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94th 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)*

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

Corr.1 and Add.1 and 2). The proposal by Thailand for a new article 62 *ter* (A/CONF.39/C.1/L.387) would deprive any small State which concluded a treaty with a State making the reservation provided for in that proposal of all safeguards and his delegation would therefore vote against it. It would also oppose the Spanish amendment (A/CONF.39/C.1/L.391), which would be harmful to newly independent States like Gabon in that, for many years to come, they would not be in a position to appoint " persons of recognized eminence " for the purposes of article 1, paragraph 2, of the annex to the amendment.

3. Mr. WYZNER (Poland) said that his delegation had not been convinced by the arguments adduced in favour of compulsory jurisdiction with regard to the disputes dealt with in article 62.

4. The future convention on the law of treaties would not cover just one branch of inter-State relations; by laying down the general pattern of the law of treaties, it would have a direct bearing on practically every field of relations between States. The inclusion of a compulsory jurisdiction clause would therefore impose on the parties much heavier obligations than a similar clause in any other treaty. Furthermore, in view of the variety of questions that would be regulated by that convention, it was impossible to foresee what types of dispute would arise in the future and thus what procedure would be best suited for settling them. The principle of good faith required that the parties to a dispute should seek an early and just solution to it and the natural course was to leave to the parties directly concerned the choice of the means to settle any disputes that might arise on such questions as invalidity, termination, withdrawal or suspension.

5. The attitude of States towards international tribunals had not been encouraging; only forty-three States had accepted the optional clause in Article 36 (2) of the Statute of the International Court of Justice, and many of those had limited the legal effects of their acceptance by reservations which virtually deprived the clause of any practical value. The concept of compulsory jurisdiction had not been accepted in previous codification conventions, such as the four Geneva Conventions of 1958 on the Law of the Sea and the two Vienna Conventions of 1961 and 1963. The attitude of States towards compulsory jurisdiction resulted from the diversity of their political, social, economic and cultural structures and legal traditions, which made it doubtful that it would be possible to establish a judicial body enjoying the equal confidence of all of them. It was therefore unrealistic to try to include a compulsory jurisdiction clause in the present draft.

6. The amendments to establish new organs or a new system for the settlement of disputes were of doubtful value because they did not go to the heart of the matter. The means of settlement already available to States were sufficient to settle any kind of dispute, provided the States made use of them in good faith. The situation would not be changed by the creation of new organs; it would merely impose fresh burdens on the United Nations.

7. Indeed, it was hard to understand why the expenses of the proposed bodies should be borne by the United Nations and not by the parties to the dispute. Such a system could encourage States to enter into a dispute without any sound reason, and further aggravate the proliferation of United Nations bodies.

8. The well-balanced text of article 62 established adequate safeguards against the arbitrary termination or suspension of treaties and ensured the observance of the all-important *pacta sunt servanda* rule by imposing appropriate limits on the action of a State wishing to denounce a treaty. The key provisions of paragraph 3, which laid down that the parties to a dispute should seek a solution through the means indicated in Article 33 of the Charter, were broad enough to cover all means of settlement. At the same time, they left to the parties the choice of the most suitable procedure in the particular circumstances. Those provisions were not only compatible with international law, but they also took account of the existence of different social, economic, political and legal systems that prevented States from evaluating problems in the same way.

9. The establishment of so-called " objective bodies " to decide on the vital interests of a State was premature. At the present stage of international relations, the only solution was to leave the choice of means of settlement to the States concerned. On that point, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had arrived at the conclusion that States must seek an " early and just settlement " of their disputes by one of the means indicated in Article 33 of the Charter " or other peaceful means of their choice ".[1]

10. Some of the opponents of the formula embodied in article 62 painted an unduly pessimistic picture of the consequences of its provisions when they asserted that States would immediately free themselves of their treaty obligations by fabricating arguments based on allegations of error, corruption, change of circumstances or *jus cogens*. These fears were not justified. The future convention on the law of treaties, as an instrument of codification, would simply restate the existing law, changing established rules of customary law into more precise norms of treaty law. Article 62 was based on the contemporary practice of States; except for some of its procedural formulas, it simply restated what was the key rule of international law: that States must seek to resolve their disputes by peaceful means.

11. For those reasons his delegation would vote against the proposals for a new article 62 *bis*.

12. Mr. BINDSCHEDLER (Switzerland) said that he wished to make some comments of a legal character on some of the amendments which had been submitted.

13. He could not support the amendment by Thailand (A/CONF.39/C.1/L.387) for a new article 62 *ter*, because it would completely nullify the effects of

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

article 62 *bis*; it would take away with one hand what was given by the other.

14. He supported the amendment by Japan (A/CONF.39/C.1/L.339) to paragraph 3 of article 62 because it stressed the role of the International Court of Justice and took account of the fact that the Court was a principal organ of the United Nations: it was the principal judicial organ, especially designated to settle international disputes.

15. He could not accept the Spanish amendment (A/CONF.39/C.1/L.391), which had two main defects. The first was that, under article 1 of its annex, the proposed " United Nations Commission for Treaties " would consist of representatives of Member States of the United Nations. There was no reason to limit in that manner the composition of that commission, which should be open to all the parties to the future convention on the law of treaties and not merely to those which were also Members of the United Nations. The fact that the commission was designated in that amendment as " a permanent subsidiary organ of the General Assembly " was immaterial. Many non-member States of the United Nations were members of subsidiary organs of the General Assembly, such as UNICEF and UNCTAD, and Switzerland had recently had the honour of presiding over the Trade and Development Board. Its second defect would be more difficult to remedy. Article 5 of the annex to the amendment drew a distinction between " legal " disputes and other disputes. But all the disputes that could arise from the application of the provisions of Part V would undoubtedly be legal disputes. Problems such as an allegation of fraud, or the invoking of a rule of *jus cogens,* were essentially legal in character. Perhaps the intention was to draw a distinction between non-political and political disputes, even if the latter also had a legal character. Experience, however, showed that such a distinction was extremely difficult to make and inevitably involved subjective factors; it was therefore wiser not to attempt to make it at all.

16. His delegation had given careful consideration to the nineteen-State proposal for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) but found it unduly complicated by comparison with the Swiss proposal (A/CONF.39/C.1/L.377). He saw little value in the establishment of a permanent list of conciliators, as suggested in paragraph 1 of annex I to the nineteen-State proposal, since under paragraph 2 (*a*) of the same annex it was open to the States parties to the dispute to choose a conciliator " from outside that list ". A further weakness of the proposed system was the provision for the appointment of two conciliators by every party to the dispute, one of them not of the nationality of the States concerned. Experience showed that any conciliator or arbitrator appointed by one of the parties to a dispute almost invariably espoused the cause of that party; nationality had little or no influence. He had knowledge of hundreds of cases of conciliation and arbitration and only knew of two in which a conciliator or an arbitrator had voted against the country appointing him. In such circumstances, it would inevitably be the fifth member of the proposed conciliation commission who would decide on the dispute. A situation of that kind was acceptable only if the umpire thus chosen enjoyed a very high standing and prestige. Examples could be given of disputes that had been settled to the satisfaction of all the parties by a single umpire; but an impartial award was much more likely to be obtained from three neutral conciliators than from a single umpire.

17. On the amendment by Ceylon (A/CONF.39/C.1/L.395), his delegation wished to reserve its position. At first sight, the provisions contained in the proposed article 62 *ter* seemed superfluous; the States parties to a treaty could always include in it whatever provisions they wished on the subject of the settlement of disputes and could agree on modes of settlement other than those set forth in article 62 *bis*, or they could even agree that there would be no procedure for the settlement of disputes.

18. As to the arguments put forward against the principle of the compulsory settlement of disputes, he was not impressed by the objection that the future convention on the law of treaties should not contain a clause on the compulsory settlement of disputes because no such clause was to be found in earlier codification conventions. But none of the existing codification conventions contained provisions such as those included in the present Part V. Many of those provisions embodied new rules which had never yet been applied and the consequences of which were very difficult to foresee. There was therefore ample justification for departing from the precedent of the other codification conventions and for including in the present draft a provision on the compulsory settlement of disputes.

19. Some delegations had directed their criticisms against the International Court of Justice, so he must point out that the Swiss amendment (A/CONF.39/C.1/L.377) did not provide for the compulsory jurisdiction of the International Court; it offered a free choice between recourse to the International Court of Justice and arbitration. A State which, for any reason, did not wish to submit a dispute to the International Court could avail itself of the more flexible system of international arbitration.

20. Other delegations had referred to the problem of possible failure to implement a decision of the International Court or of an arbitral tribunal. It had been suggested that, because of that possibility, provisions for compulsory adjudication or arbitration made little difference to a dispute. In fact, there was a marked difference between the situation before and after adjudication. Before the Court or tribunal had given its decision, the parties were still at the negotiating stage and could in good faith maintain conflicting points of view. After the judgement by the Court or the award by the tribunal, it was infinitely more difficult for one of the parties not to carry out an objective decision by the adjudicating body. In his long experience of such proceedings, he only knew of one single case of a State failing to carry out an international judgement or award.

21. The representative of Venezuela had described the unsatisfactory situation existing at present in respect

of international adjudication and arbitration. He had been much impressed by that representative's remarks, but could only reply that every effort should be made to take a step forward and to make some progress in the search for a sure means of settling international disputes.

22. Mr. AL-SABAH (Kuwait) said that the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) proposed to establish a permanent list of conciliators and to formulate rules for the establishment of conciliation commissions and arbitral tribunals. He would therefore like to ask the sponsors whether it was proposed to ignore the " Panel for Inquiry and Conciliation " which had already been established by the General Assembly under its resolution 268 D (III) — a panel which was to be available at all times to the organs of the United Nations and to all States, whether or not members of the United Nations. Procedure for compulsory conciliation could already be set in motion by making use of chapter I of the Revised General Act for the Pacific Settlement of International Disputes,[2] the efficacy of which had been restored by the General Assembly under its resolution 268 A (III).

23. The Spanish amendment (A/CONF.39/C.1/L.391) envisaged its proposed " United Nations Commission for Treaties " as a permanent subsidiary organ of the General Assembly. Was it intended to empower such an organ, by virtue of Article 96 (2) of the Charter, to request advisory opinions of the International Court of Justice on legal questions?

24. Mr. KOULICHEV (Bulgaria) said his Government was anxious to establish a satisfactory procedure for the settlement of disputes, in particular those relating to Part V of the convention. There should be sufficient procedural guarantees to ensure that the invalidity, termination or suspension of the operation of treaties was not arbitrarily invoked by States in order to escape from inconvenient treaty obligations. But such procedures must be consistent with the existing practice of States in the peaceful settlement of disputes. The text proposed by the International Law Commission in article 62, paragraph 3, of its draft provided a satisfactory solution, since it remained within the framework of Article 33 of the United Nations Charter. In Article 62 the Commission had achieved a delicate but just balance, and any attempt to upset it would threaten the success of the Conference.

25. His delegation was opposed to all the amendments for the inclusion of a new article 62 *bis*. All introduced various forms of compulsory jurisdiction as a final stage of the procedure for the settlement of disputes relating to Part V, a solution that was not acceptable to his delegation. Its opposition to that solution was not inspired by total rejection of the principle of compulsory arbitration, based on a notion of the absolute sovereignty of States that would rule out any such procedure, but by a realistic view of the role of compulsory jurisdiction in modern international relations and by the inherent characteristics of the convention on the law of treaties.

26. Although many States had paid lip service to the idea of compulsory jurisdiction in the post-war period, it had received much less support in practice, and the compulsory jurisdiction of the International Court of Justice, which the San Francisco Conference had refused to include in the United Nations Charter, was today accepted by less than a third of the Members of the United Nations, in many cases with substantial reservations. Compulsory jurisdiction was not included in any of the major codification conventions of recent years, covering the law of the sea, diplomatic and consular relations, and human rights, and its inclusion in the draft on arbitral procedure was one of the main reasons why that draft had been abandoned. Whatever the reasons for it, the reluctance of most States to submit to compulsory arbitration was a fact of life that must be recognized. Consequently many States which had supported the principle on other occasions had taken the more realistic view in relation to article 62, as evidenced by the debate on that article in the International Law Commission.

27. Inclusion of a clause on compulsory jurisdiction in the convention on the law of treaties would have the effect of extending the principle to all treaties of whatever character. Bulgaria was a signatory of a number of treaties that provided for compulsory arbitration because compulsory arbitration was appropriate in those cases, but many treaties touched on the vital interests of States, and had political aspects that made them entirely unsuitable for the application of such a procedure.

28. Consequently Bulgaria would oppose any amendment that introduced compulsory jurisdiction, and could not sign the convention if it included such a provision. Nor could it accept the amendments by Thailand (A/CONF.39/C.1/L.387) and Ceylon (A/CONF.39/C.1/L.395) because, although they provided an escape from compulsory jurisdiction, they recognized the principle, which Bulgaria regarded as an exception to the normal practice in the settlement of disputes.

29. He hoped that a formula might be found that would be acceptable to the great majority of States. His delegation was prepared to support any such formula, particularly if it were in the form of an optional protocol to the convention, a device adopted in many codification instruments of recent years.

30. Mr. ALVAREZ (Uruguay) said that his delegation maintained its oft-expressed view that the convention on the law of treaties should provide for the compulsory settlement of disputes by peaceful means, preferably through the compulsory jurisdiction of the International Court of Justice or, if that should prove impossible, through compulsory arbitration at the request of one of the parties.

31. His delegation had made it clear at the 68th meeting[3] that its amendment (A/CONF.39/C.1/L.343) to article 62 of the International Law Commission's draft was not intended to compete with any more

[2] United Nations, *Treaty Series*, vol. 71, p. 101.

[3] Para. 15.

ambitious proposals for a compulsory system of judicial settlement, and that it would come up for consideration only if it were found useful as a means to bring about an agreement between the opposing points of view.

32. Uruguay's attitude was derived from its legal traditions, which were founded on its ideas of international law and on a realistic view of international affairs. As far back as 1921 his country had accepted the compulsory jurisdiction of the Permanent Court of International Justice, and the declaration it had made at that time was still in force under Article 36 of the Statute of the International Court of Justice.

33. With regard to compulsory arbitration, Uruguay had made its position clear at the Hague Peace Conference of 1907 and had signed a number of international arbitration agreements with other States.

34. His country's realistic appreciation of the international situation was based on its view that the strength and safety of small countries could best be safeguarded by the application of the norms of international law and the setting up of machinery for the compulsory settlement of international disputes to which they could turn if all other means of settlement failed. Only thus would respect for the principle of the sovereign equality of States be ensured.

35. The Uruguayan delegation hoped that a proposal which reflected its position would commend itself to the great majority of the States represented at the Conference.

36. Mr. SHU (China) said his delegation attached great importance to the proposed new article 62 *bis*. In paragraph (1) of its commentary to article 62, the International Law Commission had said that it considered it essential that the draft should contain 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. But it had not included adequate safeguards against that possibility, or guarantees for the observation of the principle *pacta sunt servanda*. If the parties were unable to reach agreement through the means listed in Article 33 of the Charter, it would be dangerous to leave it to each party to take whatever steps it thought fit, and therefore some automatic procedure should be provided for such cases. His delegation favoured the idea of referring disputes arising from the application of Part V, especially from articles 50 and 61, to the International Court of Justice, as had been proposed by Japan (A/CONF.39/C.1/L.339). But if it were felt that the time was not yet ripe for all States to accept the compulsory jurisdiction of the Court, his delegation would support a two-stage procedure of conciliation and arbitration such as that proposed in the nineteen-State amendment. Perhaps it would be possible for them to combine the various amendments into a single text that would prove acceptable to the Committee.

37. Mr. ABED (Tunisia) said that his delegation was a co-sponsor of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev. 3 and Corr.1 and Add.1 and 2) which provided a rational solution to the problem of the settlement of disputes between States, while safeguarding the interests of all. It had the merit of filling the gaps in article 62 and of being more explicit than Article 33 of the United Nations Charter, which merely described the courses of action open to the parties to a dispute.

38. With regard to the amendment submitted by Spain (A/CONF.39/C.1/L.391), contrary to what was stated in article 5 of the annex, disputes on such a matter could not be other than legal, since they would relate to the invalidity of a treaty or the suspension of its application. And surely the suggestion that the proposed commission should have power to decide as to the nature of a dispute would put an end to any chance of settling it. The amendment by Ceylon (A/CONF.39/C.1/L.395) dealt with a more general principle and the proper place for it would be among the final clauses of the convention.

39. Some delegations objected to a procedure for the compulsory settlement of disputes, arguing that it conflicted with the principle of the sovereign equality of States and was prejudicial to the interests of the smaller States. Neither argument could stand up to criticism. First, the principle of the sovereign equality of States was not absolute or unlimited; a State was free to limit its own sovereignty under the traditional rule *pacta sunt servanda* and, moreover, a State's sovereignty was limited by that of other States. Secondly, the interests of the smaller States were protected under the procedure proposed in the nineteen-State amendment by the provision that each party would appoint one of its own nationals to the body to be set up to settle disputes.

40. Mr. BAYONA ORTIZ (Colombia) said that his delegation agreed with the view that a gap had been left in the Commission's draft of article 62, and that it was for the Conference to fill that gap. Criticisms had been levelled at Article 33 of the United Nations Charter on the ground that it was nothing more than an invitation to States to make use of the means it enumerated. It was with these considerations in mind that, already at the first session, Colombia had joined in sponsoring an amendment to article 62 in the form of proposals for a new article 62 *bis*, which established procedures for conciliation and compulsory arbitration. He regarded the amendment as a notable contribution to the progressive development of international law.

41. He could not agree that international opinion was not yet ready to accept the principle of compulsory jurisdiction in the settlement of disputes. That view was sufficiently refuted by the number of States from all parts of the world that were supporting the introduction of the principle into the convention. There was no doubt that it was in the best interests of small States that the means of peaceful settlement of disputes should be improved. The rule of law was the only defence against the rule of force. The sponsors of the other amendments relating to article 62 held similar views, and he hoped in particular that it might be possible for the nineteen-State amendment and the Swiss amendment to be combined.

42. The keystone of international relations was good faith; why, then, should anyone be afraid of compulsory jurisdiction? The time had come to sink petty differences and establish a system that would ensure the peace of mind of all because it would be applicable to all. With good will from the great Powers, and the valuable assistance of the small Powers, old and new, the Conference could adopt a procedure for the settlement of disputes, long desired by many Governments, that could be regarded as a revolution in international law.

43. Mr. BLIX (Sweden) said that a number of States, including Sweden, had accepted various controversial rules set out in Part V of the draft convention on the express presumption that procedures for the settlement of disputes relating to those rules would be automatically available. The provisions in question were specifically article 49, under which a treaty was void if its conclusion had been procured by the threat or use of force; articles 50 and 61, under which a treaty was void if it conflicted with a peremptory norm of international law; and article 59, concerning the right to withdraw from or terminate a treaty because of a fundamental change of circumstances. The Swedish Government considered that those articles would represent important progress if they were combined with automatic means of settling disputes concerning their application in specific cases.

44. Article 62 provided only that in such cases the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter, but made no provision for cases when the parties to the dispute were unable to agree on the means of settlement, so that the unsatisfactory procedure of claim and counterclaim might be the only result. The Conference should remedy that situation, since otherwise the effect of the rules in Part V, which many delegations regarded as particularly progressive, might be not to advance the rule of law, but to undermine it. It would also be most regrettable if the convention should become less generally acceptable because no adequate solution had been found to the problems raised by the articles in Part V.

45. The nineteen-State proposal for a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), was designed to provide such a solution. Some delegations would probably not consider it far-reaching enough and, in particular, would regret that the application of norms of *jus cogens* was not entrusted to a permanent judicial organ, such as the International Court of Justice. The Swedish delegation shared that point of view and had much sympathy with the proposals by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) but had nevertheless co-sponsored the nineteen-State proposal, because it considered that that proposal was more likely to be acceptable to other States which were not as yet prepared to rely on permanent judicial institutions for the application of Part V.

46. The Swiss representative had said that he found the nineteen-State proposal heavy and complicated, but the method of falling back on older institutions for conciliation and arbitration had certain disadvantages, one of which was the fact that many States had not taken part in the establishment of those institutions. A procedure involving a stage of conciliation before arbitration was of necessity somewhat heavy, but the three-stage procedure proposed in the nineteen-State amendment had definite advantages.

47. Those were, first, that the new article 62 *bis*, with its annex, left article 62 intact, including the full freedom of the parties to choose whatever method they wished to settle differences concerning the invalidity, termination or suspension of a treaty. The new article would be subsidiary to any procedure which the parties might be obliged to use under other instruments; that was the meaning of article 62, paragraph 4, which, with minor adjustments, would govern article 62 *bis*. Indeed, the parties were free to provide in a new treaty that the procedure in article 62 *bis* should not be applicable to that instrument; the Ceylonese delegation had submitted an amendment (A/CONF.39/C.1/L.395) which made that point explicit.

48. Secondly, the three-stage procedure — freedom to choose the means of settlement, conciliation, arbitration — would discourage misuse of the articles in Part V and obstruction of their application as well as provide the parties with an inducement to agree spontaneously on a method of settlement, since an obstructionist attitude to agreement was not rewarded. Moreover, it was likely that the existence of an arbitration procedure as a last resort would make the parties more inclined to make a success of the conciliation process. Some delegations had expressed scepticism about introducing the stage of conciliation and had held that the matter should be examined rigidly from the point of view of *lex lata*. For many of the disputes that might arise under Part V, however, an initial attempt at conciliation seemed the most appropriate method. That did not mean that the conciliation stage would be purely political, since Part V and the procedures in article 62 *bis* would not begin to apply unless one party invoked a provision in Part V and another party rejected the contention. There was then a legal dispute, which had to be examined by the conciliation commission, which would consist of lawyers capable of taking all the juridical aspects into account. But since their task was conciliation, they would not be limited to the legal aspects, and would be free to suggest any solutions which they thought could be accepted by the parties. The list of lawyers to be established would be a matter of great importance, since three of the five conciliators, including the chairman, were to be chosen from it. It would, of course, be quite different from the United Nations list of international lawyers who might be called upon to render assistance in the sphere of international law.

49. The Swiss representative had expressed misgivings over the composition of the conciliation commission, and considered that the appointment of two members by each of the parties would result in placing the neutral chairman in too authoritative a position, and that three neutral members would be preferable. But the position of the chairman in cases of conciliation was not nearly

as authoritative as it was in cases of arbitration; the chairman did not deliver judgement, but merely acted as the central member of a group which must co-operate to have any chance of success. In any case, those technicalities could be examined by the Drafting Committee if the nineteen-State proposal were approved.

50. Thirdly, his delegation believed that the availability of an arbitration stage was particularly important because of the very novelty of some of the provisions of Part V. Although it was true that the norms of *jus cogens*, and some aspects of the prohibition of the use of force, could not be defined in advance and must be allowed to develop in practice, it would be destructive if such development were to be left to take place by claim and counterclaim. The small States would then be placed at a disadvantage, for the principle of the equality of States was never better implemented than before an arbitration commission. Through arbitration, a body of practice might be created which would make for greater certainty as to what norms constituted *jus cogens* and as to what force vitiated consent.

51. Fourthly, some of the objections to the conciliation and arbitration procedures had been based on the ground that they were expensive. Of course, parties to arbitral and judicial procedures should keep a sense of proportion, but the cost of most arbitration procedures was certainly far less than that of a modern fighter plane. It had also been alleged that the arbitration procedure would take a great deal of time. That was true, but the time taken by arbitration often compared favourably with the time taken by the procedure of claim and counter-claim, which could drag on for decades and poison relations between two States.

52. Fifthly, the Swedish delegation considered that the procedures proposed in the nineteen-State amendment should apply only to treaties concluded after the entry into force of the convention on the law of treaties. Although that might be self-evident, it would be desirable to include an express clause against retroactivity in the final clauses or in the preamble. Of course, none of the rules of customary international law stated in the convention would be affected by such a clause, since they were applicable from the time at which they had come into being. Such a clause might make the conciliation and arbitration procedures and Part V as a whole more easily and generally acceptable.

53. The proposed article 62 *ter* submitted by Thailand (A/CONF.39/C.1/L.387) was completely unacceptable to his delegation, for its effect would be to transform article 62 *bis* into an optional protocol. If the progressive substantive articles of Part V were accepted, the progressive procedural provisions of article 62 *bis* must be accepted also. On the other hand, to reverse the Thai amendement and allow reservations to the substantive articles of Part V while prohibiting them to article 62 *bis* would also be unfair. The only equitable solution would be to prohibit reservations to Part V as a whole, provided article 62 *bis* was included in it. Perhaps the question should be dealt with at a later stage, in connexion with the thorny problem of reservations.

54. The Spanish amendment (A/CONF.39/C.1/L.391) contained some interesting features, but others were unacceptable. It did not seem possible in practice to have a large United Nations body operating as a conciliation commission, although that body might, of course, set up a special smaller commission. He had doubts, however, about the proposed method of electing the chairman of such a commission, by a majority vote in the larger body; it would be better to leave that to the Secretary-General. He had some sympathy for the idea that the commission might decide whether, if conciliation failed, the matter should be submitted for arbitration. The criterion laid down in the Spanish proposal was that the matter should be so submitted if the dispute was legal; but that criterion was hardly workable, for all disputes concerning the application of articles in Part V must surely be legal.

55. Mr. HARASZTI (Hungary) said that the commentary to the International Law Commission's text of article 62 showed that the Commission had reflected at length upon the procedure to be followed in settling disputes concerning the application of the provisions of Part V of the draft convention and had ultimately decided that the parties should resort to the means set out in Article 33 of the United Nations Charter. In voting for the approval of article 62 at the first session of the Conference, the Hungarian delegation had been aware that the text would not provide for the sastisfactory settlement of all possible disputes, but had supported it in the belief that it corresponded to the stage now reached in international law and was in conformity with contemporary practice; it therefore took realities into account.

56. The sponsors of proposals for a new article 62 *bis*, however, were not content with the International Law Commission's formula, but wished to introduce various procedures for conciliation, arbitration and compulsory judicial settlement. The Hungarian delegation could not support any of those proposals, for it believed that any attempt to introduce compulsory arbitration or jurisdiction would only mean that the convention would be unacceptable to a large majority of States.

57. In support of that argument, he said that it was noteworthy that the provisions on compulsory arbitration of the General Act of Geneva on the Pacific Settlement of International Disputes of 26 September 1928 [4] had remained a dead letter and that there had been very few accessions to the optional clause in Article 36 of the Statute of the International Court of Justice. Moreover, a number of accessions to the Statute had been so weakened by reservations that they no longer possessed even the appearance of binding obligations. Those examples showed that States were not prepared to accept compulsory arbitration or judicial settlement for all disputes which might arise between them and other States. The United Nations codification conferences of 1958, 1961 and 1963 had been wise not to insert provisions for compulsory judicial settlement or arbitration in the conventions they had drawn up. The

[4] League of Nations, *Treaty Series*, vol. XCIII, p. 343.

conventions resulting from the 1961 and 1963 conferences had been accompanied by optional protocols on the settlement of disputes; the number of States parties to those conventions would have been much smaller if those provisions had been incorporated in the conventions themselves.

58. Furthermore, the scope of the proposed article 62 *bis* was exceptionally wide, in that it covered all treaties and thus introduced arbitration and compulsory judicial settlement even in the case of political disputes. A dispute between a State which invoked article 59 and another State which rejected that contention would be essentially political, and it would be difficult, even impossible, for the International Court of Justice or an arbitral tribunal to rule on the applicability of the article. That objection applied equally to other provisions in Part V of the draft.

59. Mr. GONZALEZ GALVEZ (Mexico) said that his delegation did not consider that the question of choosing the best method of settling disputes arising from the application of Part V of the draft should be resolved by a vote, unless every possibility of arriving at a compromise between the two extreme views had first been examined. In his delegation's opinion, the best and most suitable solution would be one that which would enable a convention of such importance to be adopted by the largest possible number of States.

60. Many delegations, in considering the various aspects of the question of the settlement of international disputes, had come to the conclusion that the small countries should logically be the warmest supporters of compulsory methods of peaceful settlement. In 1955 the International Law Commission had submitted to the United Nations General Assembly a draft on arbitral procedure [5] which had received only lukewarm support from the majority of States that did not follow the traditional view of international law in the matter of State responsibility. At first sight it would seem that a weak country would welcome a clear statement of a rule that would be of universal application, since, in the event of a dispute with a great Power, recourse to compulsory arbitration would be the ideal solution for a weak country, as it ruled out the use of force and required compliance with that universal rule.

61. But it was undeniable that most small countries, especially those which had recently attained independence, had made clear their opposition both to compulsory arbitration and to the introduction of a strict arbitral procedure.

62. In his view, that was because agreement to submit a dispute to arbitration meant in the last analysis that a State was ready to accept application of the substantive international rules in force at a particular moment on the subject-matter of the dispute. The reason why the smaller and newer countries were not prepared to agree in advance to submit all their disputes to arbitration was that, generally speaking, they were not disposed to accept a number of the rules of the international law in force, quite apart from the difficulty of finding a system that would be free from political pressure.

63. The fact that few of the new countries had accepted the compulsory jurisdiction of the International Court of Justice was another aspect of their attitude of resistance.

64. Their refusal was not due to lack of confidence in the Court or to their limited interest in legal matters, but to their conviction that the set of rules which the Court would apply would not correspond to their needs, since those rules originated in the past and were based on the practice of States whose interests were different and indeed almost the opposite of those of the newer countries. If an important section of the international community was not prepared to accept many of the rules of international law, the machinery for the peaceful settlement of disputes would lack foundation. The first step was to realize that that state of affairs existed and to arrive at a clear understanding of it; the problem would not be solved by reproaching the new States and the medium-sized and small States for their lack of interest in law and bemoaning the fact that so few States had accepted the jurisdiction of the Court. As the Mexican jurist, Jorge Castañeda, had said, the remedy was to help those States to have access to the processes whereby international law was created. The fairer the new international rules that were formulated — and they would have to be fair rules, not merely legal rules reflecting practice — the more the new States would be ready to submit themselves voluntarily to those rules; and the best way of achieving that was unquestionably through international conventions in which all States would take part in the progressive development and codification of rules of conduct between States.

65. In the case of the present Conference, it was those countries, including Mexico, which should be most concerned to ensure that the Conference was a success. On the assumption that they were satisfied with the convention that was being adopted, it would merely be a question of deciding whether article 62 was sufficient or whether it should be supplemented by some of the proposals which had been submitted, although perhaps it would be safer to establish some system for the settlement of disputes arising from the application of Part V of the convention. Although for the time being he would not express an opinion on whether those amendments should be adopted, he wished to give his views on some of them, beginning with the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) introduced by the Netherlands representative. In his view, that proposal could be important if the following points were included.

66. First, it should be clearly stated that the conclusions of the proposed commission, with respect either to the facts stated or to points of law, would not be binding on the parties.

67. Secondly, it was important that the conciliation proceedings should be confidential, so as not to prejudge the arbitral procedure and any award that might be made, and he therefore thought it might be desirable

[5] See *Yearbooks of the International Law Commission, 1953*, vol. II, pp. 208-212, and *1958*, vol. II, pp. 83-86.

to omit the provision regarding consultation of other parties to the treaty from paragraph 3. Publication of the findings without the consent of the parties concerned should also be prohibited.

68. Thirdly, the arbitral tribunal's awards were more likely to be impartial if the tribunal consisted of five members instead of three, as proposed in the Japanese amendment, and if all were appointed by the parties or by the Secretary-General.

69. Fourthly, it might also be desirable to provide that any dispute concerning interpretation of the award should be submitted to the arbitral tribunal which had made the award. Moreover, it should be possible within a certain period to review the award before the same tribunal, if facts subsequently emerged of which the tribunal had been unaware at the time of making the award.

70. Fifthly, the arrangements for paying the expenses of the tribunal should be altered; at all events it should be stated more clearly whether those arrangements were to include some form of remuneration for the members of the tribunal. Several representatives had already referred to that point, which was more important than might at first sight appear.

71. The Spanish proposal provided an alternative method that was worthy of consideration, if the idea of arbitration was to be accepted, although some of the objections he had already mentioned also applied to that proposal. Precedents for the proposal were to be found in the Arbitration Treaty of 1811 between the United States and the United Kingdom, which in the end never entered into force because the United States Senate did not ratify it, and in the Revised General Act for the Peaceful Settlement of Disputes,[6] in that they had also included provisions for decisions on the legal nature of a problem to be taken by political bodies. That was an innovation which called for further reflection, and he might have occasion to revert to it in examining the other proposals on the subject.

72. The Japanese amendment (A/CONF.39/C.1/L.339) was technically sound, and should perhaps be given more careful study by the sponsors of other proposals on the matter.

73. Lastly, it seemed to him desirable to include a clause on the non-retroactivity of the convention, to be interpreted in the light of article 24. Such a clause might help to clarify the situation so far as the acceptance of a supplementary procedure to that set out in article 62 was concerned. He would however await the Committee's views about the desirability of including a clause on those lines in the preamble to the convention.

74. Mr. TSURUOKA (Japan) said that his delegation's views had already been clearly stated by the representative of Japan at the 68th meeting,[7] in introducing the Japanese amendment (A/CONF.39/C.1/L.339). His delegation still maintained the view that its proposal was the most appropriate formula for the settlement of disputes which might arise under the provisions of Part V of the Convention. His delegation did not wish to take up too much of the Conference's time by repeating the remarks it had made during the first session, but, in order to ensure that its way of thinking was fully understood, it wished to touch upon a few points which it considered to be of fundamental importance and which must therefore be taken fully into consideration in working out a satisfactory formula for that vital article.

75. First, it was essential that there should be a guarantee, as the last resort, for obtaining a just settlement of disputes, based on the objective judgement of an independent and impartial organ in cases where the parties to the dispute failed to arrive at a peaceful solution among themselves. Otherwise, the wicked would have their own way and might would prevail over right. Such a situation could not be said to be for the benefit of any *bona fide* claimant or defendant, as the case might be, particularly when they were small States, as had been pointed out by some previous speakers.

76. Secondly, the procedure for the settlement of disputes arising from Part V of the convention was fundamentally different in import from the procedure for the settlement of disputes in general. Part V related not to the interpretation or application of some provision of a particular treaty, but to the life and death of all treaties. Treaty relations constituted the very foundation of the international legal order. Unstable treaty relations must lead to serious disturbances in relations among States, and thus adversely affect international co-operation.

77. Thirdly, it should be emphasized that the so-called "compulsory" procedure for the settlement of disputes was proposed as a means available only as the final resort in the process of settling disputes. It was only in the unfortunate eventuality of all the other available methods having failed to bring about a settlement that the machinery was to be resorted to, thus guaranteeing the ultimate solution of a dispute which would otherwise have been left unsolved. The significance of the procedure lay not so much in its actual use as in its function as a safeguard. Its very existence would encourage the parties concerned to seek amicable settlement of their disputes, without actually resorting to the final procedure. It would also discourage States from making extravagant or arbitrary claims.

78. Fourthly, the Japanese delegation was well aware that some States might genuinely fear that a compulsory procedure for the settlement of disputes might create difficulties with regard to certain specific matters or situations. But it would be unfortunate if those considerations should mar one of the essential elements of a convention which was to govern relations between States for many years to come. What was essential for the Committee was to agree on the point of principle; technical questions could be settled later. For instance, the view expressed by the representative of Switzerland concerning the problem of costs was a constructive suggestion which could be pursued further.

79. What should be aimed at, in his delegation's view, was to make a success of the Conference by concluding

[6] United Nations, *Treaty Series*, vol. 71, p. 101.

[7] Paras. 2-8.

a really worth while convention on the law of treaties by which future treaty relations would be regulated in a just and satisfactory manner for long years to come.

80. Mr. WERSHOF (Canada) said that in his delegation's opinion the ideal method of dealing with disputes relating to the application of Part V of the draft convention was the one set out in the proposals submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339), for it was particularly appropriate for a convention fundamental to the law of nations to recognize the role of the International Court of Justice as the judicial organ of the United Nations system. His delegation would therefore support those proposals if they were put to the vote.

81. The Spanish proposal (A/CONF.39/C.1/L.391) had some commendable features, but it was the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) that seemed the most suitable of the proposals providing for arbitration, as opposed to adjudication by the Court. If the Swiss and Japanese proposals were not accepted, the Canadian delegation would support the nineteen-State proposal, particularly since the representative sponsorship of that text led to the assumption that it might attract wide support.

82. The essential point was that a procedure for automatically available third party adjudication was an essential accompaniment to the provisions of Part V of the draft. In his view, Canada would find some difficulty in accepting a convention which included a Part V along the lines already approved by the Committee but did not include provision for the automatic independent adjudication of disputes concerning invalidity and termination. Indeed, at the first session of the Conference, many delegations, including his own, had expressly stated that their acceptance of certain articles in Part V was conditional on the acceptance of satisfactory adjudication procedures.

83. Finally, his delegation could support the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1), provided the nineteen-State proposal was accepted, and also the proposal by Ceylon for a new article 62 *ter* (A/CONF.39/C.1/L.395).

84. Mr. SAMAD (Pakistan) said that incorporation by reference of Article 33 of the United Nations Charter into article 62 provided no automatic or compulsory means of settlement of disputes. In the absence of agreement betwen the parties concerned, there could be no settlement. Any subjective interpretation of treaty rights and obligations constituted a threat to peace and to the stability of treaty relations. Pakistan therefore supported the proposals for compulsory procedures for the settlement of disputes relating to Part V, especially those concerning articles 50 or 61, because peremptory norms of general international law must be settled at the highest judicial level, which meant by the International Court of Justice. Such questions could not be left to the subjective judgement of individual States.

85. Some speakers had argued that many international conventions did not include provisions for compulsory jurisdiction, but the draft convention was a different kind of instrument, whose purpose was to regulate the international law on treaty relations. The Conference should be guided not by past misconceptions, but by the need to find common ground in the conditions of the future.

86. Fears had been expressed that compulsory arbitration decisions might be biased, or take account of extra-legal considerations. In fact a decision by a third party was more likely to be objective, since unless the two parties concerned were equally powerful, failure to agree would mean a unilateral decision by the more powerful, and might would take the place of rule of law. Nor did Pakistan accept the view that agreement on a procedure for the settlement of disputes with other States could in any way impair the sovereignty of a State.

87. His delegation accordingly supported the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). It would, however, suggest an amendment to paragraph 6 of annex I, in the form of an additional sentence providing that, pending its final decision and in order to avoid irreparable damage, the tribunal might, at the request of any party to the dispute, order such measures as might be suitable in the circumstances of the case, including where appropriate the suspension of the operation of the treaty in whole or in part as between the parties to the dispute. Under the terms of article 39, already approved, the treaty would continue in force during the compulsory settlement procedures. If the sponsors of the nineteen-State proposal could accept that amendment, Pakistan would be able to join them.

88. His delegation was prepared to support the Spanish proposal for a "United Nations Commission for Treaties" (A/CONF.39/C.1/L.391), but preferred the nineteen-State amendment. It also supported the Japanese amendment, referring disputes relating to articles 50 or 61 to the International Court of Justice (A/CONF.39/C.1/L.339). In principle it supported the amendment by Ceylon (A/CONF.39/C.1/L.395) but could not support the amendment by Thailand (A/CONF.39/C.1/L.387), which would nullify the effect of article 62 *bis*.

The meeting rose at 6 p.m.

NINETY-FIFTH MEETING

Monday, 21 April 1969, at 10.50 a.m.

Chairman: Mr. ELIAS (Nigeria)

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

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

1. Mr. HOSTERT (Luxembourg) explained that the purpose of his delegation's amendment (A/CONF.39/