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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,

whatever its form, must be capable of producing a decision within a reasonable time and provision must be made for the operation of the treaty pending the final decision.

9. The Japanese (A/CONF.39/C.1/L.339), Swiss (L.347), United States (L.355) and thirteen-State (L.352/Rev.1/Corr.1) amendments contained interesting ideas and proposed systems which were acceptable in principle and workable in practice. The Irish delegation was prepared to support any of those amendments, or indeed any combination of proposals drawn from them which recommended itself to a substantial majority of States.

10. Mr. DADZIE (Ghana) said his delegation had already expressed the view that the convention must provide more effective machinery for the settlement of disputes. Article 62 as it stood was incomplete for the purposes of the convention. His Government's decision to advocate something stronger for the settlement of disputes than the system outlined in article 62 had not been taken lightly. Earlier, his Government had believed the article to be sufficient, so that at the meeting of the Asian-African Legal Consultative Committee held in New Delhi, the delegation of Ghana had supported it. After very careful consideration, however, his Government had come to the conclusion that, if the substantive articles of the draft convention were adopted, it would be in the interests not only of Ghana but also of the international community to strengthen the provisions of article 62. The Committee had approved the basic substantive articles and must now take a decision on article 62.

11. One question his delegation had been much concerned with was that of the International Court of Justice, which was the principal legal organ of the United Nations. It was the duty of jurists, both on the municipal and on the international plane, to uphold the dignity of legal tribunals and to encourage respect for their decisions. But unfortunately the International Court of Justice, which was the most important court in the world, was suffering from a crisis of confidence that must disturb all jurists. What was to be done? Should the jurisdiction of the Court be refused in all circumstances because of a lack of faith in the justness of some of its decisions, or should corrective measures be taken in the proper forum and at the appropriate time, in order that the Court's proceedings might adequately reflect the values of the modern world, thanks to a more rational and equitable composition of its membership? Those were questions that all countries would have to answer before long.

12. Ghana, like many other countries, had not accepted the compulsory jurisdiction of the International Court of Justice *ipso facto* and without special agreement under the provisions of Article 36 of the Court's Statute. However, there was nothing to indicate that, if it had a dispute with another State about the interpretation of a treaty, Ghana would be unwilling to submit to the jurisdiction of the International Court of Justice, despite the Court's unfortunate decision in the *South West Africa* case. The reason why Ghana had not declared itself unconditionally in favour of compulsory jurisdiction was that it believed there were disputes which, though they might relate to a breach of an international obligation, were not amenable to judicial settlement and could be better settled in a political context.

13. In the light of those considerations, it would not have been difficult for his delegation to accept the jurisdiction of the International Court of Justice for the interpretation of treaties. His delegation was realistic, however, and recognized that the time was not propitious for inserting that formula in the draft convention. It had therefore adopted a very flexible position, but it held firmly to the view that the convention must provide effective machinery for objective and independent interpretation. If the Conference was codifying *lex lata* in the international sphere, it must also codify the system for settlement of disputes. For centuries, international courts and arbitral tribunals had been the corollary of international law. What would international law be without the decisions of such bodies, which were so profusely cited by the International Law Commission in its commentaries?

14. Not one delegation had questioned the need for, and usefulness of, article 62. All the amendments before the Committee took the draft article as their starting point and were complementary to it. Some of those amendments were good and some were not, but they all suggested that article 62, as it stood, fell short of its logical conclusion. Two schools of thought had dominated the Conference since it had begun; one wished to retain the draft articles submitted by the International Law Commission, and the other wished to make sure that the articles adopted did not contain any element that might cause instability in treaty relations. Draft article 62 did not quite measure up to the second criterion, and in those circumstances it did not seem possible to insist on its retention as it stood. The Committee should therefore examine the various amendments carefully to see whether it could find a common denominator which would constitute a satisfactory compromise.

15. His delegation could not accept the view put forward by the representative of Israel, that all or most disputes likely to arise from the operation of the convention would not be amenable to the jurisdiction of a court and would have to be settled otherwise than by judicial or arbitral tribunals. Of course, some of those disputes might include elements that were preponderantly political, but if they were questions of the interpretation of the provisions of a treaty, they might be eminently amenable to judicial settlement. That was why article 62 provided for all sorts of procedures and why all the amendments were based on its text. His delegation shared the view of the authors of amendments, that a decision must eventually be arrived at that was binding on the parties to the dispute.

16. His delegation did not understand the argument that independent third party settlement was contrary to the interests of small States. Experience had shown that, in the absence of such settlement machinery, it was easier for powerful States to obtain unfair advantages. The question was how to ensure the impartiality of judicial bodies. The point had been made that their members had prejudices resulting from their educational, economic and social backgrounds, which were apt to be reflected in their decisions. But the International Law Commission's draft articles had been prepared by men with very

different backgrounds, who had nevertheless managed to produce a text that had been warmly acclaimed.

17. It had also been urged that the procedure for the settlement of disputes established by the Organization of African Unity was voluntary and that that was the kind of system that should be adopted. It was open to question, however, whether the advocates of such a system were satisfied with the present situation in certain parts of Africa.

18. Several delegations had suggested that the decision on article 62 should be postponed until the next session. His delegation was opposed to any move to postpone decisions on important and controversial articles; the Conference had stated that it would examine 75 articles, and that was what it should do. His delegation suggested that informal discussions should be held between the interested parties and that the vote on article 62 should be postponed until Tuesday, 21 May. That would allow delegations time to consult their Governments, if they needed to do so.

19. Sir Humphrey WALDOCK (Expert Consultant) said that the Liberian representative had asked a question about the words " except in cases of special urgency ", in paragraph 2. Those words had been intended by the International Law Commission to provide for cases of sudden and serious breach of a treaty which might call for prompt reaction by the injured party to protect itself from the consequences of the breach. That same preoccupation seemed to have led the delegation of Uruguay to submit its amendment (A/CONF.39/C.1/L.343).

20. The debate had shown that delegations attached great importance to the formulation of article 62. The Commission's observation that it was a key article had been cited repeatedly. It was interesting to note that, although the provisions of the article had met with strong criticisms, no delegation had questioned the need to provide safeguards for the security of treaties in connexion with the application of the rules in Part V. It was not the practice of the Commission, when submitting draft conventions to the General Assembly, to include a general article on the settlement of disputes concerning their interpretation or application. The present draft contained no such general article either. But the Commission had nevertheless thought it essential to provide procedural safeguards for the application of Part V, if the rules it contained were not to involve a serious risk for the stability of treaties and be a source of international friction. It had recognized, however, that the question of such safeguards had some connexion with the procedure for the settlement of disputes between States.

21. The Commission had concluded that the article, as provisionally adopted in 1963, represented the highest measure of common ground that could be found among Governments on the question. It had also considered that the procedures prescribed in article 62 were the minimum required as checks on arbitrary action. It had intended those procedural checks to apply to all the grounds of invalidity, termination and suspension, including those in articles 48, 49 and 50. The opening words of the article, "A party which claims that a treaty is invalid...", were designed to cover both cases in which a State invoked a defect of consent and cases in which it alleged invalidity on grounds of *jus cogens*. Those words had been criticized as not making the point entirely clear. The French amendment (A/CONF.39/C.1/L.342) was an improvement in that respect. It followed from what he had said that the Cuban proposal (A/CONF.39/C.1/L.353) to exclude articles 48, 49 and 50 from the operation of article 62 was contrary to the Commission's intention.

22. Paragraph 3 had been the subject of a great deal of criticism. In it, the Commission had stipulated that, in the event of a dispute, the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter. Although the Commission had not thought that it would go beyond Article 33, it had nevertheless considered the possibility of the parties reaching a deadlock, in which case it would be for each Government " to act as good faith demands ", as stated in paragraph (5) of the commentary. Many delegations thought the provisions insufficient; that was a matter for the Conference to decide. It was to be hoped that the Committee of the Whole would succeed in working out a procedure acceptable to all States.

23. Paragraph 5 had been criticized by implication in the Swiss and Uruguayan amendments (A/CONF.39/C.1/L.347 and L.343); that criticism seemed justified to some extent. The question had not been raised during the discussion but it deserved consideration.

24. Mr. MWENDWA (Kenya) moved that the discussion on article 62, the various amendments thereto and the proposed new article 62 *bis* be adjourned until Tuesday 21 May at the latest, in order to allow delegations time to study them more thoroughly and hold informal consultations.

25. Mr. DADZIE (Ghana) seconded the Kenyan representative's motion.

26. The CHAIRMAN put the motion for adjournment to the vote.

The motion for adjournment was adopted. [1]

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text of articles 27 to 34 adopted by the Drafting Committee.

Article 27 (General rule of interpretation) [2]

28. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 27 adopted by the Drafting Committee read as follows:

"*Article 27*

" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

" 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

" (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

[1] For resumption of the discussion of article 62 and the proposed new article 62 *bis*, see 80th meeting.

[2] For earlier discussion of article 27, see 31st to 33rd meetings.

" (*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

" 3. There shall be taken into account, together with the context:

" (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

" (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

" (*c*) any relevant rules of international law applicable in the relations between the parties.

" 4. A special meaning shall be given to a term if it is established that the parties so intended. "

29. The Drafting Committee had added the words " or the application of its provisions " at the end of paragraph 3 (*a*); that addition was based on the Pakistan amendment (A/CONF.39/C.1/L.182). In paragraph 3 (*b*), it had brought the English text into line with the French, Russian and Spanish texts by substituting the word " agreement " for the word " understanding ". It had rejected the other amendments referred to it.

30. Mr. HARRY (Australia) said he would like to ask why the Drafting Committee had rejected his delegation's amendment (A/CONF.39/C.1/L.210). The proposed deletion of the word " subsequent " in paragraph 3 (*a*) had been designed to bring out the point that any agreement between the parties regarding the interpretation of a treaty must be taken into account, whether such agreement had been reached before or after the conclusion of the treaty.

31. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had studied the Australian amendment carefully, but had considered that the word " subsequent " was absolutely necessary in paragraph 3 (*a*), because if the agreement between the parties on interpretation were not subsequent to the conclusion of the treaty, it might be regarded as part of the context. Paragraph 2 stated that " the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty ". An agreement relating to interpretation made when the treaty was concluded was therefore part of the context. Paragraph 3 dealt with another matter, for it provided, among other things, that any subsequent agreement should be taken into account together with the context. Thus the agreements it referred to did not have the same value as concomitant agreements relating to the interpretation of the treaty, which were regarded as part of the context of the treaty.

32. Paragraph (ii) of the Australian amendment, to insert the word " common " before the word " understanding ", related only to the English version, in which the word " understanding " had now been replaced by the word " agreement "; the French and Spanish versions used the words " *accord* " and " *acuerdo* ". Clearly, an agreement was always common and could not be unilateral.

33. Mr. HARRY (Australia), thanking the Chairman of the Drafting Committee for his explanation, said it seemed to him that an agreement might form part of the context if it was made in connexion with the conclusion of a treaty, even if it was not made at exactly the same time as the treaty was concluded.

Article 27 was approved.

Article 28 (Supplementary means of interpretation) [3]

" *Article 28*

" Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

" (*a*) leaves the meaning ambiguous or obscure; or

" (*b*) leads to a result which is manifestly absurd or unreasonable. "

34. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had adopted article 28 without change. It had rejected the Spanish amendment (A/CONF.39/C.1/L.217) to insert the phrase " subsequent acts of the parties " because it considered that the words " any subsequent practice ", in article 27, were sufficient.

Article 28 was approved.

Article 29 (Interpretation of treaties in two or more languages) [4]

35. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 29 adopted by the Drafting Committee read as follows:

" *Article 29*

" 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

" 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

" 3. The terms of the treaty are presumed to have the same meaning in each authentic text.

" 4. Except in the case mentioned in paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. "

36. As proposed in the United States amendment (A/CONF.39/C.1/L.197), the Drafting Committee had made the first sentence of paragraph 3 of the International Law Commission's text into a separate paragraph. The remainder of paragraph 3 had become the new paragraph 4. The Drafting Committee had considered that the first sentence of paragraph 3 should form a separate paragraph because the idea it expressed was quite different from that stated at the end of the paragraph.

[3] For earlier discussion of article 28, see 31st to 33rd meetings.

[4] For earlier discussion of article 29, see 34th meeting.

37. The Drafting Committee had inserted the word " authentic " between the words " comparison of the " and " texts " in paragraph 4. That insertion was made necessary by the division of paragraph 3 into two separate paragraphs.

38. Adopting the idea proposed in the United States amendment, the Drafting Committee had replaced the words " meaning which as far as possible reconciles the texts " at the end of the article by the words " meaning which best reconciles the texts, having regard to the object and purpose of the treaty ". The Drafting Committee had not accepted the other amendments referred to it.

Article 29 was approved.

Article 30 (General rule regarding third States) [5]

"*Article 30*

"A treaty does not create either obligations or rights for a third State without its consent."

39. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had rejected the amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.221) and had adopted without change the International Law Commission's text, which clearly stated the principle that a treaty did not create either obligations or rights for a third State without its consent.

Article 30 was approved.

Article 31 (Treaties providing for obligations for third States) [5]

40. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 31 adopted by the Drafting Committee read as follows:

"*Article 31*

"An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the third State has expressly accepted that obligation."

41. The Drafting Committee had carefully considered the Mongolian amendment (A/CONF.39/C.1/L.168) to reverse the order of articles 31 and 32 so that the rights of States would be mentioned before their obligations. The majority of the Drafting Committee had considered that, since those articles dealt with the effects of the rule that a treaty did not create either obligations or rights for a third State, the obligations, to which that rule applied even more strictly than to the rights, should be mentioned first. The provisions relating to obligations were a direct consequence of the principle stated in article 30. With regard to rights, it might be said that the provisions adopted by the International Law Commission established a certain presumption and that they did not strictly apply the principle stated in article 30. The Drafting Committee had therefore preferred not to change the order adopted by the International Law Commission.

42. The Drafting Committee had made only one change in article 31. It concerned the article—in the grammatical rather than the legal sense—used before the word " means "—in French " *moyen* " and in Spanish " *medio* ". In the English and Spanish versions the indefinite article was used, in the French the definite article. The Committee had found the French text more logical and had amended the English and Spanish texts accordingly. The Russian text did not require any change.

Article 31 was approved.

Article 32 (Treaties providing for rights for third States) [5]

43. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 32 adopted by the Drafting Committee read as follows:

"*Article 32*

" 1. A right arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to accord that right either to the State in question, or to a group of States to which it belongs, or to all States, and the State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

" 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

44. Article 32 had been referred to the Drafting Committee with the Japanese amendment (A/CONF.39/C.1/L.218) to add the words " Unless the treaty otherwise provides " at the beginning of the last sentence of paragraph 1. The Committee had adopted that amendment, but for stylistic reasons had placed the additional words at the end rather than at the beginning of the sentence.

Article 32 was approved.

Article 33 (Revocation or modification of obligations or rights of third States) [5]

45. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 33 adopted by the Drafting Committee read as follows:

"*Article 33*

" 1. When an obligation has arisen for a third State in conformity with article 31, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

" 2. When a right has arisen for a third State in conformity with article 32, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State."

46. Article 33 had also been referred to the Drafting Committee with one amendment: that submitted by the Philippines (A/CONF.39/C.1/L.211). The Committee had preferred to retain the International Law Commission's text with only a single change, namely, the deletion of the adjective " mutual " before the word " consent ". The latter term was clearly defined in the text by the phrase that followed it.

Article 33 was approved.

[5] For earlier discussion of articles 30, 31, 32 and 33, see 35th meeting.

Article 34 (Rules in a treaty becoming binding through international custom) [6]

47. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 34 adopted by the Drafting Committee read as follows:

"*Article 34*

" Nothing in articles 30 to 33 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such, or as a general principle of law."

48. The Committee of the Whole had adopted two amendments, submitted by Mexico (A/CONF.39/C.1/L.226) and Syria (A/CONF.39/C.1/L.106) respectively, to the International Law Commission's text of article 34. The Mexican amendment added the words " or as a general principle of law " at the end of the article; the Syrian amendment added the words " recognized as such ". The only question before the Drafting Committee had been the order in which the two phrases should be placed. In the original French text of the Syrian amendment, the adjective " *reconnue* " was in the feminine. It was clear, therefore, that the amendment referred only to the expression " customary rule of international law ". The Drafting Committee had therefore placed the Syrian amendment immediately after that expression and before the Mexican amendment, though the latter had been adopted first by the Committee of the Whole.

49. Mr. TAYLHARDAT (Venezuela) said that during the discussion of article 34, the Venezuelan delegation had submitted an amendment (A/CONF.39/C.1/L.223), to delete the article, which it considered to be incompatible with the principle of the sovereignty of States. Except where a rule of *jus cogens* was concerned, Venezuela would not assume obligations it had not formally accepted, still less obligations it had expressly rejected.

Article 34 was approved.

Article 63 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) [7]

50. The CHAIRMAN invited the Committee to resume its consideration of the International Law Commission's draft articles.

51. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's amendment to article 63 (A/CONF.39/C.1/L.349), said that the same problem had already been raised in the Swiss amendment to article 39 (A/CONF.39/C.1/L.121), to replace the word " invalidity " by the word " invalidation ". His delegation was opposed to the notion of invalidity *ipso facto* and for that reason proposed that the title of the article be changed to " Instruments of execution ", which was a general notion covering all the measures referred to in article 62 for claiming the invalidity of a treaty and for terminating, withdrawing from or suspending the operation of a treaty.

52. Mr. BRODERICK (Liberia) said that paragraph 2 of article 62 allowed the parties a certain time in which to raise objections and, according to article 63, if no party had raised any objection within that time, the party claiming the invalidity of a treaty or invoking a ground for termination, withdrawal from or suspension of the operation of a treaty must execute an instrument and communicate it to the other parties. If an objection had been raised by another party, however, a solution must be sought in accordance with paragraph 3 of article 62, and for that reason, paragraph 1 of article 63 should not mention paragraph 3 of article 62. Paragraph 1 of article 63 could only apply to paragraph 2 of article 62, that was to say, to cases in which the other parties had raised no objection. Paragraph 2 of article 63 was in conformity with the rule laid down in article 6 concerning full powers.

53. His delegation could not support the Swiss amendment (A/CONF.39/C.1/L.349). The title it proposed was vague and did not bring out the relationship between articles 62 and 63, which had been logically established by the International Law Commission. As to paragraph 1 of the amendment, it would be confusing to refer to the procedures to be followed as " measures " and to call either of them an instrument. According to his delegation's understanding of the International Law Commission's draft, there were two stages, the first being notification and the second communication of the instrument, provided no objection had been raised to the notification.

54. The Liberian delegation would therefore vote in favour of the International Law Commission's text, subject to the deletion from paragraph 1 of the reference to paragraph 3 of article 62.

55. The CHAIRMAN said that the Swiss delegation had requested that its amendment be referred to the Drafting Committee and that consideration of it be deferred until article 39 had been approved.

56. Mr. WERSHOF (Canada) said he would like the Expert Consultant to explain why the International Law Commission had inserted the rule contained in paragraph 2 of article 63. A formal treaty would probably be signed by the Minister for Foreign Affairs, but different Governments had different practices. As far as Canada was concerned, the Head of State and the Head of Government had not signed treaties for a great many years. Moreover, the representative who communicated the instrument would often be the accredited Ambassador, who would therefore be required under paragraph 2 to produce full powers.

57. Sir Francis VALLAT (United Kingdom) said he would like the Expert Consultant to explain two points raised in the Swiss amendment (A/CONF.39/C.1/L.349). First, one of the effects of that amendment seemed to be to delete the expression " pursuant to the provisions of the treaty " from paragraph 1 of article 63. If a notification was to be made in conformity with the provisions of a treaty, it would be made pursuant to the provisions of the treaty and not in virtue of paragraph 1 of article 63. At first sight that idea seemed to be logical, since a treaty might also provide for notification to the depositary, so that it should not be necessary also to provide for communication of the instruments to the

[6] For earlier discussion of article 34, see 35th and 36th meetings.

[7] The following amendment had been submitted: Switzerland, A/CONF.39/C.1/L.349.

other parties in virtue of paragraph 1 of article 63. Secondly, the Swiss amendment would replace the words " paragraphs 2 or 3 " by " paragraphs 1 and 2 ". That part of the amendment seemed to be justified, as it would certainly be necessary to communicate instruments pursuant to paragraphs 1 and 2 of article 62, whereas that was not so evident with respect to paragraph 3.

58. Mr. DE BRESSON (France) said that the Swiss amendment could not be fully appraised until the Committee of the Whole knew what was to be the exact wording of article 62. The French delegation had not submitted any amendment to article 63, as it was convinced that the text of that article depended on the content of article 62. The expression " declaring invalid " in paragraph 1 could have a completely different meaning depending on what system was adopted for the procedures on which the establishment of invalidity might depend.

59. He therefore supported the Swiss delegation's request that its amendment be referred to the Drafting Committee: when it saw the final formulation of article 62, the Committee of the Whole would have to draw its conclusions regarding article 63.

60. Sir Humphrey WALDOCK (Expert Consultant), replying first to the representative of Canada, said that some examples from the past had led the International Law Commission to prescribe the observance of certain forms for the acts referred to in article 62. The Commission had stated the rule in paragraph 2 rather shortly, for although it had considered that its inclusion in the article would be useful, it had not wished to reproduce there the provisions concerning the powers of a State's representative for the conclusion of treaties. The rule might, perhaps, seem a little too strict, but the International Law Commission had thought that in practice it would not cause any difficulty.

61. As to the reference to article 62, article 63 did not apply to the mere notification that might occur under paragraph 1 of article 62; such application would seem to be inconsistent with the general idea of the procedure provided for in article 62. The reference to paragraph 2 raised no particular difficulty. The International Law Commission had considered the reference to paragraph 3 justified because, after the procedures referred to in that paragraph had been gone through, it seemed possible and even probable that they might be followed by some act which fell under article 63. It would be difficult, however, to know whether that was a sound viewpoint until the ultimate fate of the provisions of article 62 was known.

62. In reply to the United Kingdom representative, he said that if the treaty contained detailed provisions on the procedure to be followed with respect to the instruments referred to in article 63, those provisions would, of course, apply. Perhaps the proviso " unless the treaty otherwise provides " should have been added to article 63. But the Commission had considered the more frequent case in which a treaty contained a provision concerning the right of denunciation, but no details of procedure. In that case it would be desirable for the denunciation to be carried out though an instrument communicated to the other parties or the depositary, whichever was appropriate.

63. The CHAIRMAN suggested that article 63 be referred to the Drafting Committee together with the Swiss amendment for consideration in the light of the eventual decision on article 62.

It was so agreed.[8]

Article 64 (Revocation of notifications and instruments provided for in articles 62 and 63)

Article 64 was referred to the Drafting Committee.[9]

Article 65 (Consequences of the invalidity of a treaty)[10]

64. Mr. DE BRESSON (France) said that his delegation had decided to withdraw the first of its amendments to article 65 (A/CONF.39/C.1/L.48). Its other amendment (A/CONF.39/C.1/L.363) was the logical sequel to his delegation's comments on article 39, paragraph 1, and to its amendment to article 62, paragraph 1 (A/CONF.39/C.1/L.342). The French delegation had pointed out at that time that the inclusion of a sentence on the establishment " of the invalidity of a treaty " in article 39, paragraph 1, confused the whole question of the conditions for establishing invalidity, and it had therefore supported the Swiss proposal (A/CONF.39/C.1/L.121) to delete that sentence and had suggested that it be specified in article 62 that that article definitely governed all the cases of invalidity set out in Part V. The French delegation now considered it desirable, in order to make the system absolutely clear, to specify at the beginning of article 65, which dealt with the consequences of the invalidity of a treaty, that the effect of the various grounds of invalidity which could be invoked under articles 43 to 50 and under article 61 was the invalidity of the treaties impeached under those articles, and that such invalidity could only be established by the procedures set out in article 62.

65. The French delegation believed that, without in any way changing the substance of Part V, it would thus be possible to achieve more satisfactorily the plan the Conference wished to adopt for Part V, which would define successively the cases of invalidity, in articles 43 to 50 and article 61, the procedure for establishing such invalidity, in article 62, and the consequences of invalidity, in articles 65 and 67.

66. Mr. MAKAREWICZ (Poland), commenting briefly on the amendment which his delegation had submitted jointly with the Bulgarian delegation (A/CONF.39/C.1/L.278), said that the word " imputable " in article 65, paragraph 3, seemed too vague and unnecessarily introduced an element of subjectivity. Paragraph (4) of the International Law Commission's commentary to the article referred to " a party whose fraud, coercion or corrupt act has been the cause of the nullity of the treaty ". The authors of the amendment preferred wording on those lines because it was clearer and more objective. It was a matter of drafting which could be referred to the Drafting Committee.

[8] For resumption of the discussion of article 63, see 81st meeting.

[9] For resumption of the discussion of article 64, see 83rd meeting.

[10] The following amendments had been submitted: France, A/CONF.39/C.1/L.48 and L.363; Bulgaria and Poland, A/CONF.39/C.1/L.278; Australia, A/CONF.39/C.1/L.217; Switzerland, A/CONF.39/C.1/L.358; United States of America A/CONF.39/C.1/L.360.

67. Mr. HARRY (Australia), introducing his delegation's amendment (A/CONF.39/C.1/L.297) to article 65, paragraph 1, said that the reference to a " void treaty " was inappropriate and might be misleading. First of all, articles 43 to 47 did not refer to " void treaties ", but to defects in consent which a State could invoke to contest the validity of a treaty; and secondly, the use of the words " void treaty " did not make it clear that the application of all the provisions relating to grounds of invalidity was subject to the procedures laid down in article 62. The Australian delegation had therefore proposed the wording " a treaty established as invalid under the present convention ". That wording was used in article 39, paragraph 1, and the word " invalidity ", which was used in article 62 and in the title of article 65 itself, was the general term for the effect of the provisions of articles 43 to 50. The wording proposed in the amendment would not prejudice the distinction made between the cases dealt with in articles 43 to 47 and those referred to in articles 48 to 50. In the former case, a treaty was considered valid unless the State concerned invoked a ground of invalidity, as provided in article 62. In the latter case, where invalidity was established under article 62, the treaty was void *ipso facto*, and if the parties wished to maintain their obligations, they must conclude a new treaty.

68. The proposed change was a drafting matter and the amendment could therefore be referred to the Drafting Committee.

69. Mr. BINDSCHEDLER (Switzerland), introducing his delegation's amendment (A/CONF.39/C.1/L.358), said that the proposal to replace the word " void " by the word " invalidated " in paragraph 1, was intended to make it clear that what was involved was not nullity *ipso facto*, and that the invalidity must be established according to the procedure laid down. On that point, he endorsed the French representative's remarks.

70. The second Swiss proposal was to delete paragraph 3. That paragraph introduced an inequality of treatment between the parties which was not necessarily justified. The fact that paragraph 2 did not apply to the party to which the defect was imputable might lead to injustice because the defect could have originated long ago. In the meantime another Government might have succeeded the guilty Government, and it would be unjust not to allow it to apply for the restoration of the previous situation, in the same way as the other party. Further, the new Government might have performed in good faith a number of acts which there was no reason to consider unlawful.

71. Acts performed by private persons must also be taken into account. A peace treaty, for example, might regulate matters of nationality or civil law. It would be unjust and incompatible with the stability of law to attack acquired rights by invalidating acts performed by private persons in conformity with the terms of such a treaty, on the ground of a defect in the State's consent. Private persons should not suffer through the faults of their Government.

72. Lastly, the non-applicability of paragraph 2 to the State to which the defect was imputable was of a penal character, which was contrary to the basic principles of international law. It would therefore be better to delete paragraph 3, which had definite disadvantages and did little to increase the efficacy of the provisions on invalidity.

73. Mr. KEARNEY (United States of America), introducing his delegation's amendment (A/CONF.39/C.1/L.360), said that it proposed first a rewording of paragraph 1, on the lines of the Australian and French amendments. That part of the amendment could be referred to the Drafting Committee.

74. It then proposed the deletion of paragraphs 2 (*a*) and 3. The various formulations adopted in articles 43-50 raised questions of the theoretical and practical consequences of invalidity. From the theoretical point of view, the legal effect of acts performed pursuant to an invalid treaty was a question of State responsibility. The United States amendment limited the article to the legal effect of invalidity on the provisions of the treaty, which was not a question of State responsibility, and to the practical aspect of the question of those acts.

75. The sanctions provided for in paragraphs 2 (*a*) and 3, which were a matter of State responsibility, would not always prove satisfactory in practice, however reasonable they might be. In the case of sales of perishable foodstuffs, for example, restitution was not always desirable or even possible. A fraudulent act could suffice to vitiate consent without being sufficiently reprehensible to justify denying the guilty party any right of recovery. That party might have performed its obligations in full and the treaty be invalidated before the other party had rendered any performance.

76. Such a limited range of sanctions, with their possibly harsh results, might discourage the parties from settling their disputes amicably and encourage them to seek the maximum benefit from the invalidity. Moreover, it was an underlying principle of the convention that treaties should continue to be performed until invalidity was established. But the parties would be disinclined to perform their obligations gratuitously while the invalidity was being discussed, if they knew that paragraph 3 denied them any right of recovery.

77. For all those reasons, he hoped the Committee would agree to delete paragraphs 2 (*a*) and 3.

78. Mr. STREZOV (Bulgaria) said that his delegation was the joint author with the Polish delegation, of an amendment to paragraph 3 (A/CONF.39/C.1/L.278), to replace the word " imputable " by an expression corresponding to the idea expressed by the International Law Commission in paragraph (4) of its commentary; the amendment was purely a drafting matter.

79. For the remainder of the article, his delegation favoured the Commission's wording, which was sufficiently comprehensive.

80. Mr. CALLE Y CALLE (Peru) said that in one way or another the amendments submitted by Australia (A/CONF.39/C.1/L.297), Switzerland (A/CONF.39/C.1/L.358), the United States (A/CONF.39/C.1/L.360) and France (A/CONF.39/C.1/L.363) all reworded paragraph 1 so as to bring article 65 into line with the other articles of the convention, particularly article 62. That aim was fully justified. The long debate on article 62 had shown that the majority of the Committee considered that the procedure laid down in article 62 should apply to all the grounds of invalidity that could be invoked. Of

the four amendments to which he had referred, the French seemed the clearest, because it expressly specified article 62, as had been done with other articles. It might perhaps be useful if the Committee were to vote on the proposed changes to paragraph 1.

81. Mr. BISHOTA (United Republic of Tanzania), referring to the Australian amendment (A/CONF.39/C.1/L.297), said that a legal distinction must be made between the word " void ", which applied to the cases dealt with in articles 48, 49 and 50, and the word " invalid ". By article 41, paragraph 5, the separability of treaty provisions was not permitted in the cases falling under articles 48, 49 and 50, whereas it was permitted in the other cases.

82. Sir Humphrey WALDOCK (Expert Consultant) said that the words " void treaty " had been used to cover all cases of invalidity. The Commission had considered that article 39, paragraph 1, should remove all doubt as to the meaning of those words. The drafting proposals before the Committee deserved consideration.

83. The changes proposed in the other paragraphs of article 65 related to substance. The International Law Commission had included those provisions at the request of Governments, which, in their written comments, had expressed the wish that the Commission should define the conditions for liquidating the situation resulting from invalidity. The representatives of Switzerland and the United States had objected, not without some justification, that the provisions adopted might prove too strict. It was for the Conference to decide whether or not the usefulness of those provisions made up for the shortcomings that had been pointed out.

84. The CHAIRMAN said that all the amendments to paragraph 1 and the amendment by Bulgaria and Poland to paragraph 3 only affected the drafting. He therefore suggested that the Committee refer to the Drafting Committee the Australian amendment (A/CONF.39/C.1/L.297), the Swiss amendment to paragraph 1 (A/CONF.39/C.1/L.358), the United States amendment to paragraph 1 (A/CONF.39/C.1/L.360), the French amendment (A/CONF.39/C.1/L.363) and the amendment by Bulgaria and Poland (A/CONF.39/C.1/L.278).

It was so agreed.

85. The CHAIRMAN put to the vote the United States amendment (A/CONF.39/C.1/L.360) to paragraph 2.

The United States amendment to paragraph 2 was rejected by 39 votes to 28, with 20 abstentions.

86. The CHAIRMAN put to the vote the amendments by Switzerland (A/CONF.39/C.1/L.358) and the United States (A/CONF.39/C.1/L.360) to delete paragraph 3.

The Swiss and United States amendments to delete paragraph 3 were rejected by 46 votes to 24, with 17 abstentions.

Article 65, with the drafting amendments, was referred to the Drafting Committee.[11]

The meeting rose at 6 p.m.

[11] For resumption of the discussion of article 65, see 83rd meeting.

SEVENTY-FIFTH MEETING

Friday, 17 May 1968, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

Article 66 (Consequences of the termination of a treaty)

1. The CHAIRMAN invited the Committee to consider article 66 of the International Law Commission's draft.[1]

2. Mr. DE BRESSON (France) said that his delegation's amendment (A/CONF.39/C.1/L.49) was based on the general proposition that some of the provisions of the draft relating to multilateral treaties sometimes did not apply to a category of instrument which his delegation described as " restricted multilateral treaties ". France believed that, in view of the character of those treaties, they must enter into operation immediately, and that the principle of separability did not apply to them. The amendment could be referred to the Drafting Committee, which already had a number of similar amendments before it.

3. Mr. EVRIGENIS (Greece) said that, in his delegation's opinion, some of the draft articles had been approved with undue haste, and insufficient attention had perhaps been paid to the wording of the texts that had been referred to the Drafting Committee. The Greek delegation could support the substance of article 66, though the rule might be difficult to apply. In particular, it seemed to be rather bold to draw a distinction between the release of the parties from any obligation further to perform the treaty and the statement that the termination of a treaty did not affect the right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. There seemed to be an element of contradiction between sub-paragraphs 1 (*a*) and 1 (*b*), but his delegation could accept the International Law Commission's formulation on the understanding that the words " legal situation of the parties created through the execution of the treaty " applied to any legal situation all the conditions of which had been fulfilled by the execution of the treaty prior to its termination, and that subsequent non-execution of the treaty, under article 66, did not have the automatic effect of reversing that situation.

4. His delegation also wished to comment on the form of article 66, in a general way which might apply to other provisions of the draft. Where the concordance of the various authentic texts was concerned, his delegation believed that the English text might be regarded as the original, and the other texts as translations. Nevertheless, those translations were sometimes not entirely adequate. Unless the Conference wished to give additional importance to article 29, on the interpretation of treaties in two or more languages, every effort should be made to bring the versions of the text even closer from the point of view of both grammar and logic. The Greek delegation was considering submitting a number of pertinent comments at a later stage of the Conference.

[1] An amendment had been submitted by France (A/CONF.39/C.1/L.49).