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adding a safety clause, such as " unless the State could not with reasonable diligence have discovered the ground prior to the expiry of the time-limit ".

58. A further practical reason for adopting the new rule was that it became more difficult, with the passage of time, for a State seeking to preserve the validity of a treaty to adduce evidence in support of its position. Witnesses might die and documents might be destroyed or lost; the longer the period that elapsed between the conclusion of the treaty and the invocation of invalidity, the less likely it would be that a reliable judgment could be made on the claim. Indeed, after ten years had passed, the State with the largest number of archivists was the most likely to prevail in any dispute; the difficulties involved were illustrated in a number of cases decided by the International Court of Justice.

59. His delegation did not insist that the time-limit should be fixed at ten years, although that seemed a reasonable time. It considered that its proposal was substantive, and should be voted on, but it would suggest that the vote be taken on the principle, and that if the principle were approved, the amendment be referred to an appropriate group for consideration of the proper time-limit and of the question of including a safety clause.

60. In view of the widespread support for the proposal in article 42, the United States had been surprised by the introduction of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) the adoption of which, for all practical purposes, would have the same effect as the deletion of the article. The amendment seemed to be designed to introduce special rules in order to cover specific long-standing disputes: but revision of the Commission's draft for such purposes would open the door to a flood of amendments, seeking to incorporate in the convention the principles designed to support stale claims of invalidity, instead of legal rules applicable to all treaties. The United States was convinced that the only realistic way of achieving a codification of the law applicable to treaties concluded by existing and future States was to deal with the future, not with the past. On the other hand, it fully understood the desire of States facing current problems not to have their legal positions undermined by any of the provisions of the convention, and would have no objection to a proposal that the convention should apply only to future treaties.

The meeting rose at 1.5 p.m.

SIXTY-SEVENTH MEETING

Monday, 13 May 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 42 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 42 of the International Law Commission's draft.[1]

2. Sir Lionel LUCKHOO (Guyana) said that in article 42 the International Law Commission had clearly been seeking to codify existing principles, while at the same time incorporating new principles deriving from developments in the international community. Article 42 as formulated by the Commission contained those elements of continuity and certainty without which law ceased to reflect the moral awareness of a society and degenerated into congeries of arbitrary imperatives. Sub-paragraph (*a*) of the article was consistent with the generally accepted principles of international law regarding consent and the sovereign independence of States, according to which a State must be considered competent to decide whether it wished to continue to enjoy rights and assume obligations under a treaty concluded in the circumstances described in articles 44 to 47.

3. Sub-paragraph (*b*) involved somewhat different considerations. The great importance in international law of the doctrines of sovereignty and consent had helped to determine the content of the jural postulate according to which the consent of States was not to be lightly presumed. Recognition of the need to inject some functional elements into the body of norms which governed conduct at the level of inter-State relations had led to the formulation of the principle that consent might be inferred from conduct. Equity and good faith required that a State which, by its conduct, had induced another State to believe that certain facts existed, should be precluded from denying their existence if, by so doing, it prejudiced the interests of that other State which had acted in good faith.

4. His delegation therefore supported article 42 as it stood, but thought that the substitution of the word " shall " for the word " may " in the first line would strengthen the element of certainty already present in the Commission's draft. That was the purpose of his delegation's amendment (A/CONF.39/C.1/L.268), which could be examined by the Drafting Committee.

5. For the reasons he had stated, his delegation could not accept the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). In introducing that amendment, the Venezuelan representative had said that the principle that a party could not be permitted to benefit from its own inconsistencies could not be invoked when the treaty was void *ab initio*. It should be noted, however, that the circumstances contemplated in articles 43 to 47 did not render a treaty void *ab initio*; the aggrieved State was merely given the right, subject to the provisions of article 62, to invoke circumstances as grounds for invalidating the treaty. If the amendment was accepted, the consequent deletion of the reference to articles 46 and 47 would mean that fraud, and the corruption of a State's representative, could be invoked to terminate a treaty although the parties, as sovereign independent entities, had expressly agreed to ignore a defect in the consent to be bound, or although the invoking State had acquiesced in the continuing validity of the treaty

[1] For the list of the amendments submitted, see 66th meeting, footnote 10.

by its conduct. The amendment went even further: it proposed the deletion of sub-paragraph (*b*), so that a State which had acquiesced in the fraud and accepted the benefits of the treaty could seek at a later date to invalidate it when political expediency dictated such a course of action. The amendment, if accepted, would thus destroy the very foundation of principles enunciated and accepted by every civilized community for years.

6. In its commentary, the International Law Commission had referred to the *Temple of Preah Vihear* case and the separate opinion of the Vice-President of the Court, Judge Alfaro, who had said: " This principle, as I understand it, is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation ... a State must not be permitted to benefit by its own inconsistency to the prejudice of another State. ... Silence by a State in the presence of facts contrary or prejudicial to rights later on claimed by it ... can only be interpreted as tacit recognition given prior to the litigation ".[2]

7. Today, there were large nations and small nations. Some could assert their rights by force, others lacked the means to do so. On attaining independence, some colonial territories had succeeded to treaties establishing boundaries. If the amendment was accepted, a State which was party to a boundary treaty with a former colonial power could attempt to impeach the validity of the treaty and advance unreasonable claims to the territory of the newly-independent State. That might be considered a monstrous suggestion, but means of encouraging any such act should not be provided. To accept the amendment would be to introduce elements of instability and uncertainty into the generally accepted norms of international law. Principles hallowed by time and judicial decisions—principles which provided an element of harmony indispensable in treaty relations—must not be undermined. Organizations such as the United Nations should proclaim equitable principles intended to protect the weak.

8. Mr. DE CASTRO (Spain) stressed the importance of article 42, which set conditions and limitations for the future application of several articles already adopted by the Committee. If it was established that a State invoking grounds for invalidating or terminating a treaty had confirmed by its conduct, expressly or impliedly, that the treaty was valid, in force or in operation, the scope of the articles establishing those grounds for invalidity would automatically be limited.

9. All the rules whose effect was to restrict the scope of Part V of the convention by limiting the scope of the grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty should therefore be drafted with the utmost precision so as to ensure stability and justice in the law of treaties. They must not impair the other essential provisions in the draft articles.

10. In the desire to further that aim, the Spanish delegation had submitted amendments (A/CONF.39/C.1/L.272) to the introductory sentence of the article and to sub-paragraph (*b*). It accepted, in principle, the idea of article 42, for the rule it stated, which was based on good faith and equity, would help to improve international morality in the future by barring wrongful and arbitrary claims relating to the invalidity or termination of treaties. To specify carefully the content and scope of article 42 would thus be equivalent to specifying and defining an element of good faith in international relations.

11. It was difficult to achieve the necessary precision, however, and the text of article 42 presented some danger of confusion and uncertainty. The danger was particularly serious in sub-paragraph (*b*) of the article, where the idea of acquiescence appeared. That might be why the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) called for the deletion of the sub-paragraph. The Spanish delegation believed that its proposal would make it possible to retain sub-paragraph (*b*) by specifying the conditions for its application and eliminating the dangers of the present text.

12. The first problem raised by the text related to the time factor. Some delegations had proposed setting a time-limit, but that was a procedural matter, and article 42 raised more serious problems. The proviso " after becoming aware of the facts " in the introductory sentence seemed inadequate. For if the ground for invalidating or terminating a treaty still existed at the time when it was invoked, article 42 should not be applicable. The Spanish amendment therefore specified that a State " being aware of the ground, and the ground having ceased to exist " could not invoke that ground for invalidation or termination.

13. The second problem related to the conduct of a State which might be considered to have acquiesced in the validity of a treaty. What were the factors on which a final judgment of its conduct could be based? Silence could mean approval, disapproval or indifference. What value should be attached to the protest of the State injured by the invalidity of the treaty? It should not be forgotten that some writers who defended the imperialist *status quo* and situations established by coercion or force had tried to restrict the effect of the objections and to extend the effect of acquiescence unduly. Another factor to be considered might be the persistence of a State's conduct for some length of time. It would then be necessary to specify whether a single act was sufficient for confirmation or whether such acts must continue over a period. For confirmation to be established, there must be no possible doubt about the State's conduct. That was what the Spanish amendment proposed. Merely to consider that a State had acquiesced, as article 42 put it, would open the door to all sorts of uncertainties which might lead to arbitrary action and consolidate unlawfully established situations.

14. The notion of acquiescence had been introduced by a member of the International Law Commission to avoid the undesirable use of municipal law terms such as " preclusion " or " estoppel " in article 42. It was true that that notion was much in favour at present, especially since the judgments of the International Court of Justice in the cases of the *Temple of Preah Vihear* and the *Arbitral Award of the King of Spain*. The concept was not precise enough, however, and its scope was not sufficiently well-defined for it to be used in article 42.

[2] *I.C.J. Reports 1962*, pp. 39 and 40.

In paragraph (4) of its commentary, the International Law Commission had explained the difficulty of introducing municipal law terms into international law, but uncertainties could not be avoided merely by eliminating terms. It might therefore be asked whether the notion of acquiescence, which served solely to cover principles of municipal law, might not cause great confusion. In the opinion of the International Law Commission, if the notion of acquiescence was to be acceptable, it must reflect the technical features of the international order. But it did not. For instance, the principle *allegans contraria non audiendus est*, on which the Commission's reasoning was based, provided no real basis for the idea of confirmation by acquiescence in the validity of a treaty that was void. In municipal law the principle was a sanction against bad faith, directly linked with conduct considered to be unlawful. It operated in the sphere of responsibility, not as confirmation of grounds for nullity of a contract *ab initio*.

15. The Spanish delegation therefore considered that the notion of acquiescence should be removed from article 42. Confirmation was possible only where a State's conduct clearly showed that it wished to renounce the right to invoke the ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. If the freely expressed will of a State was the foundation of the law of treaties, that will should be given the importance it warranted, whether it was manifested expressly or tacitly. Acquiescence called for a very delicate evaluation, in which arbitrary interpretation and error were only too easy. The will of States, on the other hand, corresponded more closely to the technical features of the international order, for in principle, no limitation on the sovereignty of the State could be presumed in that order.

16. Article 42 should be drafted in terms that did not conflict with the *pacta sunt servanda* principle. A treaty which was not valid, to which a State had not freely consented while fully aware of the facts, could not be imposed on it. To render valid what was invalid required something other than passive conduct. The Spanish delegation accordingly believed that the conditions for and effect of confirmation should be clearly stated.

17. The eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) called for the deletion of sub-paragraph (*b*) of article 42, which would remove the danger involved in introducing the word "acquiesced". The Spanish proposal was certainly more finely shaded, however, and took account of the International Law Commission's wish to introduce into the convention the principle *venire contra factum proprium non valet*, or estoppel. The Spanish delegation would have little difficulty in accepting the first part of the eight-State amendment, since the same rule could be applied to treaties concluded in the circumstances specified in articles 46 and 47 as the Commission had laid down for treaties concluded through coercion of the representative of a State.

18. Mr. SARIN CHHAK (Cambodia), introducing his delegation's amendment (A/CONF.39/C.1/L.273), said that the text of article 42 was well balanced and calculated to ensure the stability of treaties. In his opinion, the growth of international co-operation presupposed the stability of concluded treaties, achieved through their performance in good faith. His delegation accordingly considered that once concluded, a treaty was intended to last and that, *a priori*, all treaties were valid; nullity should be a rare exception.

19. So great was the importance the International Law Commission attached to the security of treaties that even in Part V it had provided, in article 42, final measures to safeguard their existence—measures which, as it were, counterbalanced the provisions that followed.

20. Sub-paragraph (*b*) of article 42 provided that certain defects could not be invoked as a ground for invalidating a treaty if the invoking State must be considered as having acquiesced in the validity of the treaty. In such cases there was a contradiction between the conduct of the State in question and the claim of invalidity. Good faith, equity and logic demanded that the conduct, not the complaint, should be taken into consideration. The conduct of the State was the clear manifestation of its acquiescence and its real will, whereas the complaint was made only for the requirements of the case.

21. Since article 45 had been adopted by the Committee by a large majority in the form proposed by the International Law Commission, it would be logical to retain article 42 as it stood, but a few drafting amendments should be made.

22. His delegation thought that article 42 could not cover certain abuses, because it contained no mention of articles 48 and 49, which dealt with coercion and the threat or use of force—means which had often been used in the past to procure the consent of a State. The defects referred to in article 42 were more permanent and might vitiate treaties concluded between States which were on an equal footing.

23. To eliminate all possibility of recourse to article 42 to cover past abuses, however, his delegation was proposing an amendment which would clarify the terms of sub-paragraph (*b*). The word "freely" had been added to show that the conduct referred to was the manifestation of a real will free from all coercion, which was the source of the obligations and rights constituting the basis of the treaty.

24. He could not support the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) because its content was too far removed from that of the articles already adopted by the Committee of the Whole.

25. Mr. BINDSCHEDLER (Switzerland) said that the purpose of his delegation's amendment (A/CONF.39/C.1/L.340) was not merely to ensure the stability of the law and treaty regulations. The terms "coercion" and "force" might be given very different interpretations. In some cases the application of article 42 would meet with difficulties. In his opinion, it was not sufficient to declare that a treaty vitiated by an element of coercion was void; it was also necessary to establish an effective procedure for obliterating the wrongful effect of the coercion and for restoring the situation as it had been originally. As experience with the Stimson doctrine had shown, that would unfortunately not always be the case. Account must be taken of that deficiency in the present structure of the international community and provision made for the consequences. From that point of view there was

no difference between the cases referred to in articles 43 to 47 and those dealt with in articles 48 and 49.

26. With regard to sub-paragraph (*a*) of article 42, he did not see how a State which had expressly agreed to conclude a treaty to which an element of coercion attached could be entitled to claim that the treaty was void if the element of coercion had disappeared. Furthermore, he did not understand on what grounds a State which appeared, by reason of its conduct, to have acquiesced in the validity of a treaty concluded under coercion, could claim that the treaty was void if it had been applied over a very long period. The omission of a reference to article 49 in article 42 might disturb the whole international legal system and endanger peace treaties and armistice agreements.

27. He thought that the relative time-limit prescribed in the Australian amendment (A/CONF.39/C.1/L.354) should be linked with the absolute time-limit of the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1), so as to establish a complete system which would promote the stability of the law. Lastly, he supported the Cambodian amendment (A/CONF.39/C.1/L.273), which clarified the principle stated in sub-paragraph (*b*).

28. Mr. BRAZIL (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.354), said that Australia had already submitted amendments to articles 43 to 48 which likewise set a twelve-months' time-limit for a State wishing to invoke a ground for invalidity. At the time, certain representatives had considered that the matter raised by those amendments properly belonged to article 42, in particular sub-paragraph (*b*) ; the Australian delegation had deferred to that view in submitting its amendment to article 42. The proposal applied only to articles 43 to 47, all of which dealt with a situation in which the expression of a State's consent to be bound by a treaty had a defect that could be invoked as a ground for invalidating the treaty. The most important feature of the amendment was that the time-limit only began to run when the State concerned had become aware of the ground of invalidity; that was the main difference between the Australian amendment and the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1). He thought that in practice it would always be possible to establish that a State had been aware of the ground of invalidity at a certain point in time. If not, the Australian amendment would not apply. The twelve months' period specified was only a suggestion and he would ask the Committee to pronounce only on the principle of the amendment.

29. He reminded the Committee that in paragraph (3) of its commentary to article 59, the International Law Commission had pointed out that some municipal courts had held that the doctrine of *rebus sic stantibus* must be invoked " within a reasonable time after the change in the circumstances was first perceived ".

30. The purpose of the Australian amendment was to ensure good faith and stability in treaty relations.

31. Mr. GARCIA-ORTIZ (Ecuador) said he regarded article 42 as an attempt to establish a legal principle connected with good faith and fair dealing, namely, that a party was not permitted to benefit from its own inconsistencies. A certain analogy between the situation referred to in article 42 and that covered by the English doctrine of estoppel might suggest that article 42 merely applied that common law notion to international law. He did not think that the cases covered by article 42 were really cases of estoppel; in that connexion, Mr. de Luna had told the International Law Commission that " The common law doctrine of estoppel had resulted from a long history of judicial decisions " and that " On the continent, the subject was governed by rules which had their origin in the Roman law maxims *nemo contra factum suum proprium venire potest* and *allegans contraria non audiendus est* ".[3] In his (Mr. Garcia's) view, it was unnecessary to have recourse to the doctrine of estoppel in the cases referred to in article 42, for the *factum proprium* maxim seemed to be sufficient.

32. The rule stated in article 42 had a basis of justice and good faith, but it should only be applied with the utmost caution in the international sphere. The International Law Commission had excluded articles 48 to 50 from the application of the rule expressed in article 42, because they dealt with cases of absolute nullity of treaties. In that connexion, it was well to remember the opinion expressed by Mr. Paredes in the International Law Commission, that treaties which were void *ab initio* " could not be affirmed or adjusted by any means except the conclusion of a new treaty without the defects of the former one." [4] Other articles, however, for example articles 46 and 47, specified circumstances which could result in a treaty being void *ab initio* without it being necessary to apply " estoppel ".

33. His delegation was opposed to the view that the presumed or supposed acquiescence by a State in the validity of a treaty could validate that treaty if it was void *ab initio.*

34. The Ecuadorian delegation supported the amendment submitted by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1), but was opposed to those submitted by Australia (A/CONF.39/C.1/L.354) and by the United States and Guyana (A/CONF.39/C.1/ L.267 and Add.1).

35. Mr. KHASHBAT (Mongolia) stressed the great importance of article 42 for the stability of treaty relations between States. The conditions under which a State could no longer invoke a ground for invalidating a treaty were not, however, formulated sufficiently clearly in the text.

36. The Mongolian delegation was opposed to the amendment by the United States and Guyana (A/CONF. 39/C.1/L.267 and Add.1), as it seemed neither desirable nor justified to consider a State as having acquiesced in the validity of a treaty after ten years of performance, even if the treaty was vitiated as to substance or had been unlawfully concluded.

37. The eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) clarified the International Law Commission's text and made it unambiguous. It deleted sub-paragraph (*b*) because it was not always possible to judge a State's conduct; it might dispute the presumption

[3] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 837th meeting, para. 93.

[4] *Yearbook of the International Law Commission, 1963*, vol. I, 701st meeting, para. 5.

that it had renounced its right to invoke grounds for invalidity, even though that presumption seemed obvious to other States. It was quite right that the principle of article 42 should not apply to articles 46 and 47, which concerned the will of a State to be bound by a treaty and therefore rendered the treaty void *ab initio*. On the other hand, his delegation had doubts about the deletion of the reference to articles 57 to 59, especially article 57. For in the event of a breach by one of the contracting parties, another party to the treaty might protest against the breach, but the treaty could remain in force between them; whereas if the reference to article 57 was deleted, the operation of the treaty would be suspended, which would greatly endanger its future. He therefore asked the sponsors of the eight-State amendment to consider carefully the possible consequences of deleting the reference to article 57.

38. He could not support the Swiss amendment (A/CONF.39/C.1/L.340), because the rule stated in article 42 should not apply to articles 48 and 49, which rendered a treaty void *ab initio*.

39. The amendment submitted by Guyana (A/CONF.39/C.1/L.268) was concerned with a matter of drafting and should be referred to the Drafting Committee, though he thought the word " may " seemed more flexible and more suitable than the word " shall ".

40. Mr. ALVAREZ TABIO (Cuba) said that article 42 embodied the theory *nemo contra factum suum proprium venire potest*. That theory was universally recognized, but its practical application gave rise to difficulties; article 42 was a case in point.

41. The Cuban delegation considered, first of all, that as defined in the opening sentence of the article, the field of application of the principle was not consistent with the régime of invalidity established by the draft, under which the effect of the grounds for invalidity in Part V was to invalidate a treaty *ipso jure*, with a very few exceptions. That being so, it was hard to see how the confirmation of a treaty vitiated by an initial defect could be logically accepted.

42. The theory of the *factum proprium* should only be applied to the régime of invalidity provided for in the draft in the case of treaties which became void by reason of subsequent facts. Those treaties were based on valid consent, the effect of which could be invalidated on the initiative of the injured party. It was therefore logical that the injured party should be able to renounce its right to claim invalidity, since such a treaty was not void *ipso jure*. The treaty was presumed to be valid unless there was evidence to the contrary.

43. The same did not apply, however, to a treaty that was void *ab initio*. If a party had been guilty of fraud or corruption, it was not justified in relying on the theory of the *factum proprium*, and article 65 denied it the right to take advantage of the legality of acts performed in bad faith before the invalidity was invoked.

44. For the application of the principle on which article 42 was based, two cases must be distinguished: that in which the treaty was invalidated after the parties had acted in good faith for some time, and that in which consent was the result of reprehensible conduct by one of the parties. Hence, it seemed illogical for article 42 to place on an equal footing cases in which a treaty was void *ab initio* and cases in which consent could be invalidated only on the application of the injured party.

45. Article 42, sub-paragraph (*b*) was not acceptable to the Cuban delegation, because it applied the principle of the *factum proprium* on the basis of tacit consent manifested by the silence of the injured party. The provision should be rejected on two grounds. First, the presumption of consent derived from conduct which was not defined precisely enough not to leave a dangerous margin of discretion liable to impair the stability of international relations. The problem became even more serious where treaties had not been freely consented to, for the provision authorized, on the basis of ill-defined conduct, confirmation of a treaty which had not even come into existence. Secondly, the rule in sub-paragraph (*b*) carried the theory of estoppel to extremes by placing the onus of action on the victim of fraud or corruption.

46. If article 42 was taken to read: " A State may no longer invoke a ground for invalidating... a treaty... if, after becoming aware of the facts... it must by reason of its conduct be considered as having acquiesced... in the validity of the treaty ", the wording permitted an interpretation bordering on the absurd, namely that, as could be inferred from that wording, silence was the conduct from which acquiescence was deduced; in other words, silence gave consent. Moreover, no provision was made for the possibility that such conduct might be the consequence of a situation that allowed no freedom of choice. Thus mere abstention or silence, in whatever circumstances, was always taken as tacit consent.

47. Consequently, in view of the unrestricted application of the principle of the *factum proprium* and the ambiguous form in which it was stated, the Cuban delegation found article 42, sub-paragraph (*b*) unacceptable.

48. It would therefore vote for the solution proposed in the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). For the reasons he had already given it could not accept the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) or the Australian amendment (A/CONF.39/C.1/L.354).

49. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) stressed the importance of article 42 in the draft convention. The article could not be accepted in its entirety, however, and the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) seemed to be a definite improvement.

50. His delegation thought the article should be drafted with the utmost precision, so as to rule out the possibility of its being applied to cases in which a State, after becoming aware of the ground for invalidity, had been unable freely to exercise its right to contest the validity of the treaty.

51. He also thought it preferable not to refer to articles 46 and 47, and he fully endorsed the arguments advanced by the Mongolian representative regarding articles 57-59.

52. He was opposed to the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), and to the Swiss amendment (A/CONF.39/C.1/L.340), which widened the scope of article 42.

53. Mr. KEMPFF MERCADO (Bolivia) said he had little to add to the Venezuelan representative's very comprehensive introduction of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3). He merely wished to point out that the notion of implied acquiescence in the validity of a treaty expressed in sub-paragraph (*b*) of article 42 could be a source of disputes; it might also be unfair to States which had been unable to exercise their full sovereignty in the conclusion of a treaty and had subsequently been subjected to pressure to prevent them from terminating or withdrawing from the treaty. Such situations were unacceptable in the modern world and the deletion of sub-paragraph (*b*) would prevent their occurrence. Consequently, his delegation could not accept the amendments relating to that sub-paragraph.

54. Mr. SOLHEIM (Norway) said that the aim of article 42 was to contribute to the stability of treaties by making it an obligation of the parties to make their position clear when they became aware that something was wrong with a treaty. As the International Law Commission had pointed out in paragraph (1) of its commentary, the foundation of the article was essentially good faith and fair dealing.

55. His delegation fully agreed with the principle on which the article was based, but wished to make a few comments on the enumeration of the articles in respect of which that principle was applicable.

56. First of all, his delegation doubted whether the reference to articles 46 and 47 was really justified. The fate of article 42 would ultimately depend on what would happen to those articles at the plenary session of the Conference in 1969. The Committee's vote on article 47 suggested indeed that that article would finally be deleted. However, the fraud and corruption which, according to the existing wording of articles 46 and 47, invalidated a State's consent to be bound by a treaty, must be attributable to another negotiating State; it seemed doubtful whether that other State, which had been responsible for the fraud or corruption, should be in a position to benefit from a rule by virtue of which the State which had been the victim of fraud or corruption would in certain circumstances lose the right conferred on it by articles 46 and 47.

57. The fact that articles 46 and 47 also covered multilateral treaties tended to complicate matters: the other parties might have a legitimate interest in seeing that the system proposed by the International Law Commission was maintained. Nevertheless, on balance and in view of the extreme rarity of cases of fraud and corruption in the conclusion of a treaty, his delegation was inclined to believe that no great harm would be done by deleting from article 42 the reference to articles 46 and 47. It was perhaps not pure coincidence that, in its commentary to article 42, the International Law Commission gave no reasons why articles 46 and 47 were included among the articles to which the principle of article 42 was applicable.

58. Consequently, although his delegation would listen attentively to the rest of the debate on article 42 and possibly adjust its final position, it was inclined to support that part of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) which would delete the reference to articles 46 and 47 in the opening sentence of article 42. On the other hand, it was strongly opposed to the deletion of sub-paragraph (*b*) proposed by the same group of countries, as the whole article would become meaningless without that sub-paragraph. It was also strongly opposed to deleting the reference to articles 57 and 59, as was proposed in that amendment.

59. His delegation supported the proposal by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1) to delete the reference to article 58, a proposal which was logical and juricidally well-founded.

60. Lastly, it approved of the principle underlying the amendment submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1), but had an open mind about the length of the period proposed: it might even be preferable not to mention a specific number of years. Further, instead of referring to " the date it first exercised rights or obtained the performance of obligations pursuant to the treaty ", which might create difficulties, it would be better to take as the starting point the entry into force of the treaty for the State invoking a ground for invalidating it.

61. Mr. MYSLIL (Czechoslovakia), speaking as a co-sponsor of the Finnish amendment (A/CONF.39/C.1/L.247 and Add.1), observed that the grounds for invalidity set out in article 58 could exist independently of the expressed will of the parties. Hence the rule in article 42 could not apply to those grounds.

62. The loss of the right to invoke a ground for invalidity was hardly conceivable in cases of fraud, corruption and, *a fortiori*, coercion. Coercion exercised at the time of the conclusion of a treaty could continue at the time of the alleged acquiescence, whether express or tacit. The Czechoslovak delegation accordingly supported the first part of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) and would vote against the Swiss amendment (A/CONF.39/C.1/L.340).

63. His delegation had doubts about the amendments to sub-paragraph (*b*) of article 42 and would abstain from voting on them. It was, however, opposed to the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and the Australian amendment (A/CONF.39/C.1/L.354), which made an unnecessary addition to the sub-paragraph.

64. Mr. RATTRAY (Jamaica) said that, as in most systems of municipal law, parties could not both approbate and reprobate in their contractual relations. The International Law Commission had sought in article 42 to lay down rather stringent conditions to preclude a State from invoking certain grounds for invalidity in certain circumstances.

65. The right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty was lost when two conditions were fulfilled: first, the State must be aware of the facts giving rise to the ground of invalidity and, secondly, the State must either have expressly agreed to renounce its right to invoke the ground of invalidity or be deemed by reason of its conduct to have renounced that right, being considered to have acquiesced in the validity of the treaty or its maintenance in force.

66. If a State was aware of the facts entailing invalidity and sought to avail itself of the right to invoke the ground of invalidity, it must resort to the procedure laid

down in article 62, that was to say, it must notify the other parties of the claim and must indicate the measure proposed to be taken with respect to the treaty and the grounds therefor. If the State failed to resort to that procedure, the failure in itself did not, under article 42, cause the State *ipso facto* to lose the right to invoke the invalidity at a later date. The failure to resort to the procedure after the discovery of the facts might indeed be *prima facie* evidence that the State renounced its right to invoke the invalidity, but it was not conclusive, and the International Law Commission had been wise to require, as a fundamental criterion, express agreement or tacit acquiescence.

67. In the international community, however, where might too often prevailed over right, the mere awareness of the facts and the existence of a right were meaningless if a State could not freely exercise its right to invoke the nullity of a treaty. The Commission had therefore been right to state the principle of acquiescence in general terms in article 42, sub-paragraph (*b*), and to explain in paragraph (5) of its commentary that the principle 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.

68. The Jamaican delegation could not support the amendment by Finland and Czechoslovakia (A/CONF. 39/C.1/L.247 and Add.1), which would permit a State at any time to terminate a treaty or suspend its operation if there had been supervening impossibility of performance, even though the parties had expressly or impliedly agreed that the treaty should remain valid; for that would unduly fetter the freedom of action of States. Nor could it support the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) which was inconsistent with the view adopted by the Committee, that the grounds of invalidity in articles 46 and 47 and articles 57 to 59 should have the effect of making a treaty voidable, but not void.

69. His delegation could not accept the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1), for if it was adopted a State would lose the right to invoke the grounds of invalidity set out in articles 43 to 47 after ten years, even if it was not then aware of the facts entailing invalidity. On the other hand, the Australian amendment (A/CONF.39/C.1/L.354) would largely allay the fears caused by the United States and Guyanese amendment.

70. The amendment submitted by Guyana (A/CONF.39/C.1/L.268) was essentially a matter of drafting. He interpreted the word " may " in the opening sentence of article 42 to mean that a State could not invoke the grounds in question if the conditions stated in the article were satisfied, but his delegation had no objection to the amendment's being referred to the Drafting Committee.

71. His delegation could not support the Spanish amendment (A/CONF.39/C.1/L.272) because it had great difficulty in understanding how a ground of invalidity such as fraud in procuring the conclusion of a treaty, could cease to exist.

72. Lastly, while it approved of the reasons for the Cambodian amendment (A/CONF.39/C.1/L.273), namely, that article 42 was based on the freedom of States to exercise their right to invoke grounds of invalidity and to renounce that right—since without that freedom there could be neither consent nor acquiescence—the Jamaican delegation considered that the principle was implicit in the International Law Commission's text.

73. Mr. BENYI (Hungary) said he was afraid that article 42 as it stood might be open to different and even contrary interpretations. The reference to articles 46 and 47 and 57 to 59 seemed calculated unduly to restrict the scope of the articles in Sections 2 and 3 of Part V of the draft. He found the opening sentence of the article too rigid; if, for example, after a breach of a treaty, the injured State nevertheless continued to fulfil its obligations under the treaty because it had good reason to hope that the defaulting State would change its attitude, it should not thereby lose the right to terminate the treaty.

74. With regard to the reference to article 58, his delegation favoured the amendment by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1) and the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) for the reasons given by their sponsors. In the event of supervening impossibility of performance, a State could neither expressly nor tacitly acquiesce in the maintenance in force of the treaty. His delegation thought that the benefit of the *rebus sic stantibus* rule should remain available to the parties, and it supported the eight-State amendment, which would delete the reference to article 59. It also agreed with the proposal in that amendment that the reference to articles 46 and 47, on fraud and corruption, should be deleted. On the other hand, it could not support the Swiss amendment (A/CONF.39/C.1/L.340).

75. Sub-paragraph (*b*) of article 42, would create a presumption that silence meant acquiescence in the loss of the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. But, as had been pointed out in connexion with fraud, corruption and coercion, there were cases in which no other conduct was possible, so that silence might mean consent, refusal or indifference, as the case might be. The true significance of a State's silence must always be deduced from the circumstances. His delegation therefore supported the eight-State proposal to delete sub-paragraph (*b*).

76. Mr. SINCLAIR (United Kingdom) said that in general his delegation supported the text of the article submitted by the International Law Commission. The Commission's preliminary draft had been concerned with estoppel, whereas the revised draft was concerned with acquiescence. It should be noted that other articles in the draft provided for acquiescence and tacit consent, in particular article 17, paragraph 5, on the acceptance of reservations. His delegation understood that article 42 did not exclude the operation, under customary law, of the doctrine of estoppel in relation to any article of the convention, except those on coercion and *jus cogens*, which the Commission clearly intended to exclude.

77. It was true that the application of sub-paragraph (*b*) might raise practical problems, but that was no reason for deleting it; it was rather a reason for subjecting the legal rule it contained to some objective system for settling such issues. His delegation was therefore opposed to the eight-State amendment (A/CONF.39/

C.1/L.251 and Add.1-3), the effect of which would be to deny the concept of acquiescence, which was a clearly recognized rule of international law supported by a very considerable body of judicial authority and State practice. The principle of good faith required that a party should not be permitted to benefit from its own inconsistency of conduct to the detriment of other parties. There were certainly considerable risks of abuse in the series of articles to which article 42 referred, but as the representative of Guyana had so clearly demonstrated, those risks would be substantially increased if the concept of acquiescence by conduct was not adequately recognized. Part of the argument advanced against the Australian amendments to articles 43 and 45 to 48, introducing time-limits, had been that the point was sufficiently covered in sub-paragraph (*b*) of article 42. Since the Committee had decided that there was no need for time-limits in those articles, his delegation trusted it would recognize the need to retain sub-paragraph (*b*) of article 42.

78. His delegation could not support the amendment submitted by Spain (A/CONF.39/C.1/L.272). The determining factor in acquiescence was that the State should be aware of the facts, not that the ground of invalidity should have ceased to exist. Moreover, sub-paragraph (*b*) of the Commission's text presented a much more objective text than the Spanish amendment. The amendments proposed by Cambodia (A/CONF.39/C.1/L.273) and Guyana (A/CONF.39/C.1/L.268) seemed to be concerned with drafting and would no doubt be referred to the Drafting Committee. The amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) had the advantage of introducing a time element. The period of time to be adopted was, of course, open to discussion, but the principle in itself was attractive. For similar reasons, his delegation was in favour of the Australian amendment (A/CONF.39/C.1/L.354). In both cases it should be left to the Drafting Committee to decide on the period in question.

79. It had been suggested that articles 46 and 47 should be deleted from the list of articles referred to in article 42. His delegation did not see why; a State wishing to invoke fraud or corruption to invalidate a treaty had complete freedom to do so and its rights were fully protected by articles 46 and 47. Article 42 merely served to indicate that a State could also agree expressly to the validity of the treaty or acquiesce in its continued operation.

80. Mr. KOVALEV (Union of Soviet Socialist Republics) said that, as one of the sponsors of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3), he endorsed the arguments advanced at the previous meeting by the Venezuelan representative.

81. The principle stated in article 42 was certainly a safeguard against arbitrariness and should be included in the convention. But too broad an interpretation of that principle would be dangerous for small countries and for those which had recently freed themselves from the colonial yoke. The tacit acquiescence referred to in sub-paragraph (*b*) of article 42 was an unacceptable idea, because States which had freed themselves from colonial rule might still be deprived of freedom of consent long after gaining their independence. It was essential to enable them to repudiate the obligations imposed on them by the former metropolitan country; their mere silence should not be interpreted to mean that they freely accepted those obligations. Only a clearly expressed acquiescence could be legally valid. Consequently his delegation proposed that sub-paragraph (*b*) be deleted; but that deletion could not of course affect any decisions by international bodies which might already have been taken and had entered into force.

82. The delegation of the Soviet Union was opposed to the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), which reflected a viewpoint diametrically opposed to its own. The United States delegation was trying to introduce notions taken from internal law. Such attempts, particularly a recent attempt to introduce the notion of prescription into international law, had proved to be very dangerous.

83. As to the field of application of article 42, although the International Law Commission had considered that the principle could not apply to cases of absolute nullity, that was to say, to cases in which the treaty had no legal existence, it had applied the principle to the situations referred to in articles 46 and 47, which scarcely differed from absolute nullity. To be convinced of that fact, it was only necessary to refer, for example, to the Commission's commentary on the effects of fraud. The reference to articles 46 and 47 should therefore be deleted from article 42. His delegation was also in favour of deleting the reference to articles 57 to 59, though it was aware that the nature of the nullity dealt with in article 57 was the subject of different interpretations.

84. The Swiss delegation was attempting by its amendment (A/CONF.39/C.1/L.340), to raise again a question that had already been settled by the Committee in a manner contrary to that delegation's wishes. Consequently, he did not support the amendment.

85. Mr. YASSEEN (Iraq) said that although maintenance of the *status quo* might satisfy a desire for stability, it should not be sought at the expense of justice. His delegation therefore regarded the idea underlying article 42 with some reserve.

86. The rule in question provided for the loss of a right. Such rules always called for strict interpretation; they could not be extended by analogy and the legislator must draft provisions of that nature with the greatest care.

87. The text of article 42 made the loss of the right to invoke a ground of nullity depend on the will of the State concerned and not on the deceptive appearance of the practice followed by that State. Although it was understandable that the International Law Commission had adopted the formula " must ... be considered as having acquiesced ", the basic idea was nevertheless that a State was free to accept or reject a situation which had been established contrary to the rules of international law.

88. The application of article 42 should not, however, be extended to cases of nullity *ab initio*, for in such cases there was no possibility of remedying the defect and the only solution was to conclude a new treaty. His delegation was therefore opposed to the amendments which would widen the scope of the article. On the other hand, it was in favour of those which would narrow

its scope by excluding cases in which the responsibility of the other party was manifest, such as fraud or coercion.

89. His delegation was against establishing a time-limit, as proposed in the amendments submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) and by Australia (A/CONF.39/C.1/L.354), whatever its duration. The mere fact that a period of time had elapsed did not make it certain that the State concerned had really meant to acquiesce in the validity of the treaty. On the other hand, his delegation was generally in favour of the amendments which stressed the need to refer only to a clear acquiescence. It was mainly a question of drafting which could be studied by the Drafting Committee.

90. Mr. THIAM (Guinea) thought that the field of application of article 42 was such as to limit unduly the scope of the articles dealing with defective consent. The application of the rule in article 42 even to the cases of fraud and corruption dealt with in articles 46 and 47 was contrary to the legitimate desire for stability in international relations, since it favoured the perpetrator of serious offences; besides, it diminished the role of the moral element which was present in Part V, particularly in Section 2.

91. Sub-paragraph (*b*) of article 42 was a dangerous provision, because it contained a subjective element. It was difficult and dangerous to infer the true intention of a State from its conduct. If that sub-paragraph was to be retained, at least the subjective element should be eliminated.

92. Mr. MOUDILENO (Congo, Brazzaville) said the prevailing doctrine was that a right could not be extinguished independently of the express will of its beneficiary or of the legislator. But, leaving aside that doubtful theoretical question, it might be asked whether the International Law Commission had in fact taken a position in article 42 on the possibility of a right expiring in silence. The article did not appear to provide a formal answer to that question, as it left the fate of the right in the hands of the injured party. But in reality, and that was the first criticism that the text attracted, article 42 made the right into something relative, by linking its fate with the reaction of its beneficiary.

93. Moreover, by providing that acquiescence might be tacit, sub-paragraph (*b*) failed to furnish the serious safeguards that should accompany a provision relating to the loss of a right. The conduct of the State concerned was a difficult criterion to define and a delicate one to handle. His delegation had therefore joined in sponsoring the eight-State proposal (A/CONF.39/C.1/L.251 and Add.1-3) to delete sub-paragraph (*b*).

94. Incidentally, it was not correct to speak of acquiescence in the validity of the treaty, because the treaty in question was void *ex hypothesi*. It would be better to speak of renunciation of the right to invoke a ground of invalidity. That was a question for the Drafting Committee.

95. He noted that sub-paragraph (*b*) did not settle the fate of acts performed before the discovery of the defect and the renunciation of the right to invoke it. In view of those shortcomings and obscurities, the best solution would be to delete the sub-paragraph.

96. Mr. DE BRESSON (France) said that his delegation was willing to accept article 42 as drafted by the International Law Commission. But in view of the misgivings expressed during the debate, he thought that only the Cambodian amendment (A/CONF.39/C.1/L.273) could reassure certain speakers without hampering the settlement of cases that were of too special a character to serve as a basis for the adoption of general rules.

97. It should be recognized that, to be significant, tacit acquiescence in a treaty liable to be voided must have come about freely. But to go further might mean touching on fundamental problems and, in particular, calling in question the stability of territorial status.

98. His delegation was in favour of the Swiss amendment (A/CONF.39/C.1/L.340), as it considered that, even if force had been used, equity required that when coercion had ceased the injured State should be able to decide the fate of the treaty.

99. Mr. ARMANDO ROJAS (Venezuela) said that the sponsors of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) had intended to remain strictly within the limits of the principle on which article 42 was based. The fears expressed by the representative of Guyana seemed excessive, since colonialism and imperialism must henceforth be regarded as evils of the past. However, the sponsors of the amendment attached greater importance to the deletion of sub-paragraph (*b*) than to the deletion of the reference to articles 47 and 57 to 59.

100. After consultation, the sponsors had therefore agreed to withdraw the first part of their amendment and confine it to the deletion of sub-paragraph (*b*).

101. Mr. MARESCA (Italy) said that article 42 was conceived entirely in terms of the will of the parties. That will, though its expression was initially vitiated, could subsequently impart full legal force to a treaty in different ways. Acquiescence could be express or tacit.

102. The Italian delegation was opposed to the deletion of sub-paragraph (*b*) of article 42 and in favour of the amendments which would extend the cases in which the freely-expressed will of the injured State could remedy the defect.

103. For the sake of the stability of treaty relations, his delegation was also in favour of setting a time-limit beyond which a State would lose the right to invoke a ground for invalidating a treaty.

104. Sir Humphrey WALDOCK (Expert Consultant) said that the International Law Commission had included the provisions of article 42 in its draft because it considered that a general principle of law was involved, which would be applicable in any case, even without such a provision. That principle was based on the notion of good faith and had often been applied in the decisions of international tribunals, including the International Court of Justice.

105. Although the principle was generally recognized, it could be formulated from different standpoints. It could be stated in terms of the renunciation of a right or of the principle that a State might not go back on a position which it had taken up and which it had led another State to act upon. The International Law Commission had found, however, that it could secure unanimity by

expressing the principle in terms of express agreement and tacit acquiescence implied from conduct. Thus formulated, article 42 had been adopted by 15 votes to none, with no abstentions.

106. With regard to the amendments before the Committee, he thought that those which deleted the references to some of the articles mentioned in article 42 would considerably limit its scope.

107. The Commission had considered that when a State had become aware of the facts referred to in articles 43 to 47 and 57 to 59, it was very unlikely to continue to regard the treaty as applicable. If, after having become aware of the facts, however, the State continued to act as though the treaty was still in force, a new situation arose in which good faith required that the State should be considered to have agreed to continued application of the treaty.

108. The Finnish and Czechoslovak amendment (A/CONF.39/C.1/L.247 and Add.1) would delete the reference to article 58. It could be argued, however, that if the State in question claimed that a situation had arisen which made performance impossible, the other party might nevertheless contest that claim. The first State might then continue to apply the treaty as though it were still in force, from which it could be concluded that it renounced the right to invoke impossibility of performance. It therefore seemed inadvisable to exclude the case referred to in article 58 altogether from the application of the principle stated in article 42.

109. Article 42 was designed to ensure the stability of international relations rather than that of treaties themselves. It was intended to provide protection against bad faith in the application of the rules in Part V.

110. As to the introduction of a time-limit, that was for the Committee of the Whole to decide, though it should retain the essential condition that the State concerned must have become aware of the facts. That was a vital element in the rule since, without knowledge, the obligation of good faith did not arise. The amendment submitted by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) did not appear to respect that condition. To stipulate an absolute time-limit of ten years which did not run from the date on which the facts became known to the State concerned would result in a rule that differed from the principle on which article 42 was based.

111. Lastly, he found it difficult to accept the addition, proposed in the Spanish amendment (A/CONF.39/C.1/L.272), of the condition that the ground of invalidity must have ceased to exist. That would be making what should be the consequence of the rule into a condition for its application.

112. The CHAIRMAN put to the vote paragraph 3 of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) deleting sub-paragraph (*b*) of article 42.

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

Japan, having been drawn by lot by the Chairman, was called upon to vote first:

In favour: Kenya, Mexico, Mongolia, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, Venezuela, Bolivia, Bulgaria, Byelorussian Soviet Socialist Republic, Colombia, Congo (Brazzaville), Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Hungary, India, Iran.

Against: Japan, Kuwait, Lebanon, Liechtenstein, Madagascar, Malaysia, Mali, Monaco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Philippines, Portugal, Republic of Viet-Nam, Singapore, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Algeria, Australia, Austria, Belgium, Brazil, Cambodia, Canada, Ceylon, Chile, China, Congo (Democratic Republic of), Denmark, Federal Republic of Germany, Finland, France, Gabon, Ghana, Guyana, Ireland, Italy, Ivory Coast, Jamaica.

Abstaining: Liberia, Morocco, Poland, Republic of Korea, Romania, Senegal, Sierra Leone, Syria, Thailand, Trininad and Tobago, Tunisia, United Arab Republic, Yugoslavia, Zambia, Afghanistan, Argentina, Central African Republic, Cyprus, Czechoslovakia, Dahomey, Ethiopia, Greece, Guinea, Holy See, Indonesia, Iraq, Israel.

Paragraph 3 of the eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) was rejected by 47 votes to 20, with 27 abstentions.

113. Mr. SUPHAMONGKHON (Thailand), explaining his delegation's vote, said that Thailand had been the victim of an application of the doctrine of estoppel by the International Court of Justice. He wished to emphasize that his Government did not endorse the reasoning on which the Court had based its judgement, in which a number of eminent judges had not concurred. His delegation had purposely refrained from entering into the discussion on article 42 and had abstained in the voting in order not to influence the deliberations of the Committee. It had wished to hear the objective views of representatives on the subject.

114. Mr. DE CASTRO (Spain) withdrew the first paragraph of his delegation's amendment (A/CONF.39/C.1/L.272).

115. The CHAIRMAN put to the vote the second paragraph of the Spanish amendment.

The second paragraph of the Spanish amendment (A/CONF.39/C.1/L.272) was rejected by 40 votes to 25, with 25 abstentions.

116. The CHAIRMAN put the Swiss amendment to the vote.

The Swiss amendment (A/CONF.39/C.1/L.340) was rejected by 63 votes by 12, with 16 abstentions.

117. The CHAIRMAN put to the vote the amendment submitted by Finland and Czechoslovakia (A/CONF.39/C.1/L.247 and Add.1).

The amendment was adopted by 42 votes to 13, with 36 abstentions.

118. Mr. SARIN CHHAK (Cambodia) withdrew his delegation's amendment (A/CONF.39/C.1/L.273).

119. The CHAIRMAN put to the vote the principle expressed in the Australian amendment (A/CONF.39/C.1/L.354), as requested by the Australian representative.

That principle was rejected by 44 votes to 23, with 24 abstentions.

120. Mr. WOZENCRAFT (United States of America) asked that only the principle expressed in the amendment by the United States and Guyana (A/CONF.39/C.1/L.267 and Add.1) be put to the vote.

121. The CHAIRMAN put that principle to the vote.

The principle was rejected by 42 votes to 21, with 26 abstentions.

122. The CHAIRMAN suggested that article 42, as amended, should be referred to the Drafting Committee, together with the amendment by Guyana (A/CONF.39/C.1/L.268).

It was so agreed.

The meeting rose at 7.15 p.m.

SIXTY-EIGHTH MEETING

Tuesday, 14 May 1968, 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)*

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty), and *Proposed new article 62* bis

1. The CHAIRMAN invited the Committee to consider article 62 of the International Law Commission's draft [1] and the new article 62 *bis* proposed by Switzerland (A/CONF.39/C.1/L.348).

2. Mr. FUJISAKI (Japan), introducing his delegation's amendments (A/CONF.39/C.1/L.338 and L.339), said it was clear from paragraph (1) of the commentary that the International Law Commission regarded article 62 as a key provision and considered it essential that procedural safeguards should be included. So far as concerned paragraph 3, which would come into operation when a dispute arose over the application of the substantive provisions of Part V, his delegation had submitted an amendment (A/CONF.39/C.1/L.339) in the belief that the Commission's text did not provide satisfactory machinery for the settlement of disputes. Indeed, the Commission had admitted the possibility of a dispute being left unsolved when it stated in paragraph (5) of the commentary 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 demands ".

3. The system proposed by the Commission would be unsatisfactory not only to the State to which the claim was presented, but also to the claimant State. On the one hand, it would enable a State to get rid of a treaty obligation simply by advancing a claim not justifiable under any of the provisions of Part V; and on the other hand, it would operate against a State wishing to invoke a ground for invalidating, terminating or suspending a treaty in good faith. The whole structure of the draft convention, especially article 39, made it clear that the treaty was presumed to be valid unless and until the claim for its invalidity, termination or suspension was established; and it would be regrettable if a State with a justifiable claim were prevented from establishing that claim, merely because article 62 did not provide for effective means of settling disputes. It was admitted in paragraph (2) of the commentary that to subordinate the application of the principles governing the invalidity, termination and suspension of the operation of treaties to the will of the objecting State which declined to secure a solution was almost as unfair as to subordinate it to the arbitrary assertion of the claimant State.

4. The Japanese amendment was designed to provide a sure guarantee for the settlement of any dispute that might arise under Part V. His delegation proposed that, in the case of claims under article 50 or article 61, the dispute should be referred to the International Court of Justice at the request of either of the parties and that, in all other cases, if no solution was reached within twelve months through the means indicated in Article 33 of the United Nations Charter, the dispute should be referred to arbitration, unless the parties agreed to refer it to the Court.

5. Questions of *jus cogens* involved the interests of the entire community of nations, and the question whether a provision of a treaty was in conflict with a rule of general international law, and whether that rule was to be regarded as a peremptory norm, could be settled authoritatively only by the International Court of Justice; his delegation could not agree that a dispute of that kind should be left to private settlement between the parties through procedures established on an *ad hoc* basis.

6. In that connexion, his delegation wished to raise the broader problem of the role of judicial organs in the international community. It was not convinced by the arguments often raised against the jurisdiction of the International Court of Justice, and believed that it would be a sad mistake to place too much emphasis on the implications of this or that particular decision of the Court, thus losing sight of the invaluable contribution that the Court had made to the development of international law. Indeed, the number of times that the International Law Commission had quoted the Court's decisions as an authority on points of law in its draft, and the numerous references to the Court's decisions made by representatives in the Committee, testified to the extent of that contribution. Whatever the present defects of the Court might be, the Japanese delegation was convinced that the best course was to try to remedy those defects and to enhance the authority of the Court, rather than attempt to discredit it and undermine its effective operation.

7. With regard to procedures for the settlement of disputes under Part V not connected with articles 50

[1] The following amendments had been submitted: Japan, A/CONF.39/C.1/L.338 and L.339; France, A/CONF.39/C.1/L.342; Uruguay, A/CONF.39/C.1/L.343; Gabon and Central African Republic, A/CONF.39/C.1/L.345; Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia, A/CONF.39/C.1/L.346; Switzerland, A/CONF.39/C.1/L.347; Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Netherlands, Peru, Sweden and Tunisia, A/CONF.39/C.1/L.352/Rev.1/Corr.1; Cuba, A/CONF.39/C.1/L.353; United States of America, A/CONF.39/C.1/L.355.