United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/C.1/SR.95

95th 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)*

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/

C.1/L.397) [1] was to enable States to exclude from the application of the provisions of Part V of the convention any State which might make reservations to the provisions of article 62 *bis*. Part V expressly stated the rules of substantive law concerning the invalidity of treaties or the cessation of their effect, but some of the provisions which introduced innovations had not yet been clearly defined. For instance, at what point did the more or less admissible pressures accompanying all negotiations cease, and where did the unlawful coercion which vitiated a treaty begin? What exactly were the peremptory norms of international law? At what point did an ordinary principle generally accepted by the international community become a peremptory norm, and who was competent to decide that that qualitative change had taken place? In short, there were still a number of uncertainties, which constituted a serious threat to the stability of treaty relations.

2. It was highly doubtful whether States which had made a bad bargain and wished to rid themselves of inconvenient commitments would show good faith in the interpretation of ideas which so far were still vague. The considerable authority of the present convention might thus be invoked as a cover for the use of force, and international law would be twisted to serve the purposes of power politics. At the present stage of international relations, the only remedy for such a situation seemed to be a procedure of arbitration or adjudication, as proposed by various delegations in article 62 *bis*. It was hard to see how ideas that were as yet ill-defined could come to form a coherent body of law that would be applicable to every situation, unless a considerable effort had been made to apply them to cases, and that could be done only by arbitrators or judges. Since the most powerful parties always had at their disposal certain means of exerting pressure whose effect tended to diminish in the course of an arbitral or judicial procedure, those procedures would seem particularly important for small or economically weak countries.

3. It had been argued that such procedures were incompatible with State sovereignty, but it should be borne in mind that the real restriction on sovereignty occurred at the stage when treaties were concluded rather than at the stage of arbitral or judicial procedure, which was merely the consequence and complement of conclusion. At the same time, the hesitation of certain newly-independent States to accept settlement procedures evolved by the European countries was quite understandable; the Luxembourg delegation would therefore support either the Swiss amendment (A/CONF.39/C.1/L.377) or the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

4. The Luxembourg delegation considered that the convention would not mark any real progress unless the novel provisions of substantive law included in Part V were accompanied, as they must be, by procedural provisions for their implementation which were equally original. The balance of Part V would surely be upset by permitting reservations only to the procedural safeguards. If certain States acted in that way, it was essential to make it possible to exclude the States making the reservation from the application of the whole of Part V; they would thus be unable to interpret certain new concepts unilaterally. The summary records of the first session seemed to show that the connexion which the Luxembourg delegation had tried to establish between the different types of provisions in Part V had also been brought out by other delegations. If his amendment were adopted, the provisions of Part V would have a dual character: they would retain their full legal effect in the relations between States bound by a commitment to submit to arbitration or judicial settlement, but in relations with other States only the rules of general international law would be applicable, and Part V of the convention would then merely provide directives and guidance.

5. Mr. BRAZIL (Australia) said that Part V, which proposed a wide variety of grounds on which the invalidity of a treaty or its termination or suspension might be claimed, clearly represented a major step in the progressive development of international law. It was necessary to consider the procedural and related requirements which must accompany such a step.

6. The Australian delegation thought it should be clearly stated that treaties were presumed to be valid and in force according to their tenor. In paragraph (1) of its commentary to article 39, the International Law Commission had noted the desirability of underlining in Part V, as a safeguard for the stability of treaties, that the validity and continuance in force of treaties was the normal state of things. At the first session, some drafting changes had been adopted to make the draft articles even more expressive on the vital point of the presumption of the continuance and validity of treaties, and it would be appropriate to refer again to that presumption in connexion with article 62 *bis*.

7. The presumption of validity and continuance was an important matter. The invalidity, termination or suspension of treaties could never be left to unilateral assertion but must be established by the party making the claim of invalidity, termination or suspension. That was the meaning to be ascribed to the words " the invalidity of which is established ", which appeared in article 39 of the Commission's draft and were to be found in article 65 as approved by the Committee of the Whole at the first session.

8. But it was not possible to speak realistically of the establishment of the invalidity or termination of a treaty unless effective procedures were provided to deal with disputes that arose. In the absence of possible resort to a binding decision, the matter was left to assertion and counter-assertion and the word " established " which appeared in the draft convention would be illusory.

9. His delegation considered that article 62 *bis* should only apply to treaties concluded after the convention came into force. That opinion followed not only from the principle of non-retroactivity laid down in article 24 of the draft convention, but also from the fact that the whole of Part V, as a major step in the progressive

[1] An amended version (A/CONF.39/C.1/L.397/Corr.1) was submitted later.

development of international law, should only be applicable to future treaties.

10. In that connexion, the Conference should adopt the suggestion made by the Swedish representative at the 94th meeting [2] on the possibility of inserting an express reference to the non-retroactivity of the provisions of the convention relating to the compulsory settlement of disputes. That reference would be without prejudice to the possible application of any rule in Part V to existing treaties, provided that rule was demonstrably part of customary international law.

11. In order to be effective, settlement procedures must provide for a binding judicial or arbitral decision if the parties were unable to agree on a settlement, and the Australian delegation would decide its attitude to the proposals before the Committee in the light of that requirement.

12. The Swiss proposal (A/CONF.39/C.1/L.377) had the merit of expressly recognizing the presumption of validity and continuance of treaties, especially in paragraph 3.

13. The Japanese proposal (A/CONF.39/C.1/L.339) also stressed the presumption of validity and continuance, and had the additional merit of taking into account the very special problems raised by the doctrine of *jus cogens,* on which articles 50 and 61 of the draft were based. The Australian delegation wondered, however, whether even the International Court of Justice, although it was the principal judicial organ of the United Nations, would be able to cope with the special and novel problems that would be involved in the application of a doctrine of *jus cogens* of unspecified content. Nevertheless, the Australian delegation whole-heartedly agreed with the approach of the Japanese proposal.

14. His delegation was disappointed that none of the proposals for article 62 *bis* dealt comprehensively with the practical problem of the provisional measures that might need to be taken in the case of a breach of the treaty under article 57. The United States amendment to article 62 (A/CONF.39/C.1/L.355) submitted at the first session, especially the new paragraph 5, contained interesting and constructive suggestions in that regard.

15. The nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) omitted some important features, but was a constructive proposal, and it might serve as a basis for the widest possible agreement on the subject of settlement procedures. Moreover, it had the advantage of providing, in the last resort, a binding decision in the case of a dispute.

16. The Australian delegation was not in favour of the Spanish proposal (A/CONF.39/C.1/L.391), under which the possibility of arbitration would depend on a decision, by a body elected by the principal political organ of the United Nations, as to whether the dispute in question was legal or political in character.

17. For the same reason, his delegation could not support the Thai proposal (A/CONF.39/C.1/L.387). The Ceylonese amendment (A/CONF.39/C.1/L.395) was interesting, but he wondered whether it was really necessary, since the parties to a treaty might always decide to exclude the application of article 62 *bis* to that treaty.

18. His delegation believed that the insertion of a clause on compulsory settlement was an indispensable improvement to Part V of the draft.

19. Mr. DELPECH (Argentina) said that in his delegation's view article 62 as drafted by the International Law Commission and approved at the first session of the Conference provided a wide range of flexible procedures for the peaceful settlement of international disputes. His delegation therefore considered that the article was in principle a satisfactory means of regulating the procedural machinery of Part V of the draft articles. However, that did not mean that his delegation would not give full consideration to the proposal for the inclusion of an article 62 *bis* having sufficient flexibility to leave open the way for solutions calculated to allay the misgivings of all those who desired the success of the convention on the law of treaties.

20. Mr. YAPOBI (Ivory Coast) said that his delegation was one of the sponsors of the amendment proposing a new article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). That article had given rise to objections which, in the view of his delegation, were not valid. The first was that it infringed the principle of the sovereign equality of States. There were no grounds for that assertion; what was the sovereignty of a State if not the freedom to contract rights and obligations? That freedom was the positive manifestation of the sovereignty of a State. It had also been asserted that the article was likely to disturb international peace and the relations between States. On the contrary, the clear definition of rights and obligations should surely facilitate relations among States. In civil law, procedure was the guarantee of social peace and of all political progress; in international law, to give a clear definition of procedures was to guarantee the stability of inter-State relations. Attention had also been drawn to the dangers of the article for small countries, but in fact it was law which guaranteed the freedom and independence of the new countries. The introduction of compulsory adjudication could not conflict with the interests of newly-independent countries, which were unable to fall back on force. It could not be left to the great Powers to decide whether a clause in a treaty was valid or not.

21. The Japanese amendment (A/CONF.39/C.1/L.339) should in principle have been warmly received by the Ivory Coast delegation, but his delegation's attitude was above all realistic, and it could not accept the jurisdiction of the International Court of Justice after the decision that that body had taken on the South West Africa question.

22. The Swiss amendment (A/CONF.39/C.1/L.377) was an improvement on article 62, since it provided for compulsory arbitration. However, the Ivory Coast delegation believed that such a procedure should be in two stages, consultation and arbitration. Consequently it considered that amendment inadequate.

[2] Para. 52.

23. His delegation could not support the Spanish amendment (A/CONF.39/C.1/L.391), because it could not accept the distinction between legal and political factors. Even if the reason underlying a claim of invalidity was political, the considerations invoked for that purpose were legal in nature. Consequently that distinction was not essential.

24. The amendments by Thailand (A/CONF.39/C.1/L.387) and Ceylon (A/CONF.39/C.1/L.395) were not acceptable, since they robbed article 62 *bis* of its substance.

25. His delegation could not support the Luxembourg amendment (A/CONF.39/C.1/L.397) either, since its effect would be to allow any one who wished to do so to evade accepting Part V of the convention. The law of treaties was a single whole, and Part V was the logical consequence of a system of peremptory norms of international law.

26. The Ivory Coast delegation hoped that the Committee would adopt the nineteen-State proposal, or else would find a compromise that would make it possible to maintain Part V, at the same time reinforcing it by some suitable procedure.

27. Mr. SMALL (New Zealand) said that the future convention must contain a provision for the operation of reasonable machinery to ensure the objective settlement of disputes arising from the implementation of Part V. New Zealand's future support of the convention would turn substantially on the solution to the problem of a fair procedural balance in Part V.

28. Article 33 of the United Nations Charter did not provide adequate safeguards, and it was difficult to see how it could protect the interests of small States in the practical application of Part V of the draft.

29. The New Zealand delegation supported the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339), which the international community could not, in all conscience, decline to support. Moreover, there was no convincing rebuttal for the notion inherent in the Japanese amendment, namely that in the event of a substantial difference of opinion between States, the ultimate determination of the existence of peremptory norms of international law was properly the task of the International Court of Justice as the judicial organ of the United Nations.

30. His delegation also supported the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which, while not offering a perfect solution, deserved the very fullest consideration as a compromise.

31. If some such procedure as that provided in those amendments was not acceptable to governments, it might well be asked whether the international community had reached the stage of development which the International Law Commission had reflected in some parts of the draft articles.

32. His delegation could not support the Spanish amendment (A/CONF.39/L.391) because it doubted the feasibility of applying the system it proposed.

33. The amendment by Thailand (A/CONF.39/C.1/L.387) was also unacceptable, because it negated the idea of a standing provision of last resort for the peaceful settlement of the disputes to which article 62 related.

34. On the other hand, his delegation supported the Swiss proposal (A/CONF.39/C.1/L.393/Corr.1) to include a new article 62 *quater* in the draft.

35. U BA CHIT (Burma) said he did not share the fears of certain representatives that the provisions of Part V might operate to the detriment of small and weak States if they were not accompanied by a provision for the compulsory settlement of disputes.

36. It was true that the application of those provisions might give rise to serious controversies. But the parties to a dispute would be able to work out a solution through the means indicated in Article 33 of the United Nations Charter if they were true to the obligations of good faith implicit in their treaty relations. There was, of course, nothing to prevent the parties from resorting to arbitration or judicial settlement if they so decided by mutual consent.

37. Obviously, certain parties might arbitrarily invoke various grounds for nullity, termination or suspension of the operation of a treaty to rid themselves of inconvenient treaty obligations. However, it was to be hoped that in a world in which States were increasingly interdependent and their interests were interrelated, no State, no matter how powerful, would venture to take such a step. In practice, many political and other considerations would deter States from doing so. If however a State disregarded such considerations and refused to assume obligations deriving from treaty relations, was it possible to say for certain that the procedure for compulsory arbitration or adjudication would be of much avail?

38. The Burmese delegation believed that the procedural safeguards provided by the International Law Commission were adequate and that, as the Commission had stated in its commentary, article 62 represented the highest measure of common ground that could be found among Governments. The Burmese delegation would therefore vote against the proposed new article 62 *bis*.

39. In his delegation's view, reservations to the convention on the law of treaties should be permitted if they were not incompatible with its object and purpose. Bearing in mind the large number of potential participants and their very diverse cultural, political and economic backgrounds, it would be readily appreciated that some of them, for one reason or another, might not be able to accept the convention without making a reservation to certain of its provisions. The effect of such a reservation on the general integrity of the convention could only be very slight. His delegation believed that in order to encourage the participation of the largest possible number of States, they should be given the power to make reservations. If a spirit of tolerance and mutual comprehension did not prevail, the convention on the law of treaties might become a restricted multilateral treaty.

40. Mr. TODORIC (Yugoslavia) said that the Conference should concentrate on the future, for its task

was not only to ensure the future stability of treaty relations, but also to make a contribution to the permanent development of friendly and peaceful relations among States.

41. An effort should be made to reconcile the notions embodied in the various amendments, which were based on different legal systems, and to reach a general agreement both to ensure the adoption of a convention on the law of treaties and to arrive at a system of impartial and pacific settlement of disputes arising between sovereign and equal States.

42. The codification of the law of treaties was something unique in the history of international law and international relations. Obviously, the task could not be carried out unless all delegations made a joint contribution. The international community needed a new system of law, more effective and more perfect than that which had hitherto prevailed, and one in conformity with the purposes and principles of the United Nations.

43. There was no doubt that a large number of delegations did not favour compulsory arbitration and compulsory adjudication. Consequently, a formula must be found that could be accepted by all States so that the future convention on the law of treaties might meet with universal acceptance.

44. In the absence of a formula acceptable to all countries, the Yugoslav delegation would vote for the solution suggested by the International Law Commission.

45. Mr. SINCLAIR (United Kingdom) noted that the fervour and enthusiasm with which some delegations had defended some of the more controversial grounds of invalidity embodied in Part V of the convention at the last session had been replaced by hesitation and scepticism in the debate on article 62 *bis*.

46. The Venezuelan representative had expressed the most profound pessimism about the prospects for international adjudication. The United Kingdom delegation, although conscious that less than half the States Members of the United Nations had made declarations conferring jurisdiction upon the International Court of Justice, did not share that pessimism. In fact, it was encouraging to note not only that new declarations had been made but also that some States had recently reconsidered their declarations with a view to limiting their reservations to the minimum and thereby increasing the range of disputes capable of being determined by the Court.

47. In reply to the Venezuelan representative, who had reproached the United Kingdom for including in its declaration a provision enabling it to withdraw the declaration at any time, he wished to make it clear that it was that very provision which had enabled his Government to replace its 1963 declaration by a new declaration, which had taken effect on 1 January 1969. That new declaration reduced the number of reservations from eight to three, thus materially extending the scope of the jurisdiction exercisable by the Court as far as the United Kingdom was concerned. The allegations that no major Power was prepared to accept extensive obligations in the field of the peaceful settlement of disputes were therefore surprising. The United Kingdom had amply demonstrated, by deeds far more than by words, that it was prepared to accept advance obligations to submit disputes involving questions of international law to international adjudication.

48. He had carefully avoided the use of the term compulsory jurisdiction of the International Court of Justice because international law knew no compulsory jurisdiction in the sense of an obligation arising *ipso jure* for a State to submit to the determination of a dispute by an international organ. Jurisdiction always depended on consent, whether given *ad hoc* in relation to a particular dispute or given in advance in relation to certain categories of disputes. An advance undertaking by a State to accept a third-party decision could not be regarded as incompatible with the principle of sovereign equality.

49. Replying to the Mexican representative, he said that the draft convention on the law of treaties had been prepared with the active collaboration and participation of all States members of the international community. Consequently, it could not be held that in the present case States were being asked to accept rules of substantive law in whose formulation they had taken no part.

50. He wished to remind the opponents of the new article 62 *bis* that it did not apply to disputes concerning the interpretation and application of treaties where no question of the validity, termination or suspension of operation of the treaty arose. What was at issue was a narrow, although profoundly important, category of disputes concerning grounds of the invalidity, termination or suspension of the operation of treaties. It was only right that in those circumstances there should be stringent safeguards to permit justified claims of invalidity to be upheld and unjustified ones rejected. No responsible government would be willing to accept the risks of abuse if such safeguards were not included in the convention.

51. The United Kingdom delegation believed that the possibility of recourse to a pre-established settlement procedure to solve disputes concerning the provisions of Part V was in the interests of all goverments. The advantages of that solution had been expounded in the report of an independent study group on the peaceful settlement of international disputes set up in the United Kingdom by the David Davies Memorial Institute of International Studies. The report pointed out, firstly, that the existence of a prior agreement whereby the parties accepted conciliation, arbitration or judicial settlement had the effect of lowering the temperature of a dispute, since it became *sub judice* as soon as it was referred to a commission or court. Secondly, by virtue of such an advance agreement, conciliation, arbitration or judicial settlement became established as part of the normal structure of the relations between the two parties, so that their Governments were less exposed to attack politically if the outcome of the dispute was not all that was desired. Thus an agreement for compulsory settlement by any of those means could help the Governments concerned to preserve friendly

relations if an incident arose. In the case of multilateral treaties, the parties became the uncontrolled interpreters of the treaty if there was no jurisdictional clause; that meant the risk of divergent or even contradictory applications of its provisions. A jurisdictional clause therefore had the advantage of guaranteeing some measure of coherence in the application of a treaty. His delegation was in full agreement with all those sentiments.

52. The United Kingdom's general approach to article 62 and to the proposals for the settlement of disputes relating to Part V had been carefully outlined by the Chairman of the United Kingdom delegation at the 71st meeting.[3] He would therefore confine himself to examining the proposals before the Committee. The most satisfactory was that submitted by the delegation of Japan (A/CONF.39/C.1/L.339). It was surely right that the establishment of a constant jurisprudence concerning the existence or content of norms of *jus cogens* should be entrusted to the International Court of Justice. Such a constant jurisprudence could not easily be established by a series of arbitral awards in individual cases. The United Kingdom would also vote for the Swiss proposal (A/CONF. 39/C.1/L.377).

53. The nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) had certain advantages and certain disadvantages. Its main attraction was that it interposed a stage of conciliation before a stage of arbitration.

54. In the United Kingdom delegation's opinion, many of the disputes which might arise out of the application of Part V of the convention could yield to a process of conciliation, for it offered each of the parties full knowledge of the opponents' case, it took account of the susceptibilities of Governments, and it left the parties full freedom of action in that they could reject the settlement proposed by the conciliators. But it was precisely for that last reason that a further stage of automatic arbitration was essential if the conciliation procedure failed. Of course, it must be admitted that the procedures proposed were cumbersome and complex, but experience showed that the mere existence of automatically available procedures resulted in their being used by Governments only on rare occasions and acted as an inducement to them to settle difficult problems in a spirit of reasonableness.

55. On balance, therefore, his delegation believed that the advantages of the nineteen-State proposal outweighed its disadvantages and would support it, subject however to three comments. Firstly, it would wish it to be made explicit that a treaty would remain in force and in operation throughout the duration of the dispute, though without prejudice to the powers given to the conciliation commission to indicate measures likely to facilitate an amicable settlement. Secondly, it would be well to take into account the suggestions relating to the confidential character of the conciliation process and to the need to provide that disputes on the interpretation of arbitral awards should be decided by the arbitral tribunal. Thirdly, it was to be hoped that the scope of the first sentence of paragraph 4 of the annex could be strengthened, since it did not seem to cover adequately the case of provisional measures.

56. The proposal by Ceylon (A/CONF.39/C.1/L.395) for a new article 62 *ter* also merited support; likewise the proposal by Switzerland (A/CONF.39/C.1/L.393/Corr.1) for a new article 62 *quater*. The impression should not be conveyed that article 62 *bis* would or might override the provisions in force as between the parties relating to the settlement of disputes.

57. With regard to the Spanish proposal (A/CONF.39/C.1/L.391), his delegation considered that, though it was interesting and constructive in certain respects, it raised some doubts as to the practicability of a " United Nations Commission for Treaties " undertaking conciliation functions and also as to the distinction between legal and political disputes. Like other delegations, the United Kingdom delegation believed that the amendment by Thailand (A/CONF.39/C.1/L.387) would, if adopted, destroy the whole essence and purpose of article 62 *bis*.

58. With regard to the Swedish representative's suggestion, there could be little doubt that a clause explicitly denying retroactive effect to the provisions of the convention would help to allay doubts and anxieties concerning the application of article 62 *bis* to existing disputes about existing treaties. It would, however, have to be stressed in addition that such non-retroactivity would be entirely without prejudice to the application of the rules of customary international law reflected in the convention to treaties concluded before it entered into force.

59. It would be preferable to consider the problem of reservations mentioned by the Swedish representative at the same time as the final clauses.

60. The United Kingdom delegation attached great importance to the provision of viable and satisfactory third party procedures for settling disputes arising out of Part V of the convention. At the first session doubts had been expressed as to the way in which various provisions, which were obscure both in substance and language, would be applied in practice, especially with regard to the scope and content of such controversial concepts as *jus cogens* reflected in articles 50 and 61. His delegation was still concerned about the threat to the stability of treaty relationships represented by such vague and indeterminate grounds of invalidity. The United Kingdom Government believed that the establishment of satisfactory procedures for the settlement of disputes was an essential counterbalance to the potentially disruptive effects of the articles relating to the invalidity, termination and suspension of the operation of treaties. If such procedures were not provided, the United Kingdom Government would not be in a position to accept the convention.

61. The participants in the Conference, united in an ambitious endeavour in the field of codification and progressive development of international law, should not forget that the Preamble of the United Nations

[3] Paras. 22-36.

Charter recorded the determination of the peoples of the United Nations to " establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ". They should therefore unite in a determination to produce a convention on the law of treaties incorporating all necessary safeguards against abuse.

62. Mr. BHOI (Kenya) said that at the first session his delegation had expressed support for draft article 62 and had drawn attention to the difficulties which the compulsory settlement procedures in article 62 *bis* could cause. To a large extent, those difficulties still remained at the second session.

63. At the international level, all States were under an obligation to seek a peaceful settlement to any dispute by the various methods laid down in Article 33 of the United Nations Charter, which specified those methods without assigning priority to any particular one and without making the settlement procedure compulsory.

64. Article 33 of the Charter was delicately balanced. The International Law Commission had specifically mentioned it in the text of article 62 which, as the Commission had said in its commentary, " represented the highest measure of common ground that could be found among Governments as well as in the Commission ".

65. Furthermore, the history of the compulsory settlement of disputes arising out of the application of treaties had not been very encouraging. The procedure was lengthy and clumsy, as the record of the Permanent Court of International Justice showed; it had settled only about thirty cases in all. And it would be difficult to name any recent decisions which testified to the success of international arbitral procedures. The contemporary state of compulsory adjudication also left much to be desired; as many speakers had pointed out, less than half the States Members of the United Nations had so far accepted the compulsory jurisdiction of the International Court of Justice, and some of them had accompanied their acceptances with reservations which cast doubts on the real usefulness of the Court. Moreover, the Court was conservative and might apply a law which no longer met the interests of new States, or it might deny justice on purely technical grounds, as in the *South West Africa* cases.

66. States were also reluctant to submit their disputes to judicial or arbitral bodies because vast areas of international law were still imprecise, and such bodies might prove inadequate; institutions did not always develop parallel with the development of the law.

67. It should also be borne in mind that several major codification conferences had already taken place, but none of the important conventions they had prepared, such as the Conventions on the Law of the Sea or the Vienna Conventions on Diplomatic Relations and on Consular Relations, contained any provision for the compulsory settlement of disputes.

68. That being so, he found it difficult to understand why there was so much insistence on providing for a compulsory settlement procedure in the convention on the law of treaties. By their very nature, the disputes arising out of the application of Part V of the convention would not be amenable to settlement by either a court or an arbitral tribunal. Some disputes resulting from the application of technical or humanitarian treaties would probably not lend themselves to that kind of settlement, and certain disputes might relate not to the convention, but to another treaty, for example in the context of a political dispute. For that reason, no adjudication procedure should be adopted. The new convention should not override the wishes of the parties as expressed in existing treaties, nor should it impose settlement procedures on them which they had not expressly accepted or which, in certain cases, they had even rejected.

69. It should also be realized that compulsory settlement procedures would not necessarily eliminate conflicts and might even complicate them. What would happen if a party to a dispute did not implement the arbitral award, and what recourse would lie against it? Obviously the only appeal possible in such cases would be to the principle of good faith, the principle which was laid down in the form of the *pacta sunt servanda* rule and which was expressly recognized by the Commission itself in its commentary to article 62. It was the duty of the parties to a treaty to respect that principle, regardless of any provision on the compulsory settlement of disputes.

70. From a practical point of view, a compulsory settlement procedure might be extremely costly to the parties, even though the sponsors of the revised nineteen-State amendment had covered that point by providing that the expenses of the arbitral tribunal should be borne by the United Nations.

71. With regard to the amendments before the Committee, he could not accept the Spanish amendment (A/CONF.39/C.1/L.391) which proposed an excessively complicated and cumbersome procedure, nor the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339). As between the amendments by Ceylon (A/CONF.39/C.1/L.395) and Thailand (A/CONF.39/C.1/L.387), he had a marked preference for the Ceylonese proposal. The Luxembourg amendment (A/CONF.39/C.1/L.397) was interesting, but required further study.

72. The nineteen-State amendment in its revised version (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) was a great improvement on what it had been previously. The passages dealing with compulsory conciliation were now worded in a form acceptable to several delegations, including his own. Consequently, Kenya did not reject the nineteen-State amendment outright, since it might ultimately represent the most viable formula for a compromise.

73. Mr. ROMERO LOZA (Bolivia) said he would like to explain the reasons why his delegation was among the sponsors of one of the drafts for an article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), on which every argument, both for and against, had already been advanced.

74. That proposal would make the convention an effective instrument. If the article was not adopted, the

convention on the law of treaties would be incomplete, since, as the Italian representative had rightly pointed out, the rules established in treaties became norms of law only if there existed some machinery for ensuring their application.

75. A broad trend of opinion among the delegations at the Conference favoured the idea that arbitration was an effective mechanism for the peaceful settlement of disputes, and one which gave practical effect to the principle of the equality of States. That did not mean, however, that the Conference should merely reproduce a system handed down from antiquity, since the value of arbitration, like any other institution, derived only from the efficacy and precision of its operation.

76. The nineteen-State proposal established a practical conciliation procedure followed by arbitration in cases of nullity or invalidity of treaties, which could provide a method of arriving at a just settlement. Awards would therefore have to be binding, since that was the only way to incorporate effective safeguards in international treaties, especially for small countries. Unless the awards were binding, the present situation, which manifestly could not prevent great Powers from obtaining unfair advantages, would simply be perpetuated. Treaties were the only recourse open to weak countries in their relations with other countries, although history showed that when treaties were concluded between States of unequal power, the rules they contained often represented arbitrary impositions by the stronger country, contained unreasonable advantage for that country and disregarded the principles of justice, equity and freedom of consent.

77. Several speakers, in an attempt to find fault with the nineteen-State amendment, had said that the fact that the proposed procedure was ultimately personal and unilateral would be unlikely to make awards more reliable. It was true that any kind of judicial decision, whether by the International Court of Justice, by permanent institutions or by specially appointed arbitrators, was the work of men acting as judges, and was thus in the last analysis a human decision, in which subjective reasoning and external pressures were permanently present. Fallible sources could not provide infallible results.

78. The fact that the Conference was trying to find more effective ways of dealing with the invalidity of treaties than those at present resorted to, such as Article 33 of the United Nations Charter or the jurisdiction of the International Court of Justice, was clear proof that that machinery had hitherto achieved little success; at all events, it made it evident that confidence in the efficacy of those methods for the peaceful and just settlement of disputes had been considerably shaken.

79. The nineteen-State proposal appeared to serve the purposes which all the participants in the Conference were trying to achieve. Several delegations had, however, put forward constructive ideas which might usefully be incorporated in the text of article 62 *bis* in its final form.

80. Mr. EUSTATHIADES (Greece) said that after a year of reflection on the question of procedures for settling disputes arising out of the application of Part V, his delegation was still convinced that the problem could not be solved on the basis of the political convictions of any given group of States, but that the solution should essentially take the interests of small countries into account.

81. First of all, he wished to dispel a misunderstanding concerning the position of the International Law Commission on the matter. It had been asserted that in referring to article 62 as a " key article ", the Commission had meant that that article provided the best possible solution. Actually, what the Commission had meant was that the question of the methods used for the peaceful settlement of disputes was a fundamental one. On that point it had limited itself to setting out in article 62 a provision which provided the " highest measure of comon ground " and which, by referring to Article 33 of the Charter, drew attention to a general obligation. The Commission had thus reserved its judgement on the question and had referred it to the Conference, believing in its wisdom that the problem was rather one for a diplomatic conference. The explanations that the Expert Consultant had given during the first session confirmed that interpretation; he had said that the International Law Commission had considered " that the procedures prescribed in article 62 were the minimum required as checks on arbitrary action ".[4]

82. The question was thus clearly put to the small States, and they had to decide whether they would be content with article 62, which provided for procedures representing " the minimum required as checks on arbitrary action " or whether they wanted further safeguards. Greece, as a small State which had become independent a century ago at the cost of sacrifices such as other new States had known more recently, considered it to be in the vital interest of small countries that the convention should provide them with the maximum procedural safeguards, especially with regard to disputes concerning Part V of the draft articles. They should give that requirement priority over the political obligations arising from their membership of any given coalition.

83. Part V was by definition the most sensitive section of the whole convention. For some delegations, the substantive rules in Part V were of the utmost importance, independently of procedural rules; but for many others the procedural rules were preponderant. It was impossible to ignore the fact that many States would refuse to accept the convention in the absence of satisfactory procedures, in other words in the absence of an article 62 *bis*. And if a large number of States failed to ratify the convention for that reason, what advantages would small States derive from Part V?

84. Some delegations maintained that going no further than the minimum safeguards as set out in article 62 would result in greater treaty stability than would the advantages provided in Part V of the draft articles. The Greek delegation considered that predetermined settlement procedures would give an even better guarantee of the application of Part V to small States,

[4] 74th meeting, para. 21.

for article 62 in no way eliminated the danger of arbitrary application of the provisions of Part V.

85. Article 62 included a reference to Article 33 of the Charter and, at first sight, the range of means of peaceful settlement indicated in that Article was very wide; but that was only true if the parties agreed on the choice of one of those means of settlement. Such agreement was not indispensable if the dispute was so serious that it threatened international peace or security, for then the General Assembly of the United Nations or the Security Council immediately became competent, and that would be so in all such cases, with or without an article 62 *bis*. That was an essential point which small States should bear in mind. Nevertheless, if the dispute in question did not threaten international peace or security or even friendly relations among States, the solution in article 62, that of free choice among all the means of settlement set out in Article 33 of the Charter, seemed inadequate. What would happen if one of the parties to a dispute relating to a multilateral treaty wished to resort to conciliation, another to arbitration, a third to judicial settlement, a fourth to inquiry and so forth? When a provision of Part V had been invoked and that action had encountered objections, the treaty would be called in question, and the uncertainty in treaty relations would bring about a deplorable situation.

86. It would therefore be better to provide for a predetermined settlement procedure, which would nevertheless be flexible, in the sense that it would apply only in cases where the parties were unable to agree on another means of peaceful settlement of the dispute.

87. One possibility was simply to provide for that predetermined procedure in separate undertakings, other than the treaty disputed under the provisions of Part V. That was the solution which was adopted at present, and it had proved inadequate, as the Venezuelan representative had pointed out. The Conference should go beyond such empirical methods and adopt progressive solutions.

88. Consideration might also be given to the possibility of making it compulsory under the convention on the law of treaties to include in every treaty the means of settling disputes arising from the application of Part V of the draft articles. The idea was attractive, but where multilateral treaties were concerned, serious difficulties would arise in connexion with the choice of the means of settlement, since, in the absence of agreement on the means of settlement, the conclusion of the entire treaty might thus be jeopardized; indeed, that was what was happening at the present Conference in respect of that very problem.

89. It was therefore preferable to provide for an overall predetermined system in the spirit of the various versions of article 62 *bis*, its applicability being subject to the agreement of the parties and exception being made in the case of treaties in which the means of settlement was explicitly laid down. In order to be effective, the system must above all be uniform, and, in order to be uniform, it should not be optional. Consequently the Greek delegation did not support the amendment by Thailand (A/CONF.39/C.1/L.387) because that proposal would make the system optional. In that event, there would be a whole series of different settlement procedures, which would be a major disadvantage if some parties to a multilateral treaty wished to use one procedure and other parties another. The multilateral treaty might be declared valid according to one of the procedures and invalid according to another, and extremely complex rules on pendency would have to be provided to offset those risks.

90. The main purpose of his statement had been to explain to small States the need for a predetermined settlement procedure, in the interests of their legal security, to ensure which it was necessary that there should be certainty that the rules laid down in the convention, including Part V, would not be subject to arbitrary action that might be taken by the strong against the weak. For it had to be remembered that the convention would establish rules for all treaties for many years to come. The machinery set up would have to provide adequate guarantees, referred to in detail by his delegation at the first session of the Conference.[5] A point that should be borne in mind in connexion with those guarantees was that the conciliation commission or arbitral body should not consist of very few members.

91. He might have occasion to make further reference to the various proposals for an article 62 *bis*. For the present, he wished to insist on the need to establish in advance machinery providing a satisfactory method of settling disputes, the most important of which would arise under Part V. Without such machinery, there was a danger that the whole edifice of the convention might be undermined and that it would be turned into a cause of dissension instead of being an instrument of peace among nations.

The meeting rose at 1.5 p.m.

[5] 73rd meeting, paras. 43-53.

NINETY-SIXTH MEETING

Monday, 21 April 1969, at 3.20 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. VEROSTA (Austria) said that Part V contained a number of progressive provisions which called for an adequate impartial procedure for their implementation. Many delegations were not satisfied with the means of settlement of international disputes contained in article 62 and had accordingly put forward a variety of