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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

of Justice " had been added, but only on the authority of the United Nations General Assembly.

5. With regard to article D, his delegation accepted the figure of forty-five for the number of ratifications required before the convention entered into force, but considered that, in view of the increase in the number of States, fifty would be a more appropriate number, since it represented one-third of the total number of States in the world; the basis for calculation should be the entire world community, and not just the membership of the United Nations or the participation in the present Conference. The number used in 1958 for the Conventions on the Law of the Sea had been twenty-two, but since that time the number of independent States had almost doubled.

6. His delegation agreed on the need for an article on the lines of the new article 77 proposed by Venezuela (A/CONF.39/C.1/L.399), and by Brazil and four other States (A/CONF.39/C.1/L.400). But neither proposal went far enough, and he hoped an attempt would be made to broaden the provisions of the article.

7. Mr. BINDSCHEDLER (Switzerland) said the first question was whether or not a specific article on non-retroactivity was really necessary, since the non-retroactivity of legal rules was a general principle of law which was universally recognized, and equally valid in international law; it was the logical consequence of the principle that a legal rule could only govern the subject of the law in the future, not in the past. If, exceptionally, a law provided for retroactivity, it was always a sort of legal fiction: the rule would be applied in the future, but with respect to previously existing legal facts and situations.

8. The question was not a simple one. The first difficulty was that the evolution of the law must be taken into account. That point was brought out very clearly by the arbitrator, Max Huber, in his well-known award in the *Island of Palmas* case where he had said: " As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law." [1] The evolution of the law was not taken into consideration in that opinion in order to determine the rule of behaviour, which always applied to a given situation at a given time, but in relation to the existence and content of rights as constituting the condition of application of the rule of behaviour. The existence and content of those rights was not immutable, either in international or civil law. However, that did not imply any exception to the principle of non-retroactivity. A right which lost its validity did not do so retroactively.

9. Another example was provided by the rule on the breadth of the territorial sea. Although the breadth had varied from time to time, that variation did not imply any variation in the application of the law in time. Unless the law expressly so provided, there was never any question of retroactive invalidation, only of abrogation or modification *ex nunc*. Even if a treaty provided for retroactivity, as in the case of some agreements on double taxation or social security agreements, the rule itself was not retroactive; it regulated only the future behaviour of States, and did not make their former behaviour illegal. There must accordingly be a definition of what was meant by non-retroactivity. It was not sufficient merely to rely on the general principle of non-retroactivity, because that notion was not sufficiently clear.

10. Switzerland was in favour of including a special provision on the question in the convention, and he was grateful to the delegation of Venezuela for having put forward a specific proposal to that effect (A/CONF.39/C.1/L.399). The Venezuelan text was, however, too brief and needed further clarification; the proposal by Brazil, Chile, Kenya, Sweden and Tunisia (A/CONF.39/C.1/L.400) had the merit of being more complete and precise. However, the proposal should include a reference not only to the rules of customary international law, but also to the general principles of law, which were also a source of international law. Secondly, the phrase " codified in the present Convention " should be deleted; that limitation was incorrect, for all customary law was applicable, not only the law codified in the convention. That comment applied also to the amendment proposed by Spain (A/CONF.39/C.1/L.401). Lastly, since the notion of the conclusion of a treaty had not been defined in article 2 of the convention, and was thus ambiguous, it would be better to avoid referring to it in the new article 77 and to replace it by that of signature or ratification. He would suggest that a revised text be drafted based on article 24 of the convention, which would provide that the present convention did not bind a party in relation to any treaty that had entered into force before, or any act or fact which had taken place, or any situation which had ceased to exist before the date of its entry into force. He believed that the Drafting Committee was best qualified to choose between the various proposals now before the Committee.

11. He wished now to reply to some questions raised by the representative of Ceylon [2] concerning the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250). The first question concerned the relationship between article 62 *bis* and article 76, which was somewhat complicated. The procedure in article 62 *bis* applied only to cases of invalidity or termination arising out of Part V of the convention, in relation to other treaties. It was for the conciliation commission or arbitral tribunal to say if there was a cause of invalidity applying to another treaty which the party concerned desired to terminate. In their report those two bodies would interpret the various articles relating to Part V. Con-

[1] United Nations, *Reports of International Arbitral Awards*, vol. II, p. 845.

[2] See 101st meeting, para. 25.

versely, the procedure provided under article 76 would apply to the convention on the law of treaties itself, except for causes of invalidity under Part V in relation to other treaties. The convention on the law of treaties could give rise to disputes regarding the scope of signature or ratification, contradiction between various treaties, or the complex question of reservations. If such disputes arose with respect to other treaties the procedure provided in those treaties would apply, but if they contained no provision for the settlement of disputes, then the parties would be able, under article 76, to resort to the procedure provided in that article. Consequently article 76 filled a gap. In addition it was desirable for the parties to give preference to the procedure under article 76 in order to guarantee uniform interpretation of the convention on the law of treaties. The convention would be part of general international law and should be interpreted uniformly in order to maintain the unity of the international legal system. The International Court of Justice was therefore the most suitable body for that purpose.

12. The procedure provided under article 76 was also applicable to article 62 *bis* if an abstract dispute arose, but if problems arose under article 62 *bis* in relation to other treaties, then the conciliation commission and the arbitral tribunal must settle such disputes. It was a general principle of law that any body, unless it was provided otherwise, must decide its own competence and procedures.

13. Mr. SAMAD (Pakistan) said that his delegation supported the principle of the participation of all States in general multilateral treaties of general interest to the international community. It accordingly supported the " all States " formula for signature of and accession to the convention. The Vienna formula was limited in scope, and he would like to see some advance on it in the interests of the progressive development of international law, as proposed by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1). The proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) embodied the limited Vienna formula, and it would therefore be difficult for Pakistan to support it. However, if the proposal by Hungary and the other countries did not win enough support, his delegation would support the proposal by Brazil and the United Kingdom as amended by Ghana and India (A/CONF.39/C.1/L.394). That text took account of current practice by referring to the Moscow Nuclear Test Ban Treaty of 1963 and the Outer Space Treaty. It was incorrect to say that the Vienna formula had become customary in United Nations practice, since the western Powers had departed from it in recent times.

14. With regard to the number of instruments of ratification or accession necessary for entry into force of the convention, his delegation thought a number representing one-third of the participating States was a reasonable suggestion. It was undesirable to set too high a figure; the number 60 suggested by Switzerland would mean too long a delay in the entry into force of the convention, and he would prefer forty-five.

15. Pakistan would like to see a revision clause included in the convention to provide for its review after a period of, say, ten years, at the request of a given number of signatory States. It supported the inclusion of a reservation clause to the extent permitted by the articles of the convention; clearly derogations might not be permitted from provisions of a fundamental nature such as those in Part V of the convention.

16. With respect to the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250), Pakistan agreed that legal disputes regarding the interpretation or application of a convention should be referred to the highest judicial forum available to the United Nations, namely, the International Court of Justice, in the absence of any other arbitral tribunal agreed to by the parties. Article 38 of the Statute of the International Court of Justice permitted that for all legal disputes.

17. His delegation would like at least the procedural provisions of Part V of the convention to be applicable also to treaties in force at the time when the present convention entered into force, as well as to future treaties, as suggested by the representative of Ecuador. If, however, that idea did not gain enough support, Pakistan would have no objection to the inclusion of an explicit provision, despite the adoption of article 24, as proposed by Brazil and four other countries (A/CONF.39/C.1/L.400). That text was preferable to the one proposed by Venezuela (A/CONF. 39/C.1/L.399), but the former needed some redrafting to make it clearer; perhaps it could be studied by the Drafting Committee, together with the amendments by Spain (A/CONF.39/C.1/L.401) and Iran (A/ CONF.39/C.1/L.402).

18. Mr. MENDOZA (Philippines) said that he appreciated the position of the advocates of the " all States " formula. The convention on the law of treaties was unique in that it was declaratory of the law as it was and possibly creative of rules which, because of their nature and of the present circumstances, were pressing for recognition as part of the law of nations. It was an attempt to legislate for all the States of the world, and if a State not present at the Conference were to recognize the value of its work and sign, or accede to, the convention, it should be a matter for gratification.

19. At the same time, there were deep and vital considerations which had led to the adoption and maintenance of the Vienna formula and which rendered it difficult, if not impossible, for many delegations to accept any other basis for signature or accession; those considerations appeared to be beyond discussion in the present forum.

20. The Vienna formula was not a very courageous solution because it avoided a decision on the question whether certain States could become parties to the convention. The burden of responsibility was thus shifted to the General Assembly, but it was precisely the merit of the formula that it did not conclude the issue but deferred it for the ultimate decision of the Assembly.

21. Under General Assembly resolution 2166 (XXI) the Conference was called upon " to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate ". That passage set forth the Conference's duties and responsibilities and those did not include dealing with questions which were far removed from the law as such and were rooted in political considerations. Many delegations probably did not have the authority to decide on those issues at the present Conference.

22. The convention constituted a codification of long-standing rules and principles of international law and of rules compatible with the concept of progressive development. It would be gratifying if those rules were to prevail throughout the community of nations. The ultimate test, however, of the value of the Conference's work would be not the formal acceptance of those rules by the States which signed, or acceded to, the convention, but the observance of those rules by all nations, whether or not parties to the convention.

23. Article 1 stated that the convention applied to treaties concluded between States; let it then apply to all States — not necessarily by the binding commitment of their signatures but by the force of the justice and fairness of the rules it embodied and of their implicit recognition as rules of international law binding upon all States.

24. He trusted that the Conference would not be constrained to resolve what the General Assembly was far more competent to decide and that its extensive work would not be endangered on an issue which was not within its province.

25. Mr. ONG KHUY TRENG (Cambodia) said that, in the opinion of his delegation, the principle of non-retroactivity, which was already laid down in article 24 of the draft, was unanimously accepted in general international law. That view was confirmed in the Venezuelan amendment (A/CONF.39/C.1/L.399). Nevertheless, the scope of article 24 differed from that of the Venezuelan amendment, since the former related to the non-retroactivity of treaties, and the latter to the non-retroactivity of the provisions of the draft before the Conference.

26. His delegation considered that many of the provisions of the draft had existed before their codification by the International Law Commission and that one of the main purposes of the Conference was to set those rules out formally. Although the Conference was not really engaged in laying down new rules or interrupting the continuity of generally accepted rules, adoption of the Venezuelan amendment might have the effect of implying that such rules would apply only to future treaties. The amendment therefore lacked the necessary precision.

27. The sponsors of the five-State amendment (A/CONF.39/C.1/L.400) had made commendable efforts to fill that gap, and their text had the merit of excluding rules of customary international law from the principle of non-retroactivity. Nevertheless, the term " rules of customary international law " might be either too restricted or too broad, according to the interpretation given them, and the door would thus be left open to controversies and disputes; that fear, moreover, had been expressed by a number of delegations in connexion with the absence of any definition of general multilateral treaties and restricted multilateral treaties. It was of course extremely difficult to draw up a satisfactory definition of those terms and indeed the International Law Commission itself had abandoned the attempt.

28. His delegation had not yet had time to study the Spanish amendment (A/CONF.39/C.1/L.401) as thoroughly as it might have wished, but believed that the disadvantages of the restrictive nature of some of the terms used could not be remedied. The wisest course would probably be to refrain from setting out the principle of the non-retroactivity of the convention in the final clauses, since the principle was already referred to in article 24.

29. Miss LAURENS (Indonesia) said that her country had always supported the idea of opening multilateral treaties which could be qualified as " law-making treaties " to participation by the international community as a whole, without excluding any countries whatsoever. Her delegation could therefore support the relevant clauses in the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1). On the other hand, the formula proposed in the amendment by Ghana and India (A/CONF.39/C.1/L.394) seemed to provide for a simpler means of implementing the principle, the value of which had already been proved in the case of at least four other multilateral conventions. Moreover, since the Government of Austria had declared its willingness to assume the duties of depositary in any case, no obstacles were to be foreseen in that important respect.

30. With regard to the number of ratifications required for the entry into force of the convention, her delegation had an open mind and could accept the formula of one-third of the number of parties participating in the Conference, although it would be willing to consider any other reasonable solution, provided it did not result in unduly delaying the entry into force of the convention.

31. The Indonesian delegation had the same misgivings with regard to the proposed new article 76 as it had expressed with regard to article 62 *bis*.

32. With regard to the principle of non-retroactivity, Indonesia could not accept any provision along the lines set out in the Venezuelan proposal (A/CONF.39/C.1/L.399), which unduly restricted the applicability of existing rules and principles of international law. Nor did it consider the text of the five-State proposal (A/CONF.39/C.1/L.400) to be much better, at least in its present form, because it seemed restrictive in scope, if not in time, and related only to rules of customary international law, which was an unacceptable limitation. The only justifiable solution would be to declare non-retroactive only certain special provisions that might be agreed upon during the Conference, such as, for instance, the provision on the compulsory settlement of disputes. In any case, the provision could certainly not apply to any rule or principle of international law

that had existed and had been applied long before the Conference. The proper solution would be a combination of the Spanish amendment (A/CONF.39/C.1/L.401) and the seven-State proposal (A/CONF.39/C.1/L.403).[3]

33. Mr. HU (China) said that, with regard to the final clauses, his delegation supported the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), which was in keeping with the final clauses contained in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; it was also in conformity with General Assembly resolution 2166 (XXI) convening the Conference. Since that form of final clauses had not created any problem in the past, there was no reason to depart from it in the present instance.

34. He could not support the amendment by Ghana and India (A/CONF.39/C.1/L.394), which purported to make the convention open to signature by States which were parties to the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water or to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. Those two treaties dealt with matters which were completely alien to the law of treaties. Moreover, that amendment, if adopted, would have the effect of limiting the authority of the General Assembly.

35. His delegation also opposed the amendment by Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1) which was simply another version of the proposal to include an article 5 *bis*. His delegation had already spoken on the subject during the discussion on the latter proposal. It would therefore be sufficient to say at the present stage that there was no such thing as a right on the part of a State to participate in a multilateral treaty.

36. He viewed with sympathy the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250) because, since the days of the League of Nations, China had accepted the compulsory jurisdiction of the Permanent Court of International Justice, and was ready to vote for that proposal.

37. With regard to the proposals for a new article 77, on the subject of non-retroactivity, perhaps the ground might already be covered by article 24. However, if an article on the subject were eventually adopted, he would prefer the proposal by the five States (A/CONF.39/C.1/L.400) to that by Venezuela (A/CONF.39/C.1/L.399).

38. Mr. CARMONA (Venezuela) said that his proposed article 77 (A/CONF.39/C.1/L.399) had been intended to express a well-known concept; it had its origin in a remark made at the 66th meeting[4] by the United States representative " that the Convention should apply only to future treaties ". Clearly, it was appropriate to legislate for the future and not for the past. The same idea had been expressed by a number of speakers, including the representative of the Ukrainian SSR, at the present session.

39. The need to include a provision on the subject of non-retroactivity had been shown by the fact that, during the discussion, some speakers had stated that such a provision was indispensable while others had felt that the provisions of article 24 were sufficient to cover the point. In the circumstances, in order to dispel all doubts, it was desirable that a separate article should be included. He realized that the subject was a very complex one and he welcomed the efforts of other delegations to improve the drafting of his proposal.

40. With regard to the five-State amendment (A/CONF.39/C.1/L.400) with its reference to " the rules of customary international law codified in the present Convention ", he would be prepared to accept it provided that the term " customary international law " were interpreted as had been done by the International Court of Justice in the *North Sea Continental Shelf* cases in its judgement of 20 February 1969.[5] There was also the problem that, apart from custom, there existed other sources of international law.

41. His delegation had given careful consideration to all the various proposals which had been made and had entered into informal discussions with the sponsors of amendments. Those discussions had led to the formulation of a joint text for article 77 (A/CONF.39/C.1/L.403) which drew upon the new wording of subparagraph (*b*) of article 3. That new wording was perhaps cumbersome but it had the advantage of having been carefully weighed by the Drafting Committee and having been approved without comment by the Committee of the Whole. It would be seen that it qualified the statement that the convention applied only to treaties concluded after its entry into force by means of an opening proviso safeguarding the application of any rules set forth in the convention " to which treaties would be subject, in accordance with international law, independently of the Convention "; he hoped that that formula would meet the concern of the various delegations. He accordingly wished to withdraw his proposal (A/CONF.39/C.1/L.399) in favour of the new text (A/CONF.39/C.1/L.403) which he hoped would be generally acceptable.

42. He could assure the representative of Ecuador, a country with which Venezuela had always maintained excellent relations, that the proposal for a new article 77 was in no way intended to harm Ecuador's interests. The purpose of article 77 was simply to resolve difficulties, not to create obligations for the future; it would be open to any State not to accept or ratify the convention on the law of treaties, or to ratify it with reservations.

43. Mr. JACOVIDES (Cyprus) said he welcomed the withdrawal of the Venezuelan amendment (A/CONF.39/C.1/L.399), which he would have been obliged to oppose. The terms in which that proposal

[3] This proposal, submitted by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela, replaced the five-State proposal. See below, para. 60.

[4] Para. 60.

[5] See *I.C.J. Reports, 1969*, p. 3.

had been couched appeared to limit the application of the convention to future treaties, without any qualifications. In his delegation's view, most of the rules in the convention constituted *lex lata* in contemporary international law, whether derived from custom, from the general principles of law, or from any of the other sources mentioned in Article 38, paragraph 1, of the Statute of the International Court. More specifically, that remark was true of most of the articles contained in Part V regarding invalidity, termination and suspension of the operation of treaties.

44. It was his delegation's firm belief — and it was gratifying to note that the belief was widely shared by other delegations — that those rules had a firm foundation in general international law; the International Law Commission, and the Committee at the first session, had only formulated those rules in a comprehensive and logical manner within the structure of the convention under discussion. Even what might go beyond mere restatement or codification and constitute progressive development could well be said to have existed sufficiently long in customary or general international law for it to have validity. The question which rules expressed in the convention constituted codification and which reflected progressive development was, of course, one which could not be determined in detail at present. It was a question that would be thrashed out in practice and in international jurisprudence.

45. Since it was his delegation's opinion that most of the rules embodied in the convention constituted *lex lata*, it would not have opposed the five-State amendment (A/CONF.39/C.1/L.400) which, unlike the original Venezuelan proposal (A/CONF.39/C.1/L.399), stressed that the rule therein proposed was " without prejudice to the application of the rules of customary international law codified in the present Convention ". He welcomed the Swedish representative's statement, when introducing the five-State amendment, that it was also the view of the sponsors that most of the contents of the present convention were merely expressive of rules which existed under customary international law and that those rules obviously could be invoked as custom without any reference to the present convention.[6] He understood the Spanish amendment (A/CONF.39/C.1/L.401) to proceed from the same premises; it brought out, moreover, an additional element regarding customary rules as such, and therefore deserved support.

46. His delegation would give objective consideration to any other suggestions on the issue of non-retroactivity which might be put forward that were consistent with the position he had outlined.

47. Mr. HADJIEV (Bulgaria) said his delegation opposed the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250) because it would introduce compulsory adjudication, a principle which was rejected by Bulgaria.

48. There was no necessity to introduce a new article on the settlement of disputes relating to the interpretation and application of the convention. The majority of major international conventions concluded in recent years contained no provisions on the subject. That was the case, for example, with the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the two International Covenants on Human Rights, and the 1958 Geneva Convention on the High Seas. At the 1958 Geneva Conference, the Swiss delegation had proposed the inclusion of a provision of that type in all four conventions on the law of the sea, but its proposal had not been accepted. The fact that none of those conventions contained any clause on the interpretation and application of their provisions did not deprive the States parties to them of the possibility of settling their disputes on the subject: they had at their disposal, for that purpose, a variety of peaceful means, among others those set forth in Article 33 of the Charter.

49. His delegation had already set out in detail its arguments against the introduction of a compulsory adjudication clause in the convention. Those arguments were valid *a fortiori* against the Swiss proposal for a new article 76 (A/CONF.39/C.1/L.250), because of the wide scope of the provisions it embodied. Since the International Law Commission had not deemed it appropriate to make provisions for compulsory adjudication in article 62 with regard to Part V, there would be even less justification for making such provision for the settlement of disputes relating to the interpretation and application of the convention.

50. The Bulgarian delegation could accept the inclusion of a text on the settlement of disputes relating to the interpretation and application of a convention, beyond what was already contained in article 62, only if the procedure contemplated remained within the framework of Article 33 of the Charter.

51. Mr. ABED (Tunisia) said that the final clauses set out in the amendment by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1) reflected his delegation's position on the subject, since that amendment took into account the realities of the international situation and were in conformity with the final clauses of the two previous Vienna Conventions and the Conventions on the Law of the Sea. His delegation could not, however, support the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1) because Article A of that proposal seemed to go beyond the terms of reference of the Conference.

52. Tunisia had been a sponsor of the five-State proposal (A/CONF.39/C.1/L.400) — now superseded by the seven-State proposal (A/CONF.39/C.1/L.403) of which it was also a sponsor — for a new article 77 in the hope of clarifying the provisions of the convention and avoiding future disputes about the application of treaties. The new article reaffirmed the principle of non-retroactivity; it had long existed in customary law and was generally recognized, but it should be re-stated in any codification of universally accepted rules, in order to make them more stable and, as far as possible, applicable *erga omnes*.

[6] See 101st meeting, para. 43.

53. Mr. DE LA GUARDIA (Argentina) said he supported the final clauses proposed by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1); the " Vienna clause " was the one which at present had the support of international practice in conferences convened under United Nations auspices.

54. With regard to the question of the temporal application of the convention, his delegation was prepared to support the principle of non-retroactivity. It had been ready to support the five-State formula (A/CONF.39/C.1/L.400), with the Spanish amendment (A/CONF.39/C.1/L.401), but now that a new consolidated text was being introduced (A/CONF.39/C.1/L.403), his delegation would support that.

55. Mr. ROMERO LOZA (Bolivia) said that the question of non-retroactivity was so delicate that, if it were decided to include a specific provision on the question in the convention, its terms would need careful reflection so as to avoid drafting any unduly rigid rule which might create more problems than it would solve. Clear references to the principle of non-retroactivity were contained not only in the International Law Commission's commentaries but also in many of the articles which had already been approved by the Committee. In fact, the principle was implicit throughout the text of the convention and it was not really necessary to include an express provision merely for the purpose of stating it in terms.

56. The discussion had shown that both the Venezuelan proposal (A/CONF.39/C.1/L.399) and the five-State amendment (A/CONF.39/C.1/L.400) were inadequate. Both purported to exclude existing treaties from the application of the convention, or at best to leave them subject to the rules of customary law. Disputes originating in treaties, however, were subject not only to the principles and rules of customary law but also to those derived from other sources of international law. To adopt such dangerously restrictive proposals would thus be tantamount in many cases to setting the seal of approval on certain agreements which were the cause of continual controversies that required a solution in keeping with the principles of international law enshrined in the convention.

57. The Spanish amendment (A/CONF.39/C.1/L.401) attempted to remedy the defects of the restrictive texts contained in the Venezuelan and the five-State proposals. It introduced a general safeguarding proviso in respect of the principles and rules of international law. That proviso would, however, be more precise if it read: " Without prejudice to the application of the principles and rules of international law that are recognized and in force, the convention will apply... ". From that point of view, the Iranian amendment (A/CONF.39/C.1/L.402) was more satisfactory. The new combined text which had been announced (A/CONF.39/C.1/L.403) appeared to remedy most of the defects which had been pointed out and he would give it careful consideration.

58. His delegation saw no necessity to include the proposed article 77 but, if the Conference decided to retain it, its wording must be very carefully drafted so as to safeguard the principles of customary law and those derived from other sources of international law at present in force for the settlement of disputes, which in large measure the convention was attempting to codify.

59. Mr. BLIX (Sweden) pointed out that at the 101st meeting he had explained that the gist of the five-State proposal (A/CONF.39/C.1/L.400) was that the convention as such should apply only to treaties concluded by parties to the convention after it had entered into force for them, and that most of the substance of that instrument expressed existing international law, which would apply independently of the adoption of the convention.

60. A number of suggestions had been made to improve the five-State proposal. In particular, it had been argued that the term " customary international law " was too limited and that the term " codified " could give rise to difficulties. The Greek representative had suggested that a solution could be found by basing article 77 on article 3(*b*). The sponsors had accepted that suggestion, and a new proposal by Brazil, Chile, Iran, Kenya, Sweden, Tunisia and Venezuela (A/CONF.39/C.1/L.403) was now submitted to supersede the original five-State proposal. The new text no longer referred to the rules of customary international law codified in the convention but applied to all the rules of international law, in the widest sense, which existed independently of the convention. Although the wording of the new text might seem cumbersome, it had the merit of being more precise and, moreover, had been approved at the first session of the Conference after thorough discussion of article 3(*b*). The sponsors had not had time to discuss their new text with the Swiss representative, who had made a suggestion about the language of the previous proposal, but they hoped that he would be able to support the new text and that his suggestion would be referred to the Drafting Committee.

61. Mr. MATINE-DAFTARY (Iran) said he agreed with the statement just made by the representative of Sweden. Having become one of the sponsors of the new proposal introduced by the Swedish representative, his delegation now withdrew its own amendment (A/CONF.39/C.1/L.402).

62. Mr. DADZIE (Ghana) said he wished to answer some of the points raised in connexion with the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1).

63. It had been claimed that participation in the convention on the law of treaties should be governed by the Vienna formula, since that formula safeguarded the principle of universality. But that principle was defended even more strongly in the amendment by Ghana and India, which was a move towards fulfilment of a principle acceptable to all.

64. It had further been claimed that that amendment converted the Vienna formula into an " all States " formula, because it referred to two treaties which contained the latter formula. But was it not a fact

that the two treaties had been adopted, and that they both went beyond the Vienna formula?

65. Next, the charge had been made that the intention of the two sponsors was to imply recognition of certain entities not recognized by some as States. That charge he emphatically denied. The intention of the sponsors was simply to move a step further in the progressive development of the principle of universality; it was not to imply or deny recognition of any entity.

66. The representative of the Federal Republic of Germany had alleged more specifically that the intention of the amendment was to benefit the German Democratic Republic in particular. In fact, the intention of the sponsors was to benefit not any entity in particular but all which qualified under the proposed formula for participation in the convention. The German Democratic Republic was already a party to four multilateral treaties, and was expected to accede to a fifth, in none of which had it been intended that the participation of the German Democratic Republic should confer on it or deny to it a particular status. Since the parties which the amendment by Ghana and India sought to admit to the convention had already been admitted to four other treaties there was no reason to deny them the same opportunity in the present convention. It was true that not all the contested States which had been allowed to participate in the two treaties mentioned in the amendment had taken advantage of the right offered them. But neither had many of the States entitled to attend the present Conference. What was important was simply to open the door of participation to all States. Whether they took advantage of the opportunity was entirely for them to decide.

67. In view of the nature of the convention on the law of treaties, and in recognition of the recent advance in the search for a formula to widen the participation of the international community in multilateral treaties of universal scope, the delegations of Ghana and India had proposed that parties to two of the most significant universal treaties to date must also be permitted to become parties to the convention. It was inconceivable that any State which had supported the participation provisions referred to as the Moscow formula, or which had accepted that formula, could now justifiably oppose the adoption of the same formula in the convention on the law of treaties.

68. It had been argued that extension of participation in multilateral treaties to States not covered by the Vienna formula would create difficulties for the Secretary-General, who would have to decide whether or not a given entity was a State. But a way out of that difficulty had already been found by the great Powers, which had extended participation in such a way as to gain the approval of the United Nations. A case in point was the Outer Space Treaty, which contained the Moscow formula and had been drafted entirely by the United Nations. It could no longer be argued that only the United Nations, being the highest international body, could change the existing Vienna formula. It had already done so when it adopted the Outer Space Treaty and others in that series.

69. The duty of the Austrian authorities and the Secretary-General as initial and final depositaries, respectively, under the amendment by Ghana and India, was therefore simplified. The delegation of Ghana noted with satisfaction that Austria was prepared to undertake such duties as the Conference might entrust to it in accordance with any of the proposals before the Conference.

70. He hoped the Conference would adopt the "all States " formula provided for in the four-State proposal (A/CONF.39/C.1/L.389 and Corr.1), but if that proposal were not accepted, adoption of the amendment by Ghana and India was essential in order to uphold the principle of universality.

71. Mr. KRISHNA RAO (India) said he wished to clarify his delegation's position in regard to certain comments on the amendment by Ghana and India (A/CONF.39/C.1/L.394).

72. One representative had warned the Committee not to be misled by his reference, in introducing the amendment, to " the new Vienna formula ". But the wording of the joint amendment was based on the final clauses of the Nuclear Test Ban and Outer Space Treaties. At that time, India had been opposed to the Moscow formula, since it considered that the Secretary-General of the United Nations ought to be the sole depositary, but it had been assured that the formula represented progress towards universality, and had reluctantly accepted it. Now, six years later, India was being told by two of the three depositaries under the Moscow formula that its attempt to follow their example was politically motivated. That charge was quite unfounded; surely, any State or entity which was or became a party to the Nuclear Test Ban and Outer Space Treaties could become a party to the convention on the law of treaties.

73. Some delegations had suggested that reference should be made to the " all States " principle, but that no practical ways of implementing it should be included in the convention. The sole purpose of the joint amendment, however, was to translate the principle of universality into reality, and its sponsors would be glad if any delegation could suggest a more acceptable way of achieving that end.

74. The advocates of the Vienna formula asserted that that system had behind it the overwhelming support of practice and precedent. But when the Indian delegation had invoked practice and precedent in the debate on article 62 *bis,* it had been urged to be progressive and liberal, rather than reactionary. It had also been argued that the Vienna formula provided for the residuary power of the General Assembly to invite any State, but it was well known that in practice no such invitation had ever been issued or was likely to be issued in the foreseeable future.

75. It had been suggested that the General Assembly might be entrusted with the responsibility for deciding what entities might become parties to the convention under article A, paragraph 1 (*b*), of the joint amendment. That suggestion seemed curious in the light of the deliberate omission from the relevant clauses of

the Nuclear Test Ban and Outer Space Treaties of any reference to the United Nations, on the ground that any such involvement of the General Assembly would create practical problems. So now, when the sponsors of the amendment claimed that their proposal represented a practical step, they were told that it failed to achieve universality, but when they said that it was directed towards universality, they were told that it was impractical and politically motivated.

76. Sir Humphrey WALDOCK (Expert Consultant) said he wished to comment on two points which were connected, because they both concerned the function of the convention as an instrument for consolidating general rules of international law. The first was the question of the non-retroactivity of the convention, and the second was the question of the number of ratifications and accessions needed to bring the convention into force.

77. He had spoken of the convention as an instrument for consolidating rather than codifying the general rules of international law, because the word " codify " was sometimes used in a rather narrow sense. Most representatives were familiar with the background of the articles which had now, for the most part, been approved. It had been his experience as Special Rapporteur, and perhaps the experience of all his colleagues on the International Law Commission, that there were a great many uncertainties in the law of treaties. His very distinguished predecessor as Special Rapporteur, Sir Hersch Lauterpacht, had said that there was virtually nothing that was settled in the law of treaties. The position could be exaggerated and he had been very comforted to hear many representatives at the Conference speak of the convention as essentially a codifying instrument. That was the right view if the convention was regarded essentially as a consolidating instrument which took account of differences of opinion but found a common agreement as to the lines to be followed in the law of treaties. From that point of view the convention had, of course, a very great significance in international law, and it was from the same point of view that he approached those two problems.

78. The principle of non-retroactivity was only one aspect of the problem of the temporal application of international law. The International Law Commission had found it to be an exceedingly delicate and troublesome problem, not only in connexion with article 24 on that very point, but also with respect to the interpretation of treaties. The Commission had tried at one stage to consider the inter-temporal element in the application of international law when interpreting treaties. It had in the end concluded that the whole problem of the relation between treaties and customary law was one which called for a searching inquiry before the Commission could be on safe ground in formulating rules in connexion with interpretation.

79. It would be seen from the text of article 27, which the Committee had accepted, that there was merely a reference, for the purpose of the interpretation of treaties, to " any relevant rules of international law "; no attempt was made to solve the problem of the temporal element. The Commission had left that element to be determined according to each case in accordance with the principle of good faith. That being the general position in the Commission on the temporal element, the Commission had provided, in article 24, after some difficult discussions, the basis of the rule on non-retroactivity which the Committee of the Whole had approved.

80. Some speakers in the debate had thought that the article would suffice to cover the question of non-retroactivity in connexion with the convention on the law of treaties. That was probably the correct view. The provision was a general one setting out the general principle of non-retroactivity, and it was flexible in that it did not foreclose the question of the temporal element in the development of international law. It might therefore serve the purpose. He had been very glad to hear the representative of Switzerland emphasize the inter-temporal element in international law, because that element was his particular preoccupation. Conventions such as the one under consideration had their consolidating force, and even matters which might or might not have been international law at the time of the codifying convention thereby gained authority. Rules which it might not be possible, on the basis of a very strict view of codification, to consider as international law at the time of the convention might be so considered at a later date. He was very anxious, in connexion with the proposals before the Conference on the question of non-retroactivity, that nothing should be done to damage the very important impact which all great conventions had as instruments for consolidating and settling general international law.

81. His own reaction to the various proposals that had been made were that a solution could be found on the basis of the latest proposal, by seven States (A/CONF.39/C.1/L.403), which amalgamated some others. That proposal left open the question of the temporal element sufficiently for it to be a satisfactory basis for the solution of the problem. He recognized that many representatives had a certain preoccupation as to the need for a non-retroactivity provision in the convention. That need had not been felt either in the case of the Conventions on the Law of the Sea or in that of the two previous Vienna Conventions. A convention on the law of treaties was perhaps a rather peculiar instrument and it might be that the justification existed in that particular case.

82. The other point, which had not been so thoroughly debated, was the number of ratifications or accessions required to bring the convention into force. Care was needed if that were not to risk losing some of the value of the work done at the Conference. It had been suggested that, because of the growth of the international community, ratification by forty-five, fifty or even sixty States should perhaps be required before a codifying convention came into force. The statistical argument was not impressive. It seemed to him that the more a convention contained codifying elements, the less there was to the argument that a large number of ratifications

was needed to bring it into force. If, *ex hypothesi,* it dealt largely with a law which was acceptable as general law, then the argument for a large number of ratifications did not seem to be particularly strong. The record would show, for example, that some eighty-seven representatives had been present at the Geneva Conference on the Law of the Sea at which it had been decided that twenty-two ratifications would be required to bring into force the four conventions adopted. In fact, they had all come into force, the Convention on the High Seas having received forty-two ratifications, the Convention on Fishing and Conservation of the Living Resources of the High Seas twenty-six ratifications, the Convention on the Continental Shelf thirty-nine ratifications and the Convention on the Territorial Sea and the Contiguous Zone thirty-five ratifications. Again, the Vienna Convention on Diplomatic Relations had received eighty ratifications, while thirty-three States had ratified the Convention on Consular Relations. But had the much higher figures suggested in the case of the present convention been applied to those conventions, only the Convention on Diplomatic Relations would be in force today. That was a serious matter, because there might be particular difficulty in getting early ratifications of the present convention. It was a difficult, long and technical convention, with many provisions of a highly intellectual quality. They were not the sort of provisions which it was easy for governments to pilot through parliaments. There might be a certain slowness in the procedure of ratification. It was common experience that, when a convention came into force, that tended to produce an acceleration in the process of ratification by additional States. It would also be agreed that, however important the mere act of adoption of a text such as the present convention, its effect as a general codifying convention would be enormously increased the moment it came into force.

83. His own feeling was that the figure of thirty-five suggested by Ghana and India would serve the purpose of recognizing the implications of an enlarged community and yet would not unduly delay the bringing into force of the convention nor endanger some of the benefits of the great work done on the convention at the present Conference.

The meeting rose at 5.55 p.m.

ONE HUNDRED AND FOURTH MEETING

Friday, 25 April 1969, at 11.20 a.m.

Chairman : Mr. ELIAS (Nigeria)

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

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

1. Mr. KHLESTOV (Union of Soviet Socialist Republics), supported by Mr. SECARIN (Romania), requested that the Committee, in voting on the proposals before it with regard to the final clauses, vote first on the proposal submitted by the delegations of Hungary, Poland, Romania and the USSR (A/CONF.39/C.1/L.389 and Corr.1); that proposal aimed at securing acceptance for the principle of universality, and the convention on the law of treaties, as a multilateral treaty forming the very basis of all treaties, should by definition be open to all States.

2. Mr. GON (Central African Republic) said that, bearing in mind the arguments his delegation had advanced at the first session with regard to the jurisdiction of the International Court of Justice, and particularly the awkward problems which the new article 76 would raise by unduly prolonging the procedure for the settlement of the majority of treaty disputes, he would vote against the proposed new article 76 (A/CONF.39/C.1/L.250).

3. On the question of participation in the convention on the law of treaties, he said that his delegation endorsed the principle of universality, although it considered that it was the General Assembly of the United Nations that should deal with any problems which might arise in that respect. It could only support the proposals in favour of the adoption of the Vienna formula, which represented the best way of ensuring respect for the principle of universality.

4. With regard to the minimum number of ratifications needed to bring the convention into force, the Central African Republic would vote against the figure of sixty proposed by Switzerland in document A/CONF.39/C.1/L.396, since it considered that number excessive.

5. On the other hand, his delegation would vote for a provision that the convention should be non-retroactive, in other words for the seven-State proposal for a new article 77 (A/CONF.39/C.1/L.403), the wording of which seemed to cover all the points.

6. Mr. PINTO (Ceylon) said he would vote in favour of the seven-State proposal for a new article 77 (A/CONF.39/C.1/L.403), which laid down the principle of the non-retroactivity of the convention on the law of treaties, because he thought the convention should contain a provision to that effect. The words " treaties which are concluded by States " were however ambiguous; it would be better to take the date on which a treaty was " adopted " or the date on which its text was settled as the point of reference.

7. With regard to participation in the convention on the law of treaties, although his delegation had consistently advocated the principle of universality, as was shown by the fact that it was co-sponsoring a proposal for an article 5 *bis* providing for the adoption of the " all States " formula (A/CONF.39/C.1/L.388 and Add. 1), it would have to abstain from voting on the amendment by Ghana and India (A/CONF.39/C.1/L.394) to the proposal submitted by Brazil and the United Kingdom (A/CONF.39/C.1/L.386/Rev.1), for various reasons.

8. The first was that the amendment by Ghana and India resorted to an undesirable legal technique : a State wishing to become a party to the convention on the law of treaties would first have to accede to two other treaties