United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/C.1/SR.93

93rd meeting of the Committee of the Whole

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, Second Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

so many obligations and responsibilities that they should not be burdened with additional legal or semi-legal functions. And the creation of new bodies within the United Nations should be avoided, since there was a general feeling against the proliferation of those organs.

53. The Turkish delegation could see no reason why the international community should not benefit by the experience acquired by the International Court of Justice over many years, and also from the Court's moral authority, which was recognized almost universally. The Turkish delegation noted with satisfaction that it was not alone in holding that opinion of the Court, and felt that special attention should be drawn to the statements by the Japanese representative at the 68th meeting of the Committee, during the first session, and to the similar views expressed by the Swiss representative and others during the current meeting.

54. The Turkish delegation reserved the right to comment in detail later on the various proposals relating to the machinery for the settlement of disputes, in the light of the views he had just expressed.

The meeting rose at 5 p.m.

NINETY-THIRD MEETING

Friday, 18 April 1969, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

Tribute to the memory of Mr. Emilio Arenales Catalán

1. The CHAIRMAN said he had received an official communication from the Chairman of the delegation of Guatemala informing him of the sudden death of the President of the twenty-third session of the United Nations General Assembly, Mr. Emilio Arenales Catalán, who had likewise been the Guatemalan Foreign Minister. He felt sure that all the members of the Committee of the Whole would have learned with deep distress of the death of so eminent a figure, whose fine qualities were known to all.

On the proposal of the Chairman, the Committee observed a minute's silence in tribute to the memory of Mr. Emilio Arenales Catalán.

2. Mr. MOLINA ORANTES (Guatemala) thanked the Chairman warmly for the condolences he had expressed on behalf of the Committee. On that day of mourning, such an expression of sympathy was particularly comforting for Guatemala.

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)*

Proposed new articles 62 bis, *62* ter, *62* quater *and 76*
(resumed from the previous meeting)

3. The CHAIRMAN invited the Commitee to resume consideration of the proposed new articles 62 *bis*, 62 *ter*, 62 *quater* and 76.

4. Mr. PINTO (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.395), said that his country had consistently been in favour of setting up a mechanism for the settlement of disputes arising out of the application of Part V of the draft articles. At the first session of the Conference, his delegation had stated that any mechanism for the compulsory settlement of disputes should be qualified by a provision leaving States completely free to exclude the application of the mechanism to any particular treaty by agreement between them.

5. The amendment submitted by his delegation was designed to make it clear that the compulsory mechanism was not *jus cogens* and to legitimize any action by the parties differing from that provided for in article 62 *bis*. The procedure for compulsory settlement must be flexible, and his delegation's amendment did not prejudge the form in whith article 62 *bis* would finally be adopted.

6. The nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), and the Japanese amendment (A/CONF.39/C.1/L.339) had much to commend them and they deserved serious consideration by the Committee.

7. His delegation sympathized with the motives which had led the delegation of Thailand to put forward its amendment (A/CONF.39/C.1/L.387), but it felt that the insertion of a clause authorizing reservations to article 62 *bis* would have the effect of destroying the object and purpose of having a compulsory settlement mechanism. In addition, the amendment raised a question on which the Conference had yet to take a decision, namely whether reservations to the convention would be permitted. In that connexion, his delegation would favour any suggestion designed to produce a reservations clause which would enable a State, when negotiating a particular treaty, to declare its unwillingness to apply the compulsory settlement mechanism to that treaty, rather than a clause which would allow a State to exclude all treaties concluded by it from the operation of the compulsory settlement mechanism by a single reservation.

8. It would also be desirable to state clearly that the compulsory mechanism would apply only to treaties entering into force after the entry into force of the convention on the law of treaties. In his delegation's view, the same principle should apply to all the provisions of the convention. There was of course nothing to prevent States from applying the provisions of the convention retrospectively by agreement between them.

9. In the great majority of cases, States not in a position to fulfil their treaty obligations would negotiate a settlement. If that was not possible, recourse to third-party settlement to end a dispute should not cause any misgivings. His Government would welcome the establishment of a just and efficient system for settling disputes which might have a salutary effect on the durability of treaty relationships.

10. Mr. MARESCA (Italy) said that article 62 *bis* was absolutely vital to the economy of the convention on

the law of treaties. Without it the convention would be incomplete. The article was based on the principle of the sovereign equality of States, the parties always being equal before the judge.

11. Arbitration procedure had been resorted to even in ancient times, and rules on arbitration had been drawn up at the beginning of the present century, on the initiative of Russia. Recourse should not be had to arbitration procedure the moment a dispute arose; the conciliation procedure should always come first. The Spanish amendment (A/CONF.39/C.1/L.391) had the virtue of being self-contained, and the Japanese amendment (A/CONF.39/C.1/L.339) was interesting in that it made reference to the International Court of Justice, whose importance must certainly not be underestimated.

12. The Swiss amendment (A/CONF.39/C.1/L.377) had the merit of clarity and brevity, and it brought out the necessity for recourse to arbitration.

13. The nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) was the outcome of lengthy negotiations and appeared to be more detailed than the amendment on the same topic submitted at the first session (A/CONF.39/C.1/L.352/Rev.2). It therefore deserved careful study. The Committee of the Whole might set up committees to study each of those amendments.

14. Mr. ALVAREZ TABIO (Cuba) said that the International Law Commission had been right to say in paragraph (4) of its commentary to article 62 that that article represented " the highest measure of common ground that could be found ". Any attempt to impose upon States an obligatory procedure for settling disputes about the validity of a treaty or the right of a party to terminate it would serve no purpose. If it proved impossible to settle an international dispute by the means provided for in article 62, it was because the attitude adopted by the States concerned was such that even compulsory adjudication would have been of no assistance. In fact, the application of a rigid procedure, especially in the case of a dispute between a large State and a small one, would only be prejudicial to the interests of the weaker State. While the principle of sovereign equality was no more than a fine phrase in the United Nations Charter, it was impossible to allay the justifiable fears of a large number of States, especially those which had been the actual victims of the operation of unequal and unjust treaties. These fears would perhaps disappear one day as a result of the introduction of a more equitable international law, based on practices differing from those imposed hitherto by a small group of powers whose relations with weaker States were based on unconditional submission. Many nations had suffered in order to achieve independence and only a few of them had been able to obtain the cancellation of treaties imposed upon them by the use of threats and coercion. International relations had not yet reached the point where such States could agree to submit themselves without misgivings to compulsory adjudication or arbitration.

15. In the case of what were termed " unilateral " treaties, of treaties void *ab initio* under the rules approved by the Committee, there was no point in discussing a preliminary procedure. But, in the case of treaties in force which it was possible to terminate by a procedure that was equitable, brief and effectual, the only acceptable solution was that proposed in article 62, which had been approved at the first session. It had been objected that that article did not provide for the compulsory settlement of disputes; but experience had shown that States tended to settle their differences without recourse to compulsory adjudication, whose awards in most cases were not objective, fair or effectual.

16. Moreover, where the dispute was between a powerful State and a weak State, what guarantee could there be that the powerful State would agree to submit to the decision of an impartial body and that it would comply with an award that was unfavourable to its interests?

17. The question of the settlement of disputes had been considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had reached the conclusion that international disputes should be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means, which should be appropriate to the circumstances and nature of the dispute.[1]

18. Freedom to choose the most appropriate means of settling a dispute, which was referred to in Article 33 of the United Nations Charter, presupposed complete respect for the sovereignty of States. The introduction of compulsory judicial settlement would go beyond the limits laid down by the Charter.

19. In certain matters, international law was no more than the adaptation of foreign policy to the needs of the moment. In an atmosphere where power prevailed over justice, it could not reasonably be expected that the decisions of a body consisting of third parties would be fair and effective.

20. A compulsory procedure could not be imposed upon the international community as long as many areas of international law that were of fundamental importance were dominated by traditional and unjust ideas which met the requirements of a very small number of powers.

21. Cuba, which had been the victim of aggression in a variety of forms, refused to accept any arrangements which would have the result of imposing methods of solving questions whose scope and nature were indeterminate.

22. Although his delegation acknowledged the efforts made by a number of delegations, particularly the Spanish delegation, it rejected any solution to the problem that would have the result of introducing a compulsory settlement procedure and it would therefore vote against article 62 *bis*.

23. Mr. SHUKRI (Syria) said that, in his delegation's view, adequate measures should be taken against the

[1] See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 248 and 272.

possibility that nullity, termination or suspension of the operation of a treaty might be arbitrarily asserted as a pretext for getting rid of inconvenient obligations. His delegation fully endorsed the *pacta sunt servanda* principle and for that reason had voted for article 62 at the first session. Article 62 was not merely the highest measure of common ground that could be found; it also provided an adequate safeguard against abuse of right by a party to a treaty, since it provided that, if objection had been raised to a notification, the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter, that was to say by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful legal means such as recourse to the International Court of Justice.

24. In other words, those who had drafted article 62 had considered that in dealing with the problem they should take as a basis the general obligation of States to settle their international disputes by peaceful means in such a way that international peace and security and justice would not be endangered.

25. Some representatives had maintained that a convention which did not provide for a compulsory settlement procedure would be inapplicable. But the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic Relations and on Consular Relations did not provide for compulsory adjudication; yet that fact had not undermined their significance as steps towards the codification of positive international law.

26. Any attempt to associate the existence of legal norms with compulsory settlement in international relations was not only unnecessary but dangerous. It could not be said that States had no obligations under the Charter merely because recourse to the International Court of Justice was optional.

27. A number of jurists took the view that the main factor that led to compliance with international law was the moral factor. Perhaps too much reliance should not be placed on such a subjective factor, but it was necessary to be realistic in the search for a workable formula. And a workable formula could not be one that compelled States to submit their disputes to judicial settlement, especially when those States had some misgivings about the value and usefulness of such a procedure.

28. Of the 127 Member States of the United Nations, only about forty had accepted the optional clause of the International Court of Justice. If States were really willing to submit their disputes to judicial settlement, all they would need to do would be to declare that they accepted the compulsory jurisdiction of the Court. The fact that the majority of States had been reluctant to do so proved that they found that course of action unattractive.

29. Syria was one of the many States which had not accepted the compulsory jurisdiction of the International Court of Justice, not because of a lack of faith in justice, but simply because his country disputed many of the existing rules of traditional international law which were supposed to govern the Court's decisions. Those rules should be subjected to progressive development, so that they would meet the requirements of the age — the age of self-determination of peoples; Syria would then be able to accept the jurisdiction of the Court. No one could deny that there was a difference in outlook between the newly-independent States and other States with regard to the rules of international law. When the question of universality had come up at previous meetings, some representatives had expressed doubts about the validity of some of the fundamental concepts of international law as far as the newly independent States were concerned. Reference might also be made to the slowness of the Court's machinery and to its somewhat conservative attitude in many cases, the most recent of which were the *South West Africa* cases.

30. Consequently, before envisaging compulsory adjudication, the Committee should reach agreement on the legal rules to be applied and on the procedure to be used. The amendments before the Committee were based on the idea that States must be forced to submit disputes to compulsory adjudication, but they made no reference to the question of how the award was to be enforced. What happened if a State refused to comply with the award of a tribunal or of the International Court of Justice? The amendments did not propose any better solution than that envisaged in article 62.

31. A further point was that the amendments seemed to assign a new role to arbitration. Arbitration was different from judicial settlement because it allowed the parties not only to nominate the arbitrators and define the scope of the dispute to be settled, but also to establish the terms of reference of the arbitral tribunal. No such provision was made in the amendments, and that would inevitably lead to a great deal of further controversy.

32. Again, the amendments would burden the United Nations with further expenditure and everyone was aware of the financial difficulties at present being experienced by the Organization; moreover, small States could not afford the expense of such complicated machinery.

33. The Syrian delegation would therefore vote against all the amendments. It would, however, agree that the general idea underlying the amendments should be included in an optional protocol similar to that annexed to the other Vienna Conventions.

34. Mr. WALDRON (Ireland) said the Committee was on the point of deciding a basic question concerning disputes relating not merely to the interpretation and application of treaties but also concerning their validity.

35. Some delegations believed that the provisions of the article 62 adopted at the first session were adequate. Ireland, which did not occupy a very powerful position in the international hierarchy, did not believe that its interests established in treaties were sufficiently protected by article 62. At the national level, in a lawless society, the powerful prevailed because they did not need the protection of the law. At the international level, too, the strong might, if necessary make their own law. The Irish delegation was therefore surprised to

hear the representatives of many small States say in effect that they did not need the protection of the law, and that they were satisfied with the freedom given them by article 62. But that freedom was wholly false.

36. Article 62 had been described as both realistic and flexible, but that was true only if realistic meant that there should be no definite provision for settling disputes and if flexible meant that States should be permitted to terminate their international obligations unilaterally.

37. Much had already been said, and more no doubt would be heard, on the subject of unequal or leonine treaties. There was no greater potential inequality than when there was nothing in a treaty which enabled a State to enforce its rights. In such a situation the weaker would always be the loser. Small States were really entering into leonine agreements when treaties did not provide any just means of ensuring that their rights were not unilaterally terminated.

38. The Irish delegation had great respect for the motives which had prompted the amendments by Japan (A/CONF.39/C.1/L.339) and by Switzerland (A/CONF.39/C.1/L.347), and unless unforeseen circumstances arose, it would vote for them. It was a sad commentary both on the Court itself and on the international community that it should not be taken for granted that the International Court of Justice should be designated as the tribunal to which international disputes of the character in question should normally be referred. But it had to be recognized that the Court had not yet been able to generate the necessary confidence in its adequacy or ability to settle many international disputes. Similarly, it must be recognized that States were not yet prepared to submit the control of their interests to the Court's jurisdiction.

39. However, the Conference should direct its attention especially to the nineteen-State proposal rather than to the Spanish proposal. The Irish delegation did not agree with the nineteen-State proposal in every detail, but it nevertheless congratulated the sponsors on their care and zeal in producing it. His delegation wished to draw attention to certain points which should recommend that document to the Conference. Firstly, the conciliation procedures would be exhaustive and the parties to a dispute would have every opportunity to settle it in that way, which was favoured by so many States; secondly, the parties themselves would establish, on a basis of equality, the conciliation commission and the arbitral tribunal, so that they could no longer contend, as they did at present, that the way in which the International Court of Justice was composed was a ground for refusing to submit to its jurisdiction; thirdly, the tribunal would be applying the law which was at present being codified by the Conference, and not a law which was alleged still to serve colonialist interests; fourthly, the Irish delegation noted the role which the Secretary-General would be playing in the conciliation and arbitration procedures laid down in the nineteen-State proposal.

40. That being so, all States, and in particular small States, should accept that document, which was reasonable and fair, served the interests of all, and appeared to be the proposal best calculated to bring the necessary security and stability to treaty relations.

41. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that at the first session the Conference had discussed at length the question of what machinery should be resorted to if a treaty was not applied. Those efforts had not been vain, since the Conference had already adopted article 62, which provided sufficient safeguards to ensure that the principle of the stability of treaties would not be arbitrarily violated. It should not be forgotten that article 62 had been drafted by the International Law Commission after thorough study, and that it represented a compromise between differing points of view. No one could doubt the competence of the International Law Commission, whose arguments carried conviction. In paragraph (4) of its commentary to article 62, the International Law Commission had rightly said that the article represented " the highest measure of common ground that could be found among Governments as well as in the Commission on this question ".[2]

42. The International Law Commission had considered that article 62 contained procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty might be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation. The delegation of the Byelorussian SSR agreed with that view. The United Nations Charter provided that United Nations organs could not impose upon States the methods to be used in settling their disputes. It was therefore impossible to accept the compulsory jurisdiction formula proposed by the sponsors of article 62 *bis*.

43. So far as concerned the provisions of Chapter VI of the United Nations Charter, even the Security Council could only make recommendations; it could not take binding decisions. At the San Francisco Conference in 1945 the United States and the United Kingdom, on behalf of the inviting Powers, had given an assurance that the recommendations of the Security Council concerning the settlement of disputes possessed no obligatory effect for the parties to the dispute.[3] Similar assurances were to be found in the United States delegation's comments on the United Nations Charter after the end of the San Francisco Conference.

44. If the United Nations Charter was taken as the basis, the inevitable conclusion was that only agreed methods of procedure were of any real use. For example, the Security Council could only reach decisions when there was unanimity among the permanent members. The Conference was bound to bear in mind the Charter and United Nations practice.

45. That practice showed that whenever there was an attempt to make a procedure for the pacific settlement of a dispute compulsory, the procedure in question became inapplicable or lost all practical value.

---

[2] *Yearbook of the International Law Commission, 1966*, vol. II, p. 262.

[3] United Nations Conference on International Organization, III/2/31.

46. Furthermore, a compulsory jurisdiction machinery would be a violation of the sovereign rights of States.

47. It was because article 62 *bis* was incompatible with the sovereignty of all States and with the provisions of the United Nations Charter itself that the Byelorussian Soviet Socialist Republic would vote against the inclusion of that article in the convention.

48. Mr. WARIOBA (United Republic of Tanzania) said that on the question of the settlement of disputes arising out of the application of the provisions of Part V of the draft articles, no one was really opposed to the principle of third-party settlement. The essence of the problem was whether or not such settlement should be automatic. After serious thought, the United Republic of Tanzania was still opposed to any compulsory machinery of settlement.

49. Article 62 as adopted at the first session provided all the necessary safeguards with regard to the application of the provisions of Part V of the draft convention; in the event of an objection being raised by " any other party ", the parties to the dispute should seek a solution through the means indicated in Article 33 of the United Nations Charter. The United Republic of Tanzania was convinced that the parties to a dispute would always make a sincere attempt to settle it through one or other of those means, as recent conflicts in Africa showed.

50. In particular, article 62 prevented States from taking unilateral action by requiring them to notify the other parties of their claims. There was always the possibility, of course, that a State might refuse to accept a particular means of settlement, but once good faith was lacking, no rule for compulsory adjudication was likely to have much more effect than article 62 itself.

51. The manifest reluctance to accept any rule of compulsory adjudication was undoubtedly due to the inadequacy of the existing machinery. The International Court of Justice, as the principal judicial organ of the United Nations, had major defects, particularly its composition and the slowness of its procedure. The various proposals before the Committee sought to remedy that situation, and he was particularly concerned with the nineteen-State amendment. (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2.)

52. The sponsors of that amendment proposed the creation of bodies whose composition would satisfy the parties to the dispute. He did not think that in the event the remedy lay in setting up new organs whose functions would in fact be those of the International Court of Justice, because, in his view, it would be preferable to seek some means whereby the Court's standing could be restored. The sponsors of the nineteen-State amendment and the other proposals of the same kind were aiming to do away with recourse to the International Court of Justice and were thus undermining the Court's prestige, even though they did not admit it.

53. Further, the attempt to satisfy the parties with respect to the composition of the judicial organ called upon to settle their disputes would inevitably entail a very lengthy procedure. Despite the efforts of the sponsors of the amendment in question to deal with that point, their formula would mean that at least forty-five months would elapse between the date on which notification was given under article 62 and the date on which arbitration would actually begin. In theory, of course, disputes might be settled at the conciliation stage; but if a party refused from the start to accept the means of settlement provided in Article 33 of the Charter, it was most unlikely that it would accept the findings of a conciliatory body. In his opinion, that kind of procedure would simply be a source of unnecessary expense to the parties and the United Nations.

54. In any case, as his delegation had stated at the previous session, the annex appended to the new article 62 *bis* proposed by the nineteen States was scarcely appropriate in a draft convention which laid down general provisions on treaty law.

55. Some delegations urged that disputes arising out of the application of specific articles, notably articles 50 and 61, should of necessity be subject to adjudication. He did not consider that to be essential, even in the case of new provisions likely, as some feared, to give rise to unilateral claims. The International Law Commission's intention in drafting such articles was certainly not to cause chaos in international relations but to put an end to unjust practices.

56. It was also argued that no two States should be permitted to settle independently a dispute relating to such an important provision as *jus cogens,* although he was not convinced that adjudication constituted a form of international legislation. Different tribunals, for example, might pronounce differently on similar questions, which would simply lead to confusion. Moreover, a tribunal's decision would bind only the parties to the dispute and consequently would not have the desired effect. Furthermore, if a party notified a claim under article 50, and the other party or parties raised no objection, so that the claimant was able to enforce its claim, would that mean that the whole world accepted the claim as establishing a rule of *jus cogens*? Or would it mean that claims made under certain articles should be subject to adjudication, whether they had given rise to objections or not? A compulsory adjudication procedure did not seem to be the ideal solution in that respect.

57. Because of those difficulties, his delegation did not believe that the proposals to include a new article 62 *bis* could have the slightest positive effect. If States could not solve their disputes by means of article 62, it was their duty " to appreciate the situation and to act as good faith demands ", as the International Law Commission stated in paragraph (5) of its commentary. If the situation endangered international peace and security, then the provisions of Chapter VI of the Charter should be applied.

58. The United Republic of Tanzania was, however, prepared to give careful consideration to the amendments submitted by Ceylon (A/CONF.39/C.1/L.395) and Thailand (A/CONF.39/C.1/L.387) or to any new proposal which improved on the nineteen-State amendment.

59. Mr. RAZAFINDRALAMBO (Madagascar) said that in view of the importance of the provisions of Part V of the draft articles, the delegations participating in the Conference all subscribed to the Commission's statement, in its commentary to article 62, that the article was a key article for the application of Part V of the convention, because it laid down certain essential procedural safeguards against arbitrary claims that a treaty was invalid.

60. The debate at the first session and the discussion now in progress showed that a substantial majority would favour a procedure which strengthened the safeguards already existing in the initial provisions of the draft articles.

61. His own delegation, which was one of the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), thought that only a procedure providing for two separate stages, conciliation and arbitration, would provide an effective safeguard against arbitrary action and instability in treaty relations between States.

62. The procedure for the settlement of disputes proposed in that amendment was entirely in keeping with the spirit and letter of the United Nations Charter, which recommended the parties to endeavour, with the assistance of other countries in the same part of the world, to settle their disputes themselves. His delegation was therefore opposed to any procedure which would cause disputes between two States on the application of Part V of the convention to be subject to the compulsory jurisdiction of the International Court of Justice. Consequently, it could not accept the Japanese amendment (A/CONF.39/C.1/L.339) or the Swiss amendment (A/CONF.39/C.1/L.377), both of which expressly provided for compulsory or optional reference to the Court.

63. However, to the extent that those amendments provided for an arbitration procedure, they were in line with the nineteen-State amendment, and the common ground between the proposals might later induce the delegations of Japan and Switzerland to come together with the sponsors of that amendment. The delegation of Madagascar would be prepared to consider the possibility of adjusting the system it had proposed for the settlement of disputes, though it would not be prepared to give way on the essential principle of conciliation and arbitration.

64. It was precisely because the amendment submitted by Thailand (A/CONF.39/C.1/L.387) struck at the very foundations of the settlement machinery proposed by the group of nineteen States that the latter could not subscribe to it. The provision envisaged by Thailand would rob article 62 *bis* of its meaning and scope, since the mere will of a State which had refused to agree that article 62 *bis* should apply to it would prevent it from applying to the other parties.

65. The Spanish amendment (A/CONF.39/C.1/L.391) would introduce a more effective method of settlement than the existing one; it was based on the same principles as the nineteen-State amendment, but the machinery it proposed was unduly clumsy and complex. However, the Spanish delegation should easily be able to find common ground with the sponsors of the nineteen-State amendment.

66. The second proposal by Switzerland (A/CONF.39/C.1/L.393. Corr.1) and the amendment by Ceylon (A/CONF.39/C.1/L.395) added nothing to the nineteen-State amendment, since they stated a rule already embodied in the revised version of the introduction to that proposal.

67. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said that in his delegation's view, the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, as laid down in article 62 in the International Law Commission's draft, was fully in keeping with the principles of international law and the provisions of the Charter. In contemporary international law, States had a moral and legal obligation to settle all international disputes by peaceful means. Those means were set forth in Article 33 of the Charter, although the list was not exhaustive. There were in fact other means, and States were entitled to select those they regarded as most appropriate. In other words, the principle of peaceful settlement of disputes was not governed by a single, compulsory procedure. The principle of choice of means was the one adopted by the United Nations, and it was in line with the basic principles of modern international law, which were founded on the sovereignty of States and on non-interference in the internal affairs of States. For that reason, the Ukrainian delegation was obliged to make serious reservations in respect of article 62 *bis* and the proposed amendments.

68. According to article 62 *bis*, the only available means of settling international disputes would appear to be recourse to an international arbitral body or to the International Court of Justice. But there were other means available, and States could choose the one they preferred. The attitude of the sponsors of article 62 *bis* was unrealistic and had little practical justification. The compulsory nature of the proposed recourse could not make a rule effective when it ran counter to the basic interests of States at the present time. The important thing was not to set up a compulsory international system in the form of a tribunal, but to lay down norms in the convention which were in keeping with the requirements of international life today. Those norms, which were universally known, would make it perfectly possible for States to dispense with an international arbitration procedure. The disputes existing at the present time could not be settled by arbitration of any kind. The Ukrainian Soviet Socialist Republic pursued a peaceful policy and had always been an advocate of any measures making for the development of international relations; and it considered that no judicial system could constitute a means of giving effectiveness to the application of international law in general and of international treaties in particular. Experience had shown that the International Court of Justice and various arbitral bodies had failed to achieve satisfactory results in that direction. If a clause relating to arbitration were inserted into the convention, a great many States would refuse to sign it. It would therefore be desirable to think

twice before adopting such a clause. The principle of collaboration and mutual understanding among States, advocated by Lenin, was a source of international law. Law developed in the direction of international co-operation, and no arbitration could replace the will of States to co-operate. For that reason his delegation supported article 62 as drafted by the Commission.

69. Mr. CARMONA (Venezuela) said that his country, at all times a champion of law and justice, had always advocated ways and means making for the peaceful settlement of international disputes, which it regarded as a sacred and inviolable principle. The law should protect the weak and the poor, but unfortunately that was not always the case. Venezuela had therefore always given the closest attention to every specific case that arose, with a view to ensuring the strictest observance of justice, and over its 150 years of independence it had frequently had recourse to arbitration. Generally speaking, in the treaties concluded by it during the twentieth century, Venezuela had undertaken to implement the decisions of the International Court for the settlement of international disputes. But it must be pointed out that instead of favouring compulsory arbitration and judicial decisions, the world today was tending to adopt a somewhat retrogressive attitude.

70. After the First World War, all civilized countries had given their backing to the Permanent Court of International Justice, which had had more backing at that time than at any other. Following the Second World War, things had changed. The Venezuelan Foreign Minister, who had been present in 1945 at the San Francisco Conference, and had been chairman of the body set up to draft the Statute of the Court, had been convinced of the need for a judicial solution in all circumstances. He had returned to Venezuela after the Conference in a somewhat disappointed frame of mind, feeling that the cause of peace had been lost rather than won; for although they had favoured compulsory jurisdiction as a basic rule, the States had finally decided in favour of the optional clause in Article 36 of the Statute of the Court. Today, of the 129 countries which were parties to the Statute of the Court, forty-four had adopted the optional clause in Article 36, in other words only one-third. Quite recently, a number of important countries had reserved the right to signify to the Registrar of the Court their withdrawal of acceptance of the optional clause at any moment they chose. It was therefore to be feared that the importance of the Court was being steadily weakened and that it now represented for people generally nothing more than a body out of touch with the needs of the times.

71. With regard to compulsory arbitration, the International Law Commission had endeavoured for many years to draft a convention on arbitral procedure acceptable to the majority of the State Members of the United Nations. But a large number of countries had opposed the 1952 draft providing for compulsory arbitration.[4] In 1958, the General Assembly had examined the 1953 draft [5] and had put it to the vote. Thirty-one countries had voted in favour of compulsory arbitration, 28 in favour of optional arbitration, and 13 had abstained. In 1958, during the Conference on the Law of the Sea, the problem of adopting compulsory arbitration had again been examined. Opinions had been divided on the subject. Thirty-three countries had voted in favour of that mode of settlement, 29 had voted against, and 18 had abstained.[6] It had finally been decided to adopt the optional protocol procedure; but whereas some 40 countries had ratified the Conventions, by December 1968 only 9 had ratified the Protocol. In 1961, an optional protocol had been annexed to the Convention on Diplomatic Relations.[7] There again, of the 92 States which had ratified the Convention, only 31, or less than a third, had signed the optional protocol. In 1963 there had been a vote on the same question in connexion with the Convention on Consular Relations. Thirty-one countries had voted in favour of compulsory arbitration, 28 against, and 13 had abstained.[8] As yet, only 11 States had ratified the protocol. All those instances made it clear that States were not ready to agree to the inflexible system of compulsory arbitration.

72. Consequently, the Venezuelan delegation was of the opinion that it would be dangerous to cross the will of the considerable number of States opposed to the rigid formula proposed in article 62 *bis*, which would most probably be rejected if a vote were taken. His delegation was nevertheless interested in the attempts made by some countries to find a formula providing for the establishment of a special arbitration commission within the United Nations.

73. His delegation would prefer that the proposal made by the Commission in article 62 should be kept, since it was likely to be acceptable to all States. Disputes could then be settled in accordance with Article 33 of the Charter. Article 33 undoubtedly lacked precision, but in present circumstances, it was the nearest approach to the ideal which the members of the Committee must have in mind.

74. Mrs. ADAMSEN (Denmark) reminded the Committee that at the first session of the Conference her delegation had joined with other States in proposing a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.2) providing for a combined conciliation and arbitration procedure for the settlement of disputes arising out of the provisions of Part V of the draft convention on the law of treaties. That was in keeping with Denmark's policy, which had at all times been to encourage the peaceful and equitable settlement of inter-State disputes by recourse to the decision of an impartial third party.

---

[4] For the text of the " Draft on Arbitral Procedure ", see *Yearbook of the International Law Commission*, 1952, vol. II, pp. 60-67.

[5] A new text had been prepared in 1953. See *Yearbooks of the International Law Commission, 1953*, vol. II, pp. 208-212, and *1958*, vol. II, pp. 83-86.

[6] See *United Nations Conference on the Law of the Sea, Official Records*, vol. III, p. 33.

[7] United Nations, *Treaty Series*, vol. 500, p. 242.

[8] See *United Nations Conference on Consular Relations, Official Records*, vol. I, First Committee, 31st meeting, para. 24.

75. The International Law Commission had no doubt drawn up article 62 of the draft convention concerning the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty with the utmost care, and it had taken account of the observations of Governments and of its own members. But the article was inadequate, as was clear from paragraph (5) of the commentary to it. For if after resorting to the means provided in Article 33 of the Charter the parties reached an impasse, each Government would have to appreciate the situation and act as good faith demanded. Article 62, as adopted by the Committee at the first session, would open up the way to abuse of the various articles of the draft convention relating to the invalidity, termination, suspension, and so forth, of treaties and would jeopardize the security and stability of treaty relations between States.

76. In co-sponsoring the amendment submitted at the first session, Denmark had been convinced that the ideas underlying the proposal would provide a satisfactory solution to the problem of the settlement of disputes resulting from the provisions of Part V of the draft convention; it had hoped that that proposal could be further improved and that the great majority of States would accept it.

77. Consultations had taken place which had led nineteen States to put forward the new amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), as explained by the Netherlands representative.

78. The Danish delegation had given careful thought to every possible solution to the problem of the settlement of disputes, and it approved amendments such as those of Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.347). It preferred them to the Spanish amendment (A/CONF.39/C.1/L.391), which seemed rather complicated and unduly difficult to apply. It could not support proposals such as that of Uruguay (A/CONF.39/C.1/L.343), since the procedures mentioned in that amendment did not seem likely to lead to the attainment of the aims intended; nor did it approve the amendment by Thailand (A/CONF.39/C.1/L.387), since its adoption would tend to put States in a position where they would not always be able to have recourse to an impartial third State to settle their disputes. But her delegation would give careful study to the amendment submitted by Ceylon (A/CONF.39/C.1/L.395).

79. The procedure for the settlement of disputes laid down in the nineteen-State proposal, involving a conciliation phase followed in the event of failure by an arbitration phase, must be regarded as a whole. That was of capital importance if the stability of treaty relations between States was to be safeguarded by means of a final settlement of all treaty disputes through an impartial organ.

80. It had been said that the earlier codification conventions did not provide for automatic, or indeed compulsory, settlement of disputes. That was most unfortunate, and the temptation must be avoided of accepting such conventions as precedents in that respect. As the President of the Conference had pointed out at the 6th plenary meeting, at the opening of the second session, a draft convention on the law of treaties was something entirely apart. It was therefore essential that a convention of that kind should be drafted in such a way that it was likely to be accepted by the majority of States. But at the first session it had been made clear that certain articles of Part V of the draft would make it difficult, if not impossible, for a large number of States to sign or ratify the convention, unless some method of settling disputes through an impartial organ were provided for.

81. The Danish delegation considered that the nineteen-State proposal of which it was a sponsor (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) solved the problem of the settlement of disputes in a manner which should be acceptable to all the members of the Conference. If that proposal were adopted, it would be possible to secure the broadly-based accession to the convention on the law of treaties which was essential to the security of future treaty relations between States.

The meeting rose at 1 p.m.

NINETY-FOURTH MEETING

Friday, 18 April 1969, at 3.15 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)*

Proposed new articles 62 bis, *62* ter, *62* quater *and 76* (continued)

1. Mr. AUGE (Gabon) said that Part V of the draft convention contained provisions that would permit a party to the convention to evade without difficulty any treaty obligation which had become burdensome to it and at the same time to refuse, by virtue of article 62, to reach an amicable settlement of its dispute with the other State. Article 33 of the Charter, to which article 62 of the draft referred, made no provision for an automatic procedure that could be set in motion against a State which refused, within a reasonable time, to reach a peaceful settlement.

2. Such provisions of the draft as article 46 on fraud, article 47 on corruption and article 50 on *jus cogens* could all give rise to difficulties of interpretation; at the same time, they were liable to introduce an element of insecurity in international relations unless provision were also made for machinery to enable a State affected by the suspension of a treaty to oblige the claimant State to prove its case before an impartial body. It was for those reasons that his delegation had joined in sponsoring what had now become the nineteen-State proposal for article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and