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SEVENTY-FIRST MEETING

Wednesday, 15 May 1968, at 10.45 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

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 *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft, together with the proposed new article 62 *bis* (A/CONF.39/C.1/L.348).

2. Mr. FATTAL (Lebanon) said it had been stated very forcibly during the discussion that certain States would be unable to accept the convention on the law of treaties if article 62 were amended. A second group of States was equally firm that the only solution was to amend article 62; if the text were left unchanged, they would find it impossible to ratify the future convention. A third group of States was undecided which position to choose.

3. He quite understood the position of the USSR delegation, which adhered to the rigid traditional conception of sovereignty: that position suited a super-Power confident in its own prestige, which over a period of fifty years had grown strong behind its frontiers, by its own strenuous and unaided efforts. The position of small States and young States was very different however. The USSR representative had explained to them that article 62 would guarantee their freedom of action. But the shapeless and ambivalent provisions of article 62 would operate sometimes in the interest and sometimes against the interest of small States. Where two partners were unequal, it would favour the strong State against the weak State. As Lacordaire had said, as between the strong and the weak, the rich and the poor, freedom meant oppression and law meant enfranchisement.

4. For example, if a small, weak country like Lebanon were to invoke the *rebus sic stantibus* doctrine of article 59 in an endeavour to terminate a treaty with a big Power, the big Power would have a whole sheaf of weapons at its disposal. It was clearly better for a weaker country not to have to confront its stronger partner but to be able to interpose conciliators or freely chosen arbitrators.

5. It was perhaps true to say that the rules of international law on co-operation had developed without judges or policemen. As early as 1890, Jellinek had pointed out that international administrations were functioning smoothly; but that was because they were highly organized institutions with a solid structure. The tragedy of the convention on the law of treaties was that it did not appear to possess any structural organization whatever. That would have been of little consequence if the Conference had merely been codifying *lex lata*, which presupposed a substantial body of State practice and legal literature to serve for purposes of interpretation in case of difficulty. The position was entirely different where rules were *de lege ferenda* and had to be interpreted in a legal vacuum. As matters stood, that vacuum would be filled by the unilateral, subjective and sovereign interpretation of over one hundred individual States acting each on its own behalf.

6. In the absence of international institutions, the doctrine of the dual capacity *(théorie du dédoublement fonctionnel)* of the State was accepted in many matters. In the present case, a State party to an international dispute would act in three separate capacities: first, as party to the dispute; secondly, as judge in its own cause; and thirdly, as judge in the cause of its treaty partner. It must be admitted that that was rather too much.

7. It might be true that, as a general rule, the law was observed without the help of judges or policemen, but it was equally true that fear of the law-enforcement officers was a salutary deterrent. In any case, the conciliators and arbitrators mentioned in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) were far from being judges or policemen. They would function very discreetly; in fact, the work of conciliators was secret and it was difficult to understand how it was possible to refuse conciliation. And although arbitration was in principle compulsory under the amendment, an arbitral award was not enforceable. Moreover, neither conciliation nor arbitration would come into play unless and until all the means of settlement specified in Article 33 of the Charter had been exhausted.

8. It had been objected that a large number of international conventions not embodying provisions for the compulsory settlement of disputes were concluded every year and functioned smoothly. The convention on the law of treaties was, however, different from other conventions. It had a constitutional character: it was not a mere treaty but a treaty to govern treaties. The convention on the law of treaties would regulate the main source of international law; it would modify the hierarchy of legal norms; it would determine the validity or invalidity of those norms. After its entry into force, it would no longer be possible to enact rules of international law otherwise than in accordance with its provisions. The convention would be the supreme law for international legislators.

9. The draft convention, moreover, contained new principles such as *jus cogens* and *rebus sic stantibus* which had been described as " dynamic " and which, for that very reason, needed a moderating element to avoid divergent and unilateral interpretations. It was hardly necessary to recall that the *rebus sic stantibus* principle had never operated in the past, despite its inherent fairness, precisely because there was no constitutional procedure to apply it.

10. If left to the subjective appreciation of the parties, the new and somewhat fluid principles embodied in the draft articles would involve the risk of resuscitating in a new form the well-known reservations regarding " vital interests " and " national honour " of States which had so often been made to conventions before the First World War, and which amounted to the negation of international law.

11. Mr. DIOP (Senegal) said he had already emphasized at the 43rd meeting the need for impartial determination of disputes arising out of allegations of invalidity under

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

the provisions of Part V, Section 2. Against that background, he must now express his doubts regarding article 62. In the interests of brevity he would concentrate on the important provisions of paragraph 3 of the article and the amendments thereto.

12. The provisions of that paragraph as they stood were inadequate in that they merely referred back to those of Article 33 of the Charter. Those Charter provisions constituted a mere enumeration, by way of indication, of possible means of settlement; the choice of means was left to the free determination of the parties. That was something that his delegation could not accept where the convention on the law of treaties was concerned. It was essential to make provision for compulsory arbitration or adjudication in order to ensure the security of international treaty relations. In view of the dangerous repercussions which disputes over the validity of treaties could have, not only on international relations but even on peace itself, there must be some means of peaceful solution if the procedures of Article 33 were exhausted. Article 62, as it stood, did not provide such means, and so left a serious gap that must be filled.

13. His delegation commended the efforts of many delegations to remedy that defect. Of the various schemes which had been put forward, his delegation could not support that contained in the Japanese amendment (A/CONF.39/C.1/L.339) because it provided for adjudication by the International Court of Justice. He recognized the contribution made by the Court to international law, but there was a need to ensure fairer representation of all the legal systems of the world in institutions of that kind. Moreover, a single denial of justice was sufficient to discredit a judge. For similar reasons, his delegation could not support the Swiss amendment (A/CONF.39/C.1/L.347), although it did have the merit of giving the parties an option to resort to an arbitration commission instead of to the International Court of Justice. The United States amendment (A/CONF.39/C.1/L.355) provided for unduly complex machinery, including a cumbersome 25-member permanent commission, and he could not support it. Nor could he support the Uruguayan amendment (A/CONF.39/C.1/L.343), despite its noble inspiration, because of doubts regarding the effectiveness of " recommendations ".

14. He supported the scheme put forward in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) which did not conflict with the provisions of article 62. Its purpose was to supplement those provisions by enabling a party to a dispute which had not been settled after a specified period to request the Secretary-General of the United Nations to bring into play the procedure indicated in the annex. That procedure represented a useful complement to the means of settlement specified in Article 33 of the Charter. With regard to that procedure, many speakers had lost sight of the fact that, at the conciliation stage, the conciliators, after ascertaining the facts, were called upon to make proposals to the parties for an amicable settlement. It was only in the absence of such a settlement that, as *ultima ratio*, the stage of compulsory arbitration would begin.

15. The scheme of compulsory arbitration provided in the thirteen-Power amendment contained all the safeguards which could be demanded by a party to a dispute confident in the justice of its cause: it offered easy access to the parties, provided for a speedy and uncomplicated procedure and was based on the principle of parity. Lastly, the scheme would not be very costly and the awards would be enforceable. A system of that type, based on conciliation machinery and compulsory arbitration within the framework of the means of pacific settlement of disputes, would make it possible to avoid unilateral interpretations and would thereby contribute to the stability of international relations and the maintenance of the rule of law.

16. Mr. PINTO (Ceylon) said that an effective article 62 could go a long way towards introducing an element of stability into the relationships arising under the proposed convention on the law of treaties. Unfortunately, paragraph 3 failed to deal with the problem of effective settlement of disputes; it merely incorporated by reference the methods and procedures for settlement set forth in Article 33 of the Charter.

17. Article 33 of the Charter simply enumerated the various modes of settlement available to the parties to a dispute. A mere catalogue of that nature was understandable in the context of political disputes likely to endanger international peace and security, for the Security Council stood behind the procedures enumerated. Without a corresponding presence in the proposed convention on the law of treaties, a catalogue of means of settlement remained a mere injunction to do no more than to seek a solution.

18. His delegation would give serious consideration to any mechanism which was flexible enough to give the parties to a dispute the widest freedom to use all possible means of arriving at a solution, but which would at the same time select one means of settlement and compel recourse to it for final determination of the dispute when all else had failed. Bearing in mind the injunction contained in Article 36 (3) of the Charter that legal disputes should as a general rule be referred to the International Court of Justice, the Court would seem to be the suitable organ for such final determination. However, such a proposal was not likely to gain much support because of some disappointment over recent decisions of the Court.

19. Compulsory conciliation would offer a workable and acceptable alternative, to be followed by arbitration in the event of failure of the efforts at conciliation. Most of the amendments submitted to article 62 reflected that approach. Although all contained some elements of interest, none of them, nor indeed article 62 as it stood, commended itself wholly to the delegation of Ceylon. Since a sound procedure for the settlement of disputes capable of gaining wide acceptance was of crucial importance to the proposed convention, he suggested that a decision on the actual text of article 62 be deferred, perhaps until the second session of the Conference. During the intervening period, consultations would be carried on by Governments for the purpose of formulating a procedure acceptable to the overwhelming majority of States.

20. The attitude of his delegation to the various amendments would be determined by the foregoing considerations. It was his delegation's understanding that, if the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) were accepted, it would apply only to future treaty relationships. The formula embodied

in that amendment would be more acceptable if provision were made for a new paragraph 3 *ter* stipulating that States were entirely free to contract out of the compulsory settlement scheme with respect to particular treaties or to particular provisions of the convention on the law of treaties. Such a paragraph would emphasize the *jus dispositivum* character of the scheme and the legitimate character of any agreement for an *ad hoc* settlement procedure tailored to a particular situation. That was not a formal proposal but merely a suggestion put forward in an effort to achieve a compromise.

21. Lastly, he supported in principle the Swiss proposal for a new article 62 *bis* (A/CONF.39/C.1/L.348), which would make it clear that article 62, regardless of its ultimate form, would not override settlement procedures agreed earlier between the parties to the dispute.

22. Sir Francis VALLAT (United Kingdom) said he must repeat his delegation's view that the proper interpretation and application of the future convention on the law of treaties, especially Part V, depended on the establishment of satisfactory procedures for the settlement of disputes.

23. He understood the representative of the USSR to have said that, if the procedures envisaged in the amendments to article 62 were adopted, his Government would not sign the convention on the law of treaties; if that understanding were correct, the Conference had reached a deadlock because, if article 62 were adopted in its present form, the convention would not be acceptable to a number of other Governments. The deep-rooted objection of the USSR to independent procedures in the application of law was difficult to understand and suggested opposition to justice itself, an opposition which had already been adumbrated when, at the 41st meeting, the USSR representative had said that the United States amendment to article 41 (A/CONF.39/C.1/L.260) " introduced a new element, the concept of justice, which only complicated matters ". Whether or not the record of the Soviet Union representative's statement was entirely accurate, it did now look as though it represented the basic policy of the Soviet Union.

24. The view of the United Kingdom delegation was that improvements to article 62 were vital in the interests of law and justice. The present text was ambiguous, unilateral and indefinite. It would not secure justice for the parties or maintain the interests of the international community. By leaving the whole matter to individual States, it did not even secure the uniform interpretation which ought to be of the essence of the codification of the law of treaties.

25. Those remarks were particularly relevant to articles 50 and 61, by virtue of which the validity of treaties would be governed by peremptory norms of international law. Such norms had been unheard of until a few years previously, and many States had until recently rejected even the idea of norms of general international law, let alone peremptory norms. The peremptory norms identified so far were few in number but they were, and must be, rules of law that were universally binding and from which there could be no derogation. Those norms must be applied not in the interests of the parties to the treaty but in the interests of the international community as a whole. To leave the identification, definition and application of peremptory norms to be determined by the interests of the individual parties concerned would mean retreat to chaos, not progress towards law and justice. Whatever might be done with regard to other draft articles, disputes arising out of articles 50 and 61 must be settled at the highest possible judicial level in the world. It would be destructive of the very concept of peremptory norms of general international law to leave those matters to the discretion of individual States.

26. The various amendments which had been proposed to article 62 had many interesting and useful features. However, it would be difficult for many delegations to make a choice in the matter without instructions from their Goverments.

27. Four main questions were involved. The first was whether the application of Part V, and particularly articles 50 and 61, would be left to unilateral action and to the decision of the parties concerned only. His delegation, like many others, felt that the only answer to that question was that there must be third party procedures for the application of those articles.

28. The second question was that of determining to which articles third party procedures should apply. His delegation's view was that there ought to be such procedures for the solution of problems arising out of the interpretation of all those articles whose application could involve questions of interpretation and the assessment of evidence in their application. They included all the articles in Part V, but above all the *jus cogens* articles 50 and 61. It was difficult to see how those articles could be acceptable to the international community without adequate procedures to protect its interests.

29. The third question was what would happen to the treaty if an objection was made under paragraph 1. The presumption should be in favour of the continuance of the treaty in force, unless there was some good reason to the contrary, and whether the reason was good could be satisfactorily decided only by some third party procedure. The interim situation should be dealt with by provisional measures decided upon by some independent authority: the States involved would be at loggerheads, and it would be unjust and wrong to allow one State to impose its will on the other.

30. Thus, the second and third questions both indicated the need for third party procedures, and the fourth question was, naturally, what those procedures should be. His delegation did not consider that a mere reference to Article 33 of the Charter was enough. The first procedure mentioned in that Article was negotiation, but although negotiation was desirable and necessary, experience had shown that it was often slow, frequently led to deadlock rather than solution, and might enable the recalcitrant State to impose its will, so that it could often be an obstacle rather than a means for the settlement of the dispute. Unless some special provisions were made in the convention, there would often be no progress beyond the stage of negotiation, because the parties would be unable to agree on any other means; and yet that seemed to be the wish of some delegations, even in the application of peremptory norms.

31. Under the various amendments, the choice seemed to lie between conciliation, arbitration and judicial settlement. Conciliation would undoubtedly be useful in

many cases, and might be made compulsory, but would not be the solution in every case, for if one of the parties rejected the proposals of the conciliator, some further procedure would be necessary if the dispute was to be settled. That left the alternatives of arbitration or recourse to the International Court of Justice.

32. The United Kingdom delegation would be satisfied if purely bilateral disputes were settled by arbitration, although ultimate resort to the International Court of Justice should not be excluded, especially in cases where the States concerned had already accepted the compulsory jurisdiction of the Court. On the other hand, in matters of such overriding importance as those covered by articles 50 and 61, reference to the Court seemed essential, for such questions could not be left to private and local arbitration. The development of a permanent universal jurisprudence was necessary in the interests of the whole international community, for if arbitral tribunals in different parts of the world arrived at different conclusions on the existence and the extent of an alleged peremptory norm, chaos and confusion would result, and the only tribunal that could really meet world needs was the International Court of Justice.

33. It had regrettably become fashionable to look with disfavour on the International Court of Justice, despite the fact that the Court was one of the principal organs of the United Nations, that all Members of the United Nations, as well as a number of other States, were parties to the Statute of the Court, and that the judges of the Court were elected by the joint action of the General Assembly and the Security Council. Moreover, every State which did not have a national of its own serving on the Court was entitled to nominate its own *ad hoc* judge for any case in which it was a party; indeed such States were, if anything, at an advantage, because they could select a judge particularly well suited for the case at issue. Although the performance of individual judges in certain cases might be criticized, there could be no doubt that, as a whole, they represented the cream of international juridical wisdom; many of them were former members of the International Law Commission.

34. It was sometimes alleged that the United Kingdom supported the Court because it knew that that body would decide in its favour; that allegation was absolutely unfounded. Since the United Kingdom had first accepted the compulsory jurisdiction of the Court in 1930, the number of cases it had won and the number of cases it had lost before the Court had been fairly evenly balanced. Since 1945, for example, it had lost the *Fisheries* case,[2] the *Anglo-Iranian Oil* case [3] and the *Ambatielos* case.[4] Incidentally, having lost the *Ambatielos* case on the questions of jurisdiction and obligation to arbitrate before the Court, the United Kingdom had ultimately won on the merits before an arbitral tribunal.

35. The United Kingdom supported the International Court of Justice because it was the supreme judicial organ of the United Nations and the only existing judicial body suitable for maintaining the authority of international law. Although the United Kingdom was convinced that all matters relating to *jus cogens* should be referred to the International Court of Justice, it believed that all the proposals before the Committee deserved further careful consideration, but doubted whether final and satisfactory conclusions could be reached at the current session of the Conference.

36. He could not conclude more appropriately than by quoting a passage from a work on the Law of Nations by the first Special Rapporteur on the law of treaties: " No lawyer is likely to doubt the desirability of a much greater readiness on the part of States than they at present show to accept the settlement of their disputes on the basis of law. The present unlimited freedom of States to reject that method of settlement is entirely indefensible; it makes possible the grossest injustices, and it is a standing danger to the peace of the world by encouraging the habit of States to regard themselves each as a law unto itself." [5]

37. Mr. SECARIN (Romania) said that the International Law Commission's continual concern for stability in treaty relations was clearly reflected in its realistic and moderate text of article 62 which provided, so to speak, a braking device for preventing any arbitrary or abusive exercise of the rights derived from the provisions of Part V of the draft convention. By means of that simple but effective procedural article, the will of a party invoking invalidity or alleging grounds for termination, withdrawal or suspension was subjected to the will of the other parties; thus, the claimant State was obliged to notify the other parties of its claim and give them the right to object thereto. The will of the objecting State was also subordinated to that of the claimant, by providing that the ultimate solution should be sought by the means laid down in Article 33 of the United Nations Charter. The Commission hat thus wisely refrained from a formulation which might have set up a machinery of coercion by entitling any of the parties to take direct action against another; that was the great merit of the proposed system.

38. The rules set out by the Commission, moreover, reflected the stage now reached in the development of international relations and international law, since they were based on world legal opinion and on State practice. The proposed procedures were in conformity with the fundamental principles of general international law, and especially with those of the sovereignty of States, of good faith in the performance of international obligations and of the pacific settlement of disputes.

39. The principle that States must fulfil in good faith the obligations assumed by them in their international relations, laid down in Article 2 (2) of the Charter, originated from the principles of the sovereignty and equal rights of States; observance of that principle, particularly in relation to the *pacta sunt servanda* rule, was a valuable protection against arbitrary allegations of invalidity and grounds for termination.

40. The system set out in article 62 was rooted in the procedures set out in the Charter for the peaceful settlement of disputes, although the invocation of grounds of invalidity, when objected to by another party, did not always assume the dimensions of a dispute. The principle that States should settle their international

[2] *I.C.J. Reports, 1951*, p. 116.

[3] *I.C.J. Reports, 1952*, p. 93.

[4] *I.C.J. Reports, 1952*, p. 28 and 1953, p. 10.

[5] Brierly, *The Law of Nations*, p. 368.

disputes by peaceful means had been formulated at its 1966 session, by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which declared *inter alia* that States should seek early and just settlement of their international disputes by one of the means provided for in Article 33 of the Charter " or other peaceful means of their choice ".[6] In seeking such a settlement the parties were to agree upon such peaceful means as might be appropriate to the circumstances and nature of the dispute, and the principle also stated that international disputes should be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. The International Law Commission had taken that stress on free choice into account in its wording of article 62.

41. Inter-State relations were based on the establishment of stable and normal relations: thus, one of the most important functions of diplomatic missions was to promote friendly and co-operative relations between the sending and receiving States, and when mutual respect and trust were established, the atmosphere was propitious for the friendly settlement of any dispute. Accordingly, the parties to a dispute must be able to choose the most appropriate means of settlement, in the light of the circumstances and nature of the dispute. They would first resort to negotiation, the efficacy of which had been amply confirmed by international experience: indeed, given realism, wisdom, patience and perseverance, States could always find acceptable solutions by negotiation.

42. For those reasons, the Romanian delegation was in favour of retaining the Commission's text of article 62, in the belief that it contained adequate guarantees for the stability of treaties. It considered that the adoption of a provision for compulsory jurisdiction or arbitration was inappropriate in a convention on the law of treaties, for such a course would lead to a rigid system, liable to restrict the development of future treaty relations. His delegation could therefore support none of the amendments providing for *a priori* establishment of judicial procedures to which the parties must resort in all cases, regardless of the nature of the treaty.

43. Mr. WERSHOF (Canada) said that, in his delegation's opinion, the procedures set out in article 62 should apply to the whole of Part V and that a separate article on disputes, covering other parts of the convention would have to be adopted later, when the final clauses were considered. Canada was in favour of a procedure which would enable States, acting in good faith, to settle their disputes informally if possible, and therefore agreed with the view that, unless the parties chose another means, after unsuccessful bilateral negotiations, there should be provision for a conciliation procedure to be invoked by either party. The machinery should be linked with the United Nations and based on parity, with each party to the dispute equally represented under a neutral chairman. If that procedure did not result in settlement, however, article 62 should provide for a second stage, entailing either arbitral or judicial settlement, which should be compulsory, and the outcome of which should be binding on the parties.

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

44. His delegation considered that disputes under Part V could be equitably settled and the principle *pacta sunt servanda* respected only if the parties were obliged to go before an impartial third party. Some States were much more powerful than others, and compulsory recourse to impartial and binding arbitral or judicial settlement would ensure equal treatment for smaller States: the principle of the sovereign equality of States stipulated such equal treatment, but it was much less likely to be applied if smaller States had to deal directly with more powerful countries. The mere enumeration of possible means of settlement, as in Article 33 of the Charter, did not go far enough.

45. With regard to the proposals before the Committee, the first Japanese amendment (A/CONF.39/C.1/L.338) and the French amendment (A/CONF.39/C.1/L.342) had the merit of making it clear that the settlement procedures in article 62 applied to disputes under articles providing for invalidity *ab initio* and to those creating voidability. On the other hand, the Cuban amendment (A/CONF.39/C.1/L.353) was entirely unacceptable because it would give any State wishing to evade a treaty obligation the right, once it had alleged coercion or conflict with a rule of *jus cogens*, unilaterally to renounce its obligations under a treaty, without allowing any recourse whatsoever under the convention to the other State concerned.

46. The Canadian delegation could support the second Japanese amendment (A/CONF.39/C.1/L.339), especially the proposal that disputes relating to *jus cogens* should always be referred to the International Court of Justice. Peremptory norms were largely undetermined concepts of international law, and it would be in the interests of all members of the international community if the Court were enabled to pronounce on them, thereby building up precedents which were as yet lacking.

47. The Uruguayan amendment (A/CONF.39/C.1/L.343), as far as it went, represented an improvement on the Commission's draft, but unfortunately it did not go far enough. Although it provided for the possibility of compulsory third party settlement if recommended by the General Assembly or the Security Council, it failed to provide the essential element of assurance of decision. The Swiss amendment (A/CONF.39/C.1/L.347) seemed to be the clearest and simplest of the proposals and, moreover, fulfilled all the requirements which the Canadian delegation considered desirable, in providing for conciliation, to be followed, if unsuccessful, by compulsory recourse to the International Court or to arbitration, the decision to be binding on the parties. The United States amendment (A/CONF.39/C.1/L.355) offered a more complicated but consistent method, which the Canadian delegation could also support, although it considered the Swiss approach preferable.

48. Finally, the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) also provided for conciliation, to be followed by compulsory and binding arbitration. The Canadian delegation regretted that, although the possibility of recourse to the International Court of Justice by joint agreement of the parties was not excluded, the proposal made no reference even to the existence of the Court; it would be unfortunate if a convention drawn up under the auspices of the United

Nations did not provide for recourse to the very body which, under the Charter, was entrusted with jurisdiction on " all matters specially provided for in the Charter or in treaties and conventions in force ". It had been argued that article 62 should not provide for compulsory adjudication or arbitration because the Charter did not do so, but merely listed possible means of settlement in Article 33. It should be remembered, however, that before 1958 most of the multilateral treaties drafted under the auspices of the United Nations contained articles requiring the submission of disputes to adjudication by the Court, unless the parties agreed to some other settlement procedure. It was unreasonable, inequitable and unacceptable to enable individual parties to claim invalidity of a treaty under Part V of the convention against the protest of another party, without ensuring that at some point the dispute would be decided by a competent outside body. Such a provision was no more inconsistent with sovereignty than was the draft convention as a whole or, for that matter, the United Nations Charter itself.

49. His delegation could not support the Commission's draft, but would be prepared to accept the procedures proposed by Japan, Switzerland, the United States or the thirteen States.

50. Mr. STREZOV (Bulgaria) said that, in his delegation's opinion, the International Law Commission's text provided adequate procedural guarantees against arbitrary allegations of invalidity with a view to terminating or suspending the operation of a treaty which one party regarded as inconvenient. The Commission had dealt realistically with the means of settling any disputes which might arise in that regard. His delegation's careful study of the observations of Governments on the Commission's draft led it to concur with the view expressed in paragraph (4) of the commentary that the article " represented the highest measure of common ground that could be found among Governments as well as in the Commission on this question ". The solution was based on the general obligation for States to settle their international differences by the peaceful means set out in Article 33 of the United Nations Charter. That Article contained a wide range of possible solutions of problems which might arise in connexion with the application of Part V.

51. The Bulgarian delegation could not understand the arguments of those who urged compulsory judicial or arbitral settlement as the only solution, for that amounted to renunciation of the machinery provided for in Article 33 of the Charter. His delegation fully supported the simple and clear provisions of paragraphs 4 and 5 of the Commission's text.

52. Although his delegation appreciated the efforts of the sponsors of various amendments to the text, it could not support any proposals which directly or indirectly implied compulsory recourse to arbitration or to the International Court of Justice. On the other hand, it took a favourable view of proposals, such as the Cuban amendment (A/CONF.39/C.1/L.353), which did not provide for compulsory recourse to arbitral or judicial settlement.

53. Mr. SAINIO (Finland) said that the fundamental principle underlying the law of treaties was *pacta sunt servanda*, which meant that no provisions of the convention should encourage unilateral withdrawal from treaty obligations. On the other hand, it would be most unrealistic not to allow a party to denounce or withdraw from a treaty on certain exceptional grounds such as, for instance, a grave breach by the other party or a fundamental change of circumstances. However, it would be unjustified to allow the nullity, termination or suspension of the operation of a treaty to be invoked by one party as a mere pretext for getting rid of inconvenient treaty obligations.

54. His delegation had frequently asserted the importance of the procedural provisions to be applied whenever a party claimed a treaty to be invalid or invoked grounds of nullity, termination or suspension. The just and effective implementation of the rules in Part V was one of the main conditions for the reasonable and useful general application of the convention.

55. According to article 62, the first step was for a party claiming that a treaty was invalid or alleging a ground of termination, withdrawal from or suspension of the operation of a treaty, to notify the other party. The next stage depended on whether an objection was made; if it was not made before the expiry of a reasonable period, then the party could take the measure it had proposed, as provided in article 63.

56. The main provisions regulating the procedure to be followed in cases of dispute were laid down in paragraphs 3 and 4, and under the former the parties were required to seek a solution through the means enumerated in Article 33 of the Charter.

57. His delegation agreed in principle with the provisions of article 62, which constituted progress so far as concerned the settlement of disputes about the validity or invalidity of treaties, but it was aware of the difficulties that could arise in cases when the procedural safeguards in paragraphs 3 and 4 could not be applied. When one party was unwilling to refer a dispute to the means of pacific settlement proposed by the other, the latter could denounce or withdraw from the treaty. Such a solution would be inimical to international peace and security, and would reduce the significance of the new convention.

58. A treaty should in principle remain in force until all disputes concerning its invalidity or termination had been settled, and his delegation would therefore support amendments that would strengthen the procedural safeguards in article 62; that was why it was one of the sponsors of the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The organ for conciliation and arbitration proposed in the amendment would have a good chance of solving disputes referred to it, but that was not to deny the importance of the judicial machinery of the United Nations. His Government had consistently worked to strengthen the position of the International Court of Justice as the principal judicial organ of the United Nations, and was also in favour of referring disputes to peaceful means of settlement as enumerated in Article 33 of the Charter. Disputes over the interpretation and application of the present convention would usually be typical legal disputes which, under Article 36 (3) of the Charter, should as a general rule be referred to the International Court.

59. The thirteen-State amendment did not exclude the Court's jurisdiction, but did not make recourse to it compulsory because of the reluctance of certain States to accept its jurisdiction. On the other hand, the arbitral procedure provided for in the amendment was compulsory. The special conciliation and arbitration machinery would not increase the number of permanent organs of the United Nations and the conciliators would be selected from a list of qualified jurists drawn up by the Secretary-General. The proposed procedure would not be too burdensome for the United Nations.

60. The conciliation machinery had some points of similarity with the fact-finding procedure approved by the General Assembly at its last session. The conciliation commission would have to establish the facts as well as the legal elements of the disputes, though the former would be subordinate in importance. The amendment would provide a solid basis for a just, effective and flexible procedure.

61. Mr. DE BRESSON (France) said that the work of codification and development of law would endanger the stability of treaties unless proper safeguards were provided. The provisions in Part V of the draft could give rise to a great deal of uncertainty as to the conditions of their application. Articles 43 to 48 contained concepts derived from private law and required an objective establishment of the facts, something which was far from easy, as was demonstrated by the vast extent of jurisprudence in the matter.

62. Notions of relative nullity and nullity *ab initio* had not been defined as to their contents and effects, and their transposition from private law to international law was liable to create many difficulties. The provisions contained in articles 41 paragraph 3 (*b*), 42 (*b*), 53 paragraph 1, 55, 56, 57, 59 paragraph 1, 65 paragraph 2 (*b*) and 67 paragraph 1, all demanded a conclusion on the intention of the parties as well as a judgement on intangible factors.

63. Article 62 was not entirely adequate, because paragraph 3 prescribed the means of seeking a solution among those listed in Article 33 of the Charter, without requiring the adoption of a binding and compulsory procedure. Thus no precise means were laid down for the settlement of disputes, and the article was silent about the consequences of failure to find a solution if an invocation of nullity by one party were contested by the other. Those gaps in the article would lead to uncertainty.

64. All the amendments, with the exception of the Uruguayan amendment (A/CONF.39/C.1/L.343), provided for a compulsory means of settling disputes arising under Part V. The Japanese amendment (A/CONF.39/C.1/L.339) made a distinction between disputes concerning rules of *jus cogens*, which should be referred to the International Court of Justice, and other disputes, which should go to the Court or to an arbitral tribunal, but those provisions were not sufficient for articles 50 and 61. He subscribed to paragraph 3 *bis* in the Japanese amendment (A/CONF.39/C.1/L.339), which removed any doubts as to the status of the treaty before a decision was reached on the dispute.

65. The Swiss amendment (A/CONF.39/C.1/L.347) was acceptable, but it was the thirteen-Power amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) which was most likely to meet the needs of the case by providing the appropriate machinery for the settlement of disputes. It wisely distinguished between conciliation and judicial settlement. A procedure likely to bring States together would have the merit of making recourse to arbitration unnecessary. The idea of asking the Secretary-General to designate a list of conciliators was a useful innovation. On the other hand, the designation of arbitrators might cause difficulties. The formula contained in the thirteen-State amendment would safeguard the interests and equality of States, because the conciliation and arbitration bodies would be constituted on a parity basis. The system proposed was both flexible and efficacious, and the compulsory recourse to conciliation, arbitration or other judicial procedures would offer a guarantee that disputes would be solved. Despite the positive elements in the United States amendment (A/CONF.39/C.1/L.355), its proposal to submit disputes to a commission of twenty-five might be unwieldy and hamper a rapprochement between the States concerned. He would support the thirteen-Power amendment, which would go far towards fulfilling the hopes of the international community in peace and justice because the machinery of conciliation and arbitration it proposed would guarantee the sovereign equality of States.

66. Mr. KHLESTOV (Union of Soviet Socialist Republics), exercising his right of reply, said that the United Kingdom representative was making an entirely mistaken attempt to link up two different points. He was trying to create the impression that if a State opposed the compulsory jurisdiction of the International Court of Justice or compulsory arbitration, that State was opposed to justice. Nothing could be further from the truth. It was a well-known fact that, of the 124 States Members of the United Nations, only some forty-odd recognized the compulsory jurisdiction of the International Court. But that in no way meant that the remaining eighty States were against justice.

67. As to the statement of the Soviet Union representative at the 41st meeting, it had merely pointed out that the inclusion in article 41 of the United States amendment (A/CONF.39/C.1/L.260), which contained a reference to justice, would be inappropriate, since it would introduce a new concept which, given the character of the article, would be out of place; the statement could not in any way be interpreted to mean that the USSR was opposed to justice. Incidentally, there had been 27 votes in favour of the United States proposal, 14 against and 45 abstentions. If the United Kingdom representative's reasoning were carried to its logical conclusion, it would mean that the States which had voted against the amendment or abstained—nearly sixty in all—were against justice, which clearly was not true.

68. The United Kingdom representative's claim that the Soviet Government was opposed to justice in international relations was entirely without foundation. The USSR advocated peace and its foreign policy was in the interest of all peoples. In the United Nations, for example, it had been on the initiative of the USSR that the Declaration on the abolition of colonialism had been adopted—an act that clearly aimed at the establishment of justice in international relations. Of course, the United Kingdom representative did not like that Declaration because its

purpose was to liquidate colonialism, but there could be no doubt that it represented an act of justice. The same could be said of the Declaration on non-intervention, which had been adopted by the General Assembly on USSR initiative.

69. He categorically rejected that attempt to slight his delegation and regretted that the United Kingdom representative should have made such a statement.

The meeting rose at 1 p.m.

SEVENTY-SECOND MEETING

Wednesday, 15 May 1968, at 3.20 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

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

Article 17 (Acceptance of and objection to reservations)[1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement about article 17.

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not submitted a final text for article 17, as some of the amendments to that article dealt with the question of general and restricted multilateral treaties, on which the Committee of the Whole had not yet taken a decision. The Drafting Committee had circulated the text it had provisionally adopted for article 17 (A/CONF.39/C.1/L.344) because that text raised quite a different problem, concerning which it hoped to receive immediate instructions from the Committee of the Whole.

3. Paragraph 3 of the text of article 17, as amended by the Committee of the Whole, could be divided into two parts, the first of which read:

" When a treaty is a constituent instrument of an international organization and unless it otherwise provides, the reservation requires the acceptance of the competent organ of that organization ".

4. That part reproduced, with a slight drafting change, the whole of paragraph 3 contained in the International Law Commission's draft. The second part had been added by the Committee of the Whole after the adoption of the United States amendment (A/CONF.39/C.1/L.127). It read as follows:

" but such acceptance shall not preclude any contracting State from objecting to the reservation ".

5. The Drafting Committee wished to receive instructions from the Committee of the Whole concerning the legal effect of the objections to which the second part of paragraph 3 referred.

6. Article 17, paragraph 4 (*b*) dealt with the legal effects of an objection to a reservation. It read:

"(*b*) an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State; ".

7. But paragraph 4 opened with the words:

" In cases not falling under the preceding paragraphs of this article... ".

8. In other words, paragraph 4 (*b*) did not apply to an objection to a reservation that had been accepted by the competent organ of an international organization, since that type of objection came under paragraph 3.

9. It might therefore be argued that, in the present text of article 17, that type of objection was void of legal effect. The régime laid down in paragraph 4 of article 17 could of course be applied by analogy to those objections. The Drafting Committee was uncertain whether that had been the Committee's intention when it had adopted the United States amendment.

10. Even if that had been the intention, it should be noted that the last phrase in paragraph 3 of article 17, as adopted by the Committee of the Whole, concerned a complex problem that raised numerous difficulties which could not be settled merely by a provision in the convention. It affected the functioning of international organizations and went beyond the law of treaties, having regard to the limits set by the convention itself. It belonged rather to topics included in the International Law Commission's agenda, such as the relations between States and intergovernmental organizations. He reminded the Committee of the Whole that, at its 11th meeting, it had adopted a resolution (A/CONF.39/C.1/2) which recommended to the General Assembly that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations.

11. Consequently the Drafting Committee felt bound to recommend to the Committee that it should not retain the words that had been added in conformity with the United States amendment. It would be better to leave it to the International Law Commission to study first of all the question of international organizations as a whole, as it did not seem possible to find an acceptable solution to that question within the context of the convention on the law of treaties.

12. Mr. SWEENEY (United States of America) pointed out that the purpose of the United States amendment (A/CONF.39/C.1/L.127) had been perfectly clear and fully understood by all the members of the Drafting Committee. There had been no question of authorizing a reservation or an objection to a reservation likely to affect the internal functioning of an organization. His delegation had merely wished to say that a State could always make a reservation that did not in any way affect the internal functioning of an organization and that another State could always object to that reservation.

13. Nevertheless, in view of the drafting difficulties that the idea in the amendment would cause if it was to be adapted to the provisions of article 17, his delegation was ready to agree that its amendment should not be included in the article. His delegation's position on the idea in the amendment remained unchanged, however. The situation with which it dealt remained covered by the general rules of existing international law.

[1] For discussion of article 17, see 21st to 25th meetings.