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution*

26. The PRESIDENT invited the Conference to consider the draft declaration on participation in the convention on the law of treaties proposed, along with a new article and a draft resolution, by a group of ten States (A/CONF.39/L.47 and Rev.1).

27. Mr. ELIAS (Nigeria), introducing the combined proposal on behalf of the ten sponsors, said that it consisted of three parts but constituted an organic whole. It read as follows:

*Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties*

*The United Nations Conference on the Law of Treaties,*

*Convinced* that multilateral treaties which deal with the codification and progressive development of international law or the object and purposes of which are of interest to the international community as a whole, should be open to universal participation,

*Aware* of the fact that Article ... of the Convention on the Law of Treaties authorizes the General Assembly to issue special invitations to States not members of the United Nations, the specialized agencies or parties to the Statute of the International Court of Justice, to accede to the present Convention,

1. *Invites* the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations so as to ensure the widest possible participation in the Convention on the Law of Treaties;

2. *Expresses* the hope that the States Members of the United Nations will endeavour to achieve the object of this declaration;

3. *Requests* the Secretary-General of the United Nations to bring the present declaration to the notice of the General Assembly;

4. *Decides* that the present declaration shall form part of the Final Act of the Conference on the Law of Treaties.

*Proposed new article*

*Procedures for Adjudication, Arbitration and Conciliation*

If, under paragraph 3 of article 62, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

1. Any one of the parties to a dispute concerning the application or the interpretation of article 50 or 61 may, by application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

2. Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the convention may set in motion the procedure specified in annex I to the present convention by submitting a request to that effect to the Secretary-General of the United Nations.

*Annex I*

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitue the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article ... the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute. The report and conclusions of the Commission shall not be binding upon the parties, either with respect to the statement of facts or in regard to questions of law, and they shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate a friendly settlement of the controversy.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

*Draft resolution*

*The United Nations Conference on the Law of Treaties,*

*Considering* that the provisions in Article . . . concerning the settlement of disputes arising under Part V of the Convention on the Law of Treaties, lays down that the expenses of any conciliation commission that may be set up under Article ... shall be borne by the United Nations,

*Requests* the General Assembly of the United Nations to take note of and approve the provisions of paragraph 7 of the Annex to Article ...

28. All participants in the Conference realized that there were still two major outstanding issues to settle: the first was that of universality and the second that of the provision of satisfactory procedures for the settlement

of any disputes that might arise out of the various provisions included in Part V dealing with grounds for invalidating, terminating, withdrawing from or suspending the operation of treaties. Some delegations attached the greatest importance to the principle of universality, while others attached equal importance to the question of including in the convention provisions relating to the settlement of disputes. Many efforts had been made, in consultation and negotiation, to find an amicable solution to that dual problem. It was maintained by some that the two issues had no organic connexion and were not necessarily related. The sponsors of the present proposals would readily admit the force of that argument, but the Conference could not ignore the possibility of an agreement based on a simultaneous solution of both problems.

29. The sponsors accordingly now submitted their proposal which, apart from the draft resolution on conciliation expenses which he would describe later, consisted of two parts. The first was a " Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties ". The second was a proposed new article entitled " Procedures for Adjudication, Arbitration and Conciliation ", with an annex setting forth details of the organization of the conciliation procedure. Those two parts constituted a " package proposal " which could not be divided. The sponsors fully realized that no delegation would find the whole package completely satisfactory. Some would object to the terms of the draft declaration, others might not want a declaration at all, still others might be willing to accept the declaration but would not be fully satisfied with certain features of the procedures for the settlement of disputes. The sponsors wished to make it clear that they had not attempted to satisfy any particular group of delegations completely. Their sole aim had been to try to achieve the possible and for that purpose it had been necessary not to insist on the ideal. In the lively and even passionate discussions which had taken place, it had become clear that the gap which separated the advocates and the opponents of the principle of universality was still very wide, but the sponsors thought that the draft declaration now proposed by them represented the maximum measure of achievement possible at the present stage.

30. Two changes had been made (A/CONF.39/L.47/Rev.1) to the original text (A/CONF.39/L.47) of the proposed new article on " Procedures for Adjudication, Arbitration and Conciliation ". The first related to the title and consisted of the insertion of a reference to arbitration. The second was an amendment to paragraph 1, which enabled any of the parties to a dispute concerning the application or the interpretation of article 50 or 61 to submit that dispute to the International Court of Justice for a decision. Apart from clarifying the wording, the sponsors had now added the concluding proviso, " . . . unless the parties by common consent agree to submit the dispute to arbitration ". The third element of the combined proposal was a draft resolution requesting the General Assembly to take note of and approve the provisions of paragraph 7 of the annex to the proposed new article. That paragraph, in addition to specifying that the Secretary-General should provide the proposed Conciliation Commission with the required assistance and facilities, stated that the expenses of the commission " shall be borne by the United Nations ".

31. It should be clearly understood that the proposal which he had thus introduced must be considered as a whole and voted upon as such. The sponsors hoped that the support that it would attract would not be limited to any particular group or groups, and that the proposal would commend itself to the widest possible participation by delegations from all parts of the world. He appealed to those who might be opposed to some parts of the proposal to consider what the alternative would be to the rejection of that proposal. The answer that article 62 would remain was not convincing. Such a provision might be sufficient in other circumstances but, in the present instance, would not be enough for the purpose of arriving at a harmonious solution. The proposal which he had introduced did not give the whole loaf to either of the two groups of delegations to which he had referred at the beginning of his statement, but it did give something to each. He therefore earnestly hoped that it would be accepted in a spirit of conciliation and general harmony.

32. Mr. DADZIE (Ghana) said that his delegation was one of the sponsors of the ten-State proposal. When he had spoken in connexion with the proposed article 62 *bis*, he had pointed out that, for an acceptable compromise to be reached, steps would have to be taken by each side to meet the views of the other. The time had now come to take those steps if the Conference was not to see the results of its labours during the past two years reduced to naught. The proposal before the Conference was an attempt to strike a bargain, recognizing only what was possible and having regard to the interests of all delegations, and he urged representatives to give it their serious consideration. He hoped that the draft declaration and the proposed new article would commend themselves to all and that even those delegations which could not vote in favour of the proposal would at least refrain from casting a negative vote.

33. Mr. ESCHAUZIER (Netherlands) said that he had been favourably impressed by the Nigerian representative's presentation of the new compromise proposal. With regard to the proposed new article, he said that the original sponsors of article 62 *bis* had been in favour of a procedure for the settlement of disputes by the International Court of Justice. Realizing that that would not gain universal acceptance, they had thought it necessary to have recourse to compulsory conciliation and arbitration procedure for disputes arising from Part V of the convention. While there was a considerable difference between the proposed article 62 *bis* and the new proposal, he noted that the idea of compulsory conciliation was retained and he was glad to see that the concept of arbitration was not entirely dropped. One positive feature of the proposed new article was that it proposed a procedure involving the International Court of Justice, though it restricted the cases to be submitted to the International

Court to those arising out of disputes regarding the principle of *jus cogens* as set out in articles 50 and 61. During the negotiations to arrive at a compromise solution, he had done his utmost to persuade the sponsors of the new proposal to include also disputes under articles 49 and 59 for adjudication by the International Court. He was sorry to see that they had not done so and again appealed to them to reconsider their decision on that point.

34. The new compromise proposal might be the best that could be expected in view of the very wide divergence of opinion which had been evident on the subject. His delegation would therefore give serious consideration to the proposed new article. So far as the draft declaration was concerned, the change in its title was probably an improvement. He would give careful consideration to the other amendments proposed, but would like to hear the views of other delegations before committing his delegation. He noted that the draft declaration invited the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations so as to ensure the widest possible participation in the convention. He was not sure that it was within the Conference's competence to issue instructions to the General Assembly but obviously an invitation would not be binding.

35. He would urge delegations to cast aside their prejudices and give favourable consideration to the proposed " package deal " so as to achieve the widest possible measure of agreement.

36. Sir Francis VALLAT (United Kingdom) said he both respected and appreciated the intense efforts which had been made by the delegations which had sponsored the proposals in document (A/CONF.39/L.47/and Rev.1). Although it was dangerous to identify delegations and people in that kind of context, he would nevertheless like to express the appreciation of his delegation for the efforts which had been made personally by Mr. Elias, the Chairman of the Nigerian delegation, to find, even at that late hour, a way to salvage the work of the International Law Commission over the last eighteen years and of the Conference over the last two years.

37. To his mind, a " package deal " was rarely attractive and sometimes turned out in the end to be merely a bitter pill. The present compromise was difficult to accept, since, on the one hand, the draft declaration went further than he would have wished to go and, on the other hand, the settlement procedures did not go far enough. He felt strongly, however, that the Conference should not discard the last opportunity to save the results of its work. He appealed to all delegations to adopt a statesmanlike attitude in their consideration of the new proposal, in emulation of the statesmanlike attitude adopted by its sponsors and, at that stage, to put on one side their wishes in one respect or another.

38. Of course, delegations to the Conference could not bind their Governments to future action, whether in the General Assembly or elsewhere, and it was on that understanding that his delegation would vote for the proposal. It was regrettable that delegations should be forced to support such proposals; however, in a spirit of real compromise, he would lend the support, of his delegation to the proposals in document A/CONF. 39/L.47 and Rev.1.

39. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation wished to express its profound gratitude to all the delegations which had made such great efforts to seek a compromise solution with a view to bringing the Conference to a successful conclusion.

40. It had been interesting to hear that the United Kingdom representative regarded the proposal now before the Conference as a compromise even though, in that representative's opinion, one part went too far and the other not far enough. The Soviet Union delegation had striven for a real compromise throughout the Conference, and now wished to analyse the solution proposed.

41. To begin with the draft declaration, the core of that proposal lay in the invitation to the General Assembly to consider at its twenty-fourth session the matter of issuing invitations so as to ensure the widest possible participation in the convention. But the effect of that proposal was to place the onus of solving the problem on the General Assembly, and the United Kingdom representative had implied that the attitude of delegations to the Conference voting for the draft declaration would not be binding on the delegations of the same States to the General Assembly. Indeed, every Member of the United Nations had the right to raise any question at any session of the General Assembly so that, in practice, the vital paragraph of the draft declaration added nothing to a right that already existed for nearly all the delegations attending the Conference. Of course, the declaration did contain some positive provisions concerning the principle of universality, but its main flaw was that it carried no obligations whatsoever.

42. The draft declaration was followed by a proposed new article on procedures for adjudication and conciliation, which, if adopted, would impose firm obligations on States. Where the compulsory jurisdiction of the International Court of Justice was concerned, no vague provisions for the future and no general phrases were used, but clearly binding, if limited, undertakings were imposed. Thus, any State which supported the proposal must agree in principle to the Court's compulsory jurisdiction and must re-examine its position on compulsory arbitration.

43. In those circumstances, the new proposal could hardly be described as a compromise in which concessions had been made by both sides, since those who could not agree to compulsory jurisdiction were supposed to accept a binding provision, whereas those who disagreed with the ideas set out in the draft declaration, far from being bound by any obligations, would be absolutely free to act as they wished in matters relating to universal participation in the convention. Perhaps that was the reason why the United Kingdom delegation was prepared to support the proposal.

44. If a real compromise were sought, either both sides should agree to undertake binding obligations, or both sides should be given the same freedom of action. Since

some delegations felt that they could not accept binding obligations in respect of the principle of universality, a genuine compromise would be to make the new article an optional protocol to be adopted at the Conference. There might be other technical means of making the second part of the proposal less mandatory: for instance, the words " with the consent of all the parties " might be inserted in paragraph 1 of the proposed article, in connexion with the submission of disputes to the International Court of Justice. In any case, the second part of the proposal should have the same legal character as the first part.

45. The USSR delegation considered that the draft declaration contained certain positive elements, which went some way towards meeting its position. Accordingly, if a separate vote were taken on the draft declaration, it could vote in favour of it, although it could not vote for the proposed new article in its present form. He would suggest that the sponsors consider presenting the new article as an optional protocol: if they could not agree to that suggestion or to a separate vote on the draft declaration, the USSR delegation would be obliged to vote against the proposal as a whole.

46. Mr. SEATON (United Republic of Tanzania) said he was glad that the compromise solution proposed by his own and other delegations had, on the whole, met with a favourable response. It was most gratifying that delegations holding such widely differing views as those of the United Kingdom, the USSR and the Netherlands had all found positive elements in the proposal. The Conference had attempted for weeks to find a solution to meet the widely divergent interests of delegations; those attempts had failed, not for want of effort or goodwill, but owing to the inherent difficulty of the problem. The statements of earlier speakers had shown that the latest endeavour to break the deadlock had been successful to some extent, since the Netherlands and USSR representatives had made a number of suggestions and the United Kingdom representative had not insisted on the incorporation of certain ideas which he had pressed earlier in the debate.

47. The Tanzanian delegation hoped that an understanding would be reached among the great Powers on the principal of universality, which could subsequently be settled in the General Assembly, and that delegations which supported the draft declaration would vote for that principle in the Assembly. The true interests of the Conference would be served if those delegations could find it possible to accept the declaration on that understanding. The draft declaration could be described as very mild, for in its first operative paragraph it merely invited the General Assembly to give consideration to the matter of issuing invitations. In his delegation's opinion, the Conference was fully competent to invite the General Assembly to consider such a matter. The second operative paragraph, however, which expressed the hope that States Members would endeavour to achieve the object of the declaration, constituted an appeal to all States, especially the great Powers, to try to resolve the differences which divided them, so as to achieve the wide consensus without which international law was nothing but an illusion.

48. In his delegation's view, the new proposal was a modest step towards achieving the goal of putting an end to unequal and unjust treaties, while strengthening treaty stability and the *pacta sunt servanda* principle.

49. Mr. PINTO (Ceylon) said that his delegation was perhaps unique in the consistent support it had accorded to the compulsory procedures proposed in article 62 *bis* and the principle of universality set out in article 5 *bis*. When both those proposed new articles had been rejected, his delegation had sought achievement rather than compromise; it was therefore most gratified that the sponsors of the new proposal had been able to submit a document which represented a modest step towards both goals. Although the Ceylonese Government intended to continue working towards the final achievement of these ends, his delegation agreed with others that the ten-State proposal was the only one likely to command the wide measure of consent which would permit the efforts of the International Law Commission and the Conference to be crowned with success.

50. Mr. KEARNEY (United States of America) said that his delegation would vote for the new compromise solution. The sponsors, especially the Nigerian delegation, were to be commended for their strenuous efforts to bring the Conference to a successful conclusion. The United States delegation shared the views expressed by a variety of representatives concerning the interpretation to be given to the draft declaration and also shared the hope of the Tanzanian delegation that the great Powers would succeed in resolving their differences.

51. Mr. HUBERT (France), referring to the second part of the combined proposal, said that although his delegation associated itself with the many tributes paid to the sponsors for their efforts, it found the compromise unsatisfactory.

52. According to paragraph 1 of the proposed new article, the compulsory jurisdiction of the International Court of Justice, if it was indeed compulsory, applied only to articles 50 and 61. But it was well-known how imprecise were the rules referred to in those articles, and France could not accept even the Court's interpretation of peremptory norms of general international law, or agree that the Court should thus become a kind of international legislature. Moreover, the other articles in Part V of the convention were not placed under any compulsory jurisdiction, but were made subject only to a conciliation procedure. Such a procedure was totally inadequate for the settlement of disputes; even if only one party refused to accept the conclusions of a conciliation commission, disputes arising from articles 49 or 59, which were of vital importance, might remain unsettled for an indefinite period, thus poisoning international relations. That serious shortcoming threatened the balance of the entire convention and the French delegation would vote against the ten-State proposal.

53. M. WERSHOF (Canada) said that his delegation would vote in favour of the new proposal if it were

put to the vote in its entirety. Canada greatly appreciated the efforts made by the sponsors, especially the delegation of Nigeria.

54. In voting for the " package deal ", his delegation understood that the new paragraph of the preamble to the draft declaration did not affect the obligation or right of every State Member of the United Nations to treat on its merits any proposal that might be made in the General Assembly in pursuance of the declaration. With regard to the revised version of paragraph 1 of the proposed new article, his delegation understood the sponsors to intend it to mean compulsory jurisdiction of the International Court of Justice unless the disputing parties agreed to submit to arbitration instead.

55. Although his delegation did not consider that the new article provided a fully satisfactory method of settling disputes under Part V, it would vote for the compromise, because the new article was much better than article 62 by itself.

56. Mr. ALVAREZ TABIO (Cuba) said that his delegation had consistently expressed the view that the convention should be open for signature by all States without discrimination and that, where settlement procedures were concerned, the convention could not go beyond Article 33 of the Charter, so that no compulsory conciliation or abitration was acceptable. Since the draft declaration dealt with the problem of universality in an unsatisfactory way and since the notion of compulsory jurisdiction was introduced in the new article, his delegation would vote against the proposal.

57. Mr. USTOR (Hungary) said he was not clear as to the interpretation of the provisions of the draft declaration. The first paragraph of the preamble expressed the conviction of the Conference that multilateral treaties which dealt with the codification and progressive development of international law or the object and purposes of which were of interest to the international community as a whole should be open to universal participation and, in the second operative paragraph, the Conference expressed the hope that the States Members of the United Nations would endeavour to achieve the object of the declaration. The Conference was attended by plenipotentiary representatives of States; the question therefore arose how far the declaration would be binding upon States in the General Assembly. Would the overriding principle of good faith bind them when voting at the twenty-fourth session? Was he right in thinking that the favourable votes which would be cast for the declaration in the Conference would have the effect that the States whose plenipotentiaries had voted in favour of the declaration would be thereby prevented from casting contrary votes on the same question in the General Assembly? Perhaps the President could confirm that States voting for the declaration would be under at least a moral obligation not to vote against the principles of the declaration in the General Assembly.

58. The PRESIDENT said that it was not for him to give an opinion on the matter. The Hungarian representative would no doubt find an answer to his question in the statements made during the debate.

59. Mr. BIKOUTHA (Congo, Brazzaville) said that his delegation always advocated compromise, but only acceptable compromise. The new proposal, however, seemed to be compromise for the sake of compromise, and his delegation would vote against it, unless a separate vote was taken on the draft declaration.

60. Mr. DE LA GUARDIA (Argentina) said that the solution presented to the Conference after great efforts was a satisfactory compromise, for which his delegation would vote.

61. Mr. BILOA TANG (Cameroon) said his delegation supported the proposal for a separate vote on the draft declaration. Cameroon upheld the principle of universality, but could not prejudge what its delegation's position would be when the matter was raised at the twenty-fourth session of the General Assembly. It would therefore abstain in a separate vote on the draft declaration.

62. With regard to the proposed new article, it was indeed a compromise, but not a satisfactory one. Articles 50 and 61 related to very controversial questions, and yet it was proposed that any party to a dispute could apply unilaterally to the International Court of Justice. Moreover, only compulsory conciliation was provided for the settlement of other disputes under Part V. His delegation would therefore vote against the proposed new article.

63. Mr. HAYTA (Turkey) said that his delegation had for years advocated compulsory jurisdiction as an effective and impartial means of settling disputes. It could not therefore lend its full support to the new proposal, but would not oppose it, because at least disputes under articles 50 and 61 were to be submitted to the International Court of Justice. On the other hand, his delegation expressed reservations against the failure to submit other articles in Part V to adequate jurisdictional guarantees, and would therefore abstain in the vote.

64. Mr. GROEPPER (Federal Republic of Germany) expressed his appreciation of the efforts made by the authors of the compromise proposal. His delegation had always held the view that it was not the task of the Conference to seek solutions to general political questions. It was particularly inappropriate for it to go into the purely political problem of the existence of disputed territorial entities in international law. In order to facilitate the work of the Conference, his delegation would not oppose the compromise solution, including the draft declaration on universal participation in the convention, on the understanding, however, that the declaration did not bind the General Assembly to issue invitations to specific entities and did not prejudge the position of States in that respect.

65. The ten-State proposal showed some improvement with regard to settlement procedures, but those procedures were less satisfactory than those proposed in article 62 *bis*.

66. His delegation would abstain in the vote on the proposal.

67. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the USSR delegation had suggested that the sponsors might consider submitting the second part of their proposal as an optional protocol. There had been no response to that suggestion, and perhaps that silence implied tacit consent. If the proposal were put to the vote as it stood, his delegation would vote against it; otherwise, it would reconsider its position.

68. Mr. WYZNER (Poland) said that, although his delegation appreciated the efforts made by the sponsors, it unfortunately could see no balance between the first and second part of the " package deal ". His delegation had delayed its explanation of vote, in the hope that some member of the group of States which had long opposed the principle of universality would give some indication of an intention to reconsider their attitude. But no such indication had yet been given; on the contrary, an influential delegation had stated that the declaration would not be binding either on the General Assembly or on States. Poland would therefore vote against the proposal if it were put to the vote in its present form.

69. Mr. N'DONG (Gabon) said that his delegation appreciated the sponsors' efforts, but could not vote for the proposal, because the choice of articles 50 and 61 for submission to the compulsory jurisdiction of the International Court of Justice was injudicious. Neither propounders of legal doctrine nor members of the International Law Commission, nor representatives at the Conference were agreed on what constituted rules of *jus cogens,* and to submit the settlement of disputes concerning such rules to the jurisdiction of the Court was a risk which Gabon refused to take.

70. Mr. BLIX (Sweden) said that his delegation's active endeavours to bring about the solution of the problems of settlement procedures and universal participation in the convention made it particularly appreciative of the difficulties encountered by the sponsors of the proposal now before the Conference. They had not achieved a final solution of either of those vital issues and, indeed, such a solution was impossible at the present time, but although no immediate solution had been found for the problem of universal participation, an opportunity for such a solution in the General Assembly was offered; on the other hand, the problem of settlement procedure had to be solved immediately, for if no appropriate procedure were included in the convention now, it would be difficult to do anything about it in the future. Minimum solutions had been provided for both issues, and it was to be hoped that better ones would be reached subsequently.

71. Mr. ELIAS (Nigeria) said that the sponsors could not accept either the proposal for a separate vote on the draft declaration or the suggestion that the second part of the proposal should become an optional protocol.

72. The PRESIDENT invited the Conference to vote on the draft declaration, proposed new article and draft resolution submitted by ten States (A/CONF.39/L.47 and Rev.1).

*At the request of the Nigerian representative, the vote was taken by roll-call.*

*Nigeria, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Nigeria, Norway, Pakistan, Panama, Portugal, San Marino, Senegal, Singapore, Spain, Sudan, Sweden, Switzerland, Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Yugoslavia, Zambia, Argentina, Austria, Barbados, Belgium, Cambodia, Canada, Ceylon, Chile, Colombia, Congo (Democratic Republic of), Costa Rica, Cyprus, Denmark, Ecuador, El Salvador, Finland, Ghana, Greece, Guyana, Holy See, Honduras, Iceland, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Liechtenstein, Luxembourg, Malta, Mexico, Morocco, Nepal, Netherlands, New Zealand.

*Against:* Poland, Romania, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Congo (Brazzaville), Cuba, Czechoslovakia, France, Gabon, Hungary, Madagascar, Malaysia, Mongolia.

*Abstaining:* Peru, Philippines, Republic of Korea, Republic of Viet-Nam, Saudi Arabia, Sierra Leone, South Africa, Syria, Turkey, Venezuela, Afghanistan, Algeria, Australia, Bolivia, Brazil, China, Dahomey, Dominican Republic, Ethiopia, Federal Republic of Germany, Guatemala, India, Indonesia, Iran, Libya, Monaco.

*The ten-State proposal (A/CONF.39/L.47/Rev.1) was adopted by 61 votes to 20, with 26 abstentions.*

73. Mr. ROMERO LOZA (Bolivia), explaining his delegation's abstention on the proposed new article, observed that the title of Part V of the draft convention — " Invalidity, termination and suspension of the operation of treaties " — implied the existence of a procedure for carrying out what it proposed. In the absence of such a procedure, it was hard to say why Part V included to many articles which every delegation regarded as necessary but which few of them believed would have to be applied in practice. With the rejection of article 62 *bis* the real force of Part V had been removed, and the elimination of the procedures for arbitration and conciliation proposed in that article undermined the basic purpose of the convention. The non-inclusion of the important article 49 in the compromise proposals showed that no attempt was being made to ensure that the convention would be applied in such a way as to meet the wishes of a large number of States. In fact, Part V, and article 49 in particular, would be purely academic in character and have no practical effect.

74. Nevertheless, his delegation had instructions from the Bolivian Government to sign the convention, subject to placing on record its declaration that, first, the defective terms in which the convention had been framed meant that the fulfilment of mankind's aspirations in the matter would be postponed; and secondly, despite those defects, the rules embodied in the convention clearly represented progress and derived their inspiration from those principles of international justice which Bolivia traditionally upheld.

75. Mr. BINDSCHEDLER (Switzerland) said that, after much hesitation, his delegation had finally decided to vote in favour of the combined proposal, and he paid a warm tribute to the sponsors for achieving a formula which had proved acceptable to the largest possible number of delegations.

76. The Swiss delegation welcomed that proposal as a modest step in the direction of the acceptance of the compulsory jurisdiction of the International Court of Justice. It considered that paragraph 1 of the new article just adopted, in the form in which it now appeared, established a genuine compulsory procedure for adjudication. Under the provisions of that paragraph, every State party to the convention on the law of treaties would have the right to submit, by application, to the International Court of Justice any dispute with another party concerning the application or the interpretation of article 50 or of article 61. That first step which had now been taken gave great promise for the future. His delegation's hopes in that direction were strengthened by the vote at the 29th plenary meeting on the Swiss proposal for a new article 76 (A/CONF.39/L.33), which showed that forty-one States had favoured that proposal and thirty-six had opposed it.

77. At the same time, his delegation did not regard the new article as a satisfactory provision on the settlement of disputes; it had voted in favour of it simply because it was better than nothing. The new article made provision only for a conciliation procedure with regard to disputes arising from the application or the interpretation of the articles of Part V other than articles 50 and 61. Questions of the application and interpretation of the grave provisions contained in such articles as articles 48, 49 and 59 should undoubtedly have been left for settlement by the International Court of Justice. The conciliation procedure embodied in the new article, apart from having the defects to which he had already drawn attention at a previous meeting, provided no assurance of an objective and final decision to such disputes.

78. His delegation wished to place on record that, should Switzerland sign the convention on the law of treaties, it would do so subject to the reservation that the provisions of all the articles in Part V would only apply in the relations between Switzerland and those States parties which, like Switzerland, accepted the compulsory jurisdiction of the International Court of Justice, or compulsory arbitration, for the settlement of any dispute arising from the application or the interpretation of any of those articles.

79. Mr. MARESCA (Italy), explaining his vote in favour of the proposal, said he wished at the same time to pay a tribute to the efforts of its sponsors. The Italian delegation had consistently maintained that a procedure for the settlement of disputes on the lines of article 62 *bis* constituted an essential safeguard in respect of the provisions of Part V. It would therefore have wished for a more strict and more complete procedure than that embodied in the new article. That article nevertheless constituted a remarkable step forward, in that it made provision for the compulsory jurisdiction of the International Court of Justice in respect of disputes arising from articles 50 and 61, and for compulsory conciliation in respect of those arising from all the other articles in Part V. His delegation continued to believe, however, that a settlement procedure was necessary for the application and interpretation of such articles as articles 49 and 59 and expressed the hope that bilateral treaties would make provision for such procedure.

80. His delegation's acceptance of the declaration on universal participation was in keeping with Italy's consistent stand that the General Assembly was alone competent to invite States to participate in the convention. The recommendation made to the General Assembly in that declaration had its value but it also had its limits. It did not commit the General Assembly in any way and the General Assembly remained sovereign to take its future decisions objectively in the light of circumstances. The Italian delegation to the present Conference could undertake no commitment regarding the attitude of the Italian delegation to the General Assembly.

81. Mr. BAYONA ORTIZ (Colombia), explaining his delegation's vote in favour of the declaration and the new article, said that his delegation had consistently maintained that the question of universality was a political issue which fell within the comptence of the General Assembly. Although his delegation had voted in favour of the declaration, it wished to place on record that its vote did not prejudice in any way the position of the Colombian delegation to the General Assembly in any future debate on the question of universal participation.

82. With regard to the new article on procedures for adjudication, arbitration and conciliation, his delegation had accepted it as a compromise solution, solely because it represented the maximum that could be obtained at the present Conference. Its text, however, did not in any way satisfy his delegation's aspirations as one of the sponsors of the article 62 *bis* approved by the Committee of the Whole.

83. Although the new article just adopted represented some progress, his delegation would have preferred provision to be made for the compulsory settlement by the International Court of Justice of disputes relating to the application and interpretation of such articles as article 49 and article 59; the absence of such provision was a gap in the convention which could later create difficulties in treaty relations between States.

84. He was glad to be able to announce that he had instructions from his Government to sign the convention on the law of treaties.

85. The PRESIDENT said that, if there were no objection, he would consider that the Conference agreed to postpone any further explanations of vote until the next meeting and to proceed with the consideration of the final provisions.

*It was so agreed.*

FINAL PROVISIONS [1]

*Article A*

*Signature*

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

*Article B*

*Ratification*

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

*Article C*

*Accession*

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article A. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

*Article D*

*Entry into Force*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the..... instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the..... instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

*Article E*

*Authentic texts*

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE AT VIENNA, this twenty-fourth day of May, one thousand nine hundred and sixty-nine.

86. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text he was now submitting consisted of the titles and articles which made up what was traditionally known as the Final Provisions. The Drafting Committee had made only one change which affected all language versions. In article C, it had deleted the word " four " before the expression " categories mentioned in article A ", since it considered the word redundant and liable to cause misunderstanding.

87. In the French version of article E, the Drafting Committee had replaced the expression " *faisant foi* " by " *authentique* ". Although " *faisant foi* " was the established expression, the French version of article 9 of the convention had adopted a new terminology which must be followed in the other provisions of the draft.

88. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that Hungary, Poland, Romania, the Union of Soviet Socialist Republics, the United Republic of Tanzania and Zambia had jointly proposed amendments (A/CONF.39/L.41) to articles A and C. The aim of the amendments was clear and was based on a position already familiar to the Conference. His delegation believed that the convention on the law of treaties was of interest to the entire international community and should therefore be open for signature by all States in accordance with the principle of sovereign equality. Moreover, the formula proposed was in accordance with existing international practice.

*Article A*

89. The PRESIDENT put the six-State amendment to article A to the vote.

*The six-State amendment (A/CONF.39/L.41) to article A was rejected by 43 votes to 33, with 17 abstentions.*

90. The PRESIDENT put article A as submitted by the Drafting Committee to the vote.

*Article A was adopted by 84 votes to 11, with 5 abstentions.*

*Article B*

*Article B was adopted by 103 votes to none.*

*Article C*

91. The PRESIDENT put the six-State amendment to article C to the vote.

*The six-State amendment (A/CONF.39/L.41) to article C was rejected by 45 votes to 32, with 20 abstentions.*

92. The PRESIDENT put article C as submitted by the Drafting Committee to the vote.

*Article C was adopted by 83 votes to 13, with 6 abstentions.*

*Proposed article C* bis

93. Mr. DE CASTRO (Spain) said that his delegation had proposed an additional article, at present numbered C *bis* (A/CONF.39/L.39), for inclusion in the final provisions. Since, however, paragraph 2 of the amendment was so closely connected with the original article 62 *bis* which had subsequently been rejected, he

[1] For the discussion of these provisions in the Committee of the Whole, see 100th to 105th meetings.

Amendments were submitted to the plenary Conference by Spain (A/CONF.39/L.39); Hungary, Poland, Romania, Union of Soviet Socialist Republics, United Republic of Tanzania and Zambia (A/CONF.39/L.41); Afghanistan, Ghana, India, Ivory Coast, Kuwait, Lebanon, Nigeria, Senegal, Syria and United Republic of Tanzania (A/CONF. 39/L.48 and Add.1).

was withdrawing it. His delegation's amendment, therefore, now read simply: " No reservation is permitted to Part V of the present Convention ".

94. His delegation had decided to maintain that part of its amendment with a view to clarifying the provisions of article 16 (*c*). According to article 16 (*c*), a State might formulate a reservation to a treaty unless the reservation was incompatible with the object and purpose of the treaty. His delegation believed that reservations to Part V of the convention would be incompatible with the object and purpose of the convention, and considered that it should be specifically laid down in the final provisions that no reservations to Part V would be permitted.

95. Mr. BLIX (Sweden) said that in his delegation's view, a convention codifying and developing the law of treaties should ideally not be subject to any reservation whatsoever since, if reservations were made, they would detract from the consolidating effect of the convention. He would have liked to see a clause prohibiting any reservation whatsoever to the convention, but he realized that that would not have been acceptable to the majority. Part V contained certain articles of vital importance, and presumably reservations to such articles would be incompatible with the object and purpose of the convention, but in order to avoid any possibility of dispute, his delegation considered that it would be better to include a specific prohibition of reservations to Part V. His delegation therefore supported the Spanish amendment.

96. Mr. NASCIMENTO E SILVA (Brazil) said that a number of delegations considered the Spanish amendment unacceptable at that stage in the Conference's work for several reasons. First, there had already been a more or less substantive vote on the final provisions. Secondly, a number of countries for internal reasons could not accept a reservations clause. Finally, the convention already included five articles on reservations, which covered the subject completely. His delegation therefore strongly opposed the Spanish amendment.

97. Mr. ROSENNE (Israel) said he agreed with the view expressed by the Brazilian representative. The substantive articles concerning reservations in the convention were perfectly adequate and it was preferable not to have a further article on reservations in the final provisions. He would therefore vote against the Spanish amendment.

98. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that it was apparent from the convention that reservations were generally permissible. The assertion that a reservation to Part V would change the whole meaning of the convention was doubtful. Part V might contain provisions, reservations to which would in no way be incompatible with the object and purpose of the convention. Thus, in some cases, reservations to Part V would be permissible and would not have the dire consequences to which the Swedish representative had referred. Article 19, on the legal effects of reservations, enabled other States which might object to reservations to express their attitude. Thus the nature of Part V as a whole was not such as to preclude the possibility of reservations. He therefore agreed with those representatives who had said that the Spanish amendment was superfluous, and he would vote against it.

99. Mr. JAGOTA (India) said that his delegation would oppose the Spanish amendment since the question of reservations was already adequately covered in the convention. He might have supported the amendment if Part V as recommended by the International Law Commission had been adopted, but in view of the controversial draft declaration and proposed new article (A/CONF.39/L.47 and Rev.1) which had just been adopted and on which his delegation had abstained, he wished to reserve his Government's position so that it might, if it so desired, enter a reservation to that article.

100. Sir Francis VALLAT (United Kingdom) said that the Spanish amendment would alter the balance of the delicate compromise just adopted; he agreed with the views expressed by the USSR and Brazilian representatives.

101. Mr. ELIAS (Nigeria) said he agreed that the " package deal " just adopted excluded the acceptance of any article such as that proposed by the Spanish representative.

102. The PRESIDENT put the Spanish amendment to the final provisions to the vote.

*At the request of the Swedish representative, the vote was taken by roll-call.*

*Ecuador, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Ecuador, Guyana, Jamaica, Luxembourg, Netherlands, Spain, Sweden, United Republic of Tanzania, Zambia.

*Against:* Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Ivory Coast, Japan, Liberia, Liechtenstein, Malaysia, Malta, Mexico, Monaco, Mongolia, Nepal, New Zealand, Nigeria, Peru, Poland, Romania, San Marino, Saudi Arabia, Senegal, Singapore, South Africa, Sudan, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Afghanistan, Algeria, Argentina, Australia, Austria, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo (Brazzaville), Cuba.

*Abstaining:* Ethiopia, Ghana, Holy See, Iceland, Ireland, Kenya, Kuwait, Lebanon, Libya, Madagascar, Morocco, Norway, Pakistan, Panama, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Sierra Leone, Trinidad and Tobago, Uruguay, Yugoslavia, Belgium, Bolivia, Central African Republic, Ceylon, Congo (Democratic Republic of), Costa Rica, Cyprus, Czechoslovakia, Dahomey, Denmark, Dominican Republic.

*The Spanish amendment to insert an article C bis (A/CONF.39/L.39) was rejected by 62 votes to 9, with 33 abstentions.*

### *Article D*

103. Mr. ELIAS (Nigeria) said that ten delegations, including his own, had submitted an amendment (A/

CONF.39/L.48 and Add.1) recommending that the number of ratifications or accessions necessary to bring the present convention into force should be 35.

104. Sir Francis VALLAT (United Kingdom), speaking also on behalf of the Brazilian delegation, said that he was prepared to agree to that figure.[2]

105. The PRESIDENT put the ten-State amendment to the vote.

*The ten-State amendment (A/CONF.39/L.48 and Add.1) was adopted by 92 votes to none, with 8 abstentions.*

*Article D, as amended, was adopted.*

*Article E*

*Article E was adopted by 103 votes to none.*

*Article 49* (Coercion of a State by the threat or use of force) *(resumed from the 23rd plenary meeting)*

106. Mr. KABBAJ (Morocco) said he wished to have it put on record that his delegation was in favour of article 49, although its vote in favour of that article had, no doubt inadvertently, not been recorded during the roll-call vote at the 19th plenary meeting.

**Report of the Credentials Committee on the second session of the Conference (A/Conf.39/23/Rev.1)** [3]

107. Mr. SUAREZ (Mexico), Chairman of the Credentials Committee, said that his Committee's report on the credentials of delegations to the second session was now before the Conference.

108. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation had already expressed its position of principle with regard to the credentials submitted at the first session of the Conference. Nevertheless, in connexion with the report of the Credentials Committee concerning the credentials submitted at the second session, the USSR delegation considered itself obliged to state once again that it could not recognize the credentials of the persons claiming to represent South Viet-Nam and South Korea. The fact that it would not oppose the approval of the Committee's report should not be interpreted to mean that his delegation recognized those credentials, since it was well known that neither the ruling circles at Saigon nor the Seoul régime could really represent the peoples of South Viet-Nam and of South Korea, respectively.

109. Mr. SAULESCU (Romania) said that his delegation was prepared to approve the report of the Credentials Committee. Such approval, however, should not be interpreted as changing in any particular the position taken by his delegation at the first session, at the 5th plenary meeting. His delegation reaffirmed its profound conviction that the People's Republic of China, the Democratic Republic of Viet-Nam, the German Democratic Republic and the Democratic People's Republic of Korea should be permitted to participate in the work of codifying international law.

110. Mr. BEREKET (Turkey) said that his delegation still maintained the views with respect to Cyprus which it had expressed at the 5th plenary meeting.

111. Mr. JACOVIDES (Cyprus) said that the position taken by the Turkish representative constituted an unwarranted interference in the internal affairs of Cyprus, which was an independent State and represented the population of the country as a whole.

112. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that he had too much respect for the Conference to enter into polemics. His country was a member State of the specialized agencies and had been invited to participate in the Conference by the Secretary-General under General Assembly resolution 2166 (XXI).

113. Mr. LEE (Republic of Korea) said that paragraph 6 of the Credentials Committee's report (A/CONF.39/23/Rev.1) was phrased in such an offensive way that it could serve no constructive purpose at all. His delegation would, however, accept the report as a whole, since it had no wish, at such a late stage in the proceedings, to introduce arguments which were already familiar to the Conference.

114. Mr. STREZOV (Bulgaria) said that his delegation was prepared to accept the report of the Credentials Committee, although it wished to repeat the reservations which it had made at the 5th plenary meeting.

115. U BA CHIT (Burma) said that his delegation would vote for the report, but without prejudice to its position with respect to South Viet-Nam and South Korea.

116. Mr. MAKAREWICZ (Poland) said that his delegation could not recognize as valid the credentials of South Korea and South Viet-Nam, because the régimes of those two countries could not be regarded as representing the peoples of South Korea and South Viet-Nam. At the same time, it would like to confirm the reservations made by it at the first session of the Conference concerning other credentials as well.

117. Mr. SEATON (United Republic of Tanzania) said that his delegation would vote for the report; but that should not, however, be construed as meaning that it approved the credentials of South Viet-Nam and South Korea.

118. Mr. TSURUOKA (Japan) said that his delegation saw no grounds for challenging the validity of the credentials offered by the Republic of Korea, which had been invited by the Secretary-General of the United Nations to participate in the Conference in accordance with General Assembly resolution 2166 (XXI).

119. Mr. TODORIC (Yugoslavia) said that the attitude of his Government with respect to the admission of certain States had not changed since the first session.

[2] The proposal for the final provisions (A/CONF.39/C.1/L.386/Rev.1) approved by the Committee of the Whole had been submitted by Brazil and the United Kingdom of Great Britain and Northern Ireland.

[3] For the discussion of the report of the Credentials Committee on the first session, see 5th plenary meeting.

120. Mr. USTOR (Hungary) said that his delegation would vote for the report, subject to the same reservations as those expressed in its paragraph 6.

121. Mr. KEARNEY (United States of America) said that in the view of his delegation, it was enough that the countries whose credentials had been attacked had been duly invited to participate in the Conference by the Secretary-General under General Assembly resolution 2166 (XXI).

*The report of the Credentials Committee (A/CONF. 39/23/Rev.1) was adopted unanimously.*

The meeting rose at 8.20 p.m.

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## THIRTY-FIFTH PLENARY MEETING

*Thursday, 22 May 1969, at 12 noon*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution* (resumed from the previous meeting)

*Explanations of vote*

1. The PRESIDENT invited representatives to explain their votes on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the previous meeting.

2. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that, from the legal point of view, there was no link, in his delegation's opinion, between the two quite different questions dealt with in document A/CONF.39/L.47 and Rev.1. But the Conference had had to vote on the two questions together. In the circumstances, his delegation had abstained in the vote on the proposals in the document. On the one hand, it disapproved of the draft declaration on universal participation in and accession to treaties, but on the other, it had already supported article 62 *bis* and was still in favour of the part of the proposal relating to procedures for adjudication.

3. Mr. HU (China) said that the text proposed in document A/CONF.39/L.47 and Rev.1 was in two parts, which were independent of each other. The document had been submitted as a compromise formula. Since it had been impossible to take a vote by division, the Chinese delegation had been placed in a very difficult position, as it was in favour of the second part and strongly opposed to the first. It had therefore decided to abstain, but had reserved the right to explain its vote. Its abstention should in no way be construed as indicating approval of the first part of the proposal, since it was opposed to the declaration on the principle of universality, which it regarded as a mere recommendation with no mandatory force. The General Assembly remained the sole judge. He reserved his Government's right to express its view when the question of universality was discussed in the General Assembly.

4. Mr. SHUKRI (Syria) said he had abstained in the vote on document A/CONF.39/L.47 and Rev.1 because the formula did not go as far as his delegation would have wished where the principle of universality was concerned, and further than it would have wished on the question of the settlement of disputes. It had not, however, cast a negative vote, because it had wished to contribute to the success of the convention and to express its appreciation of the arduous efforts of the representative of Nigeria and his colleagues. If a separate vote had been taken on the declaration, the Syrian delegation would have voted in favour of it; but it regarded the declaration as merely a minimun. The Syrian Government would not only strive to achieve the object of that declaration at the next session of the General Assembly, but would also continue its efforts in all organizations and conferences to bring about the universal recognition of the principle of universality; for his country that was a matter of principle.

5. Mr. KHLESTOV (Union of Soviet Socialist Republics) explained that his delegation had voted against document A/CONF.39/L.47 and Rev.1 as a whole because the vote had not been taken by division. The document was composed of two unbalanced parts, and the second part, which provided for recourse to the International Court of Justice and had serious financial implications, was unacceptable.

6. The declaration contained merely a feeble appeal to the United Nations and the General Assembly to ensure that the question of universality should remain under consideration. Nevertheless, it had been adopted, and sixty-one States, including a large number of delegations of western States, had voted in favour of it. That meant that the Conference recognized the existence of the principle of universality in relation to multilateral treaties. Recognition of that principle was clearly expressed in the first paragraph, and confirmed what the USSR delegation had so often advocated. The USSR delegation supported the principle and the declaration.

7. Mr. CARMONA (Venezuela) said his delegation had already explained its position on the problem of arbitration and compulsory adjudication in the Committee of the Whole. That position had not changed. The Venezuelan delegation had taken the view that it should not intervene to influence the result of the vote on document A/CONF.39/L.47 and Rev.1 at the previous meeting. It had abstained, leaving the final decision to its Government.

8. Mr. FUJISAKI (Japan) said he wished to express his appreciation of the efforts made by those representatives who, until the last moment, had worked so hard to

arrive at the compromise formula submitted in document A/CONF.39/L.47 and Rev.1. Since it was a compromise, it was only natural that that formula did not entirely satisfy anyone and Japan was no exception in that respect. His delegation had voted for the formula, not because it fully supported the contents of the compromise proposal, but solely because it believed that it was the only way of saving the convention as a whole.

9. Mr. ALVAREZ (Uruguay) explained that his delegation had voted for the text submitted in document A/CONF.39/L.47 and Rev.1 because it was anxious that the Conference should reach agreement on the questions that were the subject of controversy. The proposal was a first move towards recognizing compulsory adjudication as a means of settling international disputes, but its scope was too restricted and bore no relation to the position traditionally adopted by his Government for many years, which his delegation had explained on numerous occasions during the discussion. The formula did however make a positive contribution to the progressive development of international law and substantially improved the machinery provided for in article 62.

10. His delegation's attitude towards the principle of universality did not in any way commit his Government with regard to the position it might subsequently adopt when the principle in question was again discussed in the General Assembly.

11. Mr. SAULESCU (Romania) said that his delegation had emphasized from the very beginning of the Conference's work that the convention could only be effective in so far as it contained a provision establishing the principle of universality. For that reason his delegation had joined the other delegations which had submitted amendments to that effect to the Committee of the Whole and to the plenary Conference; it considered that the convention was, by definition, a multilateral treaty of interest to the entire international community. The Conference had unfortunately decided differently by adopting at the previous meeting the draft declaration on universal participation in and accession to the convention on the law of treaties.

12. His delegation realized that the draft declaration had certain merits, although it was still far from what should have been included in a convention of world-wide effect. He therefore desired to express his appreciation to the sponsors of the draft declaration, and in particular to the representative of Nigeria. If the draft declaration had been put to the vote separately, Romania would have voted for it.

13. In the absence of a separate vote, his delegation had had to take a position on the proposals as a whole. It could not support the principle of the procedures for the settlement of disputes included in the compromise proposal. It had on several occasions explained why it supported the procedures provided for in article 62 and why it rejected machinery for compulsory settlement set up in advance. In those circumstances, his delegation had been compelled to vote against the proposals submitted together in document A/CONF.39/L.47 and Rev.1.

14. Mr. SINHA (Nepal) said he had voted for the draft declaration, the new article and the draft resolution. His delegation had, however, voted against article 62 *bis:* the Conference had been deeply divided on the issue of compulsory arbitration in case of dispute; moreover, the provision proposed in article 62 *bis* had been defective in respect of many important points. In particular, his Government did not like the idea of *ad hoc* tribunals giving decisions on vital but nebulous questions of *jus cogens.* Such tribunals might well have given conflicting decisions, particularly as there was no institution to make them uniform. Moreover, the proposed article 62 *bis* adopted a negative attitude towards the International Court of Justice which was after all the judicial organ of the world order. Again, the adoption of that provision would have prevented a considerable number of countries from acceding to the convention.

15. On the other hand, the new article just adopted on procedures for adjudication, arbitration and conciliation, although not ideal since it was a compromise solution, at least filled some of the gaps on the institutional side of the convention. It restored confidence in the International Court of Justice; although many delegations had reason to doubt the wisdom of some decisions of the International Court, the Court was an international creation and could not therefore be blamed for its merely congenital weaknesses. In future it was sure to grow in wisdom and stature.

16. His delegation had also voted for the draft declaration contained in document A/CONF.39/L.47 and Rev.1. Although the declaration did not guarantee participation by all nations in multilateral conventions of interest to the international community as a whole, it nevertheless emphasized the principle of universality. For his delegation at all events the declaration was morally binding on States; they would feel themselves called on to bring it to fruition by voting for it in the General Assembly. Nepal, at least, would not fail in its duty in that respect. It was a tragedy that at that stage, when article 1 of the convention made it applicable to treaties concluded between all States and article 5 empowered all States to conclude treaties, the convention did not provide that it was open to all States. It was because of its desire to correct that injustice that his delegation had associated itself with the sponsors of a new article laying down the principle of universality (A/CONF.39/L.36). That article had not been adopted, but he was convinced that the principle of universality would eventually triumph and his delegation would continue to work to that end.

17. His delegation had not voted against the so-called "Vienna formula", which remained the only one acceptable in the circumstances, and had simply abstained.

18. As a result of the adoption of the compromise proposal (A/CONF.39/L.47 and Rev.1) which had provided a happy solution to the crisis in the Conference's work, the convention on the law of treaties was manifestly a success.

19. Mr. SEOW (Singapore) said that in his view the draft declaration, the new article and the draft resolution contained in document A/CONF.39./L.47 and Rev.1 represented a genuine attempt to bridge differences

of opinion so deep that they had threatened to bring about the failure of the Conference. His delegation had therefore wished to support the proposals in which those efforts had resulted, primarily in order to ensure the success of the convention. He wished to pay a tribute to the sponsors of those compromise solutions.

20. Mr. JAGOTA (India) said he wished to explain exactly why his delegation had abstained in the vote at the preceding meeting on the proposals contained in document A/CONF.39/L.47 and Rev.1.

21. The dissensions that had made themselves felt in the Conference related essentially to articles 5 *bis* and 62 *bis*. The Indian delegation had supported the principle of article 5 *bis*, and its various formulations, without involving itself in any political issue arising from those proposals. As to article 62 *bis*, his delegation had been opposed to the idea of compulsory settlement procedures, and had been determined to do everything possible to prevent its adoption. The proponents of article 62 *bis* were equally determined on the opposite course, and had spent the year between the two sessions of the Conference in intensive lobbying to ensure that the article was accepted. In the process the Asian and African States had been deeply divided. When both article 5 *bis* and article 62 *bis* had been rejected the Conference had been in a mood of despondency. Yet the Conference had adopted the basic proposal of the International Law Commission by a very large majority, much larger than that by which it had adopted the proposals in document A/CONF.39/L.47 and Rev.1. Thus it could not be said that the seventeen years of work by the International Law Commission had been in jeopardy. All that had been in jeopardy had been the new proposals making additions to the draft articles prepared by the International Law Commission.

22. At that juncture, the Asian and African States, on the initiative of Nigeria and India, among others, had sought to find a fair and reasonable solution. The delegations of Nigeria and India had given shape to certain ideas that were regarded as representing a basis for negotiation, and so document A/CONF.39/L.47 had been born.

23. India had intended to support the proposal if it had received broad support from all groups in the Conference, especially the Asian and African States. Since the proposal, if adopted, would have imposed definite legal obligations upon Governments, the promotion of the proposal had had to be left to those delegations whose Governments were already prepared to go beyond article 62. Consequently the Indian delegation had been unable to join the other delegations concerned in promoting the proposal without consulting the Government of India. But the Indian delegation had decided that in any case it would not oppose it. And if the proposal had received widespread support, his delegation had decided to support it also, and to recommend it to the Indian Government for acceptance. Unfortunately, when the proposal had been put to the Asian-African group, it had not received widespread support, and it consequently became impossible to present it to the Conference on behalf of that group. Thereafter, the sponsors of the proposal had decided to put it to the Conference on their own behalf at the 34th plenary meeting. The Indian delegation's position had remained unchanged. The result of the vote — 61 votes to 20, with 26 abstentions — had clearly indicated the measure of support and the measure of opposition and caution with which the proposal had been received. India had neither supported nor opposed the proposal.

24. His delegation had not wished to oppose it principally because of its close association with the subject-matter of the proposal, and because of its deep respect for the sponsors, the representative of Nigeria and the representative of Ghana. It must also be admitted that the proposal had restored hope to the Conference.

25. The Indian delegation would continue to adopt a positive attitude towards the convention on the law of treaties as a whole, and would vote for it. India would be guided by the convention in its treaty relations, in anticipation of the entry into force of the convention. And if in the near future the sixty-one States which had supported the proposals contained in document A/CONF.39/L.47 and Rev.1 became parties to the convention without any reservation whatever on Part V, the Indian Government might very well also be inclined to follow their example.

26. Miss LAURENS (Indonesia) said that her delegation had abstained in the vote on the compromise formula consisting of the draft declaration, the new article and the draft resolution.

27. The Indonesian delegation had come to the Conference prepared to accept in principle the draft articles presented by the International Law Commission after so many years of work. At the first session of the Conference, Indonesia had stated on several occasions that it was quite satisfied with that text and was ready to subscribe to it without major changes. At the second session, her delegation had restated its position, which remained unchanged, on such major unsolved issues as the principle of universality and the compulsory settlement of disputes arising from Part V of the convention and from the interpretation and application of the other articles in general. At the plenary stage, as in the Committee of the Whole, her delegation had voted in accordance with the position it had adopted from the very beginning.

28. However, the compromise formula on which the Conference had taken action at the previous meeting represented something new. Indonesia had unequivocally stated its position, which was that it could not agree to the insertion in the convention on the law of treaties of a provision on the compulsory settlement of disputes. It had nevertheless refrained from opposing the draft declaration, the new article and the draft resolution presented together in document A/CONF.39/L.47 and Rev.1, because that formula represented a final attempt to find a solution acceptable to the great majority. In that connexion, her delegation wished to express its appreciation to those who had carried through the negotiations. Moreover, the draft declaration forming part of the proposal was quite acceptable to Indonesia. That being the case, her delegation had not wished to

stand in the way of the efforts undertaken by a number of friendly delegations and had simply abstained. It wished nevertheless to make it clear that, had there been a separate vote, it would have voted against what was in effect a new article 62 *bis*.

29. In any case, her delegation considered the convention as a whole to be acceptable and it would therefore vote in favour of it.

30. Mr. RAMANI (Malaysia) said that his delegation had voted against the compromise formula (A/CONF.39/L.47 and Rev.1) because it considered the inclusion of a declaration and a new article in a single proposal to be an unusual procedure.

31. If the sponsors had not objected to a separate vote, the Malaysian delegation would have supported the draft declaration, because the Conference, having been convened by the General Assembly, should leave it to the General Assembly to decide which States should be invited to participate in the convention on the law of treaties.

32. During the consideration of article 62 *bis*, the Malaysian delegation had already explained why it objected to the procedure laid down in that article. It continued to believe that the world had not yet reached the stage where it could accept a compulsory arbitral procedure or international jurisdiction.

33. The basic principle of international law was that every State must respect the dignity and independence of other States. There was no common ground beyond that principle. Every State applied that principle in its own way and every State had applied it in a different way. The declaration adopted by the Conference at the previous meeting jeopardized that essential principle, on which the United Nations Charter was based. For, when referring to the role of the Security Council in the pacific settlement of disputes, the United Nations Charter did not provide that legal disputes must be submitted to the International Court of Justice; it merely stated that, in making its recommendations, the Security Council should take into consideration that legal disputes should as a general rule be referred to the International Court of Justice.

34. Moreover, adoption of the new article had *ipso facto* extended the jurisdiction of the International Court of Justice, under Article 36, paragraph 1, of its Statute, to disputes arising from the convention. Accordingly, in the case of a dispute between two States concerning the existence of a norm of *jus cogens* or on the question whether a new norm had emerged, all the parties to the convention had a right to be heard by the International Court under Article 63 of its Statute. That argument should provide food for thought to those delegations which had expressed undue enthusiasm following the adoption of the compromise formula.

35. When the time came to sign the convention, the Government of Malaysia would reserve its position on that article in order to refute in advance arguments based on estoppel.

36. Mr. WYZNER (Poland) said that he had voted against the proposals contained in document A/CONF.39/L.47 and Rev.1 simply because, in the opinion of the Polish delegation, they did not represent a really balanced compromise.

37. He noted, however, that the draft declaration on universal participation in and accession to the convention on the law of treaties had been approved by an overwhelming majority. It gave him especial satisfaction that the declaration stated the principle of universality as clearly as it had previously been stated in draft article 5 *bis*. Moreover, the declaration contained a particularly important element in that it invited the General Assembly to ensure the widest possible participation in the convention. He wished to say that his delegation fully approved of the declaration and would have voted for it if it had been put to the vote separately.

38. Mr. MITSOPOULOS (Greece), explaining his delegation's vote, said that the compromise text adopted at the previous meeting was not satisfactory; the Greek delegation had always considered that the Conference's task was limited to the codification of the law of treaties and that it was therefore not competent to deal with highly political problems such as the status and legal capacity of certain territorial entities which were not recognized by the great majority of States. Moreover, the Greek delegation did not think it possible to trade legal principles against political considerations without impairing the quality and efficacy of the new system of written international law elaborated by the Conference.

39. Nevertheless, in view of the desire of most delegations to safeguard the work accomplished by the Conference, the Greek delegation had voted in favour of the compromise formula. He need hardly say that in approving that formula, his delegation was not entering into any undertaking; moreover, his powers did not permit him to commit Greece with regard to the question dealt with in the first part of the compromise formula. That question must be examined at the next session of the General Assembly, without prejudice to the right of every Member State to decide freely and without any prior obligation.

40. Mr. REY (Monaco), explaining his vote, said that the delegation of Monaco had made considerable efforts to introduce the rule of morality into the international law of obligations, to find a reasonable and clear definition of public order in the form of *jus cogens* and to make it possible to establish and organise a real system of settlement for any disputes that might arise in the future.

41. The gulf separating the results obtained and the great hopes which had been raised by the opening of the Conference had prevented his delegation from supporting the compromise text submitted.

42. For various reasons, his delegation had not voted against the text. In the first place, most of its sponsors were developing countries, and the formula showed that they were aware of the considerable part played by conciliation in international relations. Moreover, a real system of compulsory settlement — limited, it was true, but of great moral significance — had been devised for

the first time, a system entrusted to the International Court of Justice which remained the finest achievement of international law and jurisdiction. Lastly, his delegation had thought that it was not possible to do better in existing circumstances and that the present wording of the compromise formula could always be improved in the future.

43. Mr. YU (Republic of Korea) said that his delegation had abstained because it was not satisfied with the present wording of the compromise formula, which combined two different questions of substance.

44. His delegation could not accept the idea contained in the draft declaration but would have been prepared to vote in favour of the second part of the formula, relating to the compulsory procedures for the settlement of disputes arising from the application of Part V of the convention.

45. Since, however, the vote had been taken on both questions at the same time, his delegation had considered it preferable to abstain.

46. Mr. SMEJKAL (Czechoslovakia), explaining his negative vote, said that his delegation's attitude had been determined mainly by the fact that, although that part of the proposal relating to article 62 *bis* and the proposed declaration on universality did not balance one another, the two proposals had been submitted as a compromise formula.

47. The Czechoslovak delegation appreciated the efforts made by certain delegations and, if a motion for a separate vote had been accepted, it would have voted without hesitation in favour of the declaration. It regretted that it should not have been possible to arrive at a solution generally acceptable to the majority of States and one which would have made it possible to make decisive progress in the field of international relations. Nevertheless, his delegation was optimistic and hoped that the General Assembly of the United Nations would take the necessary measures to create a climate favourable to the work of exceptional importance which the Conference had just completed.

48. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that his delegation had voted against the proposed solution because it did not regard the proposed formula as a genuine compromise that took the opinions of all parties into account.

49. Since the sponsors of that formula had refused to convert the second part of the text into an optional protocol, his delegation had voted against the proposed solution.

50. If the motion for division had been accepted, his delegation would have voted in favour of the declaration, which proclaimed a principle of vital importance.

The meeting rose at 1 p.m.

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## THIRTY-SIXTH PLENARY MEETING

*Thursday, 22 May 1969, at 3.30 p.m.*

*President:* Mr. AGO (Italy)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution* (continued)

*Explanations of vote* (continued)

1. The PRESIDENT said that the representative of Algeria wished to explain his vote on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the 34th plenary meeting.

2. Mr. KELLOU (Algeria) said that his delegation's abstention in the vote should not be interpreted as a refusal to accept the compromises necessary to enable the Conference to arrive at a general agreement. His delegation greatly appreciated the efforts made by the delegation of Nigeria to lead the Conference out of an impasse.

3. The draft declaration (A/CONF.39/L.47 and Rev.1) was acceptable to his delegation despite its imperfections, but the new article on procedures for adjudication, arbitration and conciliation was not, since it provided for a compulsory procedure for the settlement of disputes which did not meet the objections put forward by his delegation.

*Report by the Chairman of the Drafting Committee*

4. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had only been able to devote one meeting to the examination of the declaration, new article, annex and resolution adopted at the 34th plenary meeting and, in the short time available, it had not been able to give to those texts the same attention as it had given to other provisions of the convention.

5. The Drafting Committee had therefore confined itself to essential drafting changes, of which he need mention only the change in the title of the declaration. The title in the proposal adopted by the Conference (A/CONF.39/L.47 and Rev.1) was " Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties ". The Drafting Committee had taken the view that the adjective " universal " could not be applied to " accession ". Accession was only one of several means whereby a State could express its consent to be bound by a treaty. To refer to accession in the title could thus appear to exclude other means of expressing consent to be bound, such as ratification or approval. The Drafting Committee had therefore

amended the title of the Declaration to read: " Declaration on Universal Participation in the Vienna Convention on the Law of Treaties ".

6. The PRESIDENT said that, if there were no objection, he would take it that the Conference confirmed its adoption of the new article 66,[1] entitled " Procedures for judicial settlement, arbitration and conciliation ", and the annex to the convention, in the form in which they had emerged from the Drafting Committee.

*It was so agreed.*

7. The PRESIDENT said that, if there were no objection, he would take it that the Conference also confirmed its adoption of the " Declaration on Universal Participation in the Vienna Convention on the Law of Treaties " and the " Resolution relating to article 66 of the Vienna Convention on the Law of Treaties and the Annex thereto " in the form in which they had emerged from the Drafting Committee.

*It was so agreed.*

8. Mr. SHUKRI (Syria) noted that the resolution adopted at the 34th plenary meeting and now confirmed by the Conference provided that the United Nations should bear the expenses of the conciliation commission to be established under article 66 and the annex thereto. He asked the Secretariat whether that provision would cover the case of a non-member of the United Nations involved in a dispute submitted to the conciliation commission.

9. Mr. WATTLES (Secretariat) said that the question of the expenses involved in the conciliation procedure would, under the resolution adopted by the Conference, be submitted to the General Assembly. It would be for the Assembly to lay down how those expenses should be borne. The terms of the resolution made no distinction between Members and non-members of the United Nations.

10. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he wished to place on record that his delegation's position on the declaration, the new article 66, the annex and the resolution was the same as that which had already been placed on record in respect of the ten-State proposal (A/CONF.39/L.47 and Rev.1) which the Conference had adopted at its 34th plenary meeting.

11. Mr. DELEAU (France), referring to the reservations made by his delegation at a previous meeting regarding the financial implications of the conciliation procedure, asked that those reservations should also be placed on record.

## Adoption of the Convention on the Law of Treaties

12. Mr. YASSEEN, Chairman of the Drafting Committee, said that, in pursuance of rule 48 of the rules of procedure, the Drafting Committee submitted to the Conference the complete draft of the Vienna Convention on the Law of Treaties (A/CONF.39/22 and Add.1 to 6 and A/CONF.39/22/Amend.1).

13. The numbering of the articles was provisional. He suggested that the Conference leave to the Secretariat the responsibility for ensuring, after the adoption of the convention, that all the articles were correctly numbered and for making any corrections to those numbers that might prove necessary.

14. The PRESIDENT invited those representatives who wished to do so to explain their votes before the vote on the convention as a whole.

15. Mr. HUBERT (France) said that, as the Conference was about to conclude its work, his delegation wished first to pay a tribute to the important work accomplished by the International Law Commission. The Commission's draft, which had provided the basis for the Conference's discussions, was the fruit of long, scholarly and frequently successful endeavour. Those parts of the draft which represented codification properly so called merited unanimous approval. The only question was whether, in a commendable desire to achieve perfection, the authors of that draft had not sometimes ended by raising problems of such complexity that they had been a drag on the Conference's deliberations.

16. No one would be surprised if he mentioned first the provisions concerning *jus cogens*; it was no doubt a lofty concept but it was liable to jeopardize the stability of treaty law, which was a necessary safeguard in inter-State relations. On that point, even the best conceived procedures for the settlement of disputes, even recourse to the International Court of Justice, could not make up for the lack of precision in the drafting of the texts. In consequence, the judge would be given such wide discretion that he would become an international legislature and that was not his proper function.

17. If provision had been made for the jurisdiction of the International Court in disputes arising from the other articles of Part V, in particular those relating to coercion by the threat or use of force and to fundamental change of circumstances, that would have gone a long way towards allaying the fears which had been aroused over those articles. But unfortunately, just where it would have been most valuable, the compulsory jurisdiction of the Court had been rejected. And no provision had been made for compulsory arbitration, so that disputes of vital importance would merely be submitted to a conciliation procedure, which must be treated with the utmost reserve and which in any case could always be rendered nugatory by the action of one of the parties alone.

18. With regard to the provisions of the convention outside Part V, no clause had been included on the settlement of disputes to which they might give rise. That omission led to the remarkable situation that, apart from the articles relating to *jus cogens,* any dispute arising out of the interpretation or the application of the convention on the law of treaties could continue indefinitely, thereby causing irremediable harm to the relations between the States concerned.

[1] This was the number allotted to the new article adopted at the 34th plenary meeting when the articles were renumbered.

19. There was nothing to be gained by passing over the disturbing deficiencies of a compromise sought with such zeal and accepted with such reticence. It was illusory to ignore the grave dangers which must inevitably follow therefrom and reckless to court such dangers. That was why the French delegation, while reiterating its country's steadfast adherence to the cause of progress in international law, would vote against a convention which was liable to raise more problems than it would solve.

20. Mrs. ADAMSEN (Denmark) said that her delegation would vote in favour of the draft convention as a whole because it agreed in general with a large number of the articles it contained. Her delegation had on several occasions, and especially as one of the sponsors of the rejected article 62 *bis*, stressed the necessity of establishing a compulsory procedure for the settlement of disputes in connexion with all the articles of Part V. Her delegation was still of the opinion that disputes arising out of any of those articles must be automatically subject to decision by an impartial third party, and the fact that the convention only provided for such a procedure to a limited extent might be expected to influence the final position which the Danish Government would take on the convention.

21. She wished to add that, when voting at the 34th plenary meeting in favour of the ten-State proposal (A/CONF.39/L.47 and Rev.1), the Danish delegation had not interpreted the draft declaration it contained as being decisive with regard to the position which Denmark would in due course take in the General Assembly or elsewhere on the subject dealt with in the declaration.

22. Mr. GALINDO-POHL (El Salvador) said that his delegation would vote in favour of the convention as a whole without prejudice to its reservations regarding some of the articles, reservations in respect of which it had already made an official statement.

23. Contemporary international law abounded in general norms but had few rules on the means of effective application and enforcement of those norms. That situation was bound to affect the convention on the law of treaties. It had, however, at least been possible to make provision for compulsory settlement of disputes arising out of the rules of *jus cogens* and that was a great step forward. Some would consider that the provision went too far; others that it did not go far enough. Viewed in its historical perspective, it could be considered as remarkable progress and would set a precedent for further progress in the same field.

24. The convention which the Conference was about to adopt did not merely codify generally accepted customs and principles; it also kept pace with contemporary changes and contained dynamic elements, such as the rules on *jus cogens*, and it would have a great influence on the international law of the future. In certain matters, such as the clause to the effect that treaty provisions might become binding through international custom, the convention went beyond its proper scope and embodied questionable pronouncements. His delegation shared the view of those who had drawn attention to the dangers arising from the imprecise formulation of the rules on the subject of *jus cogens*, which was made dependent not on the will of individual States but on that of the international community as a whole. It was true that that community consisted of States, but the various means whereby it adopted its decisions did not always coincide with the will of individual States. His delegation had nevertheless voted in favour of the articles on *jus cogens* because it considered that they introduced a dynamic element of progressive development and recognized the international community itself as a source of legal rules. The provisions on *jus cogens* would provide judges and arbitrators with a sensitive and delicate instrument which, if used with prudence, could serve to reflect the legal conscience of mankind at every stage of its development.

25. Contemporary political issues had affected the work of the Conference, but it had been possible to surmount those difficulties by means of solutions which, although not the best from the strictly legal point of view, were politically viable. The influence which political considerations had thus exerted over a legal instrument was one more demonstration of the fact that the law derived its content from the realities of life and that it would be nothing but an academic exercise to frame rules of law on the basis of pure logic.

26. The convention on the law of treaties was the most complete and progressive example of legal co-operation, and the experience gained with its adoption would facilitate future codification work.

27. Subject to the reservations it had expressed in the course of the discussions, his delegation would vote in favour of the convention.

28. Mr. USTOR (Hungary) said that the work of the Conference and the adoption of the convention on the law of treaties was an outstanding event in the long process of codification. His delegation was glad that most of the provisions of the convention had been adopted unanimously or by large majorities and either reflected rules established in international practice or added new progressive elements to the law of treaties.

29. At the same time, the Hungarian delegation regretted that the Conference had failed to include in the convention a provision to the effect that multilateral treaties which dealt with the codification and progressive development of international law should be open to universal participation. Hungary considered that to be a valid rule of contemporary international law and one which should therefore have been given a place in any convention on the law of treaties.

30. Again, that valid rule had not been reflected in the final provisions. That was a matter which Hungary, as a socialist country, could not pass over in silence, because the final provisions as adopted excluded some socialist countries from participation in the convention, although those countries, like all States in the world, had an equal and inalienable right to participate in the codification and progressive development of international law. His delegation also had misgivings in connexion with the article that had been adopted in place of article 62 *bis*, because that article accepted the

compulsory jurisdiction of the International Court of Justice.

31. Consequently, although the Hungarian delegation appreciated the results of the Conference, it was obliged to state that the great merits of the text were heavily outweighed by the exclusion of the valid and just principle of universality. To its deep and sincere regret, it would be unable to support the convention as a whole; nevertheless, it welcomed the declaration on universal participation in the convention on the law of treaties and hoped that that declaration would be implemented fully and, most important, in good faith.

32. Mr. BRAZIL (Australia) said that his delegation would abstain in the vote on the convention as a whole; it regretted that it could not support the text that had emerged from the long labours of the Conference on the basis of the draft articles prepared by the International Law Commission. The Australian delegation considered that many of the Commission's proposals marked valuable steps in the consolidation of existing law; examples of those were articles 31 and 32 [2] on the interpretation of treaties.

33. The fact remained that the Australian delegation had difficulties over a number of basic points. The first of those was the very flexible system of reservations adopted in articles 19 and 20,[3] which was bound to tend towards the erosion of texts of conventions adopted at international conferences. The second difficult point was that of procedures for the settlement of disputes under Part V of the convention. Australia considered that binding settlement procedures were indispensable if the international community was to undertake the major steps in the development of international law proposed in Part V. It must be acknowledged that the commendable efforts of the authors of the " package proposal " went some way to meet that view, but although the Australian delegation understood the satisfaction of the majority of delegations at the compromise that had been reached, which had enabled it to achieve positive results, it had been unable to support the proposal, because it did not go far enough in certain essential respects; for example, compulsory jurisdiction did not cover the sensitive grounds of invalidity set out in articles 52 and 62.[4]

34. Finally, as his delegation had stated at the 19th plenary meeting, articles 53 and 64 [5] formulated a doctrine of *jus cogens* of unspecified content, against which Australia had voted for the reasons set out in the summary record of that meeting. In that respect, Australia shared the reservations expressed by the French representative, to the effect that, although disputes under those articles were to be referred to the International Court of Justice, the problems of imprecision had not been eliminated and gave rise to concern with regard to the stability of treaties.

35. All those matters were of great importance, and the Australian delegation would unfortunately be obliged to abstain in the vote on the convention as a whole.

36. Mr. WYZNER (Poland) said that the text of the convention which had emerged from the Conference's detailed consideration of the draft articles submitted by the International Law Commission was generally acceptable to the Polish delegation and constituted a significant example of codification and progressive development in what was perhaps the most important branch of international law. Nevertheless, some fundamentally important questions had not yet been properly solved.

37. Poland had always considered that the convention should serve the interests of all States, irrespective of their political and economic systems, and his delegation had therefore collaborated closely with many others in search of compromise solutions acceptable to all States, in the belief that the spirit of good will and co-operation would finally prevail over the particular interests of a small group of States. Nevertheless, because of the intransigent attitude taken by some delegations, the Conference had been unable to confirm in the convention itself the right of every State to participate in general multilateral treaties, the universal application of which was in the interests of the whole international community. Moreover, the convention itself had not been made open directly to all States, although the right of universal participation in it was confirmed in a separate declaration.

38. The consultations conducted during the past few days had revealed that it had been chiefly due to the stubborn attitude of one State that a formula could not be found which would make the convention open to all States forthwith. It was deplorable that the short-range political interests of that one State should have prevented the Conference from inserting in the convention a formula which would ensure the legitimate right of all States to enter into international treaty relations.

39. The Polish delegation had therefore decided to abstain in the vote on the convention as a whole and to refrain from signing the instrument. At the same time, it wished to express its confidence that the General Assembly, given a clear mandate under the declaration on universal participation in the convention, would issue the necessary invitations at its twenty-fourth session, thus opening the convention to participation by all States.

40. Mr. KHASHBAT (Mongolia) said that the convention on the law of treaties should reflect the increasing development of treaty relations between countries with different political, social and economic systems. The convention now contained some positive elements and useful provisions, but his delegation regretted that, because the legitimate principle of universality had not been included in the convention itself, the significance and value of the whole instrument was severely restricted. It was unthinkable that such an important instrument as the convention on the law of treaties, which governed the treaty relations of States, should not be open to participation by all States; it could not be denied that the convention was a multilateral treaty, the object and purpose of which were of interest to the interna-

[2] Formerly articles 27 and 28.
[3] Formerly articles 16 and 17.
[4] Formerly articles 49 and 59.
[5] Formerly articles 50 and 61.

tional community of States as a whole. As a socialist State, Mongolia regarded that shortcoming of the convention as extremely serious, and would therefore abstain in the vote on the convention as a whole and would not sign it.

41. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation would be unable to support the draft convention as it stood, for a number of reasons.

42. The convention on the law of treaties had a special character in comparison with other multilateral conventions concluded with a view to codifying rules of international law, such as, for instance, the 1961 Convention on Diplomatic Relations. Since the object of the present convention was to codify rules of international law concerning the law of treaties, and to establish rules by which the entire international community would be guided in concluding international treaties, it must be based on the principle of universality, for it was common knowledge that all States participated in treaty relations and concluded international treaties.

43. The Conference had adopted a declaration on universal participation which confirmed that principle. All delegations were to be congratulated on the emergence of the Vienna Declaration on Universality, which would become a component part of international law and would undoubtedly play a positive role in the development of international relations. Unfortunately, the principle of universality had not been duly reflected in the convention itself, a shortcoming which naturally vitiated the significance of that instrument. The USSR delegation had made great efforts from the outset of the Conference to secure the inclusion of appropriate provisions on universality in the convention, and in doing so had shown all the necessary flexibility and willingness to compromise. Nevertheless, as the result of the attitude of certain delegations which had opposed the inclusion of such provisions, the problem had not been solved satisfactorily.

44. Furthermore, the final provisions of the convention contained a formula which limited the right of all States to participate in the convention, although by rights it should be open to all States, since its object and purpose were of interest to the international community of States as a whole. The existing draft therefore discriminated against a number of socialist States, and that was inadmissible.

45. In the light of those considerations, the USSR delegation was authorized to state that the Soviet Union could not sign the convention in its present form.

46. Mr. MANNER (Finland) said that his delegation would vote for the convention as a whole. The present text of the convention might not meet all the wishes of most delegations, but it still marked a historic advance in the progressive development of international law. Finland hoped that the convention would be adopted and applied by the great majority of States.

47. Mr. HU (China) said that his delegation would vote for the convention, on the understanding that China did not consider the declaration on universal participation to have any binding force.

48. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the General Assembly of the United Nations had entrusted to the Conference the great task of preparing a convention which would govern the vitally important problem of the conclusion of treaties among States. Since treaty relations were among the most important means of developing friendly relations among all States, such an instrument should naturally embody the principle of universality in the text itself. Unfortunately, that principle had not been included either in the substantive part of the convention or in the final provisions. The declaration on universal participation in the convention on the law of treaties, although a very important document in itself, could not compensate for the absence of any mention of the principle in the body of the convention and in the final provisions. The convention discriminated against a number of socialist States, and his delegation could not support it. His delegation was authorized to state that the Byelorussian Soviet Socialist Republic could not sign the convention in its present form.

49. Mr. MARESCA (Italy) said that his delegation would vote for the convention as a whole, in the belief that it marked a considerable advance along the difficult road of the codification of international law. Nevertheless, his delegation regretted that the sound legal guarantee of the compulsory jurisdiction of the International Court of Justice had not been extended to all the articles in Part V, particularly to article 52,[6] on the coercion of a State by the threat or use of force. On the other hand, his delegation welcomed the solution of submitting to the International Court of Justice disputes arising under articles 53 and 64,[7] on *jus cogens,* and also the extension of the system of compulsory conciliation to all the provisions of Part V.

50. Mr. FATTAL (Lebanon) said that some delegations could not support the convention because it went too far and others because it did not go far enough. But if too much and too little were weighed against each other, a balance was achieved. His delegation would vote for the draft convention, despite its many shortcomings, because Lebanon, which its geographical position, history and temperament made a natural mediator, regarded the golden mean as a cardinal virtue.

51. The PRESIDENT invited the Conference to vote on the draft convention on the law of treaties as a whole.

*At the request of the Colombian representative, the vote was taken by roll-call.*

*Jamaica, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Libya, Liechtenstein Luxembourg, Madagascar, Malaysia, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, Spain, Sudan, Sweden, Syria, Thailand,

[6] Formerly article 49.

[7] Formerly articles 50 and 61.

Trinidad and Tobago, Tunisia, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Austria, Belgium, Bolivia, Brazil, Cambodia, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Costa Rica, Dahomey, Denmark, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Finland, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast.

*Against:* France.

*Abstaining:* Monaco, Mongolia, Poland, Romania, South Africa, Switzerland, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Australia, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Congo (Brazzaville), Czechoslovakia, Gabon, Hungary.

*The draft convention on the law of treaties was adopted by 79 votes to 1, with 19 abstentions.*

52. Mr. MOE (Barbados) said that his delegation had unfortunately been absent during the vote. If it had been present, it would have voted in favour of the Convention.

53. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that his delegation had also been absent during the vote; had it been present it would have voted in favour of the Convention.

54. Mr. ANDERSEN (Iceland) said it was clear that no delegation was completely satisfied with the text of the Convention that had just been adopted. From that point of view, it would have been quite reasonable for his delegation to have abstained in the vote, but so much work and patience had been devoted to achieving the results, such as they were, that it had seemed only fair to vote for the Convention. It was, of course, for Governments to take the final decision.

55. Although the Icelandic Government would have liked the principle of compulsory legal settlement to be carried further, it must be admitted that a step had been taken in the right direction. He wished to stress, however, that for smaller States such as his own, the greatest possible protection was the rule of law, the guardian of which should be the International Court of Justice.

56. Mr. SOLHEIM (Norway) said that his delegation had been among the sixty-one which had voted in favour of the " package deal " submitted by ten States (A/CONF.39/L.47 and Rev.1). The Norwegian Government strongly supported the principle of a compulsory system of third-party settlement of disputes, and the ten-State proposal was all that the Conference had left if it wanted some degree of compulsory procedure on certain provisions of the Convention. The article ultimately adopted was far from adequate, but in view of the circumstances in which it had come into being and of the alternative possibility of having no provision at all on settlement procedures, with the consequent danger of a large number of negative votes and abstentions, the end result could not be regarded as insignificant. In particular, the fact that the International Court of Justice was again mentioned in the Convention was extremely gratifying and held out hopes for the future.

57. Thus, the Norwegian delegation, which had intended to abstain in the vote, had decided, in a spirit of goodwill, in view of the seriousness of the matter and in appreciation of the painstaking efforts of many delegations, to vote in favour of the Convention as a whole.

58. Mr. SECARIN (Romania) said that the problems of universality and procedure raised in the " package proposal " were of vital importance to the whole system of the Vienna Convention. As a " treaty on treaties ", that Convention should be a landmark in the process of the codification and progressive development of international treaty law. Romania continued to regard the Convention as an instrument intended to promote the principles of law and justice in relations between States.

59. Nevertheless, the problem of the principle of universality had not been solved in the way which Romania had advocated throughout the Conference. The Convention should have embodied the right of all States to participate in multilateral treaties of universal application and should have been open to participation by all States. Moreover, the solution that the Conference had adopted on procedure represented such an extreme innovation that his delegation had been unable to take a decision on it without weighing the new formula against all the rules set out in Part V and considering all its implications with regard to the application of the Convention. The Romanian delegation had therefore abstained in the vote on the Convention as a whole.

60. Mr. TEYMOUR (United Arab Republic) said that, without prejudging his Government's later attitude towards the Convention in the light of the opportunity open to all States to make reservations, his delegation's abstention in the vote on the Convention as a whole should not be interpreted as evidence of a lack of goodwill. His delegation had abstained in order to allow its Government time for a closer study of all the changes that had been made in the Convention. Everyone must be aware of his Government's co-operation and of its positive contribution to the work of the International Law Commission, and of the efforts it had made to bring about a convention on the law of treaties. The United Arab Republic was fully aware of the importance of such a convention in the development of understanding and friendly relations among members of the international community. It therefore hoped that the Convention would eventually be open to all countries and that all obstacles to the recognition of the principle of universality would be overcome.

61. Mr. REDONDO-GOMEZ (Costa Rica) said that his delegation had voted in favour of the Convention as a whole because it was an instrument of positive progress in the codification of international law and, in particular, would facilitate the development of the international co-operation which mankind so greatly needed. Admittedly, the instrument did not fully satisfy the aspirations of all the countries represented at the Conference, but it was a step towards a more promising future in international relations.

62. With regard to the compatibility of the Convention with Costa Rica's legislation, his country would make the necessary effort to accommodate its constitutional system to the provisions that had been adopted, but its internal law would continue to prevail, particularly with regard to treaty ratification procedure and its connexion with the provisions of the Convention.

63. Lastly, he wished to make it clear that his delegation interpreted the Convention as having a residuary meaning in relation to the provisions and principles of the inter-American system to which Costa Rica belonged.

64. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that his delegation's abstention in the vote should not be interpreted as opposition to the Convention as a whole. On the contrary, the Ukrainian SSR had supported a large majority of the provisions and principles set out in that instrument, such as the principles of observance of international obligations, equality and free consent, and sovereignty. The reasons for his delegation's abstention would be found in the statements it had made during the first and second sessions, which made it clear that the Ukrainian SSR could not support a convention which failed to reflect a basic principle of contemporary international law, the principle of universality, and consequently discriminated against certain socialist States. Nor had his delegation been able to support the principle of compulsory procedures for the settlement of disputes. It had therefore been authorized to declare that the Ukrainian Soviet Socialist Republic could not sign the Convention in its present form.

65. Mr. BILOA TANG (Cameroon) said that his delegation had refrained from voting against the Convention as a whole because that instrument was the result of so many years of painstaking work in the International Law Commission and in the Conference. Nevertheless, it considered that the Convention should have contained stronger guarantees in connexion with the settlement of disputes, and it did not regard the compromise solution as satisfactory. It had abstained in the vote, in the belief that that question should be studied further by Governments.

66. Mr. MUUKA (Zambia) said that his delegation associated itself with all those which had given their approval in principle to the Convention in its final form. In the course of the Conference there had been moments of such despair that, but for the resurgence of goodwill, such as had occurred on the previous day, much might have been lost and very little gained.

67. Although the Conference had not accomplished all that might have been desired, what had been gained constituted a landmark of unprecedented importance in international law. Now that the tumult was over, it was imperative that all Governments should work tirelessly towards closing the gap that still remained; in particular, he hoped that the General Assembly would recognize the principle of universality, since without that principle he feared that several States would not be in a position to ratify the Convention.

68. Mr. MOLINA ORANTES (Guatemala) said that his delegation shared the satisfaction of other delegations at the successful conclusion of the work of the Conference, culminating in the signing of a historic document which would constitute the first chapter in the codification of international law. His delegation also joined in the well-deserved tribute to the International Law Commission for its achievements during the past eighteen years; there could be no doubt that the sound juridical basis of the document prepared by it had contributed greatly to the success of the Conference.

69. His delegation had voted in favour of the Convention in the conviction that it represented an important step forward in the work of codifying international law. During the course of the debate, both in the Committee of the Whole and in the plenary Conference, his delegation had on various occasions referred to those provisions of the Guatemalan Constitution which prevented it from voting in favour of some of the articles of the Convention. Those articles included articles 11 and 12,[8] which related to consent expressed by merely signing a treaty; article 25,[9] which dealt with the provisional application of treaties; article 66,[10] which established procedures for judicial settlement, arbitration and conciliation; and article 38,[11] which contained a norm concerning the application of customary law derived from treaty law, a norm which in the opinion of his delegation lacked validity in existing international law.

70. For those reasons, while approving the text of the Convention as a whole, his delegation wished to put on record that it was compelled to make express reservations with respect to the articles to which he had referred.

71. Mr. CONCEPCION (Philippines) said that his delegation had voted for the Convention, although it had abstained on the compromise proposal (A/CONF.39/L.47 and Rev.1) put to the vote at the 34th plenary meeting. His delegation's vote for the Convention did not mean that it had abandoned the position it had adopted with regard to the major issues raised in the course of the discussions. Although some of those issues had not been met to his delegation's satisfaction, the Convention as a whole constituted a step forward in the delicate task of drafting the law of treaties and promoting the codification and progressive development of international law, as well as strengthening the fabric of peace. Untiring efforts had been made by the Secretariat and by delegations to foster a spirit of conciliation and co-operation during the Conference, and he hoped that every possible encouragement would be given to further efforts at conciliation in the future.

72. Mr. REY (Monaco) said that he had explained at the previous meeting why his delegation had abstained in the vote on the compromise proposal. The same reasons, *mutatis mutandis,* had led it to abstain in the

[8] Formerly articles 9 *bis* and 10.

[9] Formerly article 22.

[10] i.e. the new article adopted at the 34th plenary meeting.

[11] Formerly article 34.

vote on the Convention. Rather surprisingly, the text submitted to the vote had achieved practically unanimous support. It was a pity that it should have been a unanimity of dissatisfaction: the explanations of vote which he had just heard expressed reservations on the part of most delegations. However, in whatever way unanimity had been achieved, the optimists would find in it cause for satisfaction in the existing political context. He hoped that, as a result of the action taken by the United Nations, all States would strive to strengthen the rule of law for the greater happiness of mankind.

73. Mr. ROMERO LOZA (Bolivia) said that his delegation had voted for the Convention because it considered that any step, however imperfect, to improve international relations and mutual understanding should be supported. The Conference had succeeded in approving principles which constituted progress inspired by the principles of justice. The lack of an effective procedure to strengthen Part V, and above all the failure to make article 49 subject to compulsory arbitration, was one of the imperfections of the Convention, but he hoped that such imperfections were merely temporary interruptions in the forward march of humanity.

74. Mr. BRODERICK (Liberia) said that his delegation, in voting in favour of the Vienna Convention on the Law of Treaties, wished to point out first, that its Government did not consider itself in any way committed to vote in favour of the draft resolution submitted by Ghana, Ivory Coast, Kenya, Kuwait, Lebanon, Morocco, Nigeria, Sudan, Tunisia and the United Republic of Tanzania (A/CONF.39/L.47/Rev.1) which had been adopted by the Conference at its 34th plenary meeting by a roll-call vote of 61 in favour, 20 against and 26 abstentions, when it came before the United Nations General Assembly at its twenty-fourth session. Secondly, that his Government reserved the right to decide what action or course it would choose in the exercise of good faith and the *pacta sunt servanda* rule in respect of the new article on procedures for the adjudication, arbitration and conciliation of disputes other than those arising from peremptory norms of *jus cogens* which might be referred to the International Court of Justice or to arbitration.

75. It was his earnest hope that those delegations which had abstained in the vote, or had voted against the adoption of the Convention, would in time reconsider their decision and that their respective Governments would accede to and ratify the Convention.

### Tribute to the International Law Commission

### Tribute to the Federal Government and the people of the Republic of Austria

76. Mr. SINCLAIR (United Kingdom) said he had the honour of introducing the draft resolutions paying tributes to the International Law Commission (A/CONF. 39/L.50) and to the Federal Government and the people of the Republic of Austria (A/CONF.39/L.51). A small drafting amendment should be made to the draft resolution concerning the International Law Commission, where the last phrase should read: " codification and progressive development of the law of treaties ". He was sure that the entire Conference would wish to acknowledge the sterling efforts of the International Law Commission over a period of nearly twenty years which had culminated in 1966 in the final set of draft articles codifying the law of treaties. The real tribute to the International Law Commission was not the formal resolution before the Conference, but the fact that the Convention which had been adopted embodied so much of the Commission's original draft.

77. He took some pride in the fact that the four Special Rapporteurs on the topic had all been his countrymen and had contributed, each in his own inimitable way, to the progress of the work. While singling out Sir Humphrey Waldock for special mention, he recognized that every member of the International Law Commission had contributed to the task in hand. Many members of the Commission had participated actively in the work of the Conference and, in that connexion, he wished to pay a respectful tribute to the work done by the President of the Conference, by the Chairman of the Committee of the Whole, by the Rapporteur and by the Chairman of the Drafting Committee. On the pediment of St. Paul's Cathedral, the crowning achievement of the famous English architect, Sir Christopher Wren, was an inscription " *Si monumentum requiris circumspice* ". The members of the Commission might justly take a similar pride in their achievement.

78. On behalf of the whole Conference, he wished to express his sincere appreciation of the generous hospitality of the Austrian Government and the warmth, friendliness and humour of its people.

79. The PRESIDENT said that, if there were no objection, he would consider the draft resolution paying a tribute to the International Law Commission (A/CONF. 39/L.50) and the draft resolution paying a tribute to the Federal Government and the people of the Republic of Austria (A.CONF.39/L.51) as adopted.

*It was so agreed.*

### Adoption of the Final Act

80. Mr. YASSEEN, Chairman of the Drafting Committee, introducing the draft Final Act (A/CONF. 39/21) submitted by the Drafting Committee to the Conference in accordance with its instructions, said it had been modelled on the Final Acts of previous codification conferences. The brackets indicating an alternative, as in paragraphs 14 and 15, and the spaces left blank, as in paragraph 13, were due to the fact that the document had been drawn up before the end of the Conference. The matter would be dealt with by the Secretariat in accordance with the Conference's decisions.

81. The PRESIDENT said that, if there were no objection, he would consider the Final Act adopted.

*It was so agreed.*

### Closure of the Conference

82. The PRESIDENT said that now that the Conference had reached the end of its work, he wished first to express his deep appreciation of the assistance which delegations had so generously given him in carrying out his difficult task.

83. Like many others, their Conference had had its high points and its low points, its moments of confident hope and its moments of discouragement. The previous day had again produced a situation which was not unprecedented — with its morning hours when everything had seemed to be lost and its evening hours when those hopes which refused to be dashed had been crowned with success.

84. Yet he did not think that it was possible, at the present time, to judge the true value of the work which had been accomplished. In that respect, the present Conference differed from many others, since the text which they had just adopted might represent a turning-point in the history of the law of nations. Certainly from now onwards the juridical basis for international contractual relations would take on a different aspect. A written law would be set up side by side with the old customary law; and he did not think that he was being too optimistic in expressing the view that that law would win acceptance throughout an ever widening circle of nations and would one day replace the old rules altogether. Moreover, the success of the Conference's work would provide an exceptional stimulus to the continuation of the work of codification in the other chapters of international law which had not yet been touched upon.

85. Those participating in the Conference had had many problems before them : legal problems and, what were even more complex, political problems. It was primarily the task of diplomats to attempt to solve the political problems and thus make possible the solution of questions of law. Now that the text had been adopted and had acquired its definitive character, he would like to express the hope that the many jurists who would study the articles of the Convention would help to make them clear and effective through their knowledge, their ingenuity and their farsightedness. He hoped that they would succeed in making of that product of a joint effort a living work, a body of rules which really answered the needs of modern life, a genuine contribution to the development — which everyone wished to see more intense, more specific and more closely knit — of the relations between the members of the international community.

86. At the final conclusion of the long-term task of codifying the law of treaties, his thoughts turned with deep appreciation to the number of learned British jurists, and in particular to Sir Humphrey Waldock, who had devoted their studies to that question. He was also grateful to Mr. Elias, who, after presiding with incomparable ability over the work of the Committee of the Whole, had proved himself irreplaceable up to the very last minute. Mr. Elias had also found support in others whom he would not mention at that time, but whose names were familiar to all. No less gratitude however, was due to Mr. Yasseen and to all the members of the Drafting Committee over which he had presided with so much ability, firmness and devotion. He considered it a matter without precedent that all the amendments which had been proposed by that Committee had been adopted almost without discussion by the Conference. Equal gratitude was due to the Rapporteur of the Conference, Mr. Jiménez de Aréchaga. Much was also owed to the Secretariat and to the Legal Counsel, Mr. Stavropoulos.

87. Mr. TABIBI (Afghanistan), speaking on behalf of the Asian countries, the United Arab Republic, Libya and Morocco, said the President had guided the Conference's work to a successful conclusion with outstanding ability. The Nigerian representative had also played a distinguished part, while the contribution of the officers of the Conference and the Secretariat could not be overlooked. The Conference had achieved another great milestone in the field of codification and progressive development of international law, and he hoped that in the spirit of *pacta sunt servanda* the Convention would be properly applied for the good of mankind everywhere.

88. Mr. SUAREZ (Mexico) speaking on behalf of the Latin American group of delegations, said that the Conference had wisely chosen to preside over its discussions an eminent lawyer of wide and varied experience, who came from a country as outstanding in the field of law as in that of the arts. He had guided the Conference's work in a most masterly way.

89. Italian jurists had made a great contribution to every branch of law, and the Conference had paid them a well-merited tribute by including in the Convention the *pacta sunt servanda* rule. Like the other branches of law, international law, which derived not only its basic principles but its spirit from Roman law, was drawing further and further away from the parent stem of civil law and establishing its right to an independent existence. It would be too much to say that the Conference had erected a monument more lasting than bronze, but it was safe to say that the Convention which it had adopted would form a worthy part of the code of international law that was being prepared under the auspices of the United Nations.

90. Differences of view on important points had divided the Conference from the beginning and in order to reconcile them it had been necessary to accept the imperfect principles resulting from a compromise. It was possible that, at least in the immediate future, a number of countries might refrain from signing or ratifying the Convention. That, however, should not be considered a reason for discouragement. Search after truth was more important than truth itself, as Lessing had said, and to travel hopefully was a better thing than to arrive. More important than the Convention itself was the fact that all delegations had participated in a phase of the age-old effort to establish law, the noblest aspiration of humanity.

91. Sir Francis VALLAT (United Kingdom), on behalf of the group of west European and other States, Mr. USTOR (Hungary), on behalf of the group of socialist States, Mr. MUTUALE (Democratic Republic of the Congo), on behalf of Ethiopia, Ghana, Liberia,

Nigeria, Sierra Leone, the United Republic of Tanzania and Zambia, and Mr. YAPOBI (Ivory Coast), on behalf of Cameroon, Central African Republic, Congo (Brazzaville), Dahomey, Gabon, Madagascar and Senegal, all expressed their thanks to the President for his skilful and energetic guidance of the work of the Conference and paid tributes to the labours of the Vice-Presidents, the officers of the Committee of the Whole and the Drafting Committee, the Expert Consultant, the members of the International Law Commission and the Secretariat. They further expressed their great appreciation of the warmth and hospitality of the Austrian Government and people.

92. Mr. VEROSTA (Austria) said he associated his delegation with all that had been said by previous speakers in appreciation of the work of those who had contributed so much to make the Conference a success. His delegation was gratified that the Convention was to be entitled the Vienna Convention on the Law of Treaties and wished to thank all those who had spoken so kindly of the hospitality offered by his Government and the Austrian people.

93. The PRESIDENT said that he was profoundly moved by the speeches which had been made and thanked all those who had paid tribute to his work, a tribute which must be shared with the Vice-Presidents.

94. He declared closed the United Nations Conference on the Law of Treaties.

The meeting rose at 6.55 p.m.

# SUMMARY RECORDS OF MEETINGS OF THE COMMITTEE OF THE WHOLE

## EIGHTY-FOURTH MEETING

*Thursday, 10 April 1969, at 10.45 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(resumed from the first session)*

*Article 8* (Adoption of the text) [1]

1. The CHAIRMAN invited the Committee to consider the amendments and sub-amendments to article 8 submitted at the first session and still before it,[2] and the amendments submitted at the second session.[3]

2. Mr. HUBERT (France) reminded the Committee that the French delegation had submitted a number of amendments at the first session, dealing with the special class of treaties which had been tentatively called " restricted multilateral treaties ". Those treaties were referred to in draft article 17, paragraph 2, in which the International Law Commission had proposed that a reservation to such treaties required acceptance by all the parties. The French delegation had considered that provision justified because of the importance and the increasingly frequent use of restricted multilateral treaties in practice, but it believed that the reference to such treaties should not be confined to the reservations article. Accordingly, it had submitted several different amendments on the subject.

3. His delegation had reflected on the question in the interval, and though it considered that rules consonant with their special nature should govern such treaties, it had come to the conclusion that it was not essential that the amendments it had submitted should be included in the draft articles; it would be for the States concerned to include in their treaties provisions allowing for the special nature of restricted multilateral treaties. His delegation would not, therefore, press for a vote on the amendments it had submitted concerning that class of treaty. The amendments related to articles 8, 17, 26, 36, 37, 55 and 66. The Tunisian delegation, co-sponsor of the amendment to article 17 (A/CONF.39/C.1/L.113), had also consented to the withdrawal of that amendment. The French delegation was also withdrawing paragraph 3 of its amendment to article 2 (A/CONF.39/C.1/L.24) which no longer had any purpose since the term it mentioned was not used in the subsequent articles.

4. Mr. VEROSTA (Austria), introducing his delegation's amendment to article 8, paragraph 1 (A/CONF.39/C.1/L.379), said the expression " unanimous consent " was not satisfactory because it could not apply to bilateral treaties, where there could be no question of a majority. It would be better, therefore, to use the expression " consent of all the States ", which could apply to both bilateral and multilateral treaties.

5. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that his delegation had stated at the previous session that it found article 8 acceptable, but that paragraph 2 of that article, referring to the adoption of a treaty by a two-thirds majority, was not precise enough and did not reflect current international practice. The delegation of the Ukrainian SSR had therefore submitted the amendment in document A/CONF.39/C.1/L.51/Rev.1. The purpose of that amendment was to confine the application of the provisions in paragraph 2 to general or other multilateral treaties, and to exclude restricted mutlilateral treaties. Practice over the past ten years had shown that general multilateral treaties were assuming increasing importance and their number was constantly growing. Treaties of that class were the more important inasmuch as they dealt with ever widening areas of human activity. They made it possible to establish the legal basis of relations between States and to develop co-operation in the most varied spheres. In the convention now being drafted by the Conference, every State should be accorded the right to participate in general multilateral treaties. The Ukrainian amendment indicated the special procedure to be applied in adopting the text of such treaties.

6. Mr. BRAZIL (Australia) said he regretted that the Australian amendment to paragraph 2 (A/CONF.39/C.1/L.380) had not yet been distributed. Its purpose, however, was simply to insert the word " general " before the phrase " international conference ". The idea on which that amendment was based had been discussed at the first session, and the representatives of Austria, Iraq and Argentina in particular had made

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[1] For earlier discussion of article 8, see 15th meeting, paras. 1-40, and 34th meeting, para. 2.

[2] The following amendments were still before the Committee: France, A/CONF.39/C.1/L.30; Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.51/Rev.1. A sub-amendment to the French amendment had been submitted by Czechoslovakia (A/CONF.39/C.1/L.102). Amendments by Ceylon (A/CONF.39/C.1/L.43), Peru (A/CONF.39/C.1/L.101 and Corr. 1) and the United Republic of Tanzania (A/CONF.39/C.1./L.103) had been referred to the Drafting Committee at the first session.

[3] The following amendments had been submitted at the second session: Austria, A/CONF.39/C.1/L.379; Australia, A/CONF.39/C.1/L. 380.

statements to the same effect at the 15th meeting.[4] The expression " international conference " was not precise enough, since it could apply to a conference in which only a few States participated. In its commentary the International Law Commission had stated that paragraph 1 applied primarily to bilateral treaties and to treaties drawn up betwen only a few States and that paragraph 2 concerned treaties in which a larger number of States participated. But the text of paragraph 2 did not bring out that distinction plainly. The purpose of the Australian amendment was to repair that omission. The proposal differed in nature from certain other proposals relating to paragraph 2. Those proposals referred to " general multilateral treaties ", an imprecise concept involving an evaluation of the contents of a treaty. The Australian amendment concerned solely the number of States participating in the drafting of a treaty. It should, however, be noted that it would in part meet the Ukrainian representative's objections since it would make it plain that the two-thirds rule laid down in paragraph 2 applied to conferences in which the great majority of States participated.

7. Mr. KOULICHEV (Bulgaria) observed that, in drafting the article, the International Law Commission had taken into consideration the existence of various classes of treaty and had applied two different principles: the unanimity rule in the case of bilateral treaties and treaties concluded by only a few States, and the two-thirds majority rule for all other treaties, including general multilateral treaties. The text of article 8, however, did not bring out that distinction. The Bulgarian delegation therefore supported the Ukrainian amendment, which added an essential element of precision to paragraph 2. The Bulgarian delegation could accept the Austrian amendment as it was merely an amendment of form.

8. Mr. MENECEK (Czechoslovakia) said he was withdrawing his delegation's sub-amendment (A/CONF.39/C.1/L.102) to the French amendment (A/CONF.39/C.1/L.30).

9. Mr. USTOR (Hungary) said he supported the idea underlying the Ukrainian and Australian amendments, since the meaning of article 8, paragraph 2 needed to be made clearer. The expression " international conference " in that paragraph was not defined in article 2, and therefore had to be interpreted in a general sense. An international conference might, however, be a meeting of three, fifteen or twenty-five States, or more, depending on circumstances. The Australian amendment was an improvement, but it was essential to state precisely what conferences were intended. It was not enough to say that paragraph 2 applied to treaties concluded by " a large number of States ", since it was hard to see exactly what that meant. The best solution would be to modify paragraph 2 in the way indicated in the Ukrainian amendment introducing the notion of a " general multilateral treaty ".

10. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the wording of article 8 was not clear, since it did not specify which kind of international treaty had to be adopted unanimously and which kind required a two-thirds majority. The word " treaty " appeared in both paragraphs of the article, but a different procedure for adoption was provided for in each paragraph. The fact that paragraph 2 provided for a two-thirds majority doubtless implied that the treaties concerned were at least tripartite treaties, but that should be stated explicitly in the text.

11. Again, multilateral treaties varied; there was a great difference between ordinary multilateral treaties and multilateral treaties which had an object and purpose of a general character related to the interests of the community of States as a whole and stated or codified rules with which every State, as a member of that community, had to comply.

12. General multilateral treaties were becoming increasingly important, as history showed. In the early days they had consisted merely of a few conventions or administrative unions, such as the Universal Postal Union, but there were now a very large number of general multilateral treaties dealing with a wide variety of aspects of international life.

13. After the Second World War historic development had brought about significant changes in the evolution of the institution of general multilateral treaties. In the early post-war years, a number of such treaties had been concluded, such as the Genocide Convention of 1948,[5] the four 1949 Geneva Conventions for the Protection of War Victims,[6] and the Convention on the Protection of Cultural Property in the Event of Armed Conflict.[7] A large number of those conventions had been concluded under the aegis of the United Nations or of other international organizations.

14. The very large increase in the variety of problems and questions for which from the point of view of international law, rules had to be made by means of general multilateral treaties, would undoubtedly continue. Apart from the growing number of conventions concluded within the framework of the United Nations specialized agencies and dealing with a relatively restricted range of specific questions of co-operation in specialized subjects such as meteorology, postal and telegraph matters and so forth, there were also conventions on important social questions of great contemporary significance such as the elimination of discrimination in education and of all forms of racial discrimination.

15. But the most striking and conclusive instances of the widening of the scope of such treaties and of the change in the kind of subject dealt with in general multilateral treaties were the Moscow Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water,[8] the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other

[4] See 15th meeting, paras. 12, 27 and 31.

[5] Convention on the Prevention and Punishment of the Crime of Genocide; United Nations, *Treaty Series*, vol. 78, p. 277.

[6] United Nations, *Treaty Series*, vol. 75.

[7] United Nations, *Treaty Series*, vol. 249, p. 215.

[8] United Nations, *Treaty Series*, vol. 480, p. 43.

Celestial Bodies,[9] and the Treaty on the Non-Proliferation of Nuclear Weapons.[10]

16. The profound change in the nature of the problems dealt with in general multilateral treaties had not come about by chance: it was the result of the development of international relations. New problems of interest to all the peoples of the world were constantly arising and it was essential that they should be settled. The united efforts of all States were required in order to solve a large number of important present-day problems. That was the reason and justification for the growing number of general multilateral treaties and for the increasingly important part they played, at a time when mankind was confronted with extremely urgent problems such as disarmament, the prohibition of nuclear weapons, the rational utilization of the resources of the sea, the use of the advances in science and technology in the interests of peace and progress and a number of problems of a humanitarian and social character. In such circumstances it was impossible to visualize international law without taking into account the increasing impact, scope and importance of general multilateral treaties. Their growing contribution to the formulation of new rules of contemporary international law had been emphasized by a number of writers in both Eastern and Western Europe.

17. The increasing importance of general multilateral treaties in contemporary international law and in international relations was an irreversible process which would continue whether people liked it or not, and it reflected in particular the active part played by a number of African, Asian and Latin American States which, from having been for long the helpless victims of colonialist exploitation, were now creators of international law.

18. It was unthinkable that the Conference should disregard that new development in treaty law, and his delegation therefore supported the amendment by the Ukrainian SSR (A/CONF.39/C.1/L.51/Rev.1) which not only made the language of article 8 perfectly clear but brought out the growing importance of the role of general multilateral treaties in contemporary international law.

19. Mr. MARESCA (Italy), referring to the Ukrainian amendment, said that it was difficult from the legal point of view to draw a distinction between general multilateral treaties and ordinary multilateral treaties. The notion of a general international conference was ambiguous: a conference was multilateral by definition, and there was no need to distinguish between general international conferences and international conferences in which a large number of States took part.

20. He was not sure that the French word " *rédaction* " in paragraph 1 was an exact translation of the English term " drawing up ", and he hoped that the Drafting Committee would consider that question.

21. Mr. WYZNER (Poland) said that, in his view, the rule laid down in paragraph 2 would facilitate and speed up the proceedings of international conferences. The reasons which had led the Commission to choose the two-thirds majority rule were well founded and corresponded to the prevailing practice in contemporary international relations, particularly as far as general multilateral treaties were concerned. The scope of application of that rule should be defined, however, and the Ukrainian amendment seemed to be most helpful in that respect. Furthermore, the Polish delegation considered that general multilateral treaties must be open for signature, ratification and accession by all States.

22. The Australian amendment was interesting and deserved careful consideration.

23. The Polish delegation had some doubt whether paragraphs 1 and 2 of article 8 were properly co-ordinated. According to the existing wording of paragraph 2, it would only be at an international conference that States might decide to apply a rule other than the unanimity rule in adopting a treaty. But, in order to promote treaty relations, States should also be free in other circumstances to choose the rule they considered to be the most appropriate. Since the term " international conference " had no precise meaning and had not been defined for the purposes of the present convention, the rule set out in paragraph 2 should be expressed in more flexible terms. Either the wording of paragraph 1 should be changed to indicate that multilateral treaties, especially general multilateral treaties, were adopted in accordance with the rules set out in paragraph 2 or it should be stated in paragraph 1 that States might decide by a two-thirds majority to apply a rule other than the unanimity rule.

24. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that paragraph 2 laid down a rule which constituted progressive development of international law.

25. The wording proposed by the International Law Commission was obviously lacking in precision where the words " international conference " were concerned. There were different kinds of international conferences, and a meeting of three States might be regarded as an international conference.

26. Conferences held within an international organization caused no difficulty, since the procedure for adopting treaties was provided for in the rules of the organization. Nevertheless, certain regional conferences were organized independently of regional organizations. Paragraph 2 should include a reservation safeguarding the interests of States, especially of small States. That could be done either by defining the kind of international conferences referred to or by specifying the type of treaty concerned. His delegation was in favour of the former solution and supported the Australian amendment.

27. The Ukrainian amendment gave rise to serious problems. The expression " general or other multilateral treaty " did not make the text more precise; in fact, the form of words used by the Ukrainian delegation was intended to clarify the text by introducing the idea of

[9] For the text, see General Assembly resolution 2222 (XXI), annex.

[10] For the text, see General Assembly resolution 2373 (XXII), annex.

a " restricted multilateral treaty ", which the International Law Commission had considered, but had been unable to define. Indeed, it had been for that reason that the French delegation had withdrawn its amendments.

28. Mr. AMATAYAKUL (Thailand) said that paragraph 1 stated a rule which had traditionally been applied to multilateral and bilateral treaties. Recently, the tendency had been to adopt the two-thirds majority rule for general multilateral treaties; but that rule was not a well-defined one. The existing wording of paragraph 2 left States participating in a conference free not to apply the two-thirds majority rule.

29. To establish a classification of the various kinds of multilateral treaties would be premature. The choice of procedure for adopting the text of a treaty should be left to the States participating in the conference. The Thai delegation therefore favoured the International Law Commission's wording.

30. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the amendment by the Ukrainian SSR was in keeping with the theory and practice of international law. The Australian amendment was interesting and deserved careful consideration. The International Law Commission's commentary emphasized the fact that paragraph 2 of article 8 referred to treaties in the drafting of which many States had participated. It was obvious that treaties drawn up by a large number of States were general multilateral treaties.

31. The Ukrainian amendment was useful because general and other multilateral treaties played an increasingly important part in solving world problems. Experience had shown that agreements such as the International Convention on the Elimination of All Forms of Racial Discrimination [11] and the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water [12] and other agreements were drawn up in the interests of humanity as a whole.

32. The main task of the Conference was to contribute to the strengthening of world peace and security by drafting a convention on the law of treaties that would help to develop treaty relations among States on a basis of equality, sovereignty, co-operation and peace. The Ukrainian amendment was therefore fully consistent with the aims of the Conference.

33. Mr. NASCIMENTO E SILVA (Brazil) said that his delegation found the wording of article 8 as submitted by the International Law Commission satisfactory.

34. Paragraph 1 was perfectly clear: it concerned bilateral treaties or treaties involving very few States. The Austrian amendment (A/CONF.39/C.1/L.379) had the merit of emphasizing that point, but was more of a drafting change than a substantive amendment.

35. With regard to paragraph 2, the Ukrainian amendment (A/CONF.39/C.1/L.51/Rev.1) was based on an interesting idea, but particular attention should be paid to the observations made by the French representative, who had perceived that restricted multilateral treaties were fully covered by the provisions of paragraph 1 and the concluding provisions of paragraph 2, since the States participating in the conference in question were perfectly free to agree on a procedure for adoption involving a different voting rule from that normally required. Consequently, his delegation would have difficulty in accepting the Ukrainian amendment, even though it was undoubtedly evidence of a new tendency in international law to distinguish between general and restricted multilateral treaties. The difference, had proved too difficult to define, however, and the International Law Commission itself had refrained from including any definition in the text.

36. The Australian amendment (A/CONF.39/C.1/L.380) had the advantage of drawing a clear distinction between the provisions of paragraphs 1 and 2; his delegation therefore supported it unreservedly.

37. Nevertheless, the International Law Commission's text was still the clearest, and in view of its simplicity, the best.

38. Mr. BLIX (Sweden) said that the Committee had a choice between two alternatives, as the Uruguayan representative had pointed out: it could either specify the type of conference at which the adoption of the text of a treaty would take place by a two-thirds majority, or specify the type of treaty which should be adopted by that majority. Of the two main proposals before the Committee, the Australian amendment represented one of the two possible courses and the Ukrainian amendment the other. On the whole, his delegation shared the views of the Uruguayan delegation, and was sceptical about the second alternative. However, it was difficult to take a decision straight away. Out of respect for rule 30 of the rules of procedure, and in order to ensure an informed decision, no conclusion should be reached until the next meeting.

39. The Austrian amendment, on the other hand, raised no major difficulties.

40. Mr. RUEGGER (Switzerland) said he hoped that the texts prepared by the Conference would be clear and brief; in principle, therefore, he would prefer the International Law Commission's wording of article 8.

41. Consequently, his delegation appreciated the soundness of the French delegation's decision to withdraw its amendment (A/CONF.39/C.1/L.30). At the present stage, it would unnecessarily complicate the draft to talk of " general multilateral treaties " and " restricted multilateral treaties ", and for that reason his delegation could not accept the Ukrainian amendment (A/CONF.39/C.1/L.51/Rev.1).

42. On the other hand, the Swiss delegation agreed unreservedly with the Uruguayan representative's conclusions and accepted the Australian amendment (A/CONF.39/C.1/L.380), which proposed a suitable form of words. His delegation was also prepared to accept the Austrian amendment (A/CONF.30/C.1/L.379),

[11] For the text, see General Assembly resolution 2106 (XX), annex.

[12] See footnote 8.

which brought the wording of article 8 more into line with international practice.

43. Mr. STAVROPOULOS (Representative of the Secretary-General) drew the Committee's attention to the difficulties raised by paragraph 2 of article 8 as drafted by the International Law Commission. It laid down both a rule for the adoption of the text of a treaty and a rule for the adoption of the rules of procedure of the conference concerned on the question of voting, and appeared to depart from the practice of the United Nations and also from that of other international organizations. In United Nations practice, the rules of procedure of conferences were adopted by a simple majority because, under the United Nations Charter, decisions on procedural matters were normally adopted by a simple majority, and that rule had been automatically extended to United Nations conferences. That was why, for instance, the rules of procedure of the Conference on the Law of Treaties (A/CONF.39/10) [13] had been adopted by a simple majority; also, rule 61 of those rules provided that they could be amended by a decision of the Conference " taken by a majority of the representatives present and voting ".

44. It was also United Nations practice that decisions were taken by a majority of the representatives " present and voting ", abstentions and absences not being counted: decisions were not taken by a majority of " the States participating in the conference ", as provided in article 8, paragraph 2, which would normally be interpreted as meaning an absolute majority of all States present at the conference. Such absolute majorities were unknown in United Nations practice, except in the case of elections to the International Court of Justice.

45. There was no objection to the adoption of a residuary rule on the majority necessary for the adoption of the text of a treaty, since the conference concerned could always establish a different rule in any individual case. If paragraph 2 was adopted as it stood, the Secretariat would interpret the expression " States participating in the conference " as meaning " representatives present and voting ", in accordance with United Nations practice. In any event, the final phrase of paragraph 2 should be amended, either by deleting the words " by the same majority ", so that each conference could decide for itself by what majority it would adopt its voting rule, or by replacing the words " by the same majority " by the words " by a simple majority of the representatives present and voting ", which would be in keeping with United Nations practice.

46. The United Republic of Tanzania had already submitted an amendment in that sense (A/CONF.39/C.1/L.103), which had been referred to the Drafting Committee. He hoped that the Drafting Committee would consider his suggestions when it took up the Tanzanian amendment.

47. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said he was glad to see that the two paragraphs of draft article 8 made an explicit distinction between international conferences open to all States — where, even if the purpose of the conference was restricted, the aim was to formulate norms of a general nature and of universal application and where the two-thirds majority or any other majority agreed upon by the conference could be interpreted as amounting to a " consensus " — and conferences open from the very beginning to a limited number of States only, where the unanimity rule was the only one by which the participating States could be firmly bound. He fully understood why the French delegation had withdrawn its amendment, but he thought it would nevertheless be advisable to make article 8 more explicit. Since it frequently took part in international conferences of a regional nature. the Republic of Viet-Nam was of the opinion that, for example, a distinction should be made between general international conferences and other international conferences. His delegation therefore supported the Australian amendment (A/CONF.39/C.1/L.380). It likewise supported the Austrian amendment (A/CONF.39/C.1/L.379).

48. Mr. EUSTATHIADES (Greece), referring to paragraph 1, said he supported the Austrian amendment (A/CONF.39/C.1/L.379), which made a useful point with respect to bilateral treaties.

49. With regard to paragraph 2, the debate had confirmed his feeling that it would be advisable not to alter the International Law Commission's text, in view of the difficulties which arose the moment an attempt was made to draw a distinction between general and restricted multilateral treaties. The French delegation had perceived those difficulties and had wisely withdrawn its amendment, but those of the Ukrainian SSR and Australia reopened the argument on that very point, namely, at what moment was it possible to say that an international conference was " general ", and at what moment could it be said that a multilateral treaty was " general ". It was clear that the purpose of a " general international conference " within the meaning of the Australian amendment (A/CONF.39/C.1/L.380) was necessarily to adopt a " non-restricted " multilateral treaty.

50. There was another reason in favour of the International Law Commission's text: once adopted, a text carried more weight than a text which was not adopted. Adoption was already a step towards authentication, the subject of article 9. It was advisable, therefore, to have a rule providing for adoption by a sufficient majority to give treaty its proper weight, and to that end it would be wise to support the two-thirds majority rule. Moreover, the provisions of paragraph 2 provided adequate flexibility, since it would always be possible to apply some other majority rule.

51. Mr. KHASHBAT (Mongolia) said he supported the Ukrainian amendment on the ground that it was essential to specify what treaty was meant in paragraph 2, in other words to specify what was the purpose of the " international conferences " referred to in the same paragraph. The discussion had not brought out any valid argument against making that point clear; the

[13] Printed in the *Official Records* of the first session, pp. XXVI-XXX.

opponents of the Ukrainian amendment merely said that it was not useful at the present stage, or that it would be rash, inasmuch as multilateral treaties as yet represented only a trend in international law. But multilateral treaties were already an established practice, as was confirmed, incidentally, by the *Treaty Series* regularly published by the Secretariat of the United Nations and comprising all agreements signed since the League of Nations. Thus the United Nations explicitly recognized the existence of such treaties.

52. The Austrian amendment (A/CONF.39/C.1/L.379) would appear to be purely of a drafting nature, and his delegation could support it. The Australian amendment (A/CONF.39/C.1/L.380) was interesting, but it called for more detailed study.

53. Mr. DADZIE (Ghana) said he would prefer to see the International Law Commission's text retained as a whole. It seemed to him useless to draw a distinction between different kinds of treaties and between different kinds of conferences, and he could not support the amendments which proposed to introduce such distinctions.

54. For the reasons stated by the representative of the Secretary-General, he accepted in principle the amendment submitted by the United Republic of Tanzania (A/CONF.39/C.1/L.103), subject to the necessary drafting changes; every conference should have sufficient latitude to decide for itself whether the question before it was one of procedure, calling for a decision by simple majority, or a question of substance which might call for a decision by a two-thirds majority.

55. The Austrian amendment (A/CONF.39/C.1/L.379) was a purely drafting matter and could be referred to the Drafting Committee.

56. Mr. JAGOTA (India) said that the question of the adoption of the text dealt with in article 8 was a purely procedural matter. The Australian and Ukrainian amendments, which had led the Committee to discuss the field of application of article 8 and, consequently, the type of conference referred to or the nature of the treaty concluded, were actually without relevance to article 8.

57. Paragraph 1 merely stated a rule which corresponded to general practice. It could be made more explicit along the lines of the Austrian amendment (A/CONF.39/C.1/L.379), which could be referred to the Drafting Committee.

58. With respect to paragraph 2, it was desirable, as the representative of the Secretary-General had observed, to interpret it as meaning a two-thirds majority of States " present and voting " at the time of the adoption of the treaty. In the light of that interpretation, it would no doubt be necessary either to adopt the amendment of the United Republic of Tanzania (A/CONF.39/C.1/L.103), referred to by the representative of the Secretary-General and supported by the representative of Ghana, or to say " unless a different rule is prescribed by the rules of procedure adopted at that conference ". The Committee might leave it to the Drafting Committee to amend paragraph 2 as necessary; but in any case it should be dealt with strictly as a procedural matter.

The meeting rose at 12.55 p.m.

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## EIGHTY-FIFTH MEETING

*Thursday, 10 April 1969, at 3.10 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Article 8* (Adoption of the text) *(continued)* [1]

1. The CHAIRMAN invited the Committee to continue its consideration of article 8.

2. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that his delegation wished to thank all those who had spoken in support of its amendment (A/CONF.39/C.1/L.51/Rev.1). He had not been convinced by the arguments advanced against that amendment, but in a sincere desire to facilitate general agreement his delegation was prepared to withdraw it. He reserved the right, however, to revert to the subject in plenary.

3. His delegation was prepared to support both the Austrian and the Australian amendments (A/CONF.39/C.1/L.379 and L.380).

4. Mr. SECARIN (Romania) said that, in general, his delegation approved of article 8, although it considered it possible that the drafting might be improved. The Austrian amendment (A/CONF.39/C.1/L.379), in particular, contained suggestions which he was inclined to consider favourably and he hoped that the Drafting Committee would take them into consideration.

5. His delegation had also been prepared to support the Ukrainian amendment (A/CONF.39/C.1/L.51/Rev.1); it would have greatly helped to clarify the position of general multilateral treaties, which were becoming increasingly important in the treaty relations of States.

6. His delegation also appreciated the efforts by the Australian delegation in its amendment (A/CONF.39/C.1/L.380) to clarify the text of paragraph 2. He hoped that on the basis of that text the Drafting Committee would reconsider the possibility of making drafting improvements in article 8 that would meet all the objections which had been raised.

7. Mr. YASSEEN (Iraq) said that at the first session his delegation had expressed the view that the text

[1] For the list of the amendments submitted, see 84th meeting, footnotes 2 and 3.

of article 8 as proposed by the International Law Commission could be improved. In paragraph 2, in particular, it was necessary to specify in greater detail which treaties and which conferences were meant.

8. At the present session, the Committee had a new amendment before it which had been submitted by Austria (A/CONF.39/C.1/L.379); his delegation did not think that that amendment affected the substance of the article, although the Drafting Committee might examine it as a purely drafting proposal.

9. The Australian amendment (A/CONF.39/C.1/L.380) was in part similar to a proposal made by his delegation at the first session.[2] The two-thirds majority rule did not apply to all kinds of conferences but only to general international conferences; similarly, the treaties referred to in paragraph 2 were not all treaties but only general multilateral treaties. His delegation would therefore vote for that amendment.

10. At the previous meeting, the representative of the Secretary-General had questioned the conformity of article 8 with the general practice of international organizations. At the same time, he had described paragraph 2 as being of a purely procedural nature and had expressed some doubts concerning the two-thirds majority vote. In his (Mr. Yasseen's) view, the decision whether a text should be adopted by simple majority or whether it required unanimity or a two-thirds majority was certainly a matter of substance, and the two-thirds majority rule, as compared with the traditional unanimity rule, was an essential part of the progressive development of international law in that context and was a rule that should be observed and safeguarded. Any derogation from that rule at a general international conference should therefore be permitted only by a two-thirds majority vote, since the treaties in question were multilateral treaties which concerned the international community as a whole. Any amendment providing for a simple majority vote would be entirely unacceptable to his delegation. Since the question was one of substance and not of procedure, he was not in favour of referring article 8 to the Drafting Committee; a decision should be taken in plenary.

11. Mr. KEARNEY (United States of America) said that his delegation was in favour of the Austrian amendment (A/CONF.39/C.1/L.379).

12. He had found the comments by the representative of the Secretary-General of substantial interest, but he fully agreed with the representative of Iraq that it was desirable to maintain the two-thirds majority rule. It might be helpful if the Expert Consultant would give an outline of the legal reasons in favour of that rule.

13. With regard to the Australian amendment (A/CONF.39/C.1/L.380), he pointed out that the implication of that amendment was that, if the text of a treaty was not adopted at a " general " international conference, it would have to be approved unanimously, as provided in paragraph 1. That naturally led to the question of what was meant by a " general " international conference. For example, if a conference of thirty or forty States met to discuss some problem of private international law, such as motor vehicle traffic, would that be a general international conference? What would be the effect if all the participating States were States Members of the United Nations or if they were all from a certain geographical region? For those reasons, he thought that the Australian amendment tended to call in question the procedure of any international conference. The International Law Commission's text of article 8, however, laid down an easy rule, since the provision concerning the two-thirds majority would afford ample protection at all international conferences, whether general or limited.

14. Mr. ABDEL MEGUID (United Arab Republic) said that in the opinion of his delegation the Commission's text of article 8 was in need of some clarification. The article dealt with the adoption of a text of a treaty which had been drawn up by the participating States; it was obvious and logical, therefore, that a State which had participated in drafting that treaty could only accept it subject to its own consent. The question then arose of the procedure to be followed in adopting the text of a treaty concluded between several States, which required a two-thirds majority vote. Two possible ways of solving the problem had been suggested: first, the Australian amendment (A/CONF.39/C.1/L.380), which referred to a " general international conference "; and, secondly, the Ukrainian amendment (A/CONF.39/C.1/L.51/Rev.1), which had referred to different kinds of multilateral treaties. His delegation regarded those two conceptions as complementary, since a general international conference could only give rise to a general multilateral treaty, just as a general multilateral treaty could only be the product of a general international conference. As the Ukrainian delegation had withdrawn its amendment, his delegation proposed that the Australian amendment should be referred to the Drafting Committee for further study.

15. Sir Humphrey WALDOCK (Expert Consultant) noted that the Austrian amendment (A/CONF.39/C.1/L.379), which was clearly of a drafting character, had been generally commended. He too considered it a desirable amendment because it would bring the language of paragraph 1 of article 8 into line with that used in other articles of the draft dealing with a similar matter.

16. With regard to the comments by the representative of the Secretary-General at the previous meeting, he thought that the words " two-thirds of the States participating in the conference " in paragraph 2 should not give rise to any difficulty. Those words had been used by the International Law Commission in their general meaning; they were not necessarily intended to cover all the States which had taken any part in the conference. The alternative wording " two-thirds of the States present and voting " would not be contrary to the intention of the International Law Commission.

17. The second remark by the representative of the Secretary General, relating to the concluding proviso of paragraph 2 — " unless by the same majority they shall decide to apply a different rule " — raised a matter of

[2] See 15th meeting, para. 27.

substance, not of procedure. That had been the Commission's view and he fully supported the representative of Iraq's comments on that point.

18. The International Law Commission had recognized that a conference was master of its own procedure; but, when the subject-matter of the conference was the conclusion of a treaty, a matter of substance relating to the law of treaties clearly arose. The International Law Commission had therefore endeavoured to produce a text for paragraph 2 of article 8 which, while giving sufficient recognition to the sovereignty of a conference over its own procedure, would also give some protection to the substance of the law of treaties. It was essential to protect the views of a substantial minority at a conference engaged in drawing up a treaty and at the same time to safeguard the existing practice in favour of the two-thirds majority rule where major international conferences were concerned.

19. He had used the neutral term " major international conferences " advisedly. The International Law Commission had had in mind large conferences attended by a great number of States. The Peruvian amendment to paragraph 2 (A/CONF.39/C.1/L.101 and Corr.1) to a great extent expressed what the Commission had been thinking.

20. It would undoubtedly be difficult to determine the number of States required for a conference to be a " large " conference. A similar question arose in connexion with the Australian amendment (A/CONF.39/C.1/L.380), which used the expression " general international conference ". Those problems of definition were partly of a substantive and partly of a drafting nature; perhaps the Drafting Committee could devise a formula on the lines of the Peruvian or the Australian amendments that would prove generally acceptable.

21. The issue was very much a matter of substance relating to the law of treaties. Two different ways of solving the problem had been suggested. One proposal was that a distinction should be drawn between " general multilateral treaties " and other treaties, or between " restricted multilateral treaties " and other treaties. The other proposal was that the question should be settled by distinguishing between " general international conferences " and other conferences. The International Law Commission had taken the view that it was a matter of the number of States participating in a conference rather than of the nature of the particular treaty. Examples could be given of treaties which were clearly general in character but which had been concluded by a conference falling outside the scope of paragraph 2 of article 8. One was the Moscow Nuclear Test Ban Treaty. The conference which had concluded that Treaty clearly came under the provisions of paragraph 1 of article 8, not of paragraph 2; nevertheless, the Moscow Treaty was undoubtedly intended to be of a general character.

22. The CHAIRMAN suggested that article 8, together with the amendments submitted at the first session and the amendments by Austria (A/CONF.39/C.1/L.379) and Australia (A/CONF.39/C.1/L.380) should now be referred to the Drafting Committee.

*It was so agreed.* [3]

## *Article 17*

(Acceptance of and objection to reservations) [4]

23. The CHAIRMAN invited the Committee to consider the Drafting Committee's text of article 17 which read:

### *Article 17*

1. A reservation expressly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, the reservation requires the acceptance of the competent organ of that organization but such acceptance shall not preclude any contracting State from objecting to the reservation.

4. In cases not falling under the preceding paragraphs of this article and unless the treaty otherwise provides:

(*a*) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force for those States;

(*b*) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(*c*) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

24. At the 72nd meeting,[5] the Committee of the Whole had decided to delete from paragraph 3 the concluding words " but such acceptance shall not preclude any contracting State from objecting to the reservation ".

25. Mr. KHLESTOV (Union of Soviet Socialist Republics) drew attention to the amendment and explanatory memorandum (A/CONF.39/L.3) submitted by his delegation to the plenary.

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[3] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

[4] For earlier discussion of article 17, see 72nd meeting, paras. 1-14. The amendments by Czechoslovakia (A/CONF.39/C.1/L.84) and by France and Tunisia (A/CONF.39/C.1/L.113) had been withdrawn.

[5] Para. 14.

26. As explained in that memorandum, the International Court of Justice, in its advisory opinion of 28 May 1951, [6] had confirmed the principle that the fact that an objection had been made to a reservation did not signify that the treaty in question automatically ceased to be in force in the relations between the reserving State and the objecting State. The Court had come to the conclusion that, if a party to a multilateral treaty objected to a reservation made by another party, it could consider that the reserving State was not a party to that treaty;[7] the effect was not automatic and it was for the objecting State to decide in each case what the legal consequences of its objection would be.

27. The provisional text of article 17 was thus at variance with the accepted rules of international law in the matter and in contradiction with the practice of States and of the Secretary-General of the United Nations in his capacity as depositary.

28. In view of the complexity of the problem, his delegation had considered it necessary to submit a written memorandum on the subject (A/CONF.39/L.3). If the article were put to the vote in its present form, his delegation would have to vote against it.

29. Mr. CARMONA (Venezuela) said that although his delegation on the whole favoured most of the principles embodied in article 17, it concurred with the criticisms put forward on certain points by the USSR delegation. If article 17 were put to the vote as it stood, his delegation would be obliged to vote against some of its paragraphs.

30. It was important that article 17 should not be the subject of a hasty decision; the whole problem should be referred to the plenary so as to give delegations time for reflection.

31. Mr. WYZNER (Poland) said it was obvious that, unlike the solution adopted by the Committee in connexion with other articles relating to reservations, article 17 gave rise to many objections and misgivings, which had been confirmed by the memorandum of the Soviet delegation and the statement just made by the Venezuelan representative. The Polish delegation did not consider that the rule now stated in paragraph 4 (*b*), establishing a presumption in favour of the non-existence of treaty relations between the reserving and the objecting State, had any real foundation in the contemporary practice of States. For example, in all the volumes of the United Nations *Treaty Series,* some forty-seven instruments might be found which contained objections to reservations; the legal effects of those objections were not settled in the treaties themselves, and only three instruments contained declarations to the effect that the objecting State did not regard the treaty as being in force between itself and the reserving State. On the other hand, as many as forty-one instruments contained no indication of the intentions of the objecting State with regard to the existence or non-existence of treaty relations between it and the reserving State, and it might be assumed that in those cases treaty relations did exist.

32. In the light of those misgivings, the Polish delegation considered that the Venezuelan proposal was wise, for if the Committee reached a hasty decision, it would only confirm the profound differences already existing in the matter.

33. The CHAIRMAN suggested that article 17 should now be referred to the plenary Conference.

34. Mr. KHLESTOV (Union of Soviet Socialist Republics) asked that a vote be taken on article 17, so that there should be no grounds for assuming that the Committee had approved it unanimously.

*Article 17 was approved by 60 votes to 15, with 13 abstentions.*[8]

35. Mr. BLIX (Sweden), explaining his delegation's vote, said he had not objected to the request for a vote on the article, in order not to complicate the Committee's work. Nevertheless, his delegation strongly doubted the need for the vote, since the article had been approved by the Committee, and the only two amendments outstanding had been withdrawn. The vote had therefore amounted to a reconsideration, which should have been decided upon by a two-thirds majority. His delegation's vote merely confirmed its vote on the article during the first session.

36. Mr. TSURUOKA (Japan) said that his delegation had abstained in the vote on article 17 for the reasons it had given at length during the first session, when Japan had introduced an amendment to the whole scheme of reservations under section 2 of part II.

37. Mr. BRAZIL (Australia) said that his delegation, too, had abstained for the reasons it had given in detail at the first session.

*Article 26* (Application of successive treaties relating to the same subject-matter) [9]

38. The CHAIRMAN invited the Committee to consider article 26. Amendments submitted by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.202), Romania and Sweden (A/CONF.39/C.1/L.204), Japan (A/CONF.39/C.1/L.207) and Cambodia (A/CONF. 39/C.1/L.208) had been referred to the Drafting Committee at the first session. France had withdrawn its amendment (A/CONF.39/C.1/L.44).

39. Mr. SINCLAIR (United Kingdom) said that his comments on article 26 had no specific relation to any of the amendments before the Drafting Committee. The Committee would remember that the debate on article 26 at the first session had been very brief and had been held in the absence of the Expert Consultant. The United Kingdom delegation now wished to revert to two points it had raised during the first session,

[6] Reservations to the Convention on Genocide, Advisory Opinion: *I.C.J. Reports 1951,* p. 15.

[7] *Ibid.,* p. 29.

[8] For further discussion of article 17, see 10th plenary meeting, when an amended text was adopted.

[9] For earlier discussion of article 26, see 31st meeting, paras. 4-36.

which emerged from the very title of that complex article.

40. In the first place, there was an element of ambiguity in the word " successive ", for it was difficult to decide which of two treaties was the later one: for example, if convention A had been signed in 1964 and convention B in 1965, but convention B entered into force in 1966 and convention A not until 1968, the question arose which should be regarded as the prior treaty. His delegation's opinion was that the decisive date should be that of the adoption of the treaty; it based that view on paragraph 1 of article 56, which referred to the conclusion of a later treaty. It would, however, welcome the Expert Consultant's views on the matter.

41. The second point, perhaps more significant, concerned the words " relating to the same subject-matter ". There were, of course, cases where a series of treaties, relating to such specific subjects as copyright or safety of life at sea, clearly fell within the scope of the rule set out in article 26. But if, for example, a convention on such a specific topic as third party liability in the field of nuclear energy contained a provision relating to the taking of legal action in the courts of one State and the giving effect to judgements in the courts of another State, it could not be regarded as relating to the same subject-matter as a later treaty on the entirely different topic of the general reciprocal recognition and enforcement of judgements. The phrase in question should be construed strictly and should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involved was one of interpretation or of the application of such maxims as *generalia specialibus non derogant.*

42. Furthermore, paragraph 2 of the International Law Commission's text of article 26 implied that the article was in the nature of a residuary rule, although it was not specifically drafted as such, for the content of the article clearly led to the assumption that matters involving the application of successive treaties could be regulated in the series of treaties themselves; indeed, it was to be hoped that those matters would be so regulated. Finally, the Japanese amendment (A/CONF.39/C.1/L.207) was correct in principle, for where a treaty specified that it was not to be considered inconsistent with an earlier treaty, the question became one of interpretation, not of the application of successive treaties.

43. Mr. KOVALEV (Union of Soviet Socialist Republics) said that his delegation has supported article 26 at the first session on the understanding that the conclusion of successive treaties could not exempt States from the obligation to observe the *pacta sunt servanda* principle, of from the scrupulous observance of earlier treaties. The Soviet Union had submitted an amendment to that effect (A/CONF.39/C.1/L.202), which had not been accepted by the Drafting Committee because it had considered that the International Law Commission's text covered the point. His delegation now supported article 26 on the assumption that the Committee of the Whole shared that view.

44. Mr. KEARNEY (United States of America) said that his delegation regarded the Japanese amendment (A/CONF.39/C.1/L.207) as a very sensible proposal, because it believed that, if a treaty specified that it was not to be considered as inconsistent with another treaty, the purpose of the clause was not that the earlier or the later treaty should prevail, but that an effort be made to read the provisions of both treaties in a consistent manner and to allow both sets of provisions to exist as far as possible.

45. The CHAIRMAN suggested that article 26 be referred back to the Drafting Committee for consideration with the four amendments already before it.

*It was so agreed.* [10]

The meeting rose at 4.40 p.m.

[10] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

## EIGHTY-SIXTH MEETING

*Friday, 11 April 1969 at 10.55 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Article 36* (Amendment of multilateral treaties) [1]

1. The CHAIRMAN said that at the first session of the Conference the Committee of the Whole had decided to refer article 36 to the Drafting Committee, together with the amendments submitted by France (A/CONF.39/C.1/L.45) and the Netherlands (A/CONF.39/C.1/L.232). The French delegation had now withdrawn its amendment. He suggested that the Committee should refer article 36 back to the Drafting Committee together with the Netherlands amendment.

*It was so agreed.* [2]

*Article 37* (Agreements to modify multilateral treaties between certain of the parties only) [3]

2. The CHAIRMAN said that amendments had been submitted to article 37 by France (A/CONF.39/C.1/L.46), Australia (A./CONF.39/C.I/L.237), Czechoslovakia (A/CONF.39/C.1/L.238) and Bulgaria, Romania and Syria (A/CONF.39/C.1/L.240). The Czechoslovak amendment and the amendment submitted by Bulgaria, Romania and Syria had been referred to

[1] For earlier discussion of article 36, see 36th meeting, paras. 53-79, and 37th meeting, paras. 1-27.

[2] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

[3] For earlier discussion of article 37, see 37th meeting, paras. 28-56.

the Drafting Committee at the first session. The French amendment had been withdrawn. At the request of the Australian delegation, the amendment in document A/CONF.39/C.1/L.237 was to be considered by the Committee and voted on.

3. Mr. MERON (Israel) said that the Netherlands amendment (A/CONF.39/C.1/L.232) to paragraph 2 of article 36 was to replace the words " every party " by " every contracting State ", so that any proposal to modify a multilateral treaty would have to be notified to all the contracting States, whether the treaty had entered into force or not. It seemed desirable to make a similar change in paragraph 2 of article 37, in which the words " the other parties " would be replaced by the words " the other contracting States ". The effect of that amendment would be to widen the circle of States to be notified and to bring article 37, paragraph 2, into line with article 36, paragraph 2. He commended that suggestion to the attention of the Drafting Committee.

4. Mr. BRAZIL (Australia) said that the purpose of his delegation's amendment to article 37 (A/CONF.39/C.1/L.237) was to remove the class of treaties covered by article 17, paragraph 2, from the scope of article 37. That was probably a question of substance. The amendment had not been voted on at the first session because the Conference had deemed it desirable to defer a decision on the matter until it had reached some conclusion with regard to article 17, paragraph 2. The Committee of the Whole had now adopted that paragraph, under which, in the case of certain treaties between a limited number of States, a reservation required acceptance by all the parties. His delegation had abstained in the vote on article 17 as a whole, but it approved the principle of paragraph 2. If that provision was valid in regard to reservations, it was also valid in the case of article 37, relating to the modification of treaties between certain of the parties only, and of article 55, concerning the suspension of the operation of treaties between certain of the parties only. Although the wording of article 37, paragraph 2, as drafted by the International Law Commission might be said to suffice to guarantee the integrity and security of a treaty in some cases, his delegation thought it would be preferable to acknowledge expressly that a particular class of treaty existed whose integrity should be maintained.

5. Mrs. ADAMSEN (Denmark) said that, as it had stated at the first session, her delegation considered that no new restrictions should be placed on the conclusion of multilateral treaties. It was preferable not to remove the class of treaties covered by article 17, paragraph 2, from the scope of article 37. The important thing was that the rights of the parties should be respected, and article 37, paragraph 1 (*b*) (ii), provided adequate safeguards in that respect. Her delegation was not convinced that there really was an analogy between article 17, paragraph 2, and article 37, paragraph 2. There might be justification for not allowing reservations at the time when a treaty was concluded, whereas at a later stage the need for modification might become apparent and be perfectly justified. Her delegation preferred the International Law Commission's text.

6. Mr. DADZIE (Ghana) said that all the articles of the convention were interrelated; no party would be allowed to apply any provision in such a way as to contravene another provision. The effect of expressly mentioning the case provided for in the Australian amendment would be to exclude from the scope of that general rule the cases which were not mentioned. Although his delegation understood the idea behind the Australian delegation's amendment, it preferred the International Law Commission's text, in which there was reference to article 17, paragraph 2.

7. Mr. BRAZIL (Australia) pointed out that if his delegation's amendment was adopted, it would still be possible to modify treaties concluded between a limited number of States, but the consent of all the parties would be needed. The purpose of the amendment was to apply the unanimity rule, which had been accepted in the case of article 17, paragraph 2, to a similar situation provided for in article 37.

8. Mr. MARESCA (Italy) said that while there were rules of *jus cogens* from which derogation was impossible, there were other rules of law which could be applied more flexibly. To introduce new restrictions on the rules of international law would hamper the development of treaty law. The need for some restrictions was understandable in one case of reservations, but not when it was a matter of modifying multilateral agreements. Article 37 provided every safeguard that *inter se* agreements would not be incompatible with multilateral agreements. His delegation thought that rigid rules should not be introduced into the convention; consequently, it could not approve the Australian delegation's proposal.

9. Mr. CARMONA (Venezuela) said that article 17, paragraph 2 had been adopted by the Committee subject to approval by the plenary Conference. If the Committee adopted the Australian amendment, it would be prejudging the plenary Conference's decision on that paragraph. The Venezuelan delegation would therefore not vote for the Australian amendment, which in its view was incompatible with established principles and with the interests of States in general.

10. Mr. DENIS (Belgium) said the Australian delegation itself had acknowledged that certain cases to which its amendment applied were already covered by article 37, paragraph 2. The question was whether every case needed to be covered, including provisions of a treaty which were not of a fundamental nature. The Australian proposal might in certain circumstances bring normal relations between States to a standstill. It should also be noted that the Australian amendment in fact reintroduced the amendment which the French delegation had considered it unnecessary to maintain. The Belgian delegation would therefore not be able to support the Australian amendment.

11. Mr. USENKO (Union of Soviet Socialist Republics) said that his delegation was in favour of the

amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.238) and by Bulgaria, Romania and Syria (A/CONF.39/C.1/L.240); but it could not support the Australian amendment.

*The Australian amendment (A/CONF.39/C.1/L.237) was rejected by 62 votes to 4, with 22 abstentions.*

12. The CHAIRMAN suggested that article 37 and the amendments relating thereto (A/CONF.39/C.1/L.238 and L.240) should be referred to the Drafting Committee.

*It was so agreed.*[4]

*Article 55* (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only) [5]

13. The CHAIRMAN said that the only proposal relating to article 55 still before the Committee was the amendment by Australia (A/CONF.39/C.1/L.324), since the French amendment (A/CONF.39/C.1/L.47) had been withdrawn by its sponsor at the 84th meeting.[6] An amendment by Peru (A/CONF.39/C.1/L.305), which was of a drafting nature, had been referred to the Drafting Committee at the first session.

14. Mr. BRAZIL (Australia) said that since the Committee had just rejected the Australian amendment to article 37 (A/CONF.39/C.1/L.237), it probably would not approve the Australian amendment to article 55 (A/CONF.39/C.1/L.324). His delegation was therefore withdrawing it.

15. Mr. JAGOTA (India) said that the Committee could choose between the text proposed in the Peruvian amendment (A/CONF.39/C.1/L.305) and the new text of article 55, paragraph 2, proposed by Austria, Canada, Finland, Poland, Romania and Yugoslavia (A/CONF.39/C.1/L.321 and Add.1) and adopted at the first session of the Conference. He personally would like to see the Conference keep the wording proposed for paragraph 2 in the joint amendment, which had been adopted by 82 votes to none, with 6 abstentions. With the Peruvian amendment it would not be clear what would happen if the other parties notified, or any other States, raised an objection to the suspension of the operation of certain provisions of a treaty. It would be better to keep the most flexible wording possible.

16. With regard to the text adopted at the first session (A/CONF.39/C.1/L.321 and Add.1) he wished to submit a few suggestions for the Drafting Committee's consideration. The legal question raised in article 55 was similar to that raised in article 37, since it turned on the suspension of legal obligations deriving from a treaty. The two articles should therefore be drafted on similar lines. Article 37 dealt with three cases; the first where a multilateral treaty itself prohibited any agreement on the modification of any of its provisions; the second where the treaty specifically permitted the modification of some of its provisions; and the third where the treaty contained no specific provision concerning modification. Article 55 as at present drafted covered only two of the cases: the case where the treaty prohibited the suspension of the operation of some of its provisions, and the case where the treaty did not contain any specific provision to that effect. In order to meet any difficulty, the third case should also be covered, namely the case where the treaty specifically permitted the suspension of the operation of some of its provisions, so that the compatibility test would not apply to such a case.

17. The CHAIRMAN said that the Drafting Committee would no doubt bear those suggestions in mind.

18. He suggested that article 55, as amended at the first session, be referred to the Drafting Committee together with the Peruvian amendment.

*It was so agreed.*[7]

*Article 66* (Consequences of the termination of a treaty) [8]

19. The CHAIRMAN said that the French amendment (A/CONF.39/C.1/L.49), which was the only amendment to article 66, had been withdrawn by its sponsor at the 84th meeting.[9] He suggested that article 66 be referred to the Drafting Committee.

*It was so agreed.*[10]

The meeting rose at 11.40 a.m.

[4] For the resumption of the discussion in the Committee of the Whole, see 91st meeting.

[5] For earlier discussion of article 55, see 60th meeting, paras. 1-42.

[6] See 84th meeting, para. 3.

[7] For the resumption of the discussion in the Committee of the Whole, see 99th meeting.

[8] For earlier discussion of article 66, see 75th meeting, paras. 1-8.

[9] See 84th meeting, para. 3.

[10] For the resumption of the discussion in the Committee of the Whole, see 99th meeting.

## EIGHTY-SEVENTH MEETING

*Monday, 14 April 1969, at 10.55 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Article 2* (Use of terms) [1]

1. The CHAIRMAN invited the Committee to consider the amendment to draft article 2 submitted at the first session and still before the Committee of the Whole

[1] For earlier discussion, see 4th, 5th and 6th meetings.

(A/CONF.39/C.1/L.19/Rev.1),[2] together with the amendments submitted at the second session.[3] The French delegation had withdrawn that part of the amendment it had submitted at the first session (A/CONF.39/C.1/L.24) which related to the term " restricted multilateral treaty ".[4]

2. Mr. FRANCIS (Jamaica) suggested that the subject matter of article 5 *bis* should be considered at the same time as article 2.

3. The CHAIRMAN said that the USSR representative had informed him that he wished to make a proposal similar to that of the Jamaican representative. The USSR representative had agreed that consideration of the definition of general multilateral treaties might be deferred, but had said that he would if necessary raise the problem after the substance of article 5 *bis* had been examined.

4. Mr. SINCLAIR (United Kingdom) said that when the Committee examined article 5 *bis* it might take into consideration the definitions of general multilateral treaties previously proposed and the new definition submitted by the Syrian delegation.

5. Mr. SHUKRI (Syria) said he would comment on his delegation's amendment (A/CONF.39/C.1/L.385) when article 5 *bis* was considered.

6. The CHAIRMAN suggested that the Committee take up article 2, paragraph 1.

7. Mr. ESCUDERO (Ecuador), introducing his delegation's amendment (A/CONF.39/C.1/L.25/Rev.1), reminded the Committee that his delegation had submitted an amendment (A/CONF.39/C.1/L.25) at the first session. In view of the objections made at that time, it had decided to simplify the text of its amendment by including in the definition of the term " treaty " the essential element of the free consent of the parties at the time of conclusion of the treaty.

8. His delegation was firmly convinced that among the essential elements of a treaty the free consent of the parties to it was what established its validity most securely. The other essential elements were implied in or emerged implicity from the notion of " treaty ".

9. To omit the words " freely consented to " from the definition might give the impression that the words " governed by international law " applied only to the conditions for the formal validity of a treaty in international law and excluded the conditions for its essential validity.

10. The legal and logical necessity of including free consent in the wording emerged more plainly from the *pacta sunt servanda* rule set forth in article 23, which read: " Every treaty in force is binding upon the parties to it and must be performed by them in good faith." In his delegation's view, and as had been implied by the Chairman of the Drafting Committee at the first session, the expression " treaty in force " was there equivalent to " valid treaty ", in other words a treaty combining the conditions of formal validity and essential validity.

11. The omission of the element of good faith from the *pacta sunt servanda* rule would be tantamount to saying simply that treaties must be performed by the parties, which would not exclude the possibility of their being performed in bad faith. Similarly, an element essential to the validity of a treaty would be lacking if there was no reference to freedom of consent in the definition in sub-paragraph 1 (*a*). The result would be a paradoxical situation where treaties which had not been freely consented to would have to be performed in good faith.

12. Mr. NETTEL (Austria), introducing his delegation's amendment (A/CONF.39/C.1/L.383), said that the amendment submitted by the French delegation (A/CONF.39/C.1/L.24) at the first session was not precise enough and did not draw a clear enough distinction between authentication and adoption. The Austrian delegation's amendment was intended to make the terms used in the draft convention clearer.

13. Mr. BINDSCHEDLER (Switzerland) said that his delegation's amendment (A/CONF.39/C.1/L.384/Corr.1) was intended to rectify an omission. Sub-paragraph 1 (*a*) established a distinction between international treaties governed by international law and agreements between States which were governed by municipal law. The sub-paragraph, however, was silent on agreements concluded between States at the international level but not constituting treaties, such as declarations of intent, political declarations and "gentlemen's agreements ", which played a very important part in international politics and inter-State relations. Examples of such instruments were the three-Power declaration on Moroccan affairs made at Madrid in 1907, the Atlantic Charter, the 1943 declaration of the Allied Powers concerning looted property, and the " gentlemen's agreement " of 1947 concerning the allocation of seats in the United Nations Security Council. Such political declarations raised certain legal problems and were governed by international law. The definition should therefore be made more precise in order to exclude that kind of agreement.

14. The International Law Commission had considered the problem in the early stages of its work, but had decided not to pursue it.

15. The Chilean amendment (A/CONF.39/C.1/L.22) submitted at the first session was quite similar to the Swiss amendment, but the words " which produces legal effects " lacked precision.

16. The amendment by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1), likewise submitted at

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[2] This amendment had been submitted by Congo (Democratic Republic of), Czechoslovakia, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, United Arab Republic, and United Republic of Tanzania.

[3] The following amendments had been submitted at the second session: Belgium, A/CONF.39/C.1/L.381; Hungary, A/CONF.39/C.1/L.382; Austria, A/CONF.39/C.1/L.383; Switzerland, A/CONF.39/C.1/L.384/Corr.1; Syria, A/CONF.39/C.1/L.385. In addition, Ecuador had submitted a revised version (A/CONF.39/C.1/L.25/Rev.1) of an amendment it had presented at the first session.

[4] See 84th meeting, para. 3.

the first session, was not clear enough, for the consequence of any agreement and any declaration was necessarily to establish a relationship between the parties; and the relationship might be legal or political. An international treaty was an instrument which, provided for legal rights and obligations for the parties.

17. Mr. DENIS (Belgium) explained that his delegation's amendment (A/CONF.39/C.1/L.381) was purely a drafting matter.

18. The CHAIRMAN said the Drafting Committee would consider the Belgian amendment.

19. Mr. TALLOS (Hungary) said that his delegation's amendment (A/CONF.39/C.1/L.382) concerned the English text only; its purpose was to change the word order. The amendment merely raised a point of drafting and could therefore be referred to the Drafting Committee. It did not affect the amendment submitted by his delegation at the first session (A/CONF.39/C.1/L.23).

20. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the most important of the new amendments were those concerning the definition of the very notion of a treaty, since the course followed would determine the solution to many other problems which arose in connexion with the draft articles. In principle, as it had stated at the first session, the Soviet Union delegation subscribed to the definition of a treaty proposed by the International Law Commission in article 2, paragraph 1 (*a*). It had also stated that it was in favour of the amendment submitted at the first session by Ecuador (A/CONF.39/C.1/L.25), because it seemed obvious that a genuine international agreement must have " a licit object " and be " freely consented to " principles of international law which were bound to enter into an international agreement. The Ecuadorian delegation had advanced very sound arguments on that point. In the revised version of its amendment (A/CONF.39/C.1/L.25/Rev.1), the Ecuadorian delegation had deferred to the views of those who thought it pointless that the definition in article 2 should, for example, contain the important idea of the " licit object " of a treaty. He regretted it had done so, although he still supported the Ecuadorian amendment unreservedly, even in its simplified form.

21. He also supported the Austrian amendment (A/CONF.39/C.1/L.383), concerning the terms " adoption " and " authentication ", since it clarified the amendment submitted on the same point by France (A/CONF.39/C.1/L.24) which had already been referred to the Drafting Committee; the two notions of adoption and authentication, which, moreover, were the subject matter of two separate articles — articles 8 and 9 — needed to be distinguished. He might, however, wish to amend the Russian version of the Austrian amendment, since the term " adoption " was used in two senses in Russian: for the adoption of a text and for the adoption of a treaty.

22. The Soviet delegation also supported the drafting amendments submitted by Belgium (A/CONF.39/C.1/L.381) and Hungary (A/CONF.39/C.1/L.382). On the other hand, it categorically rejected the amendment submitted by Switzerland (A/CONF.39/C.1/L.384/Corr.1), which in any case reproduced the substance of a Chilean amendment submitted at the first session (A/CONF.39/C.1/L.22); his delegation had not accepted that either. By limiting the notion of a treaty to agreements which provided for rights and obligations, the Swiss amendment unduly restricted the scope of the draft articles by excluding from their sphere of application important international agreements, such as the Atlantic Charter, the Yalta and Potsdam Agreements and many political declarations which not only provided for " rights and obligations " but also laid down very important rules of international law and had governed international relations since the end of the Second World War. Such political agreements were vitally important sources of contemporary international law, of undeniable legal force and validity and the draft articles could not ignore them. Acceptance of the amendments by Switzerland and Chile would mean that agreements of great importance providing for the struggle against aggression and colonialism would be deprived of their binding force and validity, and that was something that no one could accept. As to the amendment submitted by Mexico and Malaysia at the first session (A/CONF.39/C.1/L.33 and Add.1), although it perhaps suffered from the disadvantage of complicating the definition of a treaty, it could be said that it had the virtue of precision and accuracy, and the Soviet Union supported it.

23. Mr. RODRIGUEZ (Chile) said that the Committee had to find a definition of " treaty " for the purpose of the convention in course of preparation; in other words it had to devise a concise form of words to describe an international agreement, as distinct from other agreements between States. It was a legal and technical task and the definition must not include any extraneous elements, however important they might be. That was why it was inadvisable for the definition of a treaty or an international agreement to embrace the question of the validity of international agreements, which was a matter of international norms and was dealt with further on in the draft articles. It would also be inadvisable for the definition of a treaty to restate notions of public law which were peculiar to certain States or were political in nature. The Ecuadorian amendment, however, both in its first version (A/CONF.39/C.1/L.25) and in its revised version (A/CONF.39/C.1/L.25/Rev.1), introduced elements into the definition of a treaty which, although perhaps appropriate somewhere in the draft articles, were out of place in the definition, since the notion of the free consent of the parties to a treaty was bound up with the conditions of validity of the agreement, a point which should not arise as early as in the definition of an agreement.

24. In the Swiss amendment (A/CONF.39/C.1/L.384/Corr.1), a treaty was regarded as an international agreement providing for rights and obligations. The Chilean amendment submitted at the first session (A/CONF.39/C.1/L.22) stated that a treaty was an agreement which produced legal effects. Both amendments therefore

gave prominence in their definitions to elements which would make it possible to distinguish international agreements constituting treaties from international agreements which merely recorded identical views, similar political opinions or wishes, or general aspirations. Like the Swiss representative, he was convinced that the definition of a treaty should contain elements of that kind, otherwise all international agreements alike, whatever their purport, would be governed by the draft articles, with the result that in the future Governments might hesitate to take a definite stand in writing when expressing their common political views or long-term wishes. Governments should not be inhibited in that way, because general political declarations were the driving force in the life of the international community and, as events proceeded, they facilitated the conclusion of more formal international agreements, which were binding on States and constituted genuine treaties providing for rights and obligations.

25. In addition to advancing that argument, he had also proposed that anything that was superfluous should be deleted from the International Law Commission's definition. It was pointless, for example, to say that a treaty was an " international " agreement governed by international law " embodied in a single instrument or in two or more related instruments ", or to speak of a " particular designation ". The Chilean delegation still held that view.

26. Mr. ROMERO LOZA (Bolivia) said that, as he had done at the first session, he supported the amendment by Ecuador to paragraph 1 (*a*) of article 2 (A/CONF. 39/C.1/L.25/Rev.1) because it emphasized certain elements that were essential to the validity of treaties and thereby made it possible to define with precision the subject-matter of the legal rules which the Conference was called upon to codify. Clearly, treaties must rest on certain fundamental principles such as the free consent of the parties and good faith and must have " a licit object ". Some representatives thought that the introduction of those particulars made the definition much too detailed, especially as the ideas in question were considered elsewhere in the draft articles; but in his view it was better to repeat them than to run the risk of omitting them, all the more so as the principles in question were already incorporated in the internal law of many countries. From that point of view the first version of the Ecuadorian amendment (A/CONF.39/C.1/L.25) had been preferable because it was impossible to over-emphasize the fact that the legitimate character of an international treaty was derived from the very principles which made universal co-existence possible.

27. The Swiss amendment (A/CONF.39/C.1/L.384/Corr.1) was incomplete precisely because it did not state the fundamental principles on which the rights and obligations created by international agreements depended.

28. Mr. BOLINTINEANU (Romania) said that, although it was true that article 2, paragraph 1 (*a*), referred to " an international agreement . . . governed by international law ", a reference to freedom of consent as an essential condition of the life of a treaty would seem to introduce a further element of precision and would moreover be in keeping with the prominence given in the system of the convention to consent: articles 10-14 referred to consent to be bound by a treaty, article 21 to consent as an essential element for entry into force, articles 30-32 to the consent of third States, articles 35 and 36 to consent to the amendment of treaties, articles 45-49 to defects of consent, article 51 to termination or withdrawal of a treaty by consent of the parties, and so on. Accordingly, his delegation supported the Ecuadorian amendment.

29. The Romanian delegation also supported the Austrian amendment (A/CONF.39/C.1/L.383) which would be a useful addition to article 2; the Drafting Committee should also take into account the amendments by Belgium (A/CONF.39/C.1/L.381) and Hungary (A/CONF.39/C.1/L.382).

30. The amendment by Switzerland (A/CONF.39/C.1/L.384/Corr.1) was unnecessary because the International Law Commission's wording fully covered all the elements constituting the legal substance of a treaty.

31. Mr. OSIECKI (Poland) said that, in principle, he favoured the retention of the Commission's text of article 2 because there was a risk that any attempt to render the definition of a treaty more complicated would make it uncertain whether a particular treaty fully complied with the requirements stipulated. His delegation agreed, however, that the Ecuadorian amendment deserved careful consideration.

32. Some of the other amendments were purely of a drafting character and should be referred to the Drafting Committee. In particular, his delegation supported the amendments by Belgium (A/CONF.39/C.1/L.381), Hungary (A/CONF.39/C.1/L.382) and Austria (A/CONF.39/C.1/L.383).

33. In reply to a question by Mr. HAMZEH (Kuwait), Mr. BINDSCHEDLER (Switzerland) explained that, according to the Swiss amendment, an international agreement could either create entirely new rights and obligations or set out in written form rights and obligations which already existed in customary law. The Swiss delegation, however, preferred to use the expression " providing for " which had a broader meaning than " creating ".

34. Mr. SINCLAIR (United Kingdom) said that in his view the Swiss amendment (A/CONF.39/C.1/L.384 and Corr.1) should be considered in conjunction with the amendments by Chile (A/CONF.39/C.1/L.22) and by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1). At the first session, the United Kingdom delegation had already stated that it favoured those two amendments and it also viewed with sympathy the Swiss amendment. Sir Gerald Fitzmaurice, in the definition included in his first report to the International Law Commission,[5] had incorporated the elements contained in the amendments of Switzerland and of Mexico and

[5] See *Yearbook of the International Law Commission, 1956*, vol. II, p. 107.

Malaysia. The United Kingdom delegation would find no difficulty in expanding the definition of the term " treaty " to incorporate those elements. In any event, they were already implicit in the Commission's draft by virtue of its reference to " international agreement ".

35. With regard to paragraph (2) of the Commission's commentary to article 2, the United Kingdom delegation considered that many " agreed minutes " and " memoranda of understanding " were not international agreements subject to the law of treaties because the parties had not intended to create legal rights and obligations, or a legal relationship, between themselves. In that respect his views did not correspond with those of the representative of the USSR, who had expressed too broad a view of the concept of a treaty within the framework of the draft convention. International practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views. The views of the USSR representative were not shared by all Soviet jurists, since in the work " International Law " prepared by the Academy of Sciences of the USSR, the term " international treaty " was defined as " a formally expressed agreement between two or more States regarding the establishment, amendment or termination of their reciprocal rights and obligations ".[6] The notion of rights and obligations formed an integral part of any definition of the term " treaty ".

36. In his delegation's opinion, the amendment by Ecuador (A/CONF.39/C.1/L.25/Rev.1) introduced an element which it was not appropriate to include in a definition; the Chilean representative's comments were very much to the point.

37. Mr. PINTO (Ceylon) said he was not convinced that it was necessary to introduce into the definition of the word " treaty " one particular element relating to the validity of treaties, as was done by Ecuador in its amendment. The International Law Commission had sought to set out under the heading " Use of terms " only the formal and external aspect of certain terms, not to define them; it had not touched upon the important question of the validity of treaties dealt with in other provisions of the draft articles. That was a very prudent attitude. His delegation understood the reasons which had induced the Ecuadorian delegation to submit its amendment, but it would have to abstain in the vote on it.

38. Mr. NASCIMENTO E SILVA (Brazil) regretted that the term " definition " recurred so often during the discussion; it was not very accurate, since it was rather a question of indicating the meaning given to the expressions frequently used in the Convention, in order to avoid repetition. Articles 8 and 9, however, expressed very clearly the idea on which the Austrian amendment (A/CONF.39/C.1/L.383) was based.

39. The amendments by Chile (A/CONF.39/C.1/L.22) and Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) had the same purpose as the Swiss amendment (A/CONF.39/C.1/L.384/Corr.1). Perhaps the sponsors of those amendments could meet and reach an agreement on a single text.

40. It was obvious that all the principles referred to in the Ecuadorian amendments (A/CONF.39/C.1/L.25 and Rev.1), namely that a treaty must have a " licit object ", be " freely consented to " and be " based on justice and equity ", should be observed in concluding an international treaty, but he did not think that they should be mentioned in article 2 (*a*). Those ideas should be carefully studied by the Drafting Committee when it drafted the preamble.

41. Mr. DE CASTRO (Spain) said he thought that the International Law Commission's text would serve to define the term " treaty " for the purposes of the convention. It was unnecessary to provide any general definition of that word; it was enough to explain the meaning it was intended to have in the convention. But since the Committee had several amendments before it, his delegation wished to state its position with respect to them.

42. His delegation fully supported the Ecuadorian amendment (A/CONF.39/C.1/L.25/Rev.1): a treaty was not valid unless it was freely consented to. However, it should not be forgotten that articles 23, 48, 49 and 50 already emphasized the fact that a treaty could only be valid if it was freely consented to. Nevertheless, inasmuch as some delegations to the Conference had not shown any great enthusiasm for Part V, of the Convention, there would perhaps be no harm in stressing such a fundamental aspect of the treaty as that of free consent. In that respect the Swiss amendment (A/CONF.39/C.1/L.384/Corr.1) was justified, inasmuch that it showed that the effect of an international agreement was to create rights and obligations. But if that agreement was governed by international law, it would be merely repetitious to say that it provided for rights and obligations. In the light of the doubts expressed by the Soviet Union representative, it would perhaps be better not to adopt that amendment, which tended to restrict the scope of the convention.

43. The Belgian amendment (A/CONF.39/C.1/L.381) improved the text, and the Austrian amendment (A/CONF.39/C.1/L.383) filled a gap. His delegation would have no difficulty in accepting those two amendments.

44. The CHAIRMAN suggested that the amendments by Belgium and Hungary, which were of a drafting nature and could not give rise to any controversy, should be referred to the Drafting Committee.

*It was so agreed.*

45. The CHAIRMAN invited the Committee to take a decision on the amendments by Ecuador, Switzerland and Austria.

46. Mr. ESCUDERO (Ecuador) said he realized how difficult it was to define accurately the terms used in the convention, but the Conference had a heavy responsibility in that respect. The text submitted by the

[6] English edition, p. 247.

International Law Commission was inadequate where the term " treaty " was concerned. The only element of substance to be found there was the expression " governed by international law". It was essential to include in the rules governing international law the rule concerning the freedom of consent of contracting States at the time of the conclusion of the treaty. Such freedom was essential for the existence of treaties. It was hardly possible to define a concept as complex as that of " treaty " in a few succinct words and at the same time omit any reference to the element of freedom of consent. In law, it was essential to have a clear idea of the various concepts, in order to avoid possible misunderstandings. His delegation, in presenting the revised version of its amendment, had retained only the essential element, namely, freedom of consent, because it had been anxious to meet the wishes of delegations which had not wanted too long a text.

47. In accordance with the decision taken by the Conference the previous year, his delegation hoped that its amendment would be referred to the Drafting Committee, which should make a careful study of the revised version and consider the possibility of retaining the reference to the notion of freedom of consent. The Chilean delegation had criticized the Ecuadorian amendment on the ground that it raised a question of substance concerning treaties, but the Chilean amendment (A/CONF.39/C.1/L.22), which proposed the addition of the words "which produces legal effects " also raised a question of substance. Logically that amendment should therefore also be considered as unacceptable.

48. Mr. BINDSCHEDLER (Switzerland) suggested that the Swiss amendment be referred to the Drafting Committee. The Chilean amendment (A/CONF.39/C.1/L.22), which was based on the same idea, had already been referred to the Drafting Committee, which could then choose between the two texts, or combine them in order to arrive at a better formulation.

49. The CHAIRMAN suggested that the Ecuadorian amendment (A/CONF.39/C.1/L.25/Rev.1) and the Swiss amendment (A/CONF.39/C.1/L.384/Corr.1) be referred to the Drafting Committee.

*It was so agreed.*

50. Mr. NETTEL (Austria) suggested that his delegation's amendment (A/CONF.39/C.1/L.383) be also referred to the Drafting Committee.[7]

*It was so agreed.*[8]

The meeting rose at 12.45 p.m.

[7] The amendment by Syria (A/CONF.39/C.1/L.385) to article 2 was taken up in connexion with article 5 *bis* (see 88th meeting).

[8] For the resumption of the discussion in the Committee of the Whole, see 105th meeting.

## EIGHTY-EIGHTH MEETING

*Monday, 14 April 1969, at 3.20 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new article 5* bis (The right of participation in treaties) [1]

1. The CHAIRMAN invited the Committee to consider the proposed new article 5 *bis* (A/CONF.39/C.1/L.74 and Add.1 and 2), which had not been formally introduced at the first session, when its consideration had been deferred.[2] The Committee would also remember that it had decided at its 80th meeting to defer consideration of all amendments relating to " general multilateral treaties ".[3]

2. Mr. WYZNER (Poland) said that the concept of universality, or the right of every State to participate in general multilateral treaties, was based on principles of international law embodied in the Charter of the United Nations and, in particular, on the principle of the sovereign equality of States. It was also closely linked with the undertaking by every State, formulated in the United Nations Charter, to fulfil in good faith the obligations assumed by it under the Charter. That undertaking could not be fully carried out if certain States were prevented from participating in treaties concluded in the interest of the community of States as a whole.

3. Poland's attitude towards those basic concepts of contemporary international law was evident from its sponsorship of an amendment to article 2 proposing a definition of the term " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1). That attitude was based on the conviction that the principle of universality benefited not only individual countries but the community of States as a whole. It was only fair that a State whose participation might help towards the attainment of the aims of a general multilateral treaty should have the right to become a party to the treaty. Since participation in a treaty often imposed obligations which limited the freedom of action of States parties to the treaty, it was both unreasonable and harmful to debar from participation in a general multilateral treaty a State which wished to become a party thereto, particu-

[1] The proposal for a new article 5 *bis* (A/CONF.39/C.1/L.74 and Add. 1 and 2) was submitted at the first session by Algeria, Ceylon, Hungary, India, Mali, Mongolia, Romania, Syria, Ukrainian Soviet Socialist Republic, United Arab Republic and Yugoslavia. It read:

" Insert the following new article between articles 5 and 6:

*' The right of participation in treaties*

'All States have the right to participate in general multilateral treaties in accordance with the principle of sovereign equality.' "

[2] See 13th meeting, paras. 1 and 2.

[3] See 80th meeting, para. 67.

larly in the case of treaties the purpose of which was to strengthen international peace and security, to protect human rights or to facilitate international communications and transport.

4. While the principle of universality had never been challenged as a theory, its practical realization appeared to create insurmountable obstacles for some influential States whose aim was to discriminate against certain socialist countries. That was obvious from an analysis of the practice of States before and after the Second World War in the matter of general multilateral treaties. Colonialism and other forms of dependence had been at their peak in the period before the War, but it was never argued that participation in general multilateral treaties should be restricted on the ground that it was difficult to determine whether a given political entity constituted a State. That argument had not been adduced until the so-called " cold war ". Such discrimination, sometimes described as " consistent practice ", ran counter to the interests of the international community and should not be allowed to become law.

5. Poland was convinced that the convention on the law of treaties ought to include the general rule that general multilateral treaties were open to the participation of all States. That rule must also apply to the convention itself. Moreover, all States should have the right to participate in international conferences at which general multilateral treaties were drafted and adopted.

6. One of the arguments adduced by those opposed to the principle of universality in connexion with general multilateral treaties was that the concept of such a treaty could not be defined. Poland could not accept that argument. The concept of a general multilateral treaty was neither new nor vague. The term " general multilateral treaties " had been used in the title of item 70 of the agenda for the eighteenth session of the United Nations General Assembly as well as in the routine practice of the United Nations Secretariat. Poland had sponsored a draft definition of that term at the first session of the Conference and was prepared to co-operate with other delegations in seeking the most suitable description of that category of treaties which, under the draft convention, should be open to signature, ratification or accession by all States.

7. Another objection raised by opponents of the principle of universality was that to participate with an unrecognized State in a multilateral treaty would amount to recognizing that State. That view was not in conformity with established practice in international relations or with the opinion of such eminent legal authorities as Sir Hersch Lauterpacht. However, to allay the anxiety of certain delegations in that respect, any proposal which might help to remove the difficulty could be carefully considered.

8. It was also contended that the rule of universality limited the sovereign right of a State to choose its partners in a treaty. It should be realized, however, that that right was not confined to any particular group of States. The discrimination practised against some socialist States was also an encroachment upon the sovereign rigths of States which maintained relations with the socialist States concerned and wished those relations to be governed by general multilateral treaties. Many African, Asian and Latin American countries would benefit from the removal of those barriers. It was indeed paradoxical that a State such as the German Democratic Republic, which entertained diplomatic, consular and trade relations with countries all over the world, could not yet become a party to a number of general multilateral treaties.

9. A further argument adduced against the principle of universality was that if an international organization or its organ acted as the depositary of a treaty, it would not be able to determine whether a given political entity was a State unless the restrictive formula was applied. In point of fact, no problem would arise if the depositary, whether a State or an organ of an international organization, acted impartially. Almost six years had elapsed since the signing of the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the first treaty to combine the three depositaries system with the " all States " formula, yet none of the depositaries had reported any difficulty in determining whether or not an entity applying to accede to the treaty was a State. Some opponents of the application of the " all States " formula to treaties for which the United Nations Secretary-General was the depositary argued that they did not wish to impose on the Secretary-General the task of making controversial political decisions. That difficulty, if in fact it existed at all, could be overcome by a self-explanatory text in the convention itself or by a resolution of the Conference which would ask the United Nations General Assembly to provide the Secretary-General with the necessary guidance.

10. Failure to reaffirm the principle of the universality of general multilateral treaties when codifying the law of treaties and creating a legal system of norms which should govern the treaty relations of States could only have a negative effect on the development of international law and on relations between States; indeed, it might cause many States to reconsider their attitude towards the convention itself. On the other hand, an equitable solution of the question of universality in the convention itself would be consistent with contemporary international law. It would make an important and constructive contribution to the development of treaty relations among States and ensure the success of the present Conference, since it would help to solve other outstanding problems in a spirit of accommodation and compromise.

11. Mr. MARESCA (Italy) said that his delegation had considerable sympathy for the extra-juridical motives that had prompted the proposed new article 5 *bis*, since there were general rules the application of which to the largest possible number of States would undoubtedly be advantageous to the international community as a whole. Nevertheless, there was a clear margin of difference between such sociological considerations and the certitude of law. Similar proposals had been made in other connexions, and the results had not been those desired by the sponsors of the proposed article.

12. For instance, at the 1961 Conference on Diplomatic Intercourse and Immunities, the view had been

advanced that to send diplomatic missions was a sacred right of States, since it was an expression of international co-operation and a guarantee of peace, and again, in 1963, at the Conference on Consular Relations, those relations had been described as the surest expression of international co-operation, and a right of all States. But both conferences had concluded that the juridical limitations of their terms of reference did not allow them to follow the proposals before them to their logical conclusion.

13. Of course, the right to send diplomatic and consular missions was inherent in the sovereignty of a State, but it was *a priori* subject to the consent of the other party. From the purely legal point of view, the Conference must admit that a treaty, however broad its scope, represented a meeting of wills; the basic principle *pacta sunt servanda* must be read in its complete context, *pacta sunt servanda intra gentes intra quas signita,* not among all the countries of the international community.

14. Custom and consent were both sources of international law, but there was a wide difference between them: custom was a universal source, but the rules laid down in an agreement were binding only on the parties to it. Consequently, if the Conference took extra-juridical, not purely juridical, considerations as a basis, it would be faced with difficulties which had so far proved insurmountable: on a strictly legal basis, it could not be said that a treaty, irrespective of its scope, could be joined by subjects which had not participated in its drawing up and which were not regarded by some of the parties as capable of becoming parties to it.

15. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that the question of the universality of multilateral treaties was one of principle for his country, which strongly advocated the extension of participation to all States without exception, irrespective of their political, economic or social system. That position, based on the principle of the sovereign equality of States, was not new, ephemeral or expedient: it had been determined by the historic Decree on Peace, signed by the great Lenin. In that document, Lenin had stated that the sole basis of real co-operation was the equality of all States and the participation of all nations in international relations.

16. Accordingly, the Ukrainian delegation's attitude to the convention as a whole would depend on whether a provision on universality was included in it. To sign a convention which would prevent sovereign States from participating in international treaties would be tantamount to renouncing its principles, and that the Ukrainian Soviet Socialist Republic was unable to do. In other words, universality was a criterion of the viability of the convention on the law of treaties, of the extent to which the convention reflected the current stage of development of international law and of the extent to which it took into account the actual conditions of contemporary international life. The draft convention as it stood did not meet those criteria and consequently not only failed to develop international law but, on the contrary, was directed towards the past, in that it did not reflect actual contemporary conditions.

17. The right of all States to participate in multilateral treaties affecting their legitimate interests arose out of the universal nature of contemporary international law and was a direct consequence of the basic principles of that law, enshrined not only in such international instruments as the United Nations Charter, but even in the draft convention on the law of treaties. The most important of those principles was that of the obligation of States to co-operate with each other; and article 5 of the draft recognized the capacity of every State to conclude treaties.

18. No one seemed to deny that, in theory, universality was inherent in all the basic principles of contemporary international law. From the legal point of view, that meant that every one of those principles should be applicable to all States. Nor could it be denied that, in discussing articles of the draft convention, the participants in the Conference should be guided not only by legal considerations, but also by moral precepts. But the situation that had arisen in connexion with the consideration of the proposed new article 5 *bis* was completely illogical and devoid of moral or legal foundations. Attempts to divert the Conference into the paths of legal casuistry did not mean that any legal proofs had been adduced. Indeed, no arguments could be advanced which could controvert the fact of the existence in Central Europe and in Asia of States against which discrimination was practised by the opponents of the principle of universality. No legal argument could eliminate the fact that all States were equally subjects of international law.

19. The opponents of the principle of universality were guided exclusively by political motives, however much they might try to conceal it. They were concerned, not with the purposes and principles laid down in the United Nations Charter, but with their own selfish interests. Article 2(6) of the Charter stated that the Organization should ensure " that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security ": that clearly meant that such instruments as the General Disarmament Treaty, the Convention on the Prohibition of the Use of Nuclear Weapons and the Treaty on the Non-Proliferation of Nuclear Weapons should be open not only to States Members of the United Nations, but to all States.

20. That purely legal argument, however, was ignored by the opponents of the principle of universality, who were unwilling to face the fact that a sovereign State had existed and had developed successfully in Central Europe for some twenty years. Nor were they willing to take into account the General Assembly resolutions which were addressed to all States. For example, the fourth preambular paragraph of resolution 2030 (XX), on the question of convening a world disarmament conference, read " *Convinced* that all countries should contribute towards the accomplishment of disarmament and co-operate in taking immediate steps with a view to achieving progress in this field ". Similar provisions appeared in resolution 2028 (XX), on the non-proliferation of nuclear weapons, in resolution 2054 (XX), on

the policies of *apartheid* of the Government of the Republic of South Africa, and in other resolutions. A logical development of those provisions would be to open general multilateral treaties to the participation of all States, since an increase in the number of participants in multilateral treaties would undoubtedly promote their implementation. That was what the International Law Commission had had in mind when it had stressed in the report on its fourteenth session that general multilateral treaties " because of their special character should, in principle, be open to participation on as wide a basis as possible".[4]

21. When discrimination against certain States wishing to become members of the United Nations had first been encountered, the authors of the restricted formula had been more frank and had not even attempted to base their arguments on legal casuistry. Speaking against the admission to the United Nations of a group of States with a social system different from that of the United States, the United States representative had stated in 1949 that the policy that those States were pursuing at the time rendered them ineligible for membership, in the opinion of the United States; he had gone on to say, however, that the United States would be very pleased to support the admission of those countries if they were to change their policies.[5]

22. Twenty years later, no such crude appeals to States to change their policy in return for admission to the international community were heard, but subtler methods were used to try to close the door of international co-operation to certain countries of Europe and Asia. Those machinations were contrary to the recognized principles of international law and to such international obligations as those assumed by the parties to the Potsdam Agreement [6] which provided that the entire German people should be enabled to take its place among the free and peace-loving peoples of the world. Moreover, objection to the adoption of the new article was in flagrant contradiction to the purposes and principles of the United Nations — the maintenance of peace and security and the development of co-operation among nations.

23. The existence of the States which some wished to debar from participation in multilateral treaties was a historical fact, and recognition of that fact was a prerequisite for any rational approach to the problems of peace and security. Denial of the existence of those States could not be justified in any way. The principle of international law under which the only government of a country was one which actually controlled its territory was generally recognized, and in the light of that principle it was absurd to cast doubt on the capacity of the governments of certain States to exercise authority over their territory and on the wide popular support enjoyed by those governments. Furthermore, from the point of view of international law, such a policy amounted to a violation of the principle of non-interference in the domestic affairs of other States.

24. The Conference was faced with the responsible task of confirming the principle of universality which had become evident in practice. In fulfilling that task, it would be introducing into the convention on the law of treaties a provision which would promote the progressive development of international law.

25. Mr. PINTO (Ceylon) said that his delegation had been glad to be one of the sponsors of the proposal (A/CONF.39/C.1/L.74 and Add.1 and 2) which gave effect to the principle, consistently supported by his Government, that all States had the right to participate in general multilateral treaties in accordance with the principle of sovereign equality. It was basic to the whole fabric of international law that, in the process of codifying and developing norms intended to have wide application, every State should have the opportunity to make its contribution and to participate in the final instrument.

26. That principle had its roots in the very nature of international law. Unlike domestic law, international law did not rely on a central coercive authority. It was a system which depended for its effective operation on the acceptance of States, a system which States observed because of their own desire to observe it in the interests of order within the community. The entire community was therefore concerned to secure the widest possible acceptance of general norms by throwing participation in general multilateral treaties open to all States.

27. At the same time, his Government held the view that recognition of statehood could not be implied from the fact of participation in an international conference or in the conclusion of a multilateral treaty. Participation in a general multilateral treaty to which Ceylon was a party by an entity not otherwise recognized by the Government of Ceylon could never *per se* be construed as recognition of that entity, whether or not the Government of Ceylon appended a declaration or disclaimer to that effect to its instrument of accession. That view of his Government was fully in accordance with modern international law.

28. Mr. HU (China) said that the proposed new article 5 *bis* raised a very involved question. It has a desirable aim, namely universal participation in general multilateral treaties. But there was a big difference between paving the way for universal participation and laying down a legal rule with regard to participation. There did not exist in international law any right of participation, especially in the sense of absolute or unregulated participation, and the proposal now under discussion appeared precisely to provide for such unregulated participation.

29. The new article 5 *bis*, if adopted, would conflict with the provisions of Article 4 of the United Nations Charter which laid down conditions for the admission of new members. It would also create difficulties for other international organizations in connexion with the provisions governing qualifications for membership of those organizations.

[4] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 168, para. (2) of commentary to article 9.

[5] See *Official Records of the Security Council, Fourth Year, No. 32*, 429th meeting, p. 17.

[6] For text, see *British and Foreign State Papers*, vol. 145, pp. 852-870.

30. For those reasons, his delegation was opposed to the inclusion of the proposed new article 5 *bis* in the draft convention.

31. Mr. KELLOU (Algeria) said that Algeria had always supported the principle of universality, since it considered that every State, in accordance with the principle of the equality of States, had the right to participate in general multilateral treaties that might affect its interests. The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had unanimously affirmed the principle of the sovereign equality of States. Article 5 of the draft convention, which laid down that every State possessed capacity to conclude treaties, was sound but insufficient, since it did not exclude the contrary principle of the restrictive clauses which prevented certain States from participating in treaties concluded in the interests of the international community as a whole. The very nature of certain general treaties was such that it was the duty of all States to accede to them.

32. His delegation regretted that the International Law Commission had abandoned the position it had originally taken in support of the principle of universality, as evidenced by article 8 of the 1962 draft.[7] Article 13 of the United Nations Charter invited States to promote international co-operation and the progressive development of international law and its codification. Unlike multilateral treaties of a purely contractual nature, general multilateral treaties established new legal rules, regulated the conduct of States and defined existing rules. That was in the interests both of relations between States and of the rights of individuals or groups of individuals. The rules confirmed, laid down or clarified by general multilateral treaties eventually came to affect third parties, and, thus strengthened by the practice of all States, became part of general international law.

33. Modern practice in international law provided examples of general multilateral treaties which, though concluded between a limited number of States were, because they contained provisions of a general nature, capable of being acceded to by other non-signatory States. The convention on the law of treaties should become a general multilateral treaty and take its place in the first rank of treaties. Algeria wished to reiterate its support for the principle of universality, which was one of the basic elements of modern international relations, since it could end discrimination between States whatever their political, economic or social systems.

34. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that the proposal for a new article 5 *bis* raised a very important question of principle because it attempted to open participation in general multilateral treaties to all States. His delegation had always supported any constructive step to guarantee the sovereign equality of States. In the matter of international co-operation, particularly with regard to treaties, it was, however, necessary to ascertain first the nature of the parties and the extent to which States actually had the right to participate in general multilateral treaties.

35. In their attempt to secure the widest participation in general multilateral treaties, the sponsors of the proposal under discussion could in fact open the door to territorial entities which regarded themselves as States but which in practice did not adhere either to the principles of the United Nations Charter or to the generally recognized practices of the international community. It was therefore important, in the interests of the security and the smooth conduct of international relations, to determine the meaning to be given to the term " State ". That matter could only be decided by an international authority and the only competent authority for that purpose was the United Nations.

36. The representative of Poland had referred to the practices of the colonial era, when a protectorate did not have the right to participate in international treaties, even if invited to do so. That deplorable situation had come to an end and multilateral treaties were now open to all Member States of the United Nations and the specialized agencies; it was also the practice to invite other States to participate in general multilateral treaties and that practice was amply sufficient to ensure universality.

37. A treaty could only concern parties which had the capacity to become bound by it and which were accepted by the other contracting parties. His delegation therefore urged that the proposal for a new article 5 *bis* be rejected and that the formula used in United Nations practice be maintained; that formula made general multilateral treaties open to the participation of all undisputed members of the international community, and provided for the possibility of inviting States whose participation was desired by the majority of the contracting parties.

38. Mr. ABDEL MEGUID (United Arab Republic) said that the right of every State to participate in general multilateral treaties on an equal footing was of vital importance to the progressive development of international law. General multilateral treaties were of concern to the international community as a whole. The draft convention on the law of treaties should therefore include a provision setting forth the right of all States to participate in general multilateral treaties in accordance with the principle of sovereign equality, which was the cornerstone of contemporary international law. The possibility of becoming parties to such treaties was particularly important for the promotion of peaceful relations and friendly co-operation among all nations.

39. His delegation had always advocated the participation of all States in conferences which prepared general multilateral treaties. The principle of universality was not confined to the question of membership of the United Nations. States which had nearly a quarter of the population of the world were at present prevented from participating in such conferences, and it would be illogical to expect them to become parties to general multilateral treaties when they had been debarred from assisting in their formulation.

40. General multilateral treaties were steadily increasing in number and importance. It was in the interests of

[7] See *Yearbook of the International Law Commission, 1962*, vol. II, pp. 167 and 168.

the world community that conferences dealing with treaties governing such matters as nuclear warfare and outer space activities should be open to the participation of all States without discrimination as long as they codified norms of general international law or contributed to the progressive development of those norms. His delegation therefore supported the proposal for an article 5 *bis*.

41. Mr. TODORIC (Yugoslavia) said that, in accordance with the attitude of his Government, which had been conveyed to the United Nations Secretary-General, his delegation believed that an article on the participation of all States in general multilateral treaties should be included in the future convention, in the interest of States and of the international community. Such a provision would be in accordance with the United Nations Charter, which stressed the importance of the principles of universality and the sovereign equality of States, and with the principle of non-discrimination between States whatever their social or political systems.

42. Mr. GROEPPER (Federal Republic of Germany) said he was opposed to the inclusion in the convention of the proposed article 5 *bis*, since it would create considerable insecurity in relations between States and cause great harm to multilateral co-operation in major treaties. The inclusion of the proposal in the convention would create a right to unilateral participation, or to participation without special invitation, for all States. But since there was no international authority to give a binding decision as to what constituted a State, the so-called " general multilateral treaties " would be automatically open to any territorial entity which described itself as a State. It was well-known that there existed a number of entities in the vague area between States and non-States, and the international emergence of territorial entities whose legal status was in dispute usually involved serious political conflicts. Adoption of the proposed new article 5 *bis* would expose the whole area of co-operation in major multilateral treaties to the damaging effects of such conflicts and thereby create obstacles to international co-operation instead of facilitating it.

43. It was also important to remember that the meaning of the term "participation " was not clear, any more than was that of the term " general multilateral treaty ".

44. The new article 5 *bis* would greatly restrict the freedom which States at present enjoyed in international law for purposes of the preparation and conclusion of treaties, since any territorial entity describing itself as a State would be able to participate in important treaties, regardless of the will of the majority of the community of States. There was no basis in existing international practice for imposing such a limitation on the comptence of the contracting States. Even the most " general " of all multilateral treaties, the Charter of the United Nations, required a vote of the General Assembly for the admission of new members.

45. The proposed new article would infringe the sovereign rights of States in another respect. Under its provisions, insurgents who had broken away unlawfully from their State of origin and who endeavoured to assert their independence in the areas under their control would be enabled to enhance their status by acceding to multilateral treaties.

46. Article 5 *bis* was not necessary for the purpose of safeguarding the principle of the sovereign equality of States. That principle had existed for a long time but treaties which provided for unrestricted unilateral accession were extremely rare. Nor was article 5 *bis* necessary for the purpose of guaranteeing the universality of major multilateral treaties. The practice of States and of international organizations, in particular that of the United Nations, showed that the universality of major multilateral treaties was assured without any provision being made for unilateral accession by any entity describing itself as a State. The standard formula used in the major treaties prepared by the United Nations made it possible for all undisputed members of the community of States to accede to such treaties, and also made it possible to invite territorial entities whose participation was desired by the majority of States.

47. In recent years, a limited number of treaties had been opened to unilateral accession by all States but only for very special and exceptional reasons. Moreover, in those few special cases, it had been found necessary to devise the multi-depositary system, which had grave disadvantages and which did not eliminate the legal, practical and political defects of unilateral participation. Those were the reasons why his delegation was opposed to the proposal to include a new article 5 *bis*.

48. Mr. CHO (Republic of Korea) said that amendments relating to general multilateral treaties had been submitted to articles 8 and 17, which had been discussed at the 84th and 85th meetings, but had been withdrawn because of the difficulty in arriving at a clear definition of the term " general multilateral treaty ". And because of the practical impossibility of arriving at a clear definition, it would be inappropriate to introduce into the draft convention the concept of general multilateral treaties.

49. On the proposed article 5 *bis*, he shared the views expressed by the representatives of the Republic of Viet-Nam and of the Federal Republic of Germany. There was no international body that could decide what political entity could be regarded as a State. For that reason, and because of the absence of a clear definition of a general multilateral treaty, the proposed article 5 *bis* should not be included in the draft convention.

50. Mr. BRAZIL (Australia) said that although most, if not all, delegates attending the Conference would agree that there were certain treaties that should be open to participation on as wide a basis as possible, that was not the question the Committee was considering, which was rather whether the principle referred to could and should be translated into a general rule of international law. That, in fact, was what the eleven-State proposal (A/CONF.39/C.1/L.74 and Add.1 and 2) amounted to.

51. Over the years the International Law Commission had considered a number of possibilities, and after lengthy discussions had decided that that general question should not be included in the draft articles. Aus-

tralia considered that decision correct, and believed that the subject was not at the present stage suitable for inclusion in the convention on the law of treaties.

52. The particular rule now proposed was unsatisfactory for a number of reasons. First, it could only be acceptable if there were a clear definition of a general multilateral treaty, but the definition proposed by eight States for inclusion in article 2 (A/CONF.39/C.1/L.19/Rev.1) did not meet that requirement; it defined the category by reference to content, in imprecise terms. The wording proposed might even apply to a treaty between a limited number of States on an important question of interest to them, but with wider implications that might make it of general interest to the international community.

53. Another objection was that the proposal cut across an essential basis of treaty relations, because it created the possibility of treaty relations with a third State even though the States concerned had expressly indicated that they wished to avoid that possibility. His delegation did not consider that the end in view, namely, the widest possible participation in certain multilateral treaties, justified the means proposed, which involved overriding the fundamental rule that treaty relations depended upon the consent of the State concerned. It could not accept that the proposed rule was required or demanded by the principle of the sovereign equality of States, and in fact considered that that principle indicated an opposite conclusion, namely, that States could not be forced into treaty relations against their own will.

54. Mr. SHUKRI (Syria) said that at the first session of the Conference his delegation had been one of the sponsors of a new article 5 *bis*. Since then many comments had been made on the meaning and scope of general multilateral treaties.

55. The Syrian delegation had now submitted an amendment to article 2 (A/CONF.39/C.1/L.385), providing a definition of " general multilateral treaty ", based on three sources: the definition previously proposed by the International Law Commission in article 1, paragraph 1(*c*) of its 1962 draft,[8] the definition submitted by eight States at the first session of the Conference (A/CONF.39/C.1/L.19/Rev.1), and the position taken by the Syrian delegation. The proposed amendment defined a general multilateral treaty as a treaty which related to general norms of international law or dealt with matters of general interest to the international community at large, and then went on to indicate the various means by which such a treaty could be prepared.

56. The present was an age of universality in international relations, and consequently it was necessary that all States should participate in treaties that affected the international community as a whole. To continue to ignore the existence of a number of States would be to undermine the principle of universality. It would be wrong to prevent, out of political considerations, the inclusion in the convention on the law of treaties of the principle of universality in relation to a general multilateral treaty.

[8] *Ibid.*, p. 161.

57. He hoped that Syria's attempt to define a general multilateral treaty would be well received.

58. Mr. USTOR (Hungary) said that Hungary had been one of the sponsors of the eight-State amendment to article 2 defining a general multilateral treaty (A/CONF.39/C.1/L.19/Rev.1), and of the eleven-State proposal to include a new article 5 *bis* (A/CONF.39/C.1/L.74 and Add.1 and 2). His delegation believed that all States had the right to participate in a general multilateral treaty, which had been clearly defined in the eight-State amendment to article 2. The best example of a general multilateral treaty was a treaty that served the purpose of codification and the progressive development of international law.

59. The right to participate in a general multilateral treaty was based on the general principles of international law, especially the principle of the sovereign equality of States. Another basic principle of international law involved was the duty of States to co-operate in accordance with the United Nations Charter; that was also one of the seven basic principles of international law dealt with by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. That principle, as drafted by the Drafting Committee of the Special Committee, imposed the duty to co-operate on all States.[9] In bilateral treaties, only two States were involved; in treaties of regional interest, all States of the region should co-operate to solve regional problems; but where problems of universal interest were concerned, such as questions of codification, they were of concern to all States, and it was unjust to exclude any State from a conference dealing with such a treaty. Exclusion in such circumstances amounted to a violation of the principle of co-operation.

60. In the world of today, with increasing and varied relations among States, rapid industrialization, development of the means of communication, and the danger of wars of annihilation, it was essential to establish rules of co-operation, which must be in the form of treaties, the main source of modern international law. Treaties relating to the codification and progressive development of international law had now become of overriding importance and should be binding on all States; consequently all States should be permitted to participate in preparing such treaties.

61. Article 31 of the draft confirmed the old rule that no State could be bound by a treaty if it had not expressly accepted the obligation arising from the treaty. It was to the interest of the international community that all States should be bound by codification treaties, but that aim could not be achieved so long as the present discriminatory practice continued. He therefore hoped that the Conference would accept the definition of a general multilateral treaty, and acknowledge the right of all States to participate in such treaties, in accordance with the principle of sovereign equality and the obligation of States to co-operate.

[9] See *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 87, document A/6799, para. 161.

62. Mr. NASCIMENTO E SILVA (Brazil) said that in principle all delegations could support the proposed amendment, but many considered that it would be difficult to translate it into a practical rule. The principle of universality was dear to Brazil and to all the Latin American states, which had defended that principle ever since Dumbarton Oaks. Those States had supported the admission of a number of African and Asian States, even though it meant the end of the privileged position of the Latin American States, with one-third of the total votes in the General Assembly.

63. The present system was satisfactory, since the principle of universality could be observed from a practical point of view in the General Assembly, where decisions were taken on the basis of the sovereign equality of all States, great and small. Brazil would be obliged to vote against article 5 *bis* because it would detract from the authority of the General Assembly, which must retain the right to decide what States not parties to the Charter might participate in general multilateral treaties.

64. Brazil had no objection in principle to the definition of a general multilateral treaty, but did not see why it should be introduced into the present convention. Article 2 was not a set of definitions, but an article on the use of terms employed in the convention, whose purpose was to avoid cumbersome repetition of the same expressions. Since the draft articles did not include any reference to general multilateral treaties, it was not necessary to define the expression in article 2.

65. Mr. YASSEEN (Iraq) said that for the reasons that had been given on many occasions by the representatives of his country and reiterated by several representatives during the discussion, the Iraqi delegation would vote for the principle of universality.

The meeting rose at 5.15 p.m.

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## EIGHTY-NINTH MEETING

*Tuesday, 15 April 1969, at 10.55 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new article 5* bis (The right of participation in treaties) *(continued)* [1]

1. Mr. DE CASTRO (Spain) said that the article 5 *bis* proposed by eleven States (A/CONF.39/C.1/L.74 and Add.1 and 2) raised a problem of the utmost importance which was familiar even to those opposed to the principle of universality. The question of the right of States to participate in general multilateral treaties was not new. As early as 1962, the International Law Commission had tried to draft a provisional text but had subsequently abandoned the idea, perhaps for fear of delaying the submission of the text of the convention. Article 5 *bis* was therefore intended to fill a gap. Unfortunately, the Committee was meeting the same difficulties as the International Law Commission, and it was particularly difficult for such a large body to reach a solution.

2. From the doctrinal point of view, the great difficulty was the apparent contradiction between two equally valid principles which, if considered separately, produced conflicting results, namely the principle of freedom of consent and the principle of universality. According to the principle of freedom of consent, every State was entitled to decide which States it wished to deal with. The principle of equal rights of peoples, laid down in Article 1(2) of the Charter, and the principle of the sovereign equality of States, laid down in Article 2(1) of the Charter, led to opposite conclusions. Contemporary internal and international law showed a clear preference for the democratic principle of equality. In international law, consideration had to be given to co-operation by all States, whatever system they represented, particularly in view of the growing importance of the law-making function of general multilateral treaties. In its most recent judgement, the International Court of Justice had in general, accepted that some rules once regarded as law in the formative stage had since become defined and consolidated in those treaties, because emerging law became crystallized by the adoption of conventions. How could a State be prevented from participating in that kind of agreement without impairing the principle of equality? Similarly, it was contrary to that principle to conclude restricted regional treaties in which the principle of social and economic co-operation laid down in Articles 1(3) and 55 of the Charter was not respected. The principle of universality should be recognized as a basic principle of the progressive development of international law, in both the general and the regional spheres.

3. The application of that principle met with serious obstacles, however. A wording had to be found which not only could secure a wide measure of agreement but also could be applied with certainty and to good effect.

4. The difficulties were numerous and had already been pointed out. What was to be understood by a general multilateral treaty? It was necessary to take into account its objective meaning, the general character of the subject-matter, and the object and purpose of the treaty. Consideration also had to be given to the quantitative element. Moreover, regional treaties, if effective with regard to an entire region, were entitled to be regarded as general multilateral treaties.

5. The relationship between the principle of universality and the recognition of States was another problem. There were in fact two distinct problems. But the Conference should not overlook the possible difficulties for co-existence that would be created within an organization which was set up by a multilateral treaty and which established close reciprocal relations between its members, by the fact that, for reasons affecting their legitimate interests, some States did not recognize other

[1] For the text, see 88th meeting, footnote 1.

States. The International Law Commission had discussed the nature of the principle of universality, and had abandoned the idea that the principle was a rule of *jus cogens,* because that would mean that it would be impossible to lay down rules on restricted participation, on limited accession, and on the exclusion of members of organizations set up by general multilateral treaties.

6. Perhaps those difficulties could be overcome through article 62 *bis,* by setting up a body to which they could be submitted for solution.

7. The Commission had taken the view that the problem had been insufficiently investigated for any proposal on the subject to be included in the draft articles. The Conference should take a step forward, and do so without delay. Unfortunately, the article 5 *bis* now before the Committee was not entirely satisfactory. Nevertheless, the Conference should expressly and clearly recognize the principle of universality. In that connexion, it would be helpful to consider what had transpired at the previous session on the subject of treaties concluded between States and international organizations or between two or more international organizations: the United Nations should be asked to refer the question to the International Law Commission. In order to obtain solemn recognition of the principle of universality, consideration should also be given to the possibility that the Conference might make a declaration on the lines of that approved by the Committee of the Whole at the first session with regard to article 49, on the proposal of the Netherlands delegation.

8. Mr. GALINDO-POHL (El Salvador) said that treaties gave rise to legal consequences for the parties and in international law they were a source of obligations. They were based on the principle of mutual consent. During the discussion of article 2, the representative of Ecuador had stressed the importance of freedom of consent of the parties. The conclusion of a treaty presupposed agreement between the parties which had taken part in the negotiations. With regard to the special situation of third States, article 30 provided that a treaty did not create either obligations or rights for a third State without its consent. For the same reasons, it followed that third States could not by accession impose obligations on the States which concluded the treaty. Articles 12, 31 and 32 of the draft were based on the same doctrine of freely-expressed consent. The definition of the term " treaty " in article 2 specified that it was an agreement concluded between States and requiring their consent.

9. Thus the system of the draft was based on the principle of the consent of the parties. To say that all States could participate in general multilateral treaties in accordance with the principle of the sovereign equality of States would impair the principle of the free consent of States, since it would enable any State to accede to an agreement without the consent of the signatory parties, which would be unable to prevent that State from participating in the treaty and would have to accept obligations against their will. The reverse might even be provided for — that a duly ratified general multilateral treaty might be imposed on third States which had originally refused to accede to it.

10. Article 5 *bis* made an exception to the principle of consent in the name of the principle of universality. If those two principles were to exist side by side, an attempt would have to be made to see whether they could be reconciled. The principle of universality was a political principle of great value to the modern international community. It was a regulatory principle, not a constituent principle of the international community, and the United Nations has not succeeded in applying it. It was therefore acceptable as a desirable aim; but the question was whether it was possible to apply it without impairing the principle of the consent of the parties to international agreement. In his delegation's view, it was possible to do so without impairing the one principle for the sake of the other, by means of specific decisions, as had been the case in certain recent treaties in which all States without exception, had been invited to participate.

11. Much progress had been made by the international community in applying the political principle of universality. But, although the principle was gaining ground, it could not take precedence over the principle of freedom of consent. It was to be hoped that the principle of universality would become of general application, but its introduction into the convention on the law of treaties in the abstract, as a kind of blank cheque, would substantially modify international practice where treaty obligations were concerned. It must be recognized that the international community was not yet ready to accept the automatic application of that principle. Specific consent by the parties helped to promote its acceptance without imparing the principle of freedom of consent.

12. The automatic application of the principle of universality would raise a problem of definition. The Conference would have to find a satisfactory definition of general multilateral treaty; but the decision whether the subject-matter of a treaty was covered by the definition would rest with States, at the time of negotiating a treaty. The negotiating States would have to consider whether they were drawing up a restricted multilateral treaty or a general multilateral treaty. Later, a dispute might arise with States which claimed to have the right to accede to it. That process was not very different from inviting States to participate in each individual case.

13. His delegation considered that the question of the existence of certain States should not be raised in the discussion. Recognition was not an essential condition of the existence of States; participation by a State in multilateral treaties or international conferences did not imply recognition.

14. If it was desired to go a step further, recourse might be had to the International Law Commission's 1962 formula, which provided that every State might become a party to a general multilateral treaty " unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization ".[2] That wording upheld the principle of an obligation accepted by consent. There was no doubt

[2] See *Yearbook of the International Law Commission, 1962,* vol. II, pp. 167 and 168, article 8.

that, in the interests of the international community, it was undesirable that any State should be excluded from matters which were of genuine importance to the whole world. The principle of universality should be maintained in international relations in all cases where the interests of the international community as a whole were involved; but the best way of furthering that principle was to adopt it in each specific case, thus ensuring that contractual obligations were not imposed on any State against its will.

15. Mr. STREZOV (Bulgaria) said that the Bulgarian Government had already had occasion to state that the absence of a clause on the right of all States to become parties to general multilateral treaties would be a serious omission, and it regretted that article 8 of the 1962 draft, which settled that problem more or less satisfactorily, had been abandoned. Those misgivings were shared by many governments. The Bulgarian delegation considered it very important for the Conference to agree on a text affirming the principle of universal participation in general multilateral treaties. Such an agreement would contribute to the progressive development of international law and would open the door to the more rapid elimination of the many controversies arising from other articles of the draft. General multilateral treaties were in fact in a separate category, and the problem of participation in those treaties warranted special treatment in the light of the principle of the sovereign equality of States.

16. The existence of that category of treaties was confirmed by international practice, in which they were playing an increasingly important part, since they governed problems of general interest to the entire community of nations and were intended to be universally applied. They represented an important factor in the codification and development of international law. Participation by all States in such treaties was in the interests of the international community as a whole. Moreover, every State had a legitimate interest in becoming a party to them. The right of States to participate in them was closely linked with certain fundamental principles of international law, such as the principle of the sovereign equality of States, the duty of States to co-operate with one another and the principle of the equality and self-determination of peoples.

17. It was argued by some that the principle of universal participation in general multilateral treaties was incompatible with the freedom of States to choose the partners with which they wished to establish treaty relations. That freedom was, of course, undeniable, but that was no reason for ignoring the no less justified right of other States to participate in the solution of international problems which affected their legitimate interests. To exclude certain States would be contrary to logic and to the interests of the international community. From the legal point of view, it would be inadmissible to try to lay down rules of general international law, in other words rules of universal application, and at the same time to prevent certain States from helping to draw them up. The Bulgarian delegation was convinced that the principle of the universality of general multilateral treaties was not at variance with a reasonable interpretation of the principle of the freedom of States to determine for themselves how far they were prepared to establish treaty relations with other States.

18. It had also been said that the inclusion of the principle of the universality of general multilateral treaties in the draft convention would be contrary to existing international practice, particularly within the United Nations. It was true that a large number of the general multilateral treaties concluded under the auspices of the United Nations embodied restrictions designed to prevent certain States from participating in those instruments. That practice was motivated by considerations which had nothing to do with law or justice, but in recent years it had been abandoned in several cases in which the principle of participation by all States had been adopted. The Conference should base its action on those examples, not on a retrograde practice which established discrimination between States and hampered the development of international law.

19. The objection that the adoption of the principle of universality would create practical difficulties, not only in connexion with the participation of States not recognized by other contracting parties, but also with regard to the performance of the functions of depositaries, was unfounded.

20. As the Secretary-General had pointed out in his memorandum of 1950 on the representation of States in the United Nations,[3] the practice with regard to multilateral treaties made a clear distinction between the problem of participation in general multilateral treaties and the problem of recognition. A State's participation in a multilateral treaty in no way prejudged the recognition of that State by all the other contracting parties. The States which were opposed to the principle of universality were fully aware of that fact and it was solely for political reasons and in order to maintain a discriminatory attitude that they preferred to adhere to their erroneous position and to assert that participation was tantamount to recognition. In actual fact, those States were afraid that the participation of certain States might facilitate their recognition.

21. The objection that the adoption of the principle of universality might cause difficulties for depositaries was equally unconvincing. The difficulties arose rather from the discriminatory policy pursued by certain countries. The adoption of the principle of universality would make it possible to eliminate those difficulties, since all States could participate in conferences drawing up general multilateral treaties and could therefore all become parties to those treaties. So far, treaties open to accession by all States had not caused difficulties for the depositary.

22. The opponents of the principle of universality had asserted that if a treaty were open to accession by all States, certain States would refuse to become parties to it, on the grounds that they had not been free to choose their partners, and that that would reduce the

[3] See *Official Records of the Security Council, Fifth Year, Suppplement for 1 January through 31 May 1950,* document S/1466.

number of contracting parties. That assertion, however, was refuted by the wide participation of States in the Moscow Nuclear Test Ban Treaty and other similar instruments.

23. His delegation considéred that the principle of universality, which was so important for the progressive development of international law, for co-operation among States and for the future of the entire international community, should take its place in the draft.

24. Accordingly, the Bulgarian delegation supported the eleven-State amendment, which would certainly lead to the elimination of all discrimination in regard to the accession of States to general multilateral treaties.

25. Mr. SINCLAIR (United Kingdom) said that his delegation was opposed to the eleven-State proposal because it conflicted with the principle that States negotiating the text of a treaty were entitled to determine the scope of participation in that treaty. The negotiating States also had the right to know in advance who their potential treaty partners would be.

26. Multilateral treaties varied enormously in their nature and their purpose. The fact that the French delegation had agreed to withdraw its amendments relating to restricted multilateral treaties, because of the difficulty of formulating special rules for that category of treaties, did not mean that no such category existed. Some multilateral treaties were regional in nature and concerned only States members of such regional organizations as the Organization of American States, the Organization for African Unity, the Arab League, and the Council of Europe. Other treaties might be negotiated within a regional organization, but might be open for accession, under certain conditions, to States which were not members of that organization. Other treaties again might be negotiated within the framework of a general international organization and might be open for participation to the members of that organization or related organizations. Certain treaties were negotiated at diplomatic conferences convened at the initiative of one or several governments and outside the international organization framework, as in the case of the 1954 Geneva Agreements on Indo-China or the Antarctic Treaty.

27. The international community should have flexible techniques for dealing with matters of general interest. The right of passage through vital international waterways, which was certainly a matter of general interest to the international community, might be based on treaties to which very few States were parties, but which were clearly intended to be for the benefit of third States.

28. Moreover, the provision of the eleven-State amendment would be difficult to apply in practice. Some examples of general multilateral treaties could of course be identified, but experience had shown that it was virtually impossible to provide a precise definition of that category of multilateral treaties.

29. The essence of the problem lay in the fact that the members of the international community of States had differing views on the question of what territorial entities constituted States.

30. Many representatives who had spoken in the debate had based their views on the assumption that all entities whose status was in dispute must be considered as States if they asserted a claim to statehood. But must every claim to statehood by a territorial entity, whatever its nature, and irrespective of the means by which it might have temporarily attained sufficient *de facto* control over a piece of territory, be accepted? Certainly not. Everyone knew that beyond the area of Central Europe to which the Polish representative had drawn the Committee's attention, there were other controversial régimes seeking to thrust their way into the international community of States. Was it seriously suggesed that régimes and entities of that nature had the right to participate in general multilateral treaties?

31. A number of representatives had spoken of the alleged discriminatory nature of the customary practice whereby accession to general multilateral treaties was open to States members of the United Nations and the specialized agencies and to States which the General Assembly decided specially to invite. But the fact was that the international community lacked an independent organ which could determine objectively in a particular case whether a territorial entity whose status was in dispute had the attributes of statehood. As there was no such organ, it was reasonable that the main political organ of the United Nations should decide so difficult an issue.

32. The Conference must base itself on customary law and existing practice. There could be no doubt that State practice and the practice of international organizations was based on the principle that negotiating States had full freedom of contract and were free to determine which States or other subjects of international law were entitled to become parties to a treaty which they proposed to conclude. The principle of freedom of consent, which had been mentioned in connexion with article 2, should also apply to the choice of treaty partners.

33. The problem raised in the eleven-State amendment was not fundamentally a problem of the law of treaties. It was merely one aspect of a wider question deriving from the nature of the international community and from the means whereby territorial entities whose status was in dispute were admitted to that community. The methods devised by the international community to solve that question were not perfect, but in an imperfect world, and in the present state of international relations and of the organization of the international community, the customary formula on participation — the so-called Vienna formula — offered ample guarantees that entities which were not members of the United Nations or of the specialized agencies, but which were nevertheless recognized as States by the majority of the international community would be accorded the opportunity to participate in general multilateral treaties.

34. Mr. SHUKRI (Syria), introducing a new proposal for an article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1), said that the sponsors of the amendment, after listening to the arguments advanced during the discus-

sion, had reached the conclusion that the majority of States were in favour of the principle of universality. The main objections raised had related to points of detail, such as the desirability of drawing a distinction between general multilateral treaties and ordinary multilateral treaties, or the possibility of defining general multilateral treaties.

35. In a spirit of conciliation and in order to facilitate a general agreement on the problem, Algeria, Ceylon, Hungary, India, Mongolia, Poland, Romania, Syria, the Ukrainian Soviet Socialist Republic, the United Arab Republic, the United Republic of Tanzania, Yugoslavia and Zambia had submitted a new draft of article 5 *bis* [4] which replaced the previous proposal (A/CONF.39/C.1/L.74 and Add.1 and 2).

36. It was undeniable that every State had the right to participate in drawing up treaties which established general norms of international law, for no State could be bound by such norms without its consent. That principle was clearly stated in Article 38 of the Statute of the International Court of Justice. Again, the right of every State to participate in drawing up treaties governing problems of concern to the community as a whole could not be disputed.

37. The new proposal contained no definition or statement of abstract principles.

38. Mr. ALVAREZ TABIO (Cuba) said that the Conference was discussing what might be called the constitutional law of treaties and it was therefore logical that the future convention should be open to accession by every State which desired to accede to it, without any discrimination.

39. Any decision concerning the right of States to participate in establishing international treaty relations must be based on the principle of universality. Co-operation among States made it necessary that multilateral conventions should be open to accession by all States, and that had in fact been envisaged by the International Law Commission in the 1962 draft.

40. Absolute recognition of the principle of universality was essential for the progressive development of international law. The nature of certain conventions called for the adoption of the principle of universality, because those conventions established international relations which affected the whole of mankind, and it was illogical that, when the rights and obligations arising from such relations were being defined, all the members of the international community should not all have the right to participate, in accordance with the principle of sovereign equality contained in the United Nations Charter.

41. A characteristic of contemporary international law was its trend towards universality and it was impossible to deny the existence of certain socialist States, which were subjected to arbitrary discrimination as a result of pressure exerted by certain Powers, although they fulfilled all the necessary conditions legally entitling them to form part of the community of sovereign States.

42. It had been pointed out that the eleven-Power amendment (A/CONF.39/C.1/L.74 and Add.1 and 2) did not include any definition of a general multilateral treaty, but there were other amendments, such as the Syrian amendment (A/CONF.39/C.1/L.385), which clearly indicated all the elements which would make it possible to identify such a treaty.

43. Furthermore, the issue was not the definition of a general multilateral treaty but the absolute recognition of the principle of universality.

44. His delegation would therefore vote for the amendment (A/CONF.39/C.1/L.388 and Add.1).

45. Mr. FRANCIS (Jamaica) said that he could not yet express an opinion on the new article 5 *bis* proposed by Syria, atlhough he did not think it differed much from the text previously submitted (A/CONF.39/C.1/L.74 and Add.1 and 2).

46. In his delegation's view, there was a very clear distinction between the political desirability of securing the widest possible participation in general multilateral treaties and the establishment of a peremptory norm laying down an absolute right of participation.

47. The Czechoslovak delegation had submitted an amendment to article 12 (A/CONF.39/C.1/L.104) at the first session of the Conference. Notwithstanding that amendment, if article 5 *bis* was accepted in its existing form, there would be a lack of balance in the structure of the convention. In the first place, the proposed article conflicted with article 30, which stated " A treaty does not create either obligations or rights for a third State without its consent ". The right to participate in a general multilateral treaty should not be absolute; it should be derived from the provisions of the treaty itself or from the general wish of the parties.

48. Secondly, article 5 *bis* also seemed questionable in the light of article 15, which imposed obligations on the States concerned before the treaty had been ratified, accepted or approved and even before it had entered into force. Rights entailed obligations, and article 5 *bis,* in so far as it made no provision regarding the obligations mentioned in article 15, was very much open to question.

49. His delegation would therefore be unable to support the proposal for a new article 5 *bis.*

50. Mr. PELE (Romania) said that his delegation was one of the sponsors of the proposed new article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) and of the amendment to article 2 concerning the definition of a general multilateral treaty (A/CONF.39/C.1/L.19/Rev.1) which was still before the Committee. It therefore attached particular importance to the question of the right of every State to participate in a multilateral treaty whose object was the codification or progressive development of general international law, and in any other treaty of general application. Those treaties

[4] The proposal read:

" Insert the following new article between articles 5 and 6:

' Every State has the right to participate in a multilateral treaty which codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole.' "

formed a separate category of international agreements which very properly took account of the expansion of inter-State relationships in the modern world. Whether they were called general multilateral treaties, treaties of universal interest or treaties of universal application, such agreements must be open to all States, since they all contained provisions intended to ensure the rule of law and justice among nations and to satisfy the common interests of all States, and the interests of international peace, security and co-operation. That, moreover, was the spirit of the United Nations Charter, as Article 2(6) of the Charter showed; and the universality of the Charter was undoubted. The purposes and principles of the Charter were in fact the source of such treaties, the aim of which was to promote the right of peoples to self-determination, equal rights, non-interference in the internal affairs of other States, and respect for national sovereignty and independence.

51. State practice confirmed beyond all doubt the existence of such a category of treaties, open to all States. Many collective or universal conventions had been concluded towards the end of the nineteenth century and at the beginning of the twentieth, such as the 1883 Union Convention of Paris for the Protection of Industrial Property, the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1907 Convention concerning the Laws and Customs of War on Land, and the 1928 General Treaty for Renunciation of War as an Instrument of National Policy. They all contained provisions allowing any non-signatory State to accede to them. Similarly, more recent conventions, such as the 1949 International Convention for the Northwest Atlantic Fisheries, the 1952 Universal Copyright Convention, the 1951 International Plant Protection Convention and others, were open to accession by all States. Those conventions, either in their preamble or in their initial articles, affirmed the universality of their objects and purposes.

52. The United Nations practice of restricting participation in treaties of universal interest seemed no longer to satisfy the principle of universality, as was shown by certain recent international agreements concluded under United Nations auspices such as the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the Outer Space Treaty and the Agreement on the Rescue of Astronauts.

53. The International Law Commission made extensive reference to general multilateral treaties as a firmly established institution of public international law. That was evident from its commentaries to the draft articles such as paragraph (12) of the commentary to articles 16 and 17, paragraph (2) (*c*) of the commentary to articles 27 and 28, paragraph (20) of the commentary to article 28, paragraph (1) of the commentary to article 29, paragraph (2) of the commentary to article 30, paragraph (4) of the commentary to article 50 and paragraph (7) of the commentary to article 57.

54. Nor had eminent publicists been slow to recognize the universal applicability of such treaties in their writings, for example, Paul Reuter in *Droit international public,* 1963, Charles Rousseau in *Droit international public,* 1965, and Max Sørensen in the *Manual of Public International Law* which appeared under his editorship in 1968. That being so, the Conference should affirm the principle of the universality of treaties, which sought to bind all States and were *par excellence* the legal instrument of universal co-operation. The Romanian delegation could not endorse the view of those who feared that what they called the " unilateral participation " of some States in multilateral treaties restricted freedom of consent to be bound by a treaty, in other words the sovereign equality of States. The universal treaties which he had cited as examples testified to the contrary, and the convention in course of preparation would contain a serious gap if it remained silent on general multilateral treaties.

55. Mr. MOLINA ORANTES (Guatemala) said that his country, which was resolutely anticolonialist, had always adopted an extremely liberal attitude towards the admission to international organizations of the new political entities born of decolonization. But Guatemala, both in the United Nations and in the Organization of America States, had always reserved its position with respect to would-be States which, with the help of Powers outside the American continent, attempted to establish themselves on territories forming an integral part of certain American republics and claimed by those republics. In the resolutions adopted by the United Nations General Assembly on the creation of new States, which were based on the application of the principle of self-determination, Guatemala had always introduced a proviso that such entities should only be allowed to benefit from the application of that principle if they did not form an integral part of American territories. Moreover, the Charter of the Organization of American States had been amended in that sense by the Protocol of Buenos Aires, 1967,[5] which provided that no new member could enter that Organization if it was the subject of a territorial claim by any country on the American continent.

56. His delegation feared that the article 5 *bis* proposed at the first session of the Conference might conflict with those General Assembly resolutions and international conventions. In order not to open the door to would-be political entities whose international status was open to dispute, his delegation would vote against article 5 *bis,* even in the form just proposed by the Syrian representative, which in no way disposed of the substantive difficulties which that article raised.

57. Mr. HUBERT (France) said he had some difficulty in coming to a decision on the new wording of article 5 *bis* submitted by the Syrian representative, but his impression was that the new text did not differ basically from the old one inasmuch as it maintained the principle of the universality of general multilateral treaties and was merely trying to define them.

58. Though the French delegation appreciated some of the arguments put forward by supporters of article 5 *bis* in the form in which it had been introduced at the first session, it concurred with the view that the

[5] Protocol of Amendment to the Charter of the Organization of American States (Washington, D.C., Pan American Union).

article was untimely. He would not go over all the arguments against the article, but he would observe that the members of the International Law Commission, highly qualified and independent persons who were entirely uninfluenced by political considerations had, after a lengthy and thorough debate, concluded that it was hard to find a satisfactory way of defining general multilateral treaties, and that it was not possible to draft a general provision for inclusion in the draft articles on the right of States to become parties to such treaties. In the French delegation's opinion the Commission's attitude carried considerable weight.

59. Another weighty argument against article 5 *bis* was the very nature of the Conference; it had been convened by the General Assembly of the United Nations and it was only right therefore that it should conform to United Nations practice. Except for a very few treaties, such as the Outer Space Treaty, it was part of the customary law of the United Nations to reproduce in technical conventions such as that which the Conference was now preparing certain clauses which had become usual since the Vienna Conference of 1961 on Diplomatic Intercourse and Immunities and the Vienna Conference of 1963 on Consular Relations. There was no need to make any change in what was known as the " Vienna clause ", by which participation in a convention was open to five classes of State, namely States Members of the United Nations, States members of the specialized agencies, States parties to the Statute of the International Court of Justice, States members of the International Atomic Energy Agency, and States invited by the General Assembly itself to become a party to the treaties in question. That was a broad, liberal and flexible formulation, inasmuch as it closed no door finally. The Conference should follow it to the letter in drawing up the final clauses of the convention and observe its spirit in the case of " general " multilateral treaties concluded in the future. It would be unfortunate to be committed in the future by an automatic universality clause which would prevent States from choosing their treaty partners freely. Conventions open to all States, of which the Romanian representative had given examples, were conventions on very specific matters, and their universality derived from their specific character. The Conference should take care to avoid signing a blank cheque which would amount to a definite infringement of State sovereignty. The French delegation would vote against article 5 *bis*.

60. Mr. SMEJKAL (Czechoslovakia) said that at the first session the Czechoslovak delegation had supported the universality rule, the principle that all States participated in the creation of international law. The international community should strive to ensure that all States became parties to treaties codifying or developing the general rules of international law. One illustration was the importance of the Covenants on Human Rights and the effect that would be produced by the possibility for all States to become parties to them.

61. He would not rehearse the arguments for and against the proposal, since the positions of principle were well known and it seemed hardly likely that the debate, which was limited to the theoretical questions of universality, would introduce any really new elements. That did not mean that the Czechoslovak delegation was not following the discussion with great attention or that it considered the discussion itself useless.

62. Indeed, one of the reasons why the discussion could not be said to be pointless was that the problem of universality presented itself to different delegations in different contexts. In the Czechoslovak delegation's view, the progress which the adoption of article 62 *bis* and article 5 *bis* would bring about would most certainly mark an important stage in the relationships between States. For, although it might not be immediately apparent, there was a relationship between article 5 *bis* and article 62 *bis*, which was generally recognized and decisive; only a real attempt at mutual understanding and agreement would make it possible to achieve the genuine progress in that respect which was the very object of the Conference. Without such an attempt, any decisions reached by voting alone would only represent a Pyrrhic victory.

63. Some delegations maintained that they could not accept any solution that might entail a modification of principle concerning the recognition of some other State. His delegation was not at all sure that article 5 *bis* would have any such effect. It held, indeed, that article 5 *bis* could not be interpreted in that sense. It supported without the least reservation the new text submitted by the Syrian representative in a spirit of compromise at that meeting. It was ready to take an active part in any attempt to find a compromise formula that would lead to the acceptance of the ideas underlying articles 5 *bis* and 62 *bis*.

64. In that spirit, and in order to meet the points raised by the Jamaican representative concerning the amendment to article 12 submitted by the Czechoslovak delegation at the first session (A/CONF.39/C.1/L.104), he would withdraw that amendment if any article on lines similar to those proposed for article 5 *bis* was adopted.

The meeting rose at 12.55 p.m.

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## NINETIETH MEETING

*Wednesday, 16 April 1969, at 10.55 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new article 5* bis (The right of participation in treaties) *(continued)* [1]

1. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that on the basic question who had the

[1] For the new text (A/CONF.39/C.1/L.388 and Add.1), see 89th meeting, footnote 4.

right to participate in a multilateral treaty which codified or progressively developed norms of general international law or the object and purpose of which were of interest to the international community of States as a whole, his delegation held a clear and definite position: it would like all States to participate in such treaties in accordance with the principle of their sovereign equality, since those were the treaties which nowadays increasingly opened the way to the general settlement of the most important international problems. It was through general multilateral treaties of that kind for example, that the vital question whether a nuclear war might or might not occur was currently being settled at the international level. All States should therefore be drawn in to participate in such treaties, which should be binding on them, so that no country would be prevented from playing its part in achieving the universal aim of promoting world peace. It would be manifestly illogical to prevent any State whatsoever from participating in a treaty on disarmament, or a treaty on the prohibition and liquidation of nuclear weapons.

2. All States were sovereign and therefore had equal rights. No one was entitled to deprive a State of its inalienable right to participate in general multilateral treaties. The Byelorussian SSR, which celebrated on 1 January 1969 the fiftieth anniversary of its existence as a sovereign socialist State created as a result of the wise national policy of the great Lenin, had always respected the principle of the equality and sovereignty of all States.

3. There were, unfortunately, certain Powers which were unwilling to acknowledge either the interests of mankind or the sovereign equality of States. The opponents of the principle of universality advanced " theories " which could only be harmful. Thus, the American jurist Jessup, in his work entitled *The Use of International Law,* advocated producing a law of the " selective community " of States and went so far as to classify States as he thought fit. In Western Germany, Leibholz in his work entitled *Zur gegenwärtigen Lage des Völkerrechts* said that before it was possible to speak of an " international legal community " there must be a " minimum consensus of ideology, which did not exist at the present time". That was an attempt to carry over into inter-State relations the ideological struggle current in the world. There could be no compromise on questions of ideology, but the existence and development of norms of international law were in no way governed by differences in ideologies but by the need to live in peace and to co-operate in accordance with the principles of the United Nations Charter.

4. That was the need which should govern the Cenference in working out the convention on the law of treaties; in other words there should be mutual agreement to recognize the rules for the establishment of normal relationships between States with different political, economic and social systems and for the strengthening of peace between them in the interests of the whole of mankind.

5. The Western Powers, however, were violating the recognized principles of international law one after another. They were violating the right of peoples to share in the development of the norms of international law. By their attempts to keep certain socialist countries out of international conferences they were violating the principle that general multilaetral treaties must be drawn up in the full light of day. The Conference should ignore such selfish attempts and was in duty bound to take as its basis the aims of the United Nations Charter in order to make the consolidation of peace the fundamental principle of all international relationships.

6. Article 5 *bis* would give expression to the principle of universality and was thus a proper and a feasible response to that need. Any discriminatory formulation would be an artificial structure which could never become a norm of international law. The Byelorussian Soviet Socialist Republic was firmly opposed to all discrimination, and that was the principle which would dictate its attitude towards the convention on the law of treaties. Universality was a fundamental necessity of the development of international law, including the law of treaties. Many treaties, such as the 1963 Moscow Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, and the Agreement on the Rescue of Astronauts were based on the principle of universality. Similarly, many resolutions of the United Nations General Assembly were appeals to all States, such as the resolution condemning South Africa and Portugal for their policy of *apartheid* and racial discrimination adopted at the twenty-third session of the General Assembly.[2] Similarly, on 8 October 1968, the Netherlands, in connexion with the draft Declaration on social development, had stated [3] that in principle the proposed declaration should be of a universal nature and be acceptable by and applicable to all countries.

7. Certain representatives, including those of the Federal Republic of Germany and the United Kingdom, had advocated the adoption of what was called the " Vienna formula ", by which general multilateral treaties were open to all States Members of the United Nations, members of the specialized agencies or of the International Atomic Energy Agency, States Parties to the Statute of the International Court of Justice, and any other States invited by the General Assembly of the United Nations to become a party. That was a discriminatory formula, and hence a harmful one; for if a State achieved independence in Africa, Asia or Latin America, and, owing to lack of time, it was not yet a member of the United Nations, it would have to wait until the General Assembly of the United Nations met in order to participate, if the case arose, in a conference drawing up an important multilateral treaty to which it might have wished to be a party. That would be tantamount to violating the sovereign rights of the new State, and that was a situation which the Byelorussian Soviet Socialist Republic could not accept. Only the acceptance of the principle of univer-

[2] Resolution 2446 (XXIII).

[3] A/7235/Add.1.

sality would make it possible fully to respect the sovereign equality of States and to strengthen equity and legitimacy in international relationships. Consequently, the Byelorussian Soviet Socialist Republic unreservedly supported the new article 5 *bis*.

8. Mr. WARIOBA (United Republic of Tanzania), speaking as one of the sponsors of draft article 5 *bis* in its revised version (A/CONF.39/C.1/L.388 and Add.1), said he had followed the discussions with keen interest and had noted that the objections voiced had been directed not at the principle of universality but at the difficulties to which it gave rise. The main problem was therefore to try and find a way out of those difficulties.

9. He appreciated the differences that existed between States or groups of States, but it was unfortunate that those differences should be given more importance than the principle now under consideration. It was particularly unfortunate that the arguments both for and against the principle of universal participation in treaties — a principle which vitally affected mankind as a whole — should have been dictated to such an extent by the interests of political blocs.

10. In international relations, there were certain matters which should override all individual or group interests, and participation in general multilateral treaties was one of them. In the interests of security and of international co-operation, it was necessary for every State to conform to certain rules of international law; it was therefore unfair to expect a State to fulfil its obligations in that respect if, at the same time, it was denied certain essential rights such as the right to participate in general multilateral treaties.

11. He did not wish to enter into a detailed examination of the objections raised against article 5 *bis*, since they had already been adequately dealt with by a number of representatives, particularly the Polish representative; but he would like to refer to one or two points.

12. Some representatives considered that it was so difficult to define the term " general multilateral treaty " that it would be better not to include in the draft convention an article on the universal right to participate in such treaties. The United Republic of Tanzania was one of the sponsors of an amendment to article 2 (A/CONF.39/C.1/L.19/Rev.1) which sought to define the term " general multilateral treaty ". He was convinced that a satisfactory definition was feasible and he was quite prepared to co-operate in any attempt to formulate it. For that reason he had joined the sponsors of the proposed new article 5 *bis* which contained all the elements essential to a treaty that should be open to universal participation.

13. It had also been said that the term " State " was ambiguous and that it might allow any entity to become a party to a treaty. That was a strange argument to put forward in connexion with article 5 *bis*, because the term " State " had been used throughout the draft articles and had not raised any difficulty so far. His delegation understood the term " State " to mean nothing but a sovereign State. However, if certain delegations found genuine difficulties with that concept, he was sure that it would not be beyond the ability of the Committee to clarify it further.

14. The view had also been expressed that participation in the same treaty could amount to recognition. That argument too was a fallacy, but the advocates of article 5 *bis* were quite prepared to adopt a flexible attitude; the Committee had faced a similar problem in connexion with article 60, and in a spirit of goodwill it had approved article 69 *bis*. Perhaps it would be possible, with regard to article 5 *bis*, to work out a compromise on the pattern of article 69 *bis*.

15. The opponents of article 5 *bis* had put forward an argument which they regarded as even stronger, namely that article 5 *bis* would deprive States of their right to choose their treaty partners. In fact, that argument was the weakest of all. No State could of course be forced to have a contractual relationship with another if it did not wish to, but that did not justify preventing the latter State from participating in a treaty which vitally affected it and mankind as a whole. There already existed examples of treaties which established that type of relationship. It had been claimed by some that those were special treaties. In fact, they were special precisely because they dealt with matters of vital importance to the whole international community.

16. Moreover, if the argument of the right to choose treaty partners was carried to its logical conclusion, an absurd situation arose: under the so-called Vienna formula, States Members of the United Nations and the specialized agencies and States Parties to the Statute of the International Court of Justice would participate automatically in the treaties in question. Could it really be said that every one of the States represented or entitled to be represented at the present Conference would be ready to have all the other States represented at the Conference as treaty partners? They would certainly not do so as a result of free choice, but simply because all the States represented at the Conference subscribed to the ideals of the United Nations Charter.

17. In any case, the draft articles provided sufficient flexibility to enable two or more States to participate in the same treaty without that treaty necessarily creating a contractual relationship between them, since under the provisions dealing with reservations, two or more States could participate in the same treaty even if one or more of them strongly objected to a reservation formulated by another State.

18. The opponents of article 5 *bis* also invoked the Charter of the United Nations against the principle of universality, arguing that Article 4 laid down conditions for membership of the United Nations and that the General Assembly had the right to invite non-members of the United Nations specially to participate in treaties. But, in Article 2(6), the Charter gave pride of place to international peace and co-operation, and general multilateral treaties were necessarily concerned with matters vital to the maintenance of international peace and co-operation. The question of admission to the United Nations had nothing to do with participation in treaties.

19. The attitude of the United Republic of Tanzania on the whole question was both firm and flexible: firm

in the belief that the principle of universal participation should find a place in the convention on the law of treaties, and flexible in that it was ready to accept a formulation of that principle in a manner calculated to remove the misgivings voiced by a number of representatives, provided the principle itself was left unimpaired.

20. Mr. SAMAD (Pakistan) said that it had always been the policy of the Government of Pakistan to maintain friendly relations with all States of the world community regardless of their political, social or economic structure. His delegation therefore took the view that participation in general multilateral treaties which dealt with matters of general interest to the international community should be open to all States in accordance with the principles of sovereign equality, universality and non-discrimination.

21. In his view, mere participation by an otherwise unrecognized State in a general multilateral treaty could not in any way be taken to mean or imply its recognition. Recognition in international law was a deliberate formal act from which certain juridical consequences flowed. Thus on that point, the misgivings expressed by certain representatives — misgivings which were in fact based largely on political considerations — had no basis in law.

22. The International Law Commission, in article 8 of its 1962 draft,[4] had made provision for the participation of all States in general multilateral treaties; but the provision had later been dropped for a number of reasons in favour of the so-called Vienna formula. The discussions that had taken place had not convinced him, however, that it would be inadvisable to make provision in the convention on the law of treaties for the participation of all States and he was in favour of the new article 5 *bis* now before the Committee (A/CONF.39/C.1/L.388 and Add.1).

23. The new text obviated the need to define " general multilateral treaty " in article 2 as proposed in the Syrian amendment (A/CONF.39/C.1/L.385).

24. The principle of universality could be proclaimed either in the convention itself, in article 5 *bis,* or in a separate declaration, as had been done in connexion with article 49. On that point, his delegation had an open mind, but it hoped that the Committee would be inspired solely by legal considerations and would decide in favour of the principle of universality.

25. Mr. TSURUOKA (Japan) said that although his delegation understood the good intentions and sincerity of some of those States which favoured the insertion of article 5 *bis* in the convention, it found the proposal untenable in theory and unworkable in practice. Some speakers had given the impression that the essential element in the proposed article was the principle of universality, and that those who subscribed to that principle should support article 5 *bis.* In actual fact, it was not a question of the principle of universality but of how to secure the participation of the maximum number of States when, in the view of the parties to the treaty, its nature and its object and purpose made it appropriate to do so. Surely the right answer to the question could not be to give a third State the right to participate in a treaty which it claimed to be one of universal application. It was the will and intention of the parties which should prevail. Since a treaty was an international agreement concluded between States, it was the will of the States involved which should play a decisive role in determining the extent to which a treaty should be open to accession by third States. If the negotiating States wished to open a particular treaty to all States, they were always free to do so.

26. The Japanese delegation found that the constant practice of States had always been to leave the question of the participation of States to be decided by the parties. When those drafting a treaty had thought it appropriate to open it to the entire international community because of its nature and object, that had been done. There was no reason to depart from established practice which had proved satisfactory, by making, in effect, each third State a judge on the point whether a treaty was of the kind that should be open to all States, as was proposed in documents A/CONF.39/C.1/L.74 and Add.1 and 2, and A/CONF.39/C.1/L.388 and Add.1.

27. Where the negotiating States had agreed that a particular treaty should be universally applied, it would then be asked what formula should be adopted to secure its universal application. On that point, his delegation considered that what was known as the Vienna formula adequately met the purpose. It had been said that that formula was unduly restrictive, but that was not necessarily the case; it provided that a convention should be open for signature or accession by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency, States Parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly of the United Nations to become a party to the convention. The effect of the formula was thus not only to open the convention to all States formally recognized by the international community but also to entitle every State to become a party if the General Assembly of the United Nations found by objective judgement based on a majority decision that it should be invited to do so. The Vienna formula was therefore perfectly compatible with the principle of universality and overcame all technical difficulties. On the other hand, the United Nations Secretariat had admitted that the formula proposed in article 5 *bis,* would tend to raise a whole series of technical difficulties. That formula would create problems rather than solve them. His delegation therefore considered it preferable that the proposal to include article 5 *bis* in the convention had better be dispensed with.

28. Mr. YRJÖLÄ (Finland) said that his delegation had carefully studied the proposed new article 5 *bis,* the effect of which, according to the explanations given by its sponsors, would be to enlarge the field of application of international treaties of major importance. The

[4] See *Yearbook of the International Law Commission, 1962,* vol. II, pp. 167 and 168.

Finnish delegation was well aware of the importance of the principle of universality and thought that the field of application of multilateral treaties regulating questions of concern to all or a large majority of States should be widened as much as possible. It had doubts, however, about whether the right to participate in some multilateral treaties in the manner proposed might not upset the stability of international treaty relations between States.

29. The Finnish delegation's attitude was based on the generally accepted principle that the right to participate in a treaty rose from the principle of State sovereignty, under which States should be free to decide whether or not they wished to conclude a treaty with other States. In other words, a State should, in principle, be entitled to express its opinion about participation when negotiating or concluding a treaty or when another State wished to become a party to it subsequently. If the convention were to contain a clause stipulating that the contracting parties were bound to allow any State to participate in a treaty, it would be an exception to the international law of treaties and to the fundamental right of States to choose their partners in treaty relations.

30. There was also a lack of precision in the notion of a multilateral treaty. It would be impossible to avoid varying interpretations of the scope of that category of treaties, thus creating uncertainties which would be a source of conflict between States. Furthermore, when there was no international body able to decide finally which treaties were to be regarded as multilateral treaties of the special kind referred to, the decision was left in each case to individual States. In other words, the proposed procedure enabled a State to become a party to a treaty simply by stating that it regarded it as a multilateral treaty of that special character. The principle of such a unilateral decision was unacceptable. It was also obvious that the adoption of the proposed procedure would lead to practical difficulties which would be a source of undesirable disputes between States. In that connexion, a very difficult position might arise for a depositary which had to decide whether the entity regarding itself as a State and attempting to deposit an instrument of accession to a treaty was really a State.

31. Difficulties might also arise in applying the proposed article 5 *bis* to treaties concluded under the auspices of certain international organizations, for example, those concluded on the initiative of the International Labour Organisation, where the operation of the treaty was to some extent supervised by that organization. How could such supervision be extended to States which were not members of the ILO and became parties to those treaties on the ground that they were multilateral treaties belonging to the special category in question?

32. It was therefore obvious that the adoption of the proposed amendment would tend to create problems rather than solve them. Consequently, his delegation could not support the proposal for a new article 5 *bis*.

33. Mr. KEARNEY (United States of America) said the new text of article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) was identical in substance with the old text and solved none of the difficulties which had been alluded to by many speakers. As the proposed article purported to create new rights and obligations, the Conference should know what those rights were and who was to exercise them. The text said " Every State has the right... ". Whenever it had been asked what States were included in that category, the reply had been that those were technical questions; but that did not solve the practical problems. Three Secretaries-General of the United Nations had stated that they would be unable to apply an " all-States " formula. An examination of the list of States parties to treaties published in the United Nations *Treaty Series* would show that it included many political entities which were unlikely to be considered States in the international sense. His delegation considered that the expression " every State " was too vague to be adopted as a binding legal norm for the future.

34. It was not surprising that the Secretary-General had refused to make the political decision as to what political entities were to be regarded as States. What was surprising, however, was that those very States which, in all other contexts, wished to restrict the Secretary-General's freedom of action wished in that instance to force him to make political decisions. Article 5 *bis* seemed nothing more than an effort to use the convention to solve certain political and security problems in Europe.

35. From the technical point of view it was not clear what class of treaties was referred to. What was a treaty " of interest to the international community... as a whole "? The United Nations Charter was of interest to the international community as a whole and created norms of international law; yet Article 4 limited the admission of possible members. Were the constituent treaties of the Organization of American States and the Organization of African Unity to be covered by the new version of article 5 *bis*? They fitted the definitions and descriptions which had been submitted. There was a reference in those definitions to treaties which were of general interest to the international community or of interest to the international community as a whole, and in the new version there was also a reference to treaties which codified or progressively developed norms of general international law. The phrase " general international law " was of no help, because it was hard to see what difference there was between general international law and plain international law. It was not a sufficient answer to those objections to say that such problems were mere technicalities. The Conference should not adopt a rule which would not work. The International Law Commission had tried to solve the same problems and failed. To pretend that they did not exist was not an acceptable solution.

36. In short, no one knew to whom or in what cases article 5 *bis* was to apply. But it might also be asked whether it was desirable to lay down a rule of that character in all cases. Treaties for the unification of private international law were certainly of general interest to States and progressively developed norms of international law; but it would be noted that they were not treaties open to all States. Article 31 of the 1954

Hague Convention relating to Civil Procedure [5] contained a typical formula. Participation was open to States which had participated in the seventh session of the Conference which had drawn up the Convention; other States might accede, provided that none of the parties objected. A State which undertook to give legal effect in its territory to foreign legal documents or judgements must have the right to refuse to recognize such documents or judgements if they were likely to impair the rights and interests of its nationals. Was it advisable to determine once and for all that all treaties of interest to the international community as a whole must be open to participation by every State? The United Nations Charter indicated that the answer must be no. Article 4(2) of the Charter was the mechanism for deciding who should become parties. It was a mechanism properly adjusted to the nature and needs of the Organization in question. Future multilateral treaties, whether constituent instruments of international organizations or not, must be drafted in the light of the needs of the treaty, not on the basis of an abstract formula.

37. It had been urged that those obstacles should be ignored in order to follow a principle of universality. Was the adoption of article 5 *bis* the only way of inviting all States to become parties to a convention or participants in a conference of plenipotentiaries? Despite the formula in resolution 2166 (XXI), no one had suggested the name of a State at the twenty-first or twenty-second sessions of the General Assembly; yet the General Assembly was the primary political organ in the world. Why should the Conference be asked to take decisions which had not been submitted to that body? Those who raised the cry of discrimination would have been heard with better grace if they had attempted to employ the remedies the General Assembly provided.

38. In reality, those who were seeking to have article 5 *bis* adopted had a political aim in view. For that reason, and without any prejudice to the notion of universality, the United States delegation would vote against the proposed article 5 *bis*.

39. The question arising out of article 5 *bis* was not new. Governments had had a full year to decide what position they wished to take. The time had therefore come for the Committee to vote. That was the only logical way of determining what the sentiment of the Conference really was, and it was, after all, the really democratic procedure.

40. Mr. JAGOTA (India) said that, since the Committee had approved article 5, paragraph 1, which provided that " every State " possessed capacity to conclude treaties, it would be illogical and paradoxical to deny to " every State " the capacity to participate in general multilateral treaties. That would be an act of discrimination contrary to the principle of the sovereign equality of States. On the other hand, if article 5 *bis* was adopted, it would promote universality and eliminate discrimination. It would enhance the legislative value of general multilateral treaties and reflect the interests of the international community as a whole.

41. It was unnecessary to define the terms " State ", " participation " or " general multilateral treaty ". The term " State " had already been used in article 5 and other provisions of the convention without being defined. Moreover, if an entity or régime not generally regarded as a State tried to take advantage of the principle of universality in order to participate in an international conference or to transmit an instrument of accession to the depositary of a treaty, there was no doubt that the conference or depositary would be able to take the appropriate decision. The possibility of such an abuse should not deter the Conference from embodying the principle of universality in the convention. The term " participation " could signify participation in the conclusion of a treaty as well as participation in the benefits and burdens of a treaty. The expression " general multilateral treaty " was explained by the new proposal (A/CONF.39/C.1/L.388 and Add.1): it was a treaty which " codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole ". That wording should suffice to identify a general multilateral treaty.

42. On the question of recognition, the Indian delegation considered that participation by a State in a general multilateral treaty did not imply recognition of that State by the participating States, and that it was unnecessary for them to enter express reservations on the question of recognition. His delegation urged the Committee to adopt the proposed article 5 *bis*. In addition, it took the view that the convention on the law of treaties should itself be open to all States, so that the Conference would not only be prescribing universality for participation in general multilateral treaties but would also apply that principle to the basic convention on the subject.

43. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he thought that the new wording proposed for article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) took account of the arguments put forward in the discussion on the subject and was more precise than the first version (A/CONF.39/C.1/L.74 and Add.1 and 2).

44. The Soviet Union delegation considered that the principle of universality was clearly established in international law. It was derived from the United Nations Charter and reflected the present trend in international law. The international law of the past confined itself to regulating relations between what were called the civilized States, in other words the European States. Since then, the situation had changed considerably. Many countries had become independent and had participated in drawing up rules of international law. That law had thus become universal, and was based on the principle of the sovereign equality of all States, without distinction as to their social and political systems.

45. That political and legal development had followed the economic, scientific and technological development of contemporary society. Moreover, a number of inter-

[5] United Nations, *Treaty Series*, vol. 286, p. 283.

national organizations of a technical and political nature had been set up.

46. The principle of universality was derived from the principle of international co-operation, which was one of the basic principles of the United Nations Charter. The General Assembly of the United Nations had adopted a number of resolutions calling upon all States to collaborate in the implementation of various measures, particularly in the sphere of disarmament, or to help to bring about progress in that direction.

47. The Conferences of Heads of State of the Non-aligned Countries held at Cairo in 1964 and 1967 had adopted declarations inviting all States to collaborate in accelerating world economic development.

48. Some recently concluded treaties, such as the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, also embodied the principle of universality.

49. He categorically rejected the argument of the United States representative that the Hague Conventions on private international law, which dealt with matters of interest to the international community as a whole, were not open to all States. In fact, the United Nations Commission on International Trade Law, at its first session in 1968, had pointed out that those Conventions were only in the interest of the developed countries and had requested all States to provide information on the changes to be made in them in order that they should be in the interests of all Staties and open to every State.

50. The principle of universality was based on the idea that no State or group of States was entitled to prevent another State from sharing in the solution to a problem which affected the joint interests of all States. The existence of that principle was undeniable. Since the task of the Conference was to codify the law of treaties, the principle should be established in the text of the draft convention.

51. The United Kingdom representative had claimed that the inclusion in the convention of a provision expressing the principle of universality would conflict with the freedom of parties to select their treaty partners. But that principle could not be regarded unilaterally, nor did it entitle one State to prevent others from being parties to a treaty. The right of every State to participate in a general multilateral treaty was absolute. States which wished to reserve the right not to have relations with certain other States could find ways of making their position known: for example, they could make a declaration to that effect, as the United States had done in the case of the 1926 International Sanitary Convention and the 1929 International Convention for the Safety of Life at Sea.

52. In order to meet the objections of some delegations, it should be possible to include in the convention a provision similar to that in article 9, paragraph 4, of the International Law Commission's 1962 draft, which stipulated that " when a State is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more States, an objecting State may, if it thinks fit, notify the State in question that the treaty shall not come into force between the two States ".[6]

53. The objection that the accession of all States to general multilateral treaties could raise difficulties concerning the question of the recognition of certain States was groundless, since various States which had not recognized each other had nevertheless been parties to a number of treaties, notably the Briand-Kellogg Pact of 1928, the Geneva Conventions of 1949 for the protection of war victims, the Geneva Agreements of 1954 on Indo-China and of 1962 on Laos, and the Moscow Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, and others. The United States, when signing the 1926 International Sanitary Convention, had made a declaration stating that its accession in no way signified that it recognized certain other States which were parties to the Convention.

54. Some representatives had argued that the inclusion of the principle of universality in the convention would raise serious practical difficulties for depositaries, in particular for the Secretary-General of the United Nations. But it would be perfectly possible to make provision for the designation of depositaries and for a clause specifying who would be the initial depositaries responsible for transmitting instruments of accession to the final depositary, who might be the Secretary-General of the United Nations.

55. The United States representative had asked what States would enjoy the right to become parties to multilateral treaties. It would be easy to adopt a resolution mentioning the States that would have that right for the purposes of article 5 *bis*.

56. He was not convinced by the argument that it was not possible to include a provision on general multilateral treaties in the convention because there was no precise definition of the term. Article 38, paragraph 1 (*a*) of the Statute of the International Court of Justice referred to general international conventions. Furthermore, in an advisory opinion of 28 May 1951 on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had made it clear that that Convention was of a general character. It should be noted, too, that a number of important terms in the United Nations Charter, such as " armed attack ", " force " and so on had not been defined. If the authors of the Charter had tried to give definitions of all the terms it contained, there would not yet have been any Charter.

57. But the absence of generally recognized definitions of principles or concepts of international law was not evidence that those principles and concepts did not exist. As the representative of Iraq had rightly pointed out, " the application of a legal rule did not depend on the definition of the terms it contained ".[7]

58. The principles of international law existed independently of their generally recognized definitions. The

[6] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 168.

[7] See 76th meeting, para. 76.

principle of universality was one of them. It was a principle that nobody denied. If it was desired to define it, it would be quite possible to do so. That such a thing was possible was demonstrated by the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. That Committee had already formulated such principles as the sovereign equality of States, *pacta sunt servanda,* and the peaceful settlement of international disputes. There was no reason why it should not be possible to define the term " general multilateral treaty ".

59. It had also been said that participation by all States in general multilateral treaties would upset political relations among States and give rise to serious difficulties. That argument was unsound, since that practice had been followed in the Moscow Treaty of 1963 and in many other treaties and had not led to political complications. The United States representative had stated that if a wording were adopted providing that all States might be parties to general multilateral treaties, certain States might advance their participation in such treaties as an argument for demanding admission to international organizations. That assertion was illogical, since article 5 *bis* covered only participation in general multilateral treaties, not in international organizations.

60. The representative of the Federal Republic of Germany had maintained that an article 5 *bis* would not be needed in the convention since, in practice, some treaties provided for participation by all States. That argument was unconvincing, since the Conference's task was to draw up a convention embodying all the elements of State practice.

61. Those who were against including a provision on the principle of universality were upholders not of law, but of illegality. The efforts by certain States to prevent the adoption of that principle were calculated to establish a discriminatory practice in the convention.

62. The Conference's duty was to lay down norms of international law in order to contribute to the development of co-operation among all States in the interests of the international community.

63. The USSR delegation therefore supported the new draft article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) and was ready to collaborate with other delegations in finding a solution to the problem.

64. Mr. KHASHBAT (Mongolia) said that all States, as members of the international community, had the right to become parties to general multilateral treaties. That right had been recognized in international practice, particularly in connexion with disarmament and outer space. Some States no doubt applied a discriminatory policy with regard to other States for political or social reasons, but that did not alter the fact that any attempt to restrict the principle of universality was contrary to the United Nations Charter and that the convention on the law of treaties would not be complete if the principle of universality was not clearly stated in it.

65. The earlier draft of article 5 *bis* had been amended so that the new version (A/CONF.39/C.1/L.388 and Add.1) should be acceptable to all delegations.

The meeting rose at 12.50 p.m.

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## NINETY-FIRST MEETING

*Wednesday, 16 April 1969, at 3.30 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new article 5* bis (The right of participation in treaties) *(continued)* [1]

1. Mr. FATTAL (Lebanon) said that the time had come to speak plainly about the real problem represented by the proposed article 5 *bis.* It was the problem of the political divisions and opposing régimes in China, Germany, Viet-Nam and Korea. It was a problem that both the Eastern and the Western Powers had failed to solve by political and diplomatic means over a period of twenty years, and that the Eastern States were now attempting to solve by presenting it to the Conference in the respectable guise of a problem of the progressive development of international law.

2. The universality of general multilateral treaties was already ensured in fact by United Nations practice, since nearly all States were Members either of the United Nations itself, or of one or more of its specialized agencies, or were parties to the Statute of the International Court of Justice. The four exceptions were the People's Republic of China, the German Democratic Republic, North Viet-Nam, and North Korea.

3. The whole purpose of article 5 *bis* was to embroil the Conference in the problem of the four divided countries. But however important that problem might be, there was no justification for attempting to transfer it from the sphere of politics to the sphere of law. It was essentially a problem for the United Nations. And in any case it was most unlikely that the present Conference would be more successful in dealing with it than the United Nations had so far been.

4. It had been claimed that the principle of the sovereign equality of States required that all States should be able to participate in the international legislative process. By nature, legislation was valid *erga omnes,* but of how many treaties was that true? It did not even apply to the United Nations Charter, with the exception of the principles set forth in Article 2. The principle of universality could not be severed from the principle of validity *erga omnes.* It would be convenient, but hardly logical, if a State were free to insist on being

[1] For the new text (A/CONF.39/C.1/L.388 and Add.1), see 89th meeting, footnote 3.

allowed to participate in some treaties because they were general and multilateral, while reserving its freedom to ignore other treaties of the same nature. Such a situation would make a mockery of the principle of free consent, which was the real keystone of the sovereignty of States. Furthermore, the rule *res inter alios acta* would be meaningless if each State were permitted to interpret it as it wished. The United Nations had striven to promote the development of treaty law, but was hampered by the fact that the international community did not constitute an integrated society.

5. It was edifying to note the actual number of accessions to the various multilateral treaties for which the United Nations Secretary-General acted as the depositary.[2] At 31 December 1967, the Revised General Act for the Pacific Settlement of International Disputes of 1949 had attracted 6 acceptances; the 1961 Vienna Convention on Diplomatic Relations, 65 acceptances; the 1963 Vienna Convention on Consular Relations, 27 acceptances; the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the compulsory settlement of disputes, 29 acceptances; the International Convention on the Elimination of All Forms of Racial Discrimination of 1966, 18 acceptances; the 1958 Convention on the Territorial Sea and the Contiguous Zone, 33 acceptances; the 1958 Convention on the High Seas, 40 acceptances; the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, 25 acceptances, and the 1958 Convention on the Continental Shelf, 37 acceptances. Only the Charter of the United Nations itself had been accepted by almost every State. That list was sufficient to show the practical meaning of universality. It could only be hoped that progress would be more rapid in the future than it had been so far.

6. Mr. BILOA TANG (Cameroon) said that accession to the convention or to a general multilateral treaty, which was the point at issue in the proposed new article 5 *bis*, involved the problem of divided States and of the non-recognition of some States by others. It was, of course, for each State to decide whether or not to recognize another State. In the case of divided States, Cameroon had always taken the view that the question should be resolved on the basis of the principle of self-determination.

7. Some delegations argued that a general multilateral treaty should be open to accession by all States, on the ground that that would contribute to the progressive development of international law. Others felt that it should not be open to any territorial entity which called itself a State, if it was not legally recognized as such by the majority of the members of the international community. In other words, they adopted the restrictive formula applied in the United Nations.

8. His delegation believed that it was not desirable to draft a convention without deciding the question of accession. Even if a treaty were open to accession by any State or territorial entity, a party to the treaty could, in the exercise of its sovereign right to contract treaty obligations, make it clear, by entering a reservation, that it did not recognize another party to the treaty as constituting a State and would not therefore be bound, in regard to that party, by its treaty obligations. If the majority of the States parties to a treaty adopted that position with regard to a particular territorial entity, the latter's accession to the treaty would be meaningless except in its relations with States which had recognized it.

9. In short, while his delegation did not reject the principle of universality in general multilateral treaties, it recognized that the question gave rise both to difficulties and to objections.

10. Mr. AMATAYAKUL (Thailand) said that his delegation had already made it clear during the discussion on article 8 that it was not in favour of attempting to subdivide multilateral treaties into categories, as was done in the Syrian amendment to article 2 (A/CONF.39/C.1/L.385). Thailand supported the principle of universality, and recognized that it was a sovereign right of a State to send a representative to participate in the negotiation of a treaty, and to conclude a treaty; but what was known as the Vienna formula sufficiently upheld that principle. Thailand believed that it was an abuse of the principle of sovereign equality to attempt to oblige a State to consent to the participation in a treaty, however broad its scope, of any other State, without proving the latter's capability of becoming a party to the treaty. A treaty must represent a concurrence of wills.

11. Moreover it was not in the interest of the security of international relations to deny States the legitimate right to decide for themselves whether, and to what extent, territorial entities designating themselves States should be allowed to accede to a treaty. Consequently his delegation opposed the adoption of article 5 *bis*.

12. Mr. MARESCA (Italy) said that the new draft (A/CONF.39/C.1/L.388 and Add.1) of a proposed article 5 *bis* was an improvement on the previous proposal in two respects: it obviated the need for a definition of the term " general multilateral treaty ", and it did not thrust forward the principle of universality, which had no place in law. It merely described the sort of treaty which, the sponsors felt, should be open to accession by all States. It referred to the codification or progressive development of norms of international law and to the fact that the treaty must be of interest to the international community of States as a whole.

13. The real point at issue was whether the proposed formula was necessary, or even acceptable from the legal and diplomatic standpoint. If it was a matter of pure codification, all States, even those not recognized by others, were already covered by the principles and rules of customary law; there was therefore no need to enlarge the scope of a convention the only purpose of which was codification. In the case of conventions concerned with the progressive development of international law, the will of States remained the essential

[2] See *Multilateral Treaties in respect of which the Secretary-General performs depositary functions* (United Nations publication, Sales No.: E.68.V.3).

factor because no new rules of law could be laid down unless they were acceptable to the States concerned. A State could not be allowed to accede to a treaty simply because it wished to do so, even if such accession were deemed to be in the interest of the international community as a whole.

14. The present Conference had been convened by the United Nations and must therefore abide by United Nations rules governing diplomatic conferences. It had received specific terms of reference and could not go beyond them. However, under the so-called Vienna formula, it could give a sovereign organ such as the General Assembly the legal capacity to enlarge the scope of the clauses of the convention dealing with accession. Additional States might then be invited to accede.

15. His delegation firmly maintained its view that it would not be appropriate for the present Conference to include the proposed new article 5 *bis* in the convention.

16. Mr. DE LA GUARDIA (Argentina) said that his delegation regretted that it could not support the amendment (A/CONF.39/C.1/L.388 and Add.1). The principle of universality, about which almost everything possible had already been said, was a very important one and deserved consideration, but even more important was the principle of consent, or the autonomy of the will, which meant not only freedom to decide the object of the agreement but also freedom to decide with whom the agreement was to be concluded.

17. Interesting views had been expressed during the discussion, supported by learned quotations, to show that the admission of all States to general multilateral treaties, that was to say, treaties whose purpose was of concern to the international community as a whole, by no means implied the recognition of States which other States did not wish to recognize as such.

18. His delegation, however, believed that participation in a treaty, while creating legal effects among the parties — which was the purpose of a treaty — also created effects between those participating States which did not recognize each other. A juridical relationship was inevitably created between a State which did not recognize some other entity as a State and that other entity, a relationship, if imposed as a binding general norm of the kind proposed in article 5 *bis,* would in most cases be neither desired nor consented to; in other words, a binding general norm requiring the participation of all States would be contrary to the general principle of consent.

19. His delegation believed that negotiating States should be left free to decide whether they were to be legally bound only to those States which they recognized, or whether they should be bound to political entities which they did not recognize as States. In the latter case, he questioned whether the treaty would be a true treaty, since the definition given in article 2(*a*) spoke of " an international agreement concluded between States ". It was very difficult to segregate the question of participation from that of recognition. His delegation would vote against the proposed article 5 *bis.*

20. Mr. MUUKA (Zambia) said that the proposed article dealt with one of the fundamental principles of the law of treaties. It was a harsh fact of power politics that up to the present time certain States had been debarred from participating in multilateral treaties. The participation of all States in such treaties was called for by a fundamental principle of *jus cogens,* namely, the sovereign equality of States. To confine the type of multilateral treaty referred to in article 5 *bis* to the participation of certain States would be inconsistent with the very nature of such treaties and would hamper the progressive development of international law. His delegation believed that the progressive development of international law could best be served if every State interested in the subject-matter of a treaty were encouraged to become a party to it.

21. States which did not apply treaties because they were denied accession to them could not be blamed if they did not apply the principles underlying such treaties. It was illogical to expect such States to accept certain principles of international law while at the same time denying them the possibility of participating in a universal instrument. The consensual element in that type of treaty ought to be limited; the individual will should be subsumed in the interests of the international community.

22. One of the objections put forward to article 5 *bis* would seem to be the issue of recognition. Recognition was a politico-juridical fact and States objecting to the article might feel that the admission to a treaty of a State which they did not wish to recognize would strengthen the position of that State's government and imply recognition of that State. In his opinion, that objection was untenable, inasmuch as participation in a multilateral treaty did not involve recognition of a participating State or government. To dispel any doubts, however, States could retain their freedom of action either by refusing to accept obligations flowing from the treaty vis-à-vis a State or government which they did not recognize, or by making a declaration to the effect that participation in a treaty did not imply recognition of that State.

23. Despite what the United States representative had said, he (Mr. Muuka) considered that the meaning of the amendment was perfectly clear and that the Indian representative had adequately disposed of the difficulties which were supposed to lurk behind it. Nor did his delegation feel that the difficulties envisaged with regard to the problem of depositaries was an insuperable one, since the Nuclear Test Ban Treaty clearly showed that such obstacles could be overcome. After all, it was not for the depositary but rather for each individual State to decide wheither it regarded another party to a multilateral treaty as a State.

24. Mr. HAYTA (Turkey) said that for the same sound reasons as those advanced by a number of speakers, his delegation would be obliged to vote against the amendment (A/CONF.39/C.1/L.388 and Add.1).

25. The CHAIRMAN suggested that the Committee defer further consideration of article 5 *bis* in order to permit the continuance of informal consultations.

*It was so agreed.*[3]

*Article 8* (Adoption of the text) *(resumed from the 85th meeting)* [4]

26. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement about article 8.

27. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had instructed him to report that, since it had not received the necessary instructions from the Committee of the Whole, it had not been able to take a decision on the amendments to article 8 referred to it at the 15th meeting,[5] namely, the Peruvian amendments to paragraphs 1 and 2 (A/CONF.39/C.1/L.101 and Corr.1) and the Tanzanian amendment to paragraph 2 (A/CONF.39/C.1/L.103). The Drafting Committee had found that each of those amendments raised questions of substance which must be settled by the Committee of the Whole. For the same reason, the Drafting Committee had not been able to take a decision on the Australian amendment to paragraph 2 (A/CONF.39/C.1/L.380), submitted at the second session, which had also been referred to it.[6]

28. Mr. SINCLAIR (United Kingdom) said that his delegation favoured the International Law Commission's text of article 8, read in the light of the concluding sentences of paragraph (2) of the commentary to that article: " Unanimity remains the general rule for bilateral treaties and for treaties drawn up between few States. But for other multilateral treaties, a different general rule must be specified, although, of course, it will always be open to the States concerned to apply the rule of unanimity in a particular case if they should so decide. " [7]

29. The various amendments which had been proposed to article 8 were therefore unacceptable to the United Kingdom delegation. The Tanzanian amendment (A/CONF.39/C.1/L.103) raised a question of substance and not simply one of procedure. His delegation felt, moreover, that the two-thirds majority rule should be retained for the purposes of any decision to apply a different rule and it therefore opposed that amendment.

30. With regard to the Peruvian amendments (A/CONF.39/C.1/L.101 and Corr.1), it would be very difficult to make a distinction between the cases covered by the provisions of the two paragraphs of article 8 if the text were amended as proposed. The amended text gave no real indication of what was meant by a " limited or restricted " number of States for purposes of the application of paragraph 1 or by a " substantial " number of States for purposes of the application of paragraph 2.

31. By the same token, his delegation found it difficult to accept the concept of a " general " international conference, which the Australian amendment (A/CONF.39/C.1/L.380) introduced. The implication of that amendment was that all international conferences other than those described as " general " would fall under the unanimity rule laid down in paragraph 1 of article 8. His delegation believed that it was not advisable to establish of necessity a unanimity rule for such conferences as regional conferences.

32. The CHAIRMAN invited the Committee to vote on the four amendments to article 8.

*The Peruvian amendment (A/CONF.39/C.1/L.101 and Corr.1) to paragraph 1 was rejected by 55 votes to 13, with 21 abstentions.*

*The Peruvian amendment to paragraph 2 was rejected by 54 votes to 11, with 29 abstentions.*

*The Australian amendment (A/CONF.39/C.1/L.380) was rejected by 48 votes to 24, with 20 abstentions.*

*The Tanzanian amendment (A/CONF.39/C.1/L.103) was rejected by 51 votes to 27, with 16 abstentions.*

33. The CHAIRMAN suggested that, in the light of those clear decisions, article 8 should be referred back to the Drafting Committee.

*It was so agreed.*[8]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

34. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 26, 36 and 37 as adopted by the Drafting Committee.

*Article 26* (Application of successive treaties relating to the same subject-matter) [9]

35. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 26 by the Drafting Committee read:

*Article 26*

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 specifics that it is subject to, or that it is

[3] For the resumption of the discussion in the Committee of the Whole, see 105th meeting.

[4] For the list of the amendments submitted to article 8, see 84th meeting, footnotes 2 and 3. The amendments by France (A/CONF.39/C.1/L.30) and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1./L.51/Rev.1), and the sub-amendment by Czechoslovakia (A/CONF.39/C.1/L.102) to the French amendment had been withdrawn.

[5] See 15th meeting, para. 40.

[6] See 85th meeting, para. 22.

[7] See *Yearbook of the International Law Commission, 1966*, vol. II, p. 194.

[8] For the resumption of the discussion in the Committee of the Whole, see 99th meeting.

[9] For earlier discussion of article 26, see 85th meeting, paras. 38-45.

not to be considered as incompatible 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 56, 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 to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 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.

36. At the first session, the Committee of the Whole had referred to the Drafting Committee five amendments relating to article 26.[10] The amendment by France (A/CONF.39/C.1/L.44) had been withdrawn at the 84th meeting. Of the four remaining amendments, the Drafting Committee had adopted the amendment by Romania and Sweden (A/CONF.39/C.1/L.204) to replace sub-paragraphs (*b*) and (*c*) of paragraph 4 by a single sub-paragraph. In addition, in accordance with its mandate under the provisions of the last sentence of rule 48 of the rules of procedure, the Drafting Committee had made certain drafting changes in the English, French, Spanish and Russian texts of article 26.

37. The Drafting Committee had asked him to clarify the meaning which it attached to the last phrase of paragraph 3; that passage raised the problem of the construction to be placed on the concepts of compatibility and incompatibility. In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the meaning of the last phrase of paragraph 3. In point of fact, maintenance in force of the provisions of the earlier treaty might be justified by circumstances or by the intention of the parties. That would be so for example, in the following case. If a small number of States concluded a consular convention granting wide privileges and immunities, and those same States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted régime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force.

38. Sir Humphrey WALDOCK (Expert Consultant), said that he wished to reply to the questions asked by the United Kingdom representative at the 85th meeting.[11]

39. First, he thought that the United Kingdom representative had been correct in assuming that, for purposes of determining which of two treaties was the later one, the relevant date should be that of the adoption of the treaty and not that of its entry into force. His own understanding of the intentions of the International Law Commission confirmed that assumption. The notion behind it was that, when the second treaty was adopted, there was a new legislative intention; that intention, as expressed in the later instrument, should therefore be taken as intended to prevail over the intention expressed in the earlier instrument. That being so, it was inevitable that the date of adoption should be the relevant one.

40. Another question, however, arose: that of the date at which the rules contained in article 26 would have effect for each individual party. In that connexion, the date of entry into force of a treaty for a particular party was relevant for purposes of determining the moment at which that party would be bound by the obligations arising under article 26. The provisions of that article referred to " States parties "; they therefore applied only when States had become parties to the two treaties.

41. On the second point raised by the United Kingdom delegation, concerning the words " relating to the same subject-matter ", he agreed that those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases, the question involved such principles as *generalia specialibus non derogant*.

42. Lastly, the United Kingdom representative seemed to him to be correct in interpreting the provisions of article 26 as laying down a residuary rule. Paragraph 2 of article 26 made that position clear by stating that, when a treaty contained specific provisions on the subject of compatibility, those provisions would prevail. The rules in paragraphs 3, 4 and 5 were thus designed essentially as residuary rules.

*Article 26 was approved.*[12]

*Article 36* (Amendment of multilateral treaties) [13]

43. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 36 by the Drafting Committee read:

*Article 36*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every contracting State, 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.

[10] See 31st meeting, paras. 4-36.

[11] Paras. 40 and 41.

[12] For further discussion and adoption of article 26, see 13th plenary meeting.

[13] See 86th meeting, para. 1.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

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

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

44. At the first session, the Committee of the Whole had referred article 36 to the Drafting Committee with the amendments by France (A/CONF.39/C.1/L.45) and the Netherlands (A/CONF.39/C.1/L.232). The French amendment had been withdrawn at the 84th meeting.

45. The Drafting Committee had adopted the Netherlands amendment to replace in paragraph 2 the words " to every party, each one of which " by the words " to every contracting State, each one of which ". It had also made a number of drafting changes, in accordance with rule 48 of the rules of procedure.

*Article 36 was approved.*[14]

*Article 37* (Agreements to modify multilateral treaties between certain of the parties only) [15]

46. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 37 by the Drafting Committee read:

*Article 37*

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 a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(*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 object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

47. At the first session, the Committee of the Whole had referred article 37 to the Drafting Committee with the amendments submitted by Czechoslovakia (A/CONF.39/C.1/L.238) and by Bulgaria, Romania and Syria (A/CONF.39/C.1/L.240). Amendments by France (A/CONF.39/C.1/L.46) and Australia (A/CONF.39/C.1/L.237) had been left in abeyance.[16] At the 84th meeting the French amendment had been withdrawn. The Australian amendment had been rejected at the 86th meeting.

48. The Drafting Committee had taken the view that the amendment by Czechoslovakia was unnecessary because its substance was already contained in the text. On the other hand, it had adopted with a slightly altered wording the joint amendment by Bulgaria, Romania and Syria. It had also made certain drafting changes in accordance with rule 48 of the rules of procedure.

*Article 37 was approved.*[17]

The meeting rose at 5 p.m.

[14] For the adoption of article 36, see 16th plenary meeting.

[15] For earlier discussion of article 37, see 86th meeting, paras. 2-12.

[16] See 37th meeting, paras. 55 and 56, and footnote 5 to the record of that meeting.

[17] For the adoption of article 37, see 16th plenary meeting.

## NINETY-SECOND MEETING

*Thursday, 17 April 1969, at 3.20 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* [1]

1. The CHAIRMAN invited the Committee to consider together the four proposed new articles, numbered 62 *bis,* 62 *ter,* 62 *quater* and 76.

2. In the case of article 62 *bis,* the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev. 2) originally submitted at the first session had now been replaced by a nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2),[2] while there was also before the Committee the proposal by Switzerland (A/CONF.39/C.1/L.377). The amendments to article 62 submitted at the first session by the United States (A/CONF.39/C.1/L.355) and Uruguay (A/CONF.39/C.1/L.343) had been withdrawn on the understanding that the sponsors reserved the right to resubmit them at the second session in connexion with the proposed new article 62 *bis.* The Japanese amendment to article 62 (A/CONF.39/C.1/L.339) would be considered in connexion with the proposed new article 62 *bis,* as requested by the Japanese delegation.

[1] For the texts of these and related proposals, see the report of the Committee of the Whole on its work at the second session (A/CONF.39/15 and Corr.2), paras. 98, 108, 115 and 131.

[2] The sponsors were Austria, Bolivia, Central African Republic, Colombia, Costa Rica, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Malta, Mauritius, Netherlands, Peru, Sweden, Tunisia and Uganda.

3. At the present session Spain had submitted a proposed new article 62 *bis* (A/CONF.39/C.1/L.391), Thailand had submitted a proposed new article 62 *ter* (A./CONF. 39/C.1/L.387), permitting reservations to article 62 *bis,* while Switzerland had submitted a proposed new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1).

4. Switzerland had submitted a proposed new article 76 (A/CONF.39/C.1/250) at the first session, while at the present session Spain had also submitted a new article 76 (A/CONF.39/C.1/392).

5. Mr. ESCHAUZIER (Netherlands) said the Committee would remember that towards the end of the first session thirteen delegations had jointly submitted a proposal for a new article 62 *bis* (A/CONF.39/C.1/ L.352/Rev.2) concerning the settlement of disputes in cases governed by Part V of the draft convention.[3] It had been stressed during the discussion that such disputes did not relate to the implementation of the treaty, but rather to the preliminary question of whether the treaty was valid. Disputes relating to Part V involved matters of great importance for the stability of treaty relations and, consequently, for peaceful and friendly relations and co-operation between States. Those aspects of Part V had led many delegations to conclude that a special, compulsory procedure was both justified and necessary for settling disputes arising under the articles in question.

6. The sponsors of the proposal had recognized, however, that owing to pressure of time, the text of their amendment was imperfect and might be improved by drafting changes or even by substantive modifications, provided the basic principles remained intact. Comments and suggestions received in the past month had been useful, and further consultation among the sponsors had resulted in a new proposal (A/CONF.39/C.1/ L.352/Rev.3 and Corr.1 and Add.1 and 2), submitted by the same thirteen delegations, who had been joined by six others. The revised proposal had been drafted in French, and the versions in the other languages would be brought into line with the French text, where necessary.

7. It would be seen that the essence of the proposal had not been changed and that the object of article 62 *bis* and its annex was still to include in the convention a procedure for conciliation and arbitration, as a complement to article 62. The proposed new article in no way impaired paragraphs 3 and 4 of article 62, as adopted by the Committee at the first session. The sponsors' intention was to offer a procedure for the final settlement of a dispute which would come into operation only in the event of failure to reach a solution through the means set out in Article 33 of the United Nations Charter, or through any other provisions binding between the parties.

8. It had been suggested that, in order to speed up the procedure, some of the time-limits in the annex to the proposal should be reduced. It was therefore now proposed, in paragraph 2, that the conciliators and the chairman should be appointed within sixty days instead of within three months. If those appointments were not made within the prescribed period, a time-limit was now laid down for action to be taken by the Secretary-General of the United Nations; comparable provisions now also applied to the arbitration procedure set out in paragraph 5.

9. On the other hand, the nature of a conciliation procedure made it appropriate for the parties to be entitled to extend the time-limits for the appointment of conciliators by mutual agreement, and that was now provided for in the penultimate sub-paragraph of paragraph 2.

10. In deference to observations made by some delegations, it was now stipulated in paragraph 3 that a decision by the conciliation commission could only be taken by a majority vote of all the members. Another new element was the provision in paragraph 4 that the conciliation commission might recommend the parties to a dispute to adopt, pending the final settlement, any measures which might facilitate a friendly solution. Moreover, in the final stage of the conciliation procedure, the parties were free to extend by mutual agreement the period during which the commission's report remained under consideration. The sponsors had also given due consideration to the objection that the wording of their original proposal seemed to apply to bilateral treaties only, and in paragraphs 2 and 5 explicit reference was now made to " a State or States constituting one of the parties to the dispute ".

11. With regard to the role assigned to the Secretary-General of the United Nations under article 62 *bis,* the original draft merely stated that a party might request the Secretary-General to set in motion the procedures specified in annex 1, but the revised text of the article and of paragraphs 2 and 5 of the annex made it clear that the Secretary-General had to act for the benefit of the parties. With regard to paragraph 5, one of the sponsors had suggested that any of the parties should be entitled to object, once only, to the nomination of an arbitrator or of the chairman of the tribunal by the Secretary-General, and that a second choice by the Secretary-General would be binding upon all parties. An exchange of views on that suggestion, however, had resulted in a decision to leave the matter to the discretion and impartial judgment of the Secretary-General.

12. The important question of the rights of third parties had also been raised during the consultations. Some delegations had been in favour of granting third parties the right to submit oral or written statements to the commission if they considered that their interests were affected, while others had preferred to make third party intervention dependent on the consent of the parties to the dispute. After due consideration, and in a spirit of compromise, the sponsors had decided to include the condition of the consent of the parties to the dispute, in paragraphs 3 and 6 of the proposal.

13. Those were the principal changes made in the revised proposal. As to its basic philosophy, the sponsors considered that the inclusion of an article based on the fundamental concepts of the amendment was an essential prerequisite for making the convention acceptable to the largest possible number of States. Under Part V of the draft, unilateral claims of invalidity,

[3] See 68th meeting, para. 29.

termination and suspension of a treaty could be made, for which there were few if any precedents and no clear jurisprudence; many of the provisions of Part V lent themselves to different interpretations and even to deliberate misuse. The provisions of article 62 were clearly inadequate as a safeguard against such hazards and ensuing disputes, and the proposed new article and its annex were therefore essential additions, designed to make Part V acceptable.

14. The fundamental characteristics of the proposal were twofold, entailing, first, a conciliation procedure and, secondly, the right to resort to arbitration only if the failure of conciliation had been clearly established. In the opinion of the sponsors, those two stages were indissolubly linked.

15. Mr. DE CASTRO (Spain) said that the results achieved at the first session had been most encouraging and it would indeed be unfortunate if the Conference now failed to adopt a convention on the law of treaties. At the first session, a number of delegations had objected to Part V of the draft on the ground that, in their view, its adoption would upset the stability of treaty relations. On the other hand, at least one important delegation had indicated that it could not support the convention unless provision was made for the compulsory settlement of disputes about the validity of international treaties. The two-thirds majority required for adoption of the convention might not be secured unless some formula which met those two points of view were included in the convention. Those were the considerations which had prompted the Spanish delegation to submit its own proposal for a new article 62 *bis* (A/CONF.39/C.1/L.391).

16. Agreement on a procedure for the settlement of disputes likely to satisfy a majority of States would be difficult to achieve, since States were naturally reluctant to submit to an international body matters of vital concern to them, particularly if they were not convinced that the international body concerned would act impartially in settling disputes. Moreover, care would have to be taken to separate purely legal disputes from essentially political controversies.

17. States truly interested in the development of international law should be prepared to make the necessary sacrifice for the good of the international community, and in the knowledge that adequate machinery for the settlement of disputes was the best way to overcome the reluctance of some States to forgo the advantages they derived from treaties which were invalid in law. The smaller and weaker States could be expected to receive the greatest benefit from a procedure for compulsory jurisdiction, while the more powerful States might raise objections and decide not to ratify the convention. It was therefore essential that any international body set up to settle disputes should satisfy the parties as to its objectivity. Its findings should not perpetuate injustice but provide equitable solutions likely to further the cause of an improved international legal order.

18. The Spanish delegation had taken into consideration the views expressed by other delegations, and ventured to suggest that the best course might be to entrust the United Nations with control over the application of the legal norms embodied in the convention. The General Assembly would be asked to set up a permanent organ, to be known as the " United Nations Commission for Treaties ", which would be truly representative of the international community. If other means of settling a dispute between parties failed, the dispute could be brought before that commission, which would deal with it in two stages. It would first make proposals with a view to an amicable and equitable settlement, and might set up a special conciliation commission for that purpose. If that method failed, the second stage would involve arbitration. The commission would decide whether the dispute was to be regarded as a legal dispute: if so, it would be submitted to an arbitral tribunal, whose award would be final and binding.

19. An important feature of the Spanish proposal was its procedure for the selection of the chairman of the arbitral tribunals and the special conciliation commissions. They would be selected by the United Nations commission for treaties, a method which ensured the highest degree of objectivity and impartiality in the appointments.

20. The Spanish delegation submitted its proposal in a desire to reconcile the various positions taken at the Conference and in the hope that the institutional framework thus provided for the settlement of disputes would increase the effectiveness of the convention.

21. Mr. AMATAYAKUL (Thailand) said that international relations should be based on the principle of the sovereign equality of States. Any effort to make the machinery for settling disputes compulsory must be subject to the prior acceptance of the parties concerned. International practice had so far supported that argument. Compulsory means for settling disputes had been provided for, not in any of the conventions codifying rules of international law but in separate optional protocols. Moreover, States parties to the Statute of the International Court of Justice were not *a priori* obliged to accept the jurisdiction of the Court and an acceptance could be accompanied by reservations which limited the jurisdiction of the Court to the will of the States parties.

22. His delegation considered that if article 62 *bis* were incorporated in the convention, the reservation clause proposed in its amendment (A/CONF.39/C.1/L.387) should be inserted in order that both the States opposed to article 62 *bis* and the States in favour of it might be able to become parties to the convention. That would also pave the way for the subsequent adoption of the article by States which had entered a reservation to it. The reservation could be withdrawn when the conditions which had prevented the State from accepting the article at the time of its accession to the convention no longer obtained.

23. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's proposal for a new article 62 *bis* (A/CONF.39/C.1/L.377), said that since Part V of the draft convention contained several new provisions and it was not yet clear how they would be applied or

interpreted, some compulsory procedure was required to settle disputes arising out of that part of the draft. Some such procedure was needed in order to maintain the principle of *pacta sunt servanda,* ensure the stability of the system of treaties, and avoid possible abuses in the application of Part V. It was essential to avoid lengthy litigation over Part V, since that was calculated to poison international relations. In the history of law, recourse to tribunals or courts of arbitration had always preceded written legislation.

24. Some States considered that the principle of compulsory settlement of disputes conflicted with the principle of the sovereignty of States, and as a consequence they felt misgivings over any form of international jurisdiction. Such doubts were understandable; nevertheless, a truly objective system for the settlement of disputes was the best guarantee of the independence and sovereignty of States, especially of small and weak States, of which Switzerland was one. Switzerland had accepted a number of procedures for the international settlement of disputes, and had found that they worked well. In any free negotiation between States, the stronger was likely to achieve its aims, but that was not true of disputes submitted to an independent and objective body.

25. The Swiss proposal was intended to provide a procedure that was simple, that was not costly, and that was effective. It had the merit of not requiring any new international machinery that might overlap with the activities of existing organizations and thereby lead to confusion. The Permanent Court of Arbitration at The Hague already provided machinery for the settlement of disputes that was quite independent of the International Court of Justice; more use should be made of it, because its procedures were very simple.

26. The Swiss proposal provided that it was for the party that wished to end a treaty to begin the conciliation or judicial procedure, in accordance with the general principle that it was the responsibility of the claimant to initiate the judicial procedure. It also made clear the status of the contested treaty, which would remain in force until the dispute had been settled. That provision in paragraph 3 might appear too rigid, but the text specified that it would apply only in the absence either of any agreement to the contrary between the parties, or of provisional measures ordered by the court of jurisdiction. Such provisional measures were very important in all international litigation, since they could maintain the stability of the existing situation and provide some flexibility in meeting any new situation that might arise.

27. The Swiss proposal provided two means of settling disputes: either proceedings before the International Court of Justice, or proceedings before an *ad hoc* commission of arbitration; the choice rested with the party questioning the validity of the treaty. He did not deny that some decisions of the International Court had been open to criticism, but its existence could not be overlooked. In the United Nations Charter, the International Court was described as the principal judicial organ of the United Nations, and Article 36, paragraph 3 of the Charter provided that the Security Council should take into consideration that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice. Nevertheless, the Swiss proposal left it open to the parties to the dispute to refer the case to an *ad hoc* commission of arbitration if they so wished. Paragraph 2 (*a*) of the proposed new article provided that each party should appoint only one member, out of the total of five, the other three being appointed jointly by the parties from nationals of third States. That was a more satisfactory arrangement than the one proposed in the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which provided that the majority of the members of the conciliation commission should be appointed by the individual parties, so that in effect only one person, the Chairman, would decide the issue, a rather dangerous procedure. An arbitration commission with three neutral members was more likely to achieve a just settlement, and Switzerland regarded that as a very important point.

28. Although the Swiss proposal did not expressly mention conciliation, the expression used in paragraph 2, " unless the parties otherwise agree ", showed that conciliation was not excluded. However, he was doubtful about the usefulness of conciliation procedures in the type of litigation that was likely to arise out of Part V of the draft. The points at issue were likely to be legal points that would not lend themselves to conciliation. Furthermore, conciliation procedures could be lengthy and costly. But the parties were free to resort to conciliation if they so wished.

29. For many countries the cost of the proceedings was an important consideration, and the parties should exercise moderation in selecting their agent or counsel. The proposed procedure before an arbitration tribunal was flexible and simple and would enable the parties to keep costs at a low level. He favoured the idea that the United Nations might in future meet all procedural costs involved; a special fund to cover such costs could be established, and Switzerland would be ready to contribute to such a fund.

30. His delegation had another proposal of a purely formal nature to make; it was for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1). The text of the proposed new article was the same as that of article 62, paragraph 4; if the new article 62 *bis* were adopted, a similar provision would be required for that article, and consequently, instead of the paragraph appearing in both article 62 and 62 *bis,* it would be preferable to include it as a new article 62 *quater.*

31. For Switzerland, the adoption of some procedure for the settlement of disputes was a *sine qua non* for the acceptance of Part V of the draft convention, which it would otherwise regard as containing too many pitfalls.

32. Mr. IRA PLANA (Philippines) said he wished to refer to certain aspects of the proposals before the Committee for the establishment of an acceptable procedure of conciliation and arbitration. It had been proposed that, in the event of a dispute, a conciliation body should be set up, composed of five persons, each party appointing two conciliators, one of whom must be a national of the appointing State, and a chairman to be

chosen by the conciliators thus appointed. The reason for the mandatory provision that each party must appoint a person of its own nationality was not altogether clear, although it might be supposed that each party ought to have a national representative on the conciliation body. It would not therefore matter much if the parties were given no choice, since they might be expected to appoint one of their nationals. The mandatory provision might be accepted, considering the early stage of the proceedings envisaged, the number of persons composing the conciliation body and the fact that the main purpose of that body was to seek common ground and to bring about an amicable settlement between the parties.

33. It was further proposed that, in the event of the failure of efforts at conciliation, an arbitral tribunal of three persons, having the power to make a final and binding decision, should be established, each party appointing one arbitrator, whether of its own nationality or of some other nationality, with a chairman chosen by the two arbitrators thus appointed. A party to a dispute would invariably appoint an arbitrator of its own nationality if that were permitted, and in such cases two of the members of the three-member tribunal would be active partisans. They would not be impartial adjudicators, but advocates of their respective causes; their nationality, their natural sentiments and the fact that they would be appointed by their governments would afford them little chance of being unbiased judges. Thus, the impartiality that should properly pertain to the whole arbitral body could correctly be imputed only to the chairman. That arrangement obviously called for reappraisal and modification.

34. While it was generally logical and understandable that the various proposals contemplated two sides to every dispute, cases might arise in connexion with multilateral treaties where there were not two but three sides. That eventuality might well be taken into account in the final draft of article 62 *bis*.

35. Another proposal was concerned with referring disputes to the International Court of Justice. During the first session, the Japanese delegation had submitted a proposal (A/CONF.39/C.1/L.339) that disputes relating to *jus cogens* under articles 50 and 61 should be referred to the Court at the request of either of the parties. The Philippine delegation saw substantial merit in that proposal, for the International Court of Justice, as the principal judicial organ of the United Nations, was the most authoritative agency to decide whether or not a given rule or principle constituted a peremptory norm of international law from which no derogation was permitted. A provision to that effect would undoubtedly enhance the value of article 62 *bis* and its contribution to the orderly settlement of disputes.

36. Mr. GALINDO-POHL (El Salvador) said that invalidity and the other matters dealt with in Part V were among the most important subjects in the draft convention. Since free consent was of the essence of a treaty, the system of safeguarding consent was of primary importance. In order to be effective, the clauses dealing with invalidity, termination and suspension required that, failing agreement between the parties, some impartial institutional authority should have the final say in the matter. Otherwise Part V would be weakened and would be a source of controversy rather than of international stability.

37. Article 62 laid down that " the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations "; but it did not ensure that questions of invalidity, termination and suspension would be duly considered and settled with the consequent freeing of the parties from specific contractual obligations. The system for the settlement of disputes laid down in Article 33 of the Charter represented some progress towards a well-organized international community, but in recent years its inadequacies had made it necessary to reconsider the problem in the United Nations.

38. The proposals for an article 62 *bis* were intended to establish a compulsory jurisdiction for the settlement of disputes regarding the invalidity, termination and suspension of treaties. Arbitration had a long history as a method of solving international disputes when other means had failed. In view of the fact that the other methods for the peaceful settlement of disputes were feeble and merely optional, failure to resort to arbitration would only lead to lengthy arguments and counter-arguments with all their resulting uncertainty.

39. In the view of his delegation, in the case of a dispute concerning a treaty, arbitration, with the establishment of a compulsory tribunal, was particularly appropriate. The proposals before the Committee would of course have to be perfected in order to ensure a reasonably rapid procedure and impartial awards. The time-limits laid down in the proposed drafts were of particular importance. The parties could be given the right to object to a certain number of arbitrators without having to give reasons. Also, both the number and status of the members of the tribunal required careful consideration. His delegation supported the composition proposed in the Swiss amendment (A/CONF.39/C.1/L.377).

40. The proposals before the Committee appeared all to be conceived on the basis of a dispute between two parties; in the case of multilateral treaties, if one party impeached the validity of the treaty and the remaining parties opposed such impeachment, the latter might act as a single party in order to simplify the procedure.

41. The adoption of an article 62 *bis* might involve difficulties inasmuch as the fate of national interests would be subjected to the decision of an alien. But there was no State which had not at some time or other submitted to arbitration or brought a case before the International Court of Justice, and many treaties provided for compulsory arbitration. Everything involved some risk, and compulsory arbitration was no exception to that rule, but the balance of advantage was in favour of arbitration and, in the case of Part V, arbitration was the keystone of the structure. No State could be permitted to impose its will unilaterally upon another, because all States were equally sovereign. Arbitration did not impair sovereignty, but harmonized

it, when sovereign States were on terms of reasonable co-existence and co-operation.

42. The Committee could either leave the question as it was covered by article 62 of the draft, with its reference to Article 33 of the United Nations Charter, or take a step forward by adopting an article 62 *bis*. In the latter event, it could either confine itself to conciliation or go further and accept compulsory arbitration. It was obviously in the interests of the convention itself that the clauses dealing with invalidity, termination and suspension should be effectively enforced.

43. His delegation did not at that stage favour any one in particular of the various drafts before the Committee but it did support the substance common to all of them. It would be helpful if the sponsors of the various drafts, in the light of the comments and suggestions made during the discussion and of the ideas expressed in the other proposals, would try to draw up a consolidated draft based on the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

44. Mr. CASTRÉN (Finland) said that during the debate on article 62 *bis* at the first session, his delegation, which had been a sponsor of the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.2), had explained why it considered that the procedure laid down in article 62 was not satisfactory and should be supplemented.

45. His delegation was also a sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Add.1 and 2 and Corr.1), which differed from the original amendment only on certain minor points. Most of the changes made in the revised amendment were intended to clarify and supplement the original text.

46. It seemed to him that during the lengthy discussions on article 62 and article 62 *bis* all views had been fully canvassed; he would therefore merely recapitulate a few of the arguments in favour of the nineteen-State amendment. Several delegations had rightly stated that article 62 was a key article of the draft. However, the machinery proposed by the International Law Commission for the settlement of disputes regarding the application of the provisions of Part V of the draft was defective in that it admitted the possibility that such disputes might remain unsolved. Those disputes might concern questions of vital importance for the stability of treaty relations and for peaceful relations between States. The aim of the proposed amendment was therefore to improve the position by filling the gaps in the International Law Commission's text.

47. In the majority of cases the compulsory conciliation provided for in the amendment should be adequate and it should not be necesary to have recourse to arbitration. The knowledge that the arbitration procedure was the final resort would tend to induce parties to settle the dispute without recourse to it. If the parties so preferred, they were free to choose any method of settlement they wished. But there could be no question of allowing measures to be taken unilaterally in respect of the treaty which was the subject of dispute. It was generally admitted that the draft convention contained some new principles as well as a number of provisions expressed in very general terms. In case of disagreement, the interpretation of those principles and provisions could be entrusted only to an international tribunal whose impartiality was guaranteed.

48. Attention had also been drawn to the fact that the strengthening of the safeguards against unilateral action in treaty relations would be of particular importance to small and weak States.

49. It was true that many international conventions did not provide for the compulsory settlement of disputes arising from their application. The convention on the law of treaties was, however, unique because of its constitutional nature. Disputes concerning its application and interpretation would in most cases be legal disputes which would have to be settled finally by adjudication. But the conciliation commission would also have to pronounce, in case of need, on the legal elements of disputes.

50. For those reasons, his delegation hoped that the nineteen-State amendment would be favourably received by those delegations which had so far opposed it. His delegation would support the amendments by Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.377), which had the same purpose as the nineteen-State proposal, namely, to provide additional guarantees for the settlement of disputes concerning the application of the convention. It could not support either the Uruguayan amendment (A/CONF.39/C.1/L.343) which did not, in his view, satisfy the minimum requirements, or the Spanish amendment (A/CONF.39/C.1/L.391) which laid down an unduly complicated procedure that would be difficult to apply in practice. He would comment on the amendment by Thailand (A/CONF.39/C.1/L.387) at a later stage.

51. Mr. HAYTA (Turkey) said that his delegation's views on machinery for the settlement of disputes, which had been expressed in the Sixth Committee of the General Assembly [4] and at the first session of the Conference, remained unchanged. In particular, his delegation maintained the view that the parties to a treaty should be protected against arbitrary action by another party and that the best protection and the most appropriate guarantee would be submission of the dispute to impartial settlement, either by the International Court of Justice, the supreme judicial organ of the United Nations, or by a commission of arbitration, composed as provided in paragraph 2 of the Swiss amendment (A/CONF.39/C.1/L.377).

52. To submit disputes to compulsory jurisdiction would ensure justice for the parties, the integrity of treaties and the stability of treaty relations. As a procedure it would be preferable to any other, because the tribunal would be non-political, and could examine the questions dispassionately and in an atmosphere of serenity; that was more than could be said for international political or administrative organs, which, moreover, already had

[4] See *Official Records of the General Assembly, Twenty-second Session, Sixth Committee*, 980th meeting, paras. 19 and 20.

so many obligations and responsibilities that they should not be burdened with additional legal or semi-legal functions. And the creation of new bodies within the United Nations should be avoided, since there was a general feeling against the proliferation of those organs.

53. The Turkish delegation could see no reason why the international community should not benefit by the experience acquired by the International Court of Justice over many years, and also from the Court's moral authority, which was recognized almost universally. The Turkish delegation noted with satisfaction that it was not alone in holding that opinion of the Court, and felt that special attention should be drawn to the statements by the Japanese representative at the 68th meeting of the Committee, during the first session, and to the similar views expressed by the Swiss representative and others during the current meeting.

54. The Turkish delegation reserved the right to comment in detail later on the various proposals relating to the machinery for the settlement of disputes, in the light of the views he had just expressed.

The meeting rose at 5 p.m.

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## NINETY-THIRD MEETING

*Friday, 18 April 1969, at 10.50 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

### Tribute to the memory of Mr. Emilio Arenales Catalán

1. The CHAIRMAN said he had received an official communication from the Chairman of the delegation of Guatemala informing him of the sudden death of the President of the twenty-third session of the United Nations General Assembly, Mr. Emilio Arenales Catalán, who had likewise been the Guatemalan Foreign Minister. He felt sure that all the members of the Committee of the Whole would have learned with deep distress of the death of so eminent a figure, whose fine qualities were known to all.

*On the proposal of the Chairman, the Committee observed a minute's silence in tribute to the memory of Mr. Emilio Arenales Catalán.*

2. Mr. MOLINA ORANTES (Guatemala) thanked the Chairman warmly for the condolences he had expressed on behalf of the Committee. On that day of mourning, such an expression of sympathy was particularly comforting for Guatemala.

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76*
(resumed from the previous meeting)

3. The CHAIRMAN invited the Commitee to resume consideration of the proposed new articles 62 *bis*, 62 *ter*, 62 *quater* and 76.

4. Mr. PINTO (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.395), said that his country had consistently been in favour of setting up a mechanism for the settlement of disputes arising out of the application of Part V of the draft articles. At the first session of the Conference, his delegation had stated that any mechanism for the compulsory settlement of disputes should be qualified by a provision leaving States completely free to exclude the application of the mechanism to any particular treaty by agreement between them.

5. The amendment submitted by his delegation was designed to make it clear that the compulsory mechanism was not *jus cogens* and to legitimize any action by the parties differing from that provided for in article 62 *bis*. The procedure for compulsory settlement must be flexible, and his delegation's amendment did not prejudge the form in whith article 62 *bis* would finally be adopted.

6. The nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), and the Japanese amendment (A/CONF.39/C.1/L.339) had much to commend them and they deserved serious consideration by the Committee.

7. His delegation sympathized with the motives which had led the delegation of Thailand to put forward its amendment (A/CONF.39/C.1/L.387), but it felt that the insertion of a clause authorizing reservations to article 62 *bis* would have the effect of destroying the object and purpose of having a compulsory settlement mechanism. In addition, the amendment raised a question on which the Conference had yet to take a decision, namely whether reservations to the convention would be permitted. In that connexion, his delegation would favour any suggestion designed to produce a reservations clause which would enable a State, when negotiating a particular treaty, to declare its unwillingness to apply the compulsory settlement mechanism to that treaty, rather than a clause which would allow a State to exclude all treaties concluded by it from the operation of the compulsory settlement mechanism by a single reservation.

8. It would also be desirable to state clearly that the compulsory mechanism would apply only to treaties entering into force after the entry into force of the convention on the law of treaties. In his delegation's view, the same principle should apply to all the provisions of the convention. There was of course nothing to prevent States from applying the provisions of the convention retrospectively by agreement between them.

9. In the great majority of cases, States not in a position to fulfil their treaty obligations would negotiate a settlement. If that was not possible, recourse to third-party settlement to end a dispute should not cause any misgivings. His Government would welcome the establishment of a just and efficient system for settling disputes which might have a salutary effect on the durability of treaty relationships.

10. Mr. MARESCA (Italy) said that article 62 *bis* was absolutely vital to the economy of the convention on

the law of treaties. Without it the convention would be incomplete. The article was based on the principle of the sovereign equality of States, the parties always being equal before the judge.

11. Arbitration procedure had been resorted to even in ancient times, and rules on arbitration had been drawn up at the beginning of the present century, on the initiative of Russia. Recourse should not be had to arbitration procedure the moment a dispute arose; the conciliation procedure should always come first. The Spanish amendment (A/CONF.39/C.1/L.391) had the virtue of being self-contained, and the Japanese amendment (A/CONF.39/C.1/L.339) was interesting in that it made reference to the International Court of Justice, whose importance must certainly not be underestimated.

12. The Swiss amendment (A/CONF.39/C.1/L.377) had the merit of clarity and brevity, and it brought out the necessity for recourse to arbitration.

13. The nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) was the outcome of lengthy negotiations and appeared to be more detailed than the amendment on the same topic submitted at the first session (A/CONF.39/C.1/L.352/Rev.2). It therefore deserved careful study. The Committee of the Whole might set up committees to study each of those amendments.

14. Mr. ALVAREZ TABIO (Cuba) said that the International Law Commission had been right to say in paragraph (4) of its commentary to article 62 that that article represented " the highest measure of common ground that could be found ". Any attempt to impose upon States an obligatory procedure for settling disputes about the validity of a treaty or the right of a party to terminate it would serve no purpose. If it proved impossible to settle an international dispute by the means provided for in article 62, it was because the attitude adopted by the States concerned was such that even compulsory adjudication would have been of no assistance. In fact, the application of a rigid procedure, especially in the case of a dispute between a large State and a small one, would only be prejudicial to the interests of the weaker State. While the principle of sovereign equality was no more than a fine phrase in the United Nations Charter, it was impossible to allay the justifiable fears of a large number of States, especially those which had been the actual victims of the operation of unequal and unjust treaties. These fears would perhaps disappear one day as a result of the introduction of a more equitable international law, based on practices differing from those imposed hitherto by a small group of powers whose relations with weaker States were based on unconditional submission. Many nations had suffered in order to achieve independence and only a few of them had been able to obtain the cancellation of treaties imposed upon them by the use of threats and coercion. International relations had not yet reached the point where such States could agree to submit themselves without misgivings to compulsory adjudication or arbitration.

15. In the case of what were termed " unilateral " treaties, of treaties void *ab initio* under the rules approved by the Committee, there was no point in discussing a preliminary procedure. But, in the case of treaties in force which it was possible to terminate by a procedure that was equitable, brief and effectual, the only acceptable solution was that proposed in article 62, which had been approved at the first session. It had been objected that that article did not provide for the compulsory settlement of disputes; but experience had shown that States tended to settle their differences without recourse to compulsory adjudication, whose awards in most cases were not objective, fair or effectual.

16. Moreover, where the dispute was between a powerful State and a weak State, what guarantee could there be that the powerful State would agree to submit to the decision of an impartial body and that it would comply with an award that was unfavourable to its interests?

17. The question of the settlement of disputes had been considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had reached the conclusion that international disputes should be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means, which should be appropriate to the circumstances and nature of the dispute.[1]

18. Freedom to choose the most appropriate means of settling a dispute, which was referred to in Article 33 of the United Nations Charter, presupposed complete respect for the sovereignty of States. The introduction of compulsory judicial settlement would go beyond the limits laid down by the Charter.

19. In certain matters, international law was no more than the adaptation of foreign policy to the needs of the moment. In an atmosphere where power prevailed over justice, it could not reasonably be expected that the decisions of a body consisting of third parties would be fair and effective.

20. A compulsory procedure could not be imposed upon the international community as long as many areas of international law that were of fundamental importance were dominated by traditional and unjust ideas which met the requirements of a very small number of powers.

21. Cuba, which had been the victim of aggression in a variety of forms, refused to accept any arrangements which would have the result of imposing methods of solving questions whose scope and nature were indeterminate.

22. Although his delegation acknowledged the efforts made by a number of delegations, particularly the Spanish delegation, it rejected any solution to the problem that would have the result of introducing a compulsory settlement procedure and it would therefore vote against article 62 *bis*.

23. Mr. SHUKRI (Syria) said that, in his delegation's view, adequate measures should be taken against the

[1] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

possibility that nullity, termination or suspension of the operation of a treaty might be arbitrarily asserted as a pretext for getting rid of inconvenient obligations. His delegation fully endorsed the *pacta sunt servanda* principle and for that reason had voted for article 62 at the first session. Article 62 was not merely the highest measure of common ground that could be found; it also provided an adequate safeguard against abuse of right by a party to a treaty, since it provided that, if objection had been raised to a notification, the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter, that was to say by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful legal means such as recourse to the International Court of Justice.

24. In other words, those who had drafted article 62 had considered that in dealing with the problem they should take as a basis the general obligation of States to settle their international disputes by peaceful means in such a way that international peace and security and justice would not be endangered.

25. Some representatives had maintained that a convention which did not provide for a compulsory settlement procedure would be inapplicable. But the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic Relations and on Consular Relations did not provide for compulsory adjudication; yet that fact had not undermined their significance as steps towards the codification of positive international law.

26. Any attempt to associate the existence of legal norms with compulsory settlement in international relations was not only unnecessary but dangerous. It could not be said that States had no obligations under the Charter merely because recourse to the International Court of Justice was optional.

27. A number of jurists took the view that the main factor that led to compliance with international law was the moral factor. Perhaps too much reliance should not be placed on such a subjective factor, but it was necessary to be realistic in the search for a workable formula. And a workable formula could not be one that compelled States to submit their disputes to judicial settlement, especially when those States had some misgivings about the value and usefulness of such a procedure.

28. Of the 127 Member States of the United Nations, only about forty had accepted the optional clause of the International Court of Justice. If States were really willing to submit their disputes to judicial settlement, all they would need to do would be to declare that they accepted the compulsory jurisdiction of the Court. The fact that the majority of States had been reluctant to do so proved that they found that course of action unattractive.

29. Syria was one of the many States which had not accepted the compulsory jurisdiction of the International Court of Justice, not because of a lack of faith in justice, but simply because his country disputed many of the existing rules of traditional international law which were supposed to govern the Court's decisions. Those rules should be subjected to progressive development, so that they would meet the requirements of the age — the age of self-determination of peoples; Syria would then be able to accept the jurisdiction of the Court. No one could deny that there was a difference in outlook between the newly-independent States and other States with regard to the rules of international law. When the question of universality had come up at previous meetings, some representatives had expressed doubts about the validity of some of the fundamental concepts of international law as far as the newly independent States were concerned. Reference might also be made to the slowness of the Court's machinery and to its somewhat conservative attitude in many cases, the most recent of which were the *South West Africa* cases.

30. Consequently, before envisaging compulsory adjudication, the Committee should reach agreement on the legal rules to be applied and on the procedure to be used. The amendments before the Committee were based on the idea that States must be forced to submit disputes to compulsory adjudication, but they made no reference to the question of how the award was to be enforced. What happened if a State refused to comply with the award of a tribunal or of the International Court of Justice? The amendments did not propose any better solution than that envisaged in article 62.

31. A further point was that the amendments seemed to assign a new role to arbitration. Arbitration was different from judicial settlement because it allowed the parties not only to nominate the arbitrators and define the scope of the dispute to be settled, but also to establish the terms of reference of the arbitral tribunal. No such provision was made in the amendments, and that would inevitably lead to a great deal of further controversy.

32. Again, the amendments would burden the United Nations with further expenditure and everyone was aware of the financial difficulties at present being experienced by the Organization; moreover, small States could not afford the expense of such complicated machinery.

33. The Syrian delegation would therefore vote against all the amendments. It would, however, agree that the general idea underlying the amendments should be included in an optional protocol similar to that annexed to the other Vienna Conventions.

34. Mr. WALDRON (Ireland) said the Committee was on the point of deciding a basic question concerning disputes relating not merely to the interpretation and application of treaties but also concerning their validity.

35. Some delegations believed that the provisions of the article 62 adopted at the first session were adequate. Ireland, which did not occupy a very powerful position in the international hierarchy, did not believe that its interests established in treaties were sufficiently protected by article 62. At the national level, in a lawless society, the powerful prevailed because they did not need the protection of the law. At the international level, too, the strong might, if necessary make their own law. The Irish delegation was therefore surprised to

hear the representatives of many small States say in effect that they did not need the protection of the law, and that they were satisfied with the freedom given them by article 62. But that freedom was wholly false.

36. Article 62 had been described as both realistic and flexible, but that was true only if realistic meant that there should be no definite provision for settling disputes and if flexible meant that States should be permitted to terminate their international obligations unilaterally.

37. Much had already been said, and more no doubt would be heard, on the subject of unequal or leonine treaties. There was no greater potential inequality than when there was nothing in a treaty which enabled a State to enforce its rights. In such a situation the weaker would always be the loser. Small States were really entering into leonine agreements when treaties did not provide any just means of ensuring that their rights were not unilaterally terminated.

38. The Irish delegation had great respect for the motives which had prompted the amendments by Japan (A/CONF.39/C.1/L.339) and by Switzerland (A/CONF.39/C.1/L.347), and unless unforeseen circumstances arose, it would vote for them. It was a sad commentary both on the Court itself and on the international community that it should not be taken for granted that the International Court of Justice should be designated as the tribunal to which international disputes of the character in question should normally be referred. But it had to be recognized that the Court had not yet been able to generate the necessary confidence in its adequacy or ability to settle many international disputes. Similarly, it must be recognized that States were not yet prepared to submit the control of their interests to the Court's jurisdiction.

39. However, the Conference should direct its attention especially to the nineteen-State proposal rather than to the Spanish proposal. The Irish delegation did not agree with the nineteen-State proposal in every detail, but it nevertheless congratulated the sponsors on their care and zeal in producing it. His delegation wished to draw attention to certain points which should recommend that document to the Conference. Firstly, the conciliation procedures would be exhaustive and the parties to a dispute would have every opportunity to settle it in that way, which was favoured by so many States; secondly, the parties themselves would establish, on a basis of equality, the conciliation commission and the arbitral tribunal, so that they could no longer contend, as they did at present, that the way in which the International Court of Justice was composed was a ground for refusing to submit to its jurisdiction; thirdly, the tribunal would be applying the law which was at present being codified by the Conference, and not a law which was alleged still to serve colonialist interests; fourthly, the Irish delegation noted the role which the Secretary-General would be playing in the conciliation and arbitration procedures laid down in the nineteen-State proposal.

40. That being so, all States, and in particular small States, should accept that document, which was reasonable and fair, served the interests of all, and appeared to be the proposal best calculated to bring the necessary security and stability to treaty relations.

41. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that at the first session the Conference had discussed at length the question of what machinery should be resorted to if a treaty was not applied. Those efforts had not been vain, since the Conference had already adopted article 62, which provided sufficient safeguards to ensure that the principle of the stability of treaties would not be arbitrarily violated. It should not be forgotten that article 62 had been drafted by the International Law Commission after thorough study, and that it represented a compromise between differing points of view. No one could doubt the competence of the International Law Commission, whose arguments carried conviction. In paragraph (4) of its commentary to article 62, the International Law Commission had rightly said that the article represented " the highest measure of common ground that could be found among Governments as well as in the Commission on this question ".[2]

42. The International Law Commission had considered that article 62 contained procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty might be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation. The delegation of the Byelorussian SSR agreed with that view. The United Nations Charter provided that United Nations organs could not impose upon States the methods to be used in settling their disputes. It was therefore impossible to accept the compulsory jurisdiction formula proposed by the sponsors of article 62 *bis*.

43. So far as concerned the provisions of Chapter VI of the United Nations Charter, even the Security Council could only make recommendations; it could not take binding decisions. At the San Francisco Conference in 1945 the United States and the United Kingdom, on behalf of the inviting Powers, had given an assurance that the recommendations of the Security Council concerning the settlement of disputes possessed no obligatory effect for the parties to the dispute.[3] Similar assurances were to be found in the United States delegation's comments on the United Nations Charter after the end of the San Francisco Conference.

44. If the United Nations Charter was taken as the basis, the inevitable conclusion was that only agreed methods of procedure were of any real use. For example, the Security Council could only reach decisions when there was unanimity among the permanent members. The Conference was bound to bear in mind the Charter and United Nations practice.

45. That practice showed that whenever there was an attempt to make a procedure for the pacific settlement of a dispute compulsory, the procedure in question became inapplicable or lost all practical value.

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[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 262.

[3] United Nations Conference on International Organization, III/2/31.

46. Furthermore, a compulsory jurisdiction machinery would be a violation of the sovereign rights of States.

47. It was because article 62 *bis* was incompatible with the sovereignty of all States and with the provisions of the United Nations Charter itself that the Byelorussian Soviet Socialist Republic would vote against the inclusion of that article in the convention.

48. Mr. WARIOBA (United Republic of Tanzania) said that on the question of the settlement of disputes arising out of the application of the provisions of Part V of the draft articles, no one was really opposed to the principle of third-party settlement. The essence of the problem was whether or not such settlement should be automatic. After serious thought, the United Republic of Tanzania was still opposed to any compulsory machinery of settlement.

49. Article 62 as adopted at the first session provided all the necessary safeguards with regard to the application of the provisions of Part V of the draft convention; in the event of an objection being raised by " any other party ", the parties to the dispute should seek a solution through the means indicated in Article 33 of the United Nations Charter. The United Republic of Tanzania was convinced that the parties to a dispute would always make a sincere attempt to settle it through one or other of those means, as recent conflicts in Africa showed.

50. In particular, article 62 prevented States from taking unilateral action by requiring them to notify the other parties of their claims. There was always the possibility, of course, that a State might refuse to accept a particular means of settlement, but once good faith was lacking, no rule for compulsory adjudication was likely to have much more effect than article 62 itself.

51. The manifest reluctance to accept any rule of compulsory adjudication was undoubtedly due to the inadequacy of the existing machinery. The International Court of Justice, as the principal judicial organ of the United Nations, had major defects, particularly its composition and the slowness of its procedure. The various proposals before the Committee sought to remedy that situation, and he was particularly concerned with the nineteen-State amendment. (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2.)

52. The sponsors of that amendment proposed the creation of bodies whose composition would satisfy the parties to the dispute. He did not think that in the event the remedy lay in setting up new organs whose functions would in fact be those of the International Court of Justice, because, in his view, it would be preferable to seek some means whereby the Court's standing could be restored. The sponsors of the nineteen-State amendment and the other proposals of the same kind were aiming to do away with recourse to the International Court of Justice and were thus undermining the Court's prestige, even though they did not admit it.

53. Further, the attempt to satisfy the parties with respect to the composition of the judicial organ called upon to settle their disputes would inevitably entail a very lengthy procedure. Despite the efforts of the sponsors of the amendment in question to deal with that point, their formula would mean that at least forty-five months would elapse between the date on which notification was given under article 62 and the date on which arbitration would actually begin. In theory, of course, disputes might be settled at the conciliation stage; but if a party refused from the start to accept the means of settlement provided in Article 33 of the Charter, it was most unlikely that it would accept the findings of a conciliatory body. In his opinion, that kind of procedure would simply be a source of unnecessary expense to the parties and the United Nations.

54. In any case, as his delegation had stated at the previous session, the annex appended to the new article 62 *bis* proposed by the nineteen States was scarcely appropriate in a draft convention which laid down general provisions on treaty law.

55. Some delegations urged that disputes arising out of the application of specific articles, notably articles 50 and 61, should of necessity be subject to adjudication. He did not consider that to be essential, even in the case of new provisions likely, as some feared, to give rise to unilateral claims. The International Law Commission's intention in drafting such articles was certainly not to cause chaos in international relations but to put an end to unjust practices.

56. It was also argued that no two States should be permitted to settle independently a dispute relating to such an important provision as *jus cogens,* although he was not convinced that adjudication constituted a form of international legislation. Different tribunals, for example, might pronounce differently on similar questions, which would simply lead to confusion. Moreover, a tribunal's decision would bind only the parties to the dispute and consequently would not have the desired effect. Furthermore, if a party notified a claim under article 50, and the other party or parties raised no objection, so that the claimant was able to enforce its claim, would that mean that the whole world accepted the claim as establishing a rule of *jus cogens*? Or would it mean that claims made under certain articles should be subject to adjudication, whether they had given rise to objections or not? A compulsory adjudication procedure did not seem to be the ideal solution in that respect.

57. Because of those difficulties, his delegation did not believe that the proposals to include a new article 62 *bis* could have the slightest positive effect. If States could not solve their disputes by means of article 62, it was their duty " to appreciate the situation and to act as good faith demands ", as the International Law Commission stated in paragraph (5) of its commentary. If the situation endangered international peace and security, then the provisions of Chapter VI of the Charter should be applied.

58. The United Republic of Tanzania was, however, prepared to give careful consideration to the amendments submitted by Ceylon (A/CONF.39/C.1/L.395) and Thailand (A/CONF.39/C.1/L.387) or to any new proposal which improved on the nineteen-State amendment.

59. Mr. RAZAFINDRALAMBO (Madagascar) said that in view of the importance of the provisions of Part V of the draft articles, the delegations participating in the Conference all subscribed to the Commission's statement, in its commentary to article 62, that the article was a key article for the application of Part V of the convention, because it laid down certain essential procedural safeguards against arbitrary claims that a treaty was invalid.

60. The debate at the first session and the discussion now in progress showed that a substantial majority would favour a procedure which strengthened the safeguards already existing in the initial provisions of the draft articles.

61. His own delegation, which was one of the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), thought that only a procedure providing for two separate stages, conciliation and arbitration, would provide an effective safeguard against arbitrary action and instability in treaty relations between States.

62. The procedure for the settlement of disputes proposed in that amendment was entirely in keeping with the spirit and letter of the United Nations Charter, which recommended the parties to endeavour, with the assistance of other countries in the same part of the world, to settle their disputes themselves. His delegation was therefore opposed to any procedure which would cause disputes between two States on the application of Part V of the convention to be subject to the compulsory jurisdiction of the International Court of Justice. Consequently, it could not accept the Japanese amendment (A/CONF.39/C.1/L.339) or the Swiss amendment (A/CONF.39/C.1/L.377), both of which expressly provided for compulsory or optional reference to the Court.

63. However, to the extent that those amendments provided for an arbitration procedure, they were in line with the nineteen-State amendment, and the common ground between the proposals might later induce the delegations of Japan and Switzerland to come together with the sponsors of that amendment. The delegation of Madagascar would be prepared to consider the possibility of adjusting the system it had proposed for the settlement of disputes, though it would not be prepared to give way on the essential principle of conciliation and arbitration.

64. It was precisely because the amendment submitted by Thailand (A/CONF.39/C.1/L.387) struck at the very foundations of the settlement machinery proposed by the group of nineteen States that the latter could not subscribe to it. The provision envisaged by Thailand would rob article 62 *bis* of its meaning and scope, since the mere will of a State which had refused to agree that article 62 *bis* should apply to it would prevent it from applying to the other parties.

65. The Spanish amendment (A/CONF.39/C.1/L.391) would introduce a more effective method of settlement than the existing one; it was based on the same principles as the nineteen-State amendment, but the machinery it proposed was unduly clumsy and complex. However, the Spanish delegation should easily be able to find common ground with the sponsors of the nineteen-State amendment.

66. The second proposal by Switzerland (A/CONF.39/C.1/L.393. Corr.1) and the amendment by Ceylon (A/CONF.39/C.1/L.395) added nothing to the nineteen-State amendment, since they stated a rule already embodied in the revised version of the introduction to that proposal.

67. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that in his delegation's view, the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, as laid down in article 62 in the International Law Commission's draft, was fully in keeping with the principles of international law and the provisions of the Charter. In contemporary international law, States had a moral and legal obligation to settle all international disputes by peaceful means. Those means were set forth in Article 33 of the Charter, although the list was not exhaustive. There were in fact other means, and States were entitled to select those they regarded as most appropriate. In other words, the principle of peaceful settlement of disputes was not governed by a single, compulsory procedure. The principle of choice of means was the one adopted by the United Nations, and it was in line with the basic principles of modern international law, which were founded on the sovereignty of States and on non-interference in the internal affairs of States. For that reason, the Ukrainian delegation was obliged to make serious reservations in respect of article 62 *bis* and the proposed amendments.

68. According to article 62 *bis*, the only available means of settling international disputes would appear to be recourse to an international arbitral body or to the International Court of Justice. But there were other means available, and States could choose the one they preferred. The attitude of the sponsors of article 62 *bis* was unrealistic and had little practical justification. The compulsory nature of the proposed recourse could not make a rule effective when it ran counter to the basic interests of States at the present time. The important thing was not to set up a compulsory international system in the form of a tribunal, but to lay down norms in the convention which were in keeping with the requirements of international life today. Those norms, which were universally known, would make it perfectly possible for States to dispense with an international arbitration procedure. The disputes existing at the present time could not be settled by arbitration of any kind. The Ukrainian Soviet Socialist Republic pursued a peaceful policy and had always been an advocate of any measures making for the development of international relations; and it considered that no judicial system could constitute a means of giving effectiveness to the application of international law in general and of international treaties in particular. Experience had shown that the International Court of Justice and various arbitral bodies had failed to achieve satisfactory results in that direction. If a clause relating to arbitration were inserted into the convention, a great many States would refuse to sign it. It would therefore be desirable to think

twice before adopting such a clause. The principle of collaboration and mutual understanding among States, advocated by Lenin, was a source of international law. Law developed in the direction of international co-operation, and no arbitration could replace the will of States to co-operate. For that reason his delegation supported article 62 as drafted by the Commission.

69. Mr. CARMONA (Venezuela) said that his country, at all times a champion of law and justice, had always advocated ways and means making for the peaceful settlement of international disputes, which it regarded as a sacred and inviolable principle. The law should protect the weak and the poor, but unfortunately that was not always the case. Venezuela had therefore always given the closest attention to every specific case that arose, with a view to ensuring the strictest observance of justice, and over its 150 years of independence it had frequently had recourse to arbitration. Generally speaking, in the treaties concluded by it during the twentieth century, Venezuela had undertaken to implement the decisions of the International Court for the settlement of international disputes. But it must be pointed out that instead of favouring compulsory arbitration and judicial decisions, the world today was tending to adopt a somewhat retrogressive attitude.

70. After the First World War, all civilized countries had given their backing to the Permanent Court of International Justice, which had had more backing at that time than at any other. Following the Second World War, things had changed. The Venezuelan Foreign Minister, who had been present in 1945 at the San Francisco Conference, and had been chairman of the body set up to draft the Statute of the Court, had been convinced of the need for a judicial solution in all circumstances. He had returned to Venezuela after the Conference in a somewhat disappointed frame of mind, feeling that the cause of peace had been lost rather than won; for although they had favoured compulsory jurisdiction as a basic rule, the States had finally decided in favour of the optional clause in Article 36 of the Statute of the Court. Today, of the 129 countries which were parties to the Statute of the Court, forty-four had adopted the optional clause in Article 36, in other words only one-third. Quite recently, a number of important countries had reserved the right to signify to the Registrar of the Court their withdrawal of acceptance of the optional clause at any moment they chose. It was therefore to be feared that the importance of the Court was being steadily weakened and that it now represented for people generally nothing more than a body out of touch with the needs of the times.

71. With regard to compulsory arbitration, the International Law Commission had endeavoured for many years to draft a convention on arbitral procedure acceptable to the majority of the State Members of the United Nations. But a large number of countries had opposed the 1952 draft providing for compulsory arbitration.[4] In 1958, the General Assembly had examined the 1953 draft [5] and had put it to the vote. Thirty-one countries had voted in favour of compulsory arbitration, 28 in favour of optional arbitration, and 13 had abstained. In 1958, during the Conference on the Law of the Sea, the problem of adopting compulsory arbitration had again been examined. Opinions had been divided on the subject. Thirty-three countries had voted in favour of that mode of settlement, 29 had voted against, and 18 had abstained.[6] It had finally been decided to adopt the optional protocol procedure; but whereas some 40 countries had ratified the Conventions, by December 1968 only 9 had ratified the Protocol. In 1961, an optional protocol had been annexed to the Convention on Diplomatic Relations.[7] There again, of the 92 States which had ratified the Convention, only 31, or less than a third, had signed the optional protocol. In 1963 there had been a vote on the same question in connexion with the Convention on Consular Relations. Thirty-one countries had voted in favour of compulsory arbitration, 28 against, and 13 had abstained.[8] As yet, only 11 States had ratified the protocol. All those instances made it clear that States were not ready to agree to the inflexible system of compulsory arbitration.

72. Consequently, the Venezuelan delegation was of the opinion that it would be dangerous to cross the will of the considerable number of States opposed to the rigid formula proposed in article 62 *bis*, which would most probably be rejected if a vote were taken. His delegation was nevertheless interested in the attempts made by some countries to find a formula providing for the establishment of a special arbitration commission within the United Nations.

73. His delegation would prefer that the proposal made by the Commission in article 62 should be kept, since it was likely to be acceptable to all States. Disputes could then be settled in accordance with Article 33 of the Charter. Article 33 undoubtedly lacked precision, but in present circumstances, it was the nearest approach to the ideal which the members of the Committee must have in mind.

74. Mrs. ADAMSEN (Denmark) reminded the Committee that at the first session of the Conference her delegation had joined with other States in proposing a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.2) providing for a combined conciliation and arbitration procedure for the settlement of disputes arising out of the provisions of Part V of the draft convention on the law of treaties. That was in keeping with Denmark's policy, which had at all times been to encourage the peaceful and equitable settlement of inter-State disputes by recourse to the decision of an impartial third party.

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[4] For the text of the " Draft on Arbitral Procedure ", see *Yearbook of the International Law Commission*, 1952, vol. II, pp. 60-67.

[5] A new text had been prepared in 1953. See *Yearbooks of the International Law Commission, 1953*, vol. II, pp. 208-212, and *1958*, vol. II, pp. 83-86.

[6] See *United Nations Conference on the Law of the Sea, Official Records*, vol. III, p. 33.

[7] United Nations, *Treaty Series*, vol. 500, p. 242.

[8] See *United Nations Conference on Consular Relations, Official Records*, vol. I, First Committee, 31st meeting, para. 24.

75. The International Law Commission had no doubt drawn up article 62 of the draft convention concerning the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty with the utmost care, and it had taken account of the observations of Governments and of its own members. But the article was inadequate, as was clear from paragraph (5) of the commentary to it. For if after resorting to the means provided in Article 33 of the Charter the parties reached an impasse, each Government would have to appreciate the situation and act as good faith demanded. Article 62, as adopted by the Committee at the first session, would open up the way to abuse of the various articles of the draft convention relating to the invalidity, termination, suspension, and so forth, of treaties and would jeopardize the security and stability of treaty relations between States.

76. In co-sponsoring the amendment submitted at the first session, Denmark had been convinced that the ideas underlying the proposal would provide a satisfactory solution to the problem of the settlement of disputes resulting from the provisions of Part V of the draft convention; it had hoped that that proposal could be further improved and that the great majority of States would accept it.

77. Consultations had taken place which had led nineteen States to put forward the new amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), as explained by the Netherlands representative.

78. The Danish delegation had given careful thought to every possible solution to the problem of the settlement of disputes, and it approved amendments such as those of Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.347). It preferred them to the Spanish amendment (A/CONF.39/C.1/L.391), which seemed rather complicated and unduly difficult to apply. It could not support proposals such as that of Uruguay (A/CONF.39/C.1/L.343), since the procedures mentioned in that amendment did not seem likely to lead to the attainment of the aims intended; nor did it approve the amendment by Thailand (A/CONF.39/C.1/L.387), since its adoption would tend to put States in a position where they would not always be able to have recourse to an impartial third State to settle their disputes. But her delegation would give careful study to the amendment submitted by Ceylon (A/CONF.39/C.1/L.395).

79. The procedure for the settlement of disputes laid down in the nineteen-State proposal, involving a conciliation phase followed in the event of failure by an arbitration phase, must be regarded as a whole. That was of capital importance if the stability of treaty relations between States was to be safeguarded by means of a final settlement of all treaty disputes through an impartial organ.

80. It had been said that the earlier codification conventions did not provide for automatic, or indeed compulsory, settlement of disputes. That was most unfortunate, and the temptation must be avoided of accepting such conventions as precedents in that respect. As the President of the Conference had pointed out at the 6th plenary meeting, at the opening of the second session, a draft convention on the law of treaties was something entirely apart. It was therefore essential that a convention of that kind should be drafted in such a way that it was likely to be accepted by the majority of States. But at the first session it had been made clear that certain articles of Part V of the draft would make it difficult, if not impossible, for a large number of States to sign or ratify the convention, unless some method of settling disputes through an impartial organ were provided for.

81. The Danish delegation considered that the nineteen-State proposal of which it was a sponsor (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) solved the problem of the settlement of disputes in a manner which should be acceptable to all the members of the Conference. If that proposal were adopted, it would be possible to secure the broadly-based accession to the convention on the law of treaties which was essential to the security of future treaty relations between States.

The meeting rose at 1 p.m.

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## NINETY-FOURTH MEETING

*Friday, 18 April 1969, at 3.15 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* (continued)

1. Mr. AUGE (Gabon) said that Part V of the draft convention contained provisions that would permit a party to the convention to evade without difficulty any treaty obligation which had become burdensome to it and at the same time to refuse, by virtue of article 62, to reach an amicable settlement of its dispute with the other State. Article 33 of the Charter, to which article 62 of the draft referred, made no provision for an automatic procedure that could be set in motion against a State which refused, within a reasonable time, to reach a peaceful settlement.

2. Such provisions of the draft as article 46 on fraud, article 47 on corruption and article 50 on *jus cogens* could all give rise to difficulties of interpretation; at the same time, they were liable to introduce an element of insecurity in international relations unless provision were also made for machinery to enable a State affected by the suspension of a treaty to oblige the claimant State to prove its case before an impartial body. It was for those reasons that his delegation had joined in sponsoring what had now become the nineteen-State proposal for article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and

Corr.1 and Add.1 and 2). The proposal by Thailand for a new article 62 *ter* (A/CONF.39/C.1/L.387) would deprive any small State which concluded a treaty with a State making the reservation provided for in that proposal of all safeguards and his delegation would therefore vote against it. It would also oppose the Spanish amendment (A/CONF.39/C.1/L.391), which would be harmful to newly independent States like Gabon in that, for many years to come, they would not be in a position to appoint " persons of recognized eminence " for the purposes of article 1, paragraph 2, of the annex to the amendment.

3. Mr. WYZNER (Poland) said that his delegation had not been convinced by the arguments adduced in favour of compulsory jurisdiction with regard to the disputes dealt with in article 62.

4. The future convention on the law of treaties would not cover just one branch of inter-State relations; by laying down the general pattern of the law of treaties, it would have a direct bearing on practically every field of relations between States. The inclusion of a compulsory jurisdiction clause would therefore impose on the parties much heavier obligations than a similar clause in any other treaty. Furthermore, in view of the variety of questions that would be regulated by that convention, it was impossible to foresee what types of dispute would arise in the future and thus what procedure would be best suited for settling them. The principle of good faith required that the parties to a dispute should seek an early and just solution to it and the natural course was to leave to the parties directly concerned the choice of the means to settle any disputes that might arise on such questions as invalidity, termination, withdrawal or suspension.

5. The attitude of States towards international tribunals had not been encouraging; only forty-three States had accepted the optional clause in Article 36 (2) of the Statute of the International Court of Justice, and many of those had limited the legal effects of their acceptance by reservations which virtually deprived the clause of any practical value. The concept of compulsory jurisdiction had not been accepted in previous codification conventions, such as the four Geneva Conventions of 1958 on the Law of the Sea and the two Vienna Conventions of 1961 and 1963. The attitude of States towards compulsory jurisdiction resulted from the diversity of their political, social, economic and cultural structures and legal traditions, which made it doubtful that it would be possible to establish a judicial body enjoying the equal confidence of all of them. It was therefore unrealistic to try to include a compulsory jurisdiction clause in the present draft.

6. The amendments to establish new organs or a new system for the settlement of disputes were of doubtful value because they did not go to the heart of the matter. The means of settlement already available to States were sufficient to settle any kind of dispute, provided the States made use of them in good faith. The situation would not be changed by the creation of new organs; it would merely impose fresh burdens on the United Nations.

7. Indeed, it was hard to understand why the expenses of the proposed bodies should be borne by the United Nations and not by the parties to the dispute. Such a system could encourage States to enter into a dispute without any sound reason, and further aggravate the proliferation of United Nations bodies.

8. The well-balanced text of article 62 established adequate safeguards against the arbitrary termination or suspension of treaties and ensured the observance of the all-important *pacta sunt servanda* rule by imposing appropriate limits on the action of a State wishing to denounce a treaty. The key provisions of paragraph 3, which laid down that the parties to a dispute should seek a solution through the means indicated in Article 33 of the Charter, were broad enough to cover all means of settlement. At the same time, they left to the parties the choice of the most suitable procedure in the particular circumstances. Those provisions were not only compatible with international law, but they also took account of the existence of different social, economic, political and legal systems that prevented States from evaluating problems in the same way.

9. The establishment of so-called " objective bodies " to decide on the vital interests of a State was premature. At the present stage of international relations, the only solution was to leave the choice of means of settlement to the States concerned. On that point, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had arrived at the conclusion that States must seek an " early and just settlement " of their disputes by one of the means indicated in Article 33 of the Charter " or other peaceful means of their choice ".[1]

10. Some of the opponents of the formula embodied in article 62 painted an unduly pessimistic picture of the consequences of its provisions when they asserted that States would immediately free themselves of their treaty obligations by fabricating arguments based on allegations of error, corruption, change of circumstances or *jus cogens*. These fears were not justified. The future convention on the law of treaties, as an instrument of codification, would simply restate the existing law, changing established rules of customary law into more precise norms of treaty law. Article 62 was based on the contemporary practice of States; except for some of its procedural formulas, it simply restated what was the key rule of international law: that States must seek to resolve their disputes by peaceful means.

11. For those reasons his delegation would vote against the proposals for a new article 62 *bis*.

12. Mr. BINDSCHEDLER (Switzerland) said that he wished to make some comments of a legal character on some of the amendments which had been submitted.

13. He could not support the amendment by Thailand (A/CONF.39/C.1/L.387) for a new article 62 *ter*, because it would completely nullify the effects of

[1] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

article 62 *bis*; it would take away with one hand what was given by the other.

14. He supported the amendment by Japan (A/CONF.39/C.1/L.339) to paragraph 3 of article 62 because it stressed the role of the International Court of Justice and took account of the fact that the Court was a principal organ of the United Nations: it was the principal judicial organ, especially designated to settle international disputes.

15. He could not accept the Spanish amendment (A/CONF.39/C.1/L.391), which had two main defects. The first was that, under article 1 of its annex, the proposed " United Nations Commission for Treaties " would consist of representatives of Member States of the United Nations. There was no reason to limit in that manner the composition of that commission, which should be open to all the parties to the future convention on the law of treaties and not merely to those which were also Members of the United Nations. The fact that the commission was designated in that amendment as " a permanent subsidiary organ of the General Assembly " was immaterial. Many non-member States of the United Nations were members of subsidiary organs of the General Assembly, such as UNICEF and UNCTAD, and Switzerland had recently had the honour of presiding over the Trade and Development Board. Its second defect would be more difficult to remedy. Article 5 of the annex to the amendment drew a distinction between " legal " disputes and other disputes. But all the disputes that could arise from the application of the provisions of Part V would undoubtedly be legal disputes. Problems such as an allegation of fraud, or the invoking of a rule of *jus cogens,* were essentially legal in character. Perhaps the intention was to draw a distinction between non-political and political disputes, even if the latter also had a legal character. Experience, however, showed that such a distinction was extremely difficult to make and inevitably involved subjective factors; it was therefore wiser not to attempt to make it at all.

16. His delegation had given careful consideration to the nineteen-State proposal for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) but found it unduly complicated by comparison with the Swiss proposal (A/CONF.39/C.1/L.377). He saw little value in the establishment of a permanent list of conciliators, as suggested in paragraph 1 of annex I to the nineteen-State proposal, since under paragraph 2 (*a*) of the same annex it was open to the States parties to the dispute to choose a conciliator " from outside that list ". A further weakness of the proposed system was the provision for the appointment of two conciliators by every party to the dispute, one of them not of the nationality of the States concerned. Experience showed that any conciliator or arbitrator appointed by one of the parties to a dispute almost invariably espoused the cause of that party; nationality had little or no influence. He had knowledge of hundreds of cases of conciliation and arbitration and only knew of two in which a conciliator or an arbitrator had voted against the country appointing him. In such circumstances, it would inevitably be the fifth member of the proposed conciliation commission who would decide on the dispute. A situation of that kind was acceptable only if the umpire thus chosen enjoyed a very high standing and prestige. Examples could be given of disputes that had been settled to the satisfaction of all the parties by a single umpire; but an impartial award was much more likely to be obtained from three neutral conciliators than from a single umpire.

17. On the amendment by Ceylon (A/CONF.39/C.1/L.395), his delegation wished to reserve its position. At first sight, the provisions contained in the proposed article 62 *ter* seemed superfluous; the States parties to a treaty could always include in it whatever provisions they wished on the subject of the settlement of disputes and could agree on modes of settlement other than those set forth in article 62 *bis*, or they could even agree that there would be no procedure for the settlement of disputes.

18. As to the arguments put forward against the principle of the compulsory settlement of disputes, he was not impressed by the objection that the future convention on the law of treaties should not contain a clause on the compulsory settlement of disputes because no such clause was to be found in earlier codification conventions. But none of the existing codification conventions contained provisions such as those included in the present Part V. Many of those provisions embodied new rules which had never yet been applied and the consequences of which were very difficult to foresee. There was therefore ample justification for departing from the precedent of the other codification conventions and for including in the present draft a provision on the compulsory settlement of disputes.

19. Some delegations had directed their criticisms against the International Court of Justice, so he must point out that the Swiss amendment (A/CONF.39/C.1/L.377) did not provide for the compulsory jurisdiction of the International Court; it offered a free choice between recourse to the International Court of Justice and arbitration. A State which, for any reason, did not wish to submit a dispute to the International Court could avail itself of the more flexible system of international arbitration.

20. Other delegations had referred to the problem of possible failure to implement a decision of the International Court or of an arbitral tribunal. It had been suggested that, because of that possibility, provisions for compulsory adjudication or arbitration made little difference to a dispute. In fact, there was a marked difference between the situation before and after adjudication. Before the Court or tribunal had given its decision, the parties were still at the negotiating stage and could in good faith maintain conflicting points of view. After the judgement by the Court or the award by the tribunal, it was infinitely more difficult for one of the parties not to carry out an objective decision by the adjudicating body. In his long experience of such proceedings, he only knew of one single case of a State failing to carry out an international judgement or award.

21. The representative of Venezuela had described the unsatisfactory situation existing at present in respect

of international adjudication and arbitration. He had been much impressed by that representative's remarks, but could only reply that every effort should be made to take a step forward and to make some progress in the search for a sure means of settling international disputes.

22. Mr. AL-SABAH (Kuwait) said that the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) proposed to establish a permanent list of conciliators and to formulate rules for the establishment of conciliation commissions and arbitral tribunals. He would therefore like to ask the sponsors whether it was proposed to ignore the " Panel for Inquiry and Conciliation " which had already been established by the General Assembly under its resolution 268 D (III) — a panel which was to be available at all times to the organs of the United Nations and to all States, whether or not members of the United Nations. Procedure for compulsory conciliation could already be set in motion by making use of chapter I of the Revised General Act for the Pacific Settlement of International Disputes,[2] the efficacy of which had been restored by the General Assembly under its resolution 268 A (III).

23. The Spanish amendment (A/CONF.39/C.1/L.391) envisaged its proposed " United Nations Commission for Treaties " as a permanent subsidiary organ of the General Assembly. Was it intended to empower such an organ, by virtue of Article 96 (2) of the Charter, to request advisory opinions of the International Court of Justice on legal questions?

24. Mr. KOULICHEV (Bulgaria) said his Government was anxious to establish a satisfactory procedure for the settlement of disputes, in particular those relating to Part V of the convention. There should be sufficient procedural guarantees to ensure that the invalidity, termination or suspension of the operation of treaties was not arbitrarily invoked by States in order to escape from inconvenient treaty obligations. But such procedures must be consistent with the existing practice of States in the peaceful settlement of disputes. The text proposed by the International Law Commission in article 62, paragraph 3, of its draft provided a satisfactory solution, since it remained within the framework of Article 33 of the United Nations Charter. In Article 62 the Commission had achieved a delicate but just balance, and any attempt to upset it would threaten the success of the Conference.

25. His delegation was opposed to all the amendments for the inclusion of a new article 62 *bis*. All introduced various forms of compulsory jurisdiction as a final stage of the procedure for the settlement of disputes relating to Part V, a solution that was not acceptable to his delegation. Its opposition to that solution was not inspired by total rejection of the principle of compulsory arbitration, based on a notion of the absolute sovereignty of States that would rule out any such procedure, but by a realistic view of the role of compulsory jurisdiction in modern international relations and by the inherent characteristics of the convention on the law of treaties.

26. Although many States had paid lip service to the idea of compulsory jurisdiction in the post-war period, it had received much less support in practice, and the compulsory jurisdiction of the International Court of Justice, which the San Francisco Conference had refused to include in the United Nations Charter, was today accepted by less than a third of the Members of the United Nations, in many cases with substantial reservations. Compulsory jurisdiction was not included in any of the major codification conventions of recent years, covering the law of the sea, diplomatic and consular relations, and human rights, and its inclusion in the draft on arbitral procedure was one of the main reasons why that draft had been abandoned. Whatever the reasons for it, the reluctance of most States to submit to compulsory arbitration was a fact of life that must be recognized. Consequently many States which had supported the principle on other occasions had taken the more realistic view in relation to article 62, as evidenced by the debate on that article in the International Law Commission.

27. Inclusion of a clause on compulsory jurisdiction in the convention on the law of treaties would have the effect of extending the principle to all treaties of whatever character. Bulgaria was a signatory of a number of treaties that provided for compulsory arbitration because compulsory arbitration was appropriate in those cases, but many treaties touched on the vital interests of States, and had political aspects that made them entirely unsuitable for the application of such a procedure.

28. Consequently Bulgaria would oppose any amendment that introduced compulsory jurisdiction, and could not sign the convention if it included such a provision. Nor could it accept the amendments by Thailand (A/CONF.39/C.1/L.387) and Ceylon (A/CONF.39/C.1/L.395) because, although they provided an escape from compulsory jurisdiction, they recognized the principle, which Bulgaria regarded as an exception to the normal practice in the settlement of disputes.

29. He hoped that a formula might be found that would be acceptable to the great majority of States. His delegation was prepared to support any such formula, particularly if it were in the form of an optional protocol to the convention, a device adopted in many codification instruments of recent years.

30. Mr. ALVAREZ (Uruguay) said that his delegation maintained its oft-expressed view that the convention on the law of treaties should provide for the compulsory settlement of disputes by peaceful means, preferably through the compulsory jurisdiction of the International Court of Justice or, if that should prove impossible, through compulsory arbitration at the request of one of the parties.

31. His delegation had made it clear at the 68th meeting[3] that its amendment (A/CONF.39/C.1/L.343) to article 62 of the International Law Commission's draft was not intended to compete with any more

[2] United Nations, *Treaty Series*, vol. 71, p. 101.

[3] Para. 15.

ambitious proposals for a compulsory system of judicial settlement, and that it would come up for consideration only if it were found useful as a means to bring about an agreement between the opposing points of view.

32. Uruguay's attitude was derived from its legal traditions, which were founded on its ideas of international law and on a realistic view of international affairs. As far back as 1921 his country had accepted the compulsory jurisdiction of the Permanent Court of International Justice, and the declaration it had made at that time was still in force under Article 36 of the Statute of the International Court of Justice.

33. With regard to compulsory arbitration, Uruguay had made its position clear at the Hague Peace Conference of 1907 and had signed a number of international arbitration agreements with other States.

34. His country's realistic appreciation of the international situation was based on its view that the strength and safety of small countries could best be safeguarded by the application of the norms of international law and the setting up of machinery for the compulsory settlement of international disputes to which they could turn if all other means of settlement failed. Only thus would respect for the principle of the sovereign equality of States be ensured.

35. The Uruguayan delegation hoped that a proposal which reflected its position would commend itself to the great majority of the States represented at the Conference.

36. Mr. SHU (China) said his delegation attached great importance to the proposed new article 62 *bis*. In paragraph (1) of its commentary to article 62, the International Law Commission had said that it considered it essential that the draft should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty might be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation. But it had not included adequate safeguards against that possibility, or guarantees for the observation of the principle *pacta sunt servanda*. If the parties were unable to reach agreement through the means listed in Article 33 of the Charter, it would be dangerous to leave it to each party to take whatever steps it thought fit, and therefore some automatic procedure should be provided for such cases. His delegation favoured the idea of referring disputes arising from the application of Part V, especially from articles 50 and 61, to the International Court of Justice, as had been proposed by Japan (A/CONF.39/C.1/L.339). But if it were felt that the time was not yet ripe for all States to accept the compulsory jurisdiction of the Court, his delegation would support a two-stage procedure of conciliation and arbitration such as that proposed in the nineteen-State amendment. Perhaps it would be possible for them to combine the various amendments into a single text that would prove acceptable to the Committee.

37. Mr. ABED (Tunisia) said that his delegation was a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev. 3 and Corr.1 and Add.1 and 2) which provided a rational solution to the problem of the settlement of disputes between States, while safeguarding the interests of all. It had the merit of filling the gaps in article 62 and of being more explicit than Article 33 of the United Nations Charter, which merely described the courses of action open to the parties to a dispute.

38. With regard to the amendment submitted by Spain (A/CONF.39/C.1/L.391), contrary to what was stated in article 5 of the annex, disputes on such a matter could not be other than legal, since they would relate to the invalidity of a treaty or the suspension of its application. And surely the suggestion that the proposed commission should have power to decide as to the nature of a dispute would put an end to any chance of settling it. The amendment by Ceylon (A/CONF.39/C.1/L.395) dealt with a more general principle and the proper place for it would be among the final clauses of the convention.

39. Some delegations objected to a procedure for the compulsory settlement of disputes, arguing that it conflicted with the principle of the sovereign equality of States and was prejudicial to the interests of the smaller States. Neither argument could stand up to criticism. First, the principle of the sovereign equality of States was not absolute or unlimited; a State was free to limit its own sovereignty under the traditional rule *pacta sunt servanda* and, moreover, a State's sovereignty was limited by that of other States. Secondly, the interests of the smaller States were protected under the procedure proposed in the nineteen-State amendment by the provision that each party would appoint one of its own nationals to the body to be set up to settle disputes.

40. Mr. BAYONA ORTIZ (Colombia) said that his delegation agreed with the view that a gap had been left in the Commission's draft of article 62, and that it was for the Conference to fill that gap. Criticisms had been levelled at Article 33 of the United Nations Charter on the ground that it was nothing more than an invitation to States to make use of the means it enumerated. It was with these considerations in mind that, already at the first session, Colombia had joined in sponsoring an amendment to article 62 in the form of proposals for a new article 62 *bis*, which established procedures for conciliation and compulsory arbitration. He regarded the amendment as a notable contribution to the progressive development of international law.

41. He could not agree that international opinion was not yet ready to accept the principle of compulsory jurisdiction in the settlement of disputes. That view was sufficiently refuted by the number of States from all parts of the world that were supporting the introduction of the principle into the convention. There was no doubt that it was in the best interests of small States that the means of peaceful settlement of disputes should be improved. The rule of law was the only defence against the rule of force. The sponsors of the other amendments relating to article 62 held similar views, and he hoped in particular that it might be possible for the nineteen-State amendment and the Swiss amendment to be combined.

42. The keystone of international relations was good faith; why, then, should anyone be afraid of compulsory jurisdiction? The time had come to sink petty differences and establish a system that would ensure the peace of mind of all because it would be applicable to all. With good will from the great Powers, and the valuable assistance of the small Powers, old and new, the Conference could adopt a procedure for the settlement of disputes, long desired by many Governments, that could be regarded as a revolution in international law.

43. Mr. BLIX (Sweden) said that a number of States, including Sweden, had accepted various controversial rules set out in Part V of the draft convention on the express presumption that procedures for the settlement of disputes relating to those rules would be automatically available. The provisions in question were specifically article 49, under which a treaty was void if its conclusion had been procured by the threat or use of force; articles 50 and 61, under which a treaty was void if it conflicted with a peremptory norm of international law; and article 59, concerning the right to withdraw from or terminate a treaty because of a fundamental change of circumstances. The Swedish Government considered that those articles would represent important progress if they were combined with automatic means of settling disputes concerning their application in specific cases.

44. Article 62 provided only that in such cases the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter, but made no provision for cases when the parties to the dispute were unable to agree on the means of settlement, so that the unsatisfactory procedure of claim and counterclaim might be the only result. The Conference should remedy that situation, since otherwise the effect of the rules in Part V, which many delegations regarded as particularly progressive, might be not to advance the rule of law, but to undermine it. It would also be most regrettable if the convention should become less generally acceptable because no adequate solution had been found to the problems raised by the articles in Part V.

45. The nineteen-State proposal for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), was designed to provide such a solution. Some delegations would probably not consider it far-reaching enough and, in particular, would regret that the application of norms of *jus cogens* was not entrusted to a permanent judicial organ, such as the International Court of Justice. The Swedish delegation shared that point of view and had much sympathy with the proposals by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) but had nevertheless co-sponsored the nineteen-State proposal, because it considered that that proposal was more likely to be acceptable to other States which were not as yet prepared to rely on permanent judicial institutions for the application of Part V.

46. The Swiss representative had said that he found the nineteen-State proposal heavy and complicated, but the method of falling back on older institutions for conciliation and arbitration had certain disadvantages, one of which was the fact that many States had not taken part in the establishment of those institutions. A procedure involving a stage of conciliation before arbitration was of necessity somewhat heavy, but the three-stage procedure proposed in the nineteen-State amendment had definite advantages.

47. Those were, first, that the new article 62 *bis*, with its annex, left article 62 intact, including the full freedom of the parties to choose whatever method they wished to settle differences concerning the invalidity, termination or suspension of a treaty. The new article would be subsidiary to any procedure which the parties might be obliged to use under other instruments; that was the meaning of article 62, paragraph 4, which, with minor adjustments, would govern article 62 *bis*. Indeed, the parties were free to provide in a new treaty that the procedure in article 62 *bis* should not be applicable to that instrument; the Ceylonese delegation had submitted an amendment (A/CONF.39/C.1/L.395) which made that point explicit.

48. Secondly, the three-stage procedure — freedom to choose the means of settlement, conciliation, arbitration — would discourage misuse of the articles in Part V and obstruction of their application as well as provide the parties with an inducement to agree spontaneously on a method of settlement, since an obstructionist attitude to agreement was not rewarded. Moreover, it was likely that the existence of an arbitration procedure as a last resort would make the parties more inclined to make a success of the conciliation process. Some delegations had expressed scepticism about introducing the stage of conciliation and had held that the matter should be examined rigidly from the point of view of *lex lata*. For many of the disputes that might arise under Part V, however, an initial attempt at conciliation seemed the most appropriate method. That did not mean that the conciliation stage would be purely political, since Part V and the procedures in article 62 *bis* would not begin to apply unless one party invoked a provision in Part V and another party rejected the contention. There was then a legal dispute, which had to be examined by the conciliation commission, which would consist of lawyers capable of taking all the juridical aspects into account. But since their task was conciliation, they would not be limited to the legal aspects, and would be free to suggest any solutions which they thought could be accepted by the parties. The list of lawyers to be established would be a matter of great importance, since three of the five conciliators, including the chairman, were to be chosen from it. It would, of course, be quite different from the United Nations list of international lawyers who might be called upon to render assistance in the sphere of international law.

49. The Swiss representative had expressed misgivings over the composition of the conciliation commission, and considered that the appointment of two members by each of the parties would result in placing the neutral chairman in too authoritative a position, and that three neutral members would be preferable. But the position of the chairman in cases of conciliation was not nearly

as authoritative as it was in cases of arbitration; the chairman did not deliver judgement, but merely acted as the central member of a group which must co-operate to have any chance of success. In any case, those technicalities could be examined by the Drafting Committee if the nineteen-State proposal were approved.

50. Thirdly, his delegation believed that the availability of an arbitration stage was particularly important because of the very novelty of some of the provisions of Part V. Although it was true that the norms of *jus cogens*, and some aspects of the prohibition of the use of force, could not be defined in advance and must be allowed to develop in practice, it would be destructive if such development were to be left to take place by claim and counterclaim. The small States would then be placed at a disadvantage, for the principle of the equality of States was never better implemented than before an arbitration commission. Through arbitration, a body of practice might be created which would make for greater certainty as to what norms constituted *jus cogens* and as to what force vitiated consent.

51. Fourthly, some of the objections to the conciliation and arbitration procedures had been based on the ground that they were expensive. Of course, parties to arbitral and judicial procedures should keep a sense of proportion, but the cost of most arbitration procedures was certainly far less than that of a modern fighter plane. It had also been alleged that the arbitration procedure would take a great deal of time. That was true, but the time taken by arbitration often compared favourably with the time taken by the procedure of claim and counter-claim, which could drag on for decades and poison relations between two States.

52. Fifthly, the Swedish delegation considered that the procedures proposed in the nineteen-State amendment should apply only to treaties concluded after the entry into force of the convention on the law of treaties. Although that might be self-evident, it would be desirable to include an express clause against retroactivity in the final clauses or in the preamble. Of course, none of the rules of customary international law stated in the convention would be affected by such a clause, since they were applicable from the time at which they had come into being. Such a clause might make the conciliation and arbitration procedures and Part V as a whole more easily and generally acceptable.

53. The proposed article 62 *ter* submitted by Thailand (A/CONF.39/C.1/L.387) was completely unacceptable to his delegation, for its effect would be to transform article 62 *bis* into an optional protocol. If the progressive substantive articles of Part V were accepted, the progressive procedural provisions of article 62 *bis* must be accepted also. On the other hand, to reverse the Thai amendement and allow reservations to the substantive articles of Part V while prohibiting them to article 62 *bis* would also be unfair. The only equitable solution would be to prohibit reservations to Part V as a whole, provided article 62 *bis* was included in it. Perhaps the question should be dealt with at a later stage, in connexion with the thorny problem of reservations.

54. The Spanish amendment (A/CONF.39/C.1/L.391) contained some interesting features, but others were unacceptable. It did not seem possible in practice to have a large United Nations body operating as a conciliation commission, although that body might, of course, set up a special smaller commission. He had doubts, however, about the proposed method of electing the chairman of such a commission, by a majority vote in the larger body; it would be better to leave that to the Secretary-General. He had some sympathy for the idea that the commission might decide whether, if conciliation failed, the matter should be submitted for arbitration. The criterion laid down in the Spanish proposal was that the matter should be so submitted if the dispute was legal; but that criterion was hardly workable, for all disputes concerning the application of articles in Part V must surely be legal.

55. Mr. HARASZTI (Hungary) said that the commentary to the International Law Commission's text of article 62 showed that the Commission had reflected at length upon the procedure to be followed in settling disputes concerning the application of the provisions of Part V of the draft convention and had ultimately decided that the parties should resort to the means set out in Article 33 of the United Nations Charter. In voting for the approval of article 62 at the first session of the Conference, the Hungarian delegation had been aware that the text would not provide for the sastisfactory settlement of all possible disputes, but had supported it in the belief that it corresponded to the stage now reached in international law and was in conformity with contemporary practice; it therefore took realities into account.

56. The sponsors of proposals for a new article 62 *bis*, however, were not content with the International Law Commission's formula, but wished to introduce various procedures for conciliation, arbitration and compulsory judicial settlement. The Hungarian delegation could not support any of those proposals, for it believed that any attempt to introduce compulsory arbitration or jurisdiction would only mean that the convention would be unacceptable to a large majority of States.

57. In support of that argument, he said that it was noteworthy that the provisions on compulsory arbitration of the General Act of Geneva on the Pacific Settlement of International Disputes of 26 September 1928 [4] had remained a dead letter and that there had been very few accessions to the optional clause in Article 36 of the Statute of the International Court of Justice. Moreover, a number of accessions to the Statute had been so weakened by reservations that they no longer possessed even the appearance of binding obligations. Those examples showed that States were not prepared to accept compulsory arbitration or judicial settlement for all disputes which might arise between them and other States. The United Nations codification conferences of 1958, 1961 and 1963 had been wise not to insert provisions for compulsory judicial settlement or arbitration in the conventions they had drawn up. The

[4] League of Nations, *Treaty Series*, vol. XCIII, p. 343.

conventions resulting from the 1961 and 1963 conferences had been accompanied by optional protocols on the settlement of disputes; the number of States parties to those conventions would have been much smaller if those provisions had been incorporated in the conventions themselves.

58. Furthermore, the scope of the proposed article 62 *bis* was exceptionally wide, in that it covered all treaties and thus introduced arbitration and compulsory judicial settlement even in the case of political disputes. A dispute between a State which invoked article 59 and another State which rejected that contention would be essentially political, and it would be difficult, even impossible, for the International Court of Justice or an arbitral tribunal to rule on the applicability of the article. That objection applied equally to other provisions in Part V of the draft.

59. Mr. GONZALEZ GALVEZ (Mexico) said that his delegation did not consider that the question of choosing the best method of settling disputes arising from the application of Part V of the draft should be resolved by a vote, unless every possibility of arriving at a compromise between the two extreme views had first been examined. In his delegation's opinion, the best and most suitable solution would be one that which would enable a convention of such importance to be adopted by the largest possible number of States.

60. Many delegations, in considering the various aspects of the question of the settlement of international disputes, had come to the conclusion that the small countries should logically be the warmest supporters of compulsory methods of peaceful settlement. In 1955 the International Law Commission had submitted to the United Nations General Assembly a draft on arbitral procedure [5] which had received only lukewarm support from the majority of States that did not follow the traditional view of international law in the matter of State responsibility. At first sight it would seem that a weak country would welcome a clear statement of a rule that would be of universal application, since, in the event of a dispute with a great Power, recourse to compulsory arbitration would be the ideal solution for a weak country, as it ruled out the use of force and required compliance with that universal rule.

61. But it was undeniable that most small countries, especially those which had recently attained independence, had made clear their opposition both to compulsory arbitration and to the introduction of a strict arbitral procedure.

62. In his view, that was because agreement to submit a dispute to arbitration meant in the last analysis that a State was ready to accept application of the substantive international rules in force at a particular moment on the subject-matter of the dispute. The reason why the smaller and newer countries were not prepared to agree in advance to submit all their disputes to arbitration was that, generally speaking, they were not disposed to accept a number of the rules of the international law in force, quite apart from the difficulty of finding a system that would be free from political pressure.

63. The fact that few of the new countries had accepted the compulsory jurisdiction of the International Court of Justice was another aspect of their attitude of resistance.

64. Their refusal was not due to lack of confidence in the Court or to their limited interest in legal matters, but to their conviction that the set of rules which the Court would apply would not correspond to their needs, since those rules originated in the past and were based on the practice of States whose interests were different and indeed almost the opposite of those of the newer countries. If an important section of the international community was not prepared to accept many of the rules of international law, the machinery for the peaceful settlement of disputes would lack foundation. The first step was to realize that that state of affairs existed and to arrive at a clear understanding of it; the problem would not be solved by reproaching the new States and the medium-sized and small States for their lack of interest in law and bemoaning the fact that so few States had accepted the jurisdiction of the Court. As the Mexican jurist, Jorge Castañeda, had said, the remedy was to help those States to have access to the processes whereby international law was created. The fairer the new international rules that were formulated — and they would have to be fair rules, not merely legal rules reflecting practice — the more the new States would be ready to submit themselves voluntarily to those rules; and the best way of achieving that was unquestionably through international conventions in which all States would take part in the progressive development and codification of rules of conduct between States.

65. In the case of the present Conference, it was those countries, including Mexico, which should be most concerned to ensure that the Conference was a success. On the assumption that they were satisfied with the convention that was being adopted, it would merely be a question of deciding whether article 62 was sufficient or whether it should be supplemented by some of the proposals which had been submitted, although perhaps it would be safer to establish some system for the settlement of disputes arising from the application of Part V of the convention. Although for the time being he would not express an opinion on whether those amendments should be adopted, he wished to give his views on some of them, beginning with the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) introduced by the Netherlands representative. In his view, that proposal could be important if the following points were included.

66. First, it should be clearly stated that the conclusions of the proposed commission, with respect either to the facts stated or to points of law, would not be binding on the parties.

67. Secondly, it was important that the conciliation proceedings should be confidential, so as not to prejudge the arbitral procedure and any award that might be made, and he therefore thought it might be desirable

[5] See *Yearbooks of the International Law Commission, 1953*, vol. II, pp. 208-212, and *1958*, vol. II, pp. 83-86.

to omit the provision regarding consultation of other parties to the treaty from paragraph 3. Publication of the findings without the consent of the parties concerned should also be prohibited.

68. Thirdly, the arbitral tribunal's awards were more likely to be impartial if the tribunal consisted of five members instead of three, as proposed in the Japanese amendment, and if all were appointed by the parties or by the Secretary-General.

69. Fourthly, it might also be desirable to provide that any dispute concerning interpretation of the award should be submitted to the arbitral tribunal which had made the award. Moreover, it should be possible within a certain period to review the award before the same tribunal, if facts subsequently emerged of which the tribunal had been unaware at the time of making the award.

70. Fifthly, the arrangements for paying the expenses of the tribunal should be altered; at all events it should be stated more clearly whether those arrangements were to include some form of remuneration for the members of the tribunal. Several representatives had already referred to that point, which was more important than might at first sight appear.

71. The Spanish proposal provided an alternative method that was worthy of consideration, if the idea of arbitration was to be accepted, although some of the objections he had already mentioned also applied to that proposal. Precedents for the proposal were to be found in the Arbitration Treaty of 1811 between the United States and the United Kingdom, which in the end never entered into force because the United States Senate did not ratify it, and in the Revised General Act for the Peaceful Settlement of Disputes,[6] in that they had also included provisions for decisions on the legal nature of a problem to be taken by political bodies. That was an innovation which called for further reflection, and he might have occasion to revert to it in examining the other proposals on the subject.

72. The Japanese amendment (A/CONF.39/C.1/L.339) was technically sound, and should perhaps be given more careful study by the sponsors of other proposals on the matter.

73. Lastly, it seemed to him desirable to include a clause on the non-retroactivity of the convention, to be interpreted in the light of article 24. Such a clause might help to clarify the situation so far as the acceptance of a supplementary procedure to that set out in article 62 was concerned. He would however await the Committee's views about the desirability of including a clause on those lines in the preamble to the convention.

74. Mr. TSURUOKA (Japan) said that his delegation's views had already been clearly stated by the representative of Japan at the 68th meeting,[7] in introducing the Japanese amendment (A/CONF.39/C.1/L.339). His delegation still maintained the view that its proposal was the most appropriate formula for the settlement of disputes which might arise under the provisions of Part V of the Convention. His delegation did not wish to take up too much of the Conference's time by repeating the remarks it had made during the first session, but, in order to ensure that its way of thinking was fully understood, it wished to touch upon a few points which it considered to be of fundamental importance and which must therefore be taken fully into consideration in working out a satisfactory formula for that vital article.

75. First, it was essential that there should be a guarantee, as the last resort, for obtaining a just settlement of disputes, based on the objective judgement of an independent and impartial organ in cases where the parties to the dispute failed to arrive at a peaceful solution among themselves. Otherwise, the wicked would have their own way and might would prevail over right. Such a situation could not be said to be for the benefit of any *bona fide* claimant or defendant, as the case might be, particularly when they were small States, as had been pointed out by some previous speakers.

76. Secondly, the procedure for the settlement of disputes arising from Part V of the convention was fundamentally different in import from the procedure for the settlement of disputes in general. Part V related not to the interpretation or application of some provision of a particular treaty, but to the life and death of all treaties. Treaty relations constituted the very foundation of the international legal order. Unstable treaty relations must lead to serious disturbances in relations among States, and thus adversely affect international co-operation.

77. Thirdly, it should be emphasized that the so-called "compulsory" procedure for the settlement of disputes was proposed as a means available only as the final resort in the process of settling disputes. It was only in the unfortunate eventuality of all the other available methods having failed to bring about a settlement that the machinery was to be resorted to, thus guaranteeing the ultimate solution of a dispute which would otherwise have been left unsolved. The significance of the procedure lay not so much in its actual use as in its function as a safeguard. Its very existence would encourage the parties concerned to seek amicable settlement of their disputes, without actually resorting to the final procedure. It would also discourage States from making extravagant or arbitrary claims.

78. Fourthly, the Japanese delegation was well aware that some States might genuinely fear that a compulsory procedure for the settlement of disputes might create difficulties with regard to certain specific matters or situations. But it would be unfortunate if those considerations should mar one of the essential elements of a convention which was to govern relations between States for many years to come. What was essential for the Committee was to agree on the point of principle; technical questions could be settled later. For instance, the view expressed by the representative of Switzerland concerning the problem of costs was a constructive suggestion which could be pursued further.

79. What should be aimed at, in his delegation's view, was to make a success of the Conference by concluding

[6] United Nations, *Treaty Series*, vol. 71, p. 101.

[7] Paras. 2-8.

a really worth while convention on the law of treaties by which future treaty relations would be regulated in a just and satisfactory manner for long years to come.

80. Mr. WERSHOF (Canada) said that in his delegation's opinion the ideal method of dealing with disputes relating to the application of Part V of the draft convention was the one set out in the proposals submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339), for it was particularly appropriate for a convention fundamental to the law of nations to recognize the role of the International Court of Justice as the judicial organ of the United Nations system. His delegation would therefore support those proposals if they were put to the vote.

81. The Spanish proposal (A/CONF.39/C.1/L.391) had some commendable features, but it was the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) that seemed the most suitable of the proposals providing for arbitration, as opposed to adjudication by the Court. If the Swiss and Japanese proposals were not accepted, the Canadian delegation would support the nineteen-State proposal, particularly since the representative sponsorship of that text led to the assumption that it might attract wide support.

82. The essential point was that a procedure for automatically available third party adjudication was an essential accompaniment to the provisions of Part V of the draft. In his view, Canada would find some difficulty in accepting a convention which included a Part V along the lines already approved by the Committee but did not include provision for the automatic independent adjudication of disputes concerning invalidity and termination. Indeed, at the first session of the Conference, many delegations, including his own, had expressly stated that their acceptance of certain articles in Part V was conditional on the acceptance of satisfactory adjudication procedures.

83. Finally, his delegation could support the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1), provided the nineteen-State proposal was accepted, and also the proposal by Ceylon for a new article 62 *ter* (A/CONF.39/C.1/L.395).

84. Mr. SAMAD (Pakistan) said that incorporation by reference of Article 33 of the United Nations Charter into article 62 provided no automatic or compulsory means of settlement of disputes. In the absence of agreement betwen the parties concerned, there could be no settlement. Any subjective interpretation of treaty rights and obligations constituted a threat to peace and to the stability of treaty relations. Pakistan therefore supported the proposals for compulsory procedures for the settlement of disputes relating to Part V, especially those concerning articles 50 or 61, because peremptory norms of general international law must be settled at the highest judicial level, which meant by the International Court of Justice. Such questions could not be left to the subjective judgement of individual States.

85. Some speakers had argued that many international conventions did not include provisions for compulsory jurisdiction, but the draft convention was a different kind of instrument, whose purpose was to regulate the international law on treaty relations. The Conference should be guided not by past misconceptions, but by the need to find common ground in the conditions of the future.

86. Fears had been expressed that compulsory arbitration decisions might be biased, or take account of extra-legal considerations. In fact a decision by a third party was more likely to be objective, since unless the two parties concerned were equally powerful, failure to agree would mean a unilateral decision by the more powerful, and might would take the place of rule of law. Nor did Pakistan accept the view that agreement on a procedure for the settlement of disputes with other States could in any way impair the sovereignty of a State.

87. His delegation accordingly supported the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). It would, however, suggest an amendment to paragraph 6 of annex I, in the form of an additional sentence providing that, pending its final decision and in order to avoid irreparable damage, the tribunal might, at the request of any party to the dispute, order such measures as might be suitable in the circumstances of the case, including where appropriate the suspension of the operation of the treaty in whole or in part as between the parties to the dispute. Under the terms of article 39, already approved, the treaty would continue in force during the compulsory settlement procedures. If the sponsors of the nineteen-State proposal could accept that amendment, Pakistan would be able to join them.

88. His delegation was prepared to support the Spanish proposal for a "United Nations Commission for Treaties" (A/CONF.39/C.1/L.391), but preferred the nineteen-State amendment. It also supported the Japanese amendment, referring disputes relating to articles 50 or 61 to the International Court of Justice (A/CONF.39/C.1/L.339). In principle it supported the amendment by Ceylon (A/CONF.39/C.1/L.395) but could not support the amendment by Thailand (A/CONF.39/C.1/L.387), which would nullify the effect of article 62 *bis*.

The meeting rose at 6 p.m.

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## NINETY-FIFTH MEETING

*Monday, 21 April 1969, at 10.50 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* (continued)

1. Mr. HOSTERT (Luxembourg) explained that the purpose of his delegation's amendment (A/CONF.39/

C.1/L.397) [1] was to enable States to exclude from the application of the provisions of Part V of the convention any State which might make reservations to the provisions of article 62 *bis*. Part V expressly stated the rules of substantive law concerning the invalidity of treaties or the cessation of their effect, but some of the provisions which introduced innovations had not yet been clearly defined. For instance, at what point did the more or less admissible pressures accompanying all negotiations cease, and where did the unlawful coercion which vitiated a treaty begin? What exactly were the peremptory norms of international law? At what point did an ordinary principle generally accepted by the international community become a peremptory norm, and who was competent to decide that that qualitative change had taken place? In short, there were still a number of uncertainties, which constituted a serious threat to the stability of treaty relations.

2. It was highly doubtful whether States which had made a bad bargain and wished to rid themselves of inconvenient commitments would show good faith in the interpretation of ideas which so far were still vague. The considerable authority of the present convention might thus be invoked as a cover for the use of force, and international law would be twisted to serve the purposes of power politics. At the present stage of international relations, the only remedy for such a situation seemed to be a procedure of arbitration or adjudication, as proposed by various delegations in article 62 *bis*. It was hard to see how ideas that were as yet ill-defined could come to form a coherent body of law that would be applicable to every situation, unless a considerable effort had been made to apply them to cases, and that could be done only by arbitrators or judges. Since the most powerful parties always had at their disposal certain means of exerting pressure whose effect tended to diminish in the course of an arbitral or judicial procedure, those procedures would seem particularly important for small or economically weak countries.

3. It had been argued that such procedures were incompatible with State sovereignty, but it should be borne in mind that the real restriction on sovereignty occurred at the stage when treaties were concluded rather than at the stage of arbitral or judicial procedure, which was merely the consequence and complement of conclusion. At the same time, the hesitation of certain newly-independent States to accept settlement procedures evolved by the European countries was quite understandable; the Luxembourg delegation would therefore support either the Swiss amendment (A/CONF.39/C.1/L.377) or the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

4. The Luxembourg delegation considered that the convention would not mark any real progress unless the novel provisions of substantive law included in Part V were accompanied, as they must be, by procedural provisions for their implementation which were equally original. The balance of Part V would surely be upset by permitting reservations only to the procedural safeguards. If certain States acted in that way, it was essential to make it possible to exclude the States making the reservation from the application of the whole of Part V; they would thus be unable to interpret certain new concepts unilaterally. The summary records of the first session seemed to show that the connexion which the Luxembourg delegation had tried to establish between the different types of provisions in Part V had also been brought out by other delegations. If his amendment were adopted, the provisions of Part V would have a dual character: they would retain their full legal effect in the relations between States bound by a commitment to submit to arbitration or judicial settlement, but in relations with other States only the rules of general international law would be applicable, and Part V of the convention would then merely provide directives and guidance.

5. Mr. BRAZIL (Australia) said that Part V, which proposed a wide variety of grounds on which the invalidity of a treaty or its termination or suspension might be claimed, clearly represented a major step in the progressive development of international law. It was necessary to consider the procedural and related requirements which must accompany such a step.

6. The Australian delegation thought it should be clearly stated that treaties were presumed to be valid and in force according to their tenor. In paragraph (1) of its commentary to article 39, the International Law Commission had noted the desirability of underlining in Part V, as a safeguard for the stability of treaties, that the validity and continuance in force of treaties was the normal state of things. At the first session, some drafting changes had been adopted to make the draft articles even more expressive on the vital point of the presumption of the continuance and validity of treaties, and it would be appropriate to refer again to that presumption in connexion with article 62 *bis*.

7. The presumption of validity and continuance was an important matter. The invalidity, termination or suspension of treaties could never be left to unilateral assertion but must be established by the party making the claim of invalidity, termination or suspension. That was the meaning to be ascribed to the words " the invalidity of which is established ", which appeared in article 39 of the Commission's draft and were to be found in article 65 as approved by the Committee of the Whole at the first session.

8. But it was not possible to speak realistically of the establishment of the invalidity or termination of a treaty unless effective procedures were provided to deal with disputes that arose. In the absence of possible resort to a binding decision, the matter was left to assertion and counter-assertion and the word " established " which appeared in the draft convention would be illusory.

9. His delegation considered that article 62 *bis* should only apply to treaties concluded after the convention came into force. That opinion followed not only from the principle of non-retroactivity laid down in article 24 of the draft convention, but also from the fact that the whole of Part V, as a major step in the progressive

[1] An amended version (A/CONF.39/C.1/L.397/Corr.1) was submitted later.

development of international law, should only be applicable to future treaties.

10. In that connexion, the Conference should adopt the suggestion made by the Swedish representative at the 94th meeting [2] on the possibility of inserting an express reference to the non-retroactivity of the provisions of the convention relating to the compulsory settlement of disputes. That reference would be without prejudice to the possible application of any rule in Part V to existing treaties, provided that rule was demonstrably part of customary international law.

11. In order to be effective, settlement procedures must provide for a binding judicial or arbitral decision if the parties were unable to agree on a settlement, and the Australian delegation would decide its attitude to the proposals before the Committee in the light of that requirement.

12. The Swiss proposal (A/CONF.39/C.1/L.377) had the merit of expressly recognizing the presumption of validity and continuance of treaties, especially in paragraph 3.

13. The Japanese proposal (A/CONF.39/C.1/L.339) also stressed the presumption of validity and continuance, and had the additional merit of taking into account the very special problems raised by the doctrine of *jus cogens,* on which articles 50 and 61 of the draft were based. The Australian delegation wondered, however, whether even the International Court of Justice, although it was the principal judicial organ of the United Nations, would be able to cope with the special and novel problems that would be involved in the application of a doctrine of *jus cogens* of unspecified content. Nevertheless, the Australian delegation whole-heartedly agreed with the approach of the Japanese proposal.

14. His delegation was disappointed that none of the proposals for article 62 *bis* dealt comprehensively with the practical problem of the provisional measures that might need to be taken in the case of a breach of the treaty under article 57. The United States amendment to article 62 (A/CONF.39/C.1/L.355) submitted at the first session, especially the new paragraph 5, contained interesting and constructive suggestions in that regard.

15. The nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) omitted some important features, but was a constructive proposal, and it might serve as a basis for the widest possible agreement on the subject of settlement procedures. Moreover, it had the advantage of providing, in the last resort, a binding decision in the case of a dispute.

16. The Australian delegation was not in favour of the Spanish proposal (A/CONF.39/C.1/L.391), under which the possibility of arbitration would depend on a decision, by a body elected by the principal political organ of the United Nations, as to whether the dispute in question was legal or political in character.

17. For the same reason, his delegation could not support the Thai proposal (A/CONF.39/C.1/L.387). The Ceylonese amendment (A/CONF.39/C.1/L.395) was interesting, but he wondered whether it was really necessary, since the parties to a treaty might always decide to exclude the application of article 62 *bis* to that treaty.

18. His delegation believed that the insertion of a clause on compulsory settlement was an indispensable improvement to Part V of the draft.

19. Mr. DELPECH (Argentina) said that in his delegation's view article 62 as drafted by the International Law Commission and approved at the first session of the Conference provided a wide range of flexible procedures for the peaceful settlement of international disputes. His delegation therefore considered that the article was in principle a satisfactory means of regulating the procedural machinery of Part V of the draft articles. However, that did not mean that his delegation would not give full consideration to the proposal for the inclusion of an article 62 *bis* having sufficient flexibility to leave open the way for solutions calculated to allay the misgivings of all those who desired the success of the convention on the law of treaties.

20. Mr. YAPOBI (Ivory Coast) said that his delegation was one of the sponsors of the amendment proposing a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). That article had given rise to objections which, in the view of his delegation, were not valid. The first was that it infringed the principle of the sovereign equality of States. There were no grounds for that assertion; what was the sovereignty of a State if not the freedom to contract rights and obligations? That freedom was the positive manifestation of the sovereignty of a State. It had also been asserted that the article was likely to disturb international peace and the relations between States. On the contrary, the clear definition of rights and obligations should surely facilitate relations among States. In civil law, procedure was the guarantee of social peace and of all political progress; in international law, to give a clear definition of procedures was to guarantee the stability of inter-State relations. Attention had also been drawn to the dangers of the article for small countries, but in fact it was law which guaranteed the freedom and independence of the new countries. The introduction of compulsory adjudication could not conflict with the interests of newly-independent countries, which were unable to fall back on force. It could not be left to the great Powers to decide whether a clause in a treaty was valid or not.

21. The Japanese amendment (A/CONF.39/C.1/L.339) should in principle have been warmly received by the Ivory Coast delegation, but his delegation's attitude was above all realistic, and it could not accept the jurisdiction of the International Court of Justice after the decision that that body had taken on the South West Africa question.

22. The Swiss amendment (A/CONF.39/C.1/L.377) was an improvement on article 62, since it provided for compulsory arbitration. However, the Ivory Coast delegation believed that such a procedure should be in two stages, consultation and arbitration. Consequently it considered that amendment inadequate.

[2] Para. 52.

23. His delegation could not support the Spanish amendment (A/CONF.39/C.1/L.391), because it could not accept the distinction between legal and political factors. Even if the reason underlying a claim of invalidity was political, the considerations invoked for that purpose were legal in nature. Consequently that distinction was not essential.

24. The amendments by Thailand (A/CONF.39/C.1/L.387) and Ceylon (A/CONF.39/C.1/L.395) were not acceptable, since they robbed article 62 *bis* of its substance.

25. His delegation could not support the Luxembourg amendment (A/CONF.39/C.1/L.397) either, since its effect would be to allow any one who wished to do so to evade accepting Part V of the convention. The law of treaties was a single whole, and Part V was the logical consequence of a system of peremptory norms of international law.

26. The Ivory Coast delegation hoped that the Committee would adopt the nineteen-State proposal, or else would find a compromise that would make it possible to maintain Part V, at the same time reinforcing it by some suitable procedure.

27. Mr. SMALL (New Zealand) said that the future convention must contain a provision for the operation of reasonable machinery to ensure the objective settlement of disputes arising from the implementation of Part V. New Zealand's future support of the convention would turn substantially on the solution to the problem of a fair procedural balance in Part V.

28. Article 33 of the United Nations Charter did not provide adequate safeguards, and it was difficult to see how it could protect the interests of small States in the practical application of Part V of the draft.

29. The New Zealand delegation supported the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339), which the international community could not, in all conscience, decline to support. Moreover, there was no convincing rebuttal for the notion inherent in the Japanese amendment, namely that in the event of a substantial difference of opinion between States, the ultimate determination of the existence of peremptory norms of international law was properly the task of the International Court of Justice as the judicial organ of the United Nations.

30. His delegation also supported the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which, while not offering a perfect solution, deserved the very fullest consideration as a compromise.

31. If some such procedure as that provided in those amendments was not acceptable to governments, it might well be asked whether the international community had reached the stage of development which the International Law Commission had reflected in some parts of the draft articles.

32. His delegation could not support the Spanish amendment (A/CONF.39/L.391) because it doubted the feasibility of applying the system it proposed.

33. The amendment by Thailand (A/CONF.39/C.1/L.387) was also unacceptable, because it negated the idea of a standing provision of last resort for the peaceful settlement of the disputes to which article 62 related.

34. On the other hand, his delegation supported the Swiss proposal (A/CONF.39/C.1/L.393/Corr.1) to include a new article 62 *quater* in the draft.

35. U BA CHIT (Burma) said he did not share the fears of certain representatives that the provisions of Part V might operate to the detriment of small and weak States if they were not accompanied by a provision for the compulsory settlement of disputes.

36. It was true that the application of those provisions might give rise to serious controversies. But the parties to a dispute would be able to work out a solution through the means indicated in Article 33 of the United Nations Charter if they were true to the obligations of good faith implicit in their treaty relations. There was, of course, nothing to prevent the parties from resorting to arbitration or judicial settlement if they so decided by mutual consent.

37. Obviously, certain parties might arbitrarily invoke various grounds for nullity, termination or suspension of the operation of a treaty to rid themselves of inconvenient treaty obligations. However, it was to be hoped that in a world in which States were increasingly interdependent and their interests were interrelated, no State, no matter how powerful, would venture to take such a step. In practice, many political and other considerations would deter States from doing so. If however a State disregarded such considerations and refused to assume obligations deriving from treaty relations, was it possible to say for certain that the procedure for compulsory arbitration or adjudication would be of much avail?

38. The Burmese delegation believed that the procedural safeguards provided by the International Law Commission were adequate and that, as the Commission had stated in its commentary, article 62 represented the highest measure of common ground that could be found among Governments. The Burmese delegation would therefore vote against the proposed new article 62 *bis*.

39. In his delegation's view, reservations to the convention on the law of treaties should be permitted if they were not incompatible with its object and purpose. Bearing in mind the large number of potential participants and their very diverse cultural, political and economic backgrounds, it would be readily appreciated that some of them, for one reason or another, might not be able to accept the convention without making a reservation to certain of its provisions. The effect of such a reservation on the general integrity of the convention could only be very slight. His delegation believed that in order to encourage the participation of the largest possible number of States, they should be given the power to make reservations. If a spirit of tolerance and mutual comprehension did not prevail, the convention on the law of treaties might become a restricted multilateral treaty.

40. Mr. TODORIC (Yugoslavia) said that the Conference should concentrate on the future, for its task

was not only to ensure the future stability of treaty relations, but also to make a contribution to the permanent development of friendly and peaceful relations among States.

41. An effort should be made to reconcile the notions embodied in the various amendments, which were based on different legal systems, and to reach a general agreement both to ensure the adoption of a convention on the law of treaties and to arrive at a system of impartial and pacific settlement of disputes arising between sovereign and equal States.

42. The codification of the law of treaties was something unique in the history of international law and international relations. Obviously, the task could not be carried out unless all delegations made a joint contribution. The international community needed a new system of law, more effective and more perfect than that which had hitherto prevailed, and one in conformity with the purposes and principles of the United Nations.

43. There was no doubt that a large number of delegations did not favour compulsory arbitration and compulsory adjudication. Consequently, a formula must be found that could be accepted by all States so that the future convention on the law of treaties might meet with universal acceptance.

44. In the absence of a formula acceptable to all countries, the Yugoslav delegation would vote for the solution suggested by the International Law Commission.

45. Mr. SINCLAIR (United Kingdom) noted that the fervour and enthusiasm with which some delegations had defended some of the more controversial grounds of invalidity embodied in Part V of the convention at the last session had been replaced by hesitation and scepticism in the debate on article 62 *bis*.

46. The Venezuelan representative had expressed the most profound pessimism about the prospects for international adjudication. The United Kingdom delegation, although conscious that less than half the States Members of the United Nations had made declarations conferring jurisdiction upon the International Court of Justice, did not share that pessimism. In fact, it was encouraging to note not only that new declarations had been made but also that some States had recently reconsidered their declarations with a view to limiting their reservations to the minimum and thereby increasing the range of disputes capable of being determined by the Court.

47. In reply to the Venezuelan representative, who had reproached the United Kingdom for including in its declaration a provision enabling it to withdraw the declaration at any time, he wished to make it clear that it was that very provision which had enabled his Government to replace its 1963 declaration by a new declaration, which had taken effect on 1 January 1969. That new declaration reduced the number of reservations from eight to three, thus materially extending the scope of the jurisdiction exercisable by the Court as far as the United Kingdom was concerned. The allegations that no major Power was prepared to accept extensive obligations in the field of the peaceful settlement of disputes were therefore surprising. The United Kingdom had amply demonstrated, by deeds far more than by words, that it was prepared to accept advance obligations to submit disputes involving questions of international law to international adjudication.

48. He had carefully avoided the use of the term compulsory jurisdiction of the International Court of Justice because international law knew no compulsory jurisdiction in the sense of an obligation arising *ipso jure* for a State to submit to the determination of a dispute by an international organ. Jurisdiction always depended on consent, whether given *ad hoc* in relation to a particular dispute or given in advance in relation to certain categories of disputes. An advance undertaking by a State to accept a third-party decision could not be regarded as incompatible with the principle of sovereign equality.

49. Replying to the Mexican representative, he said that the draft convention on the law of treaties had been prepared with the active collaboration and participation of all States members of the international community. Consequently, it could not be held that in the present case States were being asked to accept rules of substantive law in whose formulation they had taken no part.

50. He wished to remind the opponents of the new article 62 *bis* that it did not apply to disputes concerning the interpretation and application of treaties where no question of the validity, termination or suspension of operation of the treaty arose. What was at issue was a narrow, although profoundly important, category of disputes concerning grounds of the invalidity, termination or suspension of the operation of treaties. It was only right that in those circumstances there should be stringent safeguards to permit justified claims of invalidity to be upheld and unjustified ones rejected. No responsible government would be willing to accept the risks of abuse if such safeguards were not included in the convention.

51. The United Kingdom delegation believed that the possibility of recourse to a pre-established settlement procedure to solve disputes concerning the provisions of Part V was in the interests of all goverments. The advantages of that solution had been expounded in the report of an independent study group on the peaceful settlement of international disputes set up in the United Kingdom by the David Davies Memorial Institute of International Studies. The report pointed out, firstly, that the existence of a prior agreement whereby the parties accepted conciliation, arbitration or judicial settlement had the effect of lowering the temperature of a dispute, since it became *sub judice* as soon as it was referred to a commission or court. Secondly, by virtue of such an advance agreement, conciliation, arbitration or judicial settlement became established as part of the normal structure of the relations between the two parties, so that their Governments were less exposed to attack politically if the outcome of the dispute was not all that was desired. Thus an agreement for compulsory settlement by any of those means could help the Governments concerned to preserve friendly

relations if an incident arose. In the case of multilateral treaties, the parties became the uncontrolled interpreters of the treaty if there was no jurisdictional clause; that meant the risk of divergent or even contradictory applications of its provisions. A jurisdictional clause therefore had the advantage of guaranteeing some measure of coherence in the application of a treaty. His delegation was in full agreement with all those sentiments.

52. The United Kingdom's general approach to article 62 and to the proposals for the settlement of disputes relating to Part V had been carefully outlined by the Chairman of the United Kingdom delegation at the 71st meeting.[3] He would therefore confine himself to examining the proposals before the Committee. The most satisfactory was that submitted by the delegation of Japan (A/CONF.39/C.1/L.339). It was surely right that the establishment of a constant jurisprudence concerning the existence or content of norms of *jus cogens* should be entrusted to the International Court of Justice. Such a constant jurisprudence could not easily be established by a series of arbitral awards in individual cases. The United Kingdom would also vote for the Swiss proposal (A/CONF. 39/C.1/L.377).

53. The nineteen-State proposal (A/CONF.39/C.1/ L.352/Rev.3 and Corr.1 and Add.1 and 2) had certain advantages and certain disadvantages. Its main attraction was that it interposed a stage of conciliation before a stage of arbitration.

54. In the United Kingdom delegation's opinion, many of the disputes which might arise out of the application of Part V of the convention could yield to a process of conciliation, for it offered each of the parties full knowledge of the opponents' case, it took account of the susceptibilities of Governments, and it left the parties full freedom of action in that they could reject the settlement proposed by the conciliators. But it was precisely for that last reason that a further stage of automatic arbitration was essential if the conciliation procedure failed. Of course, it must be admitted that the procedures proposed were cumbersome and complex, but experience showed that the mere existence of automatically available procedures resulted in their being used by Governments only on rare occasions and acted as an inducement to them to settle difficult problems in a spirit of reasonableness.

55. On balance, therefore, his delegation believed that the advantages of the nineteen-State proposal outweighed its disadvantages and would support it, subject however to three comments. Firstly, it would wish it to be made explicit that a treaty would remain in force and in operation throughout the duration of the dispute, though without prejudice to the powers given to the conciliation commission to indicate measures likely to facilitate an amicable settlement. Secondly, it would be well to take into account the suggestions relating to the confidential character of the conciliation process and to the need to provide that disputes on the interpretation of arbitral awards should be decided by the arbitral tribunal. Thirdly, it was to be hoped that the scope of the first sentence of paragraph 4 of the annex could be strengthened, since it did not seem to cover adequately the case of provisional measures.

56. The proposal by Ceylon (A/CONF.39/C.1/L.395) for a new article 62 *ter* also merited support; likewise the proposal by Switzerland (A/CONF.39/C.1/L.393/ Corr.1) for a new article 62 *quater*. The impression should not be conveyed that article 62 *bis* would or might override the provisions in force as between the parties relating to the settlement of disputes.

57. With regard to the Spanish proposal (A/CONF.39/ C.1/L.391), his delegation considered that, though it was interesting and constructive in certain respects, it raised some doubts as to the practicability of a " United Nations Commission for Treaties " undertaking conciliation functions and also as to the distinction between legal and political disputes. Like other delegations, the United Kingdom delegation believed that the amendment by Thailand (A/CONF.39/C.1/L.387) would, if adopted, destroy the whole essence and purpose of article 62 *bis*.

58. With regard to the Swedish representative's suggestion, there could be little doubt that a clause explicitly denying retroactive effect to the provisions of the convention would help to allay doubts and anxieties concerning the application of article 62 *bis* to existing disputes about existing treaties. It would, however, have to be stressed in addition that such non-retroactivity would be entirely without prejudice to the application of the rules of customary international law reflected in the convention to treaties concluded before it entered into force.

59. It would be preferable to consider the problem of reservations mentioned by the Swedish representative at the same time as the final clauses.

60. The United Kingdom delegation attached great importance to the provision of viable and satisfactory third party procedures for settling disputes arising out of Part V of the convention. At the first session doubts had been expressed as to the way in which various provisions, which were obscure both in substance and language, would be applied in practice, especially with regard to the scope and content of such controversial concepts as *jus cogens* reflected in articles 50 and 61. His delegation was still concerned about the threat to the stability of treaty relationships represented by such vague and indeterminate grounds of invalidity. The United Kingdom Government believed that the establishment of satisfactory procedures for the settlement of disputes was an essential counterbalance to the potentially disruptive effects of the articles relating to the invalidity, termination and suspension of the operation of treaties. If such procedures were not provided, the United Kingdom Government would not be in a position to accept the convention.

61. The participants in the Conference, united in an ambitious endeavour in the field of codification and progressive development of international law, should not forget that the Preamble of the United Nations

[3] Paras. 22-36.

Charter recorded the determination of the peoples of the United Nations to " establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ". They should therefore unite in a determination to produce a convention on the law of treaties incorporating all necessary safeguards against abuse.

62. Mr. BHOI (Kenya) said that at the first session his delegation had expressed support for draft article 62 and had drawn attention to the difficulties which the compulsory settlement procedures in article 62 *bis* could cause. To a large extent, those difficulties still remained at the second session.

63. At the international level, all States were under an obligation to seek a peaceful settlement to any dispute by the various methods laid down in Article 33 of the United Nations Charter, which specified those methods without assigning priority to any particular one and without making the settlement procedure compulsory.

64. Article 33 of the Charter was delicately balanced. The International Law Commission had specifically mentioned it in the text of article 62 which, as the Commission had said in its commentary, " represented the highest measure of common ground that could be found among Governments as well as in the Commission ".

65. Furthermore, the history of the compulsory settlement of disputes arising out of the application of treaties had not been very encouraging. The procedure was lengthy and clumsy, as the record of the Permanent Court of International Justice showed; it had settled only about thirty cases in all. And it would be difficult to name any recent decisions which testified to the success of international arbitral procedures. The contemporary state of compulsory adjudication also left much to be desired; as many speakers had pointed out, less than half the States Members of the United Nations had so far accepted the compulsory jurisdiction of the International Court of Justice, and some of them had accompanied their acceptances with reservations which cast doubts on the real usefulness of the Court. Moreover, the Court was conservative and might apply a law which no longer met the interests of new States, or it might deny justice on purely technical grounds, as in the *South West Africa* cases.

66. States were also reluctant to submit their disputes to judicial or arbitral bodies because vast areas of international law were still imprecise, and such bodies might prove inadequate; institutions did not always develop parallel with the development of the law.

67. It should also be borne in mind that several major codification conferences had already taken place, but none of the important conventions they had prepared, such as the Conventions on the Law of the Sea or the Vienna Conventions on Diplomatic Relations and on Consular Relations, contained any provision for the compulsory settlement of disputes.

68. That being so, he found it difficult to understand why there was so much insistence on providing for a compulsory settlement procedure in the convention on the law of treaties. By their very nature, the disputes arising out of the application of Part V of the convention would not be amenable to settlement by either a court or an arbitral tribunal. Some disputes resulting from the application of technical or humanitarian treaties would probably not lend themselves to that kind of settlement, and certain disputes might relate not to the convention, but to another treaty, for example in the context of a political dispute. For that reason, no adjudication procedure should be adopted. The new convention should not override the wishes of the parties as expressed in existing treaties, nor should it impose settlement procedures on them which they had not expressly accepted or which, in certain cases, they had even rejected.

69. It should also be realized that compulsory settlement procedures would not necessarily eliminate conflicts and might even complicate them. What would happen if a party to a dispute did not implement the arbitral award, and what recourse would lie against it? Obviously the only appeal possible in such cases would be to the principle of good faith, the principle which was laid down in the form of the *pacta sunt servanda* rule and which was expressly recognized by the Commission itself in its commentary to article 62. It was the duty of the parties to a treaty to respect that principle, regardless of any provision on the compulsory settlement of disputes.

70. From a practical point of view, a compulsory settlement procedure might be extremely costly to the parties, even though the sponsors of the revised nineteen-State amendment had covered that point by providing that the expenses of the arbitral tribunal should be borne by the United Nations.

71. With regard to the amendments before the Committee, he could not accept the Spanish amendment (A/CONF.39/C.1/L.391) which proposed an excessively complicated and cumbersome procedure, nor the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339). As between the amendments by Ceylon (A/CONF.39/C.1/L.395) and Thailand (A/CONF.39/C.1/L.387), he had a marked preference for the Ceylonese proposal. The Luxembourg amendment (A/CONF.39/C.1/L.397) was interesting, but required further study.

72. The nineteen-State amendment in its revised version (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) was a great improvement on what it had been previously. The passages dealing with compulsory conciliation were now worded in a form acceptable to several delegations, including his own. Consequently, Kenya did not reject the nineteen-State amendment outright, since it might ultimately represent the most viable formula for a compromise.

73. Mr. ROMERO LOZA (Bolivia) said he would like to explain the reasons why his delegation was among the sponsors of one of the drafts for an article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), on which every argument, both for and against, had already been advanced.

74. That proposal would make the convention an effective instrument. If the article was not adopted, the

convention on the law of treaties would be incomplete, since, as the Italian representative had rightly pointed out, the rules established in treaties became norms of law only if there existed some machinery for ensuring their application.

75. A broad trend of opinion among the delegations at the Conference favoured the idea that arbitration was an effective mechanism for the peaceful settlement of disputes, and one which gave practical effect to the principle of the equality of States. That did not mean, however, that the Conference should merely reproduce a system handed down from antiquity, since the value of arbitration, like any other institution, derived only from the efficacy and precision of its operation.

76. The nineteen-State proposal established a practical conciliation procedure followed by arbitration in cases of nullity or invalidity of treaties, which could provide a method of arriving at a just settlement. Awards would therefore have to be binding, since that was the only way to incorporate effective safeguards in international treaties, especially for small countries. Unless the awards were binding, the present situation, which manifestly could not prevent great Powers from obtaining unfair advantages, would simply be perpetuated. Treaties were the only recourse open to weak countries in their relations with other countries, although history showed that when treaties were concluded between States of unequal power, the rules they contained often represented arbitrary impositions by the stronger country, contained unreasonable advantage for that country and disregarded the principles of justice, equity and freedom of consent.

77. Several speakers, in an attempt to find fault with the nineteen-State amendment, had said that the fact that the proposed procedure was ultimately personal and unilateral would be unlikely to make awards more reliable. It was true that any kind of judicial decision, whether by the International Court of Justice, by permanent institutions or by specially appointed arbitrators, was the work of men acting as judges, and was thus in the last analysis a human decision, in which subjective reasoning and external pressures were permanently present. Fallible sources could not provide infallible results.

78. The fact that the Conference was trying to find more effective ways of dealing with the invalidity of treaties than those at present resorted to, such as Article 33 of the United Nations Charter or the jurisdiction of the International Court of Justice, was clear proof that that machinery had hitherto achieved little success; at all events, it made it evident that confidence in the efficacy of those methods for the peaceful and just settlement of disputes had been considerably shaken.

79. The nineteen-State proposal appeared to serve the purposes which all the participants in the Conference were trying to achieve. Several delegations had, however, put forward constructive ideas which might usefully be incorporated in the text of article 62 *bis* in its final form.

80. Mr. EUSTATHIADES (Greece) said that after a year of reflection on the question of procedures for settling disputes arising out of the application of Part V, his delegation was still convinced that the problem could not be solved on the basis of the political convictions of any given group of States, but that the solution should essentially take the interests of small countries into account.

81. First of all, he wished to dispel a misunderstanding concerning the position of the International Law Commission on the matter. It had been asserted that in referring to article 62 as a " key article ", the Commission had meant that that article provided the best possible solution. Actually, what the Commission had meant was that the question of the methods used for the peaceful settlement of disputes was a fundamental one. On that point it had limited itself to setting out in article 62 a provision which provided the " highest measure of comon ground " and which, by referring to Article 33 of the Charter, drew attention to a general obligation. The Commission had thus reserved its judgement on the question and had referred it to the Conference, believing in its wisdom that the problem was rather one for a diplomatic conference. The explanations that the Expert Consultant had given during the first session confirmed that interpretation; he had said that the International Law Commission had considered " that the procedures prescribed in article 62 were the minimum required as checks on arbitrary action ".[4]

82. The question was thus clearly put to the small States, and they had to decide whether they would be content with article 62, which provided for procedures representing " the minimum required as checks on arbitrary action " or whether they wanted further safeguards. Greece, as a small State which had become independent a century ago at the cost of sacrifices such as other new States had known more recently, considered it to be in the vital interest of small countries that the convention should provide them with the maximum procedural safeguards, especially with regard to disputes concerning Part V of the draft articles. They should give that requirement priority over the political obligations arising from their membership of any given coalition.

83. Part V was by definition the most sensitive section of the whole convention. For some delegations, the substantive rules in Part V were of the utmost importance, independently of procedural rules; but for many others the procedural rules were preponderant. It was impossible to ignore the fact that many States would refuse to accept the convention in the absence of satisfactory procedures, in other words in the absence of an article 62 *bis*. And if a large number of States failed to ratify the convention for that reason, what advantages would small States derive from Part V?

84. Some delegations maintained that going no further than the minimum safeguards as set out in article 62 would result in greater treaty stability than would the advantages provided in Part V of the draft articles. The Greek delegation considered that predetermined settlement procedures would give an even better guarantee of the application of Part V to small States,

[4] 74th meeting, para. 21.

for article 62 in no way eliminated the danger of arbitrary application of the provisions of Part V.

85. Article 62 included a reference to Article 33 of the Charter and, at first sight, the range of means of peaceful settlement indicated in that Article was very wide; but that was only true if the parties agreed on the choice of one of those means of settlement. Such agreement was not indispensable if the dispute was so serious that it threatened international peace or security, for then the General Assembly of the United Nations or the Security Council immediately became competent, and that would be so in all such cases, with or without an article 62 *bis*. That was an essential point which small States should bear in mind. Nevertheless, if the dispute in question did not threaten international peace or security or even friendly relations among States, the solution in article 62, that of free choice among all the means of settlement set out in Article 33 of the Charter, seemed inadequate. What would happen if one of the parties to a dispute relating to a multilateral treaty wished to resort to conciliation, another to arbitration, a third to judicial settlement, a fourth to inquiry and so forth? When a provision of Part V had been invoked and that action had encountered objections, the treaty would be called in question, and the uncertainty in treaty relations would bring about a deplorable situation.

86. It would therefore be better to provide for a predetermined settlement procedure, which would nevertheless be flexible, in the sense that it would apply only in cases where the parties were unable to agree on another means of peaceful settlement of the dispute.

87. One possibility was simply to provide for that predetermined procedure in separate undertakings, other than the treaty disputed under the provisions of Part V. That was the solution which was adopted at present, and it had proved inadequate, as the Venezuelan representative had pointed out. The Conference should go beyond such empirical methods and adopt progressive solutions.

88. Consideration might also be given to the possibility of making it compulsory under the convention on the law of treaties to include in every treaty the means of settling disputes arising from the application of Part V of the draft articles. The idea was attractive, but where multilateral treaties were concerned, serious difficulties would arise in connexion with the choice of the means of settlement, since, in the absence of agreement on the means of settlement, the conclusion of the entire treaty might thus be jeopardized; indeed, that was what was happening at the present Conference in respect of that very problem.

89. It was therefore preferable to provide for an overall predetermined system in the spirit of the various versions of article 62 *bis*, its applicability being subject to the agreement of the parties and exception being made in the case of treaties in which the means of settlement was explicitly laid down. In order to be effective, the system must above all be uniform, and, in order to be uniform, it should not be optional. Consequently the Greek delegation did not support the amendment by Thailand (A/CONF.39/C.1/L.387) because that proposal would make the system optional. In that event, there would be a whole series of different settlement procedures, which would be a major disadvantage if some parties to a multilateral treaty wished to use one procedure and other parties another. The multilateral treaty might be declared valid according to one of the procedures and invalid according to another, and extremely complex rules on pendency would have to be provided to offset those risks.

90. The main purpose of his statement had been to explain to small States the need for a predetermined settlement procedure, in the interests of their legal security, to ensure which it was necessary that there should be certainty that the rules laid down in the convention, including Part V, would not be subject to arbitrary action that might be taken by the strong against the weak. For it had to be remembered that the convention would establish rules for all treaties for many years to come. The machinery set up would have to provide adequate guarantees, referred to in detail by his delegation at the first session of the Conference.[5] A point that should be borne in mind in connexion with those guarantees was that the conciliation commission or arbitral body should not consist of very few members.

91. He might have occasion to make further reference to the various proposals for an article 62 *bis*. For the present, he wished to insist on the need to establish in advance machinery providing a satisfactory method of settling disputes, the most important of which would arise under Part V. Without such machinery, there was a danger that the whole edifice of the convention might be undermined and that it would be turned into a cause of dissension instead of being an instrument of peace among nations.

The meeting rose at 1.5 p.m.

[5] 73rd meeting, paras. 43-53.

## NINETY-SIXTH MEETING

*Monday, 21 April 1969, at 3.20 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* (continued)

1. Mr. VEROSTA (Austria) said that Part V contained a number of progressive provisions which called for an adequate impartial procedure for their implementation. Many delegations were not satisfied with the means of settlement of international disputes contained in article 62 and had accordingly put forward a variety of

proposals for a specific procedure, to be incorporated in a new article 62 *bis*. His delegation viewed with sympathy the Spanish proposal (A/CONF.39/C.1/L.391) to establish a new United Nations permanent organ, to be called the " United Nations Commission for Treaties, " for the conciliation of disputes over international treaties, especially disputes under Part V of the future convention. Fifty years previously, the Austrian delegation to the Paris Peace Conference of 1919 had submitted three draft articles, prepared by the well known Austrian international lawyer Professor Lammasch, for inclusion in the Covenant of the League of Nations. They provided for a permanent office of conciliation within the League of Nations, which would make proposals for amicable solutions or, if it considered that the dispute was a legal one, submit it to the Permanent Court of International Justice. The Paris Peace Conference had transmitted the proposal to the Council of the League of Nations but the Council, in drafting the statutes of organs for the settlement of international disputes, had set up the Permanent Court of International Justice, but without any permanent conciliation office. The Austrian delegation was afraid that any proposal to create a new permanent organ of the United Nations had no chance of acceptance in 1969 and therefore regretted that it would be unable to vote for the Spanish amendment.

2. Yet his delegation thought that the Conference might consider, at a later stage, the very interesting idea contained in the Spanish amendment — an idea that was also to be found in the Austrian proposal of 1919 — namely that a distinction should be drawn not so much between political and legal disputes as between justiciable disputes and non-justiciable disputes, such as those relating to vital interests, frontier delimitation and so forth.

3. The amendments by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) had the merit of favouring the International Court of Justice and his delegation would be prepared to vote for them.

4. Austria was one of the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), because it gave the parties complete freedom to use all the means of settlement provided for in the United Nations Charter, offered possibilities for conciliation by competent commissions whose members could be freely elected by the parties to the dispute, and allowed for arbitration by a tribunal to be freely chosen by the parties.

5. At the 94th meeting,[1] the Mexican representative had mentioned the confidential character of the conciliation procedure. It was obvious that negotiations in the course of that procedure would have to be kept secret, and there again, the parties to the dispute had complete freedom to impose whatever degree of secrecy they wished. On the other hand, it was hard to imagine how the final solution could be kept confidential.

6. With regard to the concern that had been expressed about the cost of the conciliation and arbitration procedures, it should be remembered that in most cases the conciliation procedure alone might lead to a satisfactory solution. Since the peaceful settlement of disputes arising under Part V of the convention was in the interest of the international community as a whole, the expenses would certainly be money well spent.

7. The Austrian delegation could not vote for the amendment by Thailand (A/CONF.39/C.1/L.387), which would reduce the settlement procedure to the status of an optional protocol. On the other hand, it could support the amendments by Ceylon (A/CONF.39/C.1/L.395), Luxembourg (A/CONF.39/C.1/L.397) and Switzerland (A/CONF.39/C.1/L.393/Corr.1).

8. It had been argued that article 62 was adequate as it stood and that the time was not yet ripe for any kind of compulsory conciliation or arbitration. Perhaps, therefore, he might be allowed to mention the case from the United States Civil War when it had been suggested to President Lincoln that the *Alabama* dispute between the United States and the United Kingdom should be submitted to arbitration. That was in 1864. President Lincoln had replied that that was a beautiful idea, but quite impracticable because the millennium was still a long way off. But within eight years the *Alabama* case had been settled by a Court of Arbitration in Geneva. The present Conference should not wait for the millennium either; it should not even wait eight years, but should inaugurate the millennium of conciliation and arbitration forthwith, or certainly during the course of the Conference.

9. Mr. RATTRAY (Jamaica) said that, although the history of the judicial settlement of international disputes might not be encouraging, that should not deter the international community from experimenting with new and improved methods which were more truly representative of the aspirations of all States. And, in so far as the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) recognized the desirability of establishing some more representative system of impartial adjudication, the Jamaican delegation had no difficulty in accepting the principle it sought to establish.

10. Under the nineteen-State amendment, the principles of the law of treaties would, in the event of disputes concerning Part V of the convention, be interpreted by tribunals on which the disputing parties would be adequately represented at the stages of conciliation and arbitration. The contemporary structure of the international community might not make for complete acceptance of third-party settlement of all disputes in all situations, but under the nineteen-State proposal States would remain free to decide on alternative methods of settlement and to provide expressly in treaties that article 62 *bis* would not be applicable, even if alternative means of settlement were not provided. Article 62, paragraph 4, which the Committee had already approved, stated that the provisions of that article should not affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes; clearly, a treaty

[1] Para. 67.

provision that article 62 *bis* was not applicable was a provision with regard to the settlement of disputes.

11. That being so, the proposal by Ceylon for a new article 62 *ter* (A/CONF.39/C.1/L.395) might be regarded as superfluous. It made the content of article 62, paragraph 4, explicit in such a way that it could constitute an open invitation to contract out of the provisions of article 62 *bis*. On the other hand, it did openly recognize that there might be situations in which some States would not be prepared to submit to the ultimate arbitration and judgement of others. For small States like Jamaica, that freedom of choice might be illusory, but if the Ceylonese amendment were regarded as acceptable, his delegation would not oppose it.

12. His delegation could not support the amendment by Thailand (A/CONF.39/C.1/L.387), for its effect would be tantamount to introducing an optional clause. Although it was worded in the form of a reservation, it seemed to invite an undesirable fragmentation of treaty relations.

13. There seemed to be such a wide area of common ground between the Spanish proposal (A/CONF.39/C.1/L.391) and the nineteen-State proposal that some accommodation of views among the sponsors might be hoped for. The Jamaican delegation had reservations, however, about the introduction in the Spanish proposal of the concept of legal disputes. Article 62 was based on the assumption that there were legal grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty, and those grounds were defined in the convention itself. Consequently, any attempt to refer to legal disputes in connexion with settlement could only create confusion and lead to arguments about the distinction between legal and political disputes.

14. The first Swiss amendment (A/CONF.39/C.1/L.377) had merit, but lacked the valuable provisions for conciliation which appeared in the nineteen-State proposal. The second Swiss amendment (A/CONF.39/C.1/L.393/Corr.1) raised two fundamental issues. First, there was the question whether the convention would apply to treaties concluded before the entry into force of the convention; the Jamaican delegation assumed that the procedures set out in article 62 *bis* would not have retroactive effect. Secondly, the provisions of the amendment seemed to be already covered by article 62, paragraph 4, for since article 62 *bis* could not come into operation until the machinery of article 62 failed, and since that machinery did not apply where there were other provisions with regard to the settlement of disputes, it was hard to see what purpose was served by the amendment.

15. The proposals for a new article 62 *bis* offered a challenge and an opportunity to the international community to establish a system for the peaceful settlement of disputes, on which small countries such as his own pinned their hopes for survival. The Conference should at least give the system a trial.

16. Mr. NASCIMENTO E SILVA (Brazil) said he would try first to delimit the issue under discussion. First, there could be no doubt that articles 62 and 62 *bis* related only to Part V of the draft convention. Secondly, the entire convention would apply only to treaties concluded after it had entered into force, unless the parties agreed otherwise; the Brazilian delegation endorsed the Swedish representative's remarks on that subject at the 94th meeting [2] and would support any amendment which clearly expressed the non-retroactive effect of the convention. Thirdly, as was brought out in the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1), disputes concerning Part V of the convention could be decided by the International Court of Justice in cases where the States concerned had accepted compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court. Consequently, the field was quite narrow, and international negotiations through the accepted channels could always be resorted to. It had been claimed that such negotiations could drag on indefinitely and engender hostility between the disputing parties, but it was the opinion of the Brazilian delegation that the passage of time tended to heal the breach.

17. Brazil had always favoured arbitration as a method of settling disputes. It was bound by many treaties containing compulsory jurisdiction clauses, and the Pact of Bogotá [3] subjected all disputes that might arise to compulsory adjudication. Indeed, Article 36 of the Statute of the International Court of Justice had originally been drafted by a Brazilian delegate. Quite recently, Brazil had accepted arbitration in a very important case, and would certainly accept the decision of the arbitral body, even though it might be unfavourable. Nevertheless, his delegation was not in favour of a blanket provision for compulsory jurisdiction; each case should be considered on its merits.

18. Although the nineteen-State amendment had some interesting features and it had been gratifying to hear the Austrian representative's remarks on the confidential nature of the conciliation procedures, a deadlock might result, as the Syrian representative had pointed out, if the decision to submit the dispute to arbitration were refused by one of the parties. The sponsors of the amendment had laid great stress on treaty stability, but in his delegation's opinion, the proposed procedure was almost an invitation to States to impeach the validity of treaties; that applied in particular to paragraph 7 of the annex, which provided that all the expenses would be borne by the United Nations, though there could hardly be any reason why the entire international community should be asked to pay the cost of settling a dispute over a bilateral treaty. Again, the representative of Gabon had rightly pointed out that small, new States might find it difficult to appoint conciliators and arbitrators from among their own nationals, and might be obliged to be represented by aliens. For all those reasons, his delegation would vote against the nineteen-State proposal.

19. It would also be unable to vote for the proposals by Japan (A/CONF.39/C.1/L.339) and Switzerland

[2] Para. 52.

[3] United Nations, *Treaty Series*, vol. 30, p. 84.

(A/CONF.39/C.1/L.377), for although the Japanese proposal was interesting from the stress that it laid on disputes relating to rules of *jus cogens*, it was doubtful whether the International Court of Justice was the tribunal best qualified to pronounce on new trends in international law.

20. The Spanish proposal (A/CONF.39/C.1/L.391) was based on a new approach to the problem, and the Brazilian delegation agreed with the Austrian representative that it might be considered at a later stage. The United Kingdom representative had rightly pointed out that the Thai proposal (A/CONF.39/C.1/L.387) was really a reservation clause; it involved a number of extraneous questions, as did the Luxembourg proposal (A/CONF.39/C.1/L.397), and the discussion of those texts might also be deferred. Although the Ceylonese proposal (A/CONF.39/C.1/L.395) might be superfluous, his delegation could accept it, and also the four-State sub-amendment (A/CONF.39/C.1/L.398) [4] to the nineteen-State proposal.

21. The Brazilian delegation deplored the unduly rigid position taken by some delegations, which had stated that the whole convention would be unacceptable to them if it contained or did not contain a clause along the lines of proposals for a new article 62 *bis*. Similar statements had been heard at earlier international conferences, but had not prevented some of the States which had expressed such rigid views from ultimately ratifying the conventions in question.

22. It would be noted that, whereas some small new States were in favour of proposals for the new article and others had spoken against them, all had used much the same arguments about sovereignty and impartiality. The Brazilian delegation had an open mind on the subject, but at that stage would vote against all the various amendments submitted, in the belief that the International Law Commission, after great effort and exhaustive study, had drafted an article 62 which represented the highest measure of common ground as yet to be found, not only in the Commission itself, but also among the many States represented at the Conference.

23. Mr. VARGAS (Chile) said that article 62, as approved at the first session, was inadequate in that its provisions might permit a State party to a treaty to invoke arbitrarily and unilaterally a ground of invalidity, termination or suspension in order to evade its obligations under the treaty; the *pacta sunt servanda* rule would thereby be affected and the whole stability of treaties endangered. His delegation therefore thought it essential to go beyond the provisions of article 62 and to include a new article 62 *bis* that would provide an effective solution to a dispute, where one of the parties did not agree to a settlement. His remarks applied to the whole of Part V but the inclusion of provisions on the compulsory adjudication of disputes was, in particular, absolutely essential for the application of the provisions of articles 50 and 61 on *jus cogens*. Those provisions had no precedent and had only recently been formulated; it was therefore supremely important that an impartial judicial authority should be responsible for adjudicating on any claims of invalidity based on them and for giving precise rulings as to their meaning and scope, so as to avoid any subjective interpretation by a State interested in releasing itself from treaty obligations.

24. His delegation fully supported the Japanese amendment (A/CONF.39/C.1/L.339) which provided for the settlement by the International Court of Justice, at the request of any of the parties, of a dispute on the application of article 50 or article 61, and for arbitration — unless the parties preferred a decision by the Court — in all other cases, if no settlement was reached by the means specified in Article 33 of the Charter.

25. Compulsory arbitration was a more expeditious and less costly means of settlement than recourse to the International Court of Justice; the latter should therefore be reserved for disputes on the application or interpretation of the rules of *jus cogens*, which affected the interests of the whole international community.

26. Except for the predominant role assigned to the International Court of Justice in the Swiss amendment (A/CONF.39/C.1/L.377), the arbitration procedure it prescribed was entirely satisfactory. Another positive feature of that amendment was its paragraph 4, whereby the claimant party would be deemed to have renounced its claim if it did not have recourse within six months to one of the tribunals referred to in paragraph 1. A provision on those lines should in any case be included in the convention on the law of treaties.

27. The nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) had merits, but his delegation had serious reservations regarding some of its features. It made provision for a compulsory conciliation procedure. Conciliation was a suitable means for the settlement of certain disputes and Chile was a party to a number of treaties which provided for it. His delegation had, however, grave misgivings regarding its indiscriminate application to essentially legal matters such as the invalidity of treaties; the submission of such matters to conciliators instead of to a court, which was required to apply strictly the law in force, might even prove detrimental to the peaceful settlement of disputes. How, for example, could a conciliation commission function in a case where the issue was the invalidity or termination of a treaty on grounds based on a rule of *jus cogens*?

28. It might be objected that there was no great risk of the proposed conciliation commission dealing with exclusively legal issues because it was called upon merely to make recommendations which were not binding, because its decisions would be confidential and because, in the last resort, the proposed arbitral tribunal would decide the case on the basis of law. Nevertheless, there was bound to be some danger that the conciliation commission's recommendations would influence the arbitral tribunal's decision. His delegation did not reject the conciliation system outright, since it could be very useful in relation to some of the provisions of Part V. The conciliation system could also be im-

[4] See below, para. 46.

proved by incorporating in it the useful idea, contained in article 5 of the annex to the Spanish amendment (A/CONF.39/C.1/L.391), of enabling the conciliation commission to decide that a dispute should be regarded as a legal dispute and should therefore be submitted to an arbitral tribunal.

29. On the other hand, his delegation had doubts not only as to the effectiveness of the " United Nations Commission for Treaties " proposed in the Spanish amendment but even as to whether such a commission was constitutional.

30. In his delegation's view, the general rule should be compulsory arbitration, without prejudice to the admission of other judicial or diplomatic means of settlement in respect of some of the provisions of Part V. The various drafts submitted by Japan (A/CONF.39/C.1/L.339), Switzerland (A/CONF.39/C.1/L.377), Spain (A/CONF.39/C.1/L.391) and the nineteen-States (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) embodied the principle of compulsory arbitration and could all serve as a basis for the final draft, if that principle were accepted.

31. Those drafts suffered, however, from a number of omissions. In addition to those already referred to by the Mexican representative, he would mention the fact that there was no indication of the sources of the law on which the arbitral tribunal was to base its decision if the case referred to it transcended the application and interpretation of the provisions of the convention on the law of treaties. Another serious omission was the failure to lay down the requirement that the arbitral tribunal should state the reasons on which its decision was based. He would therefore suggest the inclusion in article 62 *bis* of provisions on the lines of Articles 38 and 56 of the Statute of the International Court of Justice.

32. In order that article 62 *bis* should truly constitute the keystone of the convention, as it had been called, every effort must be made to formulate it in such a way as to reflect the essential features of the various views expressed and to broaden the basis of its support. A number of proposals had been made for that purpose and, in that respect, he commended the amendments by Ceylon (A/CONF.39/C.1/L.395) and Switzerland (A/CONF.39/C.1/L.393/Corr.1) which would make it possible to set aside the application of article 62 *bis* if the parties expressly so agreed, or if it were so specified in a treaty in force between them on the settlement of disputes. Another idea which would not only facilitate the adoption of article 62 *bis* but would also ensure a greater number of ratifications for the convention itself was that of including, either in the preamble or in the final clauses, a provision to the effect that the convention would not operate retroactively.

33. Mr. KRISHNADASAN (Zambia) said that Part V of the draft contained a number of controversial provisions such as articles 50 and 59, which represented progressive development of international law. The importance of those provisions would be enhanced if procedures to settle disputes relating to their application were included in the convention.

34. Of the various amendments, his delegation preferred the constructive nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) together with that part of the Swiss amendment (A/CONF.39/C.1/L.377) which specified that the majority of the commission of arbitration would consist of neutral non-national members, thereby relieving the Chairman of the commission from the sole responsibility for the decision. It also favoured the new article 62 *ter* proposed by Ceylon (A/CONF.39/C.1/L.395).

35. His delegation had serious misgivings regarding proposals to dilute article 62 *bis,* but would consider them if the nineteen-State proposal failed to attract sufficient support.

36. Mr. MUTUALE (Democratic Republic of the Congo) said that the sponsors of the various amendments proposing a new article 62 *bis* obviously feared that the general obligation to settle disputes in good faith was not a sufficient safeguard and wished to introduce automatic compulsory procedures for the purpose. After prolonged study, the International Law Commission had not been able to produce a better solution than that contained in article 62, which provided minimum safeguards against arbitrary action and at the same time represented the maximum measure of safeguards on which agreement could be reached for the time being. The real question, therefore, was not that of the legal merits of procedural provisions to settle disputes arising out of Part V; it was whether there existed a political will on the part of States to accept binding obligations for automatic procedures that would apply to all future treaties — whether commercial, economic, military or other — when questions of validity arose.

37. It must be recognized that, at present, the idea of compulsory and automatic procedures for the settlement of disputes found little favour with States. There was a considerable distrust of the International Court of Justice, the principal judicial organ of the United Nations; few States had accepted its compulsory jurisdiction and many of those that had done so — including some of the sponsors of proposals for a new article 62 *bis* — had attached important reservations to their acceptance. Moreover the Court itself, by a recent notorious decision, had helped to discredit the very idea of compulsory adjudication. The best possible course, therefore, was to leave the question of the settlement of disputes to an optional protocol that would embody the procedures contained in article 62 *bis,* or an optional clause reserving the right of States to agree on such procedures.

38. In a perhaps distant future, experience might lead States to reflect on the inadequacies of international enforcement procedures. Meanwhile, it was the duty of the advisers of Governments to emphasize incessantly the principles of good faith and *pacta sunt servanda.* No amount of ingenuity in devising procedural safeguards could hope to ensure that an arbitrary decision would not be taken when settling disputes on the law of treaties; only observance of the principle of good faith by the adjudicating body could afford genuine pro-

tection. Procedural provisions merely provided secondary safeguards against partiality or arbitrary action.

39. It was his delegation's hope that a negotiated solution, rather than a solution based on votes, would be arrived at with regard to the questions left outstanding at the close of the first session.

40. Mr. KRISHNA RAO (India) said that the views of the Indian Government on the question of the compulsory settlement of disputes arising out of the application of Part V of the draft were clear: it was neither able nor willing to bind itself and its successors in perpetuity to any form of automatic procedure for compulsory arbitration or adjudication.

41. India's record of respect for treaty obligations and the rule of law had been progressive and liberal, judged by any standards. At its birth as an independent sovereign State in 1947, India had voluntarily accepted all the pre-independence treaty obligations devolving upon it. Since then, India had become a party to many international conventions adopted under United Nations auspices and containing clauses on the compulsory settlement of disputes. Even where the settlement procedures were contained in an optional protocol, as in the case of the 1961 Vienna Convention on Diplomatic Relations, India had become a party to the Optional Protocol as well as the Convention. India had been among the first States to accept the compulsory jurisdiction both of the former Permanent Court of International Justice and of the International Court of Justice.

42. India was thus prepared to accept compulsory arbitration or adjudication where such compulsory procedures were accepted at the will of the parties in each specific case. It could not, however, accept the compulsory procedures now proposed for two main reasons. First, the proponents of these procedures had made it clear that they would not be subject to reservations. Secondly, the scope of application of the convention on the law of treaties would be qualitatively wider than the limited scope of other conventions adopted at the initiative of the United Nations. The Indian Government was not ready to accept an obligation for all time in respect of all treaties to be concluded in the future; it wished to retain the freedom to agree on the appropriate method of settlement in each case.

43. He was not convinced by the argument that if the provisions of article 62 did not lead to a settlement of the dispute, might would then prevail over right, thereby aggravating the insecurity of treaty obligations and the instability of international relations. It was an oversimplification to assert that peace and security would best be served simply by the acceptance of a compulsory settlement mechanism. They would in fact be best served by States conducting themselves in good faith, abiding by their treaty obligations and settling their disputes in an orderly and fair manner.

44. The discussion had shown that not all the powerful States refused compulsory arbitration and that not all the weak States supported it. Nor was the division one between progressive and reactionary States. States of the same size and importance situated in the same region of the globe held different views. The only conclusion that could be drawn from that state of affairs was that the question of the inclusion of article 62 *bis* was less important than had been suggested. The question of the settlement of disputes was not an essential feature of the convention.

45. Article 62, as approved at the first session, did not mean that States were free either to refuse to negotiate to settle a dispute or to negotiate with a closed mind. Parties must attempt in good faith to settle a dispute. In its judgement of 20 February 1969 in the *North Sea Continental Shelf* cases the International Court of Justice had declared: " the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation. . . . ", and that " they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it ".[5] The Court had explained that " this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted." [6] The Court had supported that conclusion by referring to the decisions of the Permanent Court of International Justice in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex* [7] and its Advisory Opinion of 1931 in the case of *Railway Traffic between Lithuania and Poland*.[8] If it were considered desirable, the substance of that recent ruling of the International Court of Justice could be incorporated in article 62. His own Government was not opposed to the principle of arbitration or adjudication and would resort to those methods of settlement in appropriate cases in agreement with the other parties concerned. It could not, however, agree to sign a blank cheque and bind its successors to automatic compulsory arbitration and adjudication.

46. It was for those reasons that his delegation, together with those of Indonesia, the United Republic of Tanzania and Yugoslavia, had proposed a sub-amendment (A/CONF.39/C.1/L.398) to the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). The sub-amendment would retain the nineteen-State text for article 62 *bis* as Part " B ". A new Part " A " would be added enabling parties to the convention on the law of treaties to declare that they accepted the provisions of Part " B ", either in whole or in part; those provisions would then apply between the parties making a similar declaration, with effect from the date of the receipt of each declaration by the

[5] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47, para. 85.

[6] *Ibid.*, para. 86.

[7] *P.C.I.J.*, Series A, No. 22.

[8] *P.C.I.J.*, Series A/B, No. 42.

depositary. That proposal was intended to give freedom to the States parties to accept the procedure in article 62 *bis* in whole or in part. Among the parties making declarations to that effect, disputes relating to Part V would then be settled by the procedure prescribed in the nineteen-State amendment.

47. Mr. SECARIN (Romania) said that in 1966 the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had unanimously adopted a text on the principle that States should settle their international disputes by peaceful means. That text contained all the essential elements of any procedure of peaceful settlement, such as respect for the sovereign equality of States, free choice of means of settlement, concordance of those means with the circumstances and nature of the dispute and the duty of the parties to continue their efforts until a settlement was reached. According to the Special Committee's text, " States shall . . . seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice . . . ". The Special Committee had thus firmly adhered to the terms of Article 33 of the Charter, and had gone on to state that " the parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them ".[9]

48. To be effective, peaceful means of settlement must be chosen either at the time of the conclusion of a treaty or at the outset of a dispute. The parties were free to choose the means of settlement, either the means laid down in the Charter or any other on which they might agree. Accordingly, it seemed pointless to institute a definite procedure for all treaties, in all spheres, and for the entire treaty practice of States.

49. Experience had shown how difficult it was to establish any general system of procedure. That was illustrated by the fate of such instruments as the General Act for the Pacific Settlement of International Disputes of 1928 [10] and the International Law Commission's draft on arbitral procedure,[11] as well as by the attitude of States to compulsory jurisdiction clauses and to optional protocols for the compulsory settlement of disputes. In practice, States accepted one of the means of settlement provided for in Article 33 of the Charter. Treaties concluded by States showed that the parties tended to agree on negotiation, conciliation or arbitration, or systems combining two or more of those means.

50. Some representatives had argued that the provisions of Part V of the draft called for an immediately available procedure, in order to prevent abuse and arbitrary action. But the progressive development of international law did not necessarily call for the institution of procedural guarantees, especially when they seemed to be artificial ones. The articles in Part V were based on principles which had long been recognized in international law, such as freedom of consent and good faith, which were corollaries of State sovereignty, so their provisions could not be regarded as complete innovations. It might be best to allow State practice to prove the procedural system proposed by the International Law Commission.

51. It seemed unreasonable to see a threat to the stability of treaty relations in the fact that article 62 laid down rules based on the principle of free choice of means of settlement, which was unanimously recognized in international law. The development of treaty relations on the basis of the principles of morality and justice, mutual trust and respect, and good faith in the execution of obligations assumed under treaties freely consented to should give no cause for alarm, since the principles and rules laid down in the United Nations Charter, on which the International Law Commission had based its draft of article 62, offered adequate grounds for the settlement of any dispute whatsoever. If those principles were not respected in State practice, no improvement could be expected from instituting a pre-established procedural system.

52. Mr. BRODERICK (Liberia) said that there were two schools of thought on the question of the procedure to be followed by a party claiming the invalidity or termination of a treaty. The first favoured compulsory judicial settlement by the International Court of Justice, by an arbitral tribunal or by a conciliation commission, pursuant to the *pacta sunt servanda* principle; that course, it was maintained, would protect the sanctity of treaties. The second school favoured the provision set out in the International Law Commission's text. They maintained that States should take as their basis the general obligation to settle their international disputes by peaceful means in such a manner that international peace and security and justice were not endangered, and pointed out that neither the Geneva Conventions on the Law of the Sea nor the Vienna Conventions on Diplomatic and Consular Relations contained any provision for compulsory jurisdiction. While the claims of both schools of thought had merit, his delegation, after re-examining article 62 and the amendments to it, had reached the conclusion that the procedural safeguards proposed were inadequate.

53. His delegation appreciated the position taken by Japan with regard to disputes arising out of a claim under articles 50 or 61 of the convention, relating to a treaty conflicting with a peremptory norm of international law or of *jus cogens*. It would seem that the proper forum to settle such disputes should be the International Court of Justice, but there again the smaller nations, from past experience, had their fears; he referred in particular to the *South West Africa* cases. They feared that the more powerful nations might influence the decision of any judicial body, whether the International Court of Justice, an arbitral tribunal or a conciliation commission, and in those circumstances they would prefer to settle a dispute arising from the

[9] See *Official Records of the General Assembly, Twenty-first Session, Annexes,* agenda item 87, document A/6230, paras. 248 and 272.

[10] League of Nations, *Treaty Series,* vol. XCIII, p. 343.

[11] See 93rd meeting, footnotes 4 and 5.

claim of invalidity of a treaty by negotiation between themselves.

54. Mr. TOPANDE MAKOMBO (Central African Republic) said that his delegation's view was that article 62 *bis* was of capital importance to the entire convention. Article 62 was incomplete and, particularly with regard to the settlement of disputes, his delegation could not accept the International Law Commission's text since it would restrict action to the provisions of Article 33 of the Charter. In his view, Article 33 did not provide any guarantee in respect of procedure; such a guarantee was essential for the security of international treaty relations which could not be maintained without some compulsory jurisdiction to settle disputes. What had been left to chance in paragraph 3 of article 62 was clearly set out in the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) and its flexible and well-balanced provisions removed all doubts.

55. His delegation was well aware that the International Court of Justice was the principal judicial organ of the United Nations, but it had always had certain reservations concerning the Court because it considered its membership too narrow to represent adequately all the different legal systems of the world. The award given in the *South West Africa* cases had further strengthened his delegation's doubt, and it would oppose any reference being made to the International Court.

56. His delegation was unable to support either the Thai amendment (A/CONF.39/C.1/L.387) or the Spanish amendment (A/CONF.39/C.1/L.391), which removed all substance from the nineteen-State amendment. For the same reason, it could not support the amendments by Ceylon (A/CONF.39/C.1/L.395) and Luxembourg (A/CONF.39/C.1/L.397). Neither could it support the proposal submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) since it tended to dissociate Part V of the draft from the procedure for the settlement of disputes, which should form an integral part of Part V.

57. Mr. SOLHEIM (Norway) said that his delegation still believed that the only just way of settling treaty disputes between States, if conciliation did not lead to acceptable results, was by some compulsory judicial procedure before an independent third party, and that it would be best if that party were the International Court of Justice. There could be no doubt that, in the cases referred to in sub-paragraph 3(*a*) of the Japanese amendment (A/CONF.39/C.1/L.339), disputes relating to claims under article 50 or article 61 of the convention should be brought before the International Court of Justice. His delegation would support the Japanese amendment, which it considered very valuable. It was also in favour of the Swiss amendment (A/CONF.39/C.1/L.377) and would vote for it.

58. His delegation's views as to what the shortcomings of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) were must be obvious from its statement at the first session [12] and from what he had just said. It should be remembered, however, that that proposal was a compromise, and his delegation was prepared, in a spirit of compromise, to vote for it, while emphasizing that it contained only the very minimum acceptable to his delegation.

59. He did not share the Brazilian representative's fear that adoption of the nineteen-State proposal would involve the United Nations in undue expense since, first, there would not be a great many cases to be dealt with, and secondly, the parties would have to bear their own costs while the United Nations would only have to meet the costs of the arbitral tribunal.

60. He appreciated the creative effort made by the Spanish delegation in submitting a new proposal (A/CONF.39/C.1/L.391), but, for the reasons already given by other representatives, his delegation thought that the proposal would give rise to serious difficulties and it therefore could not support it. His delegation had serious objections to the amendment by Thailand (A/CONF.39/C.1/L.387), the adoption of which would be tantamount to removing from the convention what had just been incorporated in it. In his delegation's view the proposal submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) would have exactly the same effect as an optional clause and his delegation would vote against it. On the other hand, it would support the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1).

61. It was generally agreed that it was the constitutional character of the draft convention which made it imperative to have some machinery for the peaceful and compulsory settlement of disputes arising from its interpretation and application. It was the possibility of unilateral resort to Part V of the convention as a means of invalidating treaties which gave the problem its importance, but also circumscribed it. The crucial articles would be articles 45, 46, 47 and 48, and, in particular, articles 49, 50, 61 and 59. Normally in international life, the majority of treaties to which a State became party were negotiated by able and skilful people, were freely entered into, contained safeguarding clauses in the most important cases, and provided for termination upon notice in an orderly manner. That procedure and machinery tended to reduce considerably the number of treaties where a party might be inclined to try to make use of the provisions of Part V of the draft, with the exception perhaps of article 59. There were also cases in which the parties, when they found that some change had to be made in their treaty relations, came together in an effort to find a solution to their differences and he could cite numerous cases in which that was being done. A further important element restricting the applicability of the present convention would be the non-retroactivity of its provisions.

62. There remained some potential problems caused by an important group of treaties such as perpetual treaties with no provisions regarding termination, denunciation or withdrawal, for example, treaties establishing boundaries between States or peace and armistice treaties. The stability of treaty relations in that field was of course

[12] See 69th meeting, paras. 17-21.

of the utmost importance. That did not mean to say that such treaties could never be invalidated but, because of their importance, it was essential that any steps taken to invalidate them must follow an established procedure leading to a just and impartial final settlement.

63. His delegation was willing to accept the compromise formula of the nineteen-State amendment, even if only as an intermediate step towards more general acceptance of the compulsory jurisdiction of the International Court of Justice.

64. Mr. DIOP (Senegal) said that his delegation accepted the introduction of the concept of the invalidity of treaties in the draft convention, provided it was accompanied by a clear definition of the various causes of invalidity, and an arbitration or adjudication procedure of guaranteed impartiality to act as the final arbiter in cases of dispute. His delegation's attitude to the various proposals before the Committee would be decided in the light of those principles.

65. With regard to the Japanese amendment (A/CONF.39/C.1/L.339), his delegation fully appreciated the work of the International Court of Justice, but had some hesitation about establishing machinery which would give sole and compulsory jurisdiction to the Court in respect of disputes arising under articles 50 or 61 of the convention. His delegation did not support the distinction established by the Japanese amendment between disputes under articles 50 and 61 and other disputes, and it was moreover a firm believer in conciliation, to which the Japanese amendment paid scant attention. Consequently, his delegation could not support that amendment.

66. The Swiss amendment (A/CONF.39/C.1/L.377) had the advantage of allowing for the establishment of an arbitral tribunal in addition to reference to the International Court, but did not enlarge sufficiently on conciliation procedure. It would be more acceptable if its stages were placed in reverse order beginning with conciliation, then arbitration and finally, reference to the International Court. His delegation also disliked the proposed composition of the arbitral tribunal and the method of appointing its members, and so, while recognizing its merits, it was unable to support the Swiss amendment. He had noted with interest the Swiss representative's suggestion regarding the possibility of prior agreement between the parties on legal costs and advocating the establishment of an international legal aid fund. That would certainly help to ensure equal access by all States to international tribunals.

67. He appreciated the sentiments underlying the Spanish amendment (A/CONF.39/L.391), but he could not support the establishment of such complicated machinery. His delegation would vote against the Spanish amendment and also against the Thai amendment (A/CONF.39/C.1/L.387) which would destroy the substance of article 62 *bis*. The same applied to the amendment by Luxembourg (A/CONF.39/C.1/L.397). The amendment just proposed by the delegations of India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) required further study before he could give his delegation's view on it.

68. His delegation would support the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which was a substantial improvement on the text submitted at the previous session. It would be still further improved if the proposal by the representative of Pakistan regarding appropriate measures to be taken while awaiting the solution of a dispute [13] were accepted by the sponsors of the amendment. His delegation firmly supported the Pakistan representative's proposal and hoped the Drafting Committee would find a way of incorporating it in the nineteen-State amendment.

69. His delegation was strongly in favour of the inclusion of an article 62 *bis*, despite the objections raised by certain representatives. It had been claimed that article 62 as drafted by the International Law Commission represented a compromise. But in his delegation's view, any compromise must be between articles 59, 61 and 62 on the one hand, and an article 62 *bis* which provided guarantees, on the other. As to the objection concerning the autonomy of the parties, who must be allowed free choice of the means of peaceful settlement of disputes, his delegation thought that such free choice might end in the imposition of the will of the stronger party, in the absence of any automatic machinery for a compulsory impartial settlement. With regard to the objection based on the absence of similar clauses in other conventions, his delegation agreed with the view of the representatives of Switzerland and Sweden that the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations were of a different character from the present convention. His delegation was surprised at the suggestion that the introduction of compulsory machinery for the settlement of disputes would constitute an attack on the sovereignty of States. By agreeing in the Preamble to the Charter " to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ", States had agreed to collaborate in order to ensure that the rules of law and justice should prevail.

70. He hoped the Swiss delegation would consider amalgamating its proposal (A/CONF.39/C.1/L.377) with the nineteen-State proposal; the result would be an eminently satisfactory text.

The meeting rose at 6.5 p.m.

[13] See 94th meeting, para. 87.

## NINETY-SEVENTH MEETING

*Monday, 21 April 1969, at 8.40 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* (continued)

1. Miss LAURENS (Indonesia) said that her delegation had explained at the first session why it could not accept compulsory procedures for the settlement of disputes arising from Part V of the convention. It was not convinced by the arguments advanced in favour of such procedures, and did not believe it was wise to decide in advance on specific means of settling any dispute, relating to any type of treaty, that might arise from Part V. Disputes between two States were rarely of a purely legal character. Each treaty should have its own provisions for the settlement of disputes; where a treaty did not so provide, it should be left to the parties to the treaty concerned to decide on the procedure to be followed. Voluntary agreement on procedure would smooth the way to settlement of the dispute, while any attempt to force the issue might do more harm than good. To leave the parties free to choose the means of settlement was in harmony with the Indonesian tradition of solving issues through negotiation.

2. Some speakers had claimed that compulsory settlement of disputes would be in the best interests of the smaller and weaker countries, but it was unreasonable to force protection on those who were at present reluctant to accept it. The logical solution was to allow those who wanted compulsory machinery to have it, and to let those who did not want it do without it until practical results persuaded them that it was worth accepting. Those who advocated it could ensure that provisions for the compulsory settlement of disputes were included in any future treaties they concluded, and thus gradually extend the application of the principle of compulsory settlement.

3. Indonesia was ready to support any proposal to make the procedure envisaged in article 62 *bis* optional, and had accordingly agreed to co-sponsor the four-State amendment (A/CONF.39/C.1/L.398), which might prove to be the best solution to the problem.

4. Mr. DEJANY (Saudi Arabia) said that article 62 as drafted by the International Law Commission provided a satisfactory and realistic procedure. It was the outcome of years of work by a distinguished group of jurists representing different legal systems and points of view, who had taken into account comments made by a large number of Governments. It represented the highest measure of common ground that could be found in the Commission and among Governments. It was not perfect, and it might not suit the needs of every State, but it was more realistic than any of the other proposals made. None of the various proposals for a new article 62 *bis* providing for the compulsory settlement of disputes seemed to be acceptable to a sufficiently large majority of States. Many States, including his own, opposed the inclusion in the convention of the principle of compulsory settlement of disputes, which would then become a hard and fast rule governing all kinds of treaties for all time. States had their own good reasons for rejecting compulsory solutions, and it was wrong to imply that the aim was to evade justice. Many States that were against the inclusion of a blanket provision in the convention might agree to the inclusion of a provision for compulsory settlement in individual treaties. If pressure was eliminated there might be a surprising development of the voluntary adoption of the principle in many treaties. The parties had the right, and should be afforded the opportunity, of considering each treaty in the light of its special circumstances. It was much more likely that progress would be achieved in that way, through friendly negotiation, than through an attempt to impose a rigid formula for all time.

5. It had been suggested in connexion with the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) that a compulsory settlement procedure would deter a State from unilaterally denouncing or withdrawing from a treaty on insufficient grounds or from raising unreasonable objections, because unfounded arguments would not prevail before an objective arbitral body. While some States might be deterred, many on the contrary might feel encouraged in that they had nothing to lose by going through a lengthy and complicated procedure, particularly since most of the cost was shared among the Member States of the United Nations. A developed country might well take that view in a dispute with a developing country, and consequently it was doubtful whether the machinery proposed would really provide a fair chance for all countries. He doubted whether adequate and serious consideration had been given to the heavy cost of setting up and operating the proposed machinery in the light of the current drive to cut down United Nations expenditure. In view of the strong opposition to the procedure by so many States, it was only reasonable that the cost should be shared only among the countries that supported it. Possibly the parties to a dispute should bear the additional expense of the arbitral tribunal, and it would not be illogical to charge that expenditure to the party against which the final decision was made, for that would undoubtedly deter parties with unfounded claims from taking action.

6. On the whole, current treaty relations among States were fairly satisfactory; it was not certain that there would be any marked deterioration if article 62 *bis* were not adopted. If any State had good grounds for declaring a treaty invalid or withdrawing from it, it would be just as possible to make out a convincing case before an arbitral tribunal now as it would be after the convention had come into force. The possibility of invalidating treaties under Part V had been exaggerated. Disputes between States concerning treaties would continue to arise, and would no doubt be resolved by the parties on the basis of good faith and common interests, as they had been in the past; disputes that remained unsettled for long periods must be regarded as exceptions.

7. His delegation would therefore be unable to support any of the proposals providing for the compulsory settlement of disputes, and would vote against them. Since one large group of States was in favour of the procedure, and another large group opposed it, the best solution would be to incorporate it in an optional protocol. Compulsory settlement would then be the rule among the group of States in favour of it, and they

could further extend the application of the principle by introducing it into any treaties they concluded in the future. Such an optional protocol could always be accepted subsequently by other States, particularly if experience showed it to be as successful as the advocates of compulsory settlement expected. Only a limited number of treaties would thus remain outside the new jurisdiction, but even they would be governed by the compromise formula proposed by the International Law Commission. If the joint draft proposal was found unacceptable on the grounds of the cost or complication of the proposed new machinery, the convention could include an optional protocol providing that disputes should be referred to the International Court of Justice, as in the Convention on Diplomatic Relations.

8. If article 62 *bis* was adopted, Saudi Arabia would vote for the proposal by Thailand (A/CONF.39/C.1/L.387), since it might enable States to become parties to the convention which would otherwise be unable to do so if it included a provision on compulsory settlement of disputes.

9. His delegation wished to study further the four-State proposal (A/CONF.39/C.1/398), since it was not clear in some respects, especially with regard to the legal obligations of the parties to the convention prior to the notification to the depositary.

10. Mr. AMATAYAKUL (Thailand) said that his delegation's sole aim in submitting its proposal for a reservation clause to article 62 *bis* was to offer a compromise solution. Representatives would not be fulfilling their task at the Conference if they did not provide a solution acceptable to the great majority of States. Any pressure brought to bear in order to obtain an extreme solution of the question of settling disputes arising under Part V of the convention would jeopardize the work so far accomplished.

11. A solution should be sought in the terms of Article 2(3) of the United Nations Charter, providing that States must settle their disputes by peaceful means, which were enumerated in Article 33 of the Charter. In that connexion, the International Law Commission had wisely refrained from setting up machinery for compulsory adjudication. The wording it proposed reflected international opinion and practice and was based on the principle of good faith laid down in Article 2(2) of the Charter. The information provided by the representative of Venezuela showed that the majority of States had so far refused to accept the principle of compulsory adjudication.

12. The Thai delegation would not oppose an attempt to go beyond the International Law Commission's formula, and had proposed a reservation clause, the effect of which was that compulsory adjudication, in whatever form it might be accepted, would be applicable in the case of States which considered it beneficial and necessary, while the International Law Commission's formula in article 62 would be applicable among States making reservations to compulsory adjudication. Both systems could be applied separately to the two categories of States parties to the convention; there was no basis for the argument advanced by some speakers that the adoption of the proposed reservation clause would vitiate article 62.

13. The proposal by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/398) offered a compromise solution similar in effect to the Thai proposal. The only difference was in the procedure applied, which made the acceptance of compulsory jurisdiction optional at a later stage. In other words, it followed the lines of an optional protocol.

14. His delegation was prepared to support any proposal that might lead to a way of solving the problem of article 62 *bis* that would be generally acceptable. If no solution could be reached, it would be compelled to vote for article 62 as submitted by the International Law Commission.

15. Mr. REY (Monaco) said that so far custom had been the only source from which the law of treaties sprang. That law had steadily progressed and developed, and had led to the creation of the international institutions of the present century. Since 1949, the International Law Commission had been engaged on the codification of the law of treaties. The draft convention before the Conference contained only two or three matters of major importance, one of which was the question of compulsory recourse to impartial adjudication. The Conference was bound to fail if an acceptable solution to that question could not be found.

16. In the absence of any possibility of taking specific principles of international law as a basis, the Conference had for two sessions assimilated *jus cogens* with natural law and the concept of a universal public policy. That was perfectly logical, but why should the process stop there? Why should a contracting State be refused the right to seek redress? The argument that the principle of the sovereign equality of States would be infringed was not valid, since all that was involved was the continued application of an agreement to which a sovereign State had freely consented or the termination of a treaty precisely because it had not been freely consented to. State sovereignty had everything to gain from the introduction of rules based on morality into the law of treaties and from the upholding of those rules by a judge or arbitrator. The argument that the principle of justice should be rejected on the pretext that judicial errors had been committed in the past and that it was impossible to obtain any assurance in advance of the wisdom of the award was surely specious. Application of the new peremptory rules in Part V of the convention required the appointment of an arbitrator who would decide on the facts invoked by the parties to a dispute before applying the new law. What had to be determined was the body which offered the best guarantee of competence, speed and impartiality. The nineteen-State proposal suggested compulsory arbitration, while Switzerland and Japan proposed a further alternative, namely recourse to the International Court of Justice.

17. His delegation had no objection in principle to arbitration by an *ad hoc* commission, but great care would be necessary in drawing up the rules governing its com-

position, jurisdiction and procedure. In his view, the proposal could be improved and simplified.

18. Serious consideration ought to be given to the suggestion that disputes arising from the application of Part V of the convention should be brought before the International Court of Justice. The Court was the principal legal organ of the United Nations and its members were eminent jurists, even if their judgements did not always satisfy everyone. Moreover, it would soon come to represent almost exclusively the States which at present criticized it, since they constituted a majority in the United Nations, and the future membership of the Court would provide them with an opportunity to take part in formulating international law and jurisprudence.

19. For the reasons given, Monaco supported the principle of compulsory arbitration following an attempt at conciliation. Of the proposals before the Committee it preferred the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) because they provided a further alternative. Any other attitude would inevitably help to bring about the failure of a worthy attempt at the codification of international law.

20. Mr. MOLINA ORANTES (Guatemala) said that his delegation viewed with sympathy the various proposals to include a new article 62 *bis,* as otherwise article 62 would remain ineffective.

21. The Central American countries had supported the principle of compulsory international judicial settlement since 1907, when they had set up the first International Court with compulsory jurisdiction over the member States. Moreover, there were a number of treaties in force between the Central American States which provided for the compulsory settlement of disputes by conciliation and arbitration, notably in the case of disputes arising from the process of economic integration into the Central American Common Market.

22. It was a source of frustration to Guatemala that its most important international claim, which had its source in an unjust treaty, had remained unsettled for over a century, precisely because of the lack of effective international machinery for obtaining justice. It hoped that the Conference would go down in history as the one which had established compulsory international adjudication for all States.

23. Guatemala preferred the proposal embodied in the nineteen-State amendment (A/CONF.39/C.1/352/Rev.3 and Corr.1 and Add.1 and 2), as it provided the simplest, most practical and least costly solution with respect both to conciliation and arbitration.

24. Nevertheless, some aspects of the proposal were not clear, especially with regard to the law to be applied, a matter which seemed to be left to the discretion of the Secretary-General of the United Nations. His delegation was not sure whether it was proposed to leave open the possibility of deciding claims about the invalidity of treaties *ex aequo et bono,* or whether on the contrary the only rules applicable were those laid down in articles 27 and 28, on interpretation. In the latter case the arbitral procedure would be unduly rigid. His delegation was convinced that the *ex aequo et bono* procedure was often indispensable in order to arrive at a just settlement of disputes between States.

25. The usual practice in arbitration was for the parties to agree in advance on the arbitrators and on the terms of reference on which their decisions should be based. There should also be prior agreement on the specific questions to be referred for arbitration. His delegation did not believe that the Secretary-General of the United Nations, despite his high qualities, could provide any substitute for such prior agreement. It was also normal for agreements on arbitration to include the sources of law to be applied by the arbitrators in reaching their decisions; that applied with particular force when the question was one of interpreting a treaty claimed to be invalid. The sources were listed in detail in Article 38 of the Statute of the International Court of Justice, which also provided for the possibility of a decision *ex aequo et bono.*

26. His delegation accordingly hoped that, before any final decision was taken on the proposal for a new article 62 *bis,* a revised text could be prepared to take account of the comments made by the various delegations, including his own. That would greatly facilitate the acceptance of a provision on compulsory settlement of disputes, which Guatemala strongly supported.

27. Mr. BILOA TANG (Cameroon) said that his delegation had reservations about any proposal which referred specifically to the International Court of Justice as the body before which disputes arising under Part V of the Convention should be brought. It also objected to any proposal which limited the effects of the provisions of article 62 *bis.* Nor could it support the creation of a new United Nations organ for conciliation. Nevertheless, it considered that the nineteen-State amendment provided a possible basis for discussion. It should be borne in mind, however, that conciliation and arbitration were not essentially the same thing, and his delegation therefore hoped that provision would be made not only for conciliators but also for arbitrators, a practice followed in connexion with the International Bank for Reconstruction and Development. Moreover, conciliators should be appointed not by all the States Members of the United Nations, but only by the States parties to the convention on the law of treaties. With regard to the period laid down for the appointment of arbitrators, it was unfortunate that the period of three months provided for in the original version of the nineteen-State amendment had since been reduced to sixty days. Again, intervention by the Secretary-General of the United Nations, should be subject to consultation with the parties to a dispute and to their consent. Lastly, the Cameroonian delegation was glad to note that the intervention of the parties to the treaty over which there was a dispute had been made subject to the consent of the parties to that dispute.

28. Mr. MERON (Israel) said that two main courses of action were open to the Committee. It could either be satisfied with the International Law Commission's text of article 62 or choose one of the proposals for a

new article 62 *bis* on the treatment of disputes arising under Part V of the convention.

29. The Japanese proposal (A/CONF.39/C.1/L.339) distinguished between claims made under articles 50 and 61 of the convention and other claims involving the invalidity, termination and suspension of treaties. His delegation was not convinced that the different treatment of disputes concerning *jus cogens* and other disputes was realistic. It did not think that judicial or arbitral bodies should exercise what in effect amounted to the legislative function of establishing norms of *jus cogens*. Underlying the debate in the Committee was the assumption that disputes arising out of claims of invalidity, termination and suspension of the operation of treaties were by definition legal disputes, amenable to a compulsory settlement by adjudication or arbitration. Was that assumption entirely correct? In a way, of course, all disputes between States contained both political and legal elements. The predominance of one element over the other and the question whether a dispute was political or legal depended on all the circumstances of the dispute, its contexts, and the general relations between the parties; in short, it depended on the attitude of the parties.

30. That had been recognized in the proposal by Spain (A/CONF.39/C.1/391). Although Israel had considerable doubts about the machinery which the proposal would establish, and in particular did not consider that the idea of entrusting the proposed commission with the determination of the legal or political character of a dispute was tenable, it seemed to him significant that the proposal admitted that disputes arising under Part V could be political in nature and not amenable to compulsory arbitration. His delegation believed that the States concerned should themselves in good faith settle disputes arising out of treaties and decide which disputes were to be submitted to arbitration.

31. The Israel delegation had already pointed out at the first session of the Conference that disputes arising out of the application of Part V would, in reality, relate not to the present convention but to quite a different treaty. They would arise in distinct and concrete political circumstances, and determination in advance of rigid settlement procedures might be undesirable. The proposals for the compulsory settlement of disputes arising in connexion with Part V were therefore unprecedented in their generality when compared to other provisions bearing on the settlement of disputes and contained in multilateral treaties concluded under the auspices of the United Nations. When relations between the States concerned were normal, disputes arising out of treaties could be effectively dealt with and settled without the need for arbitration or adjudication, by routine diplomatic or other procedures or by agreement on the choice of the means of settlement which could, of course, include arbitration or adjudication. However, when the will to establish or to maintain friendly relations was lacking, when there was grave political tension, the operation of normal procedures for the settlement of disputes between States was impaired and compulsory judicial or arbitral settlement would then at best superficially and formally solve certain technical problems without significantly contributing to the elimination of the real source of the dispute.

32. All the proposals for a new article 62 *bis* sought to establish new procedures and organs of conciliation or arbitration. The financial implications of those proposals should be carefully considered. There was already an abundance of organs and procedures for the settlement of disputes. The International Court of Justice and the Permanent Court of Arbitration at The Hague were cases in point. The difficulty lay not in the scarcity of organs but in the reluctance to make full use of those which existed.

33. The history of international law showed clearly that the development of the substantive rules of international law was not contingent on the development of procedural rules. By insisting now on linking the substantive development of the law of treaties with the compulsory settlement of disputes connected with Part V the Conference might be over-ambitious and endanger the important step forward which the international community of nations would be taking in adopting the convention on the law of treaties.

34. The proposals for article 62 *bis,* by establishing a predetermined method of settlement, might reduce the incentive to solve a dispute through normal diplomatic channels, since the objecting State could count on compulsory third-party determination.

35. His delegation believed that the parties to a dispute should choose the settlement procedure which they preferred. The history of the consideration of the problem of compulsory judicial settlement by the International Law Commission in its work on the law of treaties should not be disregarded. The Commission had concluded that its proposed article 62 represented the highest measure of common ground that could be found on the question. The Commission's proposal was realistic and more in accordance with the principle of equality of States than the proposals for a new article 62 *bis*. The Israel delegation was therefore unable to support any of those proposals. On the other hand, it would support the Swiss proposals for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1). The proposal gave expression to the important principle of the autonomy of the parties and made it clear that the proposed means of settlement should not prejudice the provisions contained in other conventions regarding the means of settlement preferred by the parties. Perhaps the Swiss delegation would consider broadening the scope of the amendment so that it would apply to the convention as a whole and not merely to article 62 *bis*. In that case, the proposed article should be placed elsewhere in the convention.

36. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that the Conference had now reached the crucial point when it must determine the most effective means of settling disputes between the parties to a treaty. Respect for treaties was the touchstone for all international relations, which were based on law rather than on the free and subjective interpretation of individual States, and his delegation considered that a codification of the law of treaties must contain complete, detailed and precise

provisions concerning the remedies open to a party when it found itself injured by the non-application or suspension of a treaty.

37. In order to safeguard the application of treaties, as well as the stability of international relations in general, there should be an adequate procedure in case of dispute, in order to discourage the unilateral denunciation of treaties in bad faith. His delegation took the view that that purpose could best be served by a provision for automatic and compulsory arbitration. It was therefore prepared to support the proposal for a new article 62 bis contained in the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

38. Treaties could, of course, be denounced in bad faith by any State, whether large or small, but a provision similar to that proposed in the new article 62 *bis* was clearly necessary in order to protect the smaller powers against arbitrary action by great powers. A procedure providing for conciliation or arbitration would also provide an automatic and compulsory method of settling disputes among the great powers which, if unchecked, might lead to a world conflagration. It was unnecessary to remind the Committee of how often in world history the unilateral denunciation of international treaties, without recourse to conciliation and arbitration, had proved harmful to peace.

39. His delegation unreservedly subscribed to the provisions of article 39, paragraph 2, according to which a treaty could be terminated or denounced or withdrawn from by a party " only as a result of the application of the terms of the treaty or of the present articles ". As a logical consequence of that paragraph, it was now necessary to determine exactly how a dispute arising from the non-application of a treaty should be settled. It was true that article 62 provided for such settlement by referring to Article 33 of the United Nations Charter; but since article 62 did not expressly state that arbitration and conciliation were to be compulsory and automatic, it left the door open to subjective interpretations which would tend to increase rather than diminish disputes between signatory States. The proposed article 62 *bis,* however, by providing for compulsory conciliation and arbitration, would put an end to disputes arising from the unilateral denunciation of a treaty, or at least prevent such disputes from having more serious consequences.

40. His delegation was not convinced that freedom to choose the methods of settling a dispute should be left to the parties themselves, since once passions had been aroused it would be difficult for them to listen to the voice of reason without some compulsory mechanism for impartial arbitration.

41. The representatives of the Ivory Coast and Senegal had refuted the objections made to article 62 *bis* and had clearly shown that the nineteen-State proposal offered the best solution to the problem. His delegation was however prepared to support any other amendment which would respect the principle of automatic and compulsory arbitration and conciliation.

42. Mr. FLEISCHHAUER (Federal Republic of Germany) said that, during the first session, his delegation had stated that it regarded the inclusion of a specific provision for the settlement of disputes arising out of Part V by automatically available machinery as necessary, since in its view the provisions of Part V were so far-reaching and in many respects so open to divergent interpretations that the codification and progressive development of that part of international law could not be limited to the formulation of substantive rules but should find its corollary in specific judicial procedures.

43. His delegation had not been convinced by any of the arguments advanced against automatic third-party settlement during the discussion of the proposed new article 62 *bis*. It failed to see why there should be any contradiction between such judicial procedures and the principles of the United Nations Charter. Article 92 of the Charter stated that the Statute of the International Court of Justice formed an integral part of the Charter, alhough the ultimate aim of the Statute was clearly an over-all system of compulsory jurisdiction.

44. It was also hard to understand how the establishment of those procedures could be said to place undue limitations on the sovereignty of States; his delegation regarded them as an important means of protecting the sovereignty of smaller States. It could not accept the argument that disputes arising out of Part V of the convention would not be primarily legal disputes and that there was therefore no need for a specific judicial settlement procedure. Nor could it agree with the view that no provision should be made for judicial procedures because articles like article 50 could not be interpreted by judges since they could not have any part in determining the content of new concepts of law.

45. International treaty practice had been advanced as an argument against compulsory procedures, and it was true that treaties providing for such procedures had rarely been concluded on a world-wide basis in recent years; the normal course had been to provide for optional protocols. But never since the adoption of the United Nations Charter had there been a convention which went closer to the very roots of international law than the present convention, especially its Part V, and for that very reason the adoption of an optional protocol would not be sufficient in the case of Part V. The far-reaching effects which Part V might have made it equally impossible to follow the Israel representative's suggestion and leave the procedure for the settlement of disputes to a different treaty dealing with the settlement of disputes in general.

46. As to the cost argument, his delegation was very much in agreement with what had been said by the Swedish representative; it also found the solution mentioned by the representative of Switzerland interesting. Prolonged uncertainty over the fate of a treaty might prove even more costly than the third-party procedure.

47. His delegation would prefer a procedure which provided for judicial settlement by the International Court of Justice; it was aware, however, that such a solution would not be acceptable to a large number of States. Although it regarded the Japanese proposal (A/

CONF.39/C.1/L.339) as the most suitable and although it could also support the Swiss amendment (A/CONF.39/C.1/L.377), it was prepared to consider other proposals, provided that the principle of automatically available judicial settlement was maintained as a binding rule for all parties and not merely as an optional protocol.

48. Of the two proposals for the settlement of disputes by other means than the International Court of Justice, his delegation favoured the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). By providing for a conciliation stage, followed by recourse to an arbitral tribunal if necessary, that proposal constituted a sensible basis for compromise. His delegation would have preferred to see a commission established, at least for disputes arising out of such fundamental articles as articles 50 and 61, but it was prepared to accept the relevant provisions of the nineteen-State draft. It was also prepared to accept the provisions of that draft concerning multilateral treaties, although it would have preferred to see the provisions of the Statute of the International Court of Justice on intervention by third parties copied in the nineteen-State proposal.

49. On the subject of the Spanish proposal (A/CONF.39/C.1/L.391), his delegation wondered whether it was not premature to provide for a " United Nations Commission for Treaties " which would have the final word on whether a dispute was of a legal or of a political nature.

50. His delegation whole-heartedly supported the Swiss amendment (A/CONF.39/C.1/L.393/Corr.1) for a new article 62 *quater,* as well as the Ceylonese proposal (A/CONF.39/C.1/L.395), although it regarded that proposal rather as a useful clarification than as a new rule, since the convention was of a dispositive character wherever it did not codify rules of *jus cogens.*

51. He was unable to support the amendment by Thailand (A/CONF.39/C.1/L.387), which his delegation considered to be hardly compatible with the object and purpose of Part V. It was confirmed in that opinion by the Luxembourg amendment (A/CONF.39/C.1/L.397), although it considered that a decision should not be taken on that amendment until the Conference had a clearer view of article 62 *bis* and perhaps also of the final clauses with regard to reservations in general.

52. His delegation was opposed to the four-State amendment (A/CONF.39/C.1/L.398), which would transform article 62 *bis* into an optional provision. The Indian representative had referred to the *North Sea Continental Shelf* cases and had quoted from the judgement of the International Court of Justice, but he would point out that the Court had not discussed negotiation as a means of settlement, as opposed to compulsory jurisdiction; it had made its statement rather in relation to agreements concluded between the three parties to the dispute to continue their negotiations on the basis of the judgement. Important as those findings of the Court were, he did not think that conclusions could be drawn from them with regard to article 62 *bis.*

53. Mr. KHASHBAT (Mongolia) said that any proposals relating to article 62 should be drafted in such a way as to take account of the various legal systems of different States. It was important to establish what solution was best suited to the present practice of States. The adoption of any formula that reflected the views of only a limited number of States or a particular legal system would make the application of Part V of the convention ineffective, and would be detrimental to the application of the convention as a whole. His delegation believed that the International Law Commission's formula as adopted at the first session provided the most realistic solution. It was in accordance with such basic principles of international law as the sovereignty of States, good faith in the execution of international obligations, and the peaceful settlement of disputes. The application of those principles provided a safeguard against any arbitrary action in relation to Part V of the convention. The Commission's draft of article 62 was not perfect, but that was because it represented the greatest measure of agreement between different points of view. Moreover the Commission had been quite correct to refer to Article 33 of the Charter, since any attempt to go beyond the provisions of the Charter would be unacceptable. The most suitable pacific means of settling a dispute could be chosen in the light of the nature of the problem.

54. Experience showed that the most democratic means of settling international disputes, namely, negotiation, was usually the most effective. There was no reason for assuming that a solution arrived at in that way was necessarily unjust, and it was wrong to make such an assertion about means that were suggested in Article 33 of the Charter. Arbitration in accordance with the will of one of the parties should not be suggested as the only means of settling a dispute, since it could lead to the violation of the sovereignty of the parties, which might not accept the decision of the tribunal. It was noteworthy that Article 36, paragraph 1 of the Statute of the International Court of Justice provided that the jurisdiction of the Court comprised all cases which the parties referred to it, in other words, the consent of all the parties was required.

55. Consequently his delegation could not support the proposal to include an article 62 *bis,* and would vote against any amendment providing for compulsory jurisdiction with respect to Part V.

56. His delegation supported the four-State proposal in document A/CONF.39/C.1/L.397, which was in accordance with Mongolia's view that the parties should have the right of free choice of the means of settling their disputes.

57. Mr. HUBERT (France) said that his country had always regarded arbitration as the supreme method of settling disputes, since it possessed two great virtues: first, it ensured complete equality between all States, whether large or small; secondly, it offered the possibility of a complete settlement, something which could not always be provided by conciliation alone.

58. The present draft articles contained a number of new and difficult provisions, some of which lacked precision and might easily lead to disputes. Failure to

include a rule concerning compulsory arbitration would therefore leave a serious gap which would affect the balance of the convention as a whole, with the result that it would be impossible for his Government to accept it.

59. His delegation could not accept the amendment proposed by Thailand (A/CONF.39/C.1/L.387) or the four-State amendment (A/CONF.39/C.1/L.398), and it questioned whether the amendment proposed by Ceylon (A/CONF.39/C.1/L.395) was really necessary.

60. The Japanese amendment (A/CONF.39/C.1/L.339) gave a monopoly to the International Court of Justice in cases involving articles 50 and 61, while the Swiss amendment (A/CONF.39/C.1/L.377) was more flexible. His delegation was prepared to vote for both; if they were rejected, the Committee would be left with the Spanish amendment and the nineteen-State amendment. The Spanish amendment (A/CONF.39/C.1/L.391) displayed great legal skill, but was perhaps rather too cumbersome.

61. Since his delegation strongly supported the principle of arbitration, it would support the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), although it tended to give the Secretary-General quasi-judicial powers which were perhaps greater than what was envisaged in the Charter, and did not ensure that the conciliation procedure had the necessary confidential character.

The meeting rose at 10.35 p.m.

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## NINETY-EIGHTH MEETING

*Tuesday, 22 April 1969, at 11 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new articles 62* bis, *62* ter, *62* quater *and 76* (continued)

1. Mr. WARIOBA (United Republic of Tanzania) said that the debate on article 62 *bis* had convinced him of the impossibility of resolving, either by argument alone or by parliamentary manœuvre, the sharp division of opinion in the Committee. Certain delegations had made it clear, in some cases repeatedly, that their Governments could not ratify a convention which did not contain a provision of the kind proposed in article 62 *bis*, whereas others had said that a provision of that kind would make it difficult for their Governments to adopt the convention. In both cases, the work of the Conference would ultimately be frustrated either intentionally or unintentionally.

2. Yet it was still of paramount importance that the convention should be ratified by as many States as possible, and to that end, as he had already said at the 90th meeting,[1] individual interests would have to be overridden. That was the spirit in which his delegation had agreed to co-sponsor the sub-amendment (A/CONF.39/C.1/L.398) to the nineteen-State proposal for article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

3. The fact that the new amendment made it optional to apply the procedure for the settlement of disputes arising from the application of Part V of the convention on the law of treaties was not the only reason why his delegation had agreed to co-sponsor it. His delegation continued to believe that any automatic machinery for compulsory settlement would be illusory and it had the same doubts and reservations as it had expressed at the 93rd meeting[2] about the procedures envisaged in the nineteen-State proposal. Moreover, there was also a possibility that the competent organs of the United Nations might refuse to meet the cost of the bodies it was proposed to set up.

4. But above all the United Republic of Tanzania wished to see a spirit of compromise prevail. As the Indian representative had said, an empty victory would be useless. The United Republic of Tanzania hoped that other delegations would reconsider their position in the same spirit. His own delegation was fully prepared to consider suggestions which would improve the wording of its sub-amendment.

5. Mr. KEARNEY (United States of America) said that from the beginning of the discussion on article 62 his delegation had expressed its concern about the provisions of Part V of the draft articles, which were susceptible of unilateral abuse. An arbitrary decision by a State that a treaty was invalid might lead not only to injustice in individual cases but also to quarrels which could be a threat to peace.

6. Unless accompanied by some other provision, article 62 would give parties unrestricted freedom for abusive action, and would thus constitute a threat to the stability of the entire system of international treaties.

7. On the other hand, automatic machinery for conciliating and settling disputes concerning the invalidity of treaties would assist in the development of the legal concepts expressed in Part V of the draft articles, just as domestic tribunals had helped in the development of complex notions such as public order, for example. The principles expressed in Part V were present in various forms in all municipal systems of law and functioned as instruments of social justice and progress in municipal law precisely because of the existence of effective domestic machinery for the compulsory settlement of disputes.

8. The United States had therefore maintained from the outset that the convention on the law of treaties must provide for compulsory procedures for the impartial settlement of disputes concerning the invalidity of a treaty, and it continued to believe that such procedures were absolutely indispensable.

9. It might well be contended that the International Court of Justice, established under the Charter of the

[1] Para. 10.

[2] Paras. 48-58.

United Nations, was the judicial body best qualified to settle disputes concerning treaties. However, in view of the early and manifest opposition to the Court, the United States had attempted, with other States, to devise different procedures; at the first session it had proposed (A/CONF.39/C.1/L.355) a fairly detailed conciliation and arbitration procedure which would have solved a number of difficult problems, including disputes in which a party claimed a material breach of a treaty under article 57.

10. Between the first and second sessions of the Conference, the United States had held consultations with many Governments on the basis of the new article 62 *bis* proposed by various countries (A/CONF.39/C.1/L.352/Rev.2). In its revised form (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), the proposal at present before the Committee constituted a logical and integrated whole. Its sponsors had obviously sought to take into account the interests of the international community. Several passages concerning the conciliation and arbitration procedure had been reworded to make them acceptable to many delegations which had raised objections. The procedure envisaged was that if a party claimed that a treaty was invalid, the parties to the dispute would agree to amend the treaty or resolve the dispute by other means; the nineteen-State text made it clear that the parties were entirely free to do so. Failing agreement, there would be a conciliation procedure, which in his opinion ought normally to be successful, since the mere possibility of either party invoking compulsory arbitration as a last resort in a particular dispute was the best guarantee that the conciliation procedure would be successful.

11. On the other hand, the revised wording of the nineteen-State proposal for a new article 62 *bis* did not fully satisfy the United States, several of whose suggestions had not been taken up. After careful consideration, however, his delegation had concluded that the wording in question provided for a settlement procedure which should function justly and efficiently and adequately protect the interests of all parties to any treaty. Accordingly, the United States was finally abandoning its proposal (A/CONF.39/C.1/L.355) in favour of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which it would support whole-heartedly.

12. In a conference such as the one in progress, and in dealing with a subject of such complexity, any solution acceptable to the majority must obviously be a compromise, and the nineteen-State proposal was the result of a whole series of compromises. Unlike those for whom a compromise had only a distasteful connotation, he considered that in the case in point the compromise was a reasonable one and the most likely to guarantee a just and fair solution for all parties to a dispute.

13. That being so, his delegation would vote for the nineteen-State text and would abstain from voting on otherwise acceptable proposals which stood little chance of being accepted by the Conference, in particular those submitted by Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.377). Those two proposals nevertheless had the advantage of providing for a strictly judicial settlement of certain possible disputes, which was particularly desirable in the case of disputes based on articles 50 or 61, in view of the abstract and novel character of the concept of *jus cogens* in such a context.

14. The Spanish proposal (A/CONF.39/C.1/L.391) had attractive technical features, such as the creation of a permanent conciliation body, an idea which was on the lines of what had been suggested earlier by the United States (A/CONF.39/C.1/L.355). However, before referring a dispute to arbitration, the conciliation commission in question would have to decide whether it was to be classified as a legal dispute. That provision would be difficult to apply, because a claim against a treaty under any of the provisions of Part V of the draft articles was bound to give rise to a legal dispute, even though that dispute might also involve questions of fact and have important political consequences. The issue would always be whether a provision of the convention on the law of treaties really justified a claim that a treaty should be invalidated or terminated. Accordingly, his delegation could not support the Spanish proposal.

15. The sub-amendment (A/CONF.39/C.1/L.398) submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia to the nineteen-State proposal would make the settlement procedures in that proposal optional rather than compulsory. It would go even further in that direction than the proposal by Thailand (A/CONF.39/C.1/L.387): it would not merely allow the parties to enter a reservation against the application of a compulsory settlement procedure but would also make article 62 *bis* inapplicable unless a party had taken the affirmative step of declaring that it accepted the provisions of article 62 *bis*. His delegation would vote against both those proposals because it could not agree that the clause on the settlement of disputes should be optional.

16. Mr. ESCUDERO (Ecuador) noted that the discussion had brought out two radically opposing arguments, one of them deriving from the idea that article 62 gave sufficient safeguards owing to the rule stated in paragraph 3 that a solution to any dispute arising from the application of the provisions of Part V should be settled through the means indicated in Article 33 of the Charter of the United Nations, the other stressing the inadequacy of article 62 and the absolute necessity for providing, in an article 62 *bis*, rules for compulsory procedure to settle such disputes.

17. As things stood, the wearisome repetition of contradictory arguments before the Committee was simply aggravating the divergences instead of leading to a constructive solution; the Ecuadorian delegation would confine itself to stating its position when the time came to vote.

18. It did, however, feel constrained to take the floor to state forthwith that it categorically refused to accept an idea advanced on several occasions, whereby certain delegations were trying to muster the support of as many delegations as possible for the inclusion of an article 62 *bis* in the convention. The idea was to introduce into a convention on the law of treaties a rule that

the convention would be applicable only to future treaties, in other words to treaties concluded after the convention had entered into force.

19. He failed to see how it could reasonably be suggested that the whole system of rules laid down in the convention, those, for example, relating to reservations to multilateral treaties, to the observance of treaties, to the amendment of treaties and to the invalidity or suspension of treaties, would not apply to treaties existing before the convention entered into force, whose number was, and would be, legion. That would be tantamount to suggesting that before the convention came into force, treaties had been perfect and all models of their kind, and that international relationships had been such that the modern world was a paradise. Only future treaties would, in that view, contain every possible defect.

20. If that were accepted, what would become of the patient work and the valiant efforts of the International Law Commission, and what would become of the work of the Conference itself? Neither the Commission nor the Committee of the Whole had ever dreamed of so unjust a formula, positively calculated to undermine the very foundations of law. Furthermore, no such rule had ever been put up to Governments for consideration, as had been done with all the other provisions of the draft articles. It would, moreover, be hard to justify such an unusual formula which purported to include treaties existing before the convention from its application, seeing that the purpose of the draft convention, both in the spirit and in the letter, was to treat past, present and future treaties on an absolutely equal footing from the legal point of view, as indeed law and mere common sense demanded. It was clear, too, that such a formula would violate the principle of the sovereign equality of States on which the United Nations was based by giving States parties to future treaties a privileged position, to the disadvantage of States parties to past treaties. That would be as unfair as keeping a new wonder drug for future patients alone, thereby condemning existing patients to death. The adoption of such a formula would suffice to prevent many States, basing themselves on the higher claims of justice, from becoming parties to the convention on the law of treaties.

21. Mr. ABDEL MEGUID (United Arab Republic) said that his delegation had defined its position with regard to article 62 at the first session of the Conference and had supported the article in the form presented by the International Law Commission. It could not contemplate an automatic procedure for settling all disputes arising out of Part V of the convention.

22. Article XIX of the Charter of the Organization of African Unity [3] and article 5 of the Pact of the League of Arab States [4] stipulated procedures for solving any disputes between the parties, and they were based on the free consent of the parties. They were regional agreements accepted by a large number of States which had not considered it necessary to set up a compulsory system for settling their disputes.

23. His delegation had carefully examined all the arguments put forward by the sponsors of article 62 *bis*, and in particular the Spanish proposal, which tried to differentiate between legal and political disputes. It felt that it would be better not to mortgage the future and that it would be more realistic to leave it to the parties concerned to find the best means of settling their disputes. The sponsors of the sub-amendment (A/CONF.39/C.1/L.398) had submitted a formula which, combined with the text of the revised nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), might be a happy solution to the difficulties now confronting the Committee regarding the procedure for settling disputes.

24. Mr. DOHERTY (Sierra Leone) said that his delegation could not accept the proposal to introduce automatic machinery for settling disputes arising out of Part V into the convention. It was by no means certain that such machinery would guarantee the settlement of such disputes, for that depended mainly on the parties' good faith. It must be admitted, too, that there were no effective sanctions against a State which, in spite of a provision for compulsory arbitration, refused to implement the decision of an arbitral tribunal. The smaller States could therefore not be assured of protection, and experience had shown that such States were subjected to pressures by stronger States. Thus, though his delegation believed that a system of compulsory jurisdiction was a good thing in principle, it did not think that the time had yet come to include such a provision in a convention on the law of treaties. States should be free to choose whatever settlement procedures they preferred. Article 62, paragraph 3 stated that the parties should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. The main aim should be a rapid settlement of disputes, based on the principle of the sovereign equality of States.

25. The Sierra Leone delegation, however, had not taken up any inflexible position. In its view, the ideal would be to find a formula acceptable to the large majority of States. It was therefore ready to consider any reasonable formula which would give some measure of freedom in the choice of means of settling disputes such as, for instance, the adoption of the system of an optional protocol, as had been done in certain conventions. That formula would enable States to accept compulsory arbitration when they thought it useful to do so.

26. Some of the great Powers had objected to rising costs in the United Nations. It was surprising, therefore, that anyone should wish to impose further financial obligations on the United Nations, as article 62 *bis* implied.

27. It was in the light of the foregoing considerations that his delegation would cast its vote on the various proposals and amendments before the Committee.

28. Mr. MATOVU (Uganda) said that certain safeguards were included in the nineteen-State proposal.

[3] United Nations, *Treaty Series*, vol. 479, p. 80.

[4] United Nations, *Treaty Series*, vol. 70, p. 254.

The provisions would be applicable only to future treaties. States which were parties to treaties could always contract out of their treaty obligations, as provided in the Ceylonese amendment. Furthermore, the award, though binding, would not be enforceable. Lastly, the provisions in article 62 *bis* were favourable to the smaller States. Draft article 62 *bis* was certainly not yet perfect, but it was based on principles which merited the Committee's approval.

29. Mr. AL-RAWI (Iraq) said it was generally recognized that all States were bound to comply with the rules of international law, but that violations of those rules did occur. There was therefore a general desire for the progress and development of international law and the setting up of international courts to administer international justice. There was no doubt that States often wished to settle peacefully any disputes which arose between them, but it was equally certain that they were not ready to accept a compulsory means of settlement for that purpose. In such circumstances they could resort to the means provided in Chapter VI of the Charter. It would be a long time before States generally would accept a system of compulsory settlement and clearly some States were over-ambitious in attempting to get that rule adopted by the Conference.

30. A large number of States refused to accept the compulsory jurisdiction of the International Court of Justice. The optional clause therefore constituted the most appropriate means of settling international disputes. The main object of contemporary international law was to settle disputes by peaceful means, and the United Nations Charter enumerated those means, leaving the freedom of choice in the matter to the States themselves. That principle had been approved by the international community and was confirmed by practice. Compulsory jurisdiction had not been accepted in a large number of international conventions such as the Conventions on the Law of the Sea and the Conventions on Diplomatic and Consular Relations. The absence of that rule had not impeded the development of international relations. On the contrary, practice had shown that those relations had developed.

31. Article 62, approved by the Committee at the first session, reflected the attitude of the international community at the present stage and, as the International Law Commission, had already said, it represented the highest measure of common ground that could be found among Governments. The reference in that article to the means of settlement of disputes indicated in Article 33 of the Charter was realistic. That did not mean that States could violate unilaterally the principles of international law and the provisions of treaties they had concluded. The *pacta sunt servanda* principle must be respected. Resort to force could no longer be admitted today, and States must have recourse to the peaceful means indicated in Article 33 of the Charter.

32. For those reasons, the delegation of Iraq had not so far been able to accept any of the proposals concerning the establishment of procedures other than those mentioned in article 62. However, having studied the proposal submitted by the Indian and other delegations (A/CONF.39/C.1/L.398), it would be able to vote in favour of that proposal.

33. Mr. SIDDIQ (Afghanistan) said that at the first session his delegation had supported article 62. It was still convinced that that article provided an adequate procedure for the settlement of disputes arising out of Part V of the convention. The article envisaged speedy, impartial and just settlement of disputes by peaceful means freely chosen in conformity with the fundamental principle of the sovereign equality of States.

34. His delegation had given careful thought to the amendments which proposed to establish compulsory settlement procedures, but it was unable to support them, for it believed that the text of article 62 represented the highest measure of common ground that could possibly be found on the subject.

35. His delegation earnestly hoped that, as a result of possible consultations between the different groups, it would be possible to find a solution acceptable to all members of the Conference.

36. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the question of the compulsory judicial settlement of disputes was not new. It had been examined by many bodies and at numerous conferences. The International Law Commission had studied the problem at great length and had proposed a text of article 62 based on the provisions of the United Nations Charter which the Committee of the Whole had decided to adopt without change.

37. Attempts were now being made to introduce into the convention new provisions designed to establish a system for the compulsory settlement of disputes arising out of the application of Part V of the convention. Many arguments had been advanced in favour of such a system. The United States representative had even said that those provisions represented a compromise; the assertion was inadmissible, since the proposed new article was an attempt by a group of States to impose on other delegations a concept unacceptable to them.

38. The fact was that article 62 *bis* was not in conformity with Article 33 of the United Nations Charter, which was based on the principle of the sovereign equality of States and which urged States to settle their disputes by whatever peaceful means they chose. By applying the method advocated in the Charter to the law of treaties, the States parties to a treaty could jointly consider which were the best methods for the peaceful settlement of their disputes, bearing in mind the particular nature of the treaty. That was a very reasonable method, for there were many different kinds of treaty. In 1966, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had examined that problem and had concluded that disputes should be settled in accordance with the principles of State sovereignty and of freedom to choose the means of peaceful settlement.[5]

[5] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

The thirty-two States members of that Committee had all accepted those principles, and the Sixth Committee of the General Assembly had approved them. Accordingly, proposals for compulsory jurisdiction ran counter to the principles of the Charter and of international law.

39. Some delegations had asserted that the introduction of a provision on compulsory jurisdiction in the convention was in the interests of small States. That was not the case, for the proposal to establish compulsory jurisdiction had been prompted by powerful States. As the United States representative had just said, consultations among those States had taken place between the two sessions of the Conference, and it was obvious that article 62 *bis* had been proposed by a group of States which wished to use it for definite political ends. Compulsory arbitration would be used for the benefit of the developed countries and to protect their particular interests. It was, of course, conceivable that certain small developing countries might occasionally profit by machinery of that kind, but the procedure was primarily designed to serve, and would serve, the interests of the Western countries and in the first place those of the United States, the United Kingdom and the Federal Republic of Germany.

40. It should be borne in mind that it was the developing countries which had wished above all to introduce into the convention the provisions of Part V which gave them the right to terminate unequal treaties imposed on them against their will. It was therefore surprising that those States could contemplate accepting a compulsory arbitration procedure. That point was brought out in the Luxembourg amendment, under which a State must either accept arbitration or be debarred from availing itself of the provisions of Part V.

41. Article 62 *bis* provided for the establishment of a special organ for dealing with the settlement of disputes. The sponsors of that proposal had tried to demonstrate that the establishment of a new organ could solve all problems. That was not the case, however, as was shown by the fact that the organs which already existed — the Permanent Court of Arbitration and the International Court of Justice — were not very often resorted to by States. It was obvious that States preferred other means, and the proposal for the establishment of new organs was therefore based, not on reality and practice, but on an idealistic concept. In the opinion of the Soviet Union delegation, the establishment of new organs should be avoided.

42. The advocates of compulsory arbitration had tried to show during the debate that that procedure would not restrict the freedom of States. The arguments advanced to that end were unconvincing. Freedom to choose the means of settlement should be interpreted in its broadest sense. It had already been pointed out that in practice a single arbitrator might finally settle a dispute. Moreover, if a special list of arbitrators were established, its membership would be limited by Western lawyers, and that would restrict the right of developing countries to choose the persons they wanted to have as their arbitrators.

43. Certain delegations had submitted amendments with a view to altering or supplementing article 62 *bis*. The Japanese amendment amounted to providing that the International Court of Justice should be given the power of determining *jus cogens* in the particular case, and that would be unacceptable. Nor was the proposal for the establishment of a " United Nations Commission for Treaties " any more admissible, for there seemed to be no reason why, for instance, two African States which wished to settle a dispute arising from a treaty should necessarily apply to the commission within the framework of the United Nations. A dispute relating to a regional treaty should be settled at the regional level. Otherwise, the freedom of the States concerned would be restricted.

44. The arbitration provided for in article 62 *bis* would be inapplicable to political treaties. The delegations which supported article 62 *bis* could not deny that, in the event of a dispute arising out of a political treaty, their countries would not wish to apply to such a commission. The proposal therefore failed to take the contemporary world situation into account.

45. The provisions of article 62 *bis* also raised a financial question. According to the draft, the expenses were to be borne by the United Nations; but there seemed to be no reason why, for example, in the event of a dispute between the Federal Republic of Germany and Switzerland, which were not members of the United Nations, that Organization should bear the costs. If a dispute arose between two States, it was for those two States to pay the expenses for arbitration.

46. The Soviet Union delegation considered that the text of article 62 proposed by the International Law Commission was acceptable and it saw no reason for adopting article 62 *bis*. It was extremely anxious to ensure the success of the work on the law of treaties and was prepared to accept a common denominator, likely to cater for the interests of the various groups of States, in connexion with all important problems. But article 62 *bis* and its variants could not constitute such a common denominator. The Western countries were incurring a serious responsibility by insisting on the adoption of that provision. They wanted a vote to be taken immediately; they wanted to impose their will on the Conference; but it would be a Pyrrhic victory, for many States would then refuse to accede to the Convention. The important thing was to find a reasonable compromise, on the basis of which a generally acceptable text could be prepared. The USSR delegation would support any efforts that might be made in that direction.

47. Mr. ESCHAUZIER (Netherlands), speaking as a sponsor of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), said the procedure for compulsory settlement of disputes would not serve the interests of the western or developed countries alone, as the representative of the Soviet Union had stated; that was shown by the fact that a representative group of delegations from the developing areas of the world had co-sponsored the proposal.

48. His delegation agreed with other delegations, among them those of India, Indonesia, Saudi Arabia and the Soviet Union, on the predominant importance of negotiation as a means of settling disputes. It should, however, be stressed that article 62 *bis* would become operative only in case negotiations failed to produce a result or if one of the parties refused to negotiate. In that connexion the Indian representative had quoted from a recent judgement by the International Court of Justice in the *North Sea Continental Shelf* cases,[6] in which the Court had stated that the parties were under an obligation to enter into negotiations with a view to arriving at an agreement. No delegation could fail to concur in that statement. However, in summing up the judgement the Indian representative had not placed sufficient emphasis on certain points. The Court not only did not deny the wisdom of the parties in asking its guidance on the rules of law in force between the parties, but, as an impartial authority, had indicated what were the rules of law prevailing in that particular case in order that the parties might know the legal basis on which to negotiate successfully. Indeed, the judgement referred to by the Indian delegation was a striking example of the fruitful interplay of impartial adjudication and negotiation.

49. Some delegations had quite rightly observed that the mere existence of an automatically available arbitration machinery would have a beneficial influence on negotiation as well as on conciliation.

50. The sponsors of the nineteen-State proposal agreed with other delegations that the very nature of conciliation called for a confidential procedure. In paragraph 4 of the proposed annex the sponsors had not said that the conciliation commission's report should be published. If the wording of the paragraph did not reflect the sponsors' intention clearly enough, the Drafting Commitee would certainly be able to improve it.

51. Some delegations had mentioned that conciliation and arbitration procedures would entail a great deal of expense. It was for that very reason, however, that the sponsors had proposed that the expenses of the conciliation commission — and, if arbitration should be resorted to, the expenses of the tribunal — should be borne by the United Nations. For that matter, failure to settle a dispute might entail far heavier expense.

52. The sponsors of the nineteen-State amendment had taken note of the Mexican representative's contention that disputes on the interpretation of an arbitral award ought to be settled by the arbitral tribunal itself.[7] It was constant practice in international adjudication that a dispute as to the meaning or scope of an award was decided by the arbitrator or the tribunal which had delivered the award. That rule was well established and did not need repetition, but if the Drafting Committee preferred to include a provision covering the matter, that would be in conformity with the sponsors' intention.

53. The representative of Pakistan has asked whether the arbitral tribunal was empowered to indicate, if it considered that circumstances so required, any provisional measures which ought to be taken to preserve the respective rights of the parties.[8] The point had been considered by the sponsors with the representative of Pakistan. The arbitral tribunal might, pending its final decision on the question, and at the request of any party to the dispute, indicate such measures as might be appropriate; but the suspension of a treaty in whole or in part could not be decided except in order to avoid irreparable damage. Paragraph 6 of the annex probably already met the point by providing that the tribunal would decide its own procedure. The sponsors recognized, however, that the provision might be worded more clearly and hoped that the Drafting Committee would take that point into consideration.

54. Some delegations had objected that the nineteen-State amendment went too far; they would have preferred not to include any compulsory settlement procedure in the convention. Other delegations would have preferred a clause providing for adjudication by the International Court of Justice. The nineteen-State amendment met both those arguments by providing a compromise formula.

55. The sponsors of the nineteen-State amendment believed that it could hardly be reconciled with the proposals by Thailand (A/CONF.39/C.1/L.387) and by India, Indonesia, the United Republic of Tanzania, and Yugoslavia (A/CONF.39/C.1/L.398), since those proposals dissociated Part V from the procedure for settling disputes. One of the sponsors of the four-State amendment had said that he hesitated to accept specific means of settling disputes for an indefinite period and for an unknown number of treaties since, in his opinion, that would be an infringement of the sovereign rights of States. He (Mr. Eschauzier) would point out that all the means of settlement indicated in Article 33 of the Charter remained available.

56. In reply to the Soviet Union representative's observations about a dispute which might arise between two African States, he said that the States in question would always be at liberty to resort to the arbitration procedures laid down in the Charter of the Organization of African Unity.

57. Articles 62 and 62 *bis* dealt only with the preliminary question whether a treaty was or was not valid. Those articles did not, therefore, regulate the application or interpretation of future treaties.

58. The nineteen-State amendment was an organic whole, all the main elements of which were inseparable. Some delegations had observed that it would be wrong for a majority to impose a solution on a minority which might find it difficult to accept the proposed settlement procedure. The sponsors wished to stress that their text had been drafted in such a way as to allay the misgivings of delegations opposed to their proposal and that, if a provision of that kind was not included in the draft convention, a number of other States would find it hard to accept it.

59. The Netherlands delegation believed that after the full discussion at the first session and at the immediately

[6] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

[7] See 94th meeting, para. 69.

[8] *Ibid.*, para. 87.

preceding meetings, the time had come to take a decision by vote.

60. Mr. MARTINEZ CARO (Spain) said that the main objections raised by delegations to the Spanish amendment (A/CONF.39/C.1/L.391) concerned either the difficulty of drawing a distinction between legal disputes and other disputes which might arise from the application of Part V of the convention, or the practical aspects of setting up a " United Nations Commission for Treaties ".

61. His delegation knew how difficult it was to lay down objective criteria for dividing international disputes once and for all into the two major categories of legal disputes and political disputes. Although disputes relating to the validity or maintenance in force of a treaty, or to similar questions, were legal in nature, it was also true that the actions of States parties to a treaty were always politically motivated and likely to have political repercussions.

62. Nevertheless, means obviously had to be devised for the impartial and fair settlement of disputes which might arise from the application of the convention on the law of treaties, and it was clear that disputes between States were not all alike. Experience had shown that to solve some disputes a flexible formula was needed, whereas in other cases pre-established rules should be applied. Article 36 of the United Nations Charter and Article 36 of the Statute of the International Court of Justice expressed that distinction by referring to " legal disputes ".

63. The basis of the Spanish proposal was the fact that, in the international community as it now was, States were not prepared to submit all their treaty disputes to a judicial or arbitral organ. That was obvious from the reservations to the declarations of acceptance of what had been called the compulsory jurisdiction of the International Court of Justice and from the reservations and provisos concerning domestic jurisdiction and vital interests in many existing treaties.

64. The Spanish delegation believed that attitude on the part of States to be due both to the absence of an international legislative organ and to the climate of mutual suspicion which was still a characteristic feature of the international scene. A means must therefore be sought to facilitate the success of the task of codification which the General Assembly had entrusted to the Conference on the Law of Treaties, and it could take the form of recognizing, as his delegation had urged, that some disputes arising from the application of Part V of the convention, namely legal disputes, could be settled by an arbitration procedure.

65. The fundamental point was to distinguish between disputes which should be referred to arbitration and disputes which could be settled by negotiation. His delegation considered that it should be the task of the proposed commission for treaties, which would be responsible to the General Assembly, to settle that point.

66. The establishment of the commission would entail no serious institutional or practical difficulties. The proposed " United Nations Commission for Treaties " would at any given moment reflect the composition of the General Assembly of the United Nations and would develop on a par with the international community; it would be an essential factor in solving treaty disputes. Its recommendations to the parties would make it the vital and progressive element which the international order at present lacked. Moreover, if circumstances so required and if the state of positive law so permitted, it could decide that the dispute would be settled by an arbitral tribunal, whose award would rest on *lex lata*; that would help to establish a body of jurisprudence on treaty law. The balanced composition of the commission would also ensure the impartial appointment of the chairmen of the conciliation and arbitration bodies better than any other procedure.

67. The representative of Kuwait had asked [9] whether the proposed United Nations commission for treaties would be empowered, subject to the authorization of the United Nations General Assembly and in accordance with Article 96(2) of the Charter, to request an advisory opinion from the International Court of Justice on the disputes submitted to it. That was an interesting question because it focused attention on the commission's function with regard to the future convention. The Spanish proposal was based on the idea that the convention on the law of treaties would occupy a place of fundamental importance in the international legal order in the coming years. It was not merely a codification convention but also the most important result of United Nations work on progressive development and codification. If the proposed commission for treaties was to settle only individual cases between States, recourse to the advisory opinion provided for in Article 96 of the Charter would seem inappropriate; the opinion of the International Court would not be particularly useful in a specific case and that procedure would merely delay the solution of the dispute. But the proposed " United Nations Commission for Treaties " would be an organ for administering the convention, and it would deal not only with concrete problems arising from disputes between two States but also with general problems deriving from the application or interpretation of the convention. A request for an advisory opinion would then be appropriate.

68. Further, the commission could undertake various tasks concerning the settlement of disputes arising from Part V and from the interpretation or application of the convention, as suggested by the Spanish delegation in its proposal for a new article 76 (A/CONF.39/C.1/L.392). The comment by the representatives of Switzerland and the Federal Republic of Germany concerning the participation of States which were not members of the United Nations but were parties to the future convention was of great interest and deserved consideration.

69. The five suggestions which the Mexican representative had made [10] were implicit in the Spanish proposal. They could be regarded as substantially improving the operation of the conciliation and arbitration bodies; they

[9] *Ibid.*, para. 23.

[10] *Ibid.*, paras. 66-70.

also safeguarded the lawful rights of the parties to the dispute.

70. Mr. KRISHNA RAO (India), replying to representatives who had criticized the relevance of the passage he had quoted at the 96th meeting, said that the Court, in its judgement in the *North Sea Continental Shelf* cases, had stated that the parties were under an obligation to enter into negotiations with a view to arriving at an agreement; it had shown itself more realistic on that point than the sponsors of article 62 *bis* by stating that judicial or arbitral settlement was not universally accepted. The representative of the Federal Republic of Germany had referred to that passage at the previous meeting and had given his interpretation of the Court's decision. Delegations could form their own opinion on the subject by consulting the relevant portion of the Court's judgement.

71. In reply to the comments of the Netherlands representative on the same point, he said that the case in question had been referred to the Court by mutual consent of the parties and not by the means advocated in the nineteen-State amendment, namely arbitration or judicial settlement.

The meeting rose at 1 p.m.

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## NINETY-NINTH MEETING

*Tuesday, 22 April 1969, at 3.20 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Proposed new articles 62* bis, *62* ter *and 62* quater (continued) [1]

1. The CHAIRMAN invited the Committee to reach a decision on the three proposed new articles 62 *bis*, 62 *ter* and 63 *quater*.

2. Mr. DADZIE (Ghana) said that at its first session the Conference had reached the point when it had become saturated with proposals for machinery for the settlement of disputes regarding the application of treaties. Although some proposals had been carefully thought out, it had been obvious that none would obtain general acceptance. Wisdom had prevailed at that stage, and a vital decision had been taken which had made it possible to resume consideration of the subject at the present session with great hopes. Once again, however, a similar situation had been reached. Was the Conference now to run the risk of ruining the achievements of two years' painstaking effort? In his view, it would be far wiser to continue the attempt to reach a compromise solution, and his delegation was working on such a compromise at that moment. He therefore formally moved the adjournment of the debate on the proposed new article 62 *bis* for forty-eight hours, under rule 25 of the rules of procedure.

3. The CHAIRMAN said that, under rule 25, two representatives might speak in favour of, and two against, the motion for adjournment.

4. Mr. ABED (Tunisia) said that to adjourn the debate at that stage after spending many days in discussing article 62 *bis* did not, in his delegation's view, constitute a solution. Continued postponement would merely delay the Committee's work, and the time had come to proceed to a vote, particularly since the proposed article 62 *bis* already represented a compromise.

5. Mr. NEMECEK (Czechoslovakia) said that his delegation supported the Ghanaian representative's proposal for adjournment, since informal discussions were still continuing which should lead to a compromise proposal. Adjournment could not do any harm, and should help to promote a harmonious atmosphere in the Committee's work.

6. Mr. NASCIMENTO E SILVA (Brazil) said that, although his delegation was a prospective loser in the vote about to be taken, he was in favour of proceeding to the vote immediately. The Committee had had a whole year in which to consider the subject, and another forty-eight hours was not likely to make any difference. Once the vote had been taken, delegations would know how they stood and what further action to take. If no proposal received a two-thirds majority, further efforts could be made to reach a compromise solution.

7. Mr. BHOI (Kenya) said he supported the motion for adjournment since he believed that a last-ditch effort might help to achieve a compromise.

8. The CHAIRMAN put to the vote the Ghanaian representative's motion for adjournment of the debate for forty-eight hours.

*The motion for adjournment was rejected by 46 votes to 44, with 7 abstentions.*

9. The CHAIRMAN said that one or two delegations wished to explain their intended votes in advance. As soon as they had done so he would put to the vote all the amendments before the Committee for, or relating to, the proposed new articles 62 *bis*, 62 *ter* and 62 *quater*.

10. Mr. EL HASSIN EL HASSAN (Sudan) said that his delegation was against the inclusion in the convention of any form of provision for the compulsory settlement of disputes. The convention was intended to apply to all treaties and it was therefore essential that the freedom of choice of the parties should be safeguarded. Article 62 was adequate for that purpose. Moreover, since its purpose was to codify international law, the convention should be acceptable to as many delegations as possible. The opposition expressed to article 62 *bis* would lessen the chances of the convention

[1] For the resumption of the discussion of the proposed new article 76, see 100th meeting.

being accepted if such an article were included in it. His delegation was, however, in favour of the amendment by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) which would make article 62 *bis* optional, and he hoped that that amendment would meet the wishes of all delegations.

11. Mr. FUJISAKI (Japan) said that if his delegation's amendment (A/CONF.39/C.1/L.339) was rejected, he would vote in favour of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) which fulfilled the minimum requirements for ensuring an impartial solution to disputes and was the best compromise formula available at that time. He could not support the amendments by Thailand (A/CONF.39/C.1/L.387) and by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C1./L.398), because they would destroy the whole system of compulsory settlement of disputes. He would, however, vote for the amendment by Ceylon (A/CONF.39/C.1/L.395) which would not prejudice the basic principle of article 62 *bis*.

12. Mr. DADZIE (Ghana) said his delegation's position was that the convention should include an effective means of settling disputes. An effective means did not necessarily mean what was acceptable to the majority; in order to be effective, any system proposed must command acceptance by the international community as a whole. Consequently, having been prevented from continuing the search for another compromise, his delegation had no choice but to vote against the proposed article 62 *bis*.

13. Mr. VARGAS (Chile) requested a roll-call vote on all the amendments and sub-amendments to the draft articles concerning the proposed new articles 62 *bis*, 62 *ter*, and 62 *quater*.

14. The CHAIRMAN invited the Committee to vote first on the amendment by Switzerland proposing a new article 62 *bis* (A/CONF.39/C.1/L.377).

*Austria, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Austria, Barbados, Belgium, Cambodia, Canada, Chile, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Greece, Holy See, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, Philippines, Republic of Korea, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay, Australia.

*Against:* Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ethiopia, Ghana, Hungary, India, Indonesia, Iran, Iraq, Israel, Kenya, Kuwait, Libya, Malaysia, Mauritius, Mexico, Mongolia, Nigeria, Pakistan, Panama, Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Thailand, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Afghanistan, Algeria, Argentina.

*Abstaining:* Central African Republic, Ceylon, China, Colombia, Costa Rica, Ecuador, El Salvador, Gabon, Guatemala, Guyana, Honduras, Ivory Coast, Jamaica, Lebanon, Madagascar, Netherlands, Peru, Portugal, Republic of Viet-Nam, Senegal, Singapore, Spain, Sweden, Trinidad and Tobago, Tunisia, United States of America, Zambia.

*The Swiss amendment (A/CONF.39/C.1/L.377) was rejected by 47 votes to 28, with 27 abstentions.*

15. The CHAIRMAN invited the Committee to vote on the amendment by Japan (A/CONF.39/C.1/L.339) which had been resubmitted in connexion with the proposed new article 62 *bis*.

*Tunisia, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* United Kingdom of Great Britain and Northern Ireland, Uruguay, Australia, Austria, Barbados, Belgium, Cambodia, Canada, Chile, China, Denmark, Dominican Republic, El Salvador, Federal Republic of Germany, Finland, France, Holy See, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Mauritius, Monaco, New Zealand, Norway, Pakistan, Philippines, Republic of Korea, Republic of Viet-Nam, Switzerland.

*Against:* Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ecuador, Ethiopia, Gabon, Ghana, Hungary, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Kenya, Kuwait, Libya, Malaysia, Mongolia, Nigeria, Panama, Poland, Romania, Saudi Arabia, Senegal, Sierra Leone, South Africa, Spain, Sudan, Syria, Thailand.

*Abstaining:* Turkey, United States, of America, Central African Republic, Ceylon, Colombia, Costa Rica, Greece, Guatemala, Guyana, Honduras, Jamaica, Lebanon, Madagascar, Mexico, Netherlands, Peru, Portugal, Singapore, Sweden, Trinidad and Tobago.

*The Japanese amendment (A/CONF.39/C.1/L.339) was rejected by 51 votes to 31, with 20 abstentions.*

16. The CHAIRMAN invited the Committee to vote on the sub-amendment submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/398) to the amendment by Austria, Bolivia, Central African Republic, Colombia, Costa Rica, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Malta, Mauritius, Netherlands, Peru, Sweden, Tunisia and Uganda A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

*Afghanistan, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Afghanistan, Algeria, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Czechoslovakia, Ethiopia, Hungary, India, Indonesia, Iran, Iraq, Israel, Kuwait, Libya, Malaysia, Mongolia, Poland, Romania, Saudi Arabia, Sierra Leone, Singapore, South Africa, Sudan, Syria, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia.

*Against:* Australia, Austria, Barbados, Belgium, Canada, Central African Republic, Ceylon, Chile, China, Colombia,

Denmark, El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guyana, Holy See, Honduras, Ireland, Italy, Ivory Coast, Jamaica, Japan, Lebanon, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Republic of Viet-Nam, Senegal, Spain, Sweden, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Zambia.

*Abstaining:* Argentina, Bolivia, Cameroon, Costa Rica, Cyprus, Dominican Republic, Ecuador, Ghana, Guatemala, Kenya, Liberia, Madagascar, Mauritius, Nigeria, Portugal, Republic of Korea, Trinidad and Tobago, Turkey, Uganda.

*The sub-amendment (A/CONF.39/C.1/L.398) was rejected by 47 votes to 37, with 19 abstentions.*

17. The CHAIRMAN invited the Committee to vote on the amendment proposing a new article 62 *bis* by Austria, Bolivia, Central African Republic, Colombia, Costa Rica, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Malta, Mauritius, Netherlands, Peru, Sweden, Tunisia and Uganda (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

*Brazil, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Cameroon, Canada, Central African Republic, Ceylon, China, Colombia, Costa Rica, Denmark, Ecuador, El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guyana, Holy See, Honduras, Ireland, Italy, Ivory Coast, Jamaica, Japan, Lebanon, Liechtenstein, Luxembourg, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Republic of Korea, Republic of Viet-Nam, Senegal, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Zambia, Australia, Austria, Barbados, Belgium, Bolivia.

*Against:* Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Ethiopia, Ghana, Hungary, India, Indonesia, Iran, Iraq, Israel, Kuwait, Libya, Malaysia, Mongolia, Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Thailand, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Afghanistan, Algeria.

*Abstaining:* Cambodia, Chile, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Guatemala, Kenya, Liberia, Nigeria, Portugal, Singapore, Spain, Yugoslavia, Argentina.

*The nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) was adopted by 54 votes to 34, with 14 abstentions.*

18. Mr. DE CASTRO (Spain) said that he wished to withdraw his amendment (A/CONF.39/C.1/L.391) but to reserve the right to resubmit it at a later stage in the session.

19. The CHAIRMAN said that the amendment by Thailand (A/CONF.39/C.1/L.387) had also been withdrawn. He invited the Committee to vote on the amendment by Ceylon for a new article 62 *ter* (A/CONF.39/C.1/L.395).

*Trinidad and Tobago, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia, Austria, Belgium, Canada, Ceylon, Chile, Cyprus, Denmark, Federal Republic of Germany, Finland, Guatemala, Ireland, Israel, Jamaica, Japan, Kenya, Lebanon, Liechtenstein, Mauritius, Mexico, Pakistan, Peru, Republic of Korea, Sweden.

*Against:* Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Republic of Tanzania, Venezuela, Bolivia, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cuba, Ecuador, El Salvador, France, Gabon, Greece, Hungary, India, Indonesia, Italy, Ivory Coast, Kuwait, Malaysia, Monaco, Mongolia, Poland, Romania, Saudi Arabia, South Africa, Thailand.

*Abstaining:* Tunisia, Turkey, United Arab Republic, United States of America, Yugoslavia, Afghanistan, Algeria, Argentina, Australia, Barbados, Brazil, Cambodia, Cameroon, Central African Republic, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Czechoslovakia, Ethiopia, Ghana, Guyana, Holy See, Honduras, Iran, Iraq, Liberia, Libya, Luxembourg, Madagascar, Netherlands, New Zealand, Nigeria, Norway, Panama, Philippines, Portugal, Republic of Viet-Nam, Senegal, Sierra Leone, Singapore, Spain, Sudan, Switzerland, Syria.

*The amendment by Ceylon (A/CONF.39/C.1/L.395) was rejected, 28 votes being cast in favour and 28 against, with 46 abstentions.*

20. Mr. HOSTERT (Luxembourg) said that he wished to withdraw his amendment proposing a new article 62 *ter* (A/CONF.39/C.1/L.397 and Corr.1) but to reserve the right to resubmit it later in the session.

21. The CHAIRMAN invited the Committee to vote on the Swiss amendment proposing a new article 62 *quater* (A/CONF.39/C.1/L.393 and Corr.1).

*Thailand, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Trinidad and Tobago, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Argentina, Australia, Austria, Barbados, Belgium, Brazil, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Denmark, Federal Republic of Germany, Finland, France, Guatemala, Guyana, Holy See, Honduras, Ireland, Israel, Italy, Japan, Lebanon, Liechtenstein, Luxembourg, Mauritius, Mexico, Monaco, New Zealand, Norway, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, South Africa, Sweden, Switzerland.

*Against:* Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Algeria, Bolivia, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, Ecuador, Hungary, India, Indonesia, Malaysia, Mongolia, Poland, Romania, Syria.

*Abstaining:* Tunisia, Uganda, Venezuela, Yugoslavia, Zambia, Afghanistan, Cambodia, Cameroon, Central African Republic, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, El Salvador, Ethiopia, Gabon, Ghana, Greece, Iran, Iraq, Ivory Coast, Jamaica, Kenya, Kuwait, Liberia, Libya, Madagascar, Netherlands, Nigeria, Pakistan, Panama, Saudi Arabia, Senegal, Sierra Leone, Singapore, Spain, Sudan.

*The Swiss amendment (A/CONF.39/C.1/L.393 and Corr.1) was adopted by 45 votes to 21, with 36 abstentions.*

22. The CHAIRMAN suggested that article 62 *bis* be now referred to the Drafting Committee, together with the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393 and Corr.1), which had been adopted.

*It was so agreed.*[2]

23. Mr. SEOW (Singapore), explaining his votes, said that although Singapore subscribed to the principle that any dispute regarding the validity, termination or suspension of a treaty should be settled on the basis of law and justice, his delegation had nevertheless abstained from voting on article 62 *bis* in its several forms. In view of the fact that the convention on the law of treaties would have general application and that certain treaties, by their very nature, were not justiciable according to law, his delegation felt that a settlement provision of such general application would not perhaps be appropriate. In any event, in most of his country's treaties with other friendly countries, provision was made for settlement procedures and it was the intention of Singapore to continue with that practice.

## Texts proposed by the Drafting Committee

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 8, 55 and 66 as adopted by the Drafting Committee.

### *Article 8* (Adoption of the text) [3]

25, Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 8 by the Drafting Committee read:

*Article 8*

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

26. As a result of the decisions taken by the Committee of the Whole at its 91st meeting the only amendments to be considered by the Drafting Committee had been those by Austria (A/CONF.39/C.1/L.379) and by Ceylon (A/CONF.39/C.1/L.43). The Drafting Committee had accepted the amendment by Austria to replace in paragraph 1 the words " the unanimous consent of the States " by the words " the consent of all the States ". The Committee had felt that that amendment would render the text more flexible. It had not accepted the amendment by Ceylon to add a new paragraph 3 reading: " 3. The adoption of the text of a treaty by an international organization takes place by action of a competent organ of such organization according to its rules."

27. The Drafting Committee had taken the view that, although that proposed provision might be correct, it was not necessary and was not even useful, because the question with which it dealt was already covered by article 4, which contained a general reservation with regard to the practice of international organizations.

28. The Drafting Committee had made certain drafting changes to the French version of the article, in accordance with rule 48 of the rules of procedure.

*Article 8 was approved.*[4]

### *Article 55* (Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only [5]

29. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 55 by the Drafting Committee read:

*Article 55*

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

(*a*) The possibility of such a suspension is provided for by the treaty; or

(*b*) The suspension in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

30. At the first session, the Committee of the Whole had adopted the principle contained in a six-State amendment proposing a new wording for article 55 (A/CONF.39/C.1/L.321 and Add.1) and had referred to the Drafting Committee three amendments by Australia (A/CONF.39/C.1/L.324), France (A/CONF.39/C.1/L.47) and Peru (A/CONF.39/C.1/L.305) respectively. At the present session, the amendments by Australia and France had been withdrawn.

31. The Drafting Committee had recast the wording proposed in the six-State amendment in order to bring it into line with that of article 37 because, as the International Law Commission had noted in its commentary to article 55, articles 37 and 55 dealt with two analogous questions. The first dealt with agreements for the

[2] For the resumption of the discussion in the Committee of the Whole, see 105th meeting.

[3] For earlier discussion of article 8, see 91st meeting, paras. 27-33.

[4] For further discussion and adoption of article 8, see 8th and 9th plenary meetings.

[5] For earlier discussion of article 55, see 86th meeting, paras. 13-18.

purpose of modifying multilateral treaties between certain of the parties only while the second dealt with agreements to suspend the operation of a multilateral treaty temporarily as between certain of the parties only.

32. The Peruvian amendment (A/CONF.39/C.1/L.305) proposed the insertion in article 55 of a provision making it obligatory for parties wishing to conclude an agreement to suspend the operation of a multilateral treaty as between themselves alone to notify the other parties of their intention. A provision of that kind was also included in the six-State amendment and the Drafting Committee had considered it necessary to include it. It had covered that point by means of paragraph 2 of the text it now proposed.

33. He had been asked by the Drafting Committee to clarify the meaning and scope of the opening clause of paragraph 1, which read " Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if. . . ". The Drafting Committee considered that, by referring to an agreement to suspend the " operation of provisions " of the treaty, that provision permitted the conclusion of agreements to suspend the operation either of some of the provisions of the treaty only, or of all the provisions of the treaty.

*Article 55 was approved.*[6]

*Article 66* (Consequences of the termination of a treaty)[7]

34. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 66 by the Drafting Committee read:

*Article 66*

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

35. At the first session, the Committee of the Whole had referred article 66 to the Drafting Committee with only one amendment, that by France (A/CONF.39/C.1/L.49). That amendment had been withdrawn at the second session and the Committee of the Whole, at its 86th meeting, had approved in principle the text formulated by the International Law Commission. The Drafting Committee had accordingly confined itself to making some slight drafting changes in the French, Russian and Spanish versions of article 66, in accordance with rule 48 of the rules of procedure.

*Article 66 was approved.*[8]

The meeting rose at 5.20 p.m.

[6] For the adoption of article 55, see 21st plenary meeting.

[7] See 86th meeting, para. 19.

[8] For the adoption of article 66, see 23rd plenary meeting.

## ONE HUNDREDTH MEETING

*Wednesday, 23 April 1969, at 11 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Final clauses (including proposed new articles 76 and 77)*[1]

1. The CHAIRMAN invited the Committee to consider proposals relating to the final clauses, including proposals for new articles to be numbered 76 and 77.

2. As the proposed new article 76 submitted by the Spanish delegation (A/CONF.39/C.1/L.392) derived from that delegation's amendment to article 62 *bis* (A/CONF.39/C.1/L.391) which had been withdrawn at the previous meeting, that proposal too might be regarded as withdrawn.

3. The proposal by Switzerland (A/CONF.39/C.1/L.250) for a new article 76 was still before the Committee.

4. Mr. NASCIMENTO E SILVA (Brazil) said that the proposal of which his delegation was a co-sponsor (A/CONF.39/C.1/L.386/Rev.1) was based on the formula adopted in the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, with some changes necessitated by certain provisions in the future convention on the law of treaties.

[1] Proposals of a general character for the final clauses had been submitted by Brazil and the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/C.1/L.386/Rev.1) and by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1).

Amendments to the proposal by Brazil and the United Kingdom of Great Britain and Northern Ireland had been submitted by Ghana and India (A/CONF.39/C.1/L.394) and by Switzerland (A/CONF.39/C.1/L.396).

Proposals for a new article 76 had been submitted by Switzerland (A/CONF.39/C.1/L.250) and by Spain (A/CONF.39/C.1/L.392) (see 92nd meeting, para. 4).

Proposals for a new article 77 had been submitted by Venezuela (A/CONF.39/C.1/L.399) and by Brazil, Chile, Kenya, Sweden and Tunisia (A/CONF.39/C.1/L.400). Amendments to the latter proposal had been submitted by Spain (A/CONF.39/C.1/L.401) and by Iran (A/CONF.39/C.1/L.402). Subsequently a further proposal (A/CONF.39/C.1/L.403) was submitted by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela.

5. The proposal by Hungary, Poland, Romania and the Soviet Union (A/CONF.39/C.1/L.389 and Corr.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394) might give rise to difficulties, since the Conference had not yet taken any decision on the " all States " formula.

6. Article B of the proposal by Brazil and the United Kingdom was simple and precise, whereas the amendment by Ghana and India was cumbersome and laid an unnecessary burden on the Austrian Ministry of Foreign Affairs.

7. The proposals relating to the final clauses differed with regard to the number of instruments of ratification or accession needed for the entry into force of the convention. It would be remembered that in the conventions adopted at the Geneva Conference on the Law of the Sea in 1958 the figure of twenty-two instruments, representing one-third of the participating States, had been used. That number was not high enough now and forty-five seemed to be more realistic. However, the thirty-five instruments proposed in the amendment by Ghana and India was also acceptable.

8. On the other hand the number of instruments in the Swiss proposal (A/CONF.39/C.1/L.396) was too high, and if it was adopted there was reason to fear that the convention on the law of treaties would never come into force.

9. There was no provision on reservations in the final clauses in the proposal by Brazil and the United Kingdom, since either they would be identical with the provisions already contained in the convention and therefore unnecessary, or they would be different and therefore contradictory. It would be recalled that article 16 (*c*) of the draft stipulated that a reservation must not be incompatible with the object and purpose of the treaty. That was also the tenor of the advisory opinion of the International Court of Justice of 28 May 1951 [2] on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

10. The proposal by Brazil and the United Kingdom had no clause on notifications and the functions of depositaries. However, article E of the proposal, on authentic texts, stated that the original of the convention " shall be deposited with the Secretary-General of the United Nations ". Likewise, articles B and C stated that the instruments of ratification or accession were to be deposited with the Secretary-General of the United Nations. Article 71 and the following articles dealt with those matters in detail.

11. His delegation was opposed to the new article 76. The Conference should keep to the formula adopted for the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations and provide for an optional protocol on the settlement of disputes which could be accepted by every delegation.

12. What was known as the Vienna formula had given good results and there was no reason to abandon it.

[2] *I.C.J. Reports 1951*, p. 15.

13. Mrs. BOKOR-SZEGÖ (Hungary) said that the amendment co-sponsored by her delegation (A/CONF.39/C.1/L.389 and Corr.1) followed one of the alternatives proposed in the Secretariat document on standard final clauses (A/CONF.39/L.1). The formula proposed in the amendment conformed to United Nations practice and had been adopted in four major treaties which regulated various aspects of the use of nuclear weapons and of the activities of States in outer space.

14. Final clauses which allowed all States to participate in treaties had been drawn up in the League of Nations, and the Secretary-General of the United Nations was the depositary of several conventions concluded under the auspices of the League which had used that formula of participation by all States.

15. The States which had drawn up the Nuclear Test Ban Treaty and the Outer Space Treaty had used the " all States " formula, independently of the question of *de jure* or *de facto* recognition of States wishing to become parties to those treaties. The joint regulation of such fields of activity by treaty was in the interests of all States, even in the absence of normal permanent relations.

16. A State could not seek to ignore the existence of other States which had an economic and political system basically different from its own. The regulation by treaty of certain aspects of the activities of States was necessary to the international community. It would therefore be quite illogical and unjustified not to give all States the possibility of becoming parties to a convention regulating treaty law. The rules governing the law of treaties should be applicable to all States which declared themselves prepared to accept them. The Hungarian delegation could not support the amendment by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1); it reflected a practice which discriminated against some socialist States, which was contrary to the sovereign equality of States and which paid no regard to the duty of States to co-operate internationally and develop friendly relations with each other.

17. Her delegation might wish to revert at a later stage to the other amendments relating to the final clauses.

18. Mr. KRISHNA RAO (India) said he hoped that the amendment of which his delegation was one of the sponsors (A/CONF.39/C.1/L.394) would come to be known as " the new Vienna formula ". The amendment left the old Vienna formula untouched but added to it a new paragraph based on the formula used for the Moscow Treaty. The proposed new formula improved the old Vienna formula by adding new ingredients which cured its weaknesses.

19. The new Vienna formula took full account of the existing international situation. For many years, United Nations practice had been that if a majority of the Organization's Members did not recognize a particular entity as a State, that entity, even if recognized by a substantial minority, could not become a party to law-making treaties. Until 1963, that position might have had a certain logic, for there appeared to be no alternative. That logic, however, had disappeared in 1963,

for it had been in that year, as a result of the conclusion of the Nuclear Test Ban Treaty, that the Moscow formula had been evolved, permitting entities which were not recognized as States to become parties to a set of very important conventions. By virtue of the system of three depositaries adopted under the Moscow formula, entities not generally recognized were able to become parties to the conventions in question, provided one of the three depositaries recognized them and accepted their instruments of ratification or accession. The Moscow formula had thus created a new situation. If an entity was entitled to become a party to one important set of conventions, that right should also be recognized in respect of another set of conventions codifying and developing the customary law of nations.

20. The new Vienna formula would restore logic to the law and would strengthen its predecessors by uniting them in a form acceptable to all parties. The new formula extended the scope of the old Vienna formula and overcame certain difficulties raised by the Moscow formula. The latter, by providing for three depositaries, made it hard to ascertain at any particular moment the exact number of instruments of ratification or accession that had been deposited. Moreover, the Moscow formula had done away with the excellent system of information evolved by the United Nations in respect of conventions for which the Secretary-General acted as depositary, and it would be a loss if the United Nations system were to be destroyed by the general adoption of the Moscow formula as originally drafted.

21. In order to preserve the United Nations system, the amendment by Ghana and India provided for an initial depositary, the Government of Austria, and a final depositary, the Secretary-General of the United Nations. The initial depositary would accept signatures to the convention and, after the final date of signature, would transmit the signed original of the convention to the Secretary-General. The initial depositary would also receive, in the first instance, instruments of ratification and accession and other notifications regarding the convention. Thus the Secretary-General would not be the person to whom instruments and notifications were directly addressed, which would be in accordance with the wishes of the majority of Member States of the United Nations.

22. The sponsors of the amendment had taken the liberty of proposing the Austrian Government as the initial depositary because of the traditional role of the host State as depositary, and as a token of respect and affection for the country and its people. It was, of course, for the Austrian Government itself to state whether it would accept that responsibility.

23. Part III of the amendment contained a revision of certain final clauses in the proposal by Brazil and the United Kingdom so as to bring them into accord with the new Vienna formula.

24. It was suggested in the proposal that the number of instruments of ratification or accession necessary for the entry into force of the convention should be thirty-five instead of forty-five. The traditional number in codification conventions had been twenty-two; but that figure had been fixed many years ago and it was reasonable to think that it was insufficient, in view of the development of the international community. Forty-five, however, appeared to be too high a number and might unduly delay the entry into force of the convention. Practice had shown that the entry into force of a convention was an important element in persuading States to become parties to multilateral conventions. His delegation, however, was prepared to adopt a flexible attitude towards the number of instruments necessary and would accept the majority decision on that point.

25. Mr. BINDSCHEDLER (Switzerland) said that his delegation in principle supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), since it considered that it would be proper to keep to what was known as the Vienna formula.

26. Switzerland had submitted an amendment (A/CONF.39/C.1/L.396) to that proposal to raise to sixty the number of ratifications needed before the convention on the law of treaties came into force. The convention would be one of the most important instruments that had ever existed and so should be ratified by as many States as possible. If it came into force with only twenty-two or thirty ratifications, it would not carry the required weight. The convention was to represent, as it were, the constitutional law of the international community. The accepted rule was that a constitutional law should be approved by a majority higher than that required for an ordinary instrument. It might be objected that the figure of sixty ratifications was arbitrary, but it represented more or less two-thirds of the participants in the Conference on the Law of Treaties. Switzerland had in fact simply adopted the two-thirds majority rule which was well known in both municipal and international law. It was the rule applied in the General Assembly and in the principal organs of other international organizations and it had also been the rule for the entry into force of certain multilateral conventions. Such a majority was therefore justified.

27. The Swiss delegation had submitted a proposal (A/CONF.39/C.1/L.250) at the first session for the insertion of a new article 76, for the settlement of disputes relating to the interpretation and application of the convention on the law of treaties. He would not revert in detail to the arguments advanced at the 80th meeting [3] by the Chairman of the Swiss delegation, but he would like to explain the difference between the new article 62 *bis* and the new article 76 he was proposing: article 62 *bis* related to possible disputes in connexion with treaties other than the convention on the law of treaties for reasons arising out of the application of Part V of that convention, whereas the new article 76 dealt with disputes relating to the convention on the law of treaties itself. The interpretation and application of the provisions of the convention might well give rise to disputes, for not all of those provisions were entirely lucid, as witness the chapter on reservations.

[3] Paras. 60-65.

28. Some delegations based their argument against the new article 76 on the obligation to respect State sovereignty. But State sovereignty suffered no impairment when States accepted legal obligations and gave even very extended jurisdiction to international organs on a basis of complete reciprocity and equality. And those conditions were most certainly fulfilled by the classic procedures of international adjudication.

29. Such procedures were of great value to small countries and to weak States. A specific illustration was the fact that after the end of the Second World War Switzerland had had a legal dispute with the United States concerning property which the United States considered to be enemy property. After the United States had refused for more than ten years to negotiate, Switzerland had taken the dispute to the International Court of Justice. It had lost on technical grounds, since domestic remedies had not been exhausted; but the effect of the Court's judgement had been to enable negotiations to begin at last, and the two Governments had reached an amicable solution. Without resort to the Court, Switzerland would certainly not have been able to induce the United States to come to the negotiating table. He could not understand why certain delegations maintained that international adjudication served only the interests of the group of Western States; it indubitably served only the interests of the entire international community.

30. Manifestly, a codification of law remained incomplete in the absence of some machinery for its application. The letter of legal texts was not enough; the courts must give them practical expression, define them and develop them, and the adaptation should in the case in point be uniform and all-embracing, in the interest of the international community. That was a decisive consideration in favour of a jurisdiction that was empowered to watch over the application of the convention on the law of treaties.

31. The Swiss proposal (A/CONF.39/C.1/L.250) provided for the jurisdiction of the International Court of Justice, but paragraph 3 gave the parties the option of agreeing to adopt a conciliation procedure before resorting to the International Court. Such provisions were fully accepted and were based on the first three articles of the optional protocols annexed to the codification conventions so far adopted. They also took into account the rule stated in Article 36(3) of the United Nations Charter.

32. His delegation recognized that international jurisprudence was not at the present time very favourably regarded, but there were certain encouraging precedents: several conventions, including the Convention on the Prevention and Punishment of the Crime of Genocide, [4] the Supplementary Convention on the Abolition of Slavery, [5] the International Convention on the Elimination of All Forms of Racial Discrimination [6] and the Convention on Transit Trade of Land-Locked States [7] provided for compulsory arbitration procedures in the event of disputes. Article 37 of the Constitution of the International Labour Organisation also provided for the compulsory jurisdiction of the International Court of Justice.

33. Switzerland itself had concluded bilateral conventions on arbitration and compulsory adjudication with a large number of countries; they had been signed not only with countries in the Western group but also with many countries in Africa, Asia and Latin America, and that trend towards compulsory arbitration was gratifying. The Swiss proposal, therefore, was in no way revolutionary, and it was to be hoped that all participants in the Conference would adopt it.

34. Mr. ZEMANEK (Austria) said that the Austrian Government was prepared, if necessary, to fulfil the functions entrusted to it under the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394).

35. Mr. SINCLAIR (United Kingdom), speaking as the co-sponsor of the proposal introduced by the Brazilian representative (A/CONF.39/C.1/L.386/Rev.1), said that the Vienna formula contained in article A of the proposed final clauses was the same as that adopted in 1961 for the Vienna Convention on Diplomatic Relations and in 1963 for the Vienna Convention on Consular Relations. It was substantially the same as the participation articles in each of the four Geneva Conventions on the Law of the Sea. The Secretariat itself had enumerated several other examples of similar provisions.[8] The overwhelming weight of precedent and practice definitely favoured the adoption of the Vienna formula.

36. The question of participation in general multilateral treaties had been discussed at considerable length in connexion with article 5 *bis*. Without going back over the arguments already put forward, he wished to point out that the Vienna formula was not discriminatory, because any State or entity which did not fall into one of the categories specified in the first part of article A could seek an invitation from the General Assembly, which was the most appropriate body to determine which entities of doubtful status could participate in multilateral conventions such as the convention on the law of treaties. Apart from the four cases referred to by the Lebanese representative at the 91st meeting,[9] there were other entities which had advanced highly disputed claims to statehood. His delegation thought that the Vienna formula was the best way to settle such problems.

37. With regard to article D, the United Kingdom favoured the adoption of forty-five as the number of instruments of ratification or accession needed to bring

[4] United Nations, *Treaty Series*, vol. 78, p. 277.

[5] United Nations, *Treaty Series*, vol. 266, p. 40.

[6] For text, see General Assembly resolution 2106 (XX), annex.

[7] United Nations, *Treaty Series*, vol. 597, p. 42.

[8] See document A/CONF.39/L.1, section A, alternative I, footnote.

[9] Para. 2.

the convention into force. In view of the increase in the number of States in the world since 1963, the figure adopted in the two Vienna Conventions was clearly inappropriate. More significantly, the greater importance of the convention on the law of treaties for the codification and development of international law required that it should enter into force only with the support of a good number of States. Forty-five was in any event not a very high figure; the entry into force of the 1961 Single Convention on Narcotic Drugs [10] required forty ratifications and the Treaty on the Non-Proliferation of Nuclear Weapons [11] forty-three.

38. There was also the important consideration of the transitional position. In the future, the majority of the countries participating in a conference convened to adopt a convention might not be bound by the convention on the law of treaties, although a minority could be so bound as between themselves. There was no way of averting that situation, but its effects would be lessened if the States bound by the convention on the law of treaties were not a small minority but a substantial minority, or even better a majority. The figure of forty-five was slightly less than one-third of the States invited to the Conference and just over one-third of the States Members of the United Nations.

39. Several speakers had touched on the question of reservations at the earlier stages of the Committee's work. The clauses proposed by Brazil and the United Kingdom contained no provision on that subject because it was not really possible to settle the reservations issue until it was more or less known what the final shape of the convention would be. The effect of having no provision could be that the régime laid down in articles 16 to 20 might be applied. However, problems were bound to arise with regard to reservations to the convention, particularly in respect of the substantive and procedural provisions of Part V. The United Kingdom delegation would wish to know the views of other delegations on the question before adopting a final position.

40. With regard to article E, which concerned the depositary, Brazil and the United Kingdom had decided against including a provision along the lines tentatively suggested in section F of the Secretariat document (A/CONF.39/L.1) in order to preclude the possible argument that because articles 71 and 72 of the convention were expressly mentioned in the depositary clause, other provisions of the convention were not applicable to the convention itself. He was thinking of provisions such as many of those in Part II or Part III. The inclusion of an express reference to articles 71 and 72 might give rise to arguments of an *e contrario* nature. Moreover, the convention contained other articles, for instance article 74, which imposed tasks on the depositary.

41. Nor had Brazil and the United Kingdom included a provision concerning the revision of the convention, but should the case arise, article 36 of the convention itself should be applied.

42. He might wish to speak at a later stage on the other proposals which had been submitted.

43. Mr. KOULICHEV (Bulgaria) said that most of the problems raised by the final clauses were of a purely practical kind and their solution was not likely to give rise to disputes. Moreover, they had been dealt with in virtually similar ways in the two main proposals before the Committee of the Whole (A/CONF.39/C.1/L.386/Rev.1 and L.389 and Corr.1).

44. The only question on which the two proposals differed widely was the participation of States in the convention on the law of treaties: the proposal by Brazil and the United Kingdom adhered to the so-called Vienna formula, which limited participation to four or five clearly defined categories of States and closed the door to any States not falling into one of those categories. It was common knowledge that the formula in question was currently directed against certain socialist States, and there was nothing to preclude its being used against other States as well in the future.

45. Hungary, Poland, Romania and the USSR, on the other hand, by proposing that the convention should be " open for signature by all States ", ruled out any possible discrimination and enabled all to participate in the instrument of universal co-operation which the convention on the law of treaties was intended to be.

46. The question of universality had been discussed at great length in connexion with article 5 *bis*. In that connexion many delegations, while opposing the inclusion of article 5 *bis* because they did not want to sign a blank cheque, had nevertheless declared their support for the principle of universality and expressed the hope that the largest possible number of States would praticipate in general multilateral treaties. The convention on the law of treaties would actually enable all those participating in the Conference to demonstrate how far they were prepared to translate their theories into action. For there was no doubt that a convention which aimed at codifying and developing the law of treaties was, by its very nature and object, intended to be universal. Treaty law was of crucial importance for contractual relations, and thus for collaboration between States, and it was therefore in the international community's interests that all States should accede to the convention which codified that law. That would only be possible if it was open without the slightest discrimination to all States wishing to participate in it.

47. With those considerations in mind, his delegation supported the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). It could not accept the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) as it stood, owing to the restrictive and discriminatory purport of articles A and C, but it would support it if it was amended as proposed by Ghana and India (A/CONF.39/C.1/L.394).

48. The question of participation in the convention apart, the two main proposals had many points in common. His delegation agreed with their sponsors that the final clauses should not include provisions on reservations, revision or the functions of the depositary,

[10] United Nations, *Treaty Series*, vol. 520, p. 204.

[11] For text, see General Assembly resolution 2373 (XXII), annex.

which were covered by articles 16 to 20, 37, and 72 and 73 of the convention respectively.

49. With regard to the settlement of disputes arising from the application and interpretation of the convention, his delegation categorically opposed the inclusion of article 76 as proposed by Switzerland (A/CONF.39/C.1/L.250), for reasons which it would explain subsequently.[12]

50. In conclusion, he wished to make a purely drafting comment: the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394) explicitly referred to the International Atomic Energy Agency. Perhaps, in order to simplify the text, use could be made of the formula employed in most of the other codification conventions, in which the term " specialized agencies " was interpreted broadly as covering the Agency.

51. Mr. GROEPPER (Federal Republic of Germany) said that an accession formula similar to that in the earlier Vienna codification conventions and now customary in United Nations practice — the formula known as the " United Nations " or " Vienna " formula — should be included in the convention on the law of treaties. By permitting unilateral accession by all States Members of the United Nations or of any of the specialized agencies and by permitting in addition the participation of any other State invited by the General Assembly of the United Nations, the formula ensured the application of the principle of universality, since, as had been pointed out during the debate on article 5 *bis*, the convention would thus be open to all countries which were uncontested members of the community of States and to territorial entities whose participation was desired by the majority of States. The formula therefore took account of the realities of international life and, in particular, of the uncertainty inherent in the notion of State, and at the same time it mitigated the disadvantages which might arise from formulas permitting the unilateral accession of any entity which called itself a State. His delegation accordingly supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

52. On the other hand, the Federal Republic of Germany could not accept the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) since it made provision for the inclusion in the convention of what had become known as the " all States " formula. That formula would not only put obstacles in the way of the application of the convention, but would also conflict with article 1 of the convention itself, which stipulated that the convention applied to international agreements concluded between States. An entity which enjoyed certain attributes of a States, but was not in fact recognized as a State, could not be considered in law as a State and could not claim to be treated as such, even if it alleged that it possessed the requisite legal personality within the meaning of sovereign State in international law. Furthermore, none of the great codification treaties and none of the constituent instruments of the main international organizations had so far included the " all States " formula, for the simple reason that the notion of State was not clearly defined in international law as it existed at present.

53. Moreover, the adoption of the " all States " formula had highly political implications owing to the existence of several entities which a few countries claimed to be States, but which in the view of the great majority did not have that status. That problem had existed for a long time and its solution could not and should not be sought within the context of a codification convention.

54. The Federal Republic of Germany could not accept the amendment submitted by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom for several reasons.

55. First, the effect of the amendment was to convert the " Vienna " formula into an " all States " formula, since the two treaties which, under the amendment, would permit parties to them to accede to the convention on the law of treaties contained an " all States " clause. A territorial entity whose status as a State was contested might thereby evade the test of a vote in an assembly representative of the international community, as provided for in the Vienna formula, because it would simply have to apply to one of the three co-depositaries of the 1963 Nuclear Test Ban Treaty or the 1966 Outer Space Treaty in order to seek admission to the treaty. Such substitution of the decision of the General Assembly of the United Nations, as provided in the Vienna formula, by the decision of one of the three co-depositaries of the two treaties referred to seemed inappropriate.

56. Secondly, it might well be asked whether the amendment did in fact make for universality, as its sponsors maintained. Of the entities whose status was contested and which had signed one of the two treaties mentioned in the amendment or deposited their instrument of ratification or accession, only the so-called German Democratic Republic had signed and ratified, and it would therefore be the only entity to profit from the amendment. Without going into detail on a matter which was not within the Conference's competence, he felt bound to stress that, in that sense, the amendment by Ghana and India was of a highly political nature.

57. Thirdly, contrary to what was maintained by the sponsors of the amendment and by several other delegations, the fact that an " all States " formula had been adopted in the two treaties mentioned in the amendment and the fact that those two treaties would be governed by the convention on the law of treaties could not lend any support to the idea of opening the convention on the law of treaties to any entity which had availed itself of the possibility of acceding unilaterally to the two treaties in question. Those treaties dealt with very special questions and for that very reason and because of what had led to their adoption, were exceptions. In those two treaties the accession formula had resulted from a political compromise between the two greatest

[12] See 103rd meeting, paras. 48-51.

world Powers, which moreover were the States most directly concerned by the treaties. The idea that those two treaties should be open to entities which, it was true, were not wholly extraneous to international law, but were not on that account States, had been accepted with those facts in mind. But that was no reason for repeating in the convention on the law of treaties, which was intended to apply only to treaties between States, an accession formula devised for special circumstances which did not apply to that convention.

58. He would, if necessary, speak again on the final clauses.

59. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that, in his view, it was necessary to ask for whom and for what purpose the convention was being drafted. The convention must take into account existing norms of international law as well as state practice. It was not enough to codify existing norms; account must also be taken of the progressive trends becoming apparent in international relations. It was necessary in drafting the convention to think of the future and to bear in mind the important role it was called on to fill. And that role was dependent on the number of States which might accede to it or would be entitled to accede to it. If all States were able to participate in general multilateral treaties, the convention would be of great importance both in practice and in principle. It was on the basis of those considerations that the question must be decided whether the proposed text was able to cope with the tasks facing the world at the present time. The right of States to participate in general multilateral agreements derived from the principle of the sovereign equality of all States, and one of the basic principles of existing international law was universality. Those principles must be applied to all States, and no State could prevent their implementation in respect of another State. In view of the fact that the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) was based on the Vienna formula and thus violated those principles, his delegation could not support it. On the other hand, it would support the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) and the Swiss amendment (A/CONF.39/C.1/L.396).

60. Mr. KHLESTOV (Union of Soviet Socialist Republics), speaking on a point of order, said he found it regrettable that in the course of his statement the representative of the Federal Republic of Germany had used the expression " the so-called German Democratic Republic ". Whatever the leaders in Bonn might think, the country in question existed as a sovereign State. In a meeting as important as the present Conference, every delegation should use the appropriate designation when expressing its views on a State.

61. Mr. YASSEEN (Iraq) said that, in the case of the convention on the law of treaties, there were many arguments in favour of the principle of universality. It was a codification convention, and in the interests of the international community conventions of that nature should be universally ratified and applied. It was true that for some codification conventions the principle of universality had not been accepted, but the convention now under consideration regulated questions which might be classed as " constitutional " in international juridical terms. The future of the codification and of the progressive development of international law depended on that convention, since treaties were as a rule the instruments through which codification and progressive development took place; consequently the universal character of the convention on the law of treaties must be recognized. Again, the convention not only provided for rights of which certain States might in particular circumstances be deprived; it also established obligations which it was desirable and essential to impose on all States throughout the world. His delegation could therefore not accept the Vienna formula and supported the " all States " formula. In view of the arguments advanced during the debate, based on certain practical difficulties, if the general formula was not approved, his delegation would support the amendment submitted by India and Ghana (A/CONF.39/C.1/L.394). That formula would to some extent fill in the gaps in the Vienna formula and would at the same time make for the solution of the difficulties mentioned during the discussion.

62. With regard to the number of ratifications or accessions needed for the entry into force of the convention, his delegation supported the proposal in the amendment by India and Ghana. The figure of thirty-five was acceptable; that number of ratifications was perfectly adequate.

63. The majority of the rules stated in the convention already formed part of positive law and it was better not to place too many obstacles in the way of their application as treaty rules by requiring too large a number of ratifications. His delegation could not support either the figure of forty-five proposed by Brazil and the United Kingdom, or the figure of sixty in the Swiss amendment.

64. Mr. CARMONA (Venezuela) said he wished to explain why his delegation had decided to submit a proposal for a new article 77 concerning the application of the convention in point of time (A/CONF.39/C.1/L.399). The convention contained various kinds of provisions. Those in articles 49, 50 and 61, for example, codified established principles which had great legal weight, even if the convention did not enter into force. On the other hand, the convention also contained new provisions which did not always represent progress, for example articles 10 and 11, the provisions of which ran counter to the generally accepted rules of international law; it was hard to know how States would react to them. Articles 46 and 47, which dealt with fraud and the corruption of a representative of a State, introduced a fundamental change from previous practice. States should therefore re-examine the matter in order to establish their final attitude to the convention. Article 53 dealt with the denunciation of treaties. The traditional principle in international law was that a State was free to denounce a treaty which did not prohibit denunciation or which was not inherently permanent. Article 53 laid down the opposite principle, that a treaty could not be denounced unless it provided

for denunciation. The Conference was therefore being asked to accept a new principle of law which would compel States to include a previously implicit denunciation clause in their treaties. Article 57 also laid down new provisions concerning the right of a State to invoke a breach of a treaty as a ground for its termination.

65. In view of the changes made in established rules of law and of the differences of opinion on the questions of arbitration and universality, it seemed essential, if the largest possible number of accessions was to be ensured, to state clearly and precisely that the provisions of the convention would apply only to treaties signed in the future. Some delegations considered that article 24, on non-retroactivity, provided an adequate solution to the problem, but there were many cases not covered by its provisions, since some situations lasted indefinitely or had not ceased to exist. The article was therefore ambiguous and eminent jurists had already gone into the matter very thoroughly. The Venezuelan delegation was proposing a simple and clear formula which might help a greater number of States to accede to the convention.

The meeting rose at 12.55 p.m.

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## ONE HUNDRED AND FIRST MEETING

*Wednesday, 23 April 1969, at 3.25 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Final clauses (including proposed new articles 76 and 77)* (continued)

1. Mr. BRAZIL (Australia) said that on the question of participation his delegation would support the joint proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1). The Vienna clause, which had been used in previous codification conventions, should be applied in the present case also, as provided in article A of the joint proposal.

2. The unique character of the convention should be borne in mind when a decision was taken on the number of instruments required for the purpose of bringing the convention into force. It was a convention that had an almost constitutional significance in that it laid down the basic rules that would govern the procedural aspects of treaty relations as well as the question of the essential validity of treaties that were negotiated. Possible difficulties might arise if a number of States did not become parties to the convention. There was also the possibility of transitional problems, for instance on reservations, as the convention began to come into force for some States whereas other States had not yet become parties.

3. In the view of his delegation, the convention should not come into force until a significant part of the international community had indicated its acceptance of the code laid down in the convention. Australia would therefore favour the Swiss amendment (A/CONF.39/C.1/L.396) which provided for the entry into force of the convention following the deposit of the sixtieth instrument of ratification or accession. Should that amendment not be adopted by the Committee, the Australian delegation would support the joint proposal by Brazil and the United Kingdom under which forty-five instruments of ratification or accession would be required for the convention to enter into force.

4. In the matter of reservations to the convention, two courses of action were open. One was to include no provision at all on reservations, in which case the residual rules laid down in articles 16 to 20 would apply. The other was to take the opposite course of prohibiting all reservations, having regard to the basic nature of the convention, or at least to prohibit reservations to any portion of Part V.

5. The Australian delegation was unable to take a final position on that important question at the present stage. If, for example, the Conference were to adopt the residual rules contained in articles 16 to 20, the result would be to apply to the convention the flexible system of reservations contained in those articles. Serious thought should be given to the question whether, on balance, that would be the best solution in the case of a convention intended to lay down the essential framework within which States would in future enter into treaty relations.

6. With respect to the question of non-retroactivity, the Australian delegation preferred the more balanced and precise statement of that principle in the five-State proposal (A/CONF.39/C.1/L.400) to the simpler clause contained in the Venezuelan proposal (A/CONF.39/C.1/L.399).

7. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the question before the Conference was whether it wished the rules laid down in the convention which was to govern treaty relations between States to be applied by everyone; if so, accession to the convention should be open to any State wishing to become a party to it. Only in that way would the convention serve the interests of the international community. A difficult situation would arise if some States were debarred from participation.

8. The western countries were discriminating against some of the socialist States by wishing to exclude them from the convention. It was hard to say at the present stage how many States would be debarred from participation in the convention in the future and what new States which might emerge from the struggle for national liberation would be subjected to political discrimination by the western Powers. The number of States thus debarred from the convention could not be predicted at the present stage. They would have nothing on which to base their treaty relations if they were not allowed to accede to the convention. An awkward situation might arise if a State now opposed

to the principle of universality subsequently wished to conclude a treaty with a State excluded from accession to the convention.

9. There was still time for the Conference to be guided by reason. The Byelorussian delegation appealed to it, in the interests of order, justice, and respect for the rights of sovereign States, to allow all States wishing to accede to the convention to do so.

10. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that his delegation's objections to the " all States " formula had already been explained in connexion with article 5 *bis*; they applied equally to the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). On the other hand, his delegation would support the " United Nations clause " contained in the joint proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1). The Vienna formula did not run counter to the principle of universality; on the contrary, it ensured a proper and equitable application of that principle.

11. To allow a territorial entity whose status was disputed to become a party to the convention might prevent other States whose participation was desirable from acceding to it. Some representatives who supported the " all States " formula had argued that without it a small group of countries might prevent a wider participation in the convention. That was not true, for how could a small group of countries do that when the decision as to which States should be invited to accede to the convention was a matter in the final instance for the majority of the States in the United Nations General Assembly, the supreme international forum?

12. Mr. YU (Republic of Korea) said that since the Conference had been convened under United Nations auspices to adopt a convention on the law of treaties, the final clauses of the convention should conform to United Nations practice. His delegation accordingly supported the United Nations formula proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), which dealt adequately with the question of the eligibility of States to sign and accede to the convention.

13. On the other hand the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394), both of which contained the " all States " formula, were unacceptable to his delegation. Serious difficulties would arise if any and every political entity was allowed to accede to the convention. There was no international body competent to determine objectively whether a given political entity was in fact a State, so the decision should be left to the principal political organ of the United Nations. On the question of the minimum number of accessions required to bring the convention into force, he wished to reserve his delegation's position.

14. Mr. ALVAREZ TABIO (Cuba) said that he wished to state his delegation's position on the final clauses, particularly article A. It was that, in view of its nature and importance, the convention on the law of treaties must be open to all States wishing to participate in it, without discrimination. Unqualified recognition of the principle of universality was fundamental for the progressive development of international law and to keep it in touch with reality. It would accordingly be anachronistic to maintain formulas which were no longer in keeping with the present state of the international community. The Vienna formula did not constitute the last word on the much-discussed question of participation in multilateral treaties of interest to mankind as a whole. New States had emerged in international relations and it would be both absurd and unjust to admit some and to exclude others merely on political grounds, and because they were socialist States. To try to retain rigid and unrealistic formulas and give them the status of norms conflicted with the dynamic character of legal rules, which emerged, developed and changed continually in consonance with varying conditions. No legal formula could be valid for all time.

15. His delegation could not therefore accept article A in the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) which flew in the face of international reality. On the other hand, it supported the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) which was in conformity with the present state of international treaty relations. The amendment by Ghana and India (A/CONF.39/C.1/L.394) had the merit of broadening the scope of the Vienna formula and represented a step forward towards unqualified recognition of the principle of universality. His delegation was therefore prepared to vote in favour of that amendment if the just cause of full universality did not prevail.

16. Mr. WARIOBA (United Republic of Tanzania) said that adoption of a so-called " all States " clause would not dramatically alter relations between States. Some delegations appeared to think that it would lead to an attempt by all the States excluded by the Vienna formula to join the convention, but that would not be so. Experience had demonstrated that the States which it was sought to exclude under the Vienna formula were not anxiously waiting at the gate and that there would be no concerted rush to accede to the convention.

17. There were already two treaties in which the " all States " formula had been adopted and he trusted that the trend would continue. It appeared illogical to allow States to participate in certain selected treaties and at the same time to object to the adoption of an " all States " formula in a convention which would govern relationships in an all States treaty. Delegations were of course aware of the real motives which had led to the opening to participation by all States of the Nuclear Test Ban Treaty and the Outer Space Treaty and there was no need to point out that some of the strongest opponents of the " all States " formula were the staunchest advocates of the same formula in the case of the Test Ban Treaty and the Outer Space Treaty.

18. The amendment by Ghana and India (A/CONF.39/C.1/L.394) was the perfect answer to those who feared that the " all States " formula would lead to claims

by entities whose statehood was in dispute. If the argument was that an " all States " formula was likely to bring in disputed entities, how could the position under the Nuclear Test Ban Treaty and the Outer Space Treaty be explained?

19. It had been suggested that the " all States " formula raised the question of article 5 *bis* but, while the two issues were related, article 5 *bis* was broader in scope.

20. His delegation would have wished to support the proposal by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1), but since general support for that proposal appeared to be lacking, it would support instead the amendment by Ghana and India.

21. On the question of the number of ratifications necessary to bring the convention into force, his delegation supported the proposal made in the amendment by Ghana and India of thirty-five ratifications. Thirty-five was roughly one third of the States attending the Conference, which appeared a suitable number. His delegation was entirely opposed to the Swiss amendment (A/CONF.39/C.I/L.396) since the convention was so important that it would be undesirable to wait for its entry into force until so large a number had ratified it.

22. He would explain his delegation's views on the question of reservations and non-retroactivity at a later stage.

23. Mr. PINTO (Ceylon) said that his delegation had been a sponsor of article 5 *bis* and would therefore support the proposal by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1). Any gaps in that proposal were of a technical character only, and gave rise to no difficulties.

24. The amendment by Ghana and India (A/CONF.39/C.1/L.394) combined what had been called the Vienna formula with the unusual device of opening the convention to parties to two other recently concluded international treaties. At that stage, the implications of the proposal were not entirely clear, particularly in respect of the operation of the new sub-paragraph (*b*) to be inserted in paragraph 1. That sub-paragraph would open the convention to parties to the Test Ban Treaty or the Outer Space Treaty. It therefore appeared that certain members of the international community who wished to accede to the convention on the law of treaties would first have to become parties to one or other of those treaties, which had little in common with the subject-matter of the law of treaties. His delegation was not attracted by that technique and did not consider the precondition of accession to those treaties warranted. The two treaties in question both contained the so-called " all States " formula. What his delegation would like to see was the incorporation of a straightforward " all States " clause in the convention. The amendment by Ghana and India did not go far enough, and his delegation would reserve its position on it.

25. He had not yet reached a conclusion on the Swiss proposal for an article 76 (A/CONF.39/C.1/L.250), which would give compulsory jurisdiction to the International Court of Justice. His Government did not share the current disenchantment with the principal judicial organ of the United Nations; it had been critical of some of the Court's recent decisions but it did not believe in condemning or abandoning the Court. His delegation's doubts concerning the proposed article 76 were related not to the mention of the International Court but to the scope of the provisions of article 76 and its relationship with a possible new article 62 *bis*. Whether or not the application of article 76 was limited to disputes falling outside the scope of article 62 *bis*, questions of extraordinary complexity would arise as a result of their possible overlapping. It appeared that a dispute arising out of the application of an article in Part V of the convention, which would have to be dealt with under article 62 *bis*, might itself be a dispute to which the procedures under article 76 would apply. Which set of procedures would then be applicable? Was article 76 a " higher " procedure, since it could encompass the interpretation of article 62 *bis*?

26. His delegation had always maintained that the provisions of the convention should be prospective, not retrospective, in their application, and consequently it had considerable sympathy with the Venezuelan proposal (A/CONF.39/C.1/L.399). Though the principle of non-retroactivity of treaties was widely, even if not universally, accepted, a provision along those lines was necessary, not merely to give expression to the principle, but also to clarify the manner in which it was to apply. The Venezuelan proposal, however, seemed to limit application of the convention to " treaties concluded in the future ". In his delegation's view, that was too vague an expression. It should be stated that the convention applied only to treaties adopted, in other words whose texts were established, after the entry into force of the convention. Every effort must be made to avoid a situation where a treaty had parties some of which considered themselves bound, with respect to it, by the terms of the convention, while others did not. At least such a provision should be qualified by a statement to the effect that nothing in the article prevented States from applying the provisions of the convention to earlier treaties by agreement between them, nor prejudiced the application of the rules of customary law to which the convention sought to give expression.

27. In that respect the five-State proposal (A/CONF.39/C.1/L.400) was much more satisfactory, but it too lacked an essential precision in that it referred to the date of conclusion of treaties. It would be better to speak of the date of the adoption or of the establishment of the text of a treaty as the point of reference for application of the convention; his delegation considered that a matter of substance and not of drafting.

28. Mr. OSIECKI (Poland) said that his delegation was one of the sponsors of the proposal concerning final clauses introduced by the Hungarian representative (A/CONF.39/C.1/L.389 and Corr.1). His delegation was a firm supporter of the principle of universality and had advocated the " all States " formula at many international conferences. It accordingly noted, with regret,

the recent emergence of a different formula which attempted to limit, in a discriminatory way, participation in international treaties. The formula in the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) was limitative in that it provided that, apart from certain categories specified in the Vienna formula, the convention should be open for signature by States invited by the General Assembly. But that additional clause concerning States invited by the General Assembly had never been applied and it was unlikely, in view of the contemporary international situation, that it ever would be. Consequently, it could not provide a satisfactory solution. The limitative formula did not answer the requirements of the facts of international life.

29. In a number of treaties of the highest importance for international peace and security, that formula had been abandoned; he was referring to treaties for which three depositaries had been appointed. Furthermore, many resolutions adopted by the General Assembly had been addressed to all States; indeed, only the universality formula was in accordance with the Charter. A limitative formula not only disregarded contemporary reality but in some cases led to quite absurd situations. An example was the participation by both the German Democratic Republic and the Federal Republic of Germany in the International Conventions concerning the Transport of Passengers and Baggage by Rail [1] and concerning the Transport of Goods by Rail.[2] In addition to other States, the railway administrations of the two States were parties to those agreements. The resulting legal situation was so bizarre that in the end it was impossible to make out what was the legal position of the States in question in those agreements. Another example was the 1967 Brussels Conference on Private Maritime Law at which additional protocols had been adopted revising certain provisions of the basic agreements concluded before the war. The basic agreements had been universal but the protocols contained a limitative clause. As a result, it might happen that a State which was a party to the basic agreement but was not covered by the limitative clause could not become a party to the protocol revising the very agreements to which it was a party. That was in flagrant contradiction with the principle set out in article 36, paragraph 3, of the draft convention that " Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended ".

30. The limitative formula was undoubtedly a retrograde step in the development of international law. It could not serve the interests of humanity, it was not in accordance with realities, and it was not correct from the legal standpoint. It was for those reasons that his delegation had proposed the abandonment of a limitative formula and its replacement by article A of the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). An objection put forward by the opponents of that proposal was the difficulty which they claimed would arise for the Secretary-General, as depositary of the convention, if he was called upon to determine whether or not a given entity was a State. But that difficulty was only apparent and could be disposed of. A possible solution would be to submit appropriate suggestions to the Secretary-General. It was merely a question of good faith.

31. His delegation maintained the arguments it had advanced against the article 76 proposed by Switzerland (A/CONF.39/C.1/L.250) during the debate on article 62 *bis*, and would vote against it.

32. Mr. KHASHBAT (Mongolia) said that the Conference was drafting an exceptional convention, a unique instrument that would apply to future treaties of all kinds. It would apply to all States concluding treaties, and since there was no State that had never concluded a treaty, its field of application would be universal. It was therefore illogical to propose that the convention should be open for accession only to Members of the United Nations or of its specialized agencies. All States should be free to sign or accede to the convention if they so wished, provided they assumed the obligations it imposed. Since the Vienna formula recognized only certain categories of States, it could not be regarded as a universal formula.

33. Mongolia therefore supported the proposal for final clauses submitted by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1). For the same reasons, it found the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) unacceptable.

34. Mr. MARESCA (Italy) said that drafting the final clauses was one of the most difficult tasks of a codification conference. If a codifying treaty permitted any weakness or confusion in its provisions concerning reservations, that would defeat its whole purpose. That was particularly true of the convention on the law of treaties; each article was connected with each other article, and it was not possible to accept one and reject another. A good example of the problems arising out of that kind of interrelationship was offered by articles 11 and 37 of the Vienna Convention on Diplomatic Relations; it was to be hoped that such reservation problems would not arise in the present case.

35. The number of ratifications required before the convention could enter into force should be related to the number of States expected to accede to it. In view of the increase in the numbers of the international community since the conclusion of the Vienna Conventions on Diplomatic and Consular Relations, the number of ratifications considered appropriate in those cases was no longer acceptable, and the proposal by Brazil and the United Kingdom to set the figure at forty-five (A/CONF.39/C.1/L.386/Rev.1) seemed an appropriate compromise between the figure adopted in the earlier conventions and the figure of sixty proposed by Switzerland (A/CONF.39/C.1/L.396).

36. Another very important point was the application of the convention in time; in other words, should it have retroactive effect? It was a basic principle of law that legislation should apply to the future and not to the past, which should be governed by the law in force

[1] League of Nations, *Treaty Series*, vol. CXCII, p. 327.

[2] *Ibid.*, p. 389.

at the time. It was a special feature of the convention on the law of treaties that it contained two elements: new rules representing the progressive development of international law, and the expression of existing rules of customary law. The situation was clearly explained in the five-State proposal for a new article 77 (A/CONF.39/C.1/L.400). The question which articles represented rules of customary law could be left to future interpreters of the convention.

37. With regard to the question of what States should become parties to the Convention, it was obvious that, since the convention was a codification instrument of general application, the largest possible number of States should participate. But that did not mean that the Conference would be justified in abandoning the rules laid down ten years ago and confirmed three years later. Those rules were flexible, since they provided for participation not only by Members of the United Nations and of the specialized agencies, as well as by Parties to the Statute of the International Court of Justice, but also by any other States that the General Assembly, in the exercise of its sovereign power, might invite to participate. That formula left the door wide open, and there was no need to go beyond it.

38. Mr. KEARNEY (United States of America) said that his delegation supported the proposal regarding final clauses submitted by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1). His delegation had listened with attention to the lengthy discussion of the principle of universality; it respected the motives of those to whom the philosophical and juridical basis of that principle meant much, but it must insist on a similar respect for its own motives.

39. The United States strongly supported the Vienna formula. With only three or four exceptions, the United Nations had adopted that formula for the accession clause for treaties concluded within, or under the auspices of, the United Nations. The Vienna formula, which was embodied in the proposal by Brazil and the United Kingdom, did not exclude the possibility of universality. It emphasized the authority of the United Nations General Assembly to invite a particular State to sign a United Nations treaty, and it was entirely appropriate that the General Assembly, the organ most clearly based on the principle of the sovereign equality of Member States, should have that authority.

40. No member of the United Nations had as yet attempted to induce the General Assembly to invite participation in a treaty by a State that was not a member of the United Nations family. That was undoubtedly because of a desire to avoid the results of a vote in the General Assembly, and it was the strongest argument against those alleging that the principle of universality was not being properly respected. In fact, the issue of the accession clause was entirely political; that was made clear by the proposal by Ghana and India (A/CONF.39/C.1/L.394). The effect of that proposal would be to involve the Conference in European political and security problems. The purport of the formula proposed by Ghana and India was merely to enhance the importance of the East German régime, since among the generally unrecognized régimes, it was only East Germany that had sought to sign and ratify the Nuclear Test Ban Treaty and the Outer Space Treaty. Accordingly, the United States strongly supported the proposal by Brazil and the United Kingdom, and equally strongly opposed the proposal by Ghana and India, with all its complications of an initial depositary and a final depositary.

41. The United States also strongly opposed the so-called " all States " accession clause advanced by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr. 1). The proposal was unworkable; the Secretary-General had repeatedly stated that the Secretariat could not function under an " all States " formula.

42. Mr. BLIX (Sweden) said he wished to submit to the Committee the five-State proposal for a new article 77 (A/CONF.39/C.1/L.400). His delegation considered it would be wise to establish expressly that the present convention, qua convention, did not operate retroactively. Sweden had stated during the discussion on article 62 *bis* that that article and the machinery it provided did not apply retroactively to old treaties or disputes. Similarly, other articles of the convention did not, as a matter of treaty law, apply retroactively to treaties concluded by States before the present convention had entered into force for them.

43. It was generally agreed that most of the contents of the present convention were merely expressive of rules which existed under customary international law. Those rules obviously could be invoked as custom without any reference to the present convention. But to the limited extent that the convention laid down rules that were not rules of customary international law, those rules could not be so invoked. That position could be regarded as already made clear from the general rule contained in article 24 of the convention. It might, nevertheless, be safer to make the point explicit in one of the final clauses. That was the purpose of the five-State proposal for a new article 77 which he was now submitting.

44. Although the proposal by Venezuela (A/CONF.39/C.1/L.399) had a similar aim, his delegation found it unsatisfactory, because it did not include the vital qualification that the rules of customary international law, which formed the major part of the convention, continued to govern treaties concluded in the past. It lacked the necessary indication that the convention, qua convention, would apply not generally to treaties concluded in the future, but only to treaties concluded by States after the convention had entered into force for them. That was not an easy thought to express clearly, and the sponsors of the five-State proposal would welcome suggestions for improving the text, especially from the Expert Consultant. Those comments could be taken into account by the Drafting Committee if the proposed new article 77 were accepted by the Committee.

45. Mr. BAYONA ORTIZ (Colombia) said that since questions of a political nature did not properly come within the competence of the Conference but should be

left for decision by the General Assembly, his delegation fully supported the Vienna formula and, consequently, the proposal regarding final clauses submitted by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

46. For the time being, he would refrain from commenting on the Venezuelan proposal (A/CONF.39/C.1/L.399) and the five-State proposal (A/CONF.39/C.1/L.400), on the question of non-retroactivity, since they had certain aspects which called for further clarification.

47. His delegation considered it most important that the convention, if it was to produce practical results, should enter into force as soon as possible, and that for that reason the number of ratifications proposed by Switzerland (A/CONF.39/C.1/L.396) seemed excessive. In its view, ratification by one-third of the participating States should be sufficient for the purpose.

48. Mr. SAULESCU (Romania) said that the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) provided that the future convention on the law of treaties should be open for signature and ratification by all States. His delegation had already stated that the principle of the universality of general multilateral treaties was a rule already crystallized in international law. Formed by State practice, it was the natural corollary of the principle of sovereign equality. The present convention obviously came within the category of such treaties, since its purpose was to bring about the codification and progressive development of the law of treaties. By its very nature, the convention served a universal purpose since it contained norms for the guidance of the practice of all States, in all fields, with respect to treaties. Consequently, it should be an instrument of universal application. The purpose of the convention on the law of treaties was to develop a single practice with regard to treaties which would be in conformity with the needs of international life and the fundamental principles of international law, namely that of *pacta sunt servanda* and the other principles constituting the *jus cogens gentium.*

49. His delegation, therefore, was in favour of the adoption of a new Vienna formula, which, by eliminating the earlier discriminatory practices, would make a substantial contribution to the codification of international law in conformity with the realities of contemporary international life. For that reason, it considered it essential to avoid adopting old and obsolete formulas which were only relics of the past. In view of the universal character of the convention on the law of treaties, the final clauses should include a provision respecting accession which would effectively ensure the universal application of the convention and enable all States to become parties to it. Why, in fact, should it be considered right and in conformity with law to permit all States to become parties to treaties such as, for example, the Universal Copyright Convention, and at the same time to maintain that the present convention should be open only to certain States or certain categories of States?

50. His delegation could not support the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) and reserved the right to revert to the subject of final clauses after considering the new proposals which had just been submitted.

51. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the sponsors of the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) had proceeded on the premise that participation in the convention would be open to all States, since universal participation was obviously in the interests of the international community as a whole. Arguments against that proposal had been advanced by the representatives of the United Kingdom, the United States and the Federal Republic of Germany, who had referred to the so-called " Vienna formula ". The representative of the Federal Republic of Germany, in particular, had based much of his argument on references to the political considerations underlying the Nuclear Test Ban and Outer Space Treaties, although those treaties would appear to be exceptions to the general rule. It could be said with equal justice that political considerations had played a part in the 1961 Vienna Convention on Diplomatic Relations. But the 1949 Geneva Conventions for the Protection of War Victims,[3] for example, had provided that they should be open to accession by all States. In view of those facts, it might well be asked who could become a party to an international treaty. It had been suggested that the question was one which should be decided by the General Assembly, but surely to raise that issue at the present Conference, whose purpose was to work out a general law of treaties, showed a certain lack of confidence in the Conference itself.

52. The representative of the Federal Republic of Germany had also said that the application of the " all States " formula would lead to special difficulties for Governments; he (Mr. Khlestov), however, only wished to point out that the Federal Republic of Germany was already participating in a number of multilateral treaties with the German Democratic Republic. Once embarked upon that course, he could not see why the Federal Republic of Germany should find any special difficulties in accepting the " all States " formula. One of its objections, namely, that based on the alleged difficulty of defining a " State ", seemed to him purely artificial. He could only regret that the delegation of the Federal Republic of Germany, together with certain others, by trying to include limitative clauses in the convention, seemed to be obstructing the proper functioning of the present Conference. The right of all States to participate in general multilateral treaties was something which could not be disputed. The convention on the law of treaties was an obvious example of such a treaty, as it codified and progressively developed norms and principles of that law. The convention must therefore be open to all States.

53. He reserved the right to speak later on the subject of final clauses.

The meeting rose at 5.30 p.m.

[3] United Nations, *Treaty Series,* vol. 75.

## ONE HUNDRED AND SECOND MEETING

*Thursday, 24 April 1969, at 10.50 a.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Final clauses (including proposed new articles 76 and 77)* (continued)

1. Mr. ALVAREZ (Uruguay) said that his delegation's objections related not to the actual principle of non-retroactivity referred to in the proposals before the Committee, but rather to the way in which those proposals were formulated.

2. The word " in the future " in the Venezuelan amendment (A/CONF.39/C.1./L.399) lacked legal precision. It was essential to specify the point in time to which those words related; in his delegation's opinion it was the date on which the convention entered into force. There was also the question of the rules to be applied to treaties concluded before the date on which the convention became binding on the States parties to it. Legally, of course, it seemed obvious that it was the rules and principles of international law in existence before the entry into force of the convention which would apply, but the wording of the proposal in question might, by *a contrario* reasoning, be taken to imply that the existing rules of international law reproduced in the convention would not apply to earlier treaties. His delegation therefore considered that the interpretation he had given should be included in the text of the proposal.

3. The five-State amendment (A/CONF.39/C.1/L.400) raised a question of form, in that the wording ought to be improved, at least in the Spanish version, and a point of substance, in that, in explaining how the principle was to be interpreted, it introduced an unduly restrictive element. For the proviso referred only to the rules of customary international law codified in the convention, which would be applicable to earlier treaties. But in fact it was not only the rules of customary international law but all the rules and principles of international law, regardless of their source, which must be applicable and be covered by the proviso, in accordance with Article 38 of the Statute of the International Court of Justice. If a treaty concluded before the entry into force of the convention gave rise to a dispute between States and the dispute was submitted to the International Court of Justice, the Court had to apply not only the primary sources of international law but also the secondary and subsidiary sources.

4. His delegation therefore considered that the manner in which the principle of non-retroactivity was formulated should be improved, so as not to affect, even indirectly, the legal situation which might confront States in the event of a dispute concerning treaties concluded before the entry into force of the convention.

5. Sir John CARTER (Guyana) said he favoured the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) relating to the final clauses, particularly in the context of the explanations given by the United Kingdom representative at the 100th meeting in respect of article A. Guyana preferred that formula to any other because it believed that the United Nations General Assembly should be regarded as the most competent organ to determine which political entities should be invited to participate in multilateral conventions concluded under its auspices. His delegation would thus oppose any formula which empowered an organ other than the General Assembly to decide who could participate in such conventions.

6. On the other hand, his delegation could not support the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom. The new formula it contained, although exemplifying the marriage of East and West, would open the door to even more far-reaching discrimination in the long run by simply reducing the existing areas of discrimination and focusing attention on the discriminatory attitude adopted towards entities which could not avail themselves of that formula. More important still, it would entitle a few depositary Governments to take it upon themselves to decide unilaterally, on certain conditions, who was entitled to participate in a given treaty. That situation would be particularly untenable for Guyana in view of the persistent refusal of the depositary of the Treaty for the Prohibition of Nuclear Weapons in Latin America [1] to accept Guyana's signature to a treaty whose provisions clearly entitled it to participate in that treaty. Consequently, his delegation thought it should simply be left to the highest political organ of the international community, to the exclusion of any other, to determine which States should be allowed to participate in the multilateral agreements established under its sponsorship.

7. Turning to the proposals for the inclusion of a new article 77, he said that the Venezuelan proposal (A/CONF.39/C.1/L.399), in the form in which it had been submitted, would imperil the whole body of law governing relations between States, since the generally accepted norms of international law which were codified in the convention on the law of treaties, and which were normally regarded as constituting *lex lata,* would be valid only in respect of future consensual undertakings entered into between States. All existing treaties would therefore be deprived of their legal content, and the law of the jungle would then prevail in international relations. His delegation could not support such juridical iconoclasm and would vote against the Venezuelan proposal.

8. The Venezuelan proposal was also ambiguous; it did not say that it was based on the notion that all States would become parties to the convention *sine die,* since that was the only condition on which a future treaty would be governed by the juridical norms embodied in

[1] For text, see *Official Records of the General Assembly, Twenty-second Session, Annexes,* agenda item 91, document A/C.1/946.

the convention now being prepared. It would therefore have been preferable to use the words: " subject to the provisions of article 1, the provisions of the present convention shall apply to all States and only to treaties concluded in the future ". But he was not proposing a formal amendment, since in any case his delegation could not endorse the basic idea expressed in the Venezuelan proposal.

9. The five-State proposal (A/CONF.39/C.1/L.400) made some attempt to bring the Venezuelan proposal into line with existing international law; that clearly showed that damage the latter proposal could do if it was accepted. But the amendment would only aggravate the difficulties normally associated with identifying the material and psychological components of a customary international norms. The proposal would cast doubt not only on the status of conventional rules established by free consent in existing treaties but also on the fundamental law of the international community contained in the United Nations Charter. Much of the law in the Charter had no correspondence with customary international law. Did that mean that the Venezuelan proposal, as amended by the five-State proposal, would deprive that law of all relevance for the States parties to the convention on the law of treaties? The five-State proposal would have to be rejected, since it was absolutely impossible to remedy the defects which vitiated the entire Venezuelan proposal. His delegation would therefore be forced to abstain from voting on any amendment to the Venezuelan proposal.

10. Mr. HUBERT (France) said he supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) relating to the final clauses. Article A reproduced the orthodox terms of the Vienna formula, and that solution was satisfactory to France for the reasons he had already stated, namely that the Conference had been convened by the General Assembly of the United Nations, that it was working within the framework of the United Nations practice and that all the work of the United Nations had produced customary rules from which the Conference had no reason to deviate. The purpose of the Conference was to apply the rules and not to change them. Besides, since the Vienna formula had already been adopted twice, it might well be adopted a third time. The Indian representative had advocated a rapprochement between East and West, but that was a question which, however serious, it was not for the Conference to settle, since it fell within the purview of the General Assembly.

11. The French delegation had no special observation to make or objections to raise concerning articles B and C.

12. With regard to article D, the number of States invited to the Conference, not merely the States which had been able to accept the invitation, should be taken into account. States which had been invited but had not been able to attend, perhaps for practical reasons, might well be among the initial signatories to the convention. One hundred and thirty-seven States had been invited, so that the minimum of sixty ratifications required for the convention to enter into force, as proposed by Switzerland (A/CONF.39/C.1/L.396), was not in itself unduly high. But the figure of forty-five proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), corresponding to one-third of the States invited, was a reasonable solution calculated to be generally acceptable, and hence France would gladly support it.

13. Mr. NEMECEK (Czechoslovakia) said that on the question of the universality of treaties his delegation believed that treaties which affected the interests of all States and codified and developed the principles of international law should be open to all States without exception. That fully applied to the convention on the law of treaties.

14. The Czechoslovak delegation considered that the Conference was engaged, as the Swiss representative had remarked at the 100th meeting, in drawing up a constitutional law at the international level, and that should go hand-in-hand with the need to ensure that all States were able to participate in it. His delegation therefore unreservedly supported the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) relating to the final clauses.

15. His delegation also supported the amendment by Ghana and India (A/CONF.39/C.1/L.394) as being a compromise formula which at the same time represented the furthest the Conference was in any circumstances prepared to go.

16. As the Chairman of the Drafting Committee had rightly remarked, participation in the convention entailed obligations as well as rights and it was therefore in the interest of the international community that all its members should be in a position to comply with such obligations. His delegation also concurred in the view expressed by the Indian representative at the 100th meeting that it was desirable to adopt a formula based on both the Vienna and the Moscow formulas.

17. The Czechoslovak delegation considered that it must strongly oppose the draft article 77 proposed by Venezuela (A/CONF.39/C.1/L.399). The proposal failed to take sufficiently into account the fact that the Conference was mainly concerned with codifying the rules of international law at present in force. Thus, the principle in international law that treaties whose conclusion had been procured by the threat or use of force were void *ab initio* was not merely the basic principle but the very ethic of law, without which law would not exist as such.

18. It was to be hoped that the Venezuelan delegation would be able to withdraw its proposal, the more so since there were no real differences of opinion on that head from the legal point of view, but simply different ideas of how the question should be presented. His delegation did not think that a provision on non-retroactivity should be included in the convention, but it would not oppose it if the majority of delegations were in favour of a provision of that kind, provided that the wording was quite precise and made it clear that the principle of non-retroactivity would not apply to principles of international law already recognized. With that in mind, the text of the five-State proposal (A/

CONF.39/C.1/L.400) needed to be more precisely worded.

19. Mr. YASSEEN (Iraq), referring to the Venezuelan proposal (A/CONF.39/C.1/L.399) and the five-State proposal (A/CONF.39/C.1/L400) said that the principle involved was non-retroactivity. In municipal law silence was the rule when there was no reason to state that a law was retroactive. The same method should apply in international law. If there was no question of making the convention on the law of treaties itself retroactive, there was no need to state expressly that it was non-retroactive; it was best simply to say nothing.

20. Difficulties did arise, however, in connexion with the sources of international law and the nature of the convention itself. The purpose of the draft articles was not only to create new rules, but in the main to formulate existing rules which were already part of positive international law. It had to be realized that non-retroactivity, which was the principle that should be adopted, could not impair the binding force of those rules, since, in general international law, customary rules, for instance, or rules deriving from some other source of international law did not lose their character of positive law by the mere fact of their being codified in an international convention.

21. Consequently he could not accept the Venezuelan proposal (A/CONF.39/C.1/L.399), which seemed to conflict with the general principles of international law on the matter; he would also find it hard to accept the five-State proposal for an article 77 (A/CONF.39/C.1/L.400), for that text was not essential, since the matter was already governed by very definite rules of international law which had exactly the same effect as the proposed article 77 would have.

22. Furthermore, the five-State proposal did not solve the problem as a whole, since it mentioned only " the rules of customary international law ". But treaty law and custom were not the only sources of international law: it was also necessary to take into account, for example, the general principles of law, which were a separate source, as was evident from Article 38 of the Statute of the International Court of Justice. There were also auxiliary sources of international law, such as case-law. He could not, therefore, in any case support the five-State proposal for article 77 as it stood.

23. Mr. GALINDO-POHL (El Salvador) said his delegation had no criticism to make of the intention of the Swiss proposal (A/CONF.39/C.1/L.250), which left it to the parties to choose the conciliation and arbitration procedure which best suited them in the event of a dispute relating to the interpretation or application of the convention. Article 36, paragraph 2 of the Statute of the International Court of Justice permitted the States parties to the Statute to declare at any time that they recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning among other matters the interpretation of a treaty. The Court was therefore an international tribunal competent to decide disputes relating to the interpretation of a treaty arising between States which had accepted the optional clause in Article 36 of the Statute. It had to be borne in mind that article 62 *bis* had been approved only by a very small majority and it would be hard to obtain a two-thirds majority for it in the plenary. Those who had not yet resorted to the optional clause in Article 36 would find it difficult to accept article 62 *bis,* which was the result of a compromise to meet the views of those delegations which, though in favour of compulsory arbitration, did not consider that it would be timely at present to resort to the Court. The Salvadorian delegation was not opposed to article 76, but it wished to draw attention to the difficulties the article was likely to cause. If the Swiss proposal was rejected, it would in any case still be open to certain States to resort to the optional clause in Article 36 of the Statute of the International Court of Justice.

24. With regard to non-retroactivity, the Salvadorian delegation noted that the Venezuelan amendment (A/CONF.39/C.1/L.399) did not distinguish between *lex lata* and *lex ferenda.* For that reason his delegation was unable to accept it, at any rate in its present form, because there were norms codified in the convention that were already in force; non-retroactivity could apply only to rules in which the convention introduced inovations and thus created new rules that were binding as between the parties from the time when it entered into force, in other words from the time when the process of creating them was complete.

25. The five-State proposal (A/CONF.39/C.1/L.400) excepted the rules of international law already in force, but it only referred to customary rules. The rules already in force which the convention was codifying had existed for some time; the new rules would come into force when the process of creating them had been completed. The new article 77 might be of some value if the Conference wished to make the position clearer, but certain changes would have to be made in it and emphasis placed on the rules of the present convention rather than on the objects to which they would apply, namely earlier or future treaties.

26. With regard to the problem of the States that should be permitted to accede to the convention, the Committee had heard the same arguments about universality and free consent as it had during the discussion on article 5 *bis.* The Salvadorian delegation had opposed that article because it took the view that as a political question was involved, each individual case would have to be considered on its merits in order to determine the effect of the principle on each particular treaty. There were two different formulas, the Vienna formula and the " all States " formula. Those who favoured the former believed that the convention should not permit all political entities without exception to accede. Those who favoured the " all States " formula believed that the aim of the convention should be universality. The question was whether the convention was a special case to which the principle of universality should apply, in other words whether it was desirable to ensure that as many States as possible acceded to it. The idea of treaties open to accession and ratification by all States

had been gaining ground since 1963. There had been the Nuclear Test Ban Treaty, the Outer Space Treaty and the Agreement on the rescue and return of astronauts; in 1968 there had been the Treaty on the Non-Proliferation of Nuclear Weapons. In those Treaties the " all States " formula had been used; that formula should be included in a work of codification, since it represented an existing practice. The guiding principles in the codification of international law should be consistency and concordance, so that the formulas that were codified would include existing international practice and try to deal, in connexion with each subject, with all questions and persons forming the subject of international legal relations. Deliberately to omit one aspect of legal relations would be a failure to comply with those principles and would diminish the value of the work of codification.

27. Some States represented at the Conference had regular treaty relations with entities which they recognized as States but which would not have access to the convention if the Vienna formula was applied. A Conference that had met to draft a treaty on treaties could not very well deny to those States the right to make the advantages of the convention applicable to that area of their international relations. It would be logical to enable those political entities to accede to the convention, and it would be possible to do so, despite the fact that other States did not have the same relations with them, because it was a recognized fact that accession to a general multilateral treaty did not imply recognition of the other parties. The application of a provision of that kind would allow more States to accede.

28. The amendment by Ghana and India (A/CONF.39/C.1/L.394) was a milder version of the " all States " formula; it got round certain difficulties and was an attempt to avoid raising the problem of the legal existence of certain States; above all, it made it unnecessary for the Secretary-General of the United Nations to give a decision regarding the existence of certain States. The international community had not taken those precautions when it had drawn up the Treaty on the Non-Proliferation of Nuclear Weapons and had adopted the " all States " formula. The formula proposed by Ghana and India paid attention to the position of certain States which maintained that certain political entities did not have the status of States. As it stood, the amendment provided a good basis for solving the difficulty and served the higher interests of the international community. His delegation preferred the formula by Ghana and India, because it ensured that the Secretary-General of the United Nations would not be confronted with a problem; but it recognized that the " all States " formula would be more logical in the case in point. The convention was a great legal achievement and should be open to as many States as possible. The very nature of the subject-matter required a demonstration of good will by States, so that the principle of universality would prevail. Participation by a large number of States was necessary, if the ambitious purpose of those who had drafted the articles was to be achieved. Otherwise, the instrument which the Conference was preparing would be universal neither in letter nor in spirit.

29. Mr. OGUNDERE (Nigeria) said that his delegation had carefully studied the various proposals submitted with regard to the final clauses. The amendments before the Committee once again raised the issue of the principle of universality. In 1968, during the discussion on article 5 *bis*, consultations had taken place among various regional groups as to the final form which that article should take. A draft declaration embodying the same formula as that contained in the first part of article A of the amendment by Ghana and India (A/CONF.39/C.1/L.394) had been discussed, and some regional groups had shown great interest in it. The principle of the amendment had been adopted in four conventions; and it was common knowledge that a fifth treaty, on liability for damage caused by nuclear explosion, would be signed within two or three months and would contain the same " all States " formula. Nigeria had always advocated the principle of universality. The " new " Vienna formula had the great advantage of giving practical expression to the principle of universality and at the same time of relieving the depositary of the responsibility of having to take a political decision on whether certain political entities constituted a State. It represented a compromise between the supporters of the " all States " formula and those who urged the application of the Vienna formula. A formula likely to be approved by the greatest possible number of delegations should be adopted. His delegation would therefore find it difficult to support either the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) or the proposal by Hungary, Poland, Romania and the Soviet Union (A/CONF.39/C.1/L.389 and Corr.1).

30. As to the number of instruments of ratification or accession needed to bring the convention into force, Nigeria favoured the adoption of the figure of thirty-five, suggested by Ghana and India. However, his delegation thought that if that figure was unacceptable to the majority of participants, the number adopted should not exceed forty.

31. The Nigerian delegation did not think that the final clauses should contain a provision on reservations, since articles 16-20 of the convention were adequate in that respect. Nor did it think that the final clauses should contain provisions on the settlement of disputes or on revision. Moreover, since articles 71 and 72 of the convention were concerned with the depositaries of treaties and the functions of those depositaries, it was unnecessary to deal with those matters in the final clauses.

32. Mr. EUSTATHIADES (Greece) said that although certain provisions in a convention were called " final clauses " because they appeared at the end of the text, they were a source of concern to all delegations from the very earliest stage of drafting a convention, for they related to the scope of the convention in time and space. Two major points were before the Committee: retroactivity, and the categories of States to be allowed to accede to the convention.

33. Several proposals had been submitted to the Committee on the question of the number of ratifications or accessions required for the convention to enter into force. Some had suggested thirty-five, others forty-five, others sixty. That raised the question of ensuring that the new treaty law which was to govern all future treaties would be widely applied. It was satisfactory to note that even the figure of thirty-five would already cover a good many countries, which meant that the general trend among delegations was to require accession or ratification by a large number of States. That was a very important point since, by establishing a high figure, the Conference would reflect the clear trend towards generalization of the new treaty system and a uniform law of treaties, and that would be useful in the future. While the Greek delegation was not committed to any of the figures suggested, it believed that accession by a large number of States should be required in order to bring the convention into force.

34. The International Law Commission had not drafted a provision on the non-retroactivity of the convention, although article 24 was based on the concept of non-retroactivity as accepted in general international law with respect to the law of treaties. Article 24, however, would not duplicate a provision on the non-retroactivity of the present convention itself. The non-retroactivity referred to in article 24 related to future treaties, when specific treaties would be involved and the question would be one of precise rules of substance. The problem would then be a difficult one, though not because of the accepted fact that a treaty might establish a rule contrary to that of non-retroactivity, for there was nothing to prevent the contrary rule being laid down in an international treaty. Provision had to be made for another kind of exception, the case where it would appear from the treaty that the parties had the contrary intention. From cases which had come before international tribunals, notably the *Ambatielos* [2] and *Mavrommatis Palestine Concessions* [3] cases, in which Greece had been involved, it was clear that there were other reasons in favour of abolishing the principle of non-retroactivity. That was sufficient proof that, even in the case of specific international treaties, the principle of non-retroactivity was only admitted on the understanding that it might give rise to awkward problems.

35. Article 77 was quite a different matter. Non-retroactivity there related to the application of the rules governing treaties. The problem was at once simpler and more complicated because even if the intention of the parties was to be taken into account and they had intended that non-retroactivity should not apply, it was necessary that that intention should have been clearly stated. In his delegation's view, the work of codification undertaken in the present convention could not affect general international non-treaty law which already existed prior to the convention. The intention was clear and nobody would deny that a reservation covering the rules of general international law was implied. Even if the principle of article 24 were applied to article 77, an exception would in any case have been made in the case of the rules of general international law.

36. The five-State proposal (A/CONF.39/C.1/L.400) had the merit of clearly stating that intention, and the Greek delegation therefore supported it. The representative of Iraq had drawn the Committee's attention to the fact that there were rules of general international law other than customary law. The process of formation of customary law was something extraneous to non-retroactivity, since customary law exercised its weight independently, according to the stage it had reached, and that could never be precisely stated. By definition, general international law did not raise difficult problems of non-retroactivity. The rule of non-retroactivity existed in international treaty law. The drawback of the five-State proposal was that it confined the non-retroactivity proviso to customary international law, whereas there were other forms of innovation in general international law. He therefore suggested that the sponsors of that amendment should delete the word " customary " or base their amendment on the language used in article 3 of the convention.

37. The principle of non-retroactivity laid down in the proposed new article 77 had the advantage of encouraging more States to ratify the convention, since the obligations prescribed were more restricted. It would therefore be a means of working towards universality. The adoption of article 77 would mean nothing more than the acceptance of what would exist even without that article. In any case, the principle of non-retroactivity, even when explicitly laid down, could not prevent certain awkward questions from arising, but that was inevitable. In the opinion of his delegation, it was preferable to state the principle explicitly.

38. The legal problem related to the structure of the international community, namely the problem of the participation of all States in both the rights and the obligations of existing treaty law, had become a political one. Those taking part in the Conference, despite the force of the legal arguments they had adduced, had inevitably adopted the political approach. Recognition of States was a difficult issue, but ultimately it was a question left to the sovereign discretion of each State. The Vienna formula had the advantage of raising no difficulties with regard to the question of recognition, which was not the case with the " all-States " or Moscow formulas.

39. Some representatives had claimed that accession to a general multilateral treaty by a State that was not generally recognized did not entail recognition; in support of their arguments they had cited the Nuclear Test Ban Treaty and the Outer Space Treaty. The Greek delegation also thought that accession to a multilateral treaty by a State which was not generally recognized did not imply recognition of that State by States which had not recognized it. If the principle of universality was to prevail, the best solution would be to add an express provision to that effect. That solution had in fact been accepted in international treaty law in the humanitarian field, in particular in the four Geneva Conventions of 1949, which provided that the

[2] *I.C.J. Reports 1952*, p. 28.

[3] *P.C.I.J.* (1924), Series A, No. 2.

application of certain rules to rebels or belligerents not recognized by all the parties did not imply recognition of the belligerents.

40. However, the inclusion of such a provision in a particular treaty was not to be regarded in the same way as its inclusion in the convention on the law of treaties, since although a proviso on the non-recognition of acceding States was possible in specific conventions such as the two treaties mentioned in the amendment by Ghana and India, the problem was different in the case of a convention governing treaty law as a whole. To make treaty law open to acceptance by all States implied recognition of those States. The effect of recognition was to permit the establishment of diplomatic and treaty relations. Under present circumstances, the adoption of a provision that all States could accede to the convention on the law of treaties would in practice mean the establishment of a very broad treaty relationship between all States, which would result in recognition.

41. The Vienna formula, however, allowed all States to conclude bilateral conventions, and all States were entitled to conclude a treaty of the same scope as the convention on the law of treaties with those States which were not covered by the Vienna formula. He thought it was necessary to develop treaty law first, in other words to facilitate the ratification of all treaties codifying international law by the States covered by the Vienna formula, and thereby to enable those treaties to enter into force.

42. Mr. DE CASTRO (Spain) said that the Venezuelan proposal (A/CONF.39/C.1/L.399) raised an important question which seemed to be settled in principle in article 24 of the convention but which required clarification. The Venezuelan proposal was ambiguous, since it did not say whether the rules of general international law were also applicable.

43. The expression " rules of customary international law " which appeared in the five-State proposal (A/CONF.39/C.1/L.400) was not clear, since the sponsors had not specified whether they also understood it to include the principles and rules of general international law.

44. The Spanish amendment (A/CONF.39/C.1/L.401) to that proposal merely repeated what was stated in the Preamble of the Charter, in Article 38 of the Statute of the International Court of Justice, and in articles 3, 27, 34, 40 and 49 of the draft.

45. The Swedish representative had said that the text of the five-State proposal of which he was one of the sponsors (A/CONF.39/C.1/L.400) might perhaps incorporate drafting changes proposed by the Drafting Committee. But it would also be advisable to clarify the substance of the text and to add the words proposed in the Spanish amendment.

46. His delegation might wish to speak again during the discussion, if for example the question of reservations of some other important problem was raised.

47. Mr. MATINE-DAFTARY (Iran) said he did not share the optimism of the Brazilian and United Kingdom delegations, which had proposed in their amendment (A/CONF.39/C.1/L.386/Rev.1) that the convention should enter into force following the deposit of the forty-fifth instrument of ratification or accession.

48. The sponsors of the amendment had stated that because of the increase in the number of States participating in codification conferences, it would also be necessary to increase the number of instruments of ratification and accession required, from the figure specified in the Conventions on the Law of the Sea and on Diplomatic and Consular Relations.

49. In his delegation's view, it would be well to wait for the final vote of the Conference before taking a decision on the number of instruments required for the entry into force of the convention. Moreover, most of the previous conventions, drafted by the codification conferences held at Geneva and Vienna, had only entered into force after many years of delay and of hesitation by States to ratify them, even though the number of instruments of accession or ratification required in them was less than was called for in the proposal by Brazil and the United Kingdom. What was more, the problems involved in those conventions were not as controversial as those raised in the convention on the law of treaties, which had split the participants in the Conference into two strongly opposed groups. Certain delegations had precipitated the voting on some highly controversial articles during the 99th meeting, since they wished the convention on the law of treaties to include a clause providing for the establishment of machinery for compulsory arbitration which would not permit the formulation of any reservation on the point. The vote taken during that meeting was a warning to those delegations. The representative of one great Power had stated during the debate on compulsory arbitration that his Government would not accept the convention if the provision concerning compulsory arbitration was not adopted by the Conference. The opponents of the clause providing for machinery for the compulsory settlement of disputes had carefully avoided uttering any such threat, but it was to be feared that they too might eventually be forced to adopt a similar attitude. After all, if wisdom did not prevail during the meetings of the plenary Conference, in other words, if article 62 *bis,* which had been adopted by a majority of 54 votes to 34, with 14 abstentions, was retained in its present form and its sponsors persisted in refusing to recognize the right to make reservations and did not limit themselves to the adoption of a compulsory procedure involving only conciliation, a large number of States participating in the Conference would have no alternative but to refuse to ratify the convention. In that event, the States which had won in the vote on article 62 *bis* would have drafted a convention of purely Western character which would be far from universal. It would be unfortunate if the excellent work of the International Law Commission were doomed to failure. His delegation asked the sponsors of the proposals concerning the final clauses to try to reach a general agreement on that highly important question before settling the question of the number of instruments of accession and ratification required for the entry into force of the convention.

50. It should also be pointed out that there were other factors that could be an obstacle to the ratification of conventions, in particular the absence of parliaments in a number of States participating in the Conference.

51. His delegation could not support the Venezuelan proposal (A/CONF.39/C.1/L.399) for reasons similar to those advanced by the Swedish representative in submitting the five-State alternative proposal of which he was a sponsor (A/CONF.39/C.1/L.400), and which might likewise be considered superfluous in view of the express provisions of article 24 adopted during the first session. It might also be possible to follow the example of the previous codification conventions, such as the Conventions on the Law of the Sea, where the preamble indicated which articles represented codification and which were related to the progressive development of international law.

52. If the five-State proposal (A/CONF.39/C.1/L.400) was maintained, his delegation thought that its own amendment (A/CONF.39/C.1/L.402), which was taken from the preamble to the Convention on the High Seas[4] was necessary. The Drafting Committee might work out some formula which would cover all the sources of existing international law.

The meeting rose at 1 p.m.

[4] United Nations, *Treaty Series*, vol. 450, p. 82.

## ONE HUNDRED AND THIRD MEETING

*Thursday, 24 April 1969, at 3.30 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

### Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

*Final clauses (including proposed new articles 76 and 77)* (continued)

1. Mr. ESCUDERO (Ecuador) said he was surprised that the representative of Venezuela should have submitted his proposal for a new article 77 (A/CONF.39/C.1/L.399), providing that the convention should apply only to future treaties, so soon after Ecuador had made a statement advancing unanswerable arguments against that position. The Venezuelan proposal discriminated against past treaties, and violated the principle of the sovereign equality of States, all of which had the same right in law to invoke the application of the present convention for the treaties they concluded, whether present or future. The Venezuelan proposal placed some States in an advantageous position as compared with others, and thus conflicted with the principle of the integrity of the law, which was essentially one and indivisible for all States belonging to the international community. That applied above all to the present convention, or treaty on treaties. Why should the representative of Venezuela fear that the convention should be applied to existing treaties, since those treaties, like future treaties, deserved the same legal protection?

2. The representative of Venezuela had referred to the non-retroactivity of international law as a sacred dogma, without reflecting that that principle did not apply to the problem under consideration, and that even in the field of private law it only applied with many well-founded exceptions.

3. The Venezuelan representative had himself referred to a number of rules of the greatest importance, such as those adopted by a large majority during the first session of the Conference in articles 49, 50 and 61, and had stated that they already possessed unquestioned authority, and consequently were valid before the entry into force of the convention. That meant that those rules were authentic and applicable law, already embodied in treaties and consecrated by international custom, which was a source of law as valid as international treaties, as was shown by article 38 of the Statute of the International Court of Justice. Consequently it was hard to understand why the representative of Venezuela maintained that the convention should apply only to future, and not to existing treaties, if the law proclaimed in articles 49 and 50 in fact already applied to existing treaties, a law which would disappear if the Venezuelan proposal were accepted. The Venezuelan position amounted to applying different criteria to similar situations. Possibly Venezuela objected to certain minor provisions in the convention, but that was no reason for sacrificing the application to existing treaties of all the provisions, including those in such major articles as 49, 50 and 61. In the name of justice, he appealed to the representative of Venezuela to show a more understanding attitude and withdraw his proposal. If the Venezuelan representative were unwilling to do that, he urged the Conference to reject that proposal and any other proposal of the same nature.

4. Mr. BREWER (Liberia), referring to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), said that his delegation found article A acceptable because it believed that the United Nations, and not the present Conference, should decide which States could become signatories to the convention. That principle was endorsed by the fact that it was the States that had convened the conferences on the banning of nuclear weapons and on the exploration and use of outer space that had decided to open those treaties for signature by all States. His delegation took the view that all questions of participation, signature, accession and acceptance could only be decided by the States or organization responsible for convening the conference. Prior to the Vienna Convention on Diplomatic Relations, all multilateral conventions concluded under United Nations auspices used a formula that did not go as far as the Vienna formula, which Liberia considered broad enough to cover most, if not all, States. At the 1961 Vienna Conference the additional category " States parties to the Statute of the International Court

of Justice " had been added, but only on the authority of the United Nations General Assembly.

5. With regard to article D, his delegation accepted the figure of forty-five for the number of ratifications required before the convention entered into force, but considered that, in view of the increase in the number of States, fifty would be a more appropriate number, since it represented one-third of the total number of States in the world; the basis for calculation should be the entire world community, and not just the membership of the United Nations or the participation in the present Conference. The number used in 1958 for the Conventions on the Law of the Sea had been twenty-two, but since that time the number of independent States had almost doubled.

6. His delegation agreed on the need for an article on the lines of the new article 77 proposed by Venezuela (A/CONF.39/C.1/L.399), and by Brazil and four other States (A/CONF.39/C.1/L.400). But neither proposal went far enough, and he hoped an attempt would be made to broaden the provisions of the article.

7. Mr. BINDSCHEDLER (Switzerland) said the first question was whether or not a specific article on non-retroactivity was really necessary, since the non-retroactivity of legal rules was a general principle of law which was universally recognized, and equally valid in international law; it was the logical consequence of the principle that a legal rule could only govern the subject of the law in the future, not in the past. If, exceptionally, a law provided for retroactivity, it was always a sort of legal fiction: the rule would be applied in the future, but with respect to previously existing legal facts and situations.

8. The question was not a simple one. The first difficulty was that the evolution of the law must be taken into account. That point was brought out very clearly by the arbitrator, Max Huber, in his well-known award in the *Island of Palmas* case where he had said: " As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law." [1] The evolution of the law was not taken into consideration in that opinion in order to determine the rule of behaviour, which always applied to a given situation at a given time, but in relation to the existence and content of rights as constituting the condition of application of the rule of behaviour. The existence and content of those rights was not immutable, either in international or civil law. However, that did not imply any exception to the principle of non-retroactivity. A right which lost its validity did not do so retroactively.

9. Another example was provided by the rule on the breadth of the territorial sea. Although the breadth had varied from time to time, that variation did not imply any variation in the application of the law in time. Unless the law expressly so provided, there was never any question of retroactive invalidation, only of abrogation or modification *ex nunc*. Even if a treaty provided for retroactivity, as in the case of some agreements on double taxation or social security agreements, the rule itself was not retroactive; it regulated only the future behaviour of States, and did not make their former behaviour illegal. There must accordingly be a definition of what was meant by non-retroactivity. It was not sufficient merely to rely on the general principle of non-retroactivity, because that notion was not sufficiently clear.

10. Switzerland was in favour of including a special provision on the question in the convention, and he was grateful to the delegation of Venezuela for having put forward a specific proposal to that effect (A/CONF.39/C.1/L.399). The Venezuelan text was, however, too brief and needed further clarification; the proposal by Brazil, Chile, Kenya, Sweden and Tunisia (A/CONF.39/C.1/L.400) had the merit of being more complete and precise. However, the proposal should include a reference not only to the rules of customary international law, but also to the general principles of law, which were also a source of international law. Secondly, the phrase " codified in the present Convention " should be deleted; that limitation was incorrect, for all customary law was applicable, not only the law codified in the convention. That comment applied also to the amendment proposed by Spain (A/CONF.39/C.1/L.401). Lastly, since the notion of the conclusion of a treaty had not been defined in article 2 of the convention, and was thus ambiguous, it would be better to avoid referring to it in the new article 77 and to replace it by that of signature or ratification. He would suggest that a revised text be drafted based on article 24 of the convention, which would provide that the present convention did not bind a party in relation to any treaty that had entered into force before, or any act or fact which had taken place, or any situation which had ceased to exist before the date of its entry into force. He believed that the Drafting Committee was best qualified to choose between the various proposals now before the Committee.

11. He wished now to reply to some questions raised by the representative of Ceylon [2] concerning the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250). The first question concerned the relationship between article 62 *bis* and article 76, which was somewhat complicated. The procedure in article 62 *bis* applied only to cases of invalidity or termination arising out of Part V of the convention, in relation to other treaties. It was for the conciliation commission or arbitral tribunal to say if there was a cause of invalidity applying to another treaty which the party concerned desired to terminate. In their report those two bodies would interpret the various articles relating to Part V. Con-

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

[2] See 101st meeting, para. 25.

versely, the procedure provided under article 76 would apply to the convention on the law of treaties itself, except for causes of invalidity under Part V in relation to other treaties. The convention on the law of treaties could give rise to disputes regarding the scope of signature or ratification, contradiction between various treaties, or the complex question of reservations. If such disputes arose with respect to other treaties the procedure provided in those treaties would apply, but if they contained no provision for the settlement of disputes, then the parties would be able, under article 76, to resort to the procedure provided in that article. Consequently article 76 filled a gap. In addition it was desirable for the parties to give preference to the procedure under article 76 in order to guarantee uniform interpretation of the convention on the law of treaties. The convention would be part of general international law and should be interpreted uniformly in order to maintain the unity of the international legal system. The International Court of Justice was therefore the most suitable body for that purpose.

12. The procedure provided under article 76 was also applicable to article 62 *bis* if an abstract dispute arose, but if problems arose under article 62 *bis* in relation to other treaties, then the conciliation commission and the arbitral tribunal must settle such disputes. It was a general principle of law that any body, unless it was provided otherwise, must decide its own competence and procedures.

13. Mr. SAMAD (Pakistan) said that his delegation supported the principle of the participation of all States in general multilateral treaties of general interest to the international community. It accordingly supported the " all States " formula for signature of and accession to the convention. The Vienna formula was limited in scope, and he would like to see some advance on it in the interests of the progressive development of international law, as proposed by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1). The proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) embodied the limited Vienna formula, and it would therefore be difficult for Pakistan to support it. However, if the proposal by Hungary and the other countries did not win enough support, his delegation would support the proposal by Brazil and the United Kingdom as amended by Ghana and India (A/CONF.39/C.1/L.394). That text took account of current practice by referring to the Moscow Nuclear Test Ban Treaty of 1963 and the Outer Space Treaty. It was incorrect to say that the Vienna formula had become customary in United Nations practice, since the western Powers had departed from it in recent times.

14. With regard to the number of instruments of ratification or accession necessary for entry into force of the convention, his delegation thought a number representing one-third of the participating States was a reasonable suggestion. It was undesirable to set too high a figure; the number 60 suggested by Switzerland would mean too long a delay in the entry into force of the convention, and he would prefer forty-five.

15. Pakistan would like to see a revision clause included in the convention to provide for its review after a period of, say, ten years, at the request of a given number of signatory States. It supported the inclusion of a reservation clause to the extent permitted by the articles of the convention; clearly derogations might not be permitted from provisions of a fundamental nature such as those in Part V of the convention.

16. With respect to the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250), Pakistan agreed that legal disputes regarding the interpretation or application of a convention should be referred to the highest judicial forum available to the United Nations, namely, the International Court of Justice, in the absence of any other arbitral tribunal agreed to by the parties. Article 38 of the Statute of the International Court of Justice permitted that for all legal disputes.

17. His delegation would like at least the procedural provisions of Part V of the convention to be applicable also to treaties in force at the time when the present convention entered into force, as well as to future treaties, as suggested by the representative of Ecuador. If, however, that idea did not gain enough support, Pakistan would have no objection to the inclusion of an explicit provision, despite the adoption of article 24, as proposed by Brazil and four other countries (A/CONF.39/C.1/L.400). That text was preferable to the one proposed by Venezuela (A/CONF. 39/C.1/L.399), but the former needed some redrafting to make it clearer; perhaps it could be studied by the Drafting Committee, together with the amendments by Spain (A/CONF.39/C.1/L.401) and Iran (A/ CONF.39/C.1/L.402).

18. Mr. MENDOZA (Philippines) said that he appreciated the position of the advocates of the " all States " formula. The convention on the law of treaties was unique in that it was declaratory of the law as it was and possibly creative of rules which, because of their nature and of the present circumstances, were pressing for recognition as part of the law of nations. It was an attempt to legislate for all the States of the world, and if a State not present at the Conference were to recognize the value of its work and sign, or accede to, the convention, it should be a matter for gratification.

19. At the same time, there were deep and vital considerations which had led to the adoption and maintenance of the Vienna formula and which rendered it difficult, if not impossible, for many delegations to accept any other basis for signature or accession; those considerations appeared to be beyond discussion in the present forum.

20. The Vienna formula was not a very courageous solution because it avoided a decision on the question whether certain States could become parties to the convention. The burden of responsibility was thus shifted to the General Assembly, but it was precisely the merit of the formula that it did not conclude the issue but deferred it for the ultimate decision of the Assembly.

21. Under General Assembly resolution 2166 (XXI) the Conference was called upon " to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate ". That passage set forth the Conference's duties and responsibilities and those did not include dealing with questions which were far removed from the law as such and were rooted in political considerations. Many delegations probably did not have the authority to decide on those issues at the present Conference.

22. The convention constituted a codification of long-standing rules and principles of international law and of rules compatible with the concept of progressive development. It would be gratifying if those rules were to prevail throughout the community of nations. The ultimate test, however, of the value of the Conference's work would be not the formal acceptance of those rules by the States which signed, or acceded to, the convention, but the observance of those rules by all nations, whether or not parties to the convention.

23. Article 1 stated that the convention applied to treaties concluded between States; let it then apply to all States — not necessarily by the binding commitment of their signatures but by the force of the justice and fairness of the rules it embodied and of their implicit recognition as rules of international law binding upon all States.

24. He trusted that the Conference would not be constrained to resolve what the General Assembly was far more competent to decide and that its extensive work would not be endangered on an issue which was not within its province.

25. Mr. ONG KHUY TRENG (Cambodia) said that, in the opinion of his delegation, the principle of non-retroactivity, which was already laid down in article 24 of the draft, was unanimously accepted in general international law. That view was confirmed in the Venezuelan amendment (A/CONF.39/C.1/L.399). Nevertheless, the scope of article 24 differed from that of the Venezuelan amendment, since the former related to the non-retroactivity of treaties, and the latter to the non-retroactivity of the provisions of the draft before the Conference.

26. His delegation considered that many of the provisions of the draft had existed before their codification by the International Law Commission and that one of the main purposes of the Conference was to set those rules out formally. Although the Conference was not really engaged in laying down new rules or interrupting the continuity of generally accepted rules, adoption of the Venezuelan amendment might have the effect of implying that such rules would apply only to future treaties. The amendment therefore lacked the necessary precision.

27. The sponsors of the five-State amendment (A/CONF.39/C.1/L.400) had made commendable efforts to fill that gap, and their text had the merit of excluding rules of customary international law from the principle of non-retroactivity. Nevertheless, the term " rules of customary international law " might be either too restricted or too broad, according to the interpretation given them, and the door would thus be left open to controversies and disputes; that fear, moreover, had been expressed by a number of delegations in connexion with the absence of any definition of general multilateral treaties and restricted multilateral treaties. It was of course extremely difficult to draw up a satisfactory definition of those terms and indeed the International Law Commission itself had abandoned the attempt.

28. His delegation had not yet had time to study the Spanish amendment (A/CONF.39/C.1/L.401) as thoroughly as it might have wished, but believed that the disadvantages of the restrictive nature of some of the terms used could not be remedied. The wisest course would probably be to refrain from setting out the principle of the non-retroactivity of the convention in the final clauses, since the principle was already referred to in article 24.

29. Miss LAURENS (Indonesia) said that her country had always supported the idea of opening multilateral treaties which could be qualified as " law-making treaties " to participation by the international community as a whole, without excluding any countries whatsoever. Her delegation could therefore support the relevant clauses in the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). On the other hand, the formula proposed in the amendment by Ghana and India (A/CONF.39/C.1/L.394) seemed to provide for a simpler means of implementing the principle, the value of which had already been proved in the case of at least four other multilateral conventions. Moreover, since the Government of Austria had declared its willingness to assume the duties of depositary in any case, no obstacles were to be foreseen in that important respect.

30. With regard to the number of ratifications required for the entry into force of the convention, her delegation had an open mind and could accept the formula of one-third of the number of parties participating in the Conference, although it would be willing to consider any other reasonable solution, provided it did not result in unduly delaying the entry into force of the convention.

31. The Indonesian delegation had the same misgivings with regard to the proposed new article 76 as it had expressed with regard to article 62 *bis*.

32. With regard to the principle of non-retroactivity, Indonesia could not accept any provision along the lines set out in the Venezuelan proposal (A/CONF.39/C.1/L.399), which unduly restricted the applicability of existing rules and principles of international law. Nor did it consider the text of the five-State proposal (A/CONF.39/C.1/L.400) to be much better, at least in its present form, because it seemed restrictive in scope, if not in time, and related only to rules of customary international law, which was an unacceptable limitation. The only justifiable solution would be to declare non-retroactive only certain special provisions that might be agreed upon during the Conference, such as, for instance, the provision on the compulsory settlement of disputes. In any case, the provision could certainly not apply to any rule or principle of international law

that had existed and had been applied long before the Conference. The proper solution would be a combination of the Spanish amendment (A/CONF.39/C.1/L.401) and the seven-State proposal (A/CONF.39/C.1/L.403).[3]

33. Mr. HU (China) said that, with regard to the final clauses, his delegation supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), which was in keeping with the final clauses contained in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; it was also in conformity with General Assembly resolution 2166 (XXI) convening the Conference. Since that form of final clauses had not created any problem in the past, there was no reason to depart from it in the present instance.

34. He could not support the amendment by Ghana and India (A/CONF.39/C.1/L.394), which purported to make the convention open to signature by States which were parties to the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water or to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Those two treaties dealt with matters which were completely alien to the law of treaties. Moreover, that amendment, if adopted, would have the effect of limiting the authority of the General Assembly.

35. His delegation also opposed the amendment by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) which was simply another version of the proposal to include an article 5 *bis*. His delegation had already spoken on the subject during the discussion on the latter proposal. It would therefore be sufficient to say at the present stage that there was no such thing as a right on the part of a State to participate in a multilateral treaty.

36. He viewed with sympathy the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250) because, since the days of the League of Nations, China had accepted the compulsory jurisdiction of the Permanent Court of International Justice, and was ready to vote for that proposal.

37. With regard to the proposals for a new article 77, on the subject of non-retroactivity, perhaps the ground might already be covered by article 24. However, if an article on the subject were eventually adopted, he would prefer the proposal by the five States (A/CONF.39/C.1/L.400) to that by Venezuela (A/CONF.39/C.1/L.399).

38. Mr. CARMONA (Venezuela) said that his proposed article 77 (A/CONF.39/C.1/L.399) had been intended to express a well-known concept; it had its origin in a remark made at the 66th meeting[4] by the United States representative " that the Convention should apply only to future treaties ". Clearly, it was appropriate to legislate for the future and not for the past. The same idea had been expressed by a number of speakers, including the representative of the Ukrainian SSR, at the present session.

39. The need to include a provision on the subject of non-retroactivity had been shown by the fact that, during the discussion, some speakers had stated that such a provision was indispensable while others had felt that the provisions of article 24 were sufficient to cover the point. In the circumstances, in order to dispel all doubts, it was desirable that a separate article should be included. He realized that the subject was a very complex one and he welcomed the efforts of other delegations to improve the drafting of his proposal.

40. With regard to the five-State amendment (A/CONF.39/C.1/L.400) with its reference to " the rules of customary international law codified in the present Convention ", he would be prepared to accept it provided that the term " customary international law " were interpreted as had been done by the International Court of Justice in the *North Sea Continental Shelf* cases in its judgement of 20 February 1969.[5] There was also the problem that, apart from custom, there existed other sources of international law.

41. His delegation had given careful consideration to all the various proposals which had been made and had entered into informal discussions with the sponsors of amendments. Those discussions had led to the formulation of a joint text for article 77 (A/CONF.39/C.1/L.403) which drew upon the new wording of subparagraph (*b*) of article 3. That new wording was perhaps cumbersome but it had the advantage of having been carefully weighed by the Drafting Committee and having been approved without comment by the Committee of the Whole. It would be seen that it qualified the statement that the convention applied only to treaties concluded after its entry into force by means of an opening proviso safeguarding the application of any rules set forth in the convention " to which treaties would be subject, in accordance with international law, independently of the Convention "; he hoped that that formula would meet the concern of the various delegations. He accordingly wished to withdraw his proposal (A/CONF.39/C.1/L.399) in favour of the new text (A/CONF.39/C.1/L.403) which he hoped would be generally acceptable.

42. He could assure the representative of Ecuador, a country with which Venezuela had always maintained excellent relations, that the proposal for a new article 77 was in no way intended to harm Ecuador's interests. The purpose of article 77 was simply to resolve difficulties, not to create obligations for the future; it would be open to any State not to accept or ratify the convention on the law of treaties, or to ratify it with reservations.

43. Mr. JACOVIDES (Cyprus) said he welcomed the withdrawal of the Venezuelan amendment (A/CONF.39/C.1/L.399), which he would have been obliged to oppose. The terms in which that proposal

[3] This proposal, submitted by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela, replaced the five-State proposal. See below, para. 60.

[4] Para. 60.

[5] See *I.C.J. Reports, 1969*, p. 3.

had been couched appeared to limit the application of the convention to future treaties, without any qualifications. In his delegation's view, most of the rules in the convention constituted *lex lata* in contemporary international law, whether derived from custom, from the general principles of law, or from any of the other sources mentioned in Article 38, paragraph 1, of the Statute of the International Court. More specifically, that remark was true of most of the articles contained in Part V regarding invalidity, termination and suspension of the operation of treaties.

44. It was his delegation's firm belief — and it was gratifying to note that the belief was widely shared by other delegations — that those rules had a firm foundation in general international law; the International Law Commission, and the Committee at the first session, had only formulated those rules in a comprehensive and logical manner within the structure of the convention under discussion. Even what might go beyond mere restatement or codification and constitute progressive development could well be said to have existed sufficiently long in customary or general international law for it to have validity. The question which rules expressed in the convention constituted codification and which reflected progressive development was, of course, one which could not be determined in detail at present. It was a question that would be thrashed out in practice and in international jurisprudence.

45. Since it was his delegation's opinion that most of the rules embodied in the convention constituted *lex lata*, it would not have opposed the five-State amendment (A/CONF.39/C.1/L.400) which, unlike the original Venezuelan proposal (A/CONF.39/C.1/L.399), stressed that the rule therein proposed was " without prejudice to the application of the rules of customary international law codified in the present Convention ". He welcomed the Swedish representative's statement, when introducing the five-State amendment, that it was also the view of the sponsors that most of the contents of the present convention were merely expressive of rules which existed under customary international law and that those rules obviously could be invoked as custom without any reference to the present convention.[6] He understood the Spanish amendment (A/CONF.39/C.1/L.401) to proceed from the same premises; it brought out, moreover, an additional element regarding customary rules as such, and therefore deserved support.

46. His delegation would give objective consideration to any other suggestions on the issue of non-retroactivity which might be put forward that were consistent with the position he had outlined.

47. Mr. HADJIEV (Bulgaria) said his delegation opposed the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250) because it would introduce compulsory adjudication, a principle which was rejected by Bulgaria.

48. There was no necessity to introduce a new article on the settlement of disputes relating to the interpretation and application of the convention. The majority of major international conventions concluded in recent years contained no provisions on the subject. That was the case, for example, with the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the two International Covenants on Human Rights, and the 1958 Geneva Convention on the High Seas. At the 1958 Geneva Conference, the Swiss delegation had proposed the inclusion of a provision of that type in all four conventions on the law of the sea, but its proposal had not been accepted. The fact that none of those conventions contained any clause on the interpretation and application of their provisions did not deprive the States parties to them of the possibility of settling their disputes on the subject: they had at their disposal, for that purpose, a variety of peaceful means, among others those set forth in Article 33 of the Charter.

49. His delegation had already set out in detail its arguments against the introduction of a compulsory adjudication clause in the convention. Those arguments were valid *a fortiori* against the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250), because of the wide scope of the provisions it embodied. Since the International Law Commission had not deemed it appropriate to make provisions for compulsory adjudication in article 62 with regard to Part V, there would be even less justification for making such provision for the settlement of disputes relating to the interpretation and application of the convention.

50. The Bulgarian delegation could accept the inclusion of a text on the settlement of disputes relating to the interpretation and application of a convention, beyond what was already contained in article 62, only if the procedure contemplated remained within the framework of Article 33 of the Charter.

51. Mr. ABED (Tunisia) said that the final clauses set out in the amendment by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) reflected his delegation's position on the subject, since that amendment took into account the realities of the international situation and were in conformity with the final clauses of the two previous Vienna Conventions and the Conventions on the Law of the Sea. His delegation could not, however, support the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) because Article A of that proposal seemed to go beyond the terms of reference of the Conference.

52. Tunisia had been a sponsor of the five-State proposal (A/CONF.39/C.1/L.400) — now superseded by the seven-State proposal (A/CONF.39/C.1/L.403) of which it was also a sponsor — for a new article 77 in the hope of clarifying the provisions of the convention and avoiding future disputes about the application of treaties. The new article reaffirmed the principle of non-retroactivity; it had long existed in customary law and was generally recognized, but it should be re-stated in any codification of universally accepted rules, in order to make them more stable and, as far as possible, applicable *erga omnes*.

[6] See 101st meeting, para. 43.

53. Mr. DE LA GUARDIA (Argentina) said he supported the final clauses proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1); the " Vienna clause " was the one which at present had the support of international practice in conferences convened under United Nations auspices.

54. With regard to the question of the temporal application of the convention, his delegation was prepared to support the principle of non-retroactivity. It had been ready to support the five-State formula (A/CONF.39/C.1/L.400), with the Spanish amendment (A/CONF.39/C.1/L.401), but now that a new consolidated text was being introduced (A/CONF.39/C.1/L.403), his delegation would support that.

55. Mr. ROMERO LOZA (Bolivia) said that the question of non-retroactivity was so delicate that, if it were decided to include a specific provision on the question in the convention, its terms would need careful reflection so as to avoid drafting any unduly rigid rule which might create more problems than it would solve. Clear references to the principle of non-retroactivity were contained not only in the International Law Commission's commentaries but also in many of the articles which had already been approved by the Committee. In fact, the principle was implicit throughout the text of the convention and it was not really necessary to include an express provision merely for the purpose of stating it in terms.

56. The discussion had shown that both the Venezuelan proposal (A/CONF.39/C.1/L.399) and the five-State amendment (A/CONF.39/C.1/L.400) were inadequate. Both purported to exclude existing treaties from the application of the convention, or at best to leave them subject to the rules of customary law. Disputes originating in treaties, however, were subject not only to the principles and rules of customary law but also to those derived from other sources of international law. To adopt such dangerously restrictive proposals would thus be tantamount in many cases to setting the seal of approval on certain agreements which were the cause of continual controversies that required a solution in keeping with the principles of international law enshrined in the convention.

57. The Spanish amendment (A/CONF.39/C.1/L.401) attempted to remedy the defects of the restrictive texts contained in the Venezuelan and the five-State proposals. It introduced a general safeguarding proviso in respect of the principles and rules of international law. That proviso would, however, be more precise if it read: " Without prejudice to the application of the principles and rules of international law that are recognized and in force, the convention will apply... ". From that point of view, the Iranian amendment (A/CONF.39/C.1/L.402) was more satisfactory. The new combined text which had been announced (A/CONF.39/C.1/L.403) appeared to remedy most of the defects which had been pointed out and he would give it careful consideration.

58. His delegation saw no necessity to include the proposed article 77 but, if the Conference decided to retain it, its wording must be very carefully drafted so as to safeguard the principles of customary law and those derived from other sources of international law at present in force for the settlement of disputes, which in large measure the convention was attempting to codify.

59. Mr. BLIX (Sweden) pointed out that at the 101st meeting he had explained that the gist of the five-State proposal (A/CONF.39/C.1/L.400) was that the convention as such should apply only to treaties concluded by parties to the convention after it had entered into force for them, and that most of the substance of that instrument expressed existing international law, which would apply independently of the adoption of the convention.

60. A number of suggestions had been made to improve the five-State proposal. In particular, it had been argued that the term " customary international law " was too limited and that the term " codified " could give rise to difficulties. The Greek representative had suggested that a solution could be found by basing article 77 on article 3(*b*). The sponsors had accepted that suggestion, and a new proposal by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela (A/CONF.39/C.1/L.403) was now submitted to supersede the original five-State proposal. The new text no longer referred to the rules of customary international law codified in the convention but applied to all the rules of international law, in the widest sense, which existed independently of the convention. Although the wording of the new text might seem cumbersome, it had the merit of being more precise and, moreover, had been approved at the first session of the Conference after thorough discussion of article 3(*b*). The sponsors had not had time to discuss their new text with the Swiss representative, who had made a suggestion about the language of the previous proposal, but they hoped that he would be able to support the new text and that his suggestion would be referred to the Drafting Committee.

61. Mr. MATINE-DAFTARY (Iran) said he agreed with the statement just made by the representative of Sweden. Having become one of the sponsors of the new proposal introduced by the Swedish representative, his delegation now withdrew its own amendment (A/CONF.39/C.1/L.402).

62. Mr. DADZIE (Ghana) said he wished to answer some of the points raised in connexion with the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

63. It had been claimed that participation in the convention on the law of treaties should be governed by the Vienna formula, since that formula safeguarded the principle of universality. But that principle was defended even more strongly in the amendment by Ghana and India, which was a move towards fulfilment of a principle acceptable to all.

64. It had further been claimed that that amendment converted the Vienna formula into an " all States " formula, because it referred to two treaties which contained the latter formula. But was it not a fact

that the two treaties had been adopted, and that they both went beyond the Vienna formula?

65. Next, the charge had been made that the intention of the two sponsors was to imply recognition of certain entities not recognized by some as States. That charge he emphatically denied. The intention of the sponsors was simply to move a step further in the progressive development of the principle of universality; it was not to imply or deny recognition of any entity.

66. The representative of the Federal Republic of Germany had alleged more specifically that the intention of the amendment was to benefit the German Democratic Republic in particular. In fact, the intention of the sponsors was to benefit not any entity in particular but all which qualified under the proposed formula for participation in the convention. The German Democratic Republic was already a party to four multilateral treaties, and was expected to accede to a fifth, in none of which had it been intended that the participation of the German Democratic Republic should confer on it or deny to it a particular status. Since the parties which the amendment by Ghana and India sought to admit to the convention had already been admitted to four other treaties there was no reason to deny them the same opportunity in the present convention. It was true that not all the contested States which had been allowed to participate in the two treaties mentioned in the amendment had taken advantage of the right offered them. But neither had many of the States entitled to attend the present Conference. What was important was simply to open the door of participation to all States. Whether they took advantage of the opportunity was entirely for them to decide.

67. In view of the nature of the convention on the law of treaties, and in recognition of the recent advance in the search for a formula to widen the participation of the international community in multilateral treaties of universal scope, the delegations of Ghana and India had proposed that parties to two of the most significant universal treaties to date must also be permitted to become parties to the convention. It was inconceivable that any State which had supported the participation provisions referred to as the Moscow formula, or which had accepted that formula, could now justifiably oppose the adoption of the same formula in the convention on the law of treaties.

68. It had been argued that extension of participation in multilateral treaties to States not covered by the Vienna formula would create difficulties for the Secretary-General, who would have to decide whether or not a given entity was a State. But a way out of that difficulty had already been found by the great Powers, which had extended participation in such a way as to gain the approval of the United Nations. A case in point was the Outer Space Treaty, which contained the Moscow formula and had been drafted entirely by the United Nations. It could no longer be argued that only the United Nations, being the highest international body, could change the existing Vienna formula. It had already done so when it adopted the Outer Space Treaty and others in that series.

69. The duty of the Austrian authorities and the Secretary-General as initial and final depositaries, respectively, under the amendment by Ghana and India, was therefore simplified. The delegation of Ghana noted with satisfaction that Austria was prepared to undertake such duties as the Conference might entrust to it in accordance with any of the proposals before the Conference.

70. He hoped the Conference would adopt the "all States " formula provided for in the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1), but if that proposal were not accepted, adoption of the amendment by Ghana and India was essential in order to uphold the principle of universality.

71. Mr. KRISHNA RAO (India) said he wished to clarify his delegation's position in regard to certain comments on the amendment by Ghana and India (A/CONF.39/C.1/L.394).

72. One representative had warned the Committee not to be misled by his reference, in introducing the amendment, to " the new Vienna formula ". But the wording of the joint amendment was based on the final clauses of the Nuclear Test Ban and Outer Space Treaties. At that time, India had been opposed to the Moscow formula, since it considered that the Secretary-General of the United Nations ought to be the sole depositary, but it had been assured that the formula represented progress towards universality, and had reluctantly accepted it. Now, six years later, India was being told by two of the three depositaries under the Moscow formula that its attempt to follow their example was politically motivated. That charge was quite unfounded; surely, any State or entity which was or became a party to the Nuclear Test Ban and Outer Space Treaties could become a party to the convention on the law of treaties.

73. Some delegations had suggested that reference should be made to the " all States " principle, but that no practical ways of implementing it should be included in the convention. The sole purpose of the joint amendment, however, was to translate the principle of universality into reality, and its sponsors would be glad if any delegation could suggest a more acceptable way of achieving that end.

74. The advocates of the Vienna formula asserted that that system had behind it the overwhelming support of practice and precedent. But when the Indian delegation had invoked practice and precedent in the debate on article 62 *bis,* it had been urged to be progressive and liberal, rather than reactionary. It had also been argued that the Vienna formula provided for the residuary power of the General Assembly to invite any State, but it was well known that in practice no such invitation had ever been issued or was likely to be issued in the foreseeable future.

75. It had been suggested that the General Assembly might be entrusted with the responsibility for deciding what entities might become parties to the convention under article A, paragraph 1 (*b*), of the joint amendment. That suggestion seemed curious in the light of the deliberate omission from the relevant clauses of

the Nuclear Test Ban and Outer Space Treaties of any reference to the United Nations, on the ground that any such involvement of the General Assembly would create practical problems. So now, when the sponsors of the amendment claimed that their proposal represented a practical step, they were told that it failed to achieve universality, but when they said that it was directed towards universality, they were told that it was impractical and politically motivated.

76. Sir Humphrey WALDOCK (Expert Consultant) said he wished to comment on two points which were connected, because they both concerned the function of the convention as an instrument for consolidating general rules of international law. The first was the question of the non-retroactivity of the convention, and the second was the question of the number of ratifications and accessions needed to bring the convention into force.

77. He had spoken of the convention as an instrument for consolidating rather than codifying the general rules of international law, because the word " codify " was sometimes used in a rather narrow sense. Most representatives were familiar with the background of the articles which had now, for the most part, been approved. It had been his experience as Special Rapporteur, and perhaps the experience of all his colleagues on the International Law Commission, that there were a great many uncertainties in the law of treaties. His very distinguished predecessor as Special Rapporteur, Sir Hersch Lauterpacht, had said that there was virtually nothing that was settled in the law of treaties. The position could be exaggerated and he had been very comforted to hear many representatives at the Conference speak of the convention as essentially a codifying instrument. That was the right view if the convention was regarded essentially as a consolidating instrument which took account of differences of opinion but found a common agreement as to the lines to be followed in the law of treaties. From that point of view the convention had, of course, a very great significance in international law, and it was from the same point of view that he approached those two problems.

78. The principle of non-retroactivity was only one aspect of the problem of the temporal application of international law. The International Law Commission had found it to be an exceedingly delicate and troublesome problem, not only in connexion with article 24 on that very point, but also with respect to the interpretation of treaties. The Commission had tried at one stage to consider the inter-temporal element in the application of international law when interpreting treaties. It had in the end concluded that the whole problem of the relation between treaties and customary law was one which called for a searching inquiry before the Commission could be on safe ground in formulating rules in connexion with interpretation.

79. It would be seen from the text of article 27, which the Committee had accepted, that there was merely a reference, for the purpose of the interpretation of treaties, to " any relevant rules of international law "; no attempt was made to solve the problem of the temporal element. The Commission had left that element to be determined according to each case in accordance with the principle of good faith. That being the general position in the Commission on the temporal element, the Commission had provided, in article 24, after some difficult discussions, the basis of the rule on non-retroactivity which the Committee of the Whole had approved.

80. Some speakers in the debate had thought that the article would suffice to cover the question of non-retroactivity in connexion with the convention on the law of treaties. That was probably the correct view. The provision was a general one setting out the general principle of non-retroactivity, and it was flexible in that it did not foreclose the question of the temporal element in the development of international law. It might therefore serve the purpose. He had been very glad to hear the representative of Switzerland emphasize the inter-temporal element in international law, because that element was his particular preoccupation. Conventions such as the one under consideration had their consolidating force, and even matters which might or might not have been international law at the time of the codifying convention thereby gained authority. Rules which it might not be possible, on the basis of a very strict view of codification, to consider as international law at the time of the convention might be so considered at a later date. He was very anxious, in connexion with the proposals before the Conference on the question of non-retroactivity, that nothing should be done to damage the very important impact which all great conventions had as instruments for consolidating and settling general international law.

81. His own reaction to the various proposals that had been made were that a solution could be found on the basis of the latest proposal, by seven States (A/CONF.39/C.1/L.403), which amalgamated some others. That proposal left open the question of the temporal element sufficiently for it to be a satisfactory basis for the solution of the problem. He recognized that many representatives had a certain preoccupation as to the need for a non-retroactivity provision in the convention. That need had not been felt either in the case of the Conventions on the Law of the Sea or in that of the two previous Vienna Conventions. A convention on the law of treaties was perhaps a rather peculiar instrument and it might be that the justification existed in that particular case.

82. The other point, which had not been so thoroughly debated, was the number of ratifications or accessions required to bring the convention into force. Care was needed if that were not to risk losing some of the value of the work done at the Conference. It had been suggested that, because of the growth of the international community, ratification by forty-five, fifty or even sixty States should perhaps be required before a codifying convention came into force. The statistical argument was not impressive. It seemed to him that the more a convention contained codifying elements, the less there was to the argument that a large number of ratifications

was needed to bring it into force. If, *ex hypothesi,* it dealt largely with a law which was acceptable as general law, then the argument for a large number of ratifications did not seem to be particularly strong. The record would show, for example, that some eighty-seven representatives had been present at the Geneva Conference on the Law of the Sea at which it had been decided that twenty-two ratifications would be required to bring into force the four conventions adopted. In fact, they had all come into force, the Convention on the High Seas having received forty-two ratifications, the Convention on Fishing and Conservation of the Living Resources of the High Seas twenty-six ratifications, the Convention on the Continental Shelf thirty-nine ratifications and the Convention on the Territorial Sea and the Contiguous Zone thirty-five ratifications. Again, the Vienna Convention on Diplomatic Relations had received eighty ratifications, while thirty-three States had ratified the Convention on Consular Relations. But had the much higher figures suggested in the case of the present convention been applied to those conventions, only the Convention on Diplomatic Relations would be in force today. That was a serious matter, because there might be particular difficulty in getting early ratifications of the present convention. It was a difficult, long and technical convention, with many provisions of a highly intellectual quality. They were not the sort of provisions which it was easy for governments to pilot through parliaments. There might be a certain slowness in the procedure of ratification. It was common experience that, when a convention came into force, that tended to produce an acceleration in the process of ratification by additional States. It would also be agreed that, however important the mere act of adoption of a text such as the present convention, its effect as a general codifying convention would be enormously increased the moment it came into force.

83. His own feeling was that the figure of thirty-five suggested by Ghana and India would serve the purpose of recognizing the implications of an enlarged community and yet would not unduly delay the bringing into force of the convention nor endanger some of the benefits of the great work done on the convention at the present Conference.

The meeting rose at 5.55 p.m.

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## ONE HUNDRED AND FOURTH MEETING

*Friday, 25 April 1969, at 11.20 a.m.*

*Chairman :* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Final clauses (including proposed new articles 76 and 77)* (continued)

1. Mr. KHLESTOV (Union of Soviet Socialist Republics), supported by Mr. SECARIN (Romania), requested that the Committee, in voting on the proposals before it with regard to the final clauses, vote first on the proposal submitted by the delegations of Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1); that proposal aimed at securing acceptance for the principle of universality, and the convention on the law of treaties, as a multilateral treaty forming the very basis of all treaties, should by definition be open to all States.

2. Mr. GON (Central African Republic) said that, bearing in mind the arguments his delegation had advanced at the first session with regard to the jurisdiction of the International Court of Justice, and particularly the awkward problems which the new article 76 would raise by unduly prolonging the procedure for the settlement of the majority of treaty disputes, he would vote against the proposed new article 76 (A/CONF.39/C.1/L.250).

3. On the question of participation in the convention on the law of treaties, he said that his delegation endorsed the principle of universality, although it considered that it was the General Assembly of the United Nations that should deal with any problems which might arise in that respect. It could only support the proposals in favour of the adoption of the Vienna formula, which represented the best way of ensuring respect for the principle of universality.

4. With regard to the minimum number of ratifications needed to bring the convention into force, the Central African Republic would vote against the figure of sixty proposed by Switzerland in document A/CONF.39/C.1/L.396, since it considered that number excessive.

5. On the other hand, his delegation would vote for a provision that the convention should be non-retroactive, in other words for the seven-State proposal for a new article 77 (A/CONF.39/C.1/L.403), the wording of which seemed to cover all the points.

6. Mr. PINTO (Ceylon) said he would vote in favour of the seven-State proposal for a new article 77 (A/CONF.39/C.1/L.403), which laid down the principle of the non-retroactivity of the convention on the law of treaties, because he thought the convention should contain a provision to that effect. The words " treaties which are concluded by States " were however ambiguous; it would be better to take the date on which a treaty was " adopted " or the date on which its text was settled as the point of reference.

7. With regard to participation in the convention on the law of treaties, although his delegation had consistently advocated the principle of universality, as was shown by the fact that it was co-sponsoring a proposal for an article 5 *bis* providing for the adoption of the " all States " formula (A/CONF.39/C.1/L.388 and Add. 1), it would have to abstain from voting on the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal submitted by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), for various reasons.

8. The first was that the amendment by Ghana and India resorted to an undesirable legal technique : a State wishing to become a party to the convention on the law of treaties would first have to accede to two other treaties

unrelated to the convention and concerning more or less extraneous matters which might very well be of no interest to the State concerned in either the immediate or the more distant future. It would be detrimental to the sovereignty of States to place them under that obligation solely in order to make them acceptable to their peers, namely the other parties to the convention on the law of treaties.

9. Secondly, the amendment did not adequately reflect the " Moscow formula ", in other words the " all States " formula, which his delegation regarded as the only real guarantee of universality. The Moscow formula as modified by Ghana and India would have the undesirable effect of automatically excluding from the convention on the law of treaties those States not intending to become parties to the two treaties mentioned, which would form a sort of " gateway " to the convention.

10. Lastly, in the event of the amendment by Ghana and India being adopted, at least one of the great Powers with which Ceylon had excellent relations, and which it was hoped would accede to the convention on the law of treaties through the device of an " all States " formula, might refuse to become a party to the convention solely because apparently it was refusing at present to accede to either of those " gateway " treaties. He did not wish to be associated with that possible result of the amendment.

11. The formula proposed by Ghana and India was nevertheless highly ingenious and had the great merit of being a compromise. But Ceylon stood by the principle of universality in its initial form, and it could therefore not vote in favour of the final clauses proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

12. Mr. BLIX (Sweden) said that none of the three proposals submitted with regard to the final clauses (A/CONF.39/C.1/L.386/Rev.1, L.389 and Corr.1, and L.394) was perfect for a convention such as the convention on the law of treaties. Ideally, the participation clauses should open the convention to all entities enjoying some degree of recognition in the international community. It was obviously difficult exactly to specify what degree and to say what machinery should be established to assess the degree of recognition. The international community would probably be unwilling to authorize virtually unrecognized entities, or entities which the United Nations had recommended its States Members not to recognize, to accede to codification conventions. In the Swedish view, the recognition of an entity by only one of the States parties to a treaty should not be sufficient to enable that entity to become a party to the treaty. Yet that would seemingly be the effect of the " all States " formula if the depositary was not to be required to settle controversial questions, or to refer them to some other organ. Premature or unjustified recognition had often occurred.

13. At the same time, it was going rather far to require an entity to be recognized by half the States Members of the United Nations before it could be authorized to participate in conventions of the kind prepared at Vienna. That, of course, was the practical effect of the Vienna formula. However, the latter had the advantage of making the General Assembly, the world's most representative political organ, decide on behalf of the international community which entities should have access to certain treaties of general concern. Nor did it place the Secretary-General in a difficult position or cause any legal ambiguity.

14. What was known as the Moscow formula really amounted to authorizing any one of three depositaries to decide whether or not an entity was a State. Its practical effects were less restrictive than the Vienna formula, which was an advantage, but from the point of view of principle it was undesirable that three different Powers should be left to decide on behalf of the entire community who could and could not accede to certain very important treaties; that should be a community decision. Legally, there was also the risk of confusion if all three depositaries did not take the same decision. Sweden had nonetheless shown itself willing to accept that formula where it had been accepted by consensus and applied to some treaties of particular interest to the great Powers.

15. The amendment by Ghana and India (A/CONF.39/C.1/L.394), which proposed a combination of the Vienna and Moscow formulas, had some merit; the new formula would be less restrictive than the Vienna formula and would place the functions of depositary in the hands of the Secretary-General rather than of particular States. But it would not immediately ensure the universality so strongly favoured by its advocates. It would also be rather curious if some entities, in order to become parties to the convention on the law of treaties, had to have their standing as States verified beforehand in Moscow, Washington or London, in connexion with their accession to the Nuclear Test Ban Treaty or the Outer Space Treaty, if they did not wish to raise the question in the General Assembly.

16. In view of the advantages and disadvantages of the various proposals, the Swedish delegation would support the Vienna formula in its traditional form (A/CONF.39/C.1/L.386/Rev.1) until a better formula, or a formula which could be unanimously adopted, was worked out, But his delegation would nevertheless not vote against the formula proposed by Ghana and India, the application of which ought not to raise any legal or technical difficulties.

17. Sir John CARTER (Guyana) said he was satisfied with the new formulation of the proposed article 77 and would vote for it. He would be glad, however, if the Drafting Committee could consider the possibility of amending the opening words to read: " Without prejudice to the application of the rules of international law to which treaties would be subject, independently of the convention, the convention will apply. . . "

18. With regard to the various proposals relating to the final clauses (A/CONF.39/C.1/L.386/Rev.1, L.389 and Corr.1, and L.394), his delegation would vote in the way it had already explained to the Committee at the 102nd meeting.

19. Mr. BOULBINA (Algeria) said he was in favour

of the principle of universality which the draft final clauses submitted in the four-State proposal (A/CONF. 39/C.1/L.389 and Corr.1) would embody. Algeria would therefore vote for that proposal.

20. It was essential that the convention on the law of treaties should be open to all States, since it codified a system of rules which was to govern the subject of treaties in the interest of the international community as a whole. It should therefore constitute a decisive stage in the development of international law and promote closer relations among States and peoples. Both the foundations and the scope and application of the convention should be as broad and solid as possible.

21. Although the amendment by Ghana and India (A/CONF.39/C.1/L.394) restricted the principle of universality, the Algerian delegation would vote for that proposal if the four-State proposal was not adopted.

22. Mr. ESCUDERO (Ecuador) moved that the Committee postpone the voting on the new version of article 77 (A/CONF.39/C.1/L.403) until the beginning of the following week so that Governments would have time to weigh all the implications of a complex text which had not been sufficiently discussed in the Committee.

23. The CHAIRMAN said that, under rule 25 of the rules of procedure, two speakers could speak for the motion for adjournment of the debate and two against.

24. Mr. BLIX (Sweden) said that as one of the sponsors of the new article 77 (A/CONF.39/C.1/L.403) he was against the motion for adjournment. The text had been amply discussed at the previous meeting and the Expert Consultant had taken part in the debate. Furthermore, all the changes made by sponsors of article 77 related to the first part of the provision, which was now based very closely on article 3 (*b*) of the convention adopted at the first session after thorough consideration both in the Committee of the Whole and in the Drafting Committee.

25. To judge from informal discussions, he believed that it was the words " independently of the Convention " that were at issue, as some delegations believed them unnecessary. They were, however, essential, since the convention as such would be part of international law, binding on all those who became parties to it.

26. Mr. ROMERO LOZA (Bolivia) supported the Ecuadorian representative's motion for adjournment. Consultations were still taking place and several delegations were awaiting instructions.

27. Mr. CARMONA (Venezuela) supported the Swedish delegation's arguments against the motion for adjournment. Incidentally, to adjourn the vote on article 77 would probably compel the Conference to prolong its second session.

28. Mr. ALVAREZ TABIO (Cuba) supported the motion for adjournment.

29. The CHAIRMAN put to the vote the motion for adjournment of the vote on the proposed new article 77.

*The motion for adjournment was rejected by 53 votes to 17, with 32 abstentions.*

30. Mr. ESCUDERO (Ecuador) said that in view of the result of the vote on his motion, he considered it necessary to give in advance the reasons why he would oppose the seven-State amendment (A/CONF.39/C.1/L.403).

31. The Ecuadorian delegation believed that the amendment was not only contrary to every principle of law; it was devoid of elementary justice, since it was contrary to the interests of a large number of States, especially small States, on which treaties had been imposed by force.

32. If the amendment was adopted, those States would not be able to assert their rights in accordance with the procedures laid down in Part V of the draft, since they could not be applied to treaties concluded before the convention entered into force. The International Law Commission had been wise enough not to include in its draft an article similar to what was proposed in the seven-State amendment. It would also be remembered that the Expert Consultant had intimated that a provision of that kind was not necessary in view of article 24.

33. Mr. KRISHNA RAO (India) said that his delegation would vote for the "all States " formula and also, of course, for the amendment of which his delegation was one of the sponsors (A/CONF.39/C.1/L.394).

34. Replying to the comments made by certain delegations, he explained that the purpose of the amendment was to provide machinery for the application of the " all States " formula. The two treaties mentioned in it incorporated that formula, and by quoting them the sponsors of the amendment had shown that they were in favour of the " all States " formula.

35. Some States which maintained excellent relations with a certain well-known country wondered if the result of the amendment by Ghana and India might not be that the country in question would have to become a party to the treaties mentioned before becoming a party to the convention on the law of treaties. The answer to that question was emphatically no; the problem related only to membership of the United Nations and the representation of Governments in the Organization.

36. It would be noted that the amendment did not use the term " State " but " party "; it was not concerned with the problem of recognition or the question whether an entity was or was not a State.

37. The amendment by Ghana and India was an indivisible whole; the vote should therefore be taken on the amendment as a whole, not on its parts separately.

38. Mr. CASTRÉN (Finland) said that he would vote for the amendment by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) and the seven-State amendment (A/CONF.39/C.1/L.403).

39. His delegation would vote against the four-State amendment (A/CONF.39/C.1/L.389 and Corr.1) for reasons similar to those given by the representative of

Sweden. It would abstain on the amendment by Ghana and India (A/CONF.39/C.1/L.394).

40. The CHAIRMAN put the Swiss proposal (A/CONF.39/C.1/L.250) to the vote.

*At the request of the representative of Switzerland, the vote was taken by roll-call.*

*Peru, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, Uruguay, Australia, Austria, Barbados, Belgium, Cambodia, Canada, Chile, China, Colombia, Denmark, Dominican Republic, El Salvador, Federal Republic of Germany, Finland, France, Guyana, Holy See, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, Pakistan.

*Against:* Poland, Romania, Saudi Arabia, Sierra Leone, South Africa, Sudan, Syria, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Afghanistan, Algeria, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ecuador, Ethiopia, Ghana, Hungary, India, Indonesia, Iran, Iraq, Israel, Jamaica, Kenya, Kuwait, Libya, Madagascar, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Nigeria, Panama.

*Abstaining:* Senegal, Singapore, Spain, Trinidad and Tobago, Tunisia, Uganda, United States of America, Yugoslavia, Zambia, Argentina, Ceylon, Costa Rica, Gabon, Greece, Guatemala, Honduras, Ivory Coast, Lebanon, Liberia, Netherlands.

*The Swiss proposal (A/CONF.39/C.1/L.250) was rejected by 48 votes to 37, with 20 abstentions.*

41. Mr. RATTRAY (Jamaica), explaining his delegation's vote, said that the Swiss proposal introduced an element of confusion with respect to the procedure for the settlement of disputes and made not only the interpretation but also the application of the convention more complicated.

42. Moreover, the proposal had been submitted before the Committee had considered article 62 *bis*. In view of the Committee's decision on that article, the meaning of some of the provisions in the convention, and particularly those in Part V, would have had to be determined by two separate tribunals — the International Court of Justice in the case of the Swiss proposal, and the machinery for settlement set up by article 62 *bis*.

43. The CHAIRMAN put the seven-State proposal (A/CONF.39/C.1/L.403) to the vote.

*At the request of the representative of Ecuador, the vote was taken by roll-call.*

*Turkey, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Turkey, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Argentina, Australia, Austria, Barbados, Belgium, Brazil, Canada, Central African Republic, Ceylon, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Gabon, Greece, Guyana, Holy See, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Nigeria, Norway, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, San Marino, Saudi Arabia, Senegal, Singapore, South Africa, Sudan, Sweden, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia.

*Against:* Algeria, Bolivia, Congo (Democratic Republic of), Cuba, Ecuador.

*Abstaining:* Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Zambia, Afghanistan, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Congo (Brazzaville), Cyprus, El Salvador, Ethiopia, Ghana, Guatemala, Honduras, Hungary, Indonesia, Madagascar, Malaysia, Mongolia, Morocco, Pakistan, Poland, Sierra Leone, Spain.

*The seven-State proposal (A/CONF.39/C.1/L.403) was adopted by 71 votes to 5, with 29 abstentions.*

44. Mr. NEMEČEK (Czechoslovakia), explaining his delegation's vote, said that in its view one of the basic principles of international law was that any treaty concluded by the threat or use of force in violation of the rules of international law, or which was contrary to a peremptory norm of general international law, was void.

45. The CHAIRMAN reminded the Committee that the USSR representative had requested that a vote be taken first on the proposal by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1). Since no delegation had opposed that procedure, he would put the proposal to the vote.

*At the request of the representative of Australia, the vote was taken by roll-call.*

*Venezuela, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Yugoslavia, Zambia, Afghanistan, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Ceylon, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, Ghana, Hungary, India, Indonesia, Iraq, Mexico, Mongolia, Pakistan, Poland, Romania, Sierra Leone, South Africa, Sudan, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania.

*Against:* Venezuela, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Holy See, Honduras, Ireland, Israel, Italy, Ivory Coast, Japan, Liberia, Liechtenstein, Luxembourg, Madagascar, Malaysia, Monaco, Netherlands, New Zealand, Nigeria, Norway, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Senegal, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

*Abstaining:* Congo (Democratic Republic of), Cyprus, El Salvador, Ethiopia, Guyana, Iran, Jamaica, Kenya, Kuwait, Lebanon, Libya, Mauritius, Morocco, Saudi Arabia, Singapore, Trinidad and Tobago, Uganda.

*The four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) was rejected by 56 votes to 32, with 17 abstentions.*

46. Mr. BILOA TANG (Cameroon) said he had voted in favour of the proposal as an indication of his concern for the principle of universality. There were certain matters in which every political entity, even if it was not recognized by everybody, should be given an opportunity to participate in treaties.

47. Mr. BRODERICK (Liberia) explained that he had voted against the proposal because his delegation, while in favour of universality with respect to participation in general multilateral treaties, considered that it was the responsibility of the General Assembly to decide what States had the right to become parties to the convention.

48. The CHAIRMAN put to the vote the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

*At the request of the representative of Australia, the vote was taken by roll-call.*

*The United Kingdom of Great Britain and Northern Ireland, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* United Republic of Tanzania, Yugoslavia, Afghanistan, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cuba, Czechoslovakia, Ecuador, El Salvador, Ghana, Hungary, India, Indonesia, Iraq, Kenya, Mongolia, Morocco, Nigeria, Pakistan, Poland, Romania, Saudi Arabia, Sierra Leone, Sudan, Syria, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic.

*Against:* United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Denmark, Dominican Republic, Federal Republic of Germany, France, Gabon, Greece, Guatemala, Holy See, Honduras, Ireland, Israel, Italy, Ivory Coast, Japan, Liberia, Liechtenstein, Luxembourg, Malaysia, Monaco, Netherlands, New Zealand, Norway, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Senegal, Spain, Thailand, Tunisia, Turkey.

*Abstaining:* Zambia, Austria, Barbados, Cameroon, Ceylon, Chile, Congo (Brazzaville), Congo (Democratic Republic of), Cyprus, Ethiopia, Finland, Guyana, Iran, Jamaica, Kuwait, Lebanon, Libya, Madagascar, Mauritius, Mexico, Singapore, South Africa, Sweden, Switzerland, Trinidad and Tobago.

*The amendment by Ghana and India (A/CONF.39/C.1/L.394) was rejected by 48 votes to 32, with 25 abstentions.*

49. Mr. MAKAREWICZ (Poland) said that his delegation, like the other sponsors of the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1), was in favour of the principle of universality and believed that the " all States " formula was the one best suited for the development of international relations both in theory and in practice. During the debate on universality, however, the Polish delegation had stated that it was prepared to accept any proposal which would enable all States to become parties to the convention. It had also said that it was ready to co-operate in finding a formula acceptable to as many States as possible. The Polish delegation had voted for the " new Vienna formula " on the understanding that that new formula, by referring to treaties containing the " all States " clause, would make the convention on the law of treaties open in fact to all States.

50. Mr. KHLESTOV (Union of Soviet Socialist Republics) explained the reasons for his delegation's vote in favour of the amendment by Ghana and India (A/CONF.39/C.1/L.394). The Soviet Union delegation had stated that it was in favour of the principle of universality and wished it to be applied to the present convention. Admittedly, the formula in the amendment by Ghana and India did not entirely meet the views of the Soviet Union delegation, but it did represent a step towards universality, and his delegation had therefore voted for it, thus showing its readiness to seek a compromise solution. Its vote should not, however, be construed to mean that the Soviet Union delegation had altered its basic position, which was to uphold the principle of universality with respect to multilateral treaties.

51. Mr. CUENDET (Switzerland) said his delegation withdrew its amendment (A/CONF.39/C.1/L.396 to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

52. The CHAIRMAN asked the Committee to vote on the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

53. Mr. DE CASTRO (Spain) drew attention to the fact that the proposal by Brazil and the United Kingdom raised a number of quite different points. The Spanish delegation was prepared to approve some parts of the proposal, but wished to make reservations on others. In particular, it would like a separate vote on article D concerning the number of accessions and ratifications required for the convention to enter into force. Furthermore, reservations were not mentioned in the proposal; by approving it, delegations might give the impression that they agreed that the final clauses should contain no provision concerning reservations.

54. The CHAIRMAN pointed out that the Spanish representative could raise the question of reservations in the plenary Conference, but the Committee had now to vote on the proposal by Brazil and the United Kingdom. With regard to the number of accessions and ratifications needed for the convention to come into force, a separate vote could be taken on the figure of forty-five ratifications or accessions mentioned in the proposal.

55. Mr. FATTAL (Lebanon) said it might be preferable to put the figure at forty, as a compromise between the figures of thirty-five ond forty-five which had been proposed.

56. Sir Francis VALLAT (United Kingdom) and Mr. NASCIMENTO E SILVA (Brazil) said they would accept a vote on the figure of forty.

57. After an exchange of views, Mr. KRISHNA RAO (India) proposed that the figure should be left blank and that the vote should be taken on the remainder of the proposal; it would then be left to the plenary Conference to take a decision on the figure to be inserted.

58. Mr. SHUKRI (Syria), Mr. HUBERT (France) and Mr. KHLESTOV (Union of Soviet Socialist Republics) supported the Indian proposal.

59. After a further exchange of views, the CHAIRMAN suggested that the Committee accept the Indian proposal.

*It was so decided.*

60. The CHAIRMAN invited the Committee, in the light of the decision just taken, to vote on the proposal by Brazil and the United Kingdom (A./CONF.39/C.1/L.386/Rev.1).

*At the request of the United States representative, the vote was taken by roll-call.*

*Guinea, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Guyana, Holy See, Honduras, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Lebanon, Liberia, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mauritius, Monaco, Netherlands, New Zealand, Norway, Pakistan, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Senegal, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Canada, Central African Republic, Chile, China, Colombia, Costa Rica, Denmark, Dominican Republic, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala.

*Against:* Hungary, India, Iraq, Mexico, Mongolia, Nigeria, Panama, Poland, Romania, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Zambia, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Ceylon, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, El Salvador, Ghana.

*Abstaining:* Indonesia, Kenya, Kuwait, Libya, Morocco, Saudi Arabia, Sierra Leone, Singapore, South Africa, Sudan, Trinidad and Tobago, Uganda, United Republic of Tanzania, Afghanistan, Cambodia, Cameroon, Congo (Democratic Republic of), Cyprus, Ethiopia.

*The proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) was adopted by 60 votes to 26, with 19 abstentions.*

The meeting rose at 1.35 p.m.

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## ONE HUNDRED AND FIFTH MEETING

*Friday, 25 April 1969, at 3.35 p.m.*

*Chairman:* Mr. ELIAS (Nigeria)

**Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966** *(continued)*

*Final clauses (including proposed new articles 76 and 77)* (continued)

1. Mr. SHUKRI (Syria), explaining his vote on the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) which had been adopted at the previous meeting, said that, by voting against that proposal, his delegation had voted against the old Vienna formula, which it considered deficient for four main reasons. First, it failed to take account of international reality by seeking to exclude from the convention several States which actually existed. Secondly, it confused the primarily legal question of participation in multilateral treaties with the political question of recognition. Thirdly, it assigned to the General Assembly which, in the final analysis, was a political organ, the legal role of determining the subjects of treaty law. And finally, it postulated a policy of political discrimination at a time when all kinds of discrimination had long since been outlawed.

*Proposed new article 5* bis (The right of participation in treaties) *(resumed from the 91st meeting)*

2. The CHAIRMAN reminded the Committee that the original proposal for a new article 5 *bis* (A/CONF.39/C.1/L.74 and Add.1 and 2) submitted by eleven States at the first session, had been withdrawn and replaced by a proposal by thirteen States (A/CONF.39/C.1/L.388 and Add.1).[1] He invited representatives who wished to explain their votes on that proposal to do so before the voting commenced.

3. Mr. SUAREZ (Mexico) said that his delegation would vote for the new proposal for reasons of a purely legal character. A convention which established general principles of the law of treaties for the purpose of its progressive development must be observed by all States, and all States must be entitled to participate in its formation. His Government had consistently maintained that international instruments dealing with such subjects as disarmament, the control of outer space, human rights and health, should be open to all States.

4. Some representatives had maintained that in the proposed amendment, two equally respectable legal principles were in conflict, namely, the principle of universality and the principle of freedom of contract. His delegation disagreed, since it did not consider that freedom to choose the partner was an essential part of freedom of contract. In private law, where the principle of the autonomy of the will prevailed just as much as in international law, there was a class of contract — the so-called *contrats d'adhésion* — in which one party made an offer and any other party could accept it, thus completing the contract. No one had suggested that contracts of that kind violated the principle of freedom of contract.

5. It was quite possible that the introduction of the principle of universality might give rise to some

[1] For text, see 89th meeting, footnote 4.

problems, but that was inevitable since the codification of international law would not come to an end with the convention on the law of treaties and some gaps would necessarily remain which would be gradually filled by subsequent codification or from other sources.

6. The solution of such problems would put an end to the claims of certain groups of people, who, while they exercised temporary control over a particular territory, attempted to participate in multilateral treaties entered into by authentic States. As some future date the codification of international law would set out the requirements which must be fulfilled by subjects of international law, which at present were governed by the rules of internal constitutional law. Those problems, and some of a merely administrative nature which admitted of easy solution, should not be a ground for not accepting the noble principle of universality, which welcomed all the States in the world to a free discussion of the legal principles which should govern relations in the international community.

7. Mr. ALCIVAR-CASTILLO (Ecuador) said that his delegation would vote for the proposed new article 5 *bis* because it felt strongly that there was no justification for confusing the principle of the universality of international legal norms laid down by a treaty with the institution of the recognition of States. The universality of norms of general international law was closely linked with the universal dimensions of the international community. The limited concept of the international community under the Covenant of the League of Nations had accorded with the political realities of an international society governed by colonialist empires which had maintained vast areas of the world in subjection. But at San Francisco a new image of the international community had emerged, and the present international community was characterized by its unlimited universality.

8. Customary law, previously conceived as the sole general norm of positive law governing the international legal order, had been the logical outcome of custom imposed by political power, but now treaties, which in the past had been given the modest task of establishing specific contractual norms, had become the most important source of general norms of international law. The universality of norms of customary law derived from the obligations imposed by custom, whereas the universality of treaty norms could only be achieved, at least in the initial stages, by the joint will of sovereign States. The idea of the recognition of States did not fall within the scope of the Conference's task, which was to treaty law, and thus there was nothing to justify any restriction of the principle of universality in the convention on the law of treaties.

9. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the proposed new article 5 *bis,* like the final clauses, reflected the principle of universality. The convention on the law of treaties was unique in character, in that it would constitute the foundation of treaty law and all future treaties should be based on it. It was thus of particular importance that the principle of universality should be incorporated in the convention. The validity of the principle of universality was undeniable and the statements which had been made in opposition to the right of States to participate in the convention resulted from political manœuvres designed to diminish the validity of the convention's text, and were not based on principles of law. Whatever the result of the vote on article 5 *bis,* his delegation would continue to strive for the acceptance of the principle of universality and it was convinced that in the long run that principle would triumph.

10. The CHAIRMAN invited the Committee to vote on the proposed new article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1).

*At the request of the representative of Syria, the vote was taken by roll-call.*

*Japan, having been drawn by lot by the Chairman, was called upon to vote first.*

*In favour:* Kuwait, Mexico, Mongolia, Pakistan, Poland, Romania, Sierra Leone, Sudan, Syria, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Zambia, Afghanistan, Algeria, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Ceylon, Congo (Brazzaville), Cuba, Czechoslovakia, Ecuador, Ghana, Hungary, India, Indonesia, Iraq.

*Against:* Japan, Liberia, Liechtenstein, Luxembourg, Madagascar, Malaysia, Monaco, Netherlands, New Zealand, Norway, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Central African Republic, China, Colombia, Costa Rica, Denmark, Dominican Republic, El Salvador, Federal Republic of Germany, Finland, France, Gabon, Greece, Guatemala, Guyana, Holy See, Honduras, Ireland, Israel, Italy, Ivory Coast, Jamaica.

*Abstaining:* Kenya, Lebanon, Libya, Mauritius, Morocco, Nigeria, San Marino, Saudi Arabia, Senegal, Singapore, South Africa, Trinidad and Tobago, Uganda, Barbados, Chile, Congo (Democratic Republic of), Cyprus, Ethiopia, Iran.

*The proposed new article 5* bis *(A/CONF.39/C.1/L.388 and Add.1) was rejected by 52 votes to 32, with 19 abstentions.*

11. Mr. JACOVIDES (Cyprus), explaining his vote, said that his delegation's attitude to the controversial issues involved in article 5 *bis* and in the final clauses was governed by its ardent desire to see the Conference produce a legally sound and politically acceptable convention which would stand a good chance of being ratified by the largest possible number of States in the shortest possible time. If that objective was to be achieved, moderation was essential and no substantial group of States should be forced into a position in which it felt it could not support the convention.

12. While his delegation favoured the principle of universality in general, and its incorporation in the convention in particular, it could not ignore the practical problems which would result from the adoption of the

" all States " formula. The amendment by Ghana and India (A/CONF.39/C.1/L.394) relating to the final clauses had gone a long way towards curing some of the deficiencies of the " all States " formula but had fallen short of universality in the full sense of the term. The Vienna formula had much to commend it, but it did tend to represent a position that had remained static in a world of change, particularly in view of the implications of the method adopted to enable States to participate in the Nuclear Test Ban Treaty. Every effort must be made to accommodate conflicting views if the Conference were to achieve success, and his delegation had therefore felt that it could not commit itself to either extreme view.

13. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that the vote on the principle of universality and the statements made against it in the Committee showed that many delegations were guided by purely political motives. In rejecting that realistic principle, its opponents had resorted, not to fair and logical arguments, but to the purely arithmetical pressure of votes, though in matters relating to international co-operation and to the interests of all States and peoples, such arithmetical considerations had no validity. The Ukrainian delegation had voted in favour of including the principle of universality, which was an inalienable part of contemporary international law, in the convention on the law of treaties, since its attitude to the convention as a whole would be affected by the absence of such a provision.

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

14. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 12, 2 and 62 *bis* and of annex I, as adopted by the Drafting Committee.

*Article 12* (Consent to be bound by a treaty expressed by accession) [2]

15. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 12 by the Drafting Committee read:

*Article 12*

The consent of a State to be bound by a treaty is expressed by accession when:

(*a*) The treaty provides that such consent may be expressed by that State by means of accession;

(*b*) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(*c*) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

16. The only amendment submitted to article 12 had been the Czechoslovak proposal (A/CONF.39/C.1/L.104), which had not been voted on by the Committee of the Whole. The Drafting Committee had decided to delete the words " or an amendment to the treaty " in sub-paragraph (*a*), because an amendment to the treaty was an integral part of the instrument, and a reference to amendment, which, moreover did not appear in any other part of the convention, might give rise to difficulties of interpretation.

17. Mr. NEMEČEK (Czechoslovakia) said that, when commenting on article 5 *bis* at the 89th meeting,[3] his delegation had stated that it would be prepared to withdraw its amendment to article 12 if a provision along the lines of article 5 *bis* were adopted. By proposing that compromise solution, it had hoped to reconcile varying opinions on article 5 *bis* and 62 *bis*. Unfortunately, however, the rigid attitudes of some delegations had prevented any such conciliatory solution; indeed, the Committee had even been unable to adopt the compromise solution for the final clauses proposed by Ghana and India. His delegation therefore did not consider that it would serve any useful purpose to press for a vote on a basically analogous proposal and therefore withdrew its amendment (A/CONF.39/C.1/L.104).

18. The CHAIRMAN suggested that article 12, as amended by the Drafting Committee, be considered as approved.

*It was so agreed.*[4]

*Article 2* (Use of terms) [5]

19. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 2 by the Drafting Committee read:

*Article 2*

1. For the purposes of the present Convention:

(*a*) " treaty " means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) " ratification ", " acceptance ", " approval " and " accession " mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) " full powers " means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) " reservation " means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) " negotiating State " means a State which took part in the drawing up and adoption of the text of the treaty;

[2] For earlier discussion of article 12, see 18th meeting, paras. 28-32.

[3] Para. 64.

[4] For further discussion and adoption of article 12, see 10th plenary meeting.

[5] For earlier discussion of article 2, see 87th meeting.

(*f*) " contracting State " means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) " party " means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) " third State " means a State not a party to the treaty;

(*i*) " international organization " means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

20. The Committee of the Whole had referred twenty amendments to article 2 to the Drafting Committee at the first session and five at the second session.

21. In paragraph 1 (*a*), the Committee had rejected all amendments to include a reference to the legal effect of treaties. It did not underestimate the scientific merits of such a reference, but considered that it would be superfluous in a definition whose scope, as expressly stated at the beginning of the article, was limited to " the purposes of the present Convention ".

22. The Committee had considered that the expression " agreement. . . governed by international law ", in paragraph (*a*) covered the element of the intention to create obligations and rights in international law. It had also noted that States had the right to choose whether a treaty concluded by them should be governed by international law or by internal law only in so far as such choice was permitted by international law itself.

23. The Committee had also not accepted the revised amendment by Ecuador (A/CONF.39/C.1/L.25/Rev.1) to insert the words " freely consented to " between the words " agreement " and " concluded ", because it felt that such an insertion would have been incompatible with the structure of Part V of the draft. If the Ecuadorian amendment were accepted, an international agreement not freely consented to would not be a treaty. Under the provisions of Part V, such an agreement was void but was still a treaty.

24. The only amendment to paragraph 1 (*a*) accepted by the Drafting Committee was the second amendment proposed by Spain (A/CONF.39/C.1/L.28), whereby in the French version the words " *un accord international conclu entre Etats en forme écrite* " would be replaced by the word " *un accord international conclu par écrit entre Etats* ", and in the Spanish version the words " *un acuerdo internacional celebrado entre Estados por escrito* " would be replaced by the word " *un acuerdo internacional celebrado por escrito entre Estados* ". That amendment did not affect either the English or the Russian versions.

25. Amendments had been submitted to paragraph 1 (*b*) by the United States (A/CONF.39/C.1/L.16) and Belgium (A/CONF.39/C.1/L.381) respectively. The United States amendment had been withdrawn. The Belgian amendment (A/CONF.39/C.1/L.381), which did not affect the English version, was to replace the words " *dans chaque cas* " by the words " *selon le cas* ". The Drafting Committee had accepted that amendment as an improvement of the wording.

26. The only amendment submitted to paragraph 1 (*c*) was the amendment by Austria and Spain (A/CONF.39/C.1/L.1 and Add.1) to replace the word " document " by the word " instrument ". The Drafting Committee had rejected that amendment because it had taken the view that in modern practice full powers were often contained in documents which could not be described as instruments.

27. For grammatical reasons, the Committee had replaced the closing words of the French version, " *à l'égard du traité* ", by the words " *à l'égard d'un traité* ".

28. The Drafting Committee had rejected as superfluous all the amendments to paragraph 1 (*d*), except the Hungarian amendment (A/CONF.39/C.1/L.382) to rearrange the words " signing, ratifying, accepting, approving or acceding " in the order in which they appeared in article 16. That amendment only affected the English and Russian versions, as the order proposed was already followed in the other language versions.

29. In the interests of uniformity of terminology, the Drafting Committee had replaced the expression " to vary the legal effect " in the English version by the expression " to modify the legal effect ", since article 19, which dealt with the legal effect of reservations, used the term " modify ", not " vary ".

30. The Drafting Committee had rejected all the amendments submitted to paragraph 1 (*e*) to 1 (*i*), but on its own initiative had replaced in the French version of paragraph 1 (*e*) the expression " *Etat ayant participé à la rédaction* " by the expression " *Etat ayant participé à l'élaboration* ", since it had considered that the word " *élaboration* " came closer to the English " drawing up " than did " *rédaction* ". A similar modification had been made in the Spanish version. A drafting change had also been made in the Russian version of paragraph 1 (*g*).

31. In the light of communications from GATT and the United International Bureaux for the Protection of Intellectual Property (BIRPI) concerning paragraph 1 (*i*), the Drafting Committee had examined the question of the meaning to be given to the term " international organization ", which was the subject ot the paragraph. The Drafting Committee had considered that the term covered institutions established at intergovernmental level either by agreements or by practice and which exercised international functions of some permanence. In the opinion of the Committee, the agreements or the practice establishing those institutions played the same role as the constituent instruments mentioned in article 4.

32. The Drafting Committee had examined all the amendments to add definitions of terms not included in article 2, but had considered that none was necessary for the interpretation of the convention and had therefore rejected them all.

33. There had only been one amendment to paragraph 2, that by Ceylon (A/CONF.39/C.1/L.17), to add, at the end of the paragraph, the words " or in the practice of international organizations or in any treaty ". The Committee had considered that to add those words

would duplicate the general reservation set forth in article 4 and had therefore rejected the amendment.

34. Mr. SEVILLA-BORJA (Ecuador) said that his delegation had taken due note of the reasons given by the Drafting Committee for not accepting the Ecuadorian amendment (A/CONF.39/C.1/L.25/Rev.1), to paragraph 1 (*a*) of article 2, the purpose of which was to introduce the element of freedom of consent into the definition of " treaty ". His delegation would not press its amendment because the Drafting Committee had not rejected its substance but had considered that the fundamental element of freedom of consent was already dealt with in Part V of the convention and did not fit in article 2, which did not contain a complete definition of the concept, but merely a brief explanation, intended to facilitate the understanding of the terms used in the convention.

35. His delegation, however, wished to place on record its abstention on paragraph 1 (*a*) of article 2, because it considered its contents inadequate and its scope limited. A fuller definition of the term " treaty " would have been more acceptable. As at present worded it dealt more with the formal character of a treaty and made only a rather general reference to those essential or substantive requirements which were the characteristic features of an international instrument.

36. As interpreted by his delegation, the words " governed by international law ", as used in the present text, covered both the formal elements and the elements of substance — namely the requirements that treaties must be freely consented to by the parties participating in their conclusion, that they must be concluded in good faith and that they must have a licit object.

37. He requested that the Rapporteur include that interpretation by the Ecuadorian delegation of the definition of " treaty " in his report.

38. He would also urge the Drafting Committee, when drafting the preamble of the convention, to cover the essential characteristics of treaties. On that condition, his delegation would not press its views in the plenary meetings of the Conference. Those views had been expressed in its amendment (A/CONF.39/C.1/L.25/Rev.1) which had not been accepted by the Drafting Committee purely for technical reasons.

39. Lastly, he noted in the Spanish version of the opening sentence of paragraph 1 of article 2 the expression " *a los efectos de la presente Convención* ". That was a gallicism and should be replaced by the expression " *para los efectos de la presente Convención* ". The same change should be made wherever those words appeared throughout the various articles of the convention.

40. The CHAIRMAN said that the Committee still had to dispose of two amendments to article 2: the Syrian amendment (A/CONF.39/C.1/L.385) and the eight-State amendment (A/CONF.39/C.1/L.19/Rev.1).

41. Mr. SHUKRI (Syria) said that his amendment (A/CONF.39/C.1/L.385) had been intended to supplement article 5 *bis*. Since the Committee had rejected the proposal to include article 5 *bis*, his amendment dropped automatically.

42. Mr. USTOR (Hungary), speaking only for Hungary as one of the sponsors of the eight-State amendment (A/CONF.39/C.1/L.19/Rev.1) said that the amendment no longer stood, since the definition of " general multilateral treaty " would be needed in article 2 only if that term were used in the convention itself.

43. The CHAIRMAN said that, in the absence of any comment by the other sponsors of the eight-State amendment (A/CONF.39/C.1/L.19/Rev.1) he would take it that they accepted that view. The two amendments would therefore be considered as withdrawn.

*Article 2 was approved.*[6]

### *Article 62* bis [7]

44. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 62 *bis* by the Drafting Committee read:

*Article 62* bis

1. If, under paragraph 3 of article 62, the parties have been unable to agree upon a means of reaching a solution within four months following the date on which the objection was raised, or if they have agreed upon some means of settlement other than judicial settlement or arbitration and that means of settlement has not led to a solution accepted by the parties within the twelve months following such agreement, any one of the parties may set in motion the procedures specified in Annex I to the present Convention by submitting a request to that effect to the Secretary-General of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

45. Article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1) which mentioned article 62 *bis*, repeated the language of a provision already approved by the Committee of the Whole for article 62. That provision, however, did not constitute a separate article but simply paragraph 4 of article 62. In the interests of symmetry, the Drafting Committee had therefore made article 62 *quater* the second paragraph of article 62 *bis*.

46. In the first paragraph of article 62 *bis*, the Drafting Committee had only made slight drafting changes. It had noted that the French version of that paragraph, which was the original, used the terms " *règlement judiciaire* " and " *arbitrage* " which appeared in Article 33 of the Charter. The terminology used in the Charter had not been followed in the translation of those expressions into the other languages, so the Committee had made the necessary corrections.

47. He would introduce the annex to article 62 *bis* later.[8]

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[6] For further discussion of article 2, see 7th plenary meeting. The article was adopted at the 28th plenary meeting.

[7] For earlier discussion, see 92nd to 99th meetings.

[8] See below, para. 54.

48. Mr. CUENDET (Switzerland) said he must point out that the Swiss proposal for an article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1) had not been submitted with the idea that it should become a paragraph of article 62 *bis;* the idea had been that it should be combined in due course with paragraph 4 of article 62. That was not yet possible because article 62 had already been approved, but perhaps later the two paragraphs could be combined into a separate paragraph referring to both articles 62 and 62 *bis*.

49. Mr. HAYTA (Turkey) said that his delegation wished to associate itself with what had just been said by the Swiss representative, namely that article 62 *quater* should be combined with paragraph 4 of article 62 as a new article. His delegation was therefore not in favour of incorporating article 62 *quater* in article 62 *bis*.

50. Mr. ALVAREZ TABIO (Cuba) said that his delegation approved the Drafting Committee's proposed text because it expressed the agreement reached in the Committee, but that did not mean that Cuba accepted article 62 *bis*.

51. Mr. BILOA TANG (Cameroon) said that while his delegation approved the report of the Drafting Committee, he must draw attention to the statement he had made at the 97th meeting [9] where he had suggested that provision could be made in article 62 *bis* not only for conciliators but also for arbitrators, a practice followed by the International Bank for Reconstruction and Development in connexion with the protection of private investments. He had also suggested that appointments of any conciliators or arbitrators by the United Nations Secretary-General should be made in consultation with, and subject to the consent of, the parties to the dispute. Since those suggestions had not been taken into account, he asked to have his statement placed on record.

52. Mr. KHLESTOV (Union of Soviet Socialist Republics) said his delegation considered it essential to point out, first, that the Committee was approving an article 62 *bis* that could involve expenditure for the United Nations, without first consulting that Organization. Such a step was not in accordance with normal practice.

53. Secondly, it must be made clear that consideration of drafting points relating to the articles did not mean that a number of delegations, including his own, had abandoned their opposition to article 62 *bis*. The Soviet Union still maintained the position that it had explained during the general debate. He asked that those two points be noted in the summary record.

*Article 62* bis *was approved.* [10]

[9] Para. 27.

[10] For further discussion of article 62 *bis*, see 25th to 28th plenary meetings. The article, and annex I, were put to the vote at the 27th plenary meeting and were not adopted, having failed to obtain the required two-thirds majority.

*Annex I*

54. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text of annex I read as follows:

*Annex I*

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present Convention shall be invited to nominate two conciliators, and the persons so nominated shall constitute the list. The nomination of a conciliator, including any conciliator nominated to fill a casual vacancy, shall be for a period of five years which may be renewed. A conciliator whose nomination expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 62 *bis*, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows.

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) One conciliator of the nationality of that State or of one of those States, chosen either from the list referred to in paragraph 1 above or from outside that list;

(*b*) One conciliator not of the nationality of that State or of one of those States, chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within the period of sixty days following the date on which the Secretary-General received the request.

The four conciliators shall, within the period of sixty days following the date of the last of their own appointments, appoint as Chairman a fifth member chosen from the list.

If the appointment of the Chairman or of any of the other conciliators has not been made within the period required above for that appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period.

Any of the periods within which appointments must be made may be extended by agreement between all the parties to the dispute.

Any vacancy shall be filled in the manner specified for the initial appointment.

3. The Commission thus constituted shall establish the facts and make proposals to the parties with a view to reaching an amicable settlement of the dispute. The Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

4. The Commission may draw the attention of the parties to the dispute to any measures likely to facilitate an amicable settlement. The Commission shall be required to report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute.

5. If the conciliation procedure has not led to a settlement of the dispute within six months of the date of deposit of the Commission's report, and if the parties have not agreed on a means of judicial settlement or to an extension of the above-mentioned period, any one of the parties to the dispute may

request the Secretary-General to submit the dispute to arbitration.

6. The Secretary-General shall bring the dispute before an arbitral tribunal consisting of three members. One arbitrator shall be appointed by the State or States constituting one of the parties to the dispute. The State or States constituting the other party to the dispute shall appoint an arbitrator in the same way. The third member, who shall act as Chairman, shall be appointed by the other two members; he shall not be a national of any of the States parties to the dispute.

The arbitrators shall be appointed within a period of sixty days from the date when the Secretary-General received the request.

The Chairman shall be appointed within a period of sixty days from the appointment of the two arbitrators.

If the Chairman or any one of the arbitrators has not been appointed within the above-mentioned period, the appointment shall be made by the Secretary-General of the United Nations within sixty days after the expiry of the period applicable.

Any vacancy shall be filled in the manner specified for the initial appointment.

7. The arbitral tribunal shall decide its own procedure. The tribunal, with the consent of the parties to the dispute, may invite any party to the treaty to submit its views orally or in writing. Decisions of the arbitral tribunal shall be taken by a majority vote. Its award shall be binding and definitive.

8. The Secretary-General shall provide the arbitral tribunal with such assistance and facilities as it may require. The expenses of the arbitral tribunal shall be borne by the United Nations.

55. The Drafting Committee had made a number of drafting changes in annex I, as was permitted under rule 48 of the rules of procedure, and paragraph 2 had been recast to make it clearer. Sub-paragraphs 2, 3, 4, 5 and 6 of paragraph 5 had been combined in a separate paragraph, now renumbered 6. At the end of the first sub-paragraph of the new paragraph 6, a sentence had been added to make it clear that the third member of the arbitral tribunal should not be a national of any of the States parties to the dispute.

56. With regard to the provision in paragraph 3 that the expenses of the Commission should be borne by the United Nations, the Drafting Committee had noted that it could not be implemented until it had been approved by the General Assembly of the United Nations, in accordance with the financial rules of the Organization. Some members of the Drafting Committee had expressed serious doubts about the desirability of that provision.

57. When reviewing the wording of the convention as a whole, the Drafting Committee would consider whether some provision should be included in annex I regarding the taking of provisional measures by the arbitral tribunal, and on the question which body was competent to interpret the awards of the tribunal.

*Annex I was approved.*[11]

### Statement by the Chairman of the Drafting Committee

58. Mr. YASSEEN, Chairman of the Drafting Committee, said that rule 48 of the rules of procedure of the Conference provided that the Drafting Committee " shall co-ordinate and review the drafting of all texts adopted, and shall report as appropriate either to the Conference or to the Committee of the Whole ". In paragraph 9 of the Secretary-General's memorandum on methods of work and procedures of the second session of the Conference (A/CONF.39/12), it was suggested that the Drafting Committee should submit direct to the plenary its report on the co-ordination and review of the drafting of the texts adopted by the Committee of the Whole. No objection had been raised to that suggestion at the opening of the second session, during the discussion of the memorandum by the Conference at the 6th plenary meeting. The Drafting Committee therefore proposed to follow the procedure suggested by the Secretary-General.

59. The Drafting Committee's report would also contain any decisions taken by that Committee regarding the titles of parts, sections and articles, and any amendments thereto. The Committee of the Whole would remember that he had informed it at the 28th meeting [12] that the Drafting Committee had decided not to consider titles until after the adoption of all the provisions to which they related, since the wording of a title necessarily depended on the content of the article.

### Adoption of the reports of the Committee of the Whole

60. The CHAIRMAN invited the Committee to adopt the draft report on its work at the first session of the Conference.

61. Mr. JIMENEZ DE ARECHAGA (Uruguay), Rapporteur, said that the report of the Committee of the Whole on the work of its first session (A/CONF.39/C.1/L.370/Rev.1, vol. I and II) contained a record of the discussions, all the amendments submitted and the Committee's final decisions; it had been used throughout the Committee's debates at its second session.

62. Mr. CARMONA (Venezuela) said that the comprehensive report on the work of its first session impelled the admiration of all the members of the Committee. The Committee should not adopt the report without a special vote of thanks to the Rapporteur.

63. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he agreed that the Committee should express its thanks to the Rapporteur and to all those who had helped him to prepare an admirable report. Nevertheless, the Soviet delegation wished to draw attention to a few very minor points.

64. First, it would be noted that paragraphs 39, 68, 94, 146, 187, 262, 333, 510 and 616 all contained the statement that " at the eightieth meeting of the Committee of the Whole, it was decided, without objection, to defer to the second session of the Conference consideration of all amendments relating to universal participation in multilateral treaties, to general multilateral treaties and to restricted multilateral treaties ". It would be better to clarify that statement in order to

[11] See footnote 10.

[12] Para. 2.

avoid criticism from the many future readers of the report. Secondly, the statement made by the USSR representative at the 35th meeting and referred to in paragraph 21 (*d*) was not quite accurately reflected. In actual fact, what the USSR representative had said was that the International Law Commission itself considered that article 32 did not in any way affect the rights of States enjoying most-favoured-nation treatment, but paragraph 21 (*d*) seemed to imply that that was only the view of the USSR delegation.

65. Mr. STREZOV (Bulgaria) said that the Rapporteur was to be commended for his excellent work, but that his delegation had a few minor comments to make on the Russian version. In paragraph 653, the text that the Committee had adopted for article 71 was given instead of the International Law Commission's text, and in paragraph 669, reference was made to article 75 instead of to article 73.

66. Mr. JIMENEZ DE ARECHAGA (Uruguay), Rapporteur, said that the USSR representative's comment on paragraph 21 (*d*) might be met by deleting in the third line the words " the views of his delegation ", and in the next to the last line, inserting the words " expressing the view " before the words " that, similarly ".

67. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that that change would be acceptable to his delegation.

68. Mr. SINCLAIR (United Kingdom) and Mr. BEVANS (United States of America) both supported the Venezuelan representative's suggestion that the Committee should adopt the report with a vote of thanks to the Rapporteur.

*The draft report of the Committee of the Whole on its work at the first session of the Conference, as thus amended, was adopted with a special vote of thanks to the Rapporteur.*

69. Mr. JIMENEZ DE ARECHAGA (Uruguay), Rapporteur, said that only certain parts of the Committee's report on the work of its second session had so far been circulated; the remainder would be circulated as soon as it was completed.

70. The CHAIRMAN suggested that the Committee adopt those parts of the report which had already been circulated on the understanding that the Rapporteur would submit the complete text to the plenary conference.

*It was so agreed.*

71. The CHAIRMAN said that with the adoption of its report, the Committee of the Whole had now completed its work.

72. Mr. KRISHNA RAO (India) said that it had been the Committee's responsibility to endeavour to bring the Conference to a successful conclusion. That was a duty it owed to its hosts, the Government and people of Austria, to the International Law Commission, for its years of work on the draft, and to the international community, which was concerned that the progressive development and codification of international law should not suffer a setback. Whatever the final form of the articles eventually adopted by the Committee, they would be of little avail if their content was unacceptable to a segment of the world community. Those who insisted on imposing their own point of view in disregard of the genuine convictions of those holding other views should reflect on the possible consequences of their attitude.

73. In common with all other delegates, he was sincerely grateful to the Chairman for the wisdom and impartiality with which he had guided the Committee's proceedings through a very difficult Conference. The Chairman had admirably represented the finest traditions of Asia and Africa, and upheld the best traditions of international law.

74. Sir Francis VALLAT (United Kingdom), Mr. MARESCA (Italy), Sir John CARTER (Guyana), Mr. USTOR (Hungary), Mr. HU (China) and Mr. VEROSTA (Austria) all, on behalf of their respective countries, groups, or regions, expressed their thanks to the Chairman for his guidance, his impartiality and his devotion to duty, to the Expert Consultant, the Chairman of the Drafting Committee and the Rapporteur for their invaluable help, to the Secretariat for its unobtrusive but essential contribution to their work, and finally to the Government and people of Austria for their welcome and hospitality.

75. Mr. VEROSTA (Austria) said that the Austrian delegation was deeply appreciative of the generous tributes paid to its country.

76. The CHAIRMAN said he was very touched by and sincerely grateful for the tributes paid him by the various delegations. His own contribution had only been made possible by the co-operation and goodwill of the members of the Committee. He considered himself fortunate to have been given such an opportunity to serve the international community.

77. He would like especially to thank his colleagues on the rostrum, and to express on their behalf their appreciation for the valuable contribution made by the Secretariat.

The meeting rose at 6 p.m.

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