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68th meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

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.

and 61, as set forth in the proposed annex to the convention, his delegation had tried to work out a system under which an arbitral tribunal established with the active participation of the parties might bring about a sure and satisfactory settlement of the disputes referred to it. It hoped that its proposal would serve to allay the fears of some delegations of referring disputes for binding decision by an independent body; it also appealed to all delegations to try to rid themselves of any prejudice they might have in the matter and to give careful attention to the Japanese proposal.

8. The Japanese amendments to paragraphs 1 and 2 of article 62 (A/CONF.39/C.1/L.338) consisted, firstly, of inserting the words " void or " before the word " invalid " in the first line of paragraph 1, in order to establish beyond doubt that article 62 covered all the cases referred to in Section 2 of Part V, and, secondly, of deleting the phrase " except in cases of special urgency " from paragraph 2. That exception could constitute a dangerous loophole and make the entire system of procedural safeguards meaningless, since it provided for no minimum period of notice and referred to no system for authoritative determination of urgency.

9. Mr. DE BRESSON (France), introducing his delegation's amendment to paragraph 1 (A/CONF.39/C.1/L.342), said that a study of Part V showed that the International Law Commission had drawn a distinction between cases where the validity of a treaty might be contested in accordance with the provisions of articles 43 to 47, and those, covered by articles 48 to 50 and 61, where a treaty was void *ab initio*. Although that difference was not expressly stated anywhere in the draft convention, the difference of terminology used in the two groups of articles was evident, and the Committee must consider whether that difference affected the obligation to notify other parties of a claim of invalidity or an allegation of a ground for termination, withdrawal or suspension. In its comments on article 39, the French delegation had pointed out that the actual text of article 62 gave no clear answer to that important question.

10. A *prima facie* examination of article 39, paragraph 1, gave the impression that the second sentence was complementary to the first, and that the paragraph as a whole established no distinction between " relative " invalidity and invalidity *ab initio*; that interpretation also led to the assumption that article 62, paragraph 1, covered cases under articles 43 to 50 and article 61. A closer study of Part V showed, however, that that interpretation was unduly simple and that article 39, paragraph 1, might be held to refer to two distinct but parallel means of contesting validity.

11. In that event, it could be argued that article 62, paragraph 1, only covered claims of invalidity on the grounds referred to in articles 43 to 47. But the second sentence of article 39, paragraph 1, provided for no recourse to article 62 in the cases of invalidity *ab initio* covered by articles 48 to 50 and article 61, and the grounds of invalidity in such cases could be invoked without reference to article 62, paragraph 1, and even without the intervention of the parties. That interpretation was further corroborated by the difference in the terms used in paragraphs 4 and 5 of article 41 for States invoking " relative " invalidity and those claiming invalidity *ab initio*, and also by the absence of any reference to the provisions in question in article 42.

12. The possible consequences of that anomaly would be to enable any party to a treaty unilaterally to claim invalidity on the very grounds which were most difficult to establish, and to open the way to States other than the parties to benefit by the invalidity provided for by those articles.

13. It had been claimed that the International Law Commission had meant article 62 to apply to all the provisions of Part V, but the French delegation considered that no ambiguity should be allowed to remain on such a fundamental point, and it had introduced its amendment with the sole purpose of clarifying the text in accordance with the generally recognized meaning.

14. Mr. JIMENEZ DE ARECHAGA (Uruguay) said that his delegation had submitted its amendment (A/CONF.39/C.1/L.343) for two main reasons. Paragraphs 5 and 6 of the amendment were intended to strengthen the procedure proposed by the International Law Commission and to eliminate the possibility of unilateral acts, a possibility which would enable States to reject the principle *nemo judex in causa sua*. Paragraphs 1, 2 and 4 were designed to establish the necessary distinctions between the procedures set out in article 62 in respect of different causes of invalidity.

15. Paragraphs 5 and 6 of his delegation's amendment, which were designed to prevent unilateral assertion of grounds for invalidity, were not intended to compete with any more ambitious proposals for compulsory adjudication, arbitration or conciliation machinery. Indeed, the Uruguayan delegation might vote in favour of some of those proposals, which in any case would be put to the vote before its own amendment, because they were further removed from the original article; the Uruguayan proposal would only be voted on if those more far-reaching amendments were defeated. The majority of the Committee might consider the complicated procedure suggested in other proposals to be too rigid and controversial. Those proposals related mainly to major political disputes, and less to the minor, more technical differences which occurred in the daily work of the legal departments of Ministries of Foreign Affairs in connexion with humanitarian treaties and trade agreements, and for which a rigid and cumbersome procedure might be inappropriate.

16. Paragraphs 5 and 6 of the Uruguayan proposal were based, in accordance with the United Nations Charter, on the efforts of the parties themselves, supported by other States in the same part of the world, to effect settlements of disputes among themselves, having recourse to United Nations bodies only in the last resort. Another fundamental idea, also in keeping with the Charter, was that every dispute should be settled peacefully, in accordance with the special features of the case, according to Article 33, paragraph 1, of the Charter. Most of the disputes which could arise under the convention on the law of treaties would be covered by that procedure, and recourse to the two organs of the United Nations referred to in Article 35 would be necessary only in the event of failure of the efforts of the parties and other countries in the same region to settle the dispute.

17. Paragraph 5 of the Uruguayan proposal had the important feature of subordinating the allegation of violation of a treaty, as a ground for terminating or suspending the treaty, and the right to object to grounds for invalidating or terminating the treaty, to acceptance of the obligations of pacific settlement provided for in the United Nations Charter. The organs of the United Nations mentioned in the corresponding provisions of the Charter would be responsible for deciding the most appropriate means of settling the dispute.

18. The Uruguayan proposal in no way intended the United Nations organs referred to in paragraph 5 to act as arbitrators or judges in disputes; their sole function would be to make recommendations to the parties on the means to be used to settle their differences. That was why his delegation's text did not refer to Articles 37 and 38 of the Charter. The recommendations would not be binding, but the right to invoke invalidity would depend on acceptance of the recommendation: the claim of a State which did not accept the recommendations would not be regarded as valid.

19. The possibility that States parties to the convention might not abide by their obligations but might be guided by their preference for or friendship with one of the parties to a dispute was covered by the proposed paragraph 6. The provision that States allowing themselves to be thus influenced, rather than the claimant or objecting State, would thereby violate the convention might have an important moral and legal influence. In any case, the procedure to be followed would be laid down by the United Nations organ in question and, if the dispute continued, it would be subject to an impartial decision by a third party. The Uruguayan delegation accordingly proposed that the Commission's paragraph 5 should be deleted, since it introduced an element of ambiguity.

20. With regard to paragraphs 1, 2 and 4, his delegation proposed different procedures for different grounds of invalidity and termination. The Commission's failure to make that differentiation had been criticized in the Institute of International Law, where it had been pointed out that an injured party might be obliged to continue to be victimized until the procedures set out in article 62 had been completed. The Uruguayan delegation therefore proposed, in paragraph 1 of its amendment, that a party alleging a material breach of a treaty might unilaterally suspend its execution in whole or in part. That provision obviously referred to an allegation of breach made in good faith; in keeping with the structure of the convention, good faith was presumed. If, however, the allegation was made as a pretext, the provisions of paragraph 4, setting out the machinery for establishing the existence of a material breach, would come into operation. Finally, his delegation's text of paragraph 2 had the advantage of providing unequivocally that the treaty could not be suspended unilaterally in the case of claims under articles 43 to 50, 53, 56, 59 or 61.

21. Mr. BINDSCHEDLER (Switzerland) said that article 62 of the Commission's text wisely made provision for the requisite procedure in cases of dispute, but it had certain gaps. To begin with, it did not state whether or not the treaty remained in force after the notification had been made under paragraph 1. In his opinion the treaty should remain in force until the procedure had been concluded.

22. Paragraph 3 did not specify what should be the definitive solution of a dispute; presumably each Government would have to consider the position and act in good faith. If the dispute was referred to a United Nations body, the latter could only make recommendations and could not give a binding decision unless it was a case for the Security Council because there was a threat to the peace. If the dispute was brought before the International Court of Justice, the acceptance of all the parties would be needed unless they had signed the optional clause.

23. Paragraph 5 did not seem to be in conformity with the guarantees laid down in paragraph 1, and should be dropped.

24. In paragraph 1 of the Swiss amendment (A/CONF. 39/C.1/L.347), the word "*nullité*" had been replaced by the word "*annulation*" because the former was dangerous and might threaten the stability of treaty relations. The word "claim" had been replaced by the word "intention".

25. Under paragraph 3 of the amendment, the parties were given complete freedom to negotiate and agree upon a conciliation procedure, or arbitration, or submission to the International Court of Justice. The matter had to be referred to the Court or to an arbitral tribunal if the parties failed to reach agreement within the period prescribed in paragraph 3. Under paragraph 3, the objecting State was not permitted to abrogate the treaty or unilaterally choose a judicial procedure. If the period of six months prescribed in paragraph 4 were too short, it could be extended.

26. Paragraph 5 contained detailed provisions for the arbitral procedure as well as provisions for the appointment of the arbitrators, who should be appointed by the President of the International Court of Justice in the event of failure to agree between the parties, and not by a political figure such as the Secretary-General of the United Nations. The procedure should be as simple as possible and what was proposed was the classic procedure for arbitration.

27. Paragraph 6 stipulated that the treaty should remain applicable throughout the duration of the dispute and paragraph 7 laid down that if a party made the notification and did not have recourse to one of the tribunals referred to in paragraph 4, it was deemed to have renounced its claim of invalidity.

28. The provisions contained in paragraph 5 of the Commission's text had not been retained.

29. Mr. RIPHAGEN (Netherlands), introducing the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/ Corr.1), said there was general agreement with the provision contained in paragraph 3 of the Commission's text, but it was not enough to repeat the general obligation of all States to settle their disputes by peaceful means. Many delegations, including the sponsors of the joint amendment (A/CONF.39/C.1/L.352/Rev.1) which superseded the amendments in documents A/CONF./39/C.1/L.345 and L.346, considered that the particular character of the disputes in question made it necessary to go beyond a general obligation and lay

down special procedures of a compulsory character. Disputes relating to the interpretation and application of Part V of the convention did not relate to the implementation of a treaty, but to a preliminary question of whether a treaty concluded between States was valid. They involved matters of substance that were of great importance for the stability of treaty relations and peaceful relations between States.

30. The sponsors of the joint amendment considered that the convention should provide for a compulsory procedure for the settlement of disputes arising under article 62. The amendment was in the form of a full set of rules for the settlement of disputes, but the sponsors would be willing to entertain any modifications of detail, provided the underlying principles were left untouched. Reference should be retained to the general obligation under the Charter to seek a solution by peaceful means, with specific procedures provided for cases where there were no other provisions in force concerning the settlement of disputes. The amendment was intended to fill a gap. If the parties were unable to agree *ad hoc* on a means of settlement and a solution was not reached within a year, either party might request the Secretary-General to set in motion the settlement procedures laid down in the annex to the convention. The underlying principle in annex I was that there should be a conciliation phase, which, if unsuccessful, would be succeeded by arbitration, both phases being compulsory; and the provisions followed the classic procedures of conciliation and arbitration.

31. No conciliation or arbitration could succeed unless the conciliation commission or arbitral tribunal was properly constituted. The amendment therefore provided for their establishment within a reasonable time. Both the conciliation procedure and the arbitration procedure should allow each party to the dispute to designate two conciliators or arbitrators, as the case might be; and the president of the conciliation commission, or of the arbitral tribunal, should also be appointed on the basis of the equality of the parties. In most cases conciliation should suffice, and it would be unnecessary to submit the dispute to arbitration. In order to achieve the rapid establishment of a conciliation commission, the amendment provided for a permanent list of conciliators to be drawn up by the Secretary-General.

32. In view of the gravity of the disputes to which the amendment related, the whole international community would be interested in their settlement, and the amendment therefore provided that the Secretary-General should assist the conciliation commission, and also the arbitral tribunal, should one be set up. The expenses of those bodies, but not the costs of the parties' pleadings, would be borne by the United Nations.

33. There was a close link between the substantive provisions of Part V and the procedures laid down in article 62, which was the key to that part of the convention.

34. Mr. AUGE (Gabon) said that, for the convention on the law of treaties to contribute to the development of peaceful inter-State relations, there must be some machinery to prevent arbitrary action in cases where a party to a treaty invoked a ground of termination, withdrawal or suspension. The provisions of article 62 as drafted did not provide sufficient safeguards in that respect. They left the parties free to choose the mode of settlement but it was open to any party to the dispute to refuse settlement and to take unilateral measures in respect of the disputed treaty.

35. In order to provide those safeguards, the delegations of the Central African Republic and Gabon had submitted an amendment (A/CONF.39/C.1/L.345), but, to save time, they had subsequently decided to join the sponsors of the seven-State amendment (A/CONF.39/C.1/L.346) in submitting the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1), which had just been introduced by the Netherlands representative.

36. The purpose of the consolidated amendment was to make provision for a specific and, if necessary, compulsory procedure. That procedure, however, would come into play only if one of the parties showed unwillingness to arrive at a solution in a dispute arising from the application of the convention on the law of treaties.

37. The amendment made provision for a conciliation commission and an arbitral tribunal. The composition of both bodies was based on the principle that the parties to a dispute should be able to choose their own judges. That approach was in conformity with the principle of the equality of States. In the same spirit, it was provided that the permanent list of conciliators should consist of two conciliators appointed by every Member of the United Nations and every party to the convention on the law of treaties.

38. The delegations of the Central African Republic and Gabon had been greatly concerned to ensure the reconciliation of States parties to a dispute after the settlement of that dispute in the conciliation proceedings. It was for that reason that they did not favour large conciliation bodies. Their proposals in that respect (A/CONF.39/C.1/L.345) had been accepted by the sponsors of the seven-State amendment (A/CONF.39/C.1/L.346) and incorporated in the consolidated amendment.

39. Although provision had been made in the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) for an arbitration tribunal to settle disputes in the last resort, the sponsors had not considered it advisable to deprive the parties of the right to agree, after the failure of conciliation proceedings, to some other mode of adjudication, such as resort to the International Court of Justice. The most important point for the international community was that disputes should be settled peacefully. The consolidated amendment did not affect in any way the constituent instruments of regional organizations or the right of the parties to choose any mode of settlement they found convenient, while the machinery for the settlement of disputes embodied in the consolidated amendment would not involve excessive expense for the United Nations.

40. It was for those reasons that the delegations of the Central African Republic and Gabon had decided to withdraw their own amendment (A/CONF.39/C.1/L.345) in order to join in sponsoring the consolidated amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1).

41. Mr. ALVAREZ TABIO (Cuba), introducing his delegation's amendment (A/CONF.39/C.1/L.353), said

that its purpose was to exclude from the application of article 62 treaties which were legally void *ab initio* according to articles 48, 49 and 50.

42. A treaty obtained by means of the threat or use of force, or concluded in defiance of a rule of *jus cogens*, was not merely voidable at the request of one of the parties; it was legally non-existent. Nullity under articles 48, 49 or 50 operated *ipso jure* without any formal declaration to that effect.

43. It had been objected that voidness *ab initio* undermined legal security. But the contrary position, which would establish a presumption of *ab initio* validity of a treaty that was radically void, would represent the bankruptcy of justice. Such a concept of security would be empty of historical substance. When the concept of legal security was invoked, it could reasonably be asked: security for what? security for whom? There could be no question of maintaining indefinitely situations which constituted a denial of justice, or of perpetuating the subordination of the weak to the strong.

44. His delegation could not accept the concept of security at any price; it could only accept security resting on the principles of the United Nations Charter. It could accept the procedure in article 62 for the invalidation of a treaty which was voidable and would be prepared to contribute to any efforts to improve the text of the article, but it would not accept either compulsory arbitration or the jurisdiction of the International Court of Justice. A treaty which was null and void under one of the articles 48, 49 or 50 was not a treaty in force and therefore did not bind the parties.

45. It had been objected that the Cuban amendment (A/CONF.39/C.1/L.353) did not make any provision for a procedure to deal with those situations. There could be no doubt that it was not easy in such cases to devise a procedure which would not lead to a denial of justice. He hoped, however, that an acceptable formula would be found. Meanwhile, history showed that there was only one procedure for repudiating so-called treaties that were unequal, oppressive or unjust, which was still valid, and that was the right to resist oppression, as embodied in the Declaration of Philadelphia of 1776 and the French Declaration of the Rights of Man of 1789.

46. Mr. WOZENCRAFT (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.355), said that his delegation had been concerned at the fact that while the draft articles indicated many ways of initiating arguments on the validity of treaties they failed to provide for any means of settling them. He welcomed the reference in article 62 to Article 33 of the Charter, but Article 33 did not provide an assured method of protecting a party to a treaty against arbitrary action by another party purporting to terminate the treaty without real justification. Article 62 should enable the parties to select the best method of settlement, but in such a way that a party could not refuse settlement and at the same time remain free to take unilateral action. If the Conference was going to establish a whole series of grounds for the avoidance of treaty obligations, it was imperative to provide a mechanism for impartial determination in the matter. It was not the best way of upholding the integrity of treaties, or of avoiding threats to the peace, to leave it to the interested State to decide whether it was entitled to avoid its treaty obligations.

47. The first part of the United States amendment (A/CONF.39/C.1/L.355, part 1) was intended to bring greater clarity to the provisions of paragraph 2 of article 62; since it did not affect the substance of the article, he would suggest that it be referred to the Drafting Committee.

48. The proposal to insert a new paragraph 3 *bis* (A/CONF.39/C.1/L.355, part 2) was intended to ensure that, if the parties did not agree on another mode of settlement, or if no solution were reached within twelve months, either party could refer the dispute to the commission on treaty disputes for conciliation.

49. Particulars of the composition of that commission were given in a proposed annex to the convention (A/CONF.39/C.1/L.355, annex). Parties would be able to bring their disputes before the full commission or to request the establishment of a sub-commission. Pending settlement of the dispute, the commission or sub-commission would have the power to order provisional measures to preserve the rights of the parties.

50. It was an essential feature of the proposal that the commission would be an organ of the United Nations, authorized to request advisory opinions from the International Court of Justice (A/CONF.39/C.1/L.355, annex, article 4). In most cases, the commission would be called upon not only to establish the facts but also to reach conclusions on legal issues. However, in some cases it might be desirable to obtain an advisory opinion from the International Court on the legal issues involved. In the interests of a prompt decision, a provision had been included that, with the consent of the parties, the commission would request the Court to proceed in the most expeditious manner by forming a chamber under Article 26 of its Statute.

51. Another essential element was the reporting function of the proposed commission (A/CONF.39/C.1/L.355, annex, article 5). Experience with the constitutions of the International Labour Organisation and a number of regional organizations showed that such reporting functions had generally assisted in effecting a friendly solution of disputes.

52. The United States amendment made provision for the establishment of an arbitral tribunal (A/CONF.39/C.1/L.355, annex, articles 6 and 7) in the event of failure by the commission on treaty disputes to bring about a friendly solution; that two-stage formula was commonly used by regional organizations. For example, the Protocol of the Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity dealt, in part 4, with settlements by conciliation, and in part 5 with arbitration.

53. The third part of the United States amendment (A/CONF.39/C.1/L.355, part 3) would introduce a new paragraph 4 in article 62, establishing a general rule that, when an objection had been raised to a measure proposed to be taken by a party claiming invalidity of a treaty, the measure could not be carried out until the matter was settled, unless either the other party agreed that the step could be taken, or the commission on treaty disputes, or the international tribunal competent in the matter, issued an order laying down provisional measures.

54. That same part of the amendment (A/CONF.39/C.1/L.355, part 3) would introduce a new paragraph 5 dealing with breach, as an exception to the rule in the new paragraph 4. In the case of breach, it was the practice of States to respond by suspending the operation of the treaty. That measure was necessary to protect the parties. If, for example, one party failed to pay for goods, the other must have the right to hold up delivery. The purpose of the proposed new paragraph 5 was to prevent abuses of that right. If the breach frustrated the object and purpose of the treaty, the party alleging material breach could suspend the operation of the whole treaty; but if the breach related to certain provisions only, suspension would be limited to those obligations which were directly related to the provisions allegedly breached.

55. In the absence of a convention on the law of treaties, *ad hoc* arrangements might be applied for the settlement of treaty disputes. But if a convention was to be concluded laying down rules governing termination and suspension, some permanent machinery was necessary. The proposed commission on treaty disputes would be a well-balanced, flexible and relatively inexpensive piece of machinery for the settlement of disputes. The commission could be expected to develop a substantial body of case-law which would be of great value to Foreign Ministries when drafting future treaties, or when confronted with potential treaty disputes.

56. The draft articles contained many provisions couched in the most general terms. For States to know what they could and could not do with respect to treaties, some better means of interpretation were needed than purely *ad hoc* conciliation groups or temporary arbitration panels. The proposed scheme would set up a body which would preserve the important qualities of flexibility and free choice of the parties. He commended it to the careful attention of delegations and would welcome constructive suggestions from them.

The meeting rose at 1 p.m.

SIXTY-NINTH MEETING

Tuesday, 14 May 1968, at 3.25 p.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 62 (Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty) *(continued)* [1] and *Proposed new article 62* bis (A/CONF.39/C.1/L.348) *(continued)*

1. Mr. COLE (Sierra Leone) said that when the Committee was considering article 50, he had stated that it would be running counter to the settlement procedures laid down by the United Nations to request the compulsory application of certain pre-established procedures for the settlement of disputes arising out of the interpretation or application of the provisions of the convention. Under the United Nations Charter, countries were free to choose the means for the pacific settlement of disputes.

2. In his view, it was the present wording of article 62, in particular paragraph 3, which was most likely to obtain the widest possible agreement. The speedy and just settlement of disputes by peaceful means freely chosen in conformity with the principle of the sovereign equality of States should be the main objective of the Conference. Those amendments which proposed the establishment of compulsory arbitration procedures deserved to be considered, but he feared that they would incur criticisms similar to those made against the International Court of Justice, namely, that no judgement could be delivered impartially or without the intervention of political or extra-juridical considerations. Moreover, experience had shown that States were extremely reluctant to make use of the existing permanent arbitration machinery and it was unlikely that they would have recourse to the machinery it was proposed to set up. The vast majority of States seemed rather to favour *ad hoc* investigation bodies.

3. He was opposed to those amendments which tended to draw a distinction between articles 50 and 61, on the one hand, and certain other articles of Part V, on the other. In his opinion, all those articles were equally important. Accordingly, his delegation would vote in favour of the substance of article 62, and would only support amendments which would improve it.

4. Mr. BLIX (Sweden) said that he would like the Committee to approve the broad outline and not the details of the amendment of which his delegation was a co-sponsor (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The Drafting Committee or a working group might then study the drafting solutions adopted in the other amendments and embody them, if considered necessary, in the thirteen-State amendment, provided that they did not depart from the substance of that amendment.

5. His delegation believed that the three-stage procedure provided for in the amendment, namely a method of settlement freely chosen by the parties, conciliation and arbitration, had great advantages. In the first place, it was likely that the fact that the parties would be aware that there existed procedures which would be automatically available if they did not agree on a method would facilitate such an agreement. In the second place, the knowledge that the arbitration procedure was their last possibility would doubtless make them more inclined to accept a solution resulting from the process of conciliation. Also, the parties would know that any attempt at obstruction would not pay.

6. The procedure of conciliation seemed particularly appropriate for any issues that might arise in connexion with the application of Part V. It would enable the States concerned not only to consider the applicability of the various grounds of invalidity, termination or suspension of the operation of a treaty, but also to consider the possibility of settling their dispute by the modification or renegotiation of the treaty in dispute.

7. Acceptance of the thirteen-State amendment would offer the guarantee that every State could, if the case

[1] For the list of the amendments submitted to article 62, see 68th meeting, footnote 1.