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81st meeting of the Committee of the Whole

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posed new article 76 dealt exclusively with disputes relating to the interpretation or application of the text of the convention. Although the two problems were quite distinct, differences of opinion on the subject of article 62 might well have repercussions on the decisions which the Committee might take on the Swiss proposal. It was therefore preferable to allow Governments time for reflection.

66. The CHAIRMAN suggested that consideration of the Swiss proposal (A/CONF.39/C.1/L.250) should be deferred until the second session of the Conference.

It was so decided.

Postponement of consideration of amendments containing specific references to "general multilateral treaties" and "restricted multilateral treaties"

67. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed to defer consideration of all amendments to add a specific reference to general or restricted multilateral treaties until the second session of the Conference.

It was so decided.

The meeting rose at 6.50 p.m.

EIGHTY-FIRST MEETING

Wednesday, 22 May 1968, at 11.20 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)*

TEXTS PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts of articles 51-54, 56-60 and 69 *bis* adopted by that Committee.

2. The Drafting Committee had not submitted any text for article 55 because some of the amendments to that article which had been referred to it touched on questions of substance not yet settled by the Committee of the Whole. [1]

Article 51 (Termination of or withdrawal from a treaty by consent of the parties) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 51 adopted by the Drafting Committee read:

"*Article 51*

" A treaty may be terminated or a party may withdraw from a treaty,

" (*a*) in conformity with the provisions of the treaty allowing such termination or withdrawal; or

" (*b*) at any time by consent of all the parties after consultation with the other contracting States. "

4. The Drafting Committee had made two changes. The word " provision " in sub-paragraph (*a*) had been put in the plural and the same change had been made in sub-paragraph (*a*) of article 54 because a treaty might contain several provisions on its termination or on the withdrawal of a party. With regard to sub-paragraph (*b*), the Netherlands delegation had proposed (A/CONF.39/C.1/L.313) that the clause be amended to read " at any time by consent of all the contracting States ". The Drafting Committee considered that the contracting States which were not yet parties to the treaty should not have the power of decision in connexion with the termination of a treaty, but that they had the right to be consulted in the matter. It had therefore confined itself to adding the words "after consultation with the other contracting States " at the end of sub-paragraph (*b*). Finally, in the Spanish version, the words " *poner término* " had been replaced by " *dar por terminado* ".

5. Mr. WERSHOF (Canada) said it was not clear to his delegation how a contracting State under article 51 could be a State which was not a party to the treaty. The " parties " referred to in sub-paragraph (*b*) must be those defined in article 2, sub-paragraph 1 (*g*), or States which had consented to be bound by the treaty and for which the treaty was in force. He would therefore appreciate an explanation of the reason for differentiating between the parties and the other contracting States in sub-paragraph (*b*).

6. Mr. YASSEEN, Chairman of the Drafting Committee, said that that question had been raised in the Drafting Committee, where it had been pointed out that there were a few cases in which a treaty already in force was not in force in respect of certain contracting States, which had expressed their consent to be bound by the treaty but had postponed its entry into force pending the completion of certain procedures. In those rare cases, the States concerned could not participate in the decision on termination, but had the right to be consulted; nevertheless, those States were contracting States, not parties to the treaty, for the limited period in question.

Article 51 was approved.

Article 52 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force) [3]

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 52 adopted by the Drafting Committee read:

"*Article 52*

" Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force. "

8. The Committee of the Whole had referred article 52 to the Drafting Committee with a United Kingdom amendment (A/CONF.39/C.1/L.310) to delete the words " specified in the treaty as ". The Drafting Committee considered that the number of parties necessary for the entry into force of a treaty might conceivably not be specified in the treaty itself, and had adopted the United

[1] See 80th meeting, para. 67.

[2] For earlier discussion of article 51, see 58th meeting.

[3] For earlier discussion of article 52, see 58th meeting.

Kingdom amendment. In the Spanish version, the Drafting Committee had transposed the words " *Salvo que el tratado disponga otra cosa al respecto* " to the end of the article.

9. Mr. EVRIGENIS (Greece) pointed out that the word " *nécessaire* " used in the French version of the article did not correspond to the title, where the word " *exigé* " was used. The title should be brought into line with the text.

10. Mr. YASSEEN, Chairman of the Drafting Committee, said that the titles of all the articles would be re-examined in the Drafting Committee.

Article 52 was approved.

Article 53 (Denunciation of a treaty containing no provision regarding termination) [4]

11. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 53 adopted by the Drafting Committee read:

" *Article 53*

" 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

" (*a*) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

" (*b*) a right of denunciation or withdrawal may be implied from the nature of the treaty.

" 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article ".

12. The International Law Commission's text of paragraph 1 set out a rule and an exception preceded by the word " unless ". By adopting a United Kingdom amendment (A/CONF.39/C.1/L.311), the Committee of the Whole had added a second exception, and the Drafting Committee had divided the paragraph into an introductory clause and two sub-paragraphs, (*a*) and (*b*), setting out the two exceptions. Sub-paragraph (*b*) consisted of the United Kingdom amendment, which had been slightly redrafted. In the introductory clause of the Spanish version, the words "*ni faculte para denunciarlo o retirarse de él* " had been replaced by " *ni prevea la denuncia o la retirada del mismo*" and the words "*de denuncia o retirada*" by " *de denuncia o de retirada*".

13. The only change in paragraph 2 was that the words " *Toda parte* " in the Spanish version had been replaced by " *Una parte* ", to bring the text into line with the English and French.

14. Mr. CASTRÉN (Finland) said that, in his delegation's opinion, the addition of the new provision contained in sub-paragraph 1 (*b*), according to which the right of denunciation or withdrawal might be implied solely from the nature of the treaty, introduced an element of uncertainty into article 53 and thus weakened the principle of the stability of treaties. The Finnish delegation had already drawn the attention of the Committee of the Whole to that danger at the 59th meeting, during the discussion of article 53, and it asked for a separate vote on sub-paragraph 1 (*b*), in the hope that it would be deleted.

[4] For earlier discussion of article 53, see 58th and 59th meetings.

15. Mr. BISHOTA (United Republic of Tanzania) said that, at the same meeting, his delegation had suggested in the Committee of the Whole that the word " unilateral " be inserted before " denunciation " in article 53 in order to avoid the possible interpretation that a treaty could be denounced even if all the parties agreed not to admit that possibility.

16. Mr. ARMANDO ROJAS (Venezuela) said that the text of article 53 submitted by the Drafting Committee was not satisfactory to his delegation, for the reasons it had advanced against the article at the 59th meeting.

17. The CHAIRMAN said he would invite the Committee to vote first on sub-paragraph 1 (*b*).

Sub-paragraph 1 (b) *was approved by 56 votes to 10, with 13 abstentions.*

Article 53 as a whole was approved by 73 votes to 2, with 4 abstentions.

Article 54 (Suspension of the operation of a treaty by consent of the parties) [5]

18. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had made no change in the text of article 54, and had not seen fit to adopt the two amendments which had been referred to it with the article.

Article 54 was approved.

Article 56 (Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty) [6]

19. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 56 adopted by the Drafting Committee read:

" *Article 56*

" 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

" (*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty, or

" (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

" 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties. "

20. Article 56 dealt with cases where parties to a treaty concluded a further treaty relating to the same subject matter. In the English version of the International Law Commission's draft, the subsequent treaty was sometimes called the " further " treaty, sometimes the " later " treaty, and sometimes the " subsequent " treaty; similar terminological variations appeared in the French and Spanish versions. In order to introduce some uniformity, the Drafting Committee had chosen the adjective " later " for the English, " *subséquent* " for the French and " *posterior* " for the Spanish versions.

[5] For earlier discussion of article 54, see 59th meeting.

[6] For earlier discussion of article 56, see 60th meeting.

For reasons of elegance, however, the Drafting Committee had decided to use the adverb " *ultérieurement* " instead of " *subséquemment* " in the introductory part of paragraph 1 and the word " *ulteriormente* " in the Spanish version. The Drafting Committee had also included the word " later " in the first line of sub-paragraph 1 (*a*), in order to avoid any possible ambiguity. In the last phrase of that sub-paragraph, it had omitted the word " thenceforth ", which seemed to be superfluous, and had replaced the term " by the later treaty " by the words " by that treaty ". With regard to sub-paragraph (*b*), the Drafting Committee had adopted the Romanian amendment (A/CONF.39/C.1/L.308), which related to the French version only, and which entailed a slight change in the structure of the sentence.

21. Since the term " *du traité* " in the French version of paragraph 2 seemed to refer to the subject of the sentence, " *le traité précédent* ", the Drafting Committee had replaced that term by the words " *de ce traité* ". In the Spanish version, the term " *se deduce* " had been replaced by " *se desprende* ", in accordance with the procedure adopted for other articles of the draft.

22. Mr. BARROS (Chile) said that the placing of the word " *unicamente* " in the Spanish version of paragraph 2 might lead to misinterpretation. He hoped that the Drafting Committee would take that comment into account.

Article 56 was approved.

Article 57 (Termination or suspension of the operation of a treaty as a consequence of its breach) [7]

23. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Committee of the Whole had approved the International Law Commission's text of article 57 and had referred it to the Drafting Committee without any amendments. The Drafting Committee had observed that sub-paragraph 2 (*a*) and 2 (*c*), if read literally, seemed to establish rights to terminate a treaty or to suspend its operation, which were not subject to the procedure laid down in article 62. Since some doubts had been expressed as to whether that had been the intention of the Committee of the Whole when it had approved article 57, the Drafting Committee had decided to submit the article to the Committee of the Whole without any change, but to draw attention to the legal consequences involved.

24. Sir Francis VALLAT (United Kingdom) said that his delegation was very dissatisfied with the way in which article 57 had been dealt with, owing to pressure of time. Delegations had obviously not paid proper attention to the provisions of the article, especially those of paragraph 2; there were inconsistencies between sub-paragraphs (*a*), (*b*) and (*c*) which could lead to the most serious consequences. Under sub-paragraph (*a*), parties to a treaty other than the one alleged to be in breach could by unanimous agreement suspend the operation of the treaty and, in contrast with sub-paragraph (*b*), that could be done without in any way invoking the procedures set out in the treaty. There might conceivably be something to be said for that in the case of the unanimous agreement of the other parties, but he doubted whether such was the case, for where the number of parties to a treaty was small, the disagreement between one party and the rest should not be decided unilaterally. Where sub-paragraph (*c*) was concerned, it was hardly proper to give a single party the unilateral right to suspend the operation of the treaty without going through the procedures laid down in the convention.

25. If that point could not be clarified, his delegation would be obliged to enter a strong reservation to article 57.

26. Mr. MIRAS (Turkey) said that article 57 would be unacceptable to his delegation unless the final text of article 62 provided for compulsory adjudication. Meanwhile, the Turkish delegation was obliged to reserve its position on article 57.

27. Mr. DE BRESSON (France) said that his delegation had the same reservations to make to article 57 as the United Kingdom delegation.

28. Mr. KEARNEY (United States of America) said that, in view of the serious ambiguity concerning the procedures set out in sub-paragraphs 2 (*a*) and 2 (*c*), the United States delegation also wished to enter a reservation in respect of article 57.

Article 57 was approved, subject to the reservations expressed by the United Kingdom, Turkish, French and United States delegations.

Article 58 (Supervening impossibility of performance) [8]

29. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 58 adopted by the Drafting Committee read:

" *Article 58*

" 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

" 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty. "

30. Paragraph 1 of article 58 derived from the International Law Commission's text which the Committee of the Whole had referred to the Drafting Committee, together with the Netherlands amendment to replace the words " as a ground for terminating " by the words " as a ground for terminating or withdrawing from the treaty " (A/CONF.39/C.1/L.331). The Drafting Committee had adopted that amendment in slightly modified form so as to avoid repetition of the word " treaty ".

31. Paragraph 2 was new. It had been proposed by the Netherlands delegation in the same amendment and adopted by the Committee of the Whole. The Drafting Committee had made the following drafting changes. In the first phrase, after the words " may not be invoked ", it had inserted for purposes of greater precision the words " as a ground for terminating, withdrawing from or suspending the operation of a treaty ". Out of a

[7] For earlier discussion of article 57, see 60th and 61st meetings.

[8] For earlier discussion of article 58, see 62nd meeting.

similar concern for precision, it had reworded the last two lines of the paragraph.

32. In submitting article 58 to the Committee, the Drafting Committee wished to emphasize that the destruction or disappearance of an object of a treaty did not constitute a permanent impossibility of performance if the object could be replaced.

33. In the Spanish version the words " *imposibilidad de ejecutar* " had been replaced by the words " *imposibilidad de cumplir* " and the words " *poner término* " by the words " *dar por terminado* " so as to bring the wording into line with that of other articles.

34. Mr. EVRIGENIS (Greece) said that in the English version the word " permanent " related to the disappearance of an object of a treaty, whereas in the French version it seemed to refer to both the disappearance and the destruction.

35. Mr. BARROS (Chile) said that on that point the English, French and Spanish versions were not concordant and would have to be brought into line.

36. Mr. FERNANDO (Philippines) said that he had doubts about the final clause in paragraph 2, which seemed to impose a penal sanction because a party would not be able to invoke the impossibility of performance as a ground for terminating, withdrawing from or suspending the operation of a treaty.

37. Mr. YASSEEN, Chairman of the Drafting Committee, said that the article reflected positive international law beyond which the Commission had not wished to go.

38. Sir Humphrey WALDOCK (Expert Consultant) said that the Commission's intention had been for the word " permanent " to qualify the word " disappearance ", though conceivably it could also apply to the destruction of the object of a treaty. It should be borne in mind that, although the object of a treaty might temporarily disappear or be destroyed, it might be possible later for something to be restored.

Article 58 was approved.

Article 59 (Fundamental change of circumstances) [9]

39. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 59 adopted by the Drafting Committee read:

" *Article 59*

" 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

" (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

" (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

" 2. A fundamental change of circumstances may not be invoked:

" (*a*) as a ground for terminating or withdrawing from a treaty establishing a boundary;

" (*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation of the treaty or of any other international obligation owed to any other party to the treaty.

" 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke that ground for suspending the operation of the treaty. "

40. The Commission's text for article 59 did not contemplate a fundamental change of circumstances providing a ground for the suspension of the application of a treaty but only for its termination or for withdrawal from it. In order to fill that gap the Committee of the Whole had approved the addition, in paragraph 1, of a reference to the suspension of the application of the treaty, as proposed by Canada (A/CONF.39/C.1/L.320) and Finland (A/CONF.39/C.1/L.333).

41. The Drafting Committee had noted that it would be difficult to solve the problem by the mere mention in paragraph 1 of the suspension of the application of the treaty, since that might give the impression that the application of article 59 extended to purely temporary fundamental changes of circumstances, which was not apparently the Committee's intention. The Drafting Committee believed that the Committee of the Whole wished a party to have the choice between invoking article 59 for the suspension of the application of a treaty, and invoking it for purposes of termination or withdrawal. In some circumstances a party might prefer a simple suspension to breaking contractual relations, since the former offered greater possibilities of seeking a common solution to the difficulties caused by a fundamental change of circumstances by means, for example, of a revision of the treaty. In order to express that idea more clearly and to avoid any misunderstanding, the Committee had dealt with the matter by adding a paragraph 3 to the text drafted by the Commission.

42. The Drafting Committee had introduced two other changes in the text. In paragraph 1 (*b*) of the English version, the expression " scope of obligations " had been replaced by the phrase " extent of obligations ". The meaning of that phrase should be sought in the French and Spanish versions, namely, " *portée des obligations* " and " *alcance de las obligaciones* ". Though the English word " extent " seemed to render the words " *portée* " and " *alcance* " better than the word " scope ", it did not fully satisfy the Committee, which hoped that, during the interval between the two sessions, the language services would be able to find a better translation.

43. In all the language versions the Committee had brought the wording of paragraph 2 (*b*) into line with that adopted for the similar provision in article 58, paragraph 2. In the Spanish version, the phrase " *poner término* " had been replaced by the phrase " *dar por terminado* " and the word " *ejecutarse* " had been replaced by the word " *cumplirse* ", as in other articles of the draft.

44. Mr. WERSHOF (Canada) said that the Committee of the Whole had approved in principle the proposal by the Canadian and Finnish delegations to introduce the idea of suspension in article 59, leaving the wording to

[9] For earlier discussion of article 59, see 63rd to 65th meetings.

the Drafting Committee. He was not sure that the solution suggested by the Drafting Committee was the best, since the matter should not be a question of choice for the party. Some fundamental changes of circumstances might be irreversible, justifying termination or withdrawal, and some might not be permanent. He therefore reserved his delegation's right to suggest alternative wording at the next session.

45. Mr. KEMPFF MERCADO (Bolivia) said he supported article 59, with the exception of paragraph 2 (*a*).

46. Mr. NACHABE (Syria) said that paragraph 2 (*a*) was acceptable, on condition that treaties fixing frontiers by force and in violation of the principle of self-determination were regarded as null *ab initio*.

47. Mr. MIRAS (Turkey) said that, for the reasons he had given at the 64th meeting, during the general debate on article 59, his delegation could not support the article unless a judicial procedure were provided for in article 62. He therefore reserved his position.

48. Mr. FERNANDO (Philippines) said he accepted article 59 but considered that the words " or of any other international obligation owed to any other party to the treaty " in paragraph 2 (*b*) should be explained.

49. He agreed with the Syrian representative regarding paragraph 2 (*a*).

Article 59 was approved.

Article 60 (Severance of diplomatic relations) [10] and article 69 *bis* (new article)

50. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 60 adopted by the Drafting Committee read:

" *Article 60*

" The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty. "

51. The Committee of the Whole had approved a Hungarian amendment (A/CONF.39/C.1/L.334) for the insertion of the words " and consular " between the words " diplomatic " and " relations ". The Drafting Committee had used the word " or " instead of the word " and ", which seemed more in conformity with the sponsor's intention. In the French version, the word " *relations* " had been repeated before the word " *consulaires* ".

52. The Committee of the Whole had also approved in principle an amendment by Italy and Switzerland (A/CONF.39/C.1/L.322) to add at the end of the article the words " unless those legal relations necessarily postulate the existence of normal diplomatic relations ". That wording had been modified so as to take account of the Hungarian amendment to the beginning of the article.

53. The Committee had also adopted a Chilean amendment (A/CONF.39/C.1/L.341) to add a second paragraph to article 60, reading " The severance or absence of diplomatic relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not affect the situation in regard to diplomatic relations. " The Drafting Committee considered that that text, which was concerned rather with the law of diplomatic relations, did not belong to Section 3, entitled " Termination and suspension of the operation of treaties ", and had therefore transferred it to Part VI, which was entitled " Miscellaneous provisions " and submitted it in a slightly new form as article 69 *bis*. The article was worded as follows:

" *Article 69* bis

" The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations. "

54. Mr. EL DESSOUKI (United Arab Republic) said that article 69 *bis* was not acceptable to his delegation because there was no point in stating that the absence of diplomatic relations did not prevent the conclusion of treaties. That went beyond article 60, which was quite sufficient. Article 69 *bis* should not prejudice in any way the question of non-recognition. If it were put to the vote, he would vote against it.

55. Mr. al-RAWI (Iraq) said he agreed with the previous speaker. Article 69 *bis* was not necessary and he would vote against it. The article should not prejudice the principle of non-recognition. He accordingly reserved his position on article 69 *bis*. Article 60 was satisfactory.

56. Mr. HACENE (Algeria) said he too must express his delegation's reservations about article 69 *bis*. He fully supported the views of the representative of the United Arab Republic.

57. Mr. BISHOTA (United Republic of Tanzania) said he had strong reservations about the implications of the exception introduced into article 60. He agreed with the reasoning in paragraphs (3) and (4) of the Commission's commentary to the article.

58. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation had abstained in the vote on the Chilean amendment to article 60 (A/CONF.39/C.1/L.341) because it saw no need for it. He reserved his position on article 69 *bis*; the article was unnecessary and did not fit into Part VI.

59. Mr. NACHABE (Syria) said he accepted article 60, which adequately stated the implications of the effects of severance. Article 69 *bis*, however, went too far and was unacceptable.

60. Mr. HARRY (Australia) said that his delegation still had doubts about article 60 or whether the exception it stated was necessary. If the existence of consular relations were needed for the application of a treaty, severance might be regarded as a breach.

61. Mr. MWENDWA (Kenya) said he must express a reservation on article 69 *bis*, which did not belong to the law of treaties and was unnecessary.

62. Mr. YAPOBI (Ivory Coast) said that his delegation supported the new wording of article 60. It also supported article 69 *bis*, which was in conformity with the practice of his country to conclude treaties with countries with which it had no diplomatic relations.

Article 60 was approved.

[10] For earlier discussion of article 60, see 65th meeting.

63. The CHAIRMAN said that, as a number of delegations had expressed reservations about article 69 *bis*, he would put it to the vote.

Article 69 bis *was approved by 40 votes to 13, with 34 abstentions.*

Article 39 (Validity and continuance in force of treaties)
(resumed from the 76th meeting)

64. The CHAIRMAN invited the Committee to resume its consideration of article 39. [11]

65. Mr. ALCIVAR-CASTILLO (Ecuador) said that the amendment by Switzerland (A/CONF.39/C.1/L.121) would completely upset the scheme already adopted by the Committee in approving the various articles in Section 2 of Part V. If the Swiss amendment were adopted, no treaty would be null and void *ab initio* and the only form of nullity applicable to treaties would be voidability or relative nullity. Since the Swiss amendment was the farthest removed from the text of article 39 and since it would involve reconsideration of the Committee's decisions on the various articles of Section 2 of Part V, he would urge that it be voted on first.

66. Mr. DE BRESSON (France) said that, at the 76th meeting, he had proposed that the second sentence of paragraph 1 of article 39 be transferred to paragraph 1 of article 65. The French proposal did not involve any change of substance in respect of the provisions of Part V. Its purpose was to remove any ambiguity that might result from the present arrangement and to bring articles 39 and 65 into line with the interpretation given to them by the International Law Commission and the Expert Consultant.

67. If, as he hoped, the Committee adopted his oral amendment, the text of the relevant draft articles would be made clearer and more coherent. Article 39 would set forth the cases of nullity; article 62 would deal with the implementation of the nullity provisions; article 65 would deal with the consequences of nullity.

68. The CHAIRMAN said he would first put to the vote the oral amendment by France, and then the written amendments by Singapore, Switzerland and the Republic of Viet-Nam.

The oral amendment by France, for the transfer of the second sentence of paragraph 1 to article 65, was adopted by 34 votes to 29, with 22 abstentions.

The amendment by Singapore (A/CONF.39/C.1/L.270), as orally amended at the 76th meeting, [12] *was rejected by 31 votes to 21, with 31 abstentions.*

The amendment by Switzerland (A/CONF.39/C.1/L.121) was rejected by 53 votes to 19, with 16 abstentions.

The amendment by the Republic of Viet-Nam (A/CONF. 39/C.1/L.233) was rejected by 43 votes to 3, with 33 abstentions.

69. Mr. WERSHOF (Canada) said he noted that the Peruvian amendment (A/CONF.39/C.1/L.227) purported to amend the second sentence of paragraph 1 of article 39, but the Committee had just adopted an oral French amendment to transfer that sentence to article 65.

70. The CHAIRMAN said that any amendment which might be adopted to the sentence in question would affect the sentence regardless of its placing.

71. Sir Francis VALLAT (United Kingdom) said that there was a further difficulty, which was that a proposal had now been made for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.2). The Peruvian amendment would introduce a reference only to article 62 and its wording was therefore no longer acceptable.

72. The CHAIRMAN said he would put the Peruvian amendment to the vote.

The Peruvian amendment (A/CONF.39/C.1/L.227) was rejected by 39 votes to 14, with 29 abstentions.

73. Mr. CALLE Y CALLE (Peru) said that it had been an unwise decision to remove the second sentence of paragraph 1 from article 39 and transfer it to article 65. The sentence did not deal with the consequences of invalidity, which were the subject-matter of article 65. The purpose of the sentence was to make it clear that, for a treaty to be void, its invalidity must be established under the provisions of the future convention on the law of treaties. It was precisely in order to make that meaning clear that his delegation had proposed to specify expressly that all cases of nullity, absolute or relative, must be established in accordance with the orderly procedure laid down in the draft convention. The reference was, of course, to article 62 and any ancillary provisions thereto.

74. Mr. HARRY (Australia) recalled that the purpose of his amendment to article 39 (A/CONF.39/C.1/L.245) was to introduce in both paragraphs 1 and 2 specific references to article 62. The point was essentially one of drafting, since article 62 would in any case be covered by the words " the application of the articles of the present Convention ". With regard to the point raised by the United Kingdom representative, he said that the new article 62 *bis* would be covered by the expression " the present Convention ", which would replace the expression " the present articles " in accordance with the Committee's general decision on that point.

75. Mr. MYSLIL (Czechoslovakia) said that he had voted against the French amendment because he had thought that it would have upset the balance of the article. Since it believed that the transfer of the second sentence of paragraph 1 of article 39 from Part I to Part V was not desirable, his delegation reserved its position on whatever final text of article 39 ultimately emerged from the Drafting Committee, when it would take into consideration the final form of article 65.

76. Mr. ALCIVAR-CASTILLO (Ecuador) said that, in his delegation's view, the only decision taken by the Committee had been to transfer the second sentence of paragraph 1 from article 39 to article 65. The text of that sentence should remain unaltered, since the Committee had not adopted any amendment to it.

77. The CHAIRMAN said that, if there were no objection, he would consider that the Committee agreed to refer article 39, as amended, to the Drafting Committee,

[11] For earlier discussion of article 39, see 39th, 40th and 76th meetings.

[12] Para. 2.

together with the Australian amendment (A/CONF.39/C.1/L.245).

It was so agreed. [13]

Article 63 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) *(resumed from the 74th meeting)*

78. The CHAIRMAN invited the Committee to consider the Swiss amendment to article 63 (A/CONF.39/C.1/L.349 and Corr.1).

79. Mr. WERSHOF (Canada) said he must point out that at the 74th meeting the Committee had approved article 63 and referred it to the Drafting Committee, together with the amendment by Switzerland.

80. The CHAIRMAN said that the Swiss delegation had since agreed that its amendment should be put to the vote. He would therefore put it to the vote immediately.

The amendment by Switzerland (A/CONF.39/C.1/L.349 and Corr.1) was rejected by 43 votes to 11, with 33 abstentions.

Article 63 was approved and referred to the Drafting Committee. [14]

The meeting rose at 1 p.m.

[13] For resumption of the discussion of article 39, see 83rd meeting.

[14] For resumption of the discussion of article 63, see 83rd meeting.

EIGHTY-SECOND MEETING

Thursday, 23 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)*

TEXT PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Committee to consider the texts of various articles proposed by the Drafting Committee.

Article 41 (Separability of treaty provisions) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 41 by the Drafting Committee, subject to a decision on the Finnish amendment (A/CONF.39/C.1/L.144) to delete the reference to article 50 in paragraph 5, which had been referred to it by the Committee of the Whole at its 66th meeting and which was a question of substance with which the Drafting Committee had considered that it was not competent to deal, read as follows:

"*Article 41*

" 1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

" 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 57.

" 3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

" (*a*) the said clauses are separable from the remainder of the treaty with regard to their application;

" (*b*) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole; and

" (*c*) continued performance of the remainder of the treaty would not be unjust.

" 4. In cases falling under articles 46 and 47, the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

" 5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted."

3. In paragraph 1, the Drafting Committee had adopted two amendments which seemed to improve the wording. The first was the United Kingdom amendment (A/CONF.39/C.1/L.257) to insert the adverb " only " after the past participle " exercised ", instead of between the words " may " and " be "; that affected only the English version. The Drafting Committee had made a similar change in the position of the adverb " only " in paragraph 2 and in the first part of paragraph 3.

4. The second was an amendment by Argentina (A/CONF.39/C.1/L.244) to replace the words " *podrá ejercerse únicamente* " in paragraph 1 by the words " *no podrá ejercerse sino* "; it affected only the Spanish version. The Committee had made similar changes in paragraphs 2 and 3 of the article. Other changes of a drafting nature had also been made in the Spanish version of the article.

5. The Drafting Committee had made two changes in paragraph 3. In the first line of the English version, it had replaced the word " alone " by the word " solely " and inserted it after the word " relates " and, following the United Kingdom amendment (A/CONF.39/C.1/L.257 and Corr.1), had added at the beginning of sub-paragraph (*b*) the clause " it appears from the treaty or is otherwise established that ". The Drafting Committee had not made any change in sub-paragraph (*c*), which the Committee of the Whole had added to paragraph 3 by adopting a United States amendment (A/CONF.39/C.1/L.260).

6. In paragraph 4, again following the United Kingdom amendment, the Drafting Committee had transferred the expression " Subject to paragraph 3 " to another part of the sentence. If it had been left at the beginning of the sentence, as in the International Law Commission's text, it might have given the false impression that it governed the application of articles 46 and 47.

[1] For earlier discussion of article 41, see 41st, 42nd and 66th meetings.