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69th meeting of the Committee of the Whole

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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.

should arise, invoke any of the articles of Part V to invalidate, terminate or suspend the operation of a treaty and have it established by a duly authorized body that the article invoked was applicable, or reach a settlement by conciliation.

8. Moreover, a State against which another State had unjustly invoked any of the articles of Part V would be effectively protected against abusive recourse to those articles and could have it authoritatively established that the article invoked was not applicable, or reach a settlement by conciliation.

9. His delegation was aware that a number of objections had been raised against provisions for making procedures for the settlement of disputes automatically available and in particular proposals that disputes should be referred to the International Court of Justice. It had been argued that the composition of the Court did not adequately represent the composition of the international community and that it applied " old law " which did not sufficiently reflect the interests of new States.

10. None of those objections was applicable to the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr 1). The composition of the proposed conciliation commission and arbitral tribunal was based on the principle of parity. Moreover, those bodies would not apply " old law ", but the principles set forth in the convention.

11. The novelty of some of the provisions of Part V of the convention, especially those dealing with *jus cogens*, made the establishment of an effective machinery for the settlement of disputes particularly desirable. A great part of what was today accepted as international law had been established, from the nineteenth century onwards, through the application of arbitration procedures. It would be regrettable not to develop the ideas in Part V by similar procedures.

12. It was reasonable that the costs of the conciliation commission or arbitral tribunal should be borne by the United Nations, as it was in the interest of the entire international community and not only of the litigant States that disputes should be submitted to those bodies. That provision of the thirteen-State amendment, together with the provisions under which certain tasks were to be entrusted to the Secretary-General and Members of the United Nations would, of course, have to be submitted in due course for approval by the General Assembly and acceptance by the Secretary-General. Since the amendment merely sought to complete article 62 and not to modify it, the procedures it proposed were of a subsidiary nature, compared with the other procedures that the parties might be obliged to employ under other instruments, such as the Charter of the Organization of African Unity.

13. The procedures for effecting a settlement suggested in the amendment should apply only to treaties concluded after the entry into force of the convention. Clearly, acceptance of that condition would not prevent any State from claiming the invalidity of old treaties on grounds derived from customary international law. The question of the applicability of the convention in point of time should be expressly regulated in one of the final clauses.

14. His delegation thought that the amendments by Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.347) were useful and it was ready to consider them as an alternative solution to the thirteen-State amendment if they were supported by the majority of delegations. It would adopt the same attitude towards the United States amendment (A/CONF.39/C.1/L.355), which went much further than the thirteen-State amendment. On the other hand, it hoped that if the latter amendment was favourably received by the majority of delegations, Switzerland, Japan and the United States might, in turn, accept it in place of the procedures they had proposed in their respective amendments. All those amendments had common features, since they all sought to establish the principle of an effective, automatically available procedure for settlement. The acceptance of that principle would largely determine the attitude of very many States towards Part V and the convention as a whole.

15. He had some doubt about the amendment by Uruguay (A/CONF.39/C.1/L.343), as it was probable that most of the disputes relating to the application of Part V would not be of such a serious character as to warrant the intervention of the General Assembly or other organs of the United Nations.

16. Lastly, the amendment by France (A/CONF.39/C.1/L.342) and the other Japanese amendment (A/CONF.39/C.1/L.338) related merely to drafting matters.

17. Mr. SOLHEIM (Norway) said the final outcome of the discussions on article 62 would determine whether the convention would have a really universal character and a satisfactory solution would therefore have to be found within the scope of the convention to the problem of the peaceful and compulsory settlement of disputes arising from its interpretation and application.

18. Paragraph (1) of the commentary on article 62 revealed that many members of the International Law Commission had thought that some of the grounds upon which treaties might be considered invalid or terminated or suspended under the provisions of Part V involved real dangers for the security of treaties. The Norwegian delegation fully shared their apprehensions. It was encouraging, however, to see that the Commission as a whole " considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation ".

19. Further, paragraph (4) of the commentary said that Governments in their comments had appeared to be at one in endorsing the general object of the article. But agreement had stopped there, and the Commission had been unable to solve the real problem, namely when the parties, after having followed the procedure laid down in article 62, could not reach an agreement on their dispute. What would become of the principle of the sovereign equality of States or the notion of mutual consent, which were the very basis of the negotiation, signature and ratification of treaties, if, without the requisite safeguards, the parties were allowed subsequently to rid themselves of their treaty obligations simply by claiming that a treaty was invalid under the convention? If one of the parties was convinced that it had a good case, it ought to accept some kind of independent court or tribunal without difficulty, if conciliation procedures failed. The Interna-

tional Court of Justice or an arbitral tribunal could perform those functions without being overburdened by work. The possibility of recourse to an independent court or tribunal would induce States to be careful when negotiating and concluding treaties, to agree to renegotiate treaties and to show greater willingness to seek a conciliation procedure. In any event, recourse to an independent court or tribunal would be necessary only in extremely rare cases.

20. The advantage of a system of arbitration, as compared with the jurisdiction of the International Court of Justice, was that the parties could themselves decide on the kind of tribunal they wished to set up. It was evident, however, that most arbitration systems suffered from a considerable defect: usually each party to a dispute named one or two of the members of the arbitral tribunal and the parties appointed the president of the board in common; as a result, a single person very often decided the matter. The Swiss amendment (A/CONF.39/C.1/L.347), allowing the parties to appoint by agreement three of the five members of the tribunal had certain advantages. Another point was that the arbitral tribunal usually did not give very extensive grounds for its conclusions. That disadvantage was obviated if the case was taken to the International Court of Justice, since under Article 56 of its Statute, its judgements must state the reasons on which they were based. In any event, whatever the procedure followed, it could not be expected that all the parties would agree with the decision. Some decisions might be hard to understand, but that was equally true of judgements of national courts.

21. The Norwegian delegation believed that the interests of small States would best be protected by compulsory judicial procedure before an independent court, and Norway itself had long ago accepted the compulsory jurisdiction of the International Court of Justice. Some such compulsory procedure must be provided in the convention, and his delegation would support any proposal to that end; it believed, however, that in the case of at least two provisions of the convention, disputes should be taken only to the International Court of Justice. In that respect, the Japanese amendment (A/CONF.39/C.1/L.339) contained some very useful provisions.

22. Mr. TRUCKENBRODT (Federal Republic of Germany) said the drafting and development of substantive rules of international law must be accompanied by the establishment of a corresponding procedure. That applied particularly to Part V of the draft convention, which, even where it merely restated principles of customary international law, contained notions which in many cases still had no precise legal meaning. If no provision were made for appropriate procedural guarantees in Part V, the codification of the law of treaties might weaken regard for the sanctity of treaties and undermine the stabilizing role of international law in international relations.

23. He supported article 62, paragraphs 1 and 2, of the International Law Commission's draft, but considered that paragraph 2 should specify whether a treaty which was void under articles 48, 49, 50 or 61 should be performed in good faith during the period in question. The term " void " used in those articles seemed to show that in such a case States were not bound by that obligation. Nevertheless, article 62, paragraph 2, did not give any special treatment to that form of nullity; it seemed, therefore, that even treaties which a party claimed to be void under articles 48, 49, 50 or 61 should be performed by it in good faith. From a practical point of view that seemed to be the only possible solution. One way to make the necessary clarification would be to bring articles 48, 49, 50 and 61 into line with article 62 by substituting the term " invalid " for " void " in those articles; another way would be to make specific reference in article 62 to the cases in which it was claimed that treaties were void *ipso jure*. That was a point of clarification, which had nothing to do with the fact that such treaties should be considered as void *ab initio* once their invalidity had been established.

24. As far as disputes over claims and objections under article 62, paragraphs 1 and 2, were concerned, neither article 62, paragraph 3, nor Article 33 of the United Nations Charter provided for compulsory settlement of disputes by a neutral court or tribunal. In his opinion, in view of the legal uncertainties and inherent dangers of Part V of the draft convention, no procedure would be adequate which did not provide for compulsory judicial settlement if the parties failed to settle their dispute by agreement. His delegation would welcome any solution which made the International Court of Justice responsible for interpreting Part V, but recognized that that solution might not be acceptable to other delegations. It would therefore support any decision providing simultaneously for compulsory *ad hoc* arbitration for all parties to the convention. The method of an optional protocol was, as Professor Briggs had stated in an article published in the *American Journal of International Law*, [2] clearly insufficient. On the other hand, it would be unwise to provide in article 62, paragraph 3, only for a compulsory judicial settlement; it would be preferable also to include a provision, as a first step, for a compulsory conciliation procedure based on the principle of parity and operating within the framework of the United Nations.

25. The amendments by Japan (A/CONF.39/C.1/L.338 and L.339), France (A/CONF.39/C.1/L.342), thirteen States (A/CONF.39/C.1/L.352/Rev.1/Corr.1), Switzerland (A/CONF.39/C.1/L.347) and the United States (A/CONF.39/C.1/L.355) improved article 62; his delegation could therefore support any of those amendments, but it was opposed to the Uruguayan amendment (A/CONF.39/C.1/L.343), which did not necessarily lead to compulsory judicial settlement, and the Cuban amendment (A/CONF.39/C.1/L.353). As opinions differed greatly on article 62, paragraph 3, the article should not be put to the vote before delegations had agreed on a compromise solution on the underlying principle of that paragraph. Lastly, he drew the Committee's attention to the fact that none of the amendments was clear about which party was entitled to claim the nullity of a treaty under article 50, which was designed to protect the international public order. In his opinion, not only the parties to a given treaty, but all States interested in the mainte-

[2] H. W. Briggs: " Procedures for establishing the invalidity or termination of treaties under the International Law Commission's 1966 draft articles on the law of treaties," *American Journal of International Law*, October 1967.

nance of public order, should normally be able to claim that a rule of *jus cogens* had been violated by the treaty.

26. Mr. NACHABE (Syria), said that article 62 had been drafted with great care. Ultimately, the parties had to seek a solution to their disputes by resorting to the means indicated in Article 33 of the Charter. The International Law Commission had considered that it could not go beyond the limits of that balanced compromise.

27. His delegation agreed with the Commission; the resulting formula was acceptable and the procedural safeguards it offered were adequate, since the parties had to resort to the means indicated in Article 33 of the Charter without any priority being given to any of them. The choice of the means was subject to agreement between the parties.

28. Recourse to compulsory jurisdiction or arbitration would obviously have been the ideal solution, but the justified apprehensions of many States, in particular the new States, with regard to that formula should be taken into account. Later, those apprehensions would doubtless disappear as, under the stimulus of the work done on codification, a more stable and more equitable international law based on the sovereign equality of States and respect for the rights and interests of all peoples, above all those of the new States, was progressively established. A member of the International Law Commission had said: " There was no conflict that was not amenable to settlement in accordance with rules of law. At the same time, any dispute could be charged with political implications, even one relating to a purely technical matter. It was for the State concerned to decide whether any particular dispute had political implications and whether it was or was not prepared to submit it to judicial settlement or arbitration[3]. "

29. The very great sacrifices frequently made by the new States to achieve independence explained and justified their hesitation in the present state of international relations with regard to compulsory jurisdiction and arbitration.

30. The Syrian delegation therefore favoured article 62 as it stood and did not support any of the amendments which would go beyond the limits it laid down.

31. Mr. GON (Central African Republic) reminded the Committee of the opinion his delegation had repeatedly expressed on the various means provided for in Article 33 of the Charter—to which article 62 of the draft referred—for the settlement of disputes. His delegation had always expressed reservations about the International Court of Justice, since its very restricted composition was far from representing the various legal systems of the modern world. The Court's judgement in the *South-West Africa* cases [4] had confirmed those reservations. On the other hand, the Central African Republic had always favoured the other means of settling disputes provided for in the Charter. The negotiation proceedings brought the parties to the dispute together and enabled them to start a discussion which, through the human contacts it involved, might achieve beneficial results. Resort to regional organizations had the advantage that disputes were submitted to bodies which, because of their thorough knowledge of the background, could work out satisfactory solutions to those disputes. Arbitration obviated reference to a judicial body whose composition might prevent it from understanding the importance of the problems involved; it was also the most flexible and most economic method.

32. With that in mind, his delegation had joined twelve other delegations in submitting an amendment (A/CONF. 39/C.1/L.352/Rev.1/Corr.1) of which the guiding principles were a determination to respect the provisions of article 62 and a desire to supplement them with a flexible and compulsory procedure intended to break the deadlock between the parties when all other means of settlement had been exhausted. Under the provisions of the paragraph 3 *bis* added by that amendment it was solely for the parties to the dispute to set in motion the initial stage of the procedure, namely conciliation.

33. His delegation had been opposed, and for the reasons he had stated would continue to be opposed, to recourse to any permanent body consisting of an arbitrarily determined and limited number of conciliators or arbitrators. The permanent list of conciliators provided for in annex I, paragraph (1), of the thirteen-State amendment would comprise jurists appointed by all the States Members of the United Nations or parties to the convention. If the attempt at conciliation failed, the parties could still resort to any other means indicated in Article 33 of the Charter. If a solution was still not forthcoming the dispute would be submitted to an arbitral tribunal at the request of one of the parties.

34. The amendment's sponsors had been guided by the provisions of the Convention on the settlement of investment disputes between States and nationals of other States, [5] the European Convention for the Protection of Human Rights and Fundamental Freedoms [6] and the Charter of the Organization of African Unity. [7] His delegation thought the amendment offered the necessary flexibility and realism and should provide a solution acceptable to all.

35. The appointment of the chairman or members of the conciliation commission or of the arbitral tribunal by the Secretary-General of the United Nations would not in any way be prejudicial to the functioning of the machinery provided for in the amendment, since the Secretary-General's choice would be limited by the list of conciliators and arbitrators, who would be qualified jurists appointed by the States parties to the convention. His delegation was of course aware that the Secretary-General was a political personality; but he was appointed by the General Assembly, the most representative organ of the United Nations, whereas the President of the International Court of Justice was nominated by the Court itself, which was a very restricted body.

36. The views he had expressed would govern his delegation's attitude towards the other amendments. He could not accept any amendment containing any allusion

[3] *Yearbook of the International Law Commission, 1966*, vol. I, part II, 845th meeting, para. 46.

[4] *I.C.J. Reports, 1966*, p. 6.

[5] United Nations, *Treaty Series*, vol. 575, p. 160.

[6] United Nations, *Treaty Series*, vol. 213, p. 221.

[7] United Nations, *Treaty Series*, vol. 479, p. 39.

whatsoever to the International Court of Justice. On the other hand, his delegation accepted the French amendment (A/CONF.39/C.1/L.342), which was purely a drafting matter.

37. Mr. OSIECKI (Poland) said that article 62 of the draft represented the current stage in the development of international relations. The reference to the means of settlement of disputes indicated in Article 33 of the Charter was a realistic formula which respected the sovereignty of States. The provisions of the Charter took into account the existence of different social, economic, political and, consequently, legal systems. The convention on the law of treaties should be similarly drafted. Moreover, the formula in Article 33 of the Charter had proved itself and, despite world developments, had not needed any alteration.

38. Compulsory jurisdiction had never been agreed to when it was a question of codifying a particular sphere of international relations, for example in the Conventions on the Law of the Sea, the Convention on Diplomatic Relations, and the Convention on Consular Relations. Further, fewer than half the Members of the United Nations had accepted the compulsory jurisdiction of the International Court of Justice, and in many cases acceptance had been accompanied by such reservations that their practical value remained an enigma.

39. In any case, the convention on the law of treaties was the least suitable of all for the institution of compulsory jurisdiction, because, in the case of that convention, the compulsory procedure would have to apply to all treaties, even those affecting vital interests traditionally regarded as not amenable to jurisdiction. There was nothing to justify such a leap forward at the present stage. The position was different in the case of treaties having a specific object, for instance financial or technical agreements. Poland was party to a number of such treaties containing a freely accepted and perfectly comprehensible limitation on the parties' sovereignty in the form of a compulsory jurisdiction clause. Thus Poland did not always adopt a negative approach to the principle of compulsory jurisdiction, although as far as the convention on the law of treaties was concerned, the scope and nature of the issues subject to compulsory jurisdiction would be impossible to foresee and difficult to establish.

40. His delegation supported the Cuban amendment (A/CONF.39/C.1/L.353), which had the advantage of excluding treaties that were void *ab initio* from the operation of article 62. That strengthened the position of a State which wished to rid itself of a treaty imposed by force or concluded in violation of *jus cogens*. His delegation's attitude to the other amendments would be in accordance with the views he had outlined.

41. Mr. LUKASHUK (Ukrainian Soviet Socialist Republic) said that article 62 was important because it determined the effectiveness not only of the future convention but of international law as a whole. By analogy with internal law, enforcement was sought through the creation of various types of international judicial bodies. It was said that there was no law without police, but that idea had its limits even in internal law. No governmental pressure could ensure the operation of a rule which conflicted with the fundamental requirements of contemporary life. That was even more true of international law. Despite the praise which the Swedish representative had bestowed on the international judicial system, it had to be recognized that it was not the essential factor in enforcing the rules of international law and ensuring their progressive development. What was essential was to introduce into that law rules which met the requirements of contemporary international relations, in other words universal norms. A host of rules governing vital day-to-day relations between States, as well as many of the treaties containing those rules, could do without arbitration clauses.

42. The existence of numerous international conflicts was not a reason for doubting the effectiveness of contemporary international law. In any case, arbitration did not eliminate conflicts. Even the Security Council, for example, had been unable to solve those submitted to it. The results of the activities of the International Court of Justice and of the many arbitrations which had taken place were not particularly strong arguments in their favour. It would also impair the effectiveness of international law if provisions stipulating compulsory arbitration were included in the draft, because in that case there would no longer be any hope of finding those States whose participation was indispensable among the parties to the convention.

43. International law was the fruit of co-operation between States; that was what gave it life. The more co-operation developed, the more international law would be needed and the more effective it would become. In its turn, the progress of international law would of course encourage co-operation between States. Without that co-operation, no arbitration could restore order. What was more, the existence of compulsory jurisdiction might prejudice co-operation between sovereign States.

44. That did not mean that the convention should not specify any procedure for settling disputes. The provisions of article 62, particularly paragraph 1, which stipulated prior notice, were extremely useful and would reinforce the *pacta sunt servanda* principle.

45. Most of the criticism had been directed against paragraph 3. Without innovating, it reflected very closely the contemporary life and law of the international community and protected parties to a treaty against arbitrary declarations of nullity.

46. For those reasons, his delegation favoured article 62 of the draft as presented by the International Law Commission, but with the improvement proposed in the Cuban amendment (A/CONF.39/C.1/L.353). The article seemed to reflect the general wishes of the Conference. His delegation was opposed to those amendments which would introduce compulsory arbitration, which was a costly, slow and inefficient process and could not be regarded as a universal remedy. Moreover, the object of the convention was not international law as a whole, but merely the law of treaties; consequently, arbitration should in any case be examined as a separate issue.

47. Mr. BREWER (Liberia) said there was no doubt that article 62 was a key article for the application of the provisions of Part V of the convention, and indeed of the convention as a whole. In order to ensure the observance of the important *pacta sunt servanda* principle

and to maintain the stability of treaties it was essential that limits should be imposed on the action of a State which wished to denounce a treaty and, consequently, that procedural provisions on the invalidity, termination and suspension of treaties should be included in the convention.

48. Article 62 in its present form provided the necessary safeguards for the settlement of disputes. Under the proposed procedure, the party invoking a ground for terminating a treaty or suspending its operation and the party which raised an objection to it must automatically seek a solution through the means indicated in Article 33 of the Charter. That article was broad enough in scope to cover practically all means of settling disputes, including recourse to the International Court of Justice. In paragraph (5) of its commentary the International Law Commission stated: " 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. There would also remain the right of every State ... under certain conditions, to refer the dispute to the competent organ of the United Nations ". It had been said that the United Nations Charter was a living instrument. No doubt it was not complete and might be improved, but in order to give it greater significance, it would be well to refer to it as much as possible and, in particular, in drawing up the law of treaties.

49. It would be wrong to resort to the International Court of Justice for the settlement of any and every dispute that might arise in applying the provisions of the convention, for the Court was the supreme judicial organ of the United Nations and its prestige would thereby be impaired. At the national level, most cases were settled outside the courts, and there seemed no reason why, if the provisions of Article 33 of the Charter were strictly applied, the same should not be true on the international plane.

50. His delegation would be glad to learn the exact meaning of the expression " except in cases of special urgency " and why it had been placed in article 62, paragraph 2. The expression apparently permitted a State to act unilaterally.

51. The Liberian delegation would support article 62, which, in its opinion, provided adequate safeguards against arbitrary decisions.

52. Mr. MIRAS (Turkey) said article 62 contained no safeguard that could ensure the objective application of Part V of the convention and it might lead to all kinds of abuse. The procedural safeguards in the article consisted merely in a notification by the party which claimed that it had been injured; then ensued a waiting period. If the parties did not agree, article 62 referred them to Article 33 of the Charter, which, as everyone knew, was one of the weak points in that instrument, since it contained only a list of means of peaceful settlement without providing for a final solution by compulsory reference to a court or tribunal. Under those conditions, a party which claimed to have been injured had only one obligation, namely to wait for a few months. After that, it was free to take one or other of the measures set out in Part V. The International Law Commission's statement that if the parties should reach a deadlock " it would be for each Government to appreciate the situation and to act as good faith demands " meant that any party which might wish to rid itself of its treaty obligations would not be subject to control by any impartial authority.

53. His delegation was of the opinion that when there was an element of appreciation an impartial authority should intervene. That was not merely a question of procedure. Without machinery for impartial appreciation there could be no invalidation. A codification which was endeavouring to introduce into international law new rules likely to entail serious consequences should provide adequate jurisdictional safeguards instead of codifying rules borrowed from municipal civil law shorn of the jurisdictional safeguards normally attached to them. Article 33 of the Charter was quite inadequate for settling disputes under the régime of contemporary international law and it would be even less adequate in the case of the new rules in Part V. Either a new body should have been provided or an existing body should have been entrusted with applying those rules. Without those safeguards, article 62 was likely to upset the stability of treaties on which the maintenance of peace to a great extent depended. The great paradox in the draft articles was the attempt to establish a régime of international law without any provision for adjudication. The Turkish delegation could not therefore accept article 62 as it stood.

54. The Swiss amendment (A/CONF.39/C.1/L.347) offered the necessary safeguards provided by a court or tribunal for the application of Part V. It provided both for recourse to the International Court of Justice and for a committee of arbitration. The procedure for the composition of that committee was entirely satisfactory. The Turkish delegation would therefore support the amendment.

55. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that article 62 was important because it set out the principles of contemporary international law relating to the settlement of disputes. Under the terms of Article 2 (3) of the United Nations Charter, States must settle their disputes by peaceful means, but no special procedure was imposed on them. In contemporary international law, the main obligation was therefore to settle differences peacefully, but the means of such settlement were left to the free choice of States; that principle had been confirmed by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in 1966.[8] Article 62 accurately reflected the present situation. It provided for a procedure for the settlement of disputes based on Article 33 of the Charter; that procedure was simple, clear and concise and the International Law Commission had incorporated it in the draft convention, leaving to the States parties to the treaty the possibility of having recourse to the peaceful means of their choice.

56. During the debate, certain representatives had maintained that article 62 did not guarantee treaties sufficient stability. His delegation could not accept that interpretation: the procedure laid down in article 62

[8] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

prevented the parties from taking arbitrary measures with a view to the termination or suspension of the operation of a treaty and it was therefore essential to maintain it in its present form.

57. His delegation had not been convinced by the arguments of those representatives who had maintained that it was essential to provide for the compulsory settlement of disputes by an international court or tribunal. The law of treaties existed and had existed without compulsory jurisdiction. The decisions of the International Court of Justice, in particular that concerning South-West Africa, showed that the Court was hardly capable of ensuring the proper solution of disputes relating to the invalidity of a treaty or its termination or suspension. Several cases could also be quoted in which most States had rejected compulsory arbitration. Certain delegations had claimed that compulsory arbitration was the best means of solving disputes, but the history of international relations did not provide any confirmation of that claim. A review of events over the past hundred years showed that, except in the *Alabama* case, arbitration tribunals had never succeeded in settling any important dispute. The Permanent Court of Arbitration had examined about thirty cases only, some of which had been unduly protracted.

58. Consequently, his delegation saw no positive advantage in providing for compulsory arbitration or for the compulsory jurisdiction of the International Court of Justice, and approved the draft article submitted by the International Law Commission. That article imposed precise legal obligations; it reflected the present situation in international law and took account of the position of all the groups of States. It represented a reasonable compromise between the different currents of thought. In upsetting that compromise, the difficult balance achieved by the Commission would be destroyed and many Member States, including the USSR, would not be able to support article 62. Thus his delegation could not accept the amendments proposing compulsory jurisdiction. On the other hand, the Cuban amendment (A/CONF.39/C.1/L.353) was extremely interesting and deserved careful attention; for it would be unjust that a State on which an unequal treaty had been imposed by force should have to submit to the slow procedure laid down in article 62. In that case provision must be made for a simplified procedure.

59. Miss LAURENS (Indonesia) said that her delegation fully shared the view expressed by the International Law Commission in paragraph (4) of the commentary that with regard to the procedure applicable to the invalidity, termination or suspension of a treaty, article 62 represented " the highest measure of common ground that could be found among Governments as well as in the Commission ". It should be noted that the text of the article had been adopted by the International Law Commission by a very large majority and that the Asian-African Legal Consultative Committee meeting in New Delhi in December 1967 had decided almost unanimously that article 62 should be retained in the form proposed by the Commission.

60. As the article would be applicable to all treaties entered into between States, its scope would be too general for it to be possible to provide for compulsory jurisdiction. There was the added danger that the application of the provisions of Part V of the convention might give rise to such complicated disputes that it was difficult to determine in advance the best means of peaceful settlement.

61. Her delegation considered that, in the light of contemporary international opinion and practice, the general obligation incumbent upon States under international law, as set forth in Articles 2 (3) and 33 of the Charter, should serve as a basis for article 62. Perhaps the text of the article could be improved, but to provide for a specific means of settling disputes and to make it compulsory might create serious problems and lead to disputes which the Committee would have difficulty in solving. It seemed moreover doubtful whether such a provision could, in reality, help to solve the differences that might arise in the future between States in connexion with the application of the articles of the convention.

62. Mr. ROSENNE (Israel) said that his delegation was ready to accept the International Law Commission's proposed text of article 62. As the Commission had said, that text represented " the highest measure of common ground that could be found among Governments ". It was the most that could be attained in the absence of a substantial modification of the Charter and of present international practices. It was a fair compromise which did not go beyond the provisions of the Charter. His delegation did not think that the Conference was in a position to undertake the ambitious task of attempting to modify existing settlement procedures, or that it should look further ahead than the International Law Commission. He had already indicated his delegation's position, in principle, at the 54th meeting, during the consideration of article 50 and he thought there was no need to explain it again.

63. In its written observations (A/CONF.39/6) as well as in its statements in the Sixth Committee, his Government had drawn attention to certain remarks contained in paragraph (2) of the commentary, where it appeared that the balance between the objecting State and the claimant State was not always maintained. Article 62 and the substantive articles might be reconsidered from that point of view.

64. The amendment by France (A/CONF.39/C.1/L.342), paragraphs 1 to 4 of the amendment by Uruguay (A/CONF.39/C.1/L.343) and the first part of paragraph 5 of the United States amendment (A/CONF.39/C.1/L.355) were an improvement on the Commission's text. His delegation could support them because they increased the precision of that text.

65. On the other hand, his delegation was unable at the present stage to accept the proposals concerning the establishment of new organs or the institution of new procedures, the constitutionality of some of which might be open to question. Nor could it accept those proposals which nullified the compromise proposed by the International Law Commission. Several of those proposals were based on the idea that the disputes arising out of the application of Part V were, by their very nature, amenable to the jurisdiction of a court. Such disputes, however, would not relate to the convention, but to another treaty and would arise in concrete political

circumstances; for that reason, too rigid settlement procedures must be avoided. Contrary to what had been implied by certain speakers, his delegation considered that judicial and arbitral bodies could not exercise legislative functions such as that of establishing norms of *jus cogens*. It was for the parties themselves to settle disputes relating to treaties. Only in the last resort should recourse be had to United Nations organs, and the introduction of mandatory procedures into the convention might be counter-productive.

66. Further, the question of settlement procedures was the subject of examination by other United Nations bodies, and in particular by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Useful and interesting ideas had been put forward during that Committee's debates; it would be meeting again shortly and was to submit another report to the General Assembly. Consequently, it would be better if the Committee of the Whole decided not to close the debate on article 62 at the present session of the Conference, in the hope that, at the second session, the progress achieved by the United Nations would facilitate the solution of the special problems raised by article 62.

67. With regard to the Swiss proposal for a new article 62 *bis* (A/CONF.39/C.1/L.348), his delegation agreed that paragraph 4 of article 62 should be the subject of a separate article. Moreover, the principle stated in that paragraph could not and should not apply solely to Part V. It could be worded in more general terms by saying: " Nothing in the present Convention... ". In that case, the new article should be included in another part of the convention. As his delegation had already said, care must be taken that the convention did not override the will of the parties as expressed in their treaties and that it did not impose on them settlement procedures to which they had not agreed or which they had even rejected in certain cases. The Swiss amendment would bring out clearly the fact that an external element, in that case the convention, could not override an autonomous decision of the parties in respect of the settlement of problems primarily affecting them.

The meeting rose at 6 p.m.

SEVENTIETH MEETING

Tuesday, 14 May 1968, at 8.45 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 (item 11 (a) of the agenda) *(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] For the list of amendments submitted, see 68th meeting, footnote 1.

1. Mr. RATSIRAHONANA (Madagascar) said that the settlement of disputes arising out of the operation of Part V of the draft was most important. Article 62 was therefore the key article of Part V, if not of the entire convention. The grounds for invalidating, or suspending the operation of, a treaty under the provisions of Part V of the draft would certainly be considerably reduced, if not removed altogether, unless some procedure was set up to deal with claims of invalidity or allegations of grounds for suspension, together with an appropriate procedure for settling any disputes arising during that process. It was therefore desirable to provide for both procedures with the maximum possible precision.

2. With regard to the first procedure, his delegation favoured the system prescribed by the International Law Commission in article 62, whereby a party which claimed that a treaty was invalid or which alleged a ground for suspending its operation, must not only notify the other parties of its claim or allegation but also indicate the measure which it proposed to take with respect to the treaty and the grounds for taking it.

3. As to the settlement of disputes, his delegation did not share the view expressed by the International Law Commission in paragraph (5) of its commentary on article 62 that it would be impossible to go beyond the provisions of Article 33 of the United Nations Charter " without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the parties ". In the opinion of the Malagasy delegation, to refrain from prescribing a compulsory settlement procedure was a facile solution which opened the door to abuse and dangers such as recourse to armed or unarmed coercion. It was time to lay down rules conducive to greater justice in international treaty relations; that could only exist to the extent that a compulsory system was established for settling disputes arising out of the operation of the future convention. The principle of compulsory solution was the best protection and the best guarantee for the stability of treaties. His delegation had therefore joined in sponsoring the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The conciliation and arbitration procedure it prescribed was flexible enough to preclude serious objections from States opposed to the principle of compulsory solution. Moreover, the amendment did not affect the ideas expressed in article 62 of the draft; it was merely an extension of that article, an extension which the Malagasy delegation considered useful in the context of the draft convention.

4. In its present form, the system of settling disputes between States by arbitration or judicial process had not given full satisfaction, and efforts should be redoubled to evolve a better system based on new principles.

5. Mr. OUTRATA (Czechoslovakia) referred to the controversy to which article 62 of the International Law Commission's draft had given rise. The criticism had come from the advocates of what were essentially two opposing views: on the one side, the conservatives, who would prefer the Commission to confine itself to a strict codification of what was already positive international law; and, on the other, the innovators, who would prefer the article to make a substantial contribution to the development of the law as at present in force. Both sides had