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given in due form by an organ or agent of that State competent under international law to give such consent. Without that principle, there would be great risk and uncertainty, particularly since some countries did not even have written rules regarding the conclusion of treaties.

81. Nevertheless, taking into account the need for some flexibility in international relations, an exception could be admitted without compromising the principle, provided that the exception was strictly limited. His delegation therefore supported the amendment submitted by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1), which required the violation to be not only manifest but also of fundamental importance.

82. The United Kingdom amendment (A/CONF.39/C.1/L.274) seemed to have a similar purpose, but it was inadvisable to refer to good faith in only one article of the draft because it could be inferred *a contrario* that the principle of good faith did not apply to the other articles. That point had been raised during the discussion on article 15.

83. The Polish delegation could not support the Iranian amendment (A/CONF.39/C.1/L.280), because it subordinated the possibility of invoking a violation of internal law to the official status of the individual who authorized a person to express the consent of the State, and it suggested that a Head of State could never act in contravention of the constitution of the State. The International Law Commission had pointed out in paragraph (10) of its commentary that it had admitted an exception having in mind past cases where a Head of State had concluded a treaty in contravention of an unequivocal provision of the constitution.

84. Mr. TEYMOUR (United Arab Republic) said he favoured the retention of article 43 as drafted by the International Law Commission, because, as the representative of Iraq had pointed out, it was the outcome of lengthy discussions between the supporters of two opposing legal doctrines.

85. Article 43 provided the necessary safeguards for developing countries and countries lacking internal legislation on the conclusion of treaties. His delegation could not support the amendment submitted by Pakistan and Japan, which would radically alter the meaning of the article. It was not opposed to the idea of a time-limit for invoking a violation, as proposed in the Australian amendment, provided that it was a reasonable one.

86. Mr. AMADO (Brazil) said that it was essential to use precise language. It might well be asked what a manifest violation was. The notion was so obscure that it would be necessary to consider the establishment of some body to provide a reply to that question. Violation came about as a result of tortuous and secretive intrigues; it seldom displayed itself openly. He was therefore against making an exception of manifest violation, which was the result of a compromise in the Commission which he could not accept; accordingly, he supported the amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1).

87. Mr. MATINE-DAFTARY (Iran) announced that after hearing the various speakers, particularly the Swiss representative, he was withdrawing his amendment (A/CONF.39/C.1/L.280), but intended to revert to the matter at the second session in plenary. The Iranian delegation would abstain on the International Law Commission's text.

88. Mr. CARMONA (Venezuela) said that his delegation was withdrawing its amendment (A/CONF.39/C.1/L.252) and would vote for the International Law Commission's text.

89. The CHAIRMAN put the amendments before the Committee to the vote.

The amendment by Pakistan and Japan (A/CONF.39/C.1/L.184 and Add.1) was rejected by 56 votes to 25, with 7 abstentions.

The Australian amendment (A/CONF.39/C.1/L.271/Rev.1) was rejected by 44 votes to 20, with 27 abstentions.

The amendment by Peru and the Ukrainian SSR (A/CONF.39/C.1/L.228 and Add.1) was adopted by 45 votes to 15, with 30 abstentions.

The United Kingdom amendment (A/CONF.39/C.1/L.274) was adopted by 41 votes to 13, with 39 abstentions.

90. The CHAIRMAN said that article 43 would be referred to the Drafting Committee together with the joint amendment submitted by Peru and the Ukrainian SSR and the amendment submitted by the United Kingdom. [3]

91. Mr. BADEN-SEMPER (Trinidad and Tobago), explaining his delegation's vote for the United Kingdom amendment, said he hoped that the Drafting Committee would also consider whether the word "manifest" should be retained or deleted.

The meeting rose at 6.5 p.m.

[3] For resumption of discussion, see 78th meeting.

FORTY-FOURTH MEETING

Tuesday, 30 April 1968, at 11.00 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 44 (Specific restrictions on authority to express the consent of the State)

1. The CHAIRMAN invited the Committee to consider article 44 of the International Law Commission's draft. [1]

2. Mr. SEPULVEDA AMOR (Mexico) said that the Mexican amendment (A/CONF.39/C.1/L.265) was based on the suggestion by the Secretary-General in his comments on article 44 (A/6827/Add.1) that, in the circumstances of modern multilateral conventions, the full powers of a representative could hardly ever be brought to the

[1] The following amendments had been submitted: Mexico (A/CONF.39/C.1/L.265); Japan (A/CONF.39/C.1/L.269); Ukrainian SSR (A/CONF.39/C.1/L.287); Spain (A/CONF.39/C.1/L.288).

notice of the other States concerned, but only of the depositary. If a State, in drawing up full powers to authorize its representative to make a binding signature or to execute and deposit an instrument expressing consent to be bound, made specific restrictions upon his authority, it seemed only just to allow that State to invoke those restrictions if its representative failed to observe them and if the depositary had examined the full powers. In such cases the Secretary-General had not considered that the State was bound unless it confirmed it, and he had taken the initiative to clarify the matter before making notification of the signature.

3. Mr. FUJISAKI (Japan) said that the Japanese amendment (A/CONF.39/C.1/L.269) was in full conformity with the Commission's statement in the first sentence of paragraph (3) of its commentary to article 44. Instructions given by a State to its representatives were not usually brought to the knowledge of the other negotiating States and might be kept secret in whole or in part. The instructions might be changed, or failure to observe them might not be important enough to nullify the State's consent. His delegation's view was that, in order to safeguard the security of international transactions, a State should not be able to invoke its representative's failure to observe a specific restriction unless that restriction had been " expressly notified " to the other negotiating States.

4. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that although the Commission's texts had great merit, that of article 44 was by no means clear and his delegation had accordingly proposed an amendment (A/CONF.39/C.1/L.287) in order to indicate that the authority was restricted by instructions from the representative's government.

5. Mr. TENA IBARRA (Spain) said that the Spanish amendment (A/CONF.39/C.1/L.288) contained two elements, one purely formal, the other an element of substance. The purpose of the formal element was to produce a clearer and more concise text which would, in the Spanish version, be more grammatically correct and drafted in more appropriate legal terminology, while at the same time preserving all the elements of the Commission's text. The purpose of the element of substance was to emphasize, by substituting for the expression " brought to the knowledge of " the expression " notified to ", the seriousness of the nature of the exception which the article provided to article 6, on full powers. Article 6 contained a very serious *de jure* presumption and the expression " brought to the knowledge of " was not sufficiently formal and solemn for the purpose of establishing an exception to such a presumption. In that respect, the Spanish delegation's amendment was closely akin to that submitted by the representative of Japan and he hoped it would be given serious consideration by the Drafting Committee.

6. Mr. RATTRAY (Jamaica) said that, although he agreed with the principle formulated by the Commission in article 44, he doubted whether it had been adequately expressed. The article dealt with specific limitations on the authority of a representative to express his State's consent to be bound and was not concerned with the problem dealt with in article 43, which established a special régime for dealing with constitutional limitations imposed by domestic law on the competence of States to conclude treaties. That competence could only be expressed through its representative, whether a person or an organ. The régime laid down by article 43 was extensive enough to include a limitation on the treaty-making capacity of a particular representative, subject to the procedural formalities imposed in specific restrictions. It was theoretically possible for domestic law to provide that treaties might be concluded by representatives not belonging to the categories specified in article 6, but requiring a resolution of parliament before they could be authorized to sign a treaty.

7. There appeared to be some overlapping between articles 43 and 44, since the former dealt with the competence to conclude treaties and the latter with specific restrictions on the authority of the representative; but article 43 was not necessarily co-extensive with article 44, since the restrictions on the authority of a State's representative were not confined to limitations imposed by domestic law *stricto sensu* but also extended to any restrictions properly imposed in any other manner, such as by administrative action for example.

8. In the light of those considerations it seemed necessary, or at least desirable, to make clear that the restrictions referred to in article 44 did not include those covered in article 43, and it would be more intelligible if, by means of a drafting amendment, the provisions of the two articles could be made mutually exclusive. Perhaps the Expert Consultant could indicate whether that had been the Commission's intention.

9. Though ideally it should be the duty of each State to bring restrictions to the attention of the other parties, in the case of multilateral treaties particularly it should be sufficient if notification were made to the depositary. Under article 72 (*e*), it was the duty of the depositary to inform States entitled to become parties to a treaty of acts, communications and notifications relating to it. It would not be unduly burdensome to regard receipt by the depositary of notice of a restriction as constituting constructive notice to the parties. Bearing in mind the duty of the depositary to bring the restriction to the actual notice of the parties, it would hardly be just to penalize a party which had notified a restriction to a depositary merely because the depositary had failed to discharge its duty of notifying the other parties. The Mexican amendment (A/CONF.39/C.1/L.265) was practical and he supported it.

10. He was not satisfied that the formula proposed in the Ukrainian amendment (A/CONF.39/C.1/L.287) exhausted all possible means by which a restriction might be imposed, and he therefore preferred the more flexible formulation adopted by the Commission.

11. Mr. ROSENNE (Israel) said he was prepared to accept the Commission's text and doubted whether there was any need for the detailed amendment proposed by the Ukrainian delegation (A/CONF.39/C.1/L.287). The Japanese amendment (A/CONF.39/C.1/L.269), though appearing to be a little severe, should be scrutinized by the Drafting Committee. With regard to the Spanish amendment, the question of constructive notice was perhaps covered in article 73; the introduction of a

requirement concerning formal notice in article 44 might give rise to difficulties.

12. He had no objection in principle to the Mexican amendment (A/CONF.39/C.1/L.265) but it would need to be clarified as to whether the depositary referred to was the depositary of the instrument embodying the treaty itself or the depositary of the credentials, since they might not always be one and the same. Assuming it was the former, some modification might be needed in article 72. If the Mexican amendment were accepted, it should be modified by the insertion of the words " of the treaty " after the word " depositary ". That would correspond with his Government's observation in paragraph 5 of its note of 15 May 1964, the principle of which had been accepted by the Special Rapporteur in his redraft of the former article 32 in his fourth report.

13. Mr. SEPULVEDA AMOR (Mexico) said he could accept the Israel representative's amendment.

14. Mr. CUENDET (Switzerland) said he agreed with the principle contained in the Commission's draft but did not think that the expression of it was entirely clear. He therefore supported the Ukrainian and Spanish amendments; the former explained the nature of the special restrictions, while the latter was more concise than the Commission's version. He also supported the Japanese amendment, which strengthened the Commission's text and would contribute to the stability of treaties.

15. He could not support the Mexican amendment since it gave a misleading idea of the function of a depositary, which was to register the declarations of parties. Though the depositary could have the role ascribed to it in the Mexican amendment, there was no need to make specific mention of the fact at that point in the convention.

16. Mr. WERSHOF (Canada) said he hoped he was right in thinking that the restriction in article 44 had nothing to do with the restrictions imposed on the actions of a representative at earlier stages of negotiation and signature of the text, but only to restrictions on the actions performed when expressing the State's consent to be bound.

17. The Mexican amendment was certainly essential. At the close of a conference to conclude a treaty, presumably the Secretary-General or his representative functioned as a depositary, if designated in the final clauses, and then full powers would be handed to him. He approved of the Israel amendment to the Mexican amendment.

18. The Japanese amendment seemed rather strict and he wondered what was meant by the expression " expressly notified ".

19. Mr. MARESCA (Italy) said that full powers and instructions were two entirely different categories of diplomatic documents. A full powers was a diplomatic document in the true sense, whereas instructions were a domestic matter between a representative and the authorities of his State. If full powers were brought to the knowledge of another State, that knowledge should not be limited to the parties but should be communicated to all other States.

20. He could not accept the Ukrainian amendment introducing the idea of instructions; that was out of place and had nothing to do with full powers.

21. He supported the Japanese amendment, also the Spanish amendment, which was particularly felicitous in its wording. The Mexican amendment, introducing the notion of a depositary, should be accepted.

22. Mr. SMALL (New Zealand) said that there would be no practical difficulty in applying article 44 if the restriction on the authority of a representative were brought to the attention of the State concerned in writing, by means either of a note or of a clause in the full powers.

23. Practical difficulties could, however, arise if article 44 were applied to the very common case where, during the negotiation of a treaty, a representative stated that he was not empowered to make concessions beyond a certain point. Negotiations might then proceed, a more generous concession be actually made and in due course the treaty be signed. It would undoubtedly hamper good faith and the freedom of negotiations if, in a case of that type, a representative had to be cross-examined closely and, if need be, his Government consulted in order to ensure that the restriction mentioned earlier in the negotiations had in fact been rescinded. If, of course, by the time of signing the treaty, the representative had produced unconditional full powers, or conditional powers, the condition of which was satisfied, that would be the end of the matter. However, it was quite common for full powers not to be produced at all. In that particular case, it might well become relevant to consider whether statements by the representative during his negotiations in fact indicated a limitation on his power to express consent to be bound. In regard to that kind of circumstance, the New Zealand delegation therefore differed somewhat from the Canadian representative, who had considered that article 44 could never have any relevance to the earlier negotiating stage. With respect to that one problem, however, common sense required that article 44 be given a reasonable interpretation which would embrace only those particularly obvious restrictions which, if orally expressed, were put to the other Government in such a way that no Government negotiating normally and in good faith could fail to see that a definite standing restriction was present which it could only disregard at its peril.

24. Subject to those remarks, he favoured article 44 and supported the amendment by Mexico (A/CONF.39/C.1/L.265) and also that of Japan (A/CONF.39/C.1/L.269), which would go some way towards clarifying the point he had raised.

25. He did not favour the Ukrainian amendment (A/CONF.39/C.1/L.287); the provisions of article 44 should be flexible enough to cover restrictions imposed on the authority of the representative otherwise than in the " instructions " by his Government. He had considered the Spanish redraft (A/CONF.39/C.1/L.288), but on balance did not favour it.

26. Sir Humphrey WALDOCK (Expert Consultant), in reply to the question by the Jamaican representative, said that the question was not so much whether article 44 was exclusive of the cases covered by article 43; the point was that the two articles dealt with quite different situations. Nevertheless, there was some overlap between the provisions of the two articles, because it was not inconceivable that a restriction placed on the authority of a representative, under article 44, might derive from

internal constitutional requirements which, from another point of view, were the subject of the provision in article 43.

27. With regard to the point raised by the New Zealand representative, the language of article 44 made it clear that its provisions related to a situation where the consent of a State to be bound was being expressed by the representative. A distinction should clearly be made between instructions for the purpose of negotiations and instructions in relation to the expression of consent. That question was to some extent connected with the concluding proviso "unless the restriction was brought to the knowledge of the other negotiating State prior to his expressing such consent". Amendments had been submitted by Japan (A/CONF.39/C.1/L.269) and Spain (A/CONF.39/C.1/L.288) for the purpose of making that language more formal. The International Law Commission's wording would allow any kind of proof of the restriction. It would be for the Committee and the Drafting Committee to consider the appropriateness of making the provision more strict.

28. With regard to the Ukrainian amendment (A/CONF.39/C.1/L.287), he did not believe that the International Law Commission would have favoured the introduction of a reference to Government instructions, because the Commission had been careful not to distinguish between States and Governments. Personally, he did not feel that the introduction of a reference to Government instructions would assist much in regard to the provisions of article 44.

29. On the question of the depositary, he said that the International Law Commission, in all its references to the "depositary", had meant the depositary of the treaty. The proposal of the Mexican amendment (A/CONF.39/C.1/L.265) to introduce a specific reference to the depositary would be in line with the intentions of article 44. If, however, the language of article 44 were amended so as to introduce the concept of notification, the point would be covered by the provisions of articles 72 and 73, relating to the functions of the depositary.

30. The CHAIRMAN said he would invite the Committee to vote on the various amendments to article 44, beginning with the Mexican amendment (A/CONF.39/C.1/L.265) as orally modified by Israel.

The Mexican amendment was adopted by 53 votes to 3, with 35 abstentions.

31. The CHAIRMAN invited the Committee to vote on the principle contained in the Spanish amendment (A/CONF.39/C.1/L.288) that the restriction must be "notified" or as in the Japanese amendment (A/CONF 39.C.1/L.269) "expressly notified", rather than simply "brought to the knowledge of" the other negotiating States.

The principle of notification was adopted by 30 votes to 23, with 35 abstentions.

32. The CHAIRMAN invited the Committee to vote on the Ukrainian amendment (A/CONF.39/C.1/L.287).

The Ukrainian amendment was rejected by 46 votes to 16, with 30 abstentions.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to refer article 44 to the Drafting Committee with the two amendments which had been adopted and the drafting elements in the Spanish amendment (A/CONF.39/C.1/L.288).

It was so agreed. [2]

Article 45 (Error)

34. The CHAIRMAN invited the Commission to consider article 45 of the International Law Commission's draft. [3]

35. Mr. KEARNEY (United States of America), introducing his delegation's amendment to article 45 (A/CONF.39/C.1/L.275), said that it would bring about two changes in paragraph 1 of the article. The first was a minor one and consisted of the deletion of the words "in a treaty" after the opening words "A State may invoke an error". As the text now stood, it could be interpreted as meaning that the error must be specifically embodied in the text of the treaty. In fact, a situation could arise in which the error was not reflected in the text. For example a treaty for the sharing of hydroelectric power might be based on wrong calculations of the capacity of the turbines used. The capacity would not be stated in the treaty, but all the calculations having been based on it, the error would affect the consent to the treaty. By deleting the words "in the treaty", error would be tied to the question of consent to the treaty rather than to the actual text.

36. The second proposed change in paragraph 1 was a more important one. The present text limited the class of error that could be invoked as invalidating consent to an error relating to a fact or situation which "formed an essential basis" of the consent given to the treaty. The expression "essential basis" could be interpreted either subjectively or objectively. Paragraph (1) of the commentary referred to "errors on material points of substance", but the value of that comment was reduced because paragraphs (6) and (7) of the commentary failed to pursue it.

37. The present wording seemed to suggest that any error would suffice to vitiate consent if it related to a point which the State concerned alleged to have been essential, without regard to the question whether another State in a similar situation would have considered the subject-matter of the error as an essential basis of consent to the treaty. It would be difficult to disprove such an allegation, and the interpretation of the provision would rely on the subjective appreciation of the interested State. It was important to make the essentiality test subject to objective requirements. The State claiming invalidity should prove that the matter would have been considered as important by any State similarly situated. For that purpose, the text should be clarified and the United States amendment accordingly introduced a new requirement in the form of an additional sub-paragraph reading "The assumed fact or situation was of material importance to its consent to be bound or the peformance of the treaty". Those words incorporated the objective test mentioned in paragraph (1) of the commentary. Claims of invalidity could be disruptive of treaty rela-

[2] For the resumption of the discussion of article 44, see 78th meeting.

[3] The following amendments had been submitted: United States of America (A/CONF.39/C.1/L.275); Australia (A/CONF.39/C.1/L.281).

tions and the provisions on the subject should therefore be made as clear as possible so that claims of that nature could not be made on other than well-defined grounds. His delegation was not wedded to the language used in its amendment and would accept any other formulation, provided an objective test was introduced.

38. His amendment would also insert in paragraph 2, after the words " the error ", the words " or could have avoided it by the exercise of reasonable diligence ". The purpose of that insertion was to remedy the defects of the language used in paragraph 2, which was drawn from the judgment of the International Court of Justice in the *Temple* case.[4] In paragraph (8) of its commentary, the Commission had itself pointed out that the Court's formulation of the exception now set forth in paragraph 2 was " so wide as to leave little room for the operation of the rule " contained in paragraph 1.

39. Mr. HARRY (Australia) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.281) was to make it clear that a party wishing to invoke the ground of invalidity laid down in article 45 must do so without unreasonable delay. His delegation had already mentioned its reservations concerning the attempt made in Part V of the draft convention to lay down extensive grounds for invalidating and terminating treaties before their normal expiry. But if the attempt was to be made, the formulations adopted should not be couched in unduly sweeping terms, but should contain the qualifications appropriate to the particular ground being considered. The Australian delegation therefore supported the United States amendment (A/CONF.39/C.1/L.275) to state with greater particularity the conditions under which error could be invoked as a ground of invalidity.

40. Any mature legal system contained certain general principles of law whereby a party might, on general grounds of equity, forfeit its right to invoke a particular legal ground; under the common law system, those were, for instance, the doctrine of estoppel, statutes of limitation and doctrines of the effect of unreasonable delay and acquiescence. If the Conference was to act on the basis that the international legal order was sufficiently mature to lay down the extensive grounds of invalidity proposed in Part V, appropriate recognition should be given to doctrines of that kind. The International Law Commission had itself made a valuable proposal in article 42, sub-paragraph (*b*), dealing with acquiescence.

41. The Australian amendment was designed to deal with the situation which arose after the party in question was aware of the error. The situation was more clear-cut than in article 43, where there might be some doubt as to the time of violation of internal law. Where the party was actually aware of the error, it should not be allowed to delay indefinitely its decision on whether or not to claim invalidity, but should bring its claim within a reasonable time. The Australian delegation did not insist on the period of twelve months tentatively proposed in its amendment.

42. Mr. COLE (Sierra Leone) said that, although his delegation was in favour of the inclusion in the convention of error as a ground for invalidating a State's consent to be bound by a treaty, it would have preferred the article to cover cases of error of law, rather than just cases of error of fact, for a clear distinction would then have been made between cases of error which would make a treaty void *ab initio*, and cases which would make a treaty merely voidable. On the other hand, it might be said that all errors were in the final analysis errors of fact, and the Commission's formulation of article 45 had merit.

43. The Australian amendment (A/CONF.39/C.1/L.281) was premature, and would be more appropriate in connexion with article 62, relating to the procedure to be followed in cases of invalidity, particularly since it contained the phrase " the procedure for claiming invalidity ". His delegation would therefore abstain from the vote on the Australian amendment.

44. The United States amendment to add a new sub-paragraph 1 (*b*) (A/CONF.39/C.1/L.275) seemed to be unnecessary, since the point was adequately covered by paragraph 1 of the Commission's draft: the words " formed an essential basis of its consent to be bound by a treaty " restricted the errors in question to those which went to the root of the matter and depended entirely on the exercise of good faith in the interpretation of treaties. He had some sympathy with the United States amendment to add a further criterion in paragraph 2, particularly since it was based on a judicial decision, but owing to the difficulty of determining what constituted " reasonable diligence ", and for the reasons given by the Commission in paragraph (8) of the commentary, it could not support the amendment and would vote for the Commission's text as it stood.

45. Mr. DADZIE (Ghana) said that his delegation would support the International Law Commission's draft of article 45, which represented a re-statement of existing international law combined with a minimal degree of progressive development. It could be contended that the article would be difficult to apply, since it was the State invoking invalidity which was primarily concerned with the degree of emphasis placed on the fact claimed to be an error, but his delegation did not consider that the element of subjectivity involved in that criterion *ipso facto* rendered the article impossible to apply. The Committee had already approved other articles containing subjective elements, because even in customary international law there were many rules whose essential subjectivity had not precluded their objective interpretation. Moreover, the State invoking factual error bore the burden of proving that the error had formed an essential basis of its consent to be bound by the treaty.

46. Although his delegation appreciated the principle underlying the Australian amendment (A/CONF.39/C.1/L.281), it felt that it was unnecessary, since the same end would be achieved, in a different manner, by the adoption of article 42. It could support the drafting changes proposed by the United States amendment (A/CONF.39/C.1/L.275) to the first part of paragraph 1, but did not regard its new sub-paragraph 1 (*b*) as an improvement, since the criterion " material importance " was open to the same charge of subjectivity as the Commission's draft. That criticism also applied to the "reasonable diligence " test in paragraph 2 of the amendment.

[4] *I.C.J. Reports 1962*, p. 26.

47. His delegation would abstain from voting on most of the United States amendment, but would ask for a separate vote on the words " or the performance of the treaty " at the end of its proposed sub-paragraph 1 (*b*), which drastically changed the entire concept of article 45. His delegation would vote against that phrase.

48. Mr. ALVAREZ TABIO (Cuba) said that paragraph 1 of article 45 gave a balanced definition of material error. Seen as a defect of consent, error undoubtedly corresponded to some extent to the concept of a mistake, whether intentional or unintentional, leading to a belief in a non-existent fact deciding a State to consent to be bound. On the other hand, consent could rest on a cause that had been misrepresented in order to conceal the real cause, which might be illicit or immoral. That case came under article 46, relating to fraud. His delegation supported the retention of both articles, which embodied essentially different principles.

49. Paragraph 2, however, was not acceptable, because it contained an exception expressed in such broad and imprecise terms that it left little room for the application of the general rule. In particular, the concluding proviso " if the circumstances were such as to put that State on notice of a possible error " would leave it to the interpreter to assess subjectively the significance of those circumstances. The assumptions on which that passage was based were logically and legally untenable. For that reason, his delegation would have to vote against paragraph 2, unless the second clause were put to the vote separately. Paragraph 3 was acceptable.

50. The United States amendment (A/CONF.39/C.1/L.275) would not improve the text since it introduced such subjective concepts as " material importance " and " reasonable diligence ", while retaining the ambiguous concluding proviso of paragraph 2. His delegation would therefore vote against that amendment, and also against that of Australia (A/CONF.39/C.1/L.281), which would have the effect of enabling an essential defect of consent to be covered merely by the passage of time and not as a result of the express consent of the party concerned.

51. He would ask that the various paragraphs of article 45 be voted on separately.

52. Mr. PINTO (Ceylon) said that, although his delegation was broadly in agreement with the Commission's text of article 45, it wished to ask the Expert Consultant a question in connexion with the article.

53. Article 46 dealt with the effect of misrepresentations made fraudulently, and provided that a treaty induced by fraudulent conduct was voidable at the option of the victim of the fraud. On the other hand, no specific reference was made to the effect on a treaty of misrepresentation made innocently. In his delegation's view, no misrepresentation, whether innocent or fraudulent, should be permitted to operate to the detriment of the other negotiating State. It might have been the International Law Commission's intention to provide for the effects of innocent misrepresentation through article 45, for if an error in a treaty was the result of an innocent misrepresentation, such error might be invoked to void the treaty; but that was not clear from the commentary, which stressed the error rather than the conduct that had brought it about. Where the whole treaty had been based on an innocent misrepresentation, it might still be covered by the phrase " error in a treaty " in article 45. His delegation would appreciate the comments of the Expert Consultant on the matter, particularly in view of the categorical restriction in article 39, which made Part V exhaustive of the means of impeachment of the validity of treaties.

54. Mr. VOICU (Romania) said that his delegation was in favour of the International Law Commission's text of article 45. Although sub-paragraph 1 (*a*) of the United States amendment (A/CONF.39/C.1/L.275) improved the text, the Romanian delegation had considerable doubts as to the advisability of including the new sub-paragraph 1 (*b*). The idea stated in that sub-paragraph was already covered by the preceding provision, which referred to the " essential basis " of the State's consent to be bound by a treaty, while the change in terminology proposed in sub-paragraph 1 (*b*), which referred to facts or situations " of material importance " to consent, seemed to be merely a change of emphasis. On the other hand, the term " of material importance " lent itself to subjective interpretation, which could not promote stability in treaty relations.

55. The proposed reference to " reasonable diligence " in paragraph 2, although perhaps useful in domestic law, raised problems in international law which were out of all proportion to those it was intended to solve. It would be hard to determine the exact meaning of the term in international law, and even if it could be established theoretically, it could hardly be applied in practice.

56. His delegation appreciated the reasons for the Australian amendment (A/CONF.39/C.1//L.281), but believed that a State which discovered an error would automatically set in motion the procedure for claiming invalidity, in accordance with article 62 of the draft. The exact time when the State initiated that procedure would depend on the case; to introduce a specific time-limit would make the provision too rigid.

57. The Romanian delegation would vote for the Commission's text, subject to some purely drafting amendments which could be referred to the Drafting Committee; it supported the Ghanaian proposal for a separate vote on the words " or the performance of the treaty ", in the United States amendment to paragraph 1.

57. Mr. SINCLAIR (United Kingdom) said that not all the problems raised in article 45 were fully solved by the text of the article. Presumably, no one would seriously dispute Lord McNair's proposition that " a treaty concluded as the result of a fundamental mistake induced in one party ... by circumstances involving no negligence on its part ... is voidable by that party ".[5] The effect of error had also been considered by the Permanent Court of International Justice in the *Eastern Greenland* case [6] and by the International Court of Justice in the *Temple of Preah Vihear* case.[7]

59. The Commission had rightly decided not to consider such municipal analogies as the distinction between mutual and unilateral errors of fact, but the United Kingdom delegation doubted whether all examples of possible error were covered by the article. Moreover,

[5] McNair, *The Law of Treaties*, p. 211.

[6] *P.C.I.J.* (1933), Series A/B, No. 53.

[7] *I.C.J. Reports 1962*, p. 26.

the article referred to errors " in a treaty ", but there might be errors not involving fraudulent conduct concerning the basis of a treaty which might not be covered by the Commission's text. His delegation therefore supported the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in a treaty ".

60. It also supported the United States amendment because it seemed to develop the effect of error on the validity of treaties more fully than did the original article. It was clear from the commentary, particularly from paragraph (4), that the *dicta* quoted from the *Eastern Greenland* and *Temple* cases merely threw light on the conditions under which error would not vitiate consent, rather than on those under which it would do so. That made it most important to consider the exact wording of the article very carefully. His delegation had some hesitation over the phrase " formed an essential basis of its consent to be bound by the treaty " for, although the phrase had been used in other provisions of the draft, the criterion was rather subjective. It seemed preferable to clarify the idea by adding a clause along the lines of the sub-paragraph 1 (*b*) proposed by the United States.

61. It also seemed desirable to include in paragraph 2 a rule to the effect that a State might not invoke an error if it could have avoided it by the exercise of reasonable diligence. Since, however, such an addition might give rise to further difficulties of interpretation, his delegation wished to re-emphasize the need to establish some objective machinery for the settlement of disputes which might arise in connexion with the interpretation or application of article 45, as well as of other provisions in Part V.

62. The United Kingdom delegation supported the Australian amendment (A/CONF.39/C.1/L.281), for the reasons which it had advanced in connexion with article 43. It should be noted that the proposed time-limit would begin to run only from the date when the State in question discovered the error, so that the interests of any State wishing to invoke that ground of invalidity were fully protected. Although the Ghanaian representative's comments on the relevance of sub-paragraph (*b*) of article 42 were pertinent, the United Kingdom delegation considered that there was some advantage in setting a definite time-limit.

63. Mr. WERSHOF (Canada) said that his delegation could support the United States amendment (A/CONF.39/C.1/L.275) for the reasons given by its authors and subsequently by the United Kingdom representative. The Canadian delegation could also support the Australian amendment (A/CONF.39/C.1/L.281).

64. The main reason why the Canadian delegation had asked to speak was that article 45 was the first of a series of provisions in Part V setting out grounds for invalidating a treaty. Although Canada supported some of those articles, including article 45, in principle, that support was conditional on the Committee's final decision on article 62: the Canadian Government wanted to be sure that adequate provisions for adjudication on disputes relating to those articles would be provided for in revised article 62. His delegation had thought it advisable to enter that caveat at the outset of the Committee's consideration of that group of articles, in order to avoid having to repeat it in subsequent debates.

65. Mr. MARESCA (Italy) said that error could be invoked as a ground for the invalidation of a treaty if it was excusable, but not in cases of serious negligence, which might be regarded as deliberate error. Moreover, from the practical point of view, a situation where error was discovered could not be maintained indefinitely while the State concerned made up its mind whether or not to claim invalidity.

66. The Italian delegation could therefore support the United States amendment (A/CONF.39/C.1/L.275) to delete the phrase " in the treaty ", which was rather more than a drafting amendment. It could also vote for the United States amendment to add a new sub-paragraph 1 (*b*); the reference to the performance of the treaty was perfectly relevant, since the will of the State to invalidate a treaty extended beyond consent to be bound to performance. Further, the proposal to add the criterion of the exercise of reasonable diligence was sound, particularly since that criterion had constituted the basis of a decision of the International Court of Justice. Finally, the Italian delegation could support the Australian amendment (A/CONF.39/C.1/L.281), for although the International Law Commission had decided against including any time-limit in the draft, the gravity of any prolonged delay in claiming invalidity warranted an exception to that negative rule.

The meeting rose at 1 p.m.

FORTY-FIFTH MEETING

Tuesday, 30 April 1968, 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)*

Article 45 (Error) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 45 of the International Law Commission's draft.

2. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that the United States amendment (A/CONF.39/C.1/L.275) raised important problems. The deletion of the words " in a treaty " in paragraph 1 was not a drafting amendment; it was linked with paragraph 1 (*b*) of the amendment and was tantamount to saying that the error might relate not only to the treaty, but also to its performance. That was a new element and was dangerous, especially for the principle *pacta sunt servanda*. A State wishing to avoid performance of a treaty might claim that the treaty had not brought it the advantages expected.

3. With regard to the second part of the amendment, which introduced the idea of " reasonable diligence " into paragraph 2, practice in internal law and in private law had shown that it was extremely difficult to determine whether a person had shown diligence or not. The United States representative had himself acknowledged