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sought to supplement it, contained interesting ideas and deserved further consideration. Although it went further than the International Law Commission's text by providing for a compulsory conciliation procedure, which could be followed by arbitration, it was nevertheless based on the principle of equality, and did not go outside the limits of the United Nations. The provisions for the appointment of the chairmen of the conciliation commission and arbitration tribunal by the Secretary-General, and for the United Nations to bear all the expenses of those bodies, had certain advantages. However, since the amendment had only been submitted quite recently, he had not had time to assess all its implications. While fully reserving his Government's position, he thought it might be preferable for the sponsors of the amendment not to press it to a vote at the present stage. It would perhaps be advisable to give Governments time for reflection and consultation until the following year before taking a final decision.

102. Mrs. ADAMSEN (Denmark) said the Danish delegation thought that the draft of article 62 proposed by the International Law Commission, the result of a compromise between the differing opinions of Governments and members of the Commission, did not provide a real solution to the problems arising out of the settlement of disputes in connexion with the application of the provisions of Part V. On the contrary, the article would open the door to many abuses. If the text was adopted as drafted, a party to a treaty, after exhausting the procedures laid down in paragraphs 1 and 2, would be able to decide unilaterally not to apply the treaty, to assert that it was invalid, to terminate it, withdraw from it or suspend its operation. In other words, it would be possible for a State to be the judge of its own case, and that would entail serious danger to treaty relations among States and to peace.

103. The Danish Government had always advocated and encouraged the settlement of disputes between States by recourse to an impartial third party; such a solution would make it possible to secure a peaceful and just settlement and to establish and affirm the rules of international law applicable to such disputes. It was not only the small and weak States which had an interest in including rules to that effect in article 62; the entire international community would benefit.

104. Although it believed that some means of settling disputes by independent adjudication was necessary, the Danish delegation was well aware that it would be hard to find a solution acceptable to the great majority of States. It was ready to support proposals for the reference of disputes, or certain kinds of dispute, to the International Court of Justice. But it was inclined to think that a system of settling disputes by a combination of compulsory conciliation and arbitration would have a better chance of obtaining the widespread support which was essential. For that reason it had joined with twelve other States in submitting an amendment to that effect (A/CONF.39/C.1/L.352/Rev.1/Corr.1). The solution was obviously not an ideal one. The wording might be improved, clarified or simplified. The principle it embodied, however, seemed to strike a happy mean between the various suggestions put forward and should attract a large number of votes.

105. Mr. KEITA (Guinea) said that, though article 62 was perhaps not perfect, it had certain merits which should not be underestimated. It took full account of State practice. The Conference's objective should be to adopt a final solution acceptable to a large majority of States or even all of them. The Conference should base itself on the precedents established by the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations, which did not contain a compulsory jurisdiction clause.

106. A provision for compulsory recourse to the International Court of Justice should not be included in article 62, since Article 36, paragraph 2, of the Statute of the Court itself provided only for the faculty to recognize the Court's compulsory jurisdiction, a faculty of which only a few Member States of the United Nations had so far made use; moreover, they generally attached conditions to that recognition which considerably limited its scope.

107. The international community did not, at the present time, have any practical means of executing the judgements of the International Court of Justice. Everything depended on good faith, loyalty and the observance by States of the commitments into which they had entered. The feasibility of recourse to a compulsory jurisdiction should not, therefore, be overestimated.

108. His delegation was not opposed to the amendments to improve the form of article 62. The amendments proposing the establishment, within the United Nations, of a conciliation commission or arbitral tribunal were worth considering, provided that they did not include a compulsory clause.

The meeting rose at 6.25 p.m.

SEVENTY-THIRD MEETING

Thursday, 16 May 1968, at 10.30 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

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

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft and of the proposed new article 62 *bis*.

2. Mr. DEVADDER (Belgium) said that a convention on the law of treaties would be incomplete without suitable machinery for the settlement of disputes, especially those arising under Part V. The danger was that a State might arbitrarily invoke grounds of invalidity, suspension or termination in order to release itself from

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

irksome obligations; and if there were no impartial machinery to deal with disputes, uncertainty would ensue. Such machinery was needed more particularly in order to protect the interests of small and weaker States. As with internal constitutional law, rules that were as precise as possible and the possibility of submitting disputes to independent bodies were a guarantee of the law being applied and the weak being protected.

3. The procedure contemplated in article 62 was not effective enough, and stronger safeguards were essential. Useful elements had been proposed in the Japanese (A/CONF.39/C.1/L.339), Swiss (A/CONF.39/C.1/L.347), United States (A/CONF.39/C.1/L.355) and thirteen-State (A/CONF.39/C.1/L.352/Rev.1/Corr.1) amendments, but he could not support the Uruguayan amendment (A/CONF.39/C.1/L.343), which did not go far enough. He supported the French amendment (A/CONF.39/C.1/L.342) and the first Japanese amendment (A/CONF.39/C.1/L.338).

4. Mr. AVAKOV (Byelorussian Soviet Socialist Republic) said that article 62 was regarded as a key article by several members of the Commission. Since a treaty régime was the result of consent between the parties, unilateral suspension, termination or withdrawal must not be permitted. The procedure laid down in article 62 offered some guarantee against unilateral and arbitrary action and provided for recourse to one of the means laid down in Article 33 of the Charter at the party's own choice. Article 62 represented a compromise between extreme views.

5. His delegation could not support any of the amendments proposing compulsory arbitration or compulsory jurisdiction by the International Court of Justice and could only agree to arbitration accepted by all the parties. Treaties varied widely in character, some being important and others minor, so that a separate decision had to be reached in each case. The world community was certainly not ready to accept compulsory arbitration, as was demonstrated by the fact that the Commission's draft on arbitral procedure had been rejected by the General Assembly.[2] For those reasons his delegation could not support either the Swiss or the United States amendment.

6. Paragraph 3 in the Japanese amendment (A/CONF.39/C.1/L.339) was not satisfactory, because the International Court of Justice did not create *jus cogens*. The text of article 62 would certainly be improved, however, by the adoption of the Cuban amendment (A/CONF.39/C.1/L.353).

7. The Uruguayan amendment (A/CONF.39/C.1/L.343) deserved examination but the "competent organ" referred to in paragraph 5 should be specified.

8. Mr. MUTUALE (Democratic Republic of the Congo) said that nearly all the amendments were based on the idea that the means for pacific settlement of disputes set out in Article 33 of the Charter were insufficient. In fact, what was lacking was the will of States to have recourse to them. The principle of good faith did not at present guide States in their policy. The Charter required States to settle their differences by peaceful means, and Article 33 represented a broad and flexible compromise.

9. Mr. JAGOTA (India) said that article 62 did not deal with a question of the law of treaties but with the settlement of disputes. There had been general hesitation in accepting compulsory jurisdiction, whether of conciliation commissions, arbitral tribunals or the International Court of Justice, mainly because of the inadequacy of their institutional structure and out of financial considerations. So far, all three had been optional. The International Law Commission's draft on arbitral procedure had been adopted by the General Assembly only as a model set of rules,[3] the main reason being the reluctance of States to accept compulsory arbitration. Even the Human Rights Committee, which was a conciliation committee, could be invested with functions of conciliation only if the parties had made the optional declaration provided for in article 41 of the International Covenant on Civil and Political Rights.[4]

10. The question of compulsory arbitration or adjudication for settling disputes about the interpretation or application of the provisions of a convention had also been raised at the Conference on the Law of the Sea in 1958, the Conference on Diplomatic Relations in 1961 and the Conference on Consular Relations in 1963, and optional protocols had been adopted on the subject. The question had been further discussed by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, but no provisions on compulsory arbitration or adjudication had yet been accepted.

11. The question to be faced was how to prevent unilateral and arbitrary denunciation of treaty obligations. The Commission had proposed a twofold solution. First, it had defined, as precisely and objectively as possible, the conditions under which the various grounds of invalidity, termination and so on, might be invoked, and secondly, it had included article 62, which prescribed a procedure whereby a State invoking any grounds of invalidity, termination, etc., must give notice to the other parties regarding its claim, allowing them time to make objections. The article went on to provide that, if objection was raised, a solution should be sought through the means listed in Article 33 of the Charter.

12. As was started in paragraph (5) of the commentary, the Commission had been of the opinion that if, after recourse to one of the means indicated in Article 33, the parties reached a deadlock, it would be for each Government to appreciate the situation and to act as good faith demanded. There would also remain the right of every State, whether a Member of the United Nations or not, to refer the dispute to the competent organ of the Organization. If parties had accepted obligations based on good faith, their performance must also be ultimately based on good faith, and a State acting in bad faith would be violating its general obligations under international law to settle its disputes by peaceful means in such a manner that international peace and security were not endangered.

13. A compulsory settlement procedure would be an adequate remedy against a State invoking grounds of invalidity, termination, etc., in an arbitrary manner, but

[2] See General Assembly resolution 1262 (XIII).

[3] *Ibid.*

[4] The text of the Covenant is annexed to General Assembly resolution 2200 (XXI).

the reverse side of the coin had not been given due consideration, namely, the possibility that a party might raise frivolous objections and involve the legitimate claimant State in protracted and expensive proceedings.

14. Article 62 provided, as the Commission had stated in paragraph (6) of its commentary, " a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of the operation of a treaty ". The convention would constitute the fundamental law of treaties and would regulate the entire field of the conclusion, continuation or termination of treaties; and the Conference should not therefore decide in haste on settlement procedures which might hinder the growth of treaty law and of the law of settlement procedure itself. The Conference should confine itself to preventing unilateral and arbitrary denunciation of treaty obligations. Small and developing States did not have adequate advisory staffs or arbitrators to spare for compulsory arbitral procedures, and for a few years they would have to depend on the resources of the more developed States. The expense involved in compulsory arbitration or other procedures might also be beyond their capacity to bear. He would support the Commission's draft of article 62 in its present form.

15. Mr. MATINE DAFTARY (Iran) said that while there seemed to be a wide measure of agreement on article 62, or at least on paragraph 3, its key provision, a number of delegations wanted to fill the gaps in that provision by establishing a whole series of new institutions for the application of Article 33 of the Charter. All that would make an extremely cumbersome provision. Indeed, he wondered how a large conference could hope to succeed in a few days where the International Law Commission had failed after working on its draft for more than five years.

16. Any government wishing to submit a dispute on the interpretation of the convention to the compulsory jurisdiction of the International Court of Justice could follow the procedure laid down in Article 36 of the Court's Statute. The Commission's draft on arbitral procedure had not found favour with governments because of their excessively cautious attitude, and his efforts at the Conferences on the Law of the Sea and on Diplomatic Intercourse and Immunities to persuade States to accept the compulsory jurisdiction of the International Court had been unsuccessful. Perhaps the International Law Commission could be asked to deal with the problem of the reference of disputes to the means of settlement laid down in Article 33 of the Charter. In the meantime it would appear that article 62, as drafted by the Commission, was the highest measure of common ground that could be found among governments: perhaps a small working group, possibly consisting of the sponsors of the amendments, could prepare, before the Conference met again the following year, an optional protocol concerning the submission of disputes to an arbitral tribunal or to the International Court.

17. Mr. SUPHAMONGKHON (Thailand) said that it would be ideal if, in relations between States, the same procedure could be applied as in municipal law, where a conflict between two parties on the application or the validity of a contract could be settled, failing any other acceptable arrangement, by referring the case to a competent court of justice. Unfortunately that stage had not yet been reached in international relations. Compulsory judicial settlement or arbitration of disputes in international relations remained the ultimate objective. In present world conditions, however, it would be rather ambitious to insist upon them as the only form of solution of international disputes.

18. That did not mean that governments rejected arbitration or judicial settlement. All governments, including that of Thailand, had in fact included provision for those modes of settlement in an increasing number of recent bilateral and multilateral treaties. None the less, from there to the concept of the general justiciability of all treaty disputes was a step that States might hesitate to take without further study. Compulsory jurisdiction would undoubtedly be the law of the future. Meanwhile, realism indicated the need to accept article 62 as the possible law of the present.

19. Mr. JELIC (Yugoslavia) said that the Yugoslav Government, in its comments, had expressed its satisfaction with article 62 and with the International Law Commission's conclusion that it would not be realistic to provide for compulsory adjudication.

20. A number of amendments had been submitted providing, in one form or another, for compulsory arbitration. They all had valuable features. The Swiss amendment (A/CONF.39/C.1/L.347) would adroitly neutralize the political factor in the settlement of disputes. The United States amendment (A/CONF.39/C.1/L.355) embodied the idea of a commission representing the various legal systems of the world; the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) provided for a permanent list of conciliators; the Uruguayan amendment (A/CONF.39/C.1/L.343) contained a valuable reference to Articles 35 and 36 of the Charter.

21. In itself, the idea of compulsory arbitration would not in principle be unacceptable to the Yugoslav delegation. But the real problem was to ensure universal acceptance of the future convention, and it must be recognized that to many delegations compulsory adjudication or arbitration was not acceptable. It would therefore not be realistic at the present stage to make provision for it. He did not believe that, without compulsory arbitration, the whole treaty system and the *pacta sunt servanda* rule would crumble. The system embodied in Article 33 of the Charter had been accepted by all for disputes such as those relating to political matters, economic questions and boundary problems, any of which could affect the vital interests of a State. There was therefore no reason why the same reliance should not be placed on Article 33 for disputes relating to treaties.

22. It would not be wise to try to settle the problem of compulsory arbitration by means of a vote until efforts had been made to reach an agreed solution. As between the present text of article 62 and compulsory arbitration, there was room for accommodation. One solution could be an optional protocol; another might be to render compulsory only the conciliation procedure. Yet other solutions might be put forward.

23. If a generally acceptable formula were not found, the Yugoslav delegation would vote in favour of article 62.

It reserved its final position on the French amendment (A/CONF.39/C.1/L.342).

24. Mr. CALLE Y CALLE (Peru) said that his delegation had submitted an amendment to article 39 (A/CONF.39/C.1/L.227), to make it clear that a treaty would be void only if invalidity had " been established as a result of the application of the procedure laid down in article 62 ". It had also submitted an amendment (A/CONF.39/C.1/L.230) to article 49, the purpose of which had been to stress that, for a treaty to be void under that article, it must be established that the treaty had been procured by an illegal threat or use of force. He must now once again emphasize the need for procedural safeguards in respect of such articles as articles 42 to 59. Cases of conflict with the rule of *jus cogens* also required impartial elucidation and determination. In fact, it was not only the articles on invalidity and termination which called for procedural safeguards. Other articles of the draft contained references to such vague concepts as " the object and purpose of the treaty " and called for similar safeguards for their application.

25. The Cuban amendment to article 62 (A/CONF.39/C.1/L.353) would exclude from the application of article 62 the cases envisaged in articles 48, 49 and 50. If that amendment were to be adopted, an allegation of invalidity on grounds of coercion, or of violation of a rule of *jus cogens*, would not be subject to impartial examination. The result would be to create a situation of inequality as between the State alleging invalidity and the other party or parties to the treaty. A party contesting an allegation of invalidity would thus be unable to secure an objective settlement of the dispute.

26. In the formulation of the various substantive articles, the general approach had been very progressive, and many quite broad provisions had been adopted. It was unfortunate that a similarly progressive spirit had not been shown with regard to the settlement of disputes, and that article 62 went no further than to restate the contents of Article 33 of the Charter.

27. He noted that there was general agreement that the right to invoke grounds of invalidity, termination or suspension should be subject to procedural safeguards, so as to avoid unilateral or arbitrary action by one of the parties to a treaty.

28. The amendments by Japan (A/CONF.39/C.1/L.339), Uruguay (A/CONF.39/C.1/L.343), Switzerland (A/CONF.39/C.1/L.347), the United States (A/CONF.39/C.1/L.355), and the thirteen States (A/CONF.39/C.1/L.352/Rev.1/Corr.1) all purported to supplement the provisions of article 62 by providing adequate procedural machinery for the application of the future convention on the law of treaties. The Uruguayan amendment (A/CONF.39/C.1/L.343) had the special merit of specifying that a party wishing to invoke a ground of termination, invalidity or suspension must accept in advance the Charter obligations on pacific settlement and must undertake to abide by any recommendation of a competent United Nations organ. All those amendments took as their starting point the situation to which the application of article 62, paragraph 3, as it now stood, might in the end give rise. They provided for compulsory means of settlement only for the case in which no solution had been reached by the means specified in Article 33 of the Charter. Those supplementary means of settlement would be compulsory but not generally mandatory, for States parties to the future convention on the law of treaties would remain absolutely free to accept a compulsory adjudication or arbitration that was restricted to the specific purposes of the convention.

29. Article 62 as it now stood represented *lex lata* in so far as the settlement of disputes was concerned, since it simply referred back to Article 33 of the Charter. The amendments to which he had referred were *de lege feranda* and represented progressive development.

30. He wished to place on record his delegation's view that article 62, in whatever form it was finally adopted, would apply only to the States parties to the future convention on the law of treaties; and, like the whole of that convention, it would apply only to treaties concluded after the entry into force of the convention. Furthermore, all provisions on procedural matters must be understood as being without prejudice to the methods and procedures used in the past by States for the settlement of disputes, by virtue of treaties which included specific provisions on such settlement, or by virtue of other treaties, particularly regional treaties, on the settlement of disputes.

31. All the amendments contained useful elements, and the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) constituted an acceptable basis for discussion. His delegation would support any proposal for the setting up of a working group to endeavour to devise a formula likely to attract the widest possible support for the future convention.

32. Mr. YAPOBI (Ivory Coast) said that, while it was true that the provisions of Article 33 of the Charter reflected the existing position, they were not sufficient as far as the draft convention on the law of treaties was concerned. Paragraph 3 of article 62 provided that the parties could, if they so agreed, refer a dispute on the invalidity or termination of a treaty to adjudication or arbitration. But no solution was provided for the case in which the parties could not agree on a means of settlement. In view of the grave consequences which would flow from the application of any one of the substantive provisions on invalidity or termination, an impossible situation would thus be created.

33. His delegation could not accept a legal vacuum. It would be inadmissible to provide for grave sanctions, such as invalidity or termination, without at the same time making some provision for the implementation of those sanctions. It was for those reasons that his delegation had joined with twelve other delegations in sponsoring the amendment contained in document A/CONF.39/C.1/L.352/Rev.1/Corr.1.

34. Much had been made of the need to respect the sovereign equality of States. But a State which became a party to a treaty could not invoke its sovereignty in order to evade a provision of the treaty. A claim to absolute sovereignty in such circumstances would amount to a denial of international law. It was in the interests of the smaller countries that some machinery should be set up to ensure the observance of treaty provisions. In the absence of such machinery, it would be the smaller countries that would suffer, since inevitably the strong

would impose their views on the weak. The inclusion in the draft convention of provisions on impartial determination of disputes by an authority accepted in advance by the parties would uphold the principle of equality in international relations. Failure to include provision for such machinery would make the future convention on the law of treaties void of all content. The purpose of procedural rules was to provide the means for the application and enforcement of the substantive rules. One set of rules was the indispensable complement of the other.

35. He would urge the opponents of the compulsory objective determination of disputes to put aside narrow nationalist considerations and join in taking a step forward in ensuring the paramountcy of international law. Such an approach would be realism indeed and would respond to world needs in the twentieth century.

36. Mr. FERNANDO (Philippines) said that the overriding concern of all delegations was to formulate a convention which would be both progressive and workable. In that sense, article 62 was a crucial provision, for although considerable advances were implicit in the articles already approved, the work of the Conference might be doomed to futility unless the procedure to be followed with regard to claims of invalidity and grounds of termination, withdrawal or suspension was really effective. Although there seemed to be a wide variety of opinions on possible approaches to a solution of the problem raised in paragraph 3 of article 62, there were indications that eventual agreement might be reached, even if it were only on postponing the final decision.

37. It was to be hoped, however, that all participants would accept the view that some kind of third-party procedure was essential. If the decision were left to the parties themselves, the stronger States might be tempted to impose their will arbitrarily. If the fundamental principle of third-party procedure for settling disputes was accepted, the next question would be, what form that procedure should take. The Japanese delegation proposed in its amendment (A/CONF.39/C.1/L.339), which had been supported by the United Kingdom delegation, that all disputes relating to *jus cogens* should be referred to the International Court of Justice. The Philippine delegation would go even further in suggesting that all the other questions raised in Part V should be referred to the Court, since they were essentially legal in character, irrespective of any political implications they might contain; they must be settled by jurists skilled in international law and dedicated to the ideals of justice and impartiality.

38. The Philippine delegation was fully aware of the opposition to which such a proposal might give rise, but would suggest that such opposition was not insuperable. Further reflection might minimize the tenacity with which the converse view was held. Indeed, it was not impossible to increase the membership of the Court, in order to ensure not only a wider geographical distribution, but, what was more important, a more equitable representation of the various legal systems. Such a step would undoubtedly extend the scope of the compulsory jurisdiction of the Court; but if the necessary reforms were made in the composition of the Court, the choice of judges, their number and the procedure to be followed, objections to the Court's compulsory jurisdiction might become less intense. Certainly the Philippine delegation hoped that, whatever solution were adopted in connexion with article 62, the result would be a more sympathetic and less uncharitable attitude towards the International Court of Justice.

39. Mr. SAMAD (Pakistan) said that the International Law Commission had rightly described article 62 as a key provision for the application of Part V of the convention, since the arbitrary assertion by one party, in the face of an objection from another party, of the grounds on which a treaty should be invalidated, terminated or suspended, would jeopardize the security of treaties.

40. In paragraph 3 of article 62, the Commission proposed a procedure based on Article 33 of the United Nations Charter. But that procedure was based on the consent of the parties, and it was not clear what would happen to a treaty when the parties could not agree to any of the means of settlement set out in Article 33. In particular, the Commission's text did not make it clear whether, in such cases, the treaty would be terminated or whether it would continue in force. The Pakistan delegation was convinced that any subjective interpretation would constitute a threat to peace and to the stability of treaties; and it endorsed the views of those delegations which proposed third-party procedures for the settlement of disputes under Part V as a whole, and especially under articles 50 and 61: peremptory norms of general international law must be authoritatively determined by the highest judicial organ of the United Nations.

41. Third-party procedures might take the form of conciliation, arbitration and judicial settlement in succession; but conciliation often led to a deadlock, and his delegation considered that the means offered in the Commission's paragraph 3 were inadequate. It was in favour of compulsory conciliation or arbitration, or judicial settlement, in that order of priority, at the request of either party. It therefore supported the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1), and it was also in favour of the Swiss proposal (A/CONF.39/C.1/L.348) and the United States amendment (A/CONF.39/C.1/L.355), in that order of preference. The Japanese amendment (A/CONF.39/C.1/L.339) seemed to be too inflexible with regard to disputes arising under articles 50 and 61, although its proposals with regard to other disputes under Part V were acceptable in principle. The Uruguayan amendment (A/CONF.39/C.1/L.343) also had some merit, but he could not support the Cuban amendment (A/CONF.39/C.1/L.353), the effect of which would be to delete any reference to article 50.

42. Despite the statement 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 that question, delegations would surely agree that the matter needed to be explored further before the second session of the Conference, in order to provide for a more adequate machinery than that set out in paragraph 3 of the Commission's text. In view of the exceptional importance that the convention would assume in international relations, it seemed essential to provide for an ultimate means, failing agreement between the parties, whereby

authoritative rulings or decisions could be given by a third party or tribunal at the request of either party, in all cases of disputes concerning the interpretation and application of treaties. The cost of such procedures to the parties should not deter the Conference from accepting more adequate means of settlement, in the interests of justice.

43. Mr. EUSTATHIADES (Greece) said that the problem before the Committee was one of almost unprecedented complexity, particularly since it naturally had considerable political implications. Despite those political aspects, however, it would be undesirable for States to adopt collective political attitudes to article 62, resulting, for instance, in the alignment of the smaller and weaker countries against the large and powerful States. Greece's experience of a century of independence following a long period of foreign domination placed its representative in a good position to urge the smaller, new States to look forward, rather than back to the colonial past, and to bear in mind that their dearly won independence could not be maintained unless stability prevailed over uncertainty in the law of treaties.

44. The procedure set out in article 62 was, so to speak, a two-edged sword, and indeed it might well be that in future the powerful States would consider it to be in their interest to try to evade former treaty obligations; the fact that the convention would govern future treaties clearly militated in favour of the smaller States, and they should resist the urge to allow their attitude towards article 62 to be influenced by political-group considerations, for the consequent loss in treaty stability would outweigh the undoubted advantages they had gained through the approval of some of the substantive provisions of Part V.

45. The International Law Commission's text of article 62 should be considered from the point of view of whether it in fact succeeded in eliminating a danger to the security of treaties which would lie in arbitrary application of the provisions of Part V. The Committee should appreciate the Commission's wisdom in confining itself to setting out the general rule that disputes under Part V must be settled peacefully, instead of exceeding its terms of reference by laying down more specific rules. Nevertheless, it was doubtful whether that general rule provided the guarantees essential for smaller and new States.

46. Some speakers in the debate had asked what would happen after negotiations failed and the other means referred to in Article 33 of the Charter had to be resorted to: who would decide which means would be used? What body would take the decision after the means had been chosen? Article 33 left the choice of means to the parties, but what would happen if they could not agree on a choice? And who would be the parties involved: the parties to the dispute, all the parties to the treaty, or, in the case of disputes under articles 50 and 61, the entire international community?

47. It had been argued that the decisions in question could be taken by the existing competent organs of the United Nations, but that solution had two shortcomings. First, those organs were essentially concerned with disputes constituting a threat to international peace and security or to friendly relations between States, and by no means all disputes arising under Part V could be so described. Secondly, even in such serious cases, it might be undesirable to use the basically political approach of the existing United Nations organs.

48. It therefore seemed desirable, in the case of most disputes under Part V, to seek a solution in an area less dominated by political considerations than that of the Charter. The means enumerated in Article 33 (1) of the Charter, might be resorted to, but in the absence of agreement between the parties on the choice of means, uncertainty would still prevail in treaty relations. Alternatively, provision might be made for the inclusion in future treaties of clauses on the settlement of disputes under Part V; but that solution also presumed the prior agreement of the parties, and might therefore jeopardize the very conclusion of multilateral treaties between large numbers of States. It could be argued that States would in time become accustomed to including such clauses in treaties; that would not, however, apply to States which did not ratify the convention on the law of treaties, and in any case, the international community could not afford the luxury of leaving treaty relations in a state of instability for a long period.

49. Unless a specific apolitical procedure could be found, treaty law would finally be based either on the decisions of political organs and national parliaments, or on the good faith of the contracting parties. His delegation considered that the certainty of an objective procedure was preferable to trusting in unilateral good faith. A pre-established and sure procedure must offer smaller States the essential guarantees of competence, impartiality, and rapidity: it was in the light of those minimum criteria that his delegation had studied the amendments before the Committee.

50. The United States amendment (A/CONF.39/C.1/L.355) met the criterion of competence by providing for a commission on treaty disputes, consisting of highly qualified jurists representing the principal legal systems of the world. The Japanese amendment (A/CONF.39/C.1/L.339) had the advantage of distinguishing between the *jus cogens* articles and the rest of Part V, but was unlikely to meet with widespread approval owing to its provision for compulsory resort to the International Court of Justice. The Swiss proposal (A/CONF.39/C.1/L.347) had considerable merit: it contained the sound provision of compulsory resort to Part IV, Chapter III, of the 1907 Hague Convention for the Pacific Settlement of International Disputes,[5] it did not provide for unduly long delays, and its paragraphs 6 and 7 eliminated all possible ambiguity. All those amendments provided for third-party procedures, but were still far from attaining the goal of watertight guarantees for the smaller States.

51. In the first place, his delegation considered that solution in the early stages should be optional, not compulsory. Secondly, some of the amendments provided for a very long period for settlement: for example, the procedure set out in the thirteen-State amendment (A/CONF.39/C.1/L.352/Rev.1/Corr.1) would take about four years to complete. Thirdly, the Swiss amendment, though admirable in other respects, provided that any party could unilaterally bring a dispute before the International Court of Justice; that proposal could hardly

[5] *British and Foreign State Papers*, vol. 100, pp. 307-311.

gain widespread support. Finally, some of the amendments advocated impartial settlement by only three people: surely, the degree of security of the guarantees would be commensurate with the number of objective opinions brought to bear on the dispute, and it might be wise to consider establishing a special permanent arbitral body.

52. Many important questions had been left open. Thus, the Committee had not yet considered the serious problems of the consequences of invalidity, dealt with in Section 5 of Part V, to which article 62 was also related. Moreover, if invalidity were claimed in connexion with a collective treaty and some parties objected to the claim while others did not, it was not clear what effect the decision of a competent organ would have in respect of the non-objecting States. Moreover, complicated situations might arise if different parties to a collective treaty agreed on different means of settlement, and the competent bodies reached different verdicts.

53. In view of those outstanding problems and of the many others that might arise, it would be most unwise of the Committee to adopt any hasty decision on article 62. In particular, delegations should not adopt positions dictated by political affiliations, but should bear in mind that the establishment of sound guarantees was of primary importance to all States. Such an important decision could not be taken under pressure of time, and should be postponed for mature reflection.

The meeting rose at 1.5 p.m.

SEVENTY-FOURTH MEETING

Thursday, 16 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 *(continued)*

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

1. The CHAIRMAN invited the Committee to continue its consideration of article 62 of the International Law Commission's draft and the proposed new article 62 *bis*.

2. Mr. El DESSOUKI (United Arab Republic) said that the International Law Commission's draft article on the procedure to be followed in cases of invalidity provided a suitable basis for regulating that difficult and controversial matter. He congratulated the Commission on having provided the Conference with a comprehensive and detailed formula which could be accepted by States as a general rule, since the proposed wording was balanced and effective.

3. He agreed with previous speakers that the article should be retained as it stood, though it would also be wise to take account of other evidence of recent State practice, including that to be found in the Charter of the Organization of African Unity. Article 19 of that Charter laid down that member States undertook to settle all disputes among themselves by peaceful means, and to that end had decided to establish a commission of mediation, conciliation and arbitration, whose composition and terms of reference were to be defined in a separate protocol. All the participants in the Conference regarded article 62 as the key article in Part V of the convention, but it was also necessary to stress the importance of the relations between that article and Article 33 of the United Nations Charter, which laid down the principle that States should settle their international disputes by peaceful means in such a manner that international peace and security were not endangered. Some delegations had said they were in favour of compulsory arbitration because it would be a safeguard for small States. He could not agree with that view; compulsory arbitration, or any other procedure of that kind, would only be satisfactory if the parties to a dispute were equal in all respects. The principle of compulsory arbitration could be applied to regional treaties concluded by regional organizations, but not to a higher convention such as that on the law of treaties.

4. The delegation of the United Arab Republic was in favour of article 62 as it stood.

5. Mr. DE CASTRO (Spain) said his delegation had always attached great importance to good faith in international relations and considered that the progressive trend in international law should be encouraged. It hoped that the Committee would succeed, in an atmosphere of conciliation and harmony, in working out a system satisfactory to the great majority of States.

6. The basic idea of article 62 should be regarded as an important contribution towards the completion of the draft convention. The article was not perfect, but it provided a useful starting point and a basis for negotiation. The fears expressed about it seemed exaggerated. Some speakers had criticized the article because it did not provide for any system of compulsory settlement of disputes; others refused to consider compulsory jurisdiction.

7. The Spanish delegation considered that in order to maintain international public order and ensure good relations between States, a system of compulsory jurisdiction must be established, with firm guarantees of impartiality and efficacy. It would be difficult to devise such a system: the Committee could not do so just by adopting a few amendments or by voting. In order to allow delegations time for reflection, no decision should be taken at the present session of the Conference. A working party representing all the different views might perhaps be set up to make a careful examination of all the amendments.

8. Mr. HAYES (Ireland) said his delegation considered it essential to avoid a situation in which the invalidity or termination of a treaty on any of the grounds set out in Part V would be determined by unilateral decision, for that would undermine treaty law and weaken respect for international obligations. Article 62 should therefore be strengthened. It should provide that disputes, if they could not be settled by agreement between the parties, must be submitted to machinery for compulsory and binding independent adjudication. That machinery,