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100th meeting of the Committee of the Whole

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purpose of modifying multilateral treaties between certain of the parties only while the second dealt with agreements to suspend the operation of a multilateral treaty temporarily as between certain of the parties only.

32. The Peruvian amendment (A/CONF.39/C.1/L.305) proposed the insertion in article 55 of a provision making it obligatory for parties wishing to conclude an agreement to suspend the operation of a multilateral treaty as between themselves alone to notify the other parties of their intention. A provision of that kind was also included in the six-State amendment and the Drafting Committee had considered it necessary to include it. It had covered that point by means of paragraph 2 of the text it now proposed.

33. He had been asked by the Drafting Committee to clarify the meaning and scope of the opening clause of paragraph 1, which read " Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if. . . ". The Drafting Committee considered that, by referring to an agreement to suspend the " operation of provisions " of the treaty, that provision permitted the conclusion of agreements to suspend the operation either of some of the provisions of the treaty only, or of all the provisions of the treaty.

Article 55 was approved.[6]

Article 66 (Consequences of the termination of a treaty)[7]

34. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text proposed for article 66 by the Drafting Committee read:

Article 66

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(*a*) Releases the parties from any obligation further to perform the treaty;

(*b*) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

35. At the first session, the Committee of the Whole had referred article 66 to the Drafting Committee with only one amendment, that by France (A/CONF.39/C.1/L.49). That amendment had been withdrawn at the second session and the Committee of the Whole, at its 86th meeting, had approved in principle the text formulated by the International Law Commission. The Drafting Committee had accordingly confined itself to making some slight drafting changes in the French, Russian and Spanish versions of article 66, in accordance with rule 48 of the rules of procedure.

Article 66 was approved.[8]

The meeting rose at 5.20 p.m.

[6] For the adoption of article 55, see 21st plenary meeting.

[7] See 86th meeting, para. 19.

[8] For the adoption of article 66, see 23rd plenary meeting.

ONE HUNDREDTH MEETING

Wednesday, 23 April 1969, at 11 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)*

Final clauses (including proposed new articles 76 and 77)[1]

1. The CHAIRMAN invited the Committee to consider proposals relating to the final clauses, including proposals for new articles to be numbered 76 and 77.

2. As the proposed new article 76 submitted by the Spanish delegation (A/CONF.39/C.1/L.392) derived from that delegation's amendment to article 62 *bis* (A/CONF.39/C.1/L.391) which had been withdrawn at the previous meeting, that proposal too might be regarded as withdrawn.

3. The proposal by Switzerland (A/CONF.39/C.1/L.250) for a new article 76 was still before the Committee.

4. Mr. NASCIMENTO E SILVA (Brazil) said that the proposal of which his delegation was a co-sponsor (A/CONF.39/C.1/L.386/Rev.1) was based on the formula adopted in the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, with some changes necessitated by certain provisions in the future convention on the law of treaties.

[1] Proposals of a general character for the final clauses had been submitted by Brazil and the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/C.1/L.386/Rev.1) and by Hungary, Poland, Romania and the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.389 and Corr.1).

Amendments to the proposal by Brazil and the United Kingdom of Great Britain and Northern Ireland had been submitted by Ghana and India (A/CONF.39/C.1/L.394) and by Switzerland (A/CONF.39/C.1/L.396).

Proposals for a new article 76 had been submitted by Switzerland (A/CONF.39/C.1/L.250) and by Spain (A/CONF.39/C.1/L.392) (see 92nd meeting, para. 4).

Proposals for a new article 77 had been submitted by Venezuela (A/CONF.39/C.1/L.399) and by Brazil, Chile, Kenya, Sweden and Tunisia (A/CONF.39/C.1/L.400). Amendments to the latter proposal had been submitted by Spain (A/CONF.39/C.1/L.401) and by Iran (A/CONF.39/C.1/L.402). Subsequently a further proposal (A/CONF.39/C.1/L.403) was submitted by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela.

5. The proposal by Hungary, Poland, Romania and the Soviet Union (A/CONF.39/C.1/L.389 and Corr.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394) might give rise to difficulties, since the Conference had not yet taken any decision on the " all States " formula.

6. Article B of the proposal by Brazil and the United Kingdom was simple and precise, whereas the amendment by Ghana and India was cumbersome and laid an unnecessary burden on the Austrian Ministry of Foreign Affairs.

7. The proposals relating to the final clauses differed with regard to the number of instruments of ratification or accession needed for the entry into force of the convention. It would be remembered that in the conventions adopted at the Geneva Conference on the Law of the Sea in 1958 the figure of twenty-two instruments, representing one-third of the participating States, had been used. That number was not high enough now and forty-five seemed to be more realistic. However, the thirty-five instruments proposed in the amendment by Ghana and India was also acceptable.

8. On the other hand the number of instruments in the Swiss proposal (A/CONF.39/C.1/L.396) was too high, and if it was adopted there was reason to fear that the convention on the law of treaties would never come into force.

9. There was no provision on reservations in the final clauses in the proposal by Brazil and the United Kingdom, since either they would be identical with the provisions already contained in the convention and therefore unnecessary, or they would be different and therefore contradictory. It would be recalled that article 16 (*c*) of the draft stipulated that a reservation must not be incompatible with the object and purpose of the treaty. That was also the tenor of the advisory opinion of the International Court of Justice of 28 May 1951 [2] on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

10. The proposal by Brazil and the United Kingdom had no clause on notifications and the functions of depositaries. However, article E of the proposal, on authentic texts, stated that the original of the convention " shall be deposited with the Secretary-General of the United Nations ". Likewise, articles B and C stated that the instruments of ratification or accession were to be deposited with the Secretary-General of the United Nations. Article 71 and the following articles dealt with those matters in detail.

11. His delegation was opposed to the new article 76. The Conference should keep to the formula adopted for the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations and provide for an optional protocol on the settlement of disputes which could be accepted by every delegation.

12. What was known as the Vienna formula had given good results and there was no reason to abandon it.

[2] *I.C.J. Reports 1951*, p. 15.

13. Mrs. BOKOR-SZEGÖ (Hungary) said that the amendment co-sponsored by her delegation (A/CONF.39/C.1/L.389 and Corr.1) followed one of the alternatives proposed in the Secretariat document on standard final clauses (A/CONF.39/L.1). The formula proposed in the amendment conformed to United Nations practice and had been adopted in four major treaties which regulated various aspects of the use of nuclear weapons and of the activities of States in outer space.

14. Final clauses which allowed all States to participate in treaties had been drawn up in the League of Nations, and the Secretary-General of the United Nations was the depositary of several conventions concluded under the auspices of the League which had used that formula of participation by all States.

15. The States which had drawn up the Nuclear Test Ban Treaty and the Outer Space Treaty had used the " all States " formula, independently of the question of *de jure* or *de facto* recognition of States wishing to become parties to those treaties. The joint regulation of such fields of activity by treaty was in the interests of all States, even in the absence of normal permanent relations.

16. A State could not seek to ignore the existence of other States which had an economic and political system basically different from its own. The regulation by treaty of certain aspects of the activities of States was necessary to the international community. It would therefore be quite illogical and unjustified not to give all States the possibility of becoming parties to a convention regulating treaty law. The rules governing the law of treaties should be applicable to all States which declared themselves prepared to accept them. The Hungarian delegation could not support the amendment by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1); it reflected a practice which discriminated against some socialist States, which was contrary to the sovereign equality of States and which paid no regard to the duty of States to co-operate internationally and develop friendly relations with each other.

17. Her delegation might wish to revert at a later stage to the other amendments relating to the final clauses.

18. Mr. KRISHNA RAO (India) said he hoped that the amendment of which his delegation was one of the sponsors (A/CONF.39/C.1/L.394) would come to be known as " the new Vienna formula ". The amendment left the old Vienna formula untouched but added to it a new paragraph based on the formula used for the Moscow Treaty. The proposed new formula improved the old Vienna formula by adding new ingredients which cured its weaknesses.

19. The new Vienna formula took full account of the existing international situation. For many years, United Nations practice had been that if a majority of the Organization's Members did not recognize a particular entity as a State, that entity, even if recognized by a substantial minority, could not become a party to law-making treaties. Until 1963, that position might have had a certain logic, for there appeared to be no alternative. That logic, however, had disappeared in 1963,

for it had been in that year, as a result of the conclusion of the Nuclear Test Ban Treaty, that the Moscow formula had been evolved, permitting entities which were not recognized as States to become parties to a set of very important conventions. By virtue of the system of three depositaries adopted under the Moscow formula, entities not generally recognized were able to become parties to the conventions in question, provided one of the three depositaries recognized them and accepted their instruments of ratification or accession. The Moscow formula had thus created a new situation. If an entity was entitled to become a party to one important set of conventions, that right should also be recognized in respect of another set of conventions codifying and developing the customary law of nations.

20. The new Vienna formula would restore logic to the law and would strengthen its predecessors by uniting them in a form acceptable to all parties. The new formula extended the scope of the old Vienna formula and overcame certain difficulties raised by the Moscow formula. The latter, by providing for three depositaries, made it hard to ascertain at any particular moment the exact number of instruments of ratification or accession that had been deposited. Moreover, the Moscow formula had done away with the excellent system of information evolved by the United Nations in respect of conventions for which the Secretary-General acted as depositary, and it would be a loss if the United Nations system were to be destroyed by the general adoption of the Moscow formula as originally drafted.

21. In order to preserve the United Nations system, the amendment by Ghana and India provided for an initial depositary, the Government of Austria, and a final depositary, the Secretary-General of the United Nations. The initial depositary would accept signatures to the convention and, after the final date of signature, would transmit the signed original of the convention to the Secretary-General. The initial depositary would also receive, in the first instance, instruments of ratification and accession and other notifications regarding the convention. Thus the Secretary-General would not be the person to whom instruments and notifications were directly addressed, which would be in accordance with the wishes of the majority of Member States of the United Nations.

22. The sponsors of the amendment had taken the liberty of proposing the Austrian Government as the initial depositary because of the traditional role of the host State as depositary, and as a token of respect and affection for the country and its people. It was, of course, for the Austrian Government itself to state whether it would accept that responsibility.

23. Part III of the amendment contained a revision of certain final clauses in the proposal by Brazil and the United Kingdom so as to bring them into accord with the new Vienna formula.

24. It was suggested in the proposal that the number of instruments of ratification or accession necessary for the entry into force of the convention should be thirty-five instead of forty-five. The traditional number in codification conventions had been twenty-two; but that figure had been fixed many years ago and it was reasonable to think that it was insufficient, in view of the development of the international community. Forty-five, however, appeared to be too high a number and might unduly delay the entry into force of the convention. Practice had shown that the entry into force of a convention was an important element in persuading States to become parties to multilateral conventions. His delegation, however, was prepared to adopt a flexible attitude towards the number of instruments necessary and would accept the majority decision on that point.

25. Mr. BINDSCHEDLER (Switzerland) said that his delegation in principle supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), since it considered that it would be proper to keep to what was known as the Vienna formula.

26. Switzerland had submitted an amendment (A/CONF.39/C.1/L.396) to that proposal to raise to sixty the number of ratifications needed before the convention on the law of treaties came into force. The convention would be one of the most important instruments that had ever existed and so should be ratified by as many States as possible. If it came into force with only twenty-two or thirty ratifications, it would not carry the required weight. The convention was to represent, as it were, the constitutional law of the international community. The accepted rule was that a constitutional law should be approved by a majority higher than that required for an ordinary instrument. It might be objected that the figure of sixty ratifications was arbitrary, but it represented more or less two-thirds of the participants in the Conference on the Law of Treaties. Switzerland had in fact simply adopted the two-thirds majority rule which was well known in both municipal and international law. It was the rule applied in the General Assembly and in the principal organs of other international organizations and it had also been the rule for the entry into force of certain multilateral conventions. Such a majority was therefore justified.

27. The Swiss delegation had submitted a proposal (A/CONF.39/C.1/L.250) at the first session for the insertion of a new article 76, for the settlement of disputes relating to the interpretation and application of the convention on the law of treaties. He would not revert in detail to the arguments advanced at the 80th meeting [3] by the Chairman of the Swiss delegation, but he would like to explain the difference between the new article 62 *bis* and the new article 76 he was proposing: article 62 *bis* related to possible disputes in connexion with treaties other than the convention on the law of treaties for reasons arising out of the application of Part V of that convention, whereas the new article 76 dealt with disputes relating to the convention on the law of treaties itself. The interpretation and application of the provisions of the convention might well give rise to disputes, for not all of those provisions were entirely lucid, as witness the chapter on reservations.

[3] Paras. 60-65.

28. Some delegations based their argument against the new article 76 on the obligation to respect State sovereignty. But State sovereignty suffered no impairment when States accepted legal obligations and gave even very extended jurisdiction to international organs on a basis of complete reciprocity and equality. And those conditions were most certainly fulfilled by the classic procedures of international adjudication.

29. Such procedures were of great value to small countries and to weak States. A specific illustration was the fact that after the end of the Second World War Switzerland had had a legal dispute with the United States concerning property which the United States considered to be enemy property. After the United States had refused for more than ten years to negotiate, Switzerland had taken the dispute to the International Court of Justice. It had lost on technical grounds, since domestic remedies had not been exhausted; but the effect of the Court's judgement had been to enable negotiations to begin at last, and the two Governments had reached an amicable solution. Without resort to the Court, Switzerland would certainly not have been able to induce the United States to come to the negotiating table. He could not understand why certain delegations maintained that international adjudication served only the interests of the group of Western States; it indubitably served only the interests of the entire international community.

30. Manifestly, a codification of law remained incomplete in the absence of some machinery for its application. The letter of legal texts was not enough; the courts must give them practical expression, define them and develop them, and the adaptation should in the case in point be uniform and all-embracing, in the interest of the international community. That was a decisive consideration in favour of a jurisdiction that was empowered to watch over the application of the convention on the law of treaties.

31. The Swiss proposal (A/CONF.39/C.1/L.250) provided for the jurisdiction of the International Court of Justice, but paragraph 3 gave the parties the option of agreeing to adopt a conciliation procedure before resorting to the International Court. Such provisions were fully accepted and were based on the first three articles of the optional protocols annexed to the codification conventions so far adopted. They also took into account the rule stated in Article 36(3) of the United Nations Charter.

32. His delegation recognized that international jurisprudence was not at the present time very favourably regarded, but there were certain encouraging precedents: several conventions, including the Convention on the Prevention and Punishment of the Crime of Genocide, [4] the Supplementary Convention on the Abolition of Slavery, [5] the International Convention on the Elimination of All Forms of Racial Discrimination [6] and the Convention on Transit Trade of Land-Locked States [7] provided for compulsory arbitration procedures in the event of disputes. Article 37 of the Constitution of the International Labour Organisation also provided for the compulsory jurisdiction of the International Court of Justice.

33. Switzerland itself had concluded bilateral conventions on arbitration and compulsory adjudication with a large number of countries; they had been signed not only with countries in the Western group but also with many countries in Africa, Asia and Latin America, and that trend towards compulsory arbitration was gratifying. The Swiss proposal, therefore, was in no way revolutionary, and it was to be hoped that all participants in the Conference would adopt it.

34. Mr. ZEMANEK (Austria) said that the Austrian Government was prepared, if necessary, to fulfil the functions entrusted to it under the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394).

35. Mr. SINCLAIR (United Kingdom), speaking as the co-sponsor of the proposal introduced by the Brazilian representative (A/CONF.39/C.1/L.386/Rev.1), said that the Vienna formula contained in article A of the proposed final clauses was the same as that adopted in 1961 for the Vienna Convention on Diplomatic Relations and in 1963 for the Vienna Convention on Consular Relations. It was substantially the same as the participation articles in each of the four Geneva Conventions on the Law of the Sea. The Secretariat itself had enumerated several other examples of similar provisions.[8] The overwhelming weight of precedent and practice definitely favoured the adoption of the Vienna formula.

36. The question of participation in general multilateral treaties had been discussed at considerable length in connexion with article 5 *bis*. Without going back over the arguments already put forward, he wished to point out that the Vienna formula was not discriminatory, because any State or entity which did not fall into one of the categories specified in the first part of article A could seek an invitation from the General Assembly, which was the most appropriate body to determine which entities of doubtful status could participate in multilateral conventions such as the convention on the law of treaties. Apart from the four cases referred to by the Lebanese representative at the 91st meeting,[9] there were other entities which had advanced highly disputed claims to statehood. His delegation thought that the Vienna formula was the best way to settle such problems.

37. With regard to article D, the United Kingdom favoured the adoption of forty-five as the number of instruments of ratification or accession needed to bring

[4] United Nations, *Treaty Series*, vol. 78, p. 277.

[5] United Nations, *Treaty Series*, vol. 266, p. 40.

[6] For text, see General Assembly resolution 2106 (XX), annex.

[7] United Nations, *Treaty Series*, vol. 597, p. 42.

[8] See document A/CONF.39/L.1, section A, alternative I, footnote.

[9] Para. 2.

the convention into force. In view of the increase in the number of States in the world since 1963, the figure adopted in the two Vienna Conventions was clearly inappropriate. More significantly, the greater importance of the convention on the law of treaties for the codification and development of international law required that it should enter into force only with the support of a good number of States. Forty-five was in any event not a very high figure; the entry into force of the 1961 Single Convention on Narcotic Drugs [10] required forty ratifications and the Treaty on the Non-Proliferation of Nuclear Weapons [11] forty-three.

38. There was also the important consideration of the transitional position. In the future, the majority of the countries participating in a conference convened to adopt a convention might not be bound by the convention on the law of treaties, although a minority could be so bound as between themselves. There was no way of averting that situation, but its effects would be lessened if the States bound by the convention on the law of treaties were not a small minority but a substantial minority, or even better a majority. The figure of forty-five was slightly less than one-third of the States invited to the Conference and just over one-third of the States Members of the United Nations.

39. Several speakers had touched on the question of reservations at the earlier stages of the Committee's work. The clauses proposed by Brazil and the United Kingdom contained no provision on that subject because it was not really possible to settle the reservations issue until it was more or less known what the final shape of the convention would be. The effect of having no provision could be that the régime laid down in articles 16 to 20 might be applied. However, problems were bound to arise with regard to reservations to the convention, particularly in respect of the substantive and procedural provisions of Part V. The United Kingdom delegation would wish to know the views of other delegations on the question before adopting a final position.

40. With regard to article E, which concerned the depositary, Brazil and the United Kingdom had decided against including a provision along the lines tentatively suggested in section F of the Secretariat document (A/CONF.39/L.1) in order to preclude the possible argument that because articles 71 and 72 of the convention were expressly mentioned in the depositary clause, other provisions of the convention were not applicable to the convention itself. He was thinking of provisions such as many of those in Part II or Part III. The inclusion of an express reference to articles 71 and 72 might give rise to arguments of an *e contrario* nature. Moreover, the convention contained other articles, for instance article 74, which imposed tasks on the depositary.

41. Nor had Brazil and the United Kingdom included a provision concerning the revision of the convention, but should the case arise, article 36 of the convention itself should be applied.

42. He might wish to speak at a later stage on the other proposals which had been submitted.

43. Mr. KOULICHEV (Bulgaria) said that most of the problems raised by the final clauses were of a purely practical kind and their solution was not likely to give rise to disputes. Moreover, they had been dealt with in virtually similar ways in the two main proposals before the Committee of the Whole (A/CONF.39/C.1/L.386/Rev.1 and L.389 and Corr.1).

44. The only question on which the two proposals differed widely was the participation of States in the convention on the law of treaties: the proposal by Brazil and the United Kingdom adhered to the so-called Vienna formula, which limited participation to four or five clearly defined categories of States and closed the door to any States not falling into one of those categories. It was common knowledge that the formula in question was currently directed against certain socialist States, and there was nothing to preclude its being used against other States as well in the future.

45. Hungary, Poland, Romania and the USSR, on the other hand, by proposing that the convention should be " open for signature by all States ", ruled out any possible discrimination and enabled all to participate in the instrument of universal co-operation which the convention on the law of treaties was intended to be.

46. The question of universality had been discussed at great length in connexion with article 5 *bis*. In that connexion many delegations, while opposing the inclusion of article 5 *bis* because they did not want to sign a blank cheque, had nevertheless declared their support for the principle of universality and expressed the hope that the largest possible number of States would praticipate in general multilateral treaties. The convention on the law of treaties would actually enable all those participating in the Conference to demonstrate how far they were prepared to translate their theories into action. For there was no doubt that a convention which aimed at codifying and developing the law of treaties was, by its very nature and object, intended to be universal. Treaty law was of crucial importance for contractual relations, and thus for collaboration between States, and it was therefore in the international community's interests that all States should accede to the convention which codified that law. That would only be possible if it was open without the slightest discrimination to all States wishing to participate in it.

47. With those considerations in mind, his delegation supported the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). It could not accept the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) as it stood, owing to the restrictive and discriminatory purport of articles A and C, but it would support it if it was amended as proposed by Ghana and India (A/CONF.39/C.1/L.394).

48. The question of participation in the convention apart, the two main proposals had many points in common. His delegation agreed with their sponsors that the final clauses should not include provisions on reservations, revision or the functions of the depositary,

[10] United Nations, *Treaty Series*, vol. 520, p. 204.

[11] For text, see General Assembly resolution 2373 (XXII), annex.

which were covered by articles 16 to 20, 37, and 72 and 73 of the convention respectively.

49. With regard to the settlement of disputes arising from the application and interpretation of the convention, his delegation categorically opposed the inclusion of article 76 as proposed by Switzerland (A/CONF.39/C.1/L.250), for reasons which it would explain subsequently.[12]

50. In conclusion, he wished to make a purely drafting comment: the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) and the amendment by Ghana and India (A/CONF.39/C.1/L.394) explicitly referred to the International Atomic Energy Agency. Perhaps, in order to simplify the text, use could be made of the formula employed in most of the other codification conventions, in which the term " specialized agencies " was interpreted broadly as covering the Agency.

51. Mr. GROEPPER (Federal Republic of Germany) said that an accession formula similar to that in the earlier Vienna codification conventions and now customary in United Nations practice — the formula known as the " United Nations " or " Vienna " formula — should be included in the convention on the law of treaties. By permitting unilateral accession by all States Members of the United Nations or of any of the specialized agencies and by permitting in addition the participation of any other State invited by the General Assembly of the United Nations, the formula ensured the application of the principle of universality, since, as had been pointed out during the debate on article 5 *bis*, the convention would thus be open to all countries which were uncontested members of the community of States and to territorial entities whose participation was desired by the majority of States. The formula therefore took account of the realities of international life and, in particular, of the uncertainty inherent in the notion of State, and at the same time it mitigated the disadvantages which might arise from formulas permitting the unilateral accession of any entity which called itself a State. His delegation accordingly supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

52. On the other hand, the Federal Republic of Germany could not accept the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) since it made provision for the inclusion in the convention of what had become known as the " all States " formula. That formula would not only put obstacles in the way of the application of the convention, but would also conflict with article 1 of the convention itself, which stipulated that the convention applied to international agreements concluded between States. An entity which enjoyed certain attributes of a States, but was not in fact recognized as a State, could not be considered in law as a State and could not claim to be treated as such, even if it alleged that it possessed the requisite legal personality within the meaning of sovereign State in international law. Furthermore, none of the great codification treaties and none of the constituent instruments of the main international organizations had so far included the " all States " formula, for the simple reason that the notion of State was not clearly defined in international law as it existed at present.

53. Moreover, the adoption of the " all States " formula had highly political implications owing to the existence of several entities which a few countries claimed to be States, but which in the view of the great majority did not have that status. That problem had existed for a long time and its solution could not and should not be sought within the context of a codification convention.

54. The Federal Republic of Germany could not accept the amendment submitted by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom for several reasons.

55. First, the effect of the amendment was to convert the " Vienna " formula into an " all States " formula, since the two treaties which, under the amendment, would permit parties to them to accede to the convention on the law of treaties contained an " all States " clause. A territorial entity whose status as a State was contested might thereby evade the test of a vote in an assembly representative of the international community, as provided for in the Vienna formula, because it would simply have to apply to one of the three co-depositaries of the 1963 Nuclear Test Ban Treaty or the 1966 Outer Space Treaty in order to seek admission to the treaty. Such substitution of the decision of the General Assembly of the United Nations, as provided in the Vienna formula, by the decision of one of the three co-depositaries of the two treaties referred to seemed inappropriate.

56. Secondly, it might well be asked whether the amendment did in fact make for universality, as its sponsors maintained. Of the entities whose status was contested and which had signed one of the two treaties mentioned in the amendment or deposited their instrument of ratification or accession, only the so-called German Democratic Republic had signed and ratified, and it would therefore be the only entity to profit from the amendment. Without going into detail on a matter which was not within the Conference's competence, he felt bound to stress that, in that sense, the amendment by Ghana and India was of a highly political nature.

57. Thirdly, contrary to what was maintained by the sponsors of the amendment and by several other delegations, the fact that an " all States " formula had been adopted in the two treaties mentioned in the amendment and the fact that those two treaties would be governed by the convention on the law of treaties could not lend any support to the idea of opening the convention on the law of treaties to any entity which had availed itself of the possibility of acceding unilaterally to the two treaties in question. Those treaties dealt with very special questions and for that very reason and because of what had led to their adoption, were exceptions. In those two treaties the accession formula had resulted from a political compromise between the two greatest

[12] See 103rd meeting, paras. 48-51.

world Powers, which moreover were the States most directly concerned by the treaties. The idea that those two treaties should be open to entities which, it was true, were not wholly extraneous to international law, but were not on that account States, had been accepted with those facts in mind. But that was no reason for repeating in the convention on the law of treaties, which was intended to apply only to treaties between States, an accession formula devised for special circumstances which did not apply to that convention.

58. He would, if necessary, speak again on the final clauses.

59. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that, in his view, it was necessary to ask for whom and for what purpose the convention was being drafted. The convention must take into account existing norms of international law as well as state practice. It was not enough to codify existing norms; account must also be taken of the progressive trends becoming apparent in international relations. It was necessary in drafting the convention to think of the future and to bear in mind the important role it was called on to fill. And that role was dependent on the number of States which might accede to it or would be entitled to accede to it. If all States were able to participate in general multilateral treaties, the convention would be of great importance both in practice and in principle. It was on the basis of those considerations that the question must be decided whether the proposed text was able to cope with the tasks facing the world at the present time. The right of States to participate in general multilateral agreements derived from the principle of the sovereign equality of all States, and one of the basic principles of existing international law was universality. Those principles must be applied to all States, and no State could prevent their implementation in respect of another State. In view of the fact that the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) was based on the Vienna formula and thus violated those principles, his delegation could not support it. On the other hand, it would support the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) and the Swiss amendment (A/CONF.39/C.1/L.396).

60. Mr. KHLESTOV (Union of Soviet Socialist Republics), speaking on a point of order, said he found it regrettable that in the course of his statement the representative of the Federal Republic of Germany had used the expression " the so-called German Democratic Republic ". Whatever the leaders in Bonn might think, the country in question existed as a sovereign State. In a meeting as important as the present Conference, every delegation should use the appropriate designation when expressing its views on a State.

61. Mr. YASSEEN (Iraq) said that, in the case of the convention on the law of treaties, there were many arguments in favour of the principle of universality. It was a codification convention, and in the interests of the international community conventions of that nature should be universally ratified and applied. It was true that for some codification conventions the principle of universality had not been accepted, but the convention now under consideration regulated questions which might be classed as " constitutional " in international juridical terms. The future of the codification and of the progressive development of international law depended on that convention, since treaties were as a rule the instruments through which codification and progressive development took place; consequently the universal character of the convention on the law of treaties must be recognized. Again, the convention not only provided for rights of which certain States might in particular circumstances be deprived; it also established obligations which it was desirable and essential to impose on all States throughout the world. His delegation could therefore not accept the Vienna formula and supported the " all States " formula. In view of the arguments advanced during the debate, based on certain practical difficulties, if the general formula was not approved, his delegation would support the amendment submitted by India and Ghana (A/CONF.39/C.1/L.394). That formula would to some extent fill in the gaps in the Vienna formula and would at the same time make for the solution of the difficulties mentioned during the discussion.

62. With regard to the number of ratifications or accessions needed for the entry into force of the convention, his delegation supported the proposal in the amendment by India and Ghana. The figure of thirty-five was acceptable; that number of ratifications was perfectly adequate.

63. The majority of the rules stated in the convention already formed part of positive law and it was better not to place too many obstacles in the way of their application as treaty rules by requiring too large a number of ratifications. His delegation could not support either the figure of forty-five proposed by Brazil and the United Kingdom, or the figure of sixty in the Swiss amendment.

64. Mr. CARMONA (Venezuela) said he wished to explain why his delegation had decided to submit a proposal for a new article 77 concerning the application of the convention in point of time (A/CONF.39/C.1/L.399). The convention contained various kinds of provisions. Those in articles 49, 50 and 61, for example, codified established principles which had great legal weight, even if the convention did not enter into force. On the other hand, the convention also contained new provisions which did not always represent progress, for example articles 10 and 11, the provisions of which ran counter to the generally accepted rules of international law; it was hard to know how States would react to them. Articles 46 and 47, which dealt with fraud and the corruption of a representative of a State, introduced a fundamental change from previous practice. States should therefore re-examine the matter in order to establish their final attitude to the convention. Article 53 dealt with the denunciation of treaties. The traditional principle in international law was that a State was free to denounce a treaty which did not prohibit denunciation or which was not inherently permanent. Article 53 laid down the opposite principle, that a treaty could not be denounced unless it provided

for denunciation. The Conference was therefore being asked to accept a new principle of law which would compel States to include a previously implicit denunciation clause in their treaties. Article 57 also laid down new provisions concerning the right of a State to invoke a breach of a treaty as a ground for its termination.

65. In view of the changes made in established rules of law and of the differences of opinion on the questions of arbitration and universality, it seemed essential, if the largest possible number of accessions was to be ensured, to state clearly and precisely that the provisions of the convention would apply only to treaties signed in the future. Some delegations considered that article 24, on non-retroactivity, provided an adequate solution to the problem, but there were many cases not covered by its provisions, since some situations lasted indefinitely or had not ceased to exist. The article was therefore ambiguous and eminent jurists had already gone into the matter very thoroughly. The Venezuelan delegation was proposing a simple and clear formula which might help a greater number of States to accede to the convention.

The meeting rose at 12.55 p.m.

ONE HUNDRED AND FIRST MEETING

Wednesday, 23 April 1969, at 3.25 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)*

Final clauses (including proposed new articles 76 and 77) (continued)

1. Mr. BRAZIL (Australia) said that on the question of participation his delegation would support the joint proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1). The Vienna clause, which had been used in previous codification conventions, should be applied in the present case also, as provided in article A of the joint proposal.

2. The unique character of the convention should be borne in mind when a decision was taken on the number of instruments required for the purpose of bringing the convention into force. It was a convention that had an almost constitutional significance in that it laid down the basic rules that would govern the procedural aspects of treaty relations as well as the question of the essential validity of treaties that were negotiated. Possible difficulties might arise if a number of States did not become parties to the convention. There was also the possibility of transitional problems, for instance on reservations, as the convention began to come into force for some States whereas other States had not yet become parties.

3. In the view of his delegation, the convention should not come into force until a significant part of the international community had indicated its acceptance of the code laid down in the convention. Australia would therefore favour the Swiss amendment (A/CONF.39/C.1/L.396) which provided for the entry into force of the convention following the deposit of the sixtieth instrument of ratification or accession. Should that amendment not be adopted by the Committee, the Australian delegation would support the joint proposal by Brazil and the United Kingdom under which forty-five instruments of ratification or accession would be required for the convention to enter into force.

4. In the matter of reservations to the convention, two courses of action were open. One was to include no provision at all on reservations, in which case the residual rules laid down in articles 16 to 20 would apply. The other was to take the opposite course of prohibiting all reservations, having regard to the basic nature of the convention, or at least to prohibit reservations to any portion of Part V.

5. The Australian delegation was unable to take a final position on that important question at the present stage. If, for example, the Conference were to adopt the residual rules contained in articles 16 to 20, the result would be to apply to the convention the flexible system of reservations contained in those articles. Serious thought should be given to the question whether, on balance, that would be the best solution in the case of a convention intended to lay down the essential framework within which States would in future enter into treaty relations.

6. With respect to the question of non-retroactivity, the Australian delegation preferred the more balanced and precise statement of that principle in the five-State proposal (A/CONF.39/C.1/L.400) to the simpler clause contained in the Venezuelan proposal (A/CONF.39/C.1/L.399).

7. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that the question before the Conference was whether it wished the rules laid down in the convention which was to govern treaty relations between States to be applied by everyone; if so, accession to the convention should be open to any State wishing to become a party to it. Only in that way would the convention serve the interests of the international community. A difficult situation would arise if some States were debarred from participation.

8. The western countries were discriminating against some of the socialist States by wishing to exclude them from the convention. It was hard to say at the present stage how many States would be debarred from participation in the convention in the future and what new States which might emerge from the struggle for national liberation would be subjected to political discrimination by the western Powers. The number of States thus debarred from the convention could not be predicted at the present stage. They would have nothing on which to base their treaty relations if they were not allowed to accede to the convention. An awkward situation might arise if a State now opposed