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difficult question of the effect of custom on third States, in connexion with multilateral treaties.

73. Finally, the practice referred to was the practice of the parties. But it was not clear which parties. Was it the practice of some of the parties without objection from the others, or was it the practice of some of the parties despite the objection of the others, or was it that, as stated in paragraph (2) of the commentary, " the subsequent practice, even if every party might not itself have actively participated in the practice, must be such as to establish the agreement of the parties as a whole to the modification in question "? That raised the two further problems, of the possibility of a practice *inter se* being established among a small group of the parties to a treaty, and of the position of new States acceding to the treaty vis-à-vis the existence, prior to their accession, of a practice which had modified the provisions of the instrument.

74. All those difficulties arose from the fact that article 38 was a hybrid between the logical solutions of modification of a treaty by another treaty, and modification by the establishment of a new customary rule binding on all the parties. The first case was covered by articles 35 to 37, and the second fell outside the scope of the convention, except for a negative and unnecessary reference to it in article 34. The Commission's attempt to cover both solutions has resulted in an article which could only undermine the stability of treaty relations and should therefore be deleted.

75. Mr. VARGAS (Chile) said that his delegation would vote for the deletion of article 38, in the belief that the adoption of the provision would weaken the principle of *pacta sunt servanda* which the Committee had adopted in article 23. Once a treaty was in force, the parties were bound by it until it was modified in accordance with article 35, by agreement between the parties. That agreement implied express consent by the States in question. If article 38 were adopted, any State wishing to evade its obligations under a treaty could invoke subsequent practice with a view to modifying the treaty for its own ends. The Chilean delegation considered that subsequent practice might be a useful element in the interpretation of a treaty, and had therefore supported sub-paragraph 3(*b*) of article 27, but it could not agree that such practice in the application of the treaty in itself sufficed to modify the treaty without an express consent of the parties. Any changes of circumstances necessitating modification could be dealt with through the procedures set out in article 36. Since article 38 was not only superfluous but potentially dangerous, his delegation hoped that it would be deleted; in the contrary event, it would support the French amendment (A/CONF.39/C.1/L.241), which, although not entirely satisfactory, improved the International Law Commission's text of the article.

76. Mr. WERSHOF (Canada) said that his delegation, too, was in favour of the deletion of article 38. If the Committee decided to retain the article, his delegation would support the French amendment (A/CONF.39/C.1/L.241).

77. In the event of the article being retained, he would ask the Expert Consultant for clarification on two points. First, was it appropriate to use the word " modification " in article 38, when it was used in a special sense in article 37? Secondly, did " the agreement of the parties " mean all the parties in the case of multilateral treaties or, as in article 37, two or more parties who might bring about modification of the treaty *inter se*?

The meeting rose at 6 p.m.

THIRTY-EIGHTH MEETING

Thursday, 25 April 1968, at 11.5 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 38 (Modification of treaties by subsequent practice) *(continued)* [1]

1. Mr. GRISHIN (Union of Soviet Socialist Republics) said that the reason why there had been so many proposals to delete the article was that its provisions were not in conformity either with the rules of international law or with those of internal law.

2. On the international plane, the article did not set any limits for the modification of a treaty by subsequent practice, so it could happen that, in practice, relations between the parties to a treaty would be different from those established by the treaty. It was true that that situation could arise, but it could not be reflected and legalized in a convention as important as that on the law of treaties. Such legalization would be incompatible with the purposes of the convention and the stability of international treaties, and in addition, it would create difficulties for third States.

3. It had been asked whether the subsequent practice on which the modification of a treaty was to be based would be that followed by all the parties to the treaty or only by some of them. Article 38 gave no answer to that question. If it was to be the practice of all the parties, it would be better to apply articles 35 and 37 than to take as a basis the practice followed in applying the treaty, which would make it hard to determine what part of the treaty had been modified and when. If the practice of only some of the parties was sufficient, it would be necessary to know the requisite number of parties and whether a practice which did not reflect general agreement could modify the treaty for other parties which had not followed that practice and might not agree with it. The Soviet Union delegation considered that the reply to the latter question must be in the negative, if only because of the principle *pacta sunt servanda.*

4. Moreover, the requirements of internal law, that was to say the rules of constitutional law governing the conclusion of international treaties, should not be overlooked.

5. For all those reasons, article 38 could not be retained in the convention on the law of treaties. The fewer controversial articles the convention contained, the easier it would be to apply.

6. Mr. KEARNEY (United States of America) said he supported the amendments submitted by Finland (A/

[1] For the list of the amendments submitted, see 37th meeting, footnote 6.

CONF.39/C.1/L.143), Japan (A/CONF.39/C.1/L.200), Venezuela (A/CONF.39/C.1/L.206) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220) deleting article 38. What particularly worried the United States delegation was that relatively low-ranking officials such as vice-consuls and third secretaries might interpret a treaty erroneously and follow a course of conduct which, unknown to governments, could lead to modification of the treaty.

7. He was glad the Soviet Union representative had said that the convention should contain as few controversial articles as possible, and he hoped that principle would be followed.

8. Mr. YASSEEN (Iraq) said he was in favour of retaining article 38, which reflected positive law.

9. Formalism was certainly not an established principle of international law and sovereign States were not subject to the requirements of the " *acte contraire* " theory, which was not accepted in international law. Sovereign States could act as they wished, within certain limits of course: it was sufficient for their agreement to be clear. The agreement of the parties sufficed to terminate or modify a treaty. That agreement need not be in the form of a solemn instrument. Article 38 did not depart from those principles. It provided that agreement to modify a treaty was established by practice, that was to say by a series of acts: not just any practice, but one which could be attributed to States. That excluded an act by a consul or other official who exceeded his powers.

10. Hence article 38, which was based on the agreement of the parties to modify the treaty, was in no way incompatible with the general principles of international law, with the fundamental rules governing the law of treaties, or, least of all, with the principle *pacta sunt servanda.*

11. Some speakers had maintained that subsequent practice was adequately covered by article 27, paragraph 3(*b*), but that provision dealt with interpretation, which was quite distinct from modification; the difference between interpretation and modification was the difference in kind between a declaratory act and a constituent instrument.

12. To sum up, article 38 should be retained in the convention on the law of treaties because it reflected positive law and was not incompatible with the fundamental rules of the law of treaties, which made the agreement of the parties an essential principle for the conclusion, termination or modification of treaties.

13. Mr. MAKAREWICZ (Poland) said that his delegation favoured the deletion of article 38, which lacked clarity and would raise more problems than it solved.

14. It was true that the unanimous practice of the parties could lead to the modification of a treaty, but that process was really outside the scope of the convention, which was limited to treaties concluded between States in written form.

15. The normal way to modify a treaty was that described in articles 35-37. Modification by a subsequent practice was rather exceptional. Besides, the problem was far too complicated to be solved satisfactorily in a single article which simply stated that a treaty might be modified by subsequent practice.

16. With regard to the French amendment (A/CONF.39/C.1/L.241), he said it would be difficult, in practice, to decide whether the provisions of a treaty or the conditions of its conclusion were such as to constitute a bar to its modification by subsequent practice.

17. Finally, article 38 might interfere with the constitutional practice of States in regard to the conclusion of treaties.

18. Mr. HU (China) said his delegation was in favour of deleting article 38 because it was liable to cause misunderstanding or even disagreement between the States concerned.

19. Mr. RUIZ VARELA (Colombia) said he supported the amendments submitted by Finland, Japan, Venezuela and the Republic of Viet-Nam deleting article 38.

20. Though well aware of the great difference between the modification of treaties by subsequent practice, provided for in article 38, and their interpretation taking subsequent practice into account, provided for in article 27, paragraph 3(*b*), the Colombian delegation took the view that article 38 did not reflect a fact or an evident requirement of the international community to the same extent as article 27.

21. Article 27, paragraph 3(*b*), reflected traditional practice in the interpretation of all international treaties. Article 38, on the other hand, was contrary to law and to democracy, because treaties were unmade in the same way as they were made, and if a particular procedure had been followed in the negotiation, signing, internal approval and ratification of a treaty—a procedure which involved compliance with the internal constitutional system—the same procedure must be followed for any modification of the treaty, so as to ensure the desired balance between the internal powers of governments and parliaments in the process of contracting or modifying international obligations.

22. Mr. MARESCA (Italy) said that article 38 reflected a legal fact which had always existed. International law was not a slave to formalism and by reason of its nature must adapt itself to practical realities.

23. It was true that the written form was the normal form for an agreement and the one which afforded the most complete legal certainty, but there were other means of expressing an agreement, among which practice was the most reliable and the most obvious. A glance at history could only make one thankful that, in certain cases, practice had modified treaties, which might otherwise have had tragic consequences. Consequently, States should not be bound more than was necessary.

24. Moreover, the draft articles themselves did not overlook agreements in unwritten form or practice as a source of law and a criterion for application. Article 38 reaffirmed the fact that law could evolve as the need arose.

25. Naturally, if a treaty laid down special procedure for its modification, practice would not be the most normal procedure; he therefore supported the French amendment (A/CONF.39/C.1/L.241).

26. The retention of article 38 was essential for the structure of the draft convention.

27. Mr. MIRAS (Turkey) said that under the Turkish Constitution, international treaties which had duly entered into force became law; hence the Turkish delegation could not support the retention of article 38,

which provided for the modification of treaties by subsequent practice. Moreover, it did not think that the article stated an existing rule of international law. The arbitration case cited in the commentary in no way justified the adoption of such provisions.

28. In addition, the article was unnecessary. Article 27, paragraph 3(*b*), provided sufficient flexibility by introducing the element of subsequent practice in the interpretation of treaties; that flexibility should not be carried so far that subsequent practice was recognized to be capable of modifying the treaty itself. Besides, article 38 militated against the flexibility aimed at, for contracting parties might be led to adopt an unyielding attitude in applying treaties, in order to prevent a flexible practice from being regarded as a modification of the treaty.

29. The Turkish delegation therefore supported the four proposals to delete article 38.

30. Mr. THIAM (Guinea) expressed his delegation's anxiety at the unfortunate repercussions which article 38 might have if retained in its present form, particularly on the principle *pacta sunt servanda.*

31. In the case of multilateral treaties, a majority of the States parties to a treaty might follow a practice which modified it, while the remainder, a minority, continued to abide by the provisions clearly stated in the text of the treaty. That situation had been envisaged by the Commission in paragraph (2) of its commentary to article 38. In such a case, the States which strictly applied the principle *pacta sunt servanda* would, as it were, be penalized. Naturally, States which did not approve of the modifying practice remained free to withdraw from the treaty, but it must not be forgotten that the aim of the convention was to develop contractual relations between States and promote international co-operation.

32. The delegation of Guinea was therefore in favour of deleting the article, which might frustrate the principle *pacta sunt servanda.*

33. Mr. VEROSTA (Austria) said he recognized the existence of the rule stated in article 38; moreover, it was a principle of international law. The article dealt with the problem facing all legislators and authors of treaties as soon as negotiations had been completed. A French jurist had said: " He who only knows the Code does not know French civil law. " The same was true of international law. Several examples could be given of multilateral treaties between Austria and other States which had been modified by practice. Article 38 was not contrary to the principle *pacta sunt servanda* and the International Law Commission had been right to include it in the draft convention. The Austrian delegation would vote in favour of retaining the article in its present form or as modified by the French amendment (A/CONF.39/C.1/L.241).

34. Mr. ALVAREZ (Uruguay) said that article 38 raised many insoluble problems and was incompatible with the principles forming the very basis of the convention being prepared. There was no rule of international law laying down that a treaty could be modified by subsequent practice, even if that practice resulted from the tacit agreement of the parties. Furthermore, it was not practice that modified a treaty; an agreement could be modified only by another agreement.

35. Among the many questions that arose, the following might be mentioned. What was the scope of the expression " a treaty "? Did it include peace treaties, the United Nations Charter, the agreements on human rights, the Genocide Convention? Which provisions of those treaties could be modified by subsequent practice? At the 866th meeting of the International Law Commission, Mr. Tunkin had expressed the view that the Commission should be cautious and indicate that the key provisions of a treaty could not be amended by subsequent practice. [2] If that were not so, treaties would provide no guarantee, since the result of practice could be to prejudice the recognition of fundamental freedoms and rights and of the principles enunciated by the United Nations Charter. And what was to be understood by practice? An international treaty in force bound all the organs of a State. It might therefore be asked whether all the organs of a State were empowered to take a decision concerning the application of a subsequent practice or whether the express or implied confirmation of the competent authority of the State was required. Must the practice referred to in article 38 satisfy certain prior conditions as to its nature and scope? It was in that respect that the article conflicted with the principle *pacta sunt servanda,* since any practice which entailed the modification of a treaty necessarily entailed the non-application, in other words, the breach, of the provisions of the treaty, until such time as it could be considered to be the expression of a tacit agreement between all the parties.

36. Article 38 also raised insoluble problems for internal law. A modification might not have been approved of by all the competent organs of a State; how then could that State apply it in its territory? Again, at what moment could a treaty be said to be modified by a subsequent practice of the parties, and who would determine that moment? In addition, it was clear that during the proceedings of the International Law Commission its members had not agreed on the conditions to be satisfied by subsequent practice if it was to modify multilateral treaties. Any modification of those treaties should be made in accordance with certain conditions laid down in the treaty itself. An arbitral award, however well-founded, was not sufficient to make the solution applicable to a specific case into a general norm of international law.

37. With all those questions remaining unanswered, article 38 introduced an element of uncertainty. The Uruguayan delegation would therefore vote against its retention.

38. Mr. MALITI (United Republic of Tanzania) said that after studying the question carefully and listening attentively to the different speakers, he had come to the conclusion that it would be better to delete article 38. For the rule stated in that article did not exist, and even if it did, it would be a bad rule. A very clear distinction should be made between subsequent practice which could be used for the purposes of interpreting a treaty (article 27) and subsequent practice which modified the provisions of a treaty (article 38). The retention of article 38, which expressly authorized the modification of a treaty by subsequent practice, would introduce a rule permitting

[2] *Yearbook of the International Law Commission, 1966,* vol. I, part II, 866th meeting, para. 18.

breach of a treaty; that was inadmissible, especially as the convention contained rules on the revision of treaties which were legally acceptable and would not lead to the abuses that might result from the provisions of article 38.

39. Consequently, his delegation could not support article 38, which was too controversial, or the French amendment, which retained the idea of modification by subsequent practice and scarcely altered the original text.

40. Mr. ALVAREZ TABIO (Cuba) thought it would be dangerous to admit the possibility of recognizing subsequent practice as a source of law, for it might nullify written law. The retention of article 38 would weaken the *pacta sunt servanda* rule. In fact, modifying the provisions of a treaty was tantamount to concluding a new treaty, which would enter into force through the effect of custom as opposed to law, whereas the progressive development of the law of treaties should be effected by codification, as recommended in Article 13 of the United Nations Charter. Although the adoption of subsequent practice as a means of interpretation was acceptable, it was not acceptable that subsequent practice should be able to modify a treaty containing provisions that had been drawn up with great precision.

41. It was impossible to recognize a rule that was incompatible with the very idea of a treaty and ran counter to the legal principles set out in the convention. Moreover, it should not be forgotten that some constitutions gave treaties the status of internal law and that any modification entailing innovation could only bind a State if it was made under the same conditions as those which had given binding force to the treaty. The Cuban delegation would therefore vote against the retention of article 38.

42. Mr. CRUCHO DE ALMEIDA (Portugal) said his delegation was in favour of deleting article 38, because its application, particularly in the case of multilateral treaties, might be made the excuse for serious abuses and even for the violation of the principle *pacta sunt servanda.*

43. Mr. REGALA (Philippines) pointed out that many constitutions provided that any modification of a treaty must be ratified by the legislative organs of the country. That applied to the Philippines, where the approval of the Senate was required. Thus article 38 would create serious problems, since it would lay down a rule that was incompatible with the provisions of internal law in force in many States. The article would introduce an element of uncertainty and it would be better to delete it.

44. Mr. KRAMER (Netherlands) said that his delegation did not approve of article 38. It had been included in the draft at the last minute by the International Law Commission, which probably would have decided to omit it or would have seriously reconsidered it if there had been time. The Commission would then probably have provided, not that the treaty itself could be modified by subsequent practice, but that the application of the treaty might be influenced by such practice. In fact, the text of the treaty remained unchanged, whatever the practice might be, and a new document was necessary to delete or modify the provisions of a treaty or to add new provisions. Of course, subsequent practice might lead to new forms of application, or to the non-application, of certain provisions of a treaty, but not to the removal of the provisions themselves.

45. It might be asked why the Commission had decided to depart, in that article, from the rule that treaties must be in written form in order to come within the scope of the convention. The effect of article 38 was that there were treaties not in written form which could modify treaties in written form and thus come within the scope of the convention.

46. Further, in the case of a multilateral treaty it was extremely difficult to verify whether the parties were in agreement if the only source of knowledge of such agreement was the practice followed in the application of the treaty. It seemed that, if certain treaty provisions no longer met the needs of some of the parties, there would often be other parties which they still satisfied. Article 38 would entitle the parties which no longer applied the provisions to consider the treaty modified as between themselves. There would be only a very limited possibility of applying article 37, paragraph 2; the other parties might be notified of the modification only *post factum.* That notification would come as rather a surprise to the other parties, who had a right to expect that the modification would be embodied in an agreement in written form.

47. In the view of his delegation, article 38 meant that if the parties, or a number of the parties, no longer fulfilled the requirements of a treaty for a certain time, the treaty was modified *ipso facto* to the extent of the non-performance. That would derogate in a high degree from the rule *pacta sunt servanda.* However, it did not appear that there was much State practice in support of the article, so that it was unnecessary to state a rule on the subject at all. His delegation would therefore support the amendments deleting article 38.

48. Mr. ROSENNE (Israel) said that his delegation was in favour of deleting article 38. He would not go so far as to say that the rule in question did not exist in international law, but he thought it was covered by other articles of the draft. A theoretical distinction certainly existed between subsequent practice as a means of interpreting a treaty and the modification of a treaty through subsequent practice in its application; but in practice, the consequences were substantially the same, so that it did not seem necessary to insert a separate article.

49. Mr. CHEA DEN (Cambodia) said that, initially, his delegation had had some doubts about the value of article 38, for at first glance it was difficult to accept that subsequent practice could modify treaty provisions. Moreover, it was certainly difficult to define the meaning and scope of practices. However, after carefully studying the International Law Commission's commentary, his delegation had come round to the view of those delegations which had spoken in favour of retaining the article. For in fact, the modification contemplated implied the unanimous agreement of the parties, and followed from the practice States were subsequently led to adopt. That practice was the manifestation of a new common intention of the States concerned. The article merely stated a practice followed by States. His delegation would therefore vote in favour of retaining article 38. It could also accept the French amendment (A/CONF. 39/C.1/L.241).

50. Mr. RUEGGER (Switzerland) said there was no need to repeat the arguments advanced by the repre-

sentatives of Italy and Austria in favour of retaining article 38, for which his delegation would vote. In his view, the Commission's text was in conformity with international law. He also agreed with the representative of Iraq that the article reflected positive law. The case cited in the commentary on article 38, namely, the recent arbitration between France and the United States regarding the interpretation of a bilateral agreement, was not an isolated one. Some speakers had said that the question dealt with in article 38 was controversial. Unfortunately, that comment was true, but it could also be applied to other articles of the draft. The question of the modification of treaties by subsequent practice should certainly not be left to the arbitrary decision of the parties, and the draft convention should therefore contain a provision laying down procedure for judicial settlement or arbitration of disputes on the matter.

51. Mr. DE LA GUARDIA (Argentina) said he thought the arguments advanced against article 38 unconvincing. Some delegations had spoken of violation of the principle *pacta sunt servanda*. But if all the parties agreed to apply the treaty in a manner different from that laid down in certain of its provisions, where was the violation? He supported the views expressed by the representatives of Iraq, Austria, Cambodia, Italy and Switzerland, to the effect that article 38 was based on an existing principle which helped to bring international law closer to reality. The subsequent conduct of the parties was a principle that applied not only to the interpretation of treaties, but also to their modification, and that view found support in a respectable body of court opinions and legal writings, such as those of McNair and de Visscher. He would accordingly vote in favour of that article and would accept the amendment submitted by France (A/CONF.39/C.1/L.241), which removed any ambiguity there might be in the text.

52. Mr. ŽOUREK (Czechoslovakia) said that in his opinion article 38 was not in accordance with contemporary law. The International Law Commission had stressed several times in its commentaries that the essential purpose of its work was to increase the stability of treaty relations. As a whole, the draft convention bore witness to the constant pursuit of that aim, but unfortunately article 38 conflicted with it. The article gave too much importance to the practice of States and went much too far. In article 27, paragraph 3(*b*), the practice of States was recognized as one of the elements showing the will of States. And in article 34, a customary rule was regarded as a means of extending the scope of a treaty. To go further would be to introduce an element of insecurity in treaty relations between States.

53. The practice of States was not easy to establish, for it varied with time and according to political circumstances. The adoption of State practice as a means of modifying a treaty would raise innumerable difficulties. Moreover, in most cases, a formal agreement between the contracting parties was needed to modify a treaty. That being so, it might be asked why, if the parties agreed to modify a treaty on the basis of their practice, and if in most cases they had to resort to a formal agreement to do so, they should not simply revise the treaty. That would enhance the stability of treaty relations and meet the wishes of third States which might have an interest in knowing what agreements were in force, failing which the operation of the most-favoured-nation clause would be hindered.

54. Consequently, article 38 did not seem desirable, even for the progressive development of international law. The Czechoslovak delegation would therefore vote for its deletion.

55. Sir Humphrey WALDOCK (Expert Consultant) said that his task of explaining why the International Law Commission had included article 38 in the draft had been greatly facilitated by the representatives of Iraq and Italy. Some delegations had said that the article had been inserted at the last minute. It was true that it had been drafted towards the end, but the problem had had the Commission's attention in successive stages of its work. The Commission had taken account of the difference between the interpretation of a treaty on the basis of subsequent practice and the question whether a subsequent practice departed so far from any reasonable interpretation of the terms as to constitute a modification. Not infrequently the application of a treaty diverged somewhat from its terms, either because certain provisions were difficult to apply or because circumstances had changed so that the practice which had grown up did not correspond exactly to the interpretation of the treaty on the basis of its original text. The Commission could have omitted the article and considered the question as settled, although rather vaguely, by the provision in article 3(*b*), which referred to international agreements not in written form; but it had thought it wiser to deal with the question in a separate article. If it had been able to devote another session to the law of treaties, it might have examined the problem again and drafted a more elaborate text. As it was, the Commission had given particular attention to the wording of the article; it had very nearly adopted a proposal to replace the words " subsequent practice of the parties " by " the subsequent practice of all the parties ", so as to show that modification of the treaty required the tacit agreement of all the parties. That addition would perhaps have allayed the fears expressed by some delegations. Several of the criticisms made seemed, however, to show that certain delegations were not taking account of the final words " establishing the agreement of the parties to modify its provisions ".

56. He was surprised that some delegations should think article 38 constituted a quasi-violation of the principle *pacta sunt servanda*, especially as the legal basis of the article was good faith. The provision was based on the principle that a State which had taken up a position on a point of law, particularly in the interpretation of treaties, and allowed another State to act in accordance with that understanding of the legal position, could not go back on its representation of the legal position and declare the act performed illegal. Consequently, the criticism that the article was contrary to the principle *pacta sunt servanda* could not be accepted.

57. Some representatives had held that article 38 might authorize variations of treaties in violation of internal law. So far, however, such modified applications of treaties had never raised any constitutional problem. The variations normally did not touch the main basis of the treaty and did not give rise to any objections from parliaments. If the application of a treaty provision conflicted

with national law, the representative of the Ministry of Foreign Affairs of the country concerned would object and request that the treaty be amended.

58. The Commission had submitted article 38 to the Conference for approval because without that article certain existing practices remained unprovided for.

59. Mr. BADEN-SEMPER (Trinidad and Tobago) said he supported the deletion of article 38.

60. The CHAIRMAN put to the vote the amendments submitted by Finland (A/CONF.39/C.1/L.143), Japan (A/CONF.39/C.1/L.200), Venezuela (A/CONF.39/C.1/L.206) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220), all of which would delete article 38.

At the request of the Chilean representative the vote was taken by roll-call.

Italy, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Japan, Kuwait, Lebanon, Liechtenstein, Mexico, Mongolia, Netherlands, New Zealand, Norway, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Saudi Arabia, South Africa, Spain, Sweden, Syria, Trinidad and Tobago, Turkey, 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, Algeria, Australia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Ceylon, Chile, China, Colombia, Congo (Brazzaville), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dominican Republic, Federal Republic of Gernamy, Finland, Greece, Guinea, Hungary, Israel.

Against: Italy, Kenya, Mali, San Marino, Sierra Leone, Switzerland, Argentina, Austria, Bolivia, Cambodia, Denmark, Ecuador, India, Indonesia, Iraq.

Abstaining: Ivory Coast, Liberia, Madagascar, Malaysia, Monaco, Morocco, Nigeria, Pakistan, Romania, Senegal, Singapore, Thailand, Tunisia, Zambia, Afghanistan, Belgium, Central African Republic, Congo (Democratic Republic of), Dahomey, Ethiopia, France, Gabon, Ghana, Guatemala, Holy See, Iran.

The amendments deleting article 38 were adopted by 53 votes to 15, with 26 abstentions.

The meeting rose at 12.50 p.m.

THIRTY-NINTH MEETING

Friday, 26 April 1968, 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)*

Article 39 (Validity and continuance in force of treaties)

1. The CHAIRMAN invited the Committee to consider Part V of the International Law Commission's draft, beginning with article 39.[1] He announced that the Chinese delegation had withdrawn its amendment to that article (A/CONF.39/C.1/L.242).

2. Mr. RUEGGER (Switzerland) said that the Swiss amendment (A/CONF.39/C.1/L.121) to modify the first sentence of paragraph 1 of article 39 and delete the second sentence must be regarded as substantive, not formal. The substitution of the term " invalidation " for " invalidity " raised a point of principle: the use of the word " invalidation " established the necessary guarantees for the security of treaties. A treaty must be presumed valid until the procedure for its invalidation had been completed. In the modern world, treaties *contra bonos mores* were practically unknown, because public opinion would nearly always prevent their conclusion; but in order to render impossible unilateral claims based on alleged invalidity, it was essential to provide reliable machinery for impartial ascertainment of the real reasons of invalidity. Unless that were done, the principle *pacta sunt servanda* would be jeopardized. The overwhelming majority of treaties were concluded in good faith, so it was wrong to take the presumption of invalidity as a starting point.

3. Invalidation was a procedure which must be carried out through one or more impartial organs. In discussing article 39, it was impossible not to trespass on the important area covered by article 62 which, however, at present provided a quite inadequate framework. No official position could be taken on article 39 until the Committee had agreed on the content of article 62, which certainly needed improvement. The Swiss delegation was particularly anxious that the procedure set out in article 62 should be surrounded with all possible guarantees, with arbitration as a last resort. The value of conciliation must not be underestimated, for it had the great advantage of leaving no scars, whereas arbitration was more of a surgical process. Switzerland had promoted the conclusion of many bilateral agreements concerned with the settlement of disputes through conciliation preceding arbitral awards or court judgments, but conciliation in itself could not provide all the necessary guarantees. In view of the close link between articles 39 and 62, his delegation regretted that it could not vote on article 39 until the ultimate content of article 62 was decided.

4. In its draft of article 39, the International Law Commission had resolutely crossed the frontier dividing codification from the development of international law. That frontier had already been crossed successfully when the 1958 Conference on the Law of the Sea had provided an entirely novel agreement, the Convention on the Continental Shelf.[2] The procedure whereby that result had been achieved should help the current Conference to adopt new methods of work. It would be remembered that the Convention on the Continental Shelf had been considered by a separate committee of the Conference on the Law of the Sea. Unfortunately, in establishing the machinery for the current Conference, the Sixth Committee of the General Assembly had failed to take

[1] The following amendments had been submitted: Switzerland, A/CONF.39/C.1/L.121; Peru, A/CONF.39/C.1/L.227; Republic of Viet-Nam, A/CONF.39/C.1/L.233; China, A/CONF.39/C.1/L.242; Australia, A/CONF.39/C.1/L.245. An amendment was subsequently submitted by Singapore (A/CONF.39/C.1/L.270).

[2] United Nations, *Treaty Series*, vol. 499, p. 311.