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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

proposals for a specific procedure, to be incorporated in a new article 62 *bis*. His delegation viewed with sympathy the Spanish proposal (A/CONF.39/C.1/L.391) to establish a new United Nations permanent organ, to be called the " United Nations Commission for Treaties, " for the conciliation of disputes over international treaties, especially disputes under Part V of the future convention. Fifty years previously, the Austrian delegation to the Paris Peace Conference of 1919 had submitted three draft articles, prepared by the well known Austrian international lawyer Professor Lammasch, for inclusion in the Covenant of the League of Nations. They provided for a permanent office of conciliation within the League of Nations, which would make proposals for amicable solutions or, if it considered that the dispute was a legal one, submit it to the Permanent Court of International Justice. The Paris Peace Conference had transmitted the proposal to the Council of the League of Nations but the Council, in drafting the statutes of organs for the settlement of international disputes, had set up the Permanent Court of International Justice, but without any permanent conciliation office. The Austrian delegation was afraid that any proposal to create a new permanent organ of the United Nations had no chance of acceptance in 1969 and therefore regretted that it would be unable to vote for the Spanish amendment.

2. Yet his delegation thought that the Conference might consider, at a later stage, the very interesting idea contained in the Spanish amendment — an idea that was also to be found in the Austrian proposal of 1919 — namely that a distinction should be drawn not so much between political and legal disputes as between justiciable disputes and non-justiciable disputes, such as those relating to vital interests, frontier delimitation and so forth.

3. The amendments by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) had the merit of favouring the International Court of Justice and his delegation would be prepared to vote for them.

4. Austria was one of the sponsors of the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), because it gave the parties complete freedom to use all the means of settlement provided for in the United Nations Charter, offered possibilities for conciliation by competent commissions whose members could be freely elected by the parties to the dispute, and allowed for arbitration by a tribunal to be freely chosen by the parties.

5. At the 94th meeting,[1] the Mexican representative had mentioned the confidential character of the conciliation procedure. It was obvious that negotiations in the course of that procedure would have to be kept secret, and there again, the parties to the dispute had complete freedom to impose whatever degree of secrecy they wished. On the other hand, it was hard to imagine how the final solution could be kept confidential.

6. With regard to the concern that had been expressed about the cost of the conciliation and arbitration procedures, it should be remembered that in most cases the conciliation procedure alone might lead to a satisfactory solution. Since the peaceful settlement of disputes arising under Part V of the convention was in the interest of the international community as a whole, the expenses would certainly be money well spent.

7. The Austrian delegation could not vote for the amendment by Thailand (A/CONF.39/C.1/L.387), which would reduce the settlement procedure to the status of an optional protocol. On the other hand, it could support the amendments by Ceylon (A/CONF.39/C.1/L.395), Luxembourg (A/CONF.39/C.1/L.397) and Switzerland (A/CONF.39/C.1/L.393/Corr.1).

8. It had been argued that article 62 was adequate as it stood and that the time was not yet ripe for any kind of compulsory conciliation or arbitration. Perhaps, therefore, he might be allowed to mention the case from the United States Civil War when it had been suggested to President Lincoln that the *Alabama* dispute between the United States and the United Kingdom should be submitted to arbitration. That was in 1864. President Lincoln had replied that that was a beautiful idea, but quite impracticable because the millennium was still a long way off. But within eight years the *Alabama* case had been settled by a Court of Arbitration in Geneva. The present Conference should not wait for the millennium either; it should not even wait eight years, but should inaugurate the millennium of conciliation and arbitration forthwith, or certainly during the course of the Conference.

9. Mr. RATTRAY (Jamaica) said that, although the history of the judicial settlement of international disputes might not be encouraging, that should not deter the international community from experimenting with new and improved methods which were more truly representative of the aspirations of all States. And, in so far as the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) recognized the desirability of establishing some more representative system of impartial adjudication, the Jamaican delegation had no difficulty in accepting the principle it sought to establish.

10. Under the nineteen-State amendment, the principles of the law of treaties would, in the event of disputes concerning Part V of the convention, be interpreted by tribunals on which the disputing parties would be adequately represented at the stages of conciliation and arbitration. The contemporary structure of the international community might not make for complete acceptance of third-party settlement of all disputes in all situations, but under the nineteen-State proposal States would remain free to decide on alternative methods of settlement and to provide expressly in treaties that article 62 *bis* would not be applicable, even if alternative means of settlement were not provided. Article 62, paragraph 4, which the Committee had already approved, stated that the provisions of that article should not affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes; clearly, a treaty

[1] Para. 67.

provision that article 62 *bis* was not applicable was a provision with regard to the settlement of disputes.

11. That being so, the proposal by Ceylon for a new article 62 *ter* (A/CONF.39/C.1/L.395) might be regarded as superfluous. It made the content of article 62, paragraph 4, explicit in such a way that it could constitute an open invitation to contract out of the provisions of article 62 *bis*. On the other hand, it did openly recognize that there might be situations in which some States would not be prepared to submit to the ultimate arbitration and judgement of others. For small States like Jamaica, that freedom of choice might be illusory, but if the Ceylonese amendment were regarded as acceptable, his delegation would not oppose it.

12. His delegation could not support the amendment by Thailand (A/CONF.39/C.1/L.387), for its effect would be tantamount to introducing an optional clause. Although it was worded in the form of a reservation, it seemed to invite an undesirable fragmentation of treaty relations.

13. There seemed to be such a wide area of common ground between the Spanish proposal (A/CONF.39/C.1/L.391) and the nineteen-State proposal that some accommodation of views among the sponsors might be hoped for. The Jamaican delegation had reservations, however, about the introduction in the Spanish proposal of the concept of legal disputes. Article 62 was based on the assumption that there were legal grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty, and those grounds were defined in the convention itself. Consequently, any attempt to refer to legal disputes in connexion with settlement could only create confusion and lead to arguments about the distinction between legal and political disputes.

14. The first Swiss amendment (A/CONF.39/C.1/L.377) had merit, but lacked the valuable provisions for conciliation which appeared in the nineteen-State proposal. The second Swiss amendment (A/CONF.39/C.1/L.393/Corr.1) raised two fundamental issues. First, there was the question whether the convention would apply to treaties concluded before the entry into force of the convention; the Jamaican delegation assumed that the procedures set out in article 62 *bis* would not have retroactive effect. Secondly, the provisions of the amendment seemed to be already covered by article 62, paragraph 4, for since article 62 *bis* could not come into operation until the machinery of article 62 failed, and since that machinery did not apply where there were other provisions with regard to the settlement of disputes, it was hard to see what purpose was served by the amendment.

15. The proposals for a new article 62 *bis* offered a challenge and an opportunity to the international community to establish a system for the peaceful settlement of disputes, on which small countries such as his own pinned their hopes for survival. The Conference should at least give the system a trial.

16. Mr. NASCIMENTO E SILVA (Brazil) said he would try first to delimit the issue under discussion. First, there could be no doubt that articles 62 and 62 *bis* related only to Part V of the draft convention. Secondly, the entire convention would apply only to treaties concluded after it had entered into force, unless the parties agreed otherwise; the Brazilian delegation endorsed the Swedish representative's remarks on that subject at the 94th meeting [2] and would support any amendment which clearly expressed the non-retroactive effect of the convention. Thirdly, as was brought out in the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1), disputes concerning Part V of the convention could be decided by the International Court of Justice in cases where the States concerned had accepted compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court. Consequently, the field was quite narrow, and international negotiations through the accepted channels could always be resorted to. It had been claimed that such negotiations could drag on indefinitely and engender hostility between the disputing parties, but it was the opinion of the Brazilian delegation that the passage of time tended to heal the breach.

17. Brazil had always favoured arbitration as a method of settling disputes. It was bound by many treaties containing compulsory jurisdiction clauses, and the Pact of Bogotá [3] subjected all disputes that might arise to compulsory adjudication. Indeed, Article 36 of the Statute of the International Court of Justice had originally been drafted by a Brazilian delegate. Quite recently, Brazil had accepted arbitration in a very important case, and would certainly accept the decision of the arbitral body, even though it might be unfavourable. Nevertheless, his delegation was not in favour of a blanket provision for compulsory jurisdiction; each case should be considered on its merits.

18. Although the nineteen-State amendment had some interesting features and it had been gratifying to hear the Austrian representative's remarks on the confidential nature of the conciliation procedures, a deadlock might result, as the Syrian representative had pointed out, if the decision to submit the dispute to arbitration were refused by one of the parties. The sponsors of the amendment had laid great stress on treaty stability, but in his delegation's opinion, the proposed procedure was almost an invitation to States to impeach the validity of treaties; that applied in particular to paragraph 7 of the annex, which provided that all the expenses would be borne by the United Nations, though there could hardly be any reason why the entire international community should be asked to pay the cost of settling a dispute over a bilateral treaty. Again, the representative of Gabon had rightly pointed out that small, new States might find it difficult to appoint conciliators and arbitrators from among their own nationals, and might be obliged to be represented by aliens. For all those reasons, his delegation would vote against the nineteen-State proposal.

19. It would also be unable to vote for the proposals by Japan (A/CONF.39/C.1/L.339) and Switzerland

[2] Para. 52.

[3] United Nations, *Treaty Series*, vol. 30, p. 84.

(A/CONF.39/C.1/L.377), for although the Japanese proposal was interesting from the stress that it laid on disputes relating to rules of *jus cogens*, it was doubtful whether the International Court of Justice was the tribunal best qualified to pronounce on new trends in international law.

20. The Spanish proposal (A/CONF.39/C.1/L.391) was based on a new approach to the problem, and the Brazilian delegation agreed with the Austrian representative that it might be considered at a later stage. The United Kingdom representative had rightly pointed out that the Thai proposal (A/CONF.39/C.1/L.387) was really a reservation clause; it involved a number of extraneous questions, as did the Luxembourg proposal (A/CONF.39/C.1/L.397), and the discussion of those texts might also be deferred. Although the Ceylonese proposal (A/CONF.39/C.1/L.395) might be superfluous, his delegation could accept it, and also the four-State sub-amendment (A/CONF.39/C.1/L.398) [4] to the nineteen-State proposal.

21. The Brazilian delegation deplored the unduly rigid position taken by some delegations, which had stated that the whole convention would be unacceptable to them if it contained or did not contain a clause along the lines of proposals for a new article 62 *bis*. Similar statements had been heard at earlier international conferences, but had not prevented some of the States which had expressed such rigid views from ultimately ratifying the conventions in question.

22. It would be noted that, whereas some small new States were in favour of proposals for the new article and others had spoken against them, all had used much the same arguments about sovereignty and impartiality. The Brazilian delegation had an open mind on the subject, but at that stage would vote against all the various amendments submitted, in the belief that the International Law Commission, after great effort and exhaustive study, had drafted an article 62 which represented the highest measure of common ground as yet to be found, not only in the Commission itself, but also among the many States represented at the Conference.

23. Mr. VARGAS (Chile) said that article 62, as approved at the first session, was inadequate in that its provisions might permit a State party to a treaty to invoke arbitrarily and unilaterally a ground of invalidity, termination or suspension in order to evade its obligations under the treaty; the *pacta sunt servanda* rule would thereby be affected and the whole stability of treaties endangered. His delegation therefore thought it essential to go beyond the provisions of article 62 and to include a new article 62 *bis* that would provide an effective solution to a dispute, where one of the parties did not agree to a settlement. His remarks applied to the whole of Part V but the inclusion of provisions on the compulsory adjudication of disputes was, in particular, absolutely essential for the application of the provisions of articles 50 and 61 on *jus cogens*. Those provisions had no precedent and had only recently been formulated; it was therefore supremely important that an impartial judicial authority should be responsible for adjudicating on any claims of invalidity based on them and for giving precise rulings as to their meaning and scope, so as to avoid any subjective interpretation by a State interested in releasing itself from treaty obligations.

24. His delegation fully supported the Japanese amendment (A/CONF.39/C.1/L.339) which provided for the settlement by the International Court of Justice, at the request of any of the parties, of a dispute on the application of article 50 or article 61, and for arbitration — unless the parties preferred a decision by the Court — in all other cases, if no settlement was reached by the means specified in Article 33 of the Charter.

25. Compulsory arbitration was a more expeditious and less costly means of settlement than recourse to the International Court of Justice; the latter should therefore be reserved for disputes on the application or interpretation of the rules of *jus cogens*, which affected the interests of the whole international community.

26. Except for the predominant role assigned to the International Court of Justice in the Swiss amendment (A/CONF.39/C.1/L.377), the arbitration procedure it prescribed was entirely satisfactory. Another positive feature of that amendment was its paragraph 4, whereby the claimant party would be deemed to have renounced its claim if it did not have recourse within six months to one of the tribunals referred to in paragraph 1. A provision on those lines should in any case be included in the convention on the law of treaties.

27. The nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) had merits, but his delegation had serious reservations regarding some of its features. It made provision for a compulsory conciliation procedure. Conciliation was a suitable means for the settlement of certain disputes and Chile was a party to a number of treaties which provided for it. His delegation had, however, grave misgivings regarding its indiscriminate application to essentially legal matters such as the invalidity of treaties; the submission of such matters to conciliators instead of to a court, which was required to apply strictly the law in force, might even prove detrimental to the peaceful settlement of disputes. How, for example, could a conciliation commission function in a case where the issue was the invalidity or termination of a treaty on grounds based on a rule of *jus cogens*?

28. It might be objected that there was no great risk of the proposed conciliation commission dealing with exclusively legal issues because it was called upon merely to make recommendations which were not binding, because its decisions would be confidential and because, in the last resort, the proposed arbitral tribunal would decide the case on the basis of law. Nevertheless, there was bound to be some danger that the conciliation commission's recommendations would influence the arbitral tribunal's decision. His delegation did not reject the conciliation system outright, since it could be very useful in relation to some of the provisions of Part V. The conciliation system could also be im-

[4] See below, para. 46.

proved by incorporating in it the useful idea, contained in article 5 of the annex to the Spanish amendment (A/CONF.39/C.1/L.391), of enabling the conciliation commission to decide that a dispute should be regarded as a legal dispute and should therefore be submitted to an arbitral tribunal.

29. On the other hand, his delegation had doubts not only as to the effectiveness of the " United Nations Commission for Treaties " proposed in the Spanish amendment but even as to whether such a commission was constitutional.

30. In his delegation's view, the general rule should be compulsory arbitration, without prejudice to the admission of other judicial or diplomatic means of settlement in respect of some of the provisions of Part V. The various drafts submitted by Japan (A/CONF.39/C.1/L.339), Switzerland (A/CONF.39/C.1/L.377), Spain (A/CONF.39/C.1/L.391) and the nineteen-States (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) embodied the principle of compulsory arbitration and could all serve as a basis for the final draft, if that principle were accepted.

31. Those drafts suffered, however, from a number of omissions. In addition to those already referred to by the Mexican representative, he would mention the fact that there was no indication of the sources of the law on which the arbitral tribunal was to base its decision if the case referred to it transcended the application and interpretation of the provisions of the convention on the law of treaties. Another serious omission was the failure to lay down the requirement that the arbitral tribunal should state the reasons on which its decision was based. He would therefore suggest the inclusion in article 62 *bis* of provisions on the lines of Articles 38 and 56 of the Statute of the International Court of Justice.

32. In order that article 62 *bis* should truly constitute the keystone of the convention, as it had been called, every effort must be made to formulate it in such a way as to reflect the essential features of the various views expressed and to broaden the basis of its support. A number of proposals had been made for that purpose and, in that respect, he commended the amendments by Ceylon (A/CONF.39/C.1/L.395) and Switzerland (A/CONF.39/C.1/L.393/Corr.1) which would make it possible to set aside the application of article 62 *bis* if the parties expressly so agreed, or if it were so specified in a treaty in force between them on the settlement of disputes. Another idea which would not only facilitate the adoption of article 62 *bis* but would also ensure a greater number of ratifications for the convention itself was that of including, either in the preamble or in the final clauses, a provision to the effect that the convention would not operate retroactively.

33. Mr. KRISHNADASAN (Zambia) said that Part V of the draft contained a number of controversial provisions such as articles 50 and 59, which represented progressive development of international law. The importance of those provisions would be enhanced if procedures to settle disputes relating to their application were included in the convention.

34. Of the various amendments, his delegation preferred the constructive nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) together with that part of the Swiss amendment (A/CONF.39/C.1/L.377) which specified that the majority of the commission of arbitration would consist of neutral non-national members, thereby relieving the Chairman of the commission from the sole responsibility for the decision. It also favoured the new article 62 *ter* proposed by Ceylon (A/CONF.39/C.1/L.395).

35. His delegation had serious misgivings regarding proposals to dilute article 62 *bis,* but would consider them if the nineteen-State proposal failed to attract sufficient support.

36. Mr. MUTUALE (Democratic Republic of the Congo) said that the sponsors of the various amendments proposing a new article 62 *bis* obviously feared that the general obligation to settle disputes in good faith was not a sufficient safeguard and wished to introduce automatic compulsory procedures for the purpose. After prolonged study, the International Law Commission had not been able to produce a better solution than that contained in article 62, which provided minimum safeguards against arbitrary action and at the same time represented the maximum measure of safeguards on which agreement could be reached for the time being. The real question, therefore, was not that of the legal merits of procedural provisions to settle disputes arising out of Part V; it was whether there existed a political will on the part of States to accept binding obligations for automatic procedures that would apply to all future treaties — whether commercial, economic, military or other — when questions of validity arose.

37. It must be recognized that, at present, the idea of compulsory and automatic procedures for the settlement of disputes found little favour with States. There was a considerable distrust of the International Court of Justice, the principal judicial organ of the United Nations; few States had accepted its compulsory jurisdiction and many of those that had done so — including some of the sponsors of proposals for a new article 62 *bis* — had attached important reservations to their acceptance. Moreover the Court itself, by a recent notorious decision, had helped to discredit the very idea of compulsory adjudication. The best possible course, therefore, was to leave the question of the settlement of disputes to an optional protocol that would embody the procedures contained in article 62 *bis,* or an optional clause reserving the right of States to agree on such procedures.

38. In a perhaps distant future, experience might lead States to reflect on the inadequacies of international enforcement procedures. Meanwhile, it was the duty of the advisers of Governments to emphasize incessantly the principles of good faith and *pacta sunt servanda.* No amount of ingenuity in devising procedural safeguards could hope to ensure that an arbitrary decision would not be taken when settling disputes on the law of treaties; only observance of the principle of good faith by the adjudicating body could afford genuine pro-

tection. Procedural provisions merely provided secondary safeguards against partiality or arbitrary action.

39. It was his delegation's hope that a negotiated solution, rather than a solution based on votes, would be arrived at with regard to the questions left outstanding at the close of the first session.

40. Mr. KRISHNA RAO (India) said that the views of the Indian Government on the question of the compulsory settlement of disputes arising out of the application of Part V of the draft were clear: it was neither able nor willing to bind itself and its successors in perpetuity to any form of automatic procedure for compulsory arbitration or adjudication.

41. India's record of respect for treaty obligations and the rule of law had been progressive and liberal, judged by any standards. At its birth as an independent sovereign State in 1947, India had voluntarily accepted all the pre-independence treaty obligations devolving upon it. Since then, India had become a party to many international conventions adopted under United Nations auspices and containing clauses on the compulsory settlement of disputes. Even where the settlement procedures were contained in an optional protocol, as in the case of the 1961 Vienna Convention on Diplomatic Relations, India had become a party to the Optional Protocol as well as the Convention. India had been among the first States to accept the compulsory jurisdiction both of the former Permanent Court of International Justice and of the International Court of Justice.

42. India was thus prepared to accept compulsory arbitration or adjudication where such compulsory procedures were accepted at the will of the parties in each specific case. It could not, however, accept the compulsory procedures now proposed for two main reasons. First, the proponents of these procedures had made it clear that they would not be subject to reservations. Secondly, the scope of application of the convention on the law of treaties would be qualitatively wider than the limited scope of other conventions adopted at the initiative of the United Nations. The Indian Government was not ready to accept an obligation for all time in respect of all treaties to be concluded in the future; it wished to retain the freedom to agree on the appropriate method of settlement in each case.

43. He was not convinced by the argument that if the provisions of article 62 did not lead to a settlement of the dispute, might would then prevail over right, thereby aggravating the insecurity of treaty obligations and the instability of international relations. It was an oversimplification to assert that peace and security would best be served simply by the acceptance of a compulsory settlement mechanism. They would in fact be best served by States conducting themselves in good faith, abiding by their treaty obligations and settling their disputes in an orderly and fair manner.

44. The discussion had shown that not all the powerful States refused compulsory arbitration and that not all the weak States supported it. Nor was the division one between progressive and reactionary States. States of the same size and importance situated in the same region of the globe held different views. The only conclusion that could be drawn from that state of affairs was that the question of the inclusion of article 62 *bis* was less important than had been suggested. The question of the settlement of disputes was not an essential feature of the convention.

45. Article 62, as approved at the first session, did not mean that States were free either to refuse to negotiate to settle a dispute or to negotiate with a closed mind. Parties must attempt in good faith to settle a dispute. In its judgement of 20 February 1969 in the *North Sea Continental Shelf* cases the International Court of Justice had declared: " the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation. . . . ", and that " they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it ".[5] The Court had explained that " this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted." [6] The Court had supported that conclusion by referring to the decisions of the Permanent Court of International Justice in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex* [7] and its Advisory Opinion of 1931 in the case of *Railway Traffic between Lithuania and Poland*.[8] If it were considered desirable, the substance of that recent ruling of the International Court of Justice could be incorporated in article 62. His own Government was not opposed to the principle of arbitration or adjudication and would resort to those methods of settlement in appropriate cases in agreement with the other parties concerned. It could not, however, agree to sign a blank cheque and bind its successors to automatic compulsory arbitration and adjudication.

46. It was for those reasons that his delegation, together with those of Indonesia, the United Republic of Tanzania and Yugoslavia, had proposed a sub-amendment (A/CONF.39/C.1/L.398) to the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). The sub-amendment would retain the nineteen-State text for article 62 *bis* as Part " B ". A new Part " A " would be added enabling parties to the convention on the law of treaties to declare that they accepted the provisions of Part " B ", either in whole or in part; those provisions would then apply between the parties making a similar declaration, with effect from the date of the receipt of each declaration by the

[5] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 47, para. 85.

[6] *Ibid.*, para. 86.

[7] *P.C.I.J.*, Series A, No. 22.

[8] *P.C.I.J.*, Series A/B, No. 42.

depositary. That proposal was intended to give freedom to the States parties to accept the procedure in article 62 *bis* in whole or in part. Among the parties making declarations to that effect, disputes relating to Part V would then be settled by the procedure prescribed in the nineteen-State amendment.

47. Mr. SECARIN (Romania) said that in 1966 the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had unanimously adopted a text on the principle that States should settle their international disputes by peaceful means. That text contained all the essential elements of any procedure of peaceful settlement, such as respect for the sovereign equality of States, free choice of means of settlement, concordance of those means with the circumstances and nature of the dispute and the duty of the parties to continue their efforts until a settlement was reached. According to the Special Committee's text, " States shall . . . seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice . . . ". The Special Committee had thus firmly adhered to the terms of Article 33 of the Charter, and had gone on to state that " the parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them ".[9]

48. To be effective, peaceful means of settlement must be chosen either at the time of the conclusion of a treaty or at the outset of a dispute. The parties were free to choose the means of settlement, either the means laid down in the Charter or any other on which they might agree. Accordingly, it seemed pointless to institute a definite procedure for all treaties, in all spheres, and for the entire treaty practice of States.

49. Experience had shown how difficult it was to establish any general system of procedure. That was illustrated by the fate of such instruments as the General Act for the Pacific Settlement of International Disputes of 1928 [10] and the International Law Commission's draft on arbitral procedure,[11] as well as by the attitude of States to compulsory jurisdiction clauses and to optional protocols for the compulsory settlement of disputes. In practice, States accepted one of the means of settlement provided for in Article 33 of the Charter. Treaties concluded by States showed that the parties tended to agree on negotiation, conciliation or arbitration, or systems combining two or more of those means.

50. Some representatives had argued that the provisions of Part V of the draft called for an immediately available procedure, in order to prevent abuse and arbitrary action. But the progressive development of international law did not necessarily call for the institution of procedural guarantees, especially when they seemed to be artificial ones. The articles in Part V were based on principles which had long been recognized in international law, such as freedom of consent and good faith, which were corollaries of State sovereignty, so their provisions could not be regarded as complete innovations. It might be best to allow State practice to prove the procedural system proposed by the International Law Commission.

51. It seemed unreasonable to see a threat to the stability of treaty relations in the fact that article 62 laid down rules based on the principle of free choice of means of settlement, which was unanimously recognized in international law. The development of treaty relations on the basis of the principles of morality and justice, mutual trust and respect, and good faith in the execution of obligations assumed under treaties freely consented to should give no cause for alarm, since the principles and rules laid down in the United Nations Charter, on which the International Law Commission had based its draft of article 62, offered adequate grounds for the settlement of any dispute whatsoever. If those principles were not respected in State practice, no improvement could be expected from instituting a pre-established procedural system.

52. Mr. BRODERICK (Liberia) said that there were two schools of thought on the question of the procedure to be followed by a party claiming the invalidity or termination of a treaty. The first favoured compulsory judicial settlement by the International Court of Justice, by an arbitral tribunal or by a conciliation commission, pursuant to the *pacta sunt servanda* principle; that course, it was maintained, would protect the sanctity of treaties. The second school favoured the provision set out in the International Law Commission's text. They maintained that States should take as their basis the general obligation to settle their international disputes by peaceful means in such a manner that international peace and security and justice were not endangered, and pointed out that neither the Geneva Conventions on the Law of the Sea nor the Vienna Conventions on Diplomatic and Consular Relations contained any provision for compulsory jurisdiction. While the claims of both schools of thought had merit, his delegation, after re-examining article 62 and the amendments to it, had reached the conclusion that the procedural safeguards proposed were inadequate.

53. His delegation appreciated the position taken by Japan with regard to disputes arising out of a claim under articles 50 or 61 of the convention, relating to a treaty conflicting with a peremptory norm of international law or of *jus cogens*. It would seem that the proper forum to settle such disputes should be the International Court of Justice, but there again the smaller nations, from past experience, had their fears; he referred in particular to the *South West Africa* cases. They feared that the more powerful nations might influence the decision of any judicial body, whether the International Court of Justice, an arbitral tribunal or a conciliation commission, and in those circumstances they would prefer to settle a dispute arising from the

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

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

[11] See 93rd meeting, footnotes 4 and 5.

claim of invalidity of a treaty by negotiation between themselves.

54. Mr. TOPANDE MAKOMBO (Central African Republic) said that his delegation's view was that article 62 *bis* was of capital importance to the entire convention. Article 62 was incomplete and, particularly with regard to the settlement of disputes, his delegation could not accept the International Law Commission's text since it would restrict action to the provisions of Article 33 of the Charter. In his view, Article 33 did not provide any guarantee in respect of procedure; such a guarantee was essential for the security of international treaty relations which could not be maintained without some compulsory jurisdiction to settle disputes. What had been left to chance in paragraph 3 of article 62 was clearly set out in the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) and its flexible and well-balanced provisions removed all doubts.

55. His delegation was well aware that the International Court of Justice was the principal judicial organ of the United Nations, but it had always had certain reservations concerning the Court because it considered its membership too narrow to represent adequately all the different legal systems of the world. The award given in the *South West Africa* cases had further strengthened his delegation's doubt, and it would oppose any reference being made to the International Court.

56. His delegation was unable to support either the Thai amendment (A/CONF.39/C.1/L.387) or the Spanish amendment (A/CONF.39/C.1/L.391), which removed all substance from the nineteen-State amendment. For the same reason, it could not support the amendments by Ceylon (A/CONF.39/C.1/L.395) and Luxembourg (A/CONF.39/C.1/L.397). Neither could it support the proposal submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) since it tended to dissociate Part V of the draft from the procedure for the settlement of disputes, which should form an integral part of Part V.

57. Mr. SOLHEIM (Norway) said that his delegation still believed that the only just way of settling treaty disputes between States, if conciliation did not lead to acceptable results, was by some compulsory judicial procedure before an independent third party, and that it would be best if that party were the International Court of Justice. There could be no doubt that, in the cases referred to in sub-paragraph 3(*a*) of the Japanese amendment (A/CONF.39/C.1/L.339), disputes relating to claims under article 50 or article 61 of the convention should be brought before the International Court of Justice. His delegation would support the Japanese amendment, which it considered very valuable. It was also in favour of the Swiss amendment (A/CONF.39/C.1/L.377) and would vote for it.

58. His delegation's views as to what the shortcomings of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) were must be obvious from its statement at the first session [12] and from what he had just said. It should be remembered, however, that that proposal was a compromise, and his delegation was prepared, in a spirit of compromise, to vote for it, while emphasizing that it contained only the very minimum acceptable to his delegation.

59. He did not share the Brazilian representative's fear that adoption of the nineteen-State proposal would involve the United Nations in undue expense since, first, there would not be a great many cases to be dealt with, and secondly, the parties would have to bear their own costs while the United Nations would only have to meet the costs of the arbitral tribunal.

60. He appreciated the creative effort made by the Spanish delegation in submitting a new proposal (A/CONF.39/C.1/L.391), but, for the reasons already given by other representatives, his delegation thought that the proposal would give rise to serious difficulties and it therefore could not support it. His delegation had serious objections to the amendment by Thailand (A/CONF.39/C.1/L.387), the adoption of which would be tantamount to removing from the convention what had just been incorporated in it. In his delegation's view the proposal submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) would have exactly the same effect as an optional clause and his delegation would vote against it. On the other hand, it would support the Swiss proposal for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1).

61. It was generally agreed that it was the constitutional character of the draft convention which made it imperative to have some machinery for the peaceful and compulsory settlement of disputes arising from its interpretation and application. It was the possibility of unilateral resort to Part V of the convention as a means of invalidating treaties which gave the problem its importance, but also circumscribed it. The crucial articles would be articles 45, 46, 47 and 48, and, in particular, articles 49, 50, 61 and 59. Normally in international life, the majority of treaties to which a State became party were negotiated by able and skilful people, were freely entered into, contained safeguarding clauses in the most important cases, and provided for termination upon notice in an orderly manner. That procedure and machinery tended to reduce considerably the number of treaties where a party might be inclined to try to make use of the provisions of Part V of the draft, with the exception perhaps of article 59. There were also cases in which the parties, when they found that some change had to be made in their treaty relations, came together in an effort to find a solution to their differences and he could cite numerous cases in which that was being done. A further important element restricting the applicability of the present convention would be the non-retroactivity of its provisions.

62. There remained some potential problems caused by an important group of treaties such as perpetual treaties with no provisions regarding termination, denunciation or withdrawal, for example, treaties establishing boundaries between States or peace and armistice treaties. The stability of treaty relations in that field was of course

[12] See 69th meeting, paras. 17-21.

of the utmost importance. That did not mean to say that such treaties could never be invalidated but, because of their importance, it was essential that any steps taken to invalidate them must follow an established procedure leading to a just and impartial final settlement.

63. His delegation was willing to accept the compromise formula of the nineteen-State amendment, even if only as an intermediate step towards more general acceptance of the compulsory jurisdiction of the International Court of Justice.

64. Mr. DIOP (Senegal) said that his delegation accepted the introduction of the concept of the invalidity of treaties in the draft convention, provided it was accompanied by a clear definition of the various causes of invalidity, and an arbitration or adjudication procedure of guaranteed impartiality to act as the final arbiter in cases of dispute. His delegation's attitude to the various proposals before the Committee would be decided in the light of those principles.

65. With regard to the Japanese amendment (A/CONF.39/C.1/L.339), his delegation fully appreciated the work of the International Court of Justice, but had some hesitation about establishing machinery which would give sole and compulsory jurisdiction to the Court in respect of disputes arising under articles 50 or 61 of the convention. His delegation did not support the distinction established by the Japanese amendment between disputes under articles 50 and 61 and other disputes, and it was moreover a firm believer in conciliation, to which the Japanese amendment paid scant attention. Consequently, his delegation could not support that amendment.

66. The Swiss amendment (A/CONF.39/C.1/L.377) had the advantage of allowing for the establishment of an arbitral tribunal in addition to reference to the International Court, but did not enlarge sufficiently on conciliation procedure. It would be more acceptable if its stages were placed in reverse order beginning with conciliation, then arbitration and finally, reference to the International Court. His delegation also disliked the proposed composition of the arbitral tribunal and the method of appointing its members, and so, while recognizing its merits, it was unable to support the Swiss amendment. He had noted with interest the Swiss representative's suggestion regarding the possibility of prior agreement between the parties on legal costs and advocating the establishment of an international legal aid fund. That would certainly help to ensure equal access by all States to international tribunals.

67. He appreciated the sentiments underlying the Spanish amendment (A/CONF.39/L.391), but he could not support the establishment of such complicated machinery. His delegation would vote against the Spanish amendment and also against the Thai amendment (A/CONF.39/C.1/L.387) which would destroy the substance of article 62 *bis*. The same applied to the amendment by Luxembourg (A/CONF.39/C.1/L.397). The amendment just proposed by the delegations of India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/L.398) required further study before he could give his delegation's view on it.

68. His delegation would support the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which was a substantial improvement on the text submitted at the previous session. It would be still further improved if the proposal by the representative of Pakistan regarding appropriate measures to be taken while awaiting the solution of a dispute [13] were accepted by the sponsors of the amendment. His delegation firmly supported the Pakistan representative's proposal and hoped the Drafting Committee would find a way of incorporating it in the nineteen-State amendment.

69. His delegation was strongly in favour of the inclusion of an article 62 *bis*, despite the objections raised by certain representatives. It had been claimed that article 62 as drafted by the International Law Commission represented a compromise. But in his delegation's view, any compromise must be between articles 59, 61 and 62 on the one hand, and an article 62 *bis* which provided guarantees, on the other. As to the objection concerning the autonomy of the parties, who must be allowed free choice of the means of peaceful settlement of disputes, his delegation thought that such free choice might end in the imposition of the will of the stronger party, in the absence of any automatic machinery for a compulsory impartial settlement. With regard to the objection based on the absence of similar clauses in other conventions, his delegation agreed with the view of the representatives of Switzerland and Sweden that the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations were of a different character from the present convention. His delegation was surprised at the suggestion that the introduction of compulsory machinery for the settlement of disputes would constitute an attack on the sovereignty of States. By agreeing in the Preamble to the Charter " to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ", States had agreed to collaborate in order to ensure that the rules of law and justice should prevail.

70. He hoped the Swiss delegation would consider amalgamating its proposal (A/CONF.39/C.1/L.377) with the nineteen-State proposal; the result would be an eminently satisfactory text.

The meeting rose at 6.5 p.m.

[13] See 94th meeting, para. 87.

NINETY-SEVENTH MEETING

Monday, 21 April 1969, at 8.40 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)*