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70th meeting of the Committee of the Whole

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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

advanced weighty arguments which should not be underestimated.

6. In its initial examination of draft article 62, the Czechoslovak delegation had been struck by the fact that the Commission had not considered it necessary to formulate different rules according to whether the treaty was void *ab initio* in virtue of the substantive rules formulated in the preceding articles or whether it was one which a contracting party could legitimately terminate after it had been in operation for some time. For it might be asked whether it was right to impose a long and complicated procedure not only on a State which could establish its right to terminate a previously valid treaty, but also on a State which merely wished it to be officially placed on record that a certain text, although drawn up in the form of a treaty, had never acquired binding force. From that point of view, his delegation was in favour of the Cuban amendment (A/CONF.39/C.1/L.353).

7. Article 62, incidentally, was not the only case in which the International Law Commission favoured the party defending the validity of the treaty and called for substantial sacrifices from those entitled to terminate it; it did so in the interests of greater international legal security. In that respect, the Commission's draft was not only a codification of existing rules; it also represented, in fairly large measure, the creation of new legal rules and a development of the existing law. That development was entirely to the advantage of those in the fortunate position of defending treaties, even if their position proved untenable from the legal point of view.

8. According to existing international law, there was no doubt that a State was not bound to perform a void treaty, that it could terminate a treaty which had been the subject of a flagrant breach by the other party, and so on, and that in doing so it was not bound to follow any particular procedure. The procedure prescribed in article 62 was therefore an innovation which appreciably limited the rights previously enjoyed by States. Some delegations did not think the article went far enough, however, and the many amendments they had submitted aimed, subject to slight differences, at imposing on States compulsory arbitration or jurisdiction in the case of any international dispute that might arise with respect to the validity of a treaty or the right of a party to terminate it unilaterally. That would be an excessively bold measure, because it was common knowledge that compulsory arbitration and jurisdiction existed more in doctrine than in the practice of States and that the number of disputes so far settled by such organs was not very encouraging.

9. His delegation therefore thought that the time was not yet ripe for such a far-reaching decision. It supported the opinion expressed by the Commission in paragraph (4) of its commentary on article 62 that the text of the article represented the highest measure of common ground that could be found between the widely diverging views on the subject. His delegation would therefore vote in favour of the text in the draft articles, but it was prepared to examine any proposal which obtained general, or almost general, support.

10. In his delegation's view, then, the most important thing was that the future convention should be regarded as satisfactory by the international community as a whole. Any pressure to secure the adoption of an extremist solution in connexion with article 62 might jeopardize the valuable work already accomplished.

11. To facilitate progress, the Czechoslovak delegation suggested that the Committee of the Whole, instead of examining the amendments to article 62 in detail, should first discuss the question of principle, namely to what extent the majority of delegations were really prepared to go beyond existing international law.

Texts proposed by the Drafting Committee

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 16, 18, 19 and 20 as adopted by the Drafting Committee.

Article 16 (Formulation of reservations)

13. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 16 had been adopted by the Drafting Committee:

"*Article 16*"

" A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

" (*a*) the reservation is prohibited by the treaty;

" (*b*) the treaty authorizes only specified reservations which do not include the reservation in question; or

" (*c*) in cases other than those covered by paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty. "

14. Owing to the length and complexity of articles 16 and 17, the Drafting Committee had considered that the two articles should not be combined in a single article. It had therefore not accepted the amendments to that effect.

15. In the introductory phrase of article 16, the Drafting Committee had replaced the nouns " *signature* ", " *ratification* ", etc., in the French and Spanish texts by the corresponding verbs in order to simplify the sentence and at the same time to bring it closer to the English text.

16. In the interest of greater clarity, the Drafting Committee had adopted the Polish amendment (A/CONF.39/C.1/L.136) to insert in paragraph (*b*) the word " only " between " authorizes " and " specified ".

17. With regard to paragraph (*c*), the Drafting Committee had carefully examined the phrase " in cases where the treaty contains no provisions regarding reservations " in the International Law Commission's text. Some members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in paragraphs (*a*) and (*b*), and the Drafting Committee had therefore decided to replace the phrase by " in cases other than those covered by paragraph (*a*) and (*b*) " in order to ensure that no gap was left.

18. The Drafting Committee had not accepted the other amendments referred to it; in particular, it had not thought it right to replace the words " the object and purpose of the treaty " by " the character or the purpose

of the treaty ", because the expression " the object and purpose of the treaty " had been used by the International Court of Justice and it was a notion found in many legal texts.

19. Mr. JAGOTA (India) asked for an explanation of the new wording of paragraph (*c*). The cases other than those covered by paragraph (*a*) were clear: they were cases where the reservation was not prohibited by the treaty or, in other words, was impliedly authorized; but it was hard to see what cases there were other than those covered by paragraph (*b*).

20. If the new wording meant that the terms of paragraph (*c*), namely the criterion of incompatibility with the object and purpose of the treaty, applied not only where the treaty contained no provisions regarding reservations, but also where reservations were authorized, that seemed to come to the same thing as if that criterion had been placed in the introductory phrase of the article, as some delegations had proposed.

21. Mr. ROSENNE (Israel) said he accepted the new draft of article 16 and especially the addition of the word " only " in paragraph (*b*). He wondered whether the Drafting Committee had any special reason for wording paragraph (*c*) " in cases other than those covered by paragraphs (*a*) and (*b*) " rather than simply " in other cases " or " in all other cases ".

22. Mr. HARRY (Australia) said he had no objection to the new draft. He noted that in the English text of paragraph (*c*) the words " covered by " were now used, whereas in article 17, paragraph 4, the wording used had been " falling under ". He suggested that the wording of the two provisions should be made uniform.

23. Mr. YASSEEN, Chairman of the Drafting Committee, said the Committee had given careful thought to the question put by the Indian representative. The expression " in cases where the treaty contains no provisions regarding reservations " in paragraph (*c*) of the International Law Commission's text might give the impression that the provision in paragraph (*c*) would not apply if the treaty contained any provision at all regarding reservations. But that was not what was meant. The test of incompatibility with the object and purpose of the treaty was applicable if, in the first place, reservations were not prohibited by the treaty and, in the second place, the reservation in question was not one of those expressly authorized by the treaty. It was a desire for clarity and precision, then, which had led the Drafting Committee to amend paragraph (*c*).

Article 16 was approved.

Article 18 (Procedure regarding reservations)

24. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 18 had been adopted by the Drafting Committee:

" *Article 18*

" 1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

" 2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

" 3. An express acceptance of, or an objection to, the reservation made previously to confirmation of the reservation does not itself require confirmation. "

25. In paragraph 1 of the article, in order to dispel any doubts on the scope of the provision, and using the Canadian amendment (A/CONF.39/C.1/L.158) as a basis, the Committee had inserted the words " contracting States and " before the words " other States entitled to become parties to the treaty ". The Committee had considered that the contracting States had, *a fortiori*, the right to be informed.

26. At the beginning of paragraph 3, using the Hungarian amendment (A/CONF.39/C.1/L.138) as a basis, the Committee had added the words " an express acceptance of, or ". That addition had entailed a slight change in the drafting of the remainder of the paragraph.

27. The Committee had not accepted any of the other amendments referred to it by the Committee of the Whole.

Article 18 was approved.

Article 19 (Legal effects of reservations)

28. Mr. YASSEEN, Chairman of the Drafting Committee, said that the following text for article 19 had been adopted by the Drafting Committee:

" *Article 19*

" 1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

" (*a*) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

" (*b*) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

" 2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

" 3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. "

29. In the interests of clarity, the Committee had inserted in paragraph 1 (*a*) the words " in its relations with that other party " after the words " for the reserving State ".

30. The Committee had not adopted any of the amendments referred to it by the Committee of the Whole. In particular, it had not considered it necessary to adopt the amendment by Ceylon (A/CONF.39/C.1/L.152) to add a new paragraph 4 to article 19, because it had found that the matter the amendment dealt with was already covered, in a somewhat different way, in article 17, paragraph 4 (*c*). In that provision, the term " is effective "

was general in scope and meant that the consent of the reserving State might be one of the expressions of consent required for the treaty to enter into force.

31. Mr. BARROS (Chile) observed that in the Spanish text of the opening phrase of paragraph 1 the term " *establecida* " had been replaced by " *que sea firme* ". No doubt it was hard to find an appropriate equivalent for the English " established " and the French " *établie* ". But the expression " *que sea firme* " might give rise to doubts because it was generally used of the final sentence of a court and could hardly apply to a reservation, which could be withdrawn. That translation problem might well be looked at again, and the original word " *establecida* " might perhaps be restored.

32. Mr. SEPULVEDA AMOR (Mexico) said he supported the Chilean representative's remark. The expression " *que sea firme* " was not appropriate. The Drafting Committee should try to find an adequate wording for the Spanish text.

33. Mr. YASSEEN, Chairman of the Drafting Committee, said that at the 59th meeting he had explained the Drafting Committee's method of work so far as concerned the text of the articles in the various languages. The Drafting Committee included members representing all the official languages of the Conference, and each could give his opinion on any expression in his own language; in addition, the Drafting Committee could request the assistance of the Conference's Language Services. Those were the circumstances in which the Drafting Committee had altered the Spanish version of paragraph 1.

34. Mr. DE LA GUARDIA (Argentina) said the Drafting Committee had had great difficulties with the expression to which the Chilean representative objected. In Spanish the term " *establecida* " could be construed to mean that the reservation had merely been formulated. The Expert Consultant had explained that the word " established " in the English text meant that the reservation was not only formulated but also accepted by the other party and that, consequently, it produced all the effects indicated in the article. The French-speaking members of the Drafting Committee had been divided about the meaning of the French term " *établie* "; it was held by some that the word meant that the reservation was simply formulated, and by others that it had been formulated and accepted by the other party. The Conference's Language Services had proposed the expression " *que sea firme* " for the Spanish text. For the time being, no one had been able to find a more satisfactory form of words.

35. In general, the change of a single word in an article might have repercussions on other articles which were not immediately perceptible. Consequently, the Committee of the Whole should approve the articles subject to any changes that might be considered necessary when the text was put in its final form.

36. The CHAIRMAN suggested that the Committee should approve article 19 subject to any improvement of the Spanish text that might be needed.

Subject to that reservation, article 19 was approved.

Article 20 (Withdrawal of reservations)

37. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not accepted any of the amendments to article 20 which had been referred to it, and it had adopted the International Law Commission's text as drafted.

38. Mr. ZEMANEK (Austria) said that, together with the delegation of Finland, his delegation had submitted an amendment (A/CONF.39/C.1/L.4 and Add.1) to add a new paragraph to the article with a view to dispelling possible doubts concerning the withdrawal of reservations. No objection had been made to the amendment during the discussion of the article at the 25th meeting. When introducing his delegation's sub-amendment (A/CONF. 39/C.1/L.167), the USSR representative had said that he disagreed with the Austrian amendment only on a minor point, which implied that he accepted it in principle. At the end of the debate, the Chairman had not followed the usual practice of putting substantive amendments to the vote but had referred the article and its amendments to the Drafting Committee. His delegation had not asked for a vote, but it had thought that the Drafting Committee, to which the amendment had been referred, would have considered that the Committee of the Whole had accepted it. To its surprise, the Drafting Committee had, on the contrary, taken no account of it.

39. Without wishing to raise the question whether the Drafting Committee had acted within its powers under rule 48 of the rules of procedure, his delegation wished to place on record that it deplored not only the fact that the amendment had been ignored but also the way in which it had been ignored.

40. Mr. BARROS (Chile) drew attention to a slight difference in form between paragraphs 1 and 2 in the Spanish text. The clause " Unless the treaty otherwise provides", which came at the beginning of the sentence in the English and French versions, was usually transferred to the end of the sentence in the Spanish text. That had been done in paragraph 2, but not in paragraph 1. In the interests of symmetry, it would be better to employ the same form in paragraph 1.

41. Mr. YASSEEN, Chairman of the Drafting Committee, said in reply to the remark made by the Chilean representative that the formulation adopted for the Spanish text had been considered suitable by the Spanish-speaking members of the Drafting Committee, who had been assisted by the Conference's Language Services. Each language had its peculiarities, and absolute uniformity should not always be insisted on.

42. With reference to the Austrian representative's remark he expressed the hope that the question of the Drafting Committee's powers would not be raised, as matters of form and substance were always closely linked. He regretted that he had not at once explained that the reason why the Drafting Committee had not thought it necessary to adopt the Austrian and Finnish amendment was that it had been of the opinion that the idea expressed therein was already embodied in article 20. If a party withdrew a reservation, that reservation no longer existed; its effects were nullified and the treaty entered into force between the two parties.

Article 20 was approved.

The meeting rose at 9.50 p.m.