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ONE HUNDRED AND SECOND MEETING

Thursday, 24 April 1969, 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)*

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

1. Mr. ALVAREZ (Uruguay) said that his delegation's objections related not to the actual principle of non-retroactivity referred to in the proposals before the Committee, but rather to the way in which those proposals were formulated.

2. The word " in the future " in the Venezuelan amendment (A/CONF.39/C.1./L.399) lacked legal precision. It was essential to specify the point in time to which those words related; in his delegation's opinion it was the date on which the convention entered into force. There was also the question of the rules to be applied to treaties concluded before the date on which the convention became binding on the States parties to it. Legally, of course, it seemed obvious that it was the rules and principles of international law in existence before the entry into force of the convention which would apply, but the wording of the proposal in question might, by *a contrario* reasoning, be taken to imply that the existing rules of international law reproduced in the convention would not apply to earlier treaties. His delegation therefore considered that the interpretation he had given should be included in the text of the proposal.

3. The five-State amendment (A/CONF.39/C.1/L.400) raised a question of form, in that the wording ought to be improved, at least in the Spanish version, and a point of substance, in that, in explaining how the principle was to be interpreted, it introduced an unduly restrictive element. For the proviso referred only to the rules of customary international law codified in the convention, which would be applicable to earlier treaties. But in fact it was not only the rules of customary international law but all the rules and principles of international law, regardless of their source, which must be applicable and be covered by the proviso, in accordance with Article 38 of the Statute of the International Court of Justice. If a treaty concluded before the entry into force of the convention gave rise to a dispute between States and the dispute was submitted to the International Court of Justice, the Court had to apply not only the primary sources of international law but also the secondary and subsidiary sources.

4. His delegation therefore considered that the manner in which the principle of non-retroactivity was formulated should be improved, so as not to affect, even indirectly, the legal situation which might confront States in the event of a dispute concerning treaties concluded before the entry into force of the convention.

5. Sir John CARTER (Guyana) said he favoured the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) relating to the final clauses, particularly in the context of the explanations given by the United Kingdom representative at the 100th meeting in respect of article A. Guyana preferred that formula to any other because it believed that the United Nations General Assembly should be regarded as the most competent organ to determine which political entities should be invited to participate in multilateral conventions concluded under its auspices. His delegation would thus oppose any formula which empowered an organ other than the General Assembly to decide who could participate in such conventions.

6. On the other hand, his delegation could not support the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom. The new formula it contained, although exemplifying the marriage of East and West, would open the door to even more far-reaching discrimination in the long run by simply reducing the existing areas of discrimination and focusing attention on the discriminatory attitude adopted towards entities which could not avail themselves of that formula. More important still, it would entitle a few depositary Governments to take it upon themselves to decide unilaterally, on certain conditions, who was entitled to participate in a given treaty. That situation would be particularly untenable for Guyana in view of the persistent refusal of the depositary of the Treaty for the Prohibition of Nuclear Weapons in Latin America [1] to accept Guyana's signature to a treaty whose provisions clearly entitled it to participate in that treaty. Consequently, his delegation thought it should simply be left to the highest political organ of the international community, to the exclusion of any other, to determine which States should be allowed to participate in the multilateral agreements established under its sponsorship.

7. Turning to the proposals for the inclusion of a new article 77, he said that the Venezuelan proposal (A/CONF.39/C.1/L.399), in the form in which it had been submitted, would imperil the whole body of law governing relations between States, since the generally accepted norms of international law which were codified in the convention on the law of treaties, and which were normally regarded as constituting *lex lata,* would be valid only in respect of future consensual undertakings entered into between States. All existing treaties would therefore be deprived of their legal content, and the law of the jungle would then prevail in international relations. His delegation could not support such juridical iconoclasm and would vote against the Venezuelan proposal.

8. The Venezuelan proposal was also ambiguous; it did not say that it was based on the notion that all States would become parties to the convention *sine die,* since that was the only condition on which a future treaty would be governed by the juridical norms embodied in

[1] For text, see *Official Records of the General Assembly, Twenty-second Session, Annexes,* agenda item 91, document A/C.1/946.

the convention now being prepared. It would therefore have been preferable to use the words: " subject to the provisions of article 1, the provisions of the present convention shall apply to all States and only to treaties concluded in the future ". But he was not proposing a formal amendment, since in any case his delegation could not endorse the basic idea expressed in the Venezuelan proposal.

9. The five-State proposal (A/CONF.39/C.1/L.400) made some attempt to bring the Venezuelan proposal into line with existing international law; that clearly showed that damage the latter proposal could do if it was accepted. But the amendment would only aggravate the difficulties normally associated with identifying the material and psychological components of a customary international norms. The proposal would cast doubt not only on the status of conventional rules established by free consent in existing treaties but also on the fundamental law of the international community contained in the United Nations Charter. Much of the law in the Charter had no correspondence with customary international law. Did that mean that the Venezuelan proposal, as amended by the five-State proposal, would deprive that law of all relevance for the States parties to the convention on the law of treaties? The five-State proposal would have to be rejected, since it was absolutely impossible to remedy the defects which vitiated the entire Venezuelan proposal. His delegation would therefore be forced to abstain from voting on any amendment to the Venezuelan proposal.

10. Mr. HUBERT (France) said he supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) relating to the final clauses. Article A reproduced the orthodox terms of the Vienna formula, and that solution was satisfactory to France for the reasons he had already stated, namely that the Conference had been convened by the General Assembly of the United Nations, that it was working within the framework of the United Nations practice and that all the work of the United Nations had produced customary rules from which the Conference had no reason to deviate. The purpose of the Conference was to apply the rules and not to change them. Besides, since the Vienna formula had already been adopted twice, it might well be adopted a third time. The Indian representative had advocated a rapprochement between East and West, but that was a question which, however serious, it was not for the Conference to settle, since it fell within the purview of the General Assembly.

11. The French delegation had no special observation to make or objections to raise concerning articles B and C.

12. With regard to article D, the number of States invited to the Conference, not merely the States which had been able to accept the invitation, should be taken into account. States which had been invited but had not been able to attend, perhaps for practical reasons, might well be among the initial signatories to the convention. One hundred and thirty-seven States had been invited, so that the minimum of sixty ratifications required for the convention to enter into force, as proposed by Switzerland (A/CONF.39/C.1/L.396), was not in itself unduly high. But the figure of forty-five proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), corresponding to one-third of the States invited, was a reasonable solution calculated to be generally acceptable, and hence France would gladly support it.

13. Mr. NEMECEK (Czechoslovakia) said that on the question of the universality of treaties his delegation believed that treaties which affected the interests of all States and codified and developed the principles of international law should be open to all States without exception. That fully applied to the convention on the law of treaties.

14. The Czechoslovak delegation considered that the Conference was engaged, as the Swiss representative had remarked at the 100th meeting, in drawing up a constitutional law at the international level, and that should go hand-in-hand with the need to ensure that all States were able to participate in it. His delegation therefore unreservedly supported the proposal by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) relating to the final clauses.

15. His delegation also supported the amendment by Ghana and India (A/CONF.39/C.1/L.394) as being a compromise formula which at the same time represented the furthest the Conference was in any circumstances prepared to go.

16. As the Chairman of the Drafting Committee had rightly remarked, participation in the convention entailed obligations as well as rights and it was therefore in the interest of the international community that all its members should be in a position to comply with such obligations. His delegation also concurred in the view expressed by the Indian representative at the 100th meeting that it was desirable to adopt a formula based on both the Vienna and the Moscow formulas.

17. The Czechoslovak delegation considered that it must strongly oppose the draft article 77 proposed by Venezuela (A/CONF.39/C.1/L.399). The proposal failed to take sufficiently into account the fact that the Conference was mainly concerned with codifying the rules of international law at present in force. Thus, the principle in international law that treaties whose conclusion had been procured by the threat or use of force were void *ab initio* was not merely the basic principle but the very ethic of law, without which law would not exist as such.

18. It was to be hoped that the Venezuelan delegation would be able to withdraw its proposal, the more so since there were no real differences of opinion on that head from the legal point of view, but simply different ideas of how the question should be presented. His delegation did not think that a provision on non-retroactivity should be included in the convention, but it would not oppose it if the majority of delegations were in favour of a provision of that kind, provided that the wording was quite precise and made it clear that the principle of non-retroactivity would not apply to principles of international law already recognized. With that in mind, the text of the five-State proposal (A/

CONF.39/C.1/L.400) needed to be more precisely worded.

19. Mr. YASSEEN (Iraq), referring to the Venezuelan proposal (A/CONF.39/C.1/L.399) and the five-State proposal (A/CONF.39/C.1/L400) said that the principle involved was non-retroactivity. In municipal law silence was the rule when there was no reason to state that a law was retroactive. The same method should apply in international law. If there was no question of making the convention on the law of treaties itself retroactive, there was no need to state expressly that it was non-retroactive; it was best simply to say nothing.

20. Difficulties did arise, however, in connexion with the sources of international law and the nature of the convention itself. The purpose of the draft articles was not only to create new rules, but in the main to formulate existing rules which were already part of positive international law. It had to be realized that non-retroactivity, which was the principle that should be adopted, could not impair the binding force of those rules, since, in general international law, customary rules, for instance, or rules deriving from some other source of international law did not lose their character of positive law by the mere fact of their being codified in an international convention.

21. Consequently he could not accept the Venezuelan proposal (A/CONF.39/C.1/L.399), which seemed to conflict with the general principles of international law on the matter; he would also find it hard to accept the five-State proposal for an article 77 (A/CONF.39/C.1/L.400), for that text was not essential, since the matter was already governed by very definite rules of international law which had exactly the same effect as the proposed article 77 would have.

22. Furthermore, the five-State proposal did not solve the problem as a whole, since it mentioned only " the rules of customary international law ". But treaty law and custom were not the only sources of international law: it was also necessary to take into account, for example, the general principles of law, which were a separate source, as was evident from Article 38 of the Statute of the International Court of Justice. There were also auxiliary sources of international law, such as case-law. He could not, therefore, in any case support the five-State proposal for article 77 as it stood.

23. Mr. GALINDO-POHL (El Salvador) said his delegation had no criticism to make of the intention of the Swiss proposal (A/CONF.39/C.1/L.250), which left it to the parties to choose the conciliation and arbitration procedure which best suited them in the event of a dispute relating to the interpretation or application of the convention. Article 36, paragraph 2 of the Statute of the International Court of Justice permitted the States parties to the Statute to declare at any time that they recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning among other matters the interpretation of a treaty. The Court was therefore an international tribunal competent to decide disputes relating to the interpretation of a treaty arising between States which had accepted the optional clause in Article 36 of the Statute. It had to be borne in mind that article 62 *bis* had been approved only by a very small majority and it would be hard to obtain a two-thirds majority for it in the plenary. Those who had not yet resorted to the optional clause in Article 36 would find it difficult to accept article 62 *bis,* which was the result of a compromise to meet the views of those delegations which, though in favour of compulsory arbitration, did not consider that it would be timely at present to resort to the Court. The Salvadorian delegation was not opposed to article 76, but it wished to draw attention to the difficulties the article was likely to cause. If the Swiss proposal was rejected, it would in any case still be open to certain States to resort to the optional clause in Article 36 of the Statute of the International Court of Justice.

24. With regard to non-retroactivity, the Salvadorian delegation noted that the Venezuelan amendment (A/CONF.39/C.1/L.399) did not distinguish between *lex lata* and *lex ferenda.* For that reason his delegation was unable to accept it, at any rate in its present form, because there were norms codified in the convention that were already in force; non-retroactivity could apply only to rules in which the convention introduced inovations and thus created new rules that were binding as between the parties from the time when it entered into force, in other words from the time when the process of creating them was complete.

25. The five-State proposal (A/CONF.39/C.1/L.400) excepted the rules of international law already in force, but it only referred to customary rules. The rules already in force which the convention was codifying had existed for some time; the new rules would come into force when the process of creating them had been completed. The new article 77 might be of some value if the Conference wished to make the position clearer, but certain changes would have to be made in it and emphasis placed on the rules of the present convention rather than on the objects to which they would apply, namely earlier or future treaties.

26. With regard to the problem of the States that should be permitted to accede to the convention, the Committee had heard the same arguments about universality and free consent as it had during the discussion on article 5 *bis.* The Salvadorian delegation had opposed that article because it took the view that as a political question was involved, each individual case would have to be considered on its merits in order to determine the effect of the principle on each particular treaty. There were two different formulas, the Vienna formula and the " all States " formula. Those who favoured the former believed that the convention should not permit all political entities without exception to accede. Those who favoured the " all States " formula believed that the aim of the convention should be universality. The question was whether the convention was a special case to which the principle of universality should apply, in other words whether it was desirable to ensure that as many States as possible acceded to it. The idea of treaties open to accession and ratification by all States

had been gaining ground since 1963. There had been the Nuclear Test Ban Treaty, the Outer Space Treaty and the Agreement on the rescue and return of astronauts; in 1968 there had been the Treaty on the Non-Proliferation of Nuclear Weapons. In those Treaties the " all States " formula had been used; that formula should be included in a work of codification, since it represented an existing practice. The guiding principles in the codification of international law should be consistency and concordance, so that the formulas that were codified would include existing international practice and try to deal, in connexion with each subject, with all questions and persons forming the subject of international legal relations. Deliberately to omit one aspect of legal relations would be a failure to comply with those principles and would diminish the value of the work of codification.

27. Some States represented at the Conference had regular treaty relations with entities which they recognized as States but which would not have access to the convention if the Vienna formula was applied. A Conference that had met to draft a treaty on treaties could not very well deny to those States the right to make the advantages of the convention applicable to that area of their international relations. It would be logical to enable those political entities to accede to the convention, and it would be possible to do so, despite the fact that other States did not have the same relations with them, because it was a recognized fact that accession to a general multilateral treaty did not imply recognition of the other parties. The application of a provision of that kind would allow more States to accede.

28. The amendment by Ghana and India (A/CONF.39/C.1/L.394) was a milder version of the " all States " formula; it got round certain difficulties and was an attempt to avoid raising the problem of the legal existence of certain States; above all, it made it unnecessary for the Secretary-General of the United Nations to give a decision regarding the existence of certain States. The international community had not taken those precautions when it had drawn up the Treaty on the Non-Proliferation of Nuclear Weapons and had adopted the " all States " formula. The formula proposed by Ghana and India paid attention to the position of certain States which maintained that certain political entities did not have the status of States. As it stood, the amendment provided a good basis for solving the difficulty and served the higher interests of the international community. His delegation preferred the formula by Ghana and India, because it ensured that the Secretary-General of the United Nations would not be confronted with a problem; but it recognized that the " all States " formula would be more logical in the case in point. The convention was a great legal achievement and should be open to as many States as possible. The very nature of the subject-matter required a demonstration of good will by States, so that the principle of universality would prevail. Participation by a large number of States was necessary, if the ambitious purpose of those who had drafted the articles was to be achieved. Otherwise, the instrument which the Conference was preparing would be universal neither in letter nor in spirit.

29. Mr. OGUNDERE (Nigeria) said that his delegation had carefully studied the various proposals submitted with regard to the final clauses. The amendments before the Committee once again raised the issue of the principle of universality. In 1968, during the discussion on article 5 *bis*, consultations had taken place among various regional groups as to the final form which that article should take. A draft declaration embodying the same formula as that contained in the first part of article A of the amendment by Ghana and India (A/CONF.39/C.1/L.394) had been discussed, and some regional groups had shown great interest in it. The principle of the amendment had been adopted in four conventions; and it was common knowledge that a fifth treaty, on liability for damage caused by nuclear explosion, would be signed within two or three months and would contain the same " all States " formula. Nigeria had always advocated the principle of universality. The " new " Vienna formula had the great advantage of giving practical expression to the principle of universality and at the same time of relieving the depositary of the responsibility of having to take a political decision on whether certain political entities constituted a State. It represented a compromise between the supporters of the " all States " formula and those who urged the application of the Vienna formula. A formula likely to be approved by the greatest possible number of delegations should be adopted. His delegation would therefore find it difficult to support either the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) or the proposal by Hungary, Poland, Romania and the Soviet Union (A/CONF.39/C.1/L.389 and Corr.1).

30. As to the number of instruments of ratification or accession needed to bring the convention into force, Nigeria favoured the adoption of the figure of thirty-five, suggested by Ghana and India. However, his delegation thought that if that figure was unacceptable to the majority of participants, the number adopted should not exceed forty.

31. The Nigerian delegation did not think that the final clauses should contain a provision on reservations, since articles 16-20 of the convention were adequate in that respect. Nor did it think that the final clauses should contain provisions on the settlement of disputes or on revision. Moreover, since articles 71 and 72 of the convention were concerned with the depositaries of treaties and the functions of those depositaries, it was unnecessary to deal with those matters in the final clauses.

32. Mr. EUSTATHIADES (Greece) said that although certain provisions in a convention were called " final clauses " because they appeared at the end of the text, they were a source of concern to all delegations from the very earliest stage of drafting a convention, for they related to the scope of the convention in time and space. Two major points were before the Committee: retroactivity, and the categories of States to be allowed to accede to the convention.

33. Several proposals had been submitted to the Committee on the question of the number of ratifications or accessions required for the convention to enter into force. Some had suggested thirty-five, others forty-five, others sixty. That raised the question of ensuring that the new treaty law which was to govern all future treaties would be widely applied. It was satisfactory to note that even the figure of thirty-five would already cover a good many countries, which meant that the general trend among delegations was to require accession or ratification by a large number of States. That was a very important point since, by establishing a high figure, the Conference would reflect the clear trend towards generalization of the new treaty system and a uniform law of treaties, and that would be useful in the future. While the Greek delegation was not committed to any of the figures suggested, it believed that accession by a large number of States should be required in order to bring the convention into force.

34. The International Law Commission had not drafted a provision on the non-retroactivity of the convention, although article 24 was based on the concept of non-retroactivity as accepted in general international law with respect to the law of treaties. Article 24, however, would not duplicate a provision on the non-retroactivity of the present convention itself. The non-retroactivity referred to in article 24 related to future treaties, when specific treaties would be involved and the question would be one of precise rules of substance. The problem would then be a difficult one, though not because of the accepted fact that a treaty might establish a rule contrary to that of non-retroactivity, for there was nothing to prevent the contrary rule being laid down in an international treaty. Provision had to be made for another kind of exception, the case where it would appear from the treaty that the parties had the contrary intention. From cases which had come before international tribunals, notably the *Ambatielos* [2] and *Mavrommatis Palestine Concessions* [3] cases, in which Greece had been involved, it was clear that there were other reasons in favour of abolishing the principle of non-retroactivity. That was sufficient proof that, even in the case of specific international treaties, the principle of non-retroactivity was only admitted on the understanding that it might give rise to awkward problems.

35. Article 77 was quite a different matter. Non-retroactivity there related to the application of the rules governing treaties. The problem was at once simpler and more complicated because even if the intention of the parties was to be taken into account and they had intended that non-retroactivity should not apply, it was necessary that that intention should have been clearly stated. In his delegation's view, the work of codification undertaken in the present convention could not affect general international non-treaty law which already existed prior to the convention. The intention was clear and nobody would deny that a reservation covering the rules of general international law was implied. Even if the principle of article 24 were applied to article 77, an exception would in any case have been made in the case of the rules of general international law.

36. The five-State proposal (A/CONF.39/C.1/L.400) had the merit of clearly stating that intention, and the Greek delegation therefore supported it. The representative of Iraq had drawn the Committee's attention to the fact that there were rules of general international law other than customary law. The process of formation of customary law was something extraneous to non-retroactivity, since customary law exercised its weight independently, according to the stage it had reached, and that could never be precisely stated. By definition, general international law did not raise difficult problems of non-retroactivity. The rule of non-retroactivity existed in international treaty law. The drawback of the five-State proposal was that it confined the non-retroactivity proviso to customary international law, whereas there were other forms of innovation in general international law. He therefore suggested that the sponsors of that amendment should delete the word " customary " or base their amendment on the language used in article 3 of the convention.

37. The principle of non-retroactivity laid down in the proposed new article 77 had the advantage of encouraging more States to ratify the convention, since the obligations prescribed were more restricted. It would therefore be a means of working towards universality. The adoption of article 77 would mean nothing more than the acceptance of what would exist even without that article. In any case, the principle of non-retroactivity, even when explicitly laid down, could not prevent certain awkward questions from arising, but that was inevitable. In the opinion of his delegation, it was preferable to state the principle explicitly.

38. The legal problem related to the structure of the international community, namely the problem of the participation of all States in both the rights and the obligations of existing treaty law, had become a political one. Those taking part in the Conference, despite the force of the legal arguments they had adduced, had inevitably adopted the political approach. Recognition of States was a difficult issue, but ultimately it was a question left to the sovereign discretion of each State. The Vienna formula had the advantage of raising no difficulties with regard to the question of recognition, which was not the case with the " all-States " or Moscow formulas.

39. Some representatives had claimed that accession to a general multilateral treaty by a State that was not generally recognized did not entail recognition; in support of their arguments they had cited the Nuclear Test Ban Treaty and the Outer Space Treaty. The Greek delegation also thought that accession to a multilateral treaty by a State which was not generally recognized did not imply recognition of that State by States which had not recognized it. If the principle of universality was to prevail, the best solution would be to add an express provision to that effect. That solution had in fact been accepted in international treaty law in the humanitarian field, in particular in the four Geneva Conventions of 1949, which provided that the

[2] *I.C.J. Reports 1952*, p. 28.

[3] *P.C.I.J.* (1924), Series A, No. 2.

application of certain rules to rebels or belligerents not recognized by all the parties did not imply recognition of the belligerents.

40. However, the inclusion of such a provision in a particular treaty was not to be regarded in the same way as its inclusion in the convention on the law of treaties, since although a proviso on the non-recognition of acceding States was possible in specific conventions such as the two treaties mentioned in the amendment by Ghana and India, the problem was different in the case of a convention governing treaty law as a whole. To make treaty law open to acceptance by all States implied recognition of those States. The effect of recognition was to permit the establishment of diplomatic and treaty relations. Under present circumstances, the adoption of a provision that all States could accede to the convention on the law of treaties would in practice mean the establishment of a very broad treaty relationship between all States, which would result in recognition.

41. The Vienna formula, however, allowed all States to conclude bilateral conventions, and all States were entitled to conclude a treaty of the same scope as the convention on the law of treaties with those States which were not covered by the Vienna formula. He thought it was necessary to develop treaty law first, in other words to facilitate the ratification of all treaties codifying international law by the States covered by the Vienna formula, and thereby to enable those treaties to enter into force.

42. Mr. DE CASTRO (Spain) said that the Venezuelan proposal (A/CONF.39/C.1/L.399) raised an important question which seemed to be settled in principle in article 24 of the convention but which required clarification. The Venezuelan proposal was ambiguous, since it did not say whether the rules of general international law were also applicable.

43. The expression " rules of customary international law " which appeared in the five-State proposal (A/CONF.39/C.1/L.400) was not clear, since the sponsors had not specified whether they also understood it to include the principles and rules of general international law.

44. The Spanish amendment (A/CONF.39/C.1/L.401) to that proposal merely repeated what was stated in the Preamble of the Charter, in Article 38 of the Statute of the International Court of Justice, and in articles 3, 27, 34, 40 and 49 of the draft.

45. The Swedish representative had said that the text of the five-State proposal of which he was one of the sponsors (A/CONF.39/C.1/L.400) might perhaps incorporate drafting changes proposed by the Drafting Committee. But it would also be advisable to clarify the substance of the text and to add the words proposed in the Spanish amendment.

46. His delegation might wish to speak again during the discussion, if for example the question of reservations of some other important problem was raised.

47. Mr. MATINE-DAFTARY (Iran) said he did not share the optimism of the Brazilian and United Kingdom delegations, which had proposed in their amendment (A/CONF.39/C.1/L.386/Rev.1) that the convention should enter into force following the deposit of the forty-fifth instrument of ratification or accession.

48. The sponsors of the amendment had stated that because of the increase in the number of States participating in codification conferences, it would also be necessary to increase the number of instruments of ratification and accession required, from the figure specified in the Conventions on the Law of the Sea and on Diplomatic and Consular Relations.

49. In his delegation's view, it would be well to wait for the final vote of the Conference before taking a decision on the number of instruments required for the entry into force of the convention. Moreover, most of the previous conventions, drafted by the codification conferences held at Geneva and Vienna, had only entered into force after many years of delay and of hesitation by States to ratify them, even though the number of instruments of accession or ratification required in them was less than was called for in the proposal by Brazil and the United Kingdom. What was more, the problems involved in those conventions were not as controversial as those raised in the convention on the law of treaties, which had split the participants in the Conference into two strongly opposed groups. Certain delegations had precipitated the voting on some highly controversial articles during the 99th meeting, since they wished the convention on the law of treaties to include a clause providing for the establishment of machinery for compulsory arbitration which would not permit the formulation of any reservation on the point. The vote taken during that meeting was a warning to those delegations. The representative of one great Power had stated during the debate on compulsory arbitration that his Government would not accept the convention if the provision concerning compulsory arbitration was not adopted by the Conference. The opponents of the clause providing for machinery for the compulsory settlement of disputes had carefully avoided uttering any such threat, but it was to be feared that they too might eventually be forced to adopt a similar attitude. After all, if wisdom did not prevail during the meetings of the plenary Conference, in other words, if article 62 *bis,* which had been adopted by a majority of 54 votes to 34, with 14 abstentions, was retained in its present form and its sponsors persisted in refusing to recognize the right to make reservations and did not limit themselves to the adoption of a compulsory procedure involving only conciliation, a large number of States participating in the Conference would have no alternative but to refuse to ratify the convention. In that event, the States which had won in the vote on article 62 *bis* would have drafted a convention of purely Western character which would be far from universal. It would be unfortunate if the excellent work of the International Law Commission were doomed to failure. His delegation asked the sponsors of the proposals concerning the final clauses to try to reach a general agreement on that highly important question before settling the question of the number of instruments of accession and ratification required for the entry into force of the convention.

50. It should also be pointed out that there were other factors that could be an obstacle to the ratification of conventions, in particular the absence of parliaments in a number of States participating in the Conference.

51. His delegation could not support the Venezuelan proposal (A/CONF.39/C.1/L.399) for reasons similar to those advanced by the Swedish representative in submitting the five-State alternative proposal of which he was a sponsor (A/CONF.39/C.1/L.400), and which might likewise be considered superfluous in view of the express provisions of article 24 adopted during the first session. It might also be possible to follow the example of the previous codification conventions, such as the Conventions on the Law of the Sea, where the preamble indicated which articles represented codification and which were related to the progressive development of international law.

52. If the five-State proposal (A/CONF.39/C.1/L.400) was maintained, his delegation thought that its own amendment (A/CONF.39/C.1/L.402), which was taken from the preamble to the Convention on the High Seas[4] was necessary. The Drafting Committee might work out some formula which would cover all the sources of existing international law.

The meeting rose at 1 p.m.

[4] United Nations, *Treaty Series*, vol. 450, p. 82.

ONE HUNDRED AND THIRD MEETING

Thursday, 24 April 1969, at 3.30 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. ESCUDERO (Ecuador) said he was surprised that the representative of Venezuela should have submitted his proposal for a new article 77 (A/CONF.39/C.1/L.399), providing that the convention should apply only to future treaties, so soon after Ecuador had made a statement advancing unanswerable arguments against that position. The Venezuelan proposal discriminated against past treaties, and violated the principle of the sovereign equality of States, all of which had the same right in law to invoke the application of the present convention for the treaties they concluded, whether present or future. The Venezuelan proposal placed some States in an advantageous position as compared with others, and thus conflicted with the principle of the integrity of the law, which was essentially one and indivisible for all States belonging to the international community. That applied above all to the present convention, or treaty on treaties. Why should the representative of Venezuela fear that the convention should be applied to existing treaties, since those treaties, like future treaties, deserved the same legal protection?

2. The representative of Venezuela had referred to the non-retroactivity of international law as a sacred dogma, without reflecting that that principle did not apply to the problem under consideration, and that even in the field of private law it only applied with many well-founded exceptions.

3. The Venezuelan representative had himself referred to a number of rules of the greatest importance, such as those adopted by a large majority during the first session of the Conference in articles 49, 50 and 61, and had stated that they already possessed unquestioned authority, and consequently were valid before the entry into force of the convention. That meant that those rules were authentic and applicable law, already embodied in treaties and consecrated by international custom, which was a source of law as valid as international treaties, as was shown by article 38 of the Statute of the International Court of Justice. Consequently it was hard to understand why the representative of Venezuela maintained that the convention should apply only to future, and not to existing treaties, if the law proclaimed in articles 49 and 50 in fact already applied to existing treaties, a law which would disappear if the Venezuelan proposal were accepted. The Venezuelan position amounted to applying different criteria to similar situations. Possibly Venezuela objected to certain minor provisions in the convention, but that was no reason for sacrificing the application to existing treaties of all the provisions, including those in such major articles as 49, 50 and 61. In the name of justice, he appealed to the representative of Venezuela to show a more understanding attitude and withdraw his proposal. If the Venezuelan representative were unwilling to do that, he urged the Conference to reject that proposal and any other proposal of the same nature.

4. Mr. BREWER (Liberia), referring to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), said that his delegation found article A acceptable because it believed that the United Nations, and not the present Conference, should decide which States could become signatories to the convention. That principle was endorsed by the fact that it was the States that had convened the conferences on the banning of nuclear weapons and on the exploration and use of outer space that had decided to open those treaties for signature by all States. His delegation took the view that all questions of participation, signature, accession and acceptance could only be decided by the States or organization responsible for convening the conference. Prior to the Vienna Convention on Diplomatic Relations, all multilateral conventions concluded under United Nations auspices used a formula that did not go as far as the Vienna formula, which Liberia considered broad enough to cover most, if not all, States. At the 1961 Vienna Conference the additional category " States parties to the Statute of the International Court