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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)*

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

1. Miss LAURENS (Indonesia) said that her delegation had explained at the first session why it could not accept compulsory procedures for the settlement of disputes arising from Part V of the convention. It was not convinced by the arguments advanced in favour of such procedures, and did not believe it was wise to decide in advance on specific means of settling any dispute, relating to any type of treaty, that might arise from Part V. Disputes between two States were rarely of a purely legal character. Each treaty should have its own provisions for the settlement of disputes; where a treaty did not so provide, it should be left to the parties to the treaty concerned to decide on the procedure to be followed. Voluntary agreement on procedure would smooth the way to settlement of the dispute, while any attempt to force the issue might do more harm than good. To leave the parties free to choose the means of settlement was in harmony with the Indonesian tradition of solving issues through negotiation.

2. Some speakers had claimed that compulsory settlement of disputes would be in the best interests of the smaller and weaker countries, but it was unreasonable to force protection on those who were at present reluctant to accept it. The logical solution was to allow those who wanted compulsory machinery to have it, and to let those who did not want it do without it until practical results persuaded them that it was worth accepting. Those who advocated it could ensure that provisions for the compulsory settlement of disputes were included in any future treaties they concluded, and thus gradually extend the application of the principle of compulsory settlement.

3. Indonesia was ready to support any proposal to make the procedure envisaged in article 62 *bis* optional, and had accordingly agreed to co-sponsor the four-State amendment (A/CONF.39/C.1/L.398), which might prove to be the best solution to the problem.

4. Mr. DEJANY (Saudi Arabia) said that article 62 as drafted by the International Law Commission provided a satisfactory and realistic procedure. It was the outcome of years of work by a distinguished group of jurists representing different legal systems and points of view, who had taken into account comments made by a large number of Governments. It represented the highest measure of common ground that could be found in the Commission and among Governments. It was not perfect, and it might not suit the needs of every State, but it was more realistic than any of the other proposals made. None of the various proposals for a new article 62 *bis* providing for the compulsory settlement of disputes seemed to be acceptable to a sufficiently large majority of States. Many States, including his own, opposed the inclusion in the convention of the principle of compulsory settlement of disputes, which would then become a hard and fast rule governing all kinds of treaties for all time. States had their own good reasons for rejecting compulsory solutions, and it was wrong to imply that the aim was to evade justice. Many States that were against the inclusion of a blanket provision in the convention might agree to the inclusion of a provision for compulsory settlement in individual treaties. If pressure was eliminated there might be a surprising development of the voluntary adoption of the principle in many treaties. The parties had the right, and should be afforded the opportunity, of considering each treaty in the light of its special circumstances. It was much more likely that progress would be achieved in that way, through friendly negotiation, than through an attempt to impose a rigid formula for all time.

5. It had been suggested in connexion with the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2) that a compulsory settlement procedure would deter a State from unilaterally denouncing or withdrawing from a treaty on insufficient grounds or from raising unreasonable objections, because unfounded arguments would not prevail before an objective arbitral body. While some States might be deterred, many on the contrary might feel encouraged in that they had nothing to lose by going through a lengthy and complicated procedure, particularly since most of the cost was shared among the Member States of the United Nations. A developed country might well take that view in a dispute with a developing country, and consequently it was doubtful whether the machinery proposed would really provide a fair chance for all countries. He doubted whether adequate and serious consideration had been given to the heavy cost of setting up and operating the proposed machinery in the light of the current drive to cut down United Nations expenditure. In view of the strong opposition to the procedure by so many States, it was only reasonable that the cost should be shared only among the countries that supported it. Possibly the parties to a dispute should bear the additional expense of the arbitral tribunal, and it would not be illogical to charge that expenditure to the party against which the final decision was made, for that would undoubtedly deter parties with unfounded claims from taking action.

6. On the whole, current treaty relations among States were fairly satisfactory; it was not certain that there would be any marked deterioration if article 62 *bis* were not adopted. If any State had good grounds for declaring a treaty invalid or withdrawing from it, it would be just as possible to make out a convincing case before an arbitral tribunal now as it would be after the convention had come into force. The possibility of invalidating treaties under Part V had been exaggerated. Disputes between States concerning treaties would continue to arise, and would no doubt be resolved by the parties on the basis of good faith and common interests, as they had been in the past; disputes that remained unsettled for long periods must be regarded as exceptions.

7. His delegation would therefore be unable to support any of the proposals providing for the compulsory settlement of disputes, and would vote against them. Since one large group of States was in favour of the procedure, and another large group opposed it, the best solution would be to incorporate it in an optional protocol. Compulsory settlement would then be the rule among the group of States in favour of it, and they

could further extend the application of the principle by introducing it into any treaties they concluded in the future. Such an optional protocol could always be accepted subsequently by other States, particularly if experience showed it to be as successful as the advocates of compulsory settlement expected. Only a limited number of treaties would thus remain outside the new jurisdiction, but even they would be governed by the compromise formula proposed by the International Law Commission. If the joint draft proposal was found unacceptable on the grounds of the cost or complication of the proposed new machinery, the convention could include an optional protocol providing that disputes should be referred to the International Court of Justice, as in the Convention on Diplomatic Relations.

8. If article 62 *bis* was adopted, Saudi Arabia would vote for the proposal by Thailand (A/CONF.39/C.1/L.387), since it might enable States to become parties to the convention which would otherwise be unable to do so if it included a provision on compulsory settlement of disputes.

9. His delegation wished to study further the four-State proposal (A/CONF.39/C.1/398), since it was not clear in some respects, especially with regard to the legal obligations of the parties to the convention prior to the notification to the depositary.

10. Mr. AMATAYAKUL (Thailand) said that his delegation's sole aim in submitting its proposal for a reservation clause to article 62 *bis* was to offer a compromise solution. Representatives would not be fulfilling their task at the Conference if they did not provide a solution acceptable to the great majority of States. Any pressure brought to bear in order to obtain an extreme solution of the question of settling disputes arising under Part V of the convention would jeopardize the work so far accomplished.

11. A solution should be sought in the terms of Article 2(3) of the United Nations Charter, providing that States must settle their disputes by peaceful means, which were enumerated in Article 33 of the Charter. In that connexion, the International Law Commission had wisely refrained from setting up machinery for compulsory adjudication. The wording it proposed reflected international opinion and practice and was based on the principle of good faith laid down in Article 2(2) of the Charter. The information provided by the representative of Venezuela showed that the majority of States had so far refused to accept the principle of compulsory adjudication.

12. The Thai delegation would not oppose an attempt to go beyond the International Law Commission's formula, and had proposed a reservation clause, the effect of which was that compulsory adjudication, in whatever form it might be accepted, would be applicable in the case of States which considered it beneficial and necessary, while the International Law Commission's formula in article 62 would be applicable among States making reservations to compulsory adjudication. Both systems could be applied separately to the two categories of States parties to the convention; there was no basis for the argument advanced by some speakers that the adoption of the proposed reservation clause would vitiate article 62.

13. The proposal by India, Indonesia, the United Republic of Tanzania and Yugoslavia (A/CONF.39/C.1/398) offered a compromise solution similar in effect to the Thai proposal. The only difference was in the procedure applied, which made the acceptance of compulsory jurisdiction optional at a later stage. In other words, it followed the lines of an optional protocol.

14. His delegation was prepared to support any proposal that might lead to a way of solving the problem of article 62 *bis* that would be generally acceptable. If no solution could be reached, it would be compelled to vote for article 62 as submitted by the International Law Commission.

15. Mr. REY (Monaco) said that so far custom had been the only source from which the law of treaties sprang. That law had steadily progressed and developed, and had led to the creation of the international institutions of the present century. Since 1949, the International Law Commission had been engaged on the codification of the law of treaties. The draft convention before the Conference contained only two or three matters of major importance, one of which was the question of compulsory recourse to impartial adjudication. The Conference was bound to fail if an acceptable solution to that question could not be found.

16. In the absence of any possibility of taking specific principles of international law as a basis, the Conference had for two sessions assimilated *jus cogens* with natural law and the concept of a universal public policy. That was perfectly logical, but why should the process stop there? Why should a contracting State be refused the right to seek redress? The argument that the principle of the sovereign equality of States would be infringed was not valid, since all that was involved was the continued application of an agreement to which a sovereign State had freely consented or the termination of a treaty precisely because it had not been freely consented to. State sovereignty had everything to gain from the introduction of rules based on morality into the law of treaties and from the upholding of those rules by a judge or arbitrator. The argument that the principle of justice should be rejected on the pretext that judicial errors had been committed in the past and that it was impossible to obtain any assurance in advance of the wisdom of the award was surely specious. Application of the new peremptory rules in Part V of the convention required the appointment of an arbitrator who would decide on the facts invoked by the parties to a dispute before applying the new law. What had to be determined was the body which offered the best guarantee of competence, speed and impartiality. The nineteen-State proposal suggested compulsory arbitration, while Switzerland and Japan proposed a further alternative, namely recourse to the International Court of Justice.

17. His delegation had no objection in principle to arbitration by an *ad hoc* commission, but great care would be necessary in drawing up the rules governing its com-

position, jurisdiction and procedure. In his view, the proposal could be improved and simplified.

18. Serious consideration ought to be given to the suggestion that disputes arising from the application of Part V of the convention should be brought before the International Court of Justice. The Court was the principal legal organ of the United Nations and its members were eminent jurists, even if their judgements did not always satisfy everyone. Moreover, it would soon come to represent almost exclusively the States which at present criticized it, since they constituted a majority in the United Nations, and the future membership of the Court would provide them with an opportunity to take part in formulating international law and jurisprudence.

19. For the reasons given, Monaco supported the principle of compulsory arbitration following an attempt at conciliation. Of the proposals before the Committee it preferred the amendments submitted by Switzerland (A/CONF.39/C.1/L.377) and Japan (A/CONF.39/C.1/L.339) because they provided a further alternative. Any other attitude would inevitably help to bring about the failure of a worthy attempt at the codification of international law.

20. Mr. MOLINA ORANTES (Guatemala) said that his delegation viewed with sympathy the various proposals to include a new article 62 *bis,* as otherwise article 62 would remain ineffective.

21. The Central American countries had supported the principle of compulsory international judicial settlement since 1907, when they had set up the first International Court with compulsory jurisdiction over the member States. Moreover, there were a number of treaties in force between the Central American States which provided for the compulsory settlement of disputes by conciliation and arbitration, notably in the case of disputes arising from the process of economic integration into the Central American Common Market.

22. It was a source of frustration to Guatemala that its most important international claim, which had its source in an unjust treaty, had remained unsettled for over a century, precisely because of the lack of effective international machinery for obtaining justice. It hoped that the Conference would go down in history as the one which had established compulsory international adjudication for all States.

23. Guatemala preferred the proposal embodied in the nineteen-State amendment (A/CONF.39/C.1/352/Rev.3 and Corr.1 and Add.1 and 2), as it provided the simplest, most practical and least costly solution with respect both to conciliation and arbitration.

24. Nevertheless, some aspects of the proposal were not clear, especially with regard to the law to be applied, a matter which seemed to be left to the discretion of the Secretary-General of the United Nations. His delegation was not sure whether it was proposed to leave open the possibility of deciding claims about the invalidity of treaties *ex aequo et bono,* or whether on the contrary the only rules applicable were those laid down in articles 27 and 28, on interpretation. In the latter case the arbitral procedure would be unduly rigid. His delegation was convinced that the *ex aequo et bono* procedure was often indispensable in order to arrive at a just settlement of disputes between States.

25. The usual practice in arbitration was for the parties to agree in advance on the arbitrators and on the terms of reference on which their decisions should be based. There should also be prior agreement on the specific questions to be referred for arbitration. His delegation did not believe that the Secretary-General of the United Nations, despite his high qualities, could provide any substitute for such prior agreement. It was also normal for agreements on arbitration to include the sources of law to be applied by the arbitrators in reaching their decisions; that applied with particular force when the question was one of interpreting a treaty claimed to be invalid. The sources were listed in detail in Article 38 of the Statute of the International Court of Justice, which also provided for the possibility of a decision *ex aequo et bono.*

26. His delegation accordingly hoped that, before any final decision was taken on the proposal for a new article 62 *bis,* a revised text could be prepared to take account of the comments made by the various delegations, including his own. That would greatly facilitate the acceptance of a provision on compulsory settlement of disputes, which Guatemala strongly supported.

27. Mr. BILOA TANG (Cameroon) said that his delegation had reservations about any proposal which referred specifically to the International Court of Justice as the body before which disputes arising under Part V of the Convention should be brought. It also objected to any proposal which limited the effects of the provisions of article 62 *bis.* Nor could it support the creation of a new United Nations organ for conciliation. Nevertheless, it considered that the nineteen-State amendment provided a possible basis for discussion. It should be borne in mind, however, that conciliation and arbitration were not essentially the same thing, and his delegation therefore hoped that provision would be made not only for conciliators but also for arbitrators, a practice followed in connexion with the International Bank for Reconstruction and Development. Moreover, conciliators should be appointed not by all the States Members of the United Nations, but only by the States parties to the convention on the law of treaties. With regard to the period laid down for the appointment of arbitrators, it was unfortunate that the period of three months provided for in the original version of the nineteen-State amendment had since been reduced to sixty days. Again, intervention by the Secretary-General of the United Nations, should be subject to consultation with the parties to a dispute and to their consent. Lastly, the Cameroonian delegation was glad to note that the intervention of the parties to the treaty over which there was a dispute had been made subject to the consent of the parties to that dispute.

28. Mr. MERON (Israel) said that two main courses of action were open to the Committee. It could either be satisfied with the International Law Commission's text of article 62 or choose one of the proposals for a

new article 62 *bis* on the treatment of disputes arising under Part V of the convention.

29. The Japanese proposal (A/CONF.39/C.1/L.339) distinguished between claims made under articles 50 and 61 of the convention and other claims involving the invalidity, termination and suspension of treaties. His delegation was not convinced that the different treatment of disputes concerning *jus cogens* and other disputes was realistic. It did not think that judicial or arbitral bodies should exercise what in effect amounted to the legislative function of establishing norms of *jus cogens*. Underlying the debate in the Committee was the assumption that disputes arising out of claims of invalidity, termination and suspension of the operation of treaties were by definition legal disputes, amenable to a compulsory settlement by adjudication or arbitration. Was that assumption entirely correct? In a way, of course, all disputes between States contained both political and legal elements. The predominance of one element over the other and the question whether a dispute was political or legal depended on all the circumstances of the dispute, its contexts, and the general relations between the parties; in short, it depended on the attitude of the parties.

30. That had been recognized in the proposal by Spain (A/CONF.39/C.1/391). Although Israel had considerable doubts about the machinery which the proposal would establish, and in particular did not consider that the idea of entrusting the proposed commission with the determination of the legal or political character of a dispute was tenable, it seemed to him significant that the proposal admitted that disputes arising under Part V could be political in nature and not amenable to compulsory arbitration. His delegation believed that the States concerned should themselves in good faith settle disputes arising out of treaties and decide which disputes were to be submitted to arbitration.

31. The Israel delegation had already pointed out at the first session of the Conference that disputes arising out of the application of Part V would, in reality, relate not to the present convention but to quite a different treaty. They would arise in distinct and concrete political circumstances, and determination in advance of rigid settlement procedures might be undesirable. The proposals for the compulsory settlement of disputes arising in connexion with Part V were therefore unprecedented in their generality when compared to other provisions bearing on the settlement of disputes and contained in multilateral treaties concluded under the auspices of the United Nations. When relations between the States concerned were normal, disputes arising out of treaties could be effectively dealt with and settled without the need for arbitration or adjudication, by routine diplomatic or other procedures or by agreement on the choice of the means of settlement which could, of course, include arbitration or adjudication. However, when the will to establish or to maintain friendly relations was lacking, when there was grave political tension, the operation of normal procedures for the settlement of disputes between States was impaired and compulsory judicial or arbitral settlement would then at best superficially and formally solve certain technical problems without significantly contributing to the elimination of the real source of the dispute.

32. All the proposals for a new article 62 *bis* sought to establish new procedures and organs of conciliation or arbitration. The financial implications of those proposals should be carefully considered. There was already an abundance of organs and procedures for the settlement of disputes. The International Court of Justice and the Permanent Court of Arbitration at The Hague were cases in point. The difficulty lay not in the scarcity of organs but in the reluctance to make full use of those which existed.

33. The history of international law showed clearly that the development of the substantive rules of international law was not contingent on the development of procedural rules. By insisting now on linking the substantive development of the law of treaties with the compulsory settlement of disputes connected with Part V the Conference might be over-ambitious and endanger the important step forward which the international community of nations would be taking in adopting the convention on the law of treaties.

34. The proposals for article 62 *bis,* by establishing a predetermined method of settlement, might reduce the incentive to solve a dispute through normal diplomatic channels, since the objecting State could count on compulsory third-party determination.

35. His delegation believed that the parties to a dispute should choose the settlement procedure which they preferred. The history of the consideration of the problem of compulsory judicial settlement by the International Law Commission in its work on the law of treaties should not be disregarded. The Commission had concluded that its proposed article 62 represented the highest measure of common ground that could be found on the question. The Commission's proposal was realistic and more in accordance with the principle of equality of States than the proposals for a new article 62 *bis*. The Israel delegation was therefore unable to support any of those proposals. On the other hand, it would support the Swiss proposals for a new article 62 *quater* (A/CONF.39/C.1/L.393/Corr.1). The proposal gave expression to the important principle of the autonomy of the parties and made it clear that the proposed means of settlement should not prejudice the provisions contained in other conventions regarding the means of settlement preferred by the parties. Perhaps the Swiss delegation would consider broadening the scope of the amendment so that it would apply to the convention as a whole and not merely to article 62 *bis*. In that case, the proposed article should be placed elsewhere in the convention.

36. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that the Conference had now reached the crucial point when it must determine the most effective means of settling disputes between the parties to a treaty. Respect for treaties was the touchstone for all international relations, which were based on law rather than on the free and subjective interpretation of individual States, and his delegation considered that a codification of the law of treaties must contain complete, detailed and precise

provisions concerning the remedies open to a party when it found itself injured by the non-application or suspension of a treaty.

37. In order to safeguard the application of treaties, as well as the stability of international relations in general, there should be an adequate procedure in case of dispute, in order to discourage the unilateral denunciation of treaties in bad faith. His delegation took the view that that purpose could best be served by a provision for automatic and compulsory arbitration. It was therefore prepared to support the proposal for a new article 62 bis contained in the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

38. Treaties could, of course, be denounced in bad faith by any State, whether large or small, but a provision similar to that proposed in the new article 62 *bis* was clearly necessary in order to protect the smaller powers against arbitrary action by great powers. A procedure providing for conciliation or arbitration would also provide an automatic and compulsory method of settling disputes among the great powers which, if unchecked, might lead to a world conflagration. It was unnecessary to remind the Committee of how often in world history the unilateral denunciation of international treaties, without recourse to conciliation and arbitration, had proved harmful to peace.

39. His delegation unreservedly subscribed to the provisions of article 39, paragraph 2, according to which a treaty could be terminated or denounced or withdrawn from by a party " only as a result of the application of the terms of the treaty or of the present articles ". As a logical consequence of that paragraph, it was now necessary to determine exactly how a dispute arising from the non-application of a treaty should be settled. It was true that article 62 provided for such settlement by referring to Article 33 of the United Nations Charter; but since article 62 did not expressly state that arbitration and conciliation were to be compulsory and automatic, it left the door open to subjective interpretations which would tend to increase rather than diminish disputes between signatory States. The proposed article 62 *bis,* however, by providing for compulsory conciliation and arbitration, would put an end to disputes arising from the unilateral denunciation of a treaty, or at least prevent such disputes from having more serious consequences.

40. His delegation was not convinced that freedom to choose the methods of settling a dispute should be left to the parties themselves, since once passions had been aroused it would be difficult for them to listen to the voice of reason without some compulsory mechanism for impartial arbitration.

41. The representatives of the Ivory Coast and Senegal had refuted the objections made to article 62 *bis* and had clearly shown that the nineteen-State proposal offered the best solution to the problem. His delegation was however prepared to support any other amendment which would respect the principle of automatic and compulsory arbitration and conciliation.

42. Mr. FLEISCHHAUER (Federal Republic of Germany) said that, during the first session, his delegation had stated that it regarded the inclusion of a specific provision for the settlement of disputes arising out of Part V by automatically available machinery as necessary, since in its view the provisions of Part V were so far-reaching and in many respects so open to divergent interpretations that the codification and progressive development of that part of international law could not be limited to the formulation of substantive rules but should find its corollary in specific judicial procedures.

43. His delegation had not been convinced by any of the arguments advanced against automatic third-party settlement during the discussion of the proposed new article 62 *bis*. It failed to see why there should be any contradiction between such judicial procedures and the principles of the United Nations Charter. Article 92 of the Charter stated that the Statute of the International Court of Justice formed an integral part of the Charter, alhough the ultimate aim of the Statute was clearly an over-all system of compulsory jurisdiction.

44. It was also hard to understand how the establishment of those procedures could be said to place undue limitations on the sovereignty of States; his delegation regarded them as an important means of protecting the sovereignty of smaller States. It could not accept the argument that disputes arising out of Part V of the convention would not be primarily legal disputes and that there was therefore no need for a specific judicial settlement procedure. Nor could it agree with the view that no provision should be made for judicial procedures because articles like article 50 could not be interpreted by judges since they could not have any part in determining the content of new concepts of law.

45. International treaty practice had been advanced as an argument against compulsory procedures, and it was true that treaties providing for such procedures had rarely been concluded on a world-wide basis in recent years; the normal course had been to provide for optional protocols. But never since the adoption of the United Nations Charter had there been a convention which went closer to the very roots of international law than the present convention, especially its Part V, and for that very reason the adoption of an optional protocol would not be sufficient in the case of Part V. The far-reaching effects which Part V might have made it equally impossible to follow the Israel representative's suggestion and leave the procedure for the settlement of disputes to a different treaty dealing with the settlement of disputes in general.

46. As to the cost argument, his delegation was very much in agreement with what had been said by the Swedish representative; it also found the solution mentioned by the representative of Switzerland interesting. Prolonged uncertainty over the fate of a treaty might prove even more costly than the third-party procedure.

47. His delegation would prefer a procedure which provided for judicial settlement by the International Court of Justice; it was aware, however, that such a solution would not be acceptable to a large number of States. Although it regarded the Japanese proposal (A/

CONF.39/C.1/L.339) as the most suitable and although it could also support the Swiss amendment (A/CONF.39/C.1/L.377), it was prepared to consider other proposals, provided that the principle of automatically available judicial settlement was maintained as a binding rule for all parties and not merely as an optional protocol.

48. Of the two proposals for the settlement of disputes by other means than the International Court of Justice, his delegation favoured the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2). By providing for a conciliation stage, followed by recourse to an arbitral tribunal if necessary, that proposal constituted a sensible basis for compromise. His delegation would have preferred to see a commission established, at least for disputes arising out of such fundamental articles as articles 50 and 61, but it was prepared to accept the relevant provisions of the nineteen-State draft. It was also prepared to accept the provisions of that draft concerning multilateral treaties, although it would have preferred to see the provisions of the Statute of the International Court of Justice on intervention by third parties copied in the nineteen-State proposal.

49. On the subject of the Spanish proposal (A/CONF.39/C.1/L.391), his delegation wondered whether it was not premature to provide for a " United Nations Commission for Treaties " which would have the final word on whether a dispute was of a legal or of a political nature.

50. His delegation whole-heartedly supported the Swiss amendment (A/CONF.39/C.1/L.393/Corr.1) for a new article 62 *quater,* as well as the Ceylonese proposal (A/CONF.39/C.1/L.395), although it regarded that proposal rather as a useful clarification than as a new rule, since the convention was of a dispositive character wherever it did not codify rules of *jus cogens.*

51. He was unable to support the amendment by Thailand (A/CONF.39/C.1/L.387), which his delegation considered to be hardly compatible with the object and purpose of Part V. It was confirmed in that opinion by the Luxembourg amendment (A/CONF.39/C.1/L.397), although it considered that a decision should not be taken on that amendment until the Conference had a clearer view of article 62 *bis* and perhaps also of the final clauses with regard to reservations in general.

52. His delegation was opposed to the four-State amendment (A/CONF.39/C.1/L.398), which would transform article 62 *bis* into an optional provision. The Indian representative had referred to the *North Sea Continental Shelf* cases and had quoted from the judgement of the International Court of Justice, but he would point out that the Court had not discussed negotiation as a means of settlement, as opposed to compulsory jurisdiction; it had made its statement rather in relation to agreements concluded between the three parties to the dispute to continue their negotiations on the basis of the judgement. Important as those findings of the Court were, he did not think that conclusions could be drawn from them with regard to article 62 *bis.*

53. Mr. KHASHBAT (Mongolia) said that any proposals relating to article 62 should be drafted in such a way as to take account of the various legal systems of different States. It was important to establish what solution was best suited to the present practice of States. The adoption of any formula that reflected the views of only a limited number of States or a particular legal system would make the application of Part V of the convention ineffective, and would be detrimental to the application of the convention as a whole. His delegation believed that the International Law Commission's formula as adopted at the first session provided the most realistic solution. It was in accordance with such basic principles of international law as the sovereignty of States, good faith in the execution of international obligations, and the peaceful settlement of disputes. The application of those principles provided a safeguard against any arbitrary action in relation to Part V of the convention. The Commission's draft of article 62 was not perfect, but that was because it represented the greatest measure of agreement between different points of view. Moreover the Commission had been quite correct to refer to Article 33 of the Charter, since any attempt to go beyond the provisions of the Charter would be unacceptable. The most suitable pacific means of settling a dispute could be chosen in the light of the nature of the problem.

54. Experience showed that the most democratic means of settling international disputes, namely, negotiation, was usually the most effective. There was no reason for assuming that a solution arrived at in that way was necessarily unjust, and it was wrong to make such an assertion about means that were suggested in Article 33 of the Charter. Arbitration in accordance with the will of one of the parties should not be suggested as the only means of settling a dispute, since it could lead to the violation of the sovereignty of the parties, which might not accept the decision of the tribunal. It was noteworthy that Article 36, paragraph 1 of the Statute of the International Court of Justice provided that the jurisdiction of the Court comprised all cases which the parties referred to it, in other words, the consent of all the parties was required.

55. Consequently his delegation could not support the proposal to include an article 62 *bis,* and would vote against any amendment providing for compulsory jurisdiction with respect to Part V.

56. His delegation supported the four-State proposal in document A/CONF.39/C.1/L.397, which was in accordance with Mongolia's view that the parties should have the right of free choice of the means of settling their disputes.

57. Mr. HUBERT (France) said that his country had always regarded arbitration as the supreme method of settling disputes, since it possessed two great virtues: first, it ensured complete equality between all States, whether large or small; secondly, it offered the possibility of a complete settlement, something which could not always be provided by conciliation alone.

58. The present draft articles contained a number of new and difficult provisions, some of which lacked precision and might easily lead to disputes. Failure to

include a rule concerning compulsory arbitration would therefore leave a serious gap which would affect the balance of the convention as a whole, with the result that it would be impossible for his Government to accept it.

59. His delegation could not accept the amendment proposed by Thailand (A/CONF.39/C.1/L.387) or the four-State amendment (A/CONF.39/C.1/L.398), and it questioned whether the amendment proposed by Ceylon (A/CONF.39/C.1/L.395) was really necessary.

60. The Japanese amendment (A/CONF.39/C.1/L.339) gave a monopoly to the International Court of Justice in cases involving articles 50 and 61, while the Swiss amendment (A/CONF.39/C.1/L.377) was more flexible. His delegation was prepared to vote for both; if they were rejected, the Committee would be left with the Spanish amendment and the nineteen-State amendment. The Spanish amendment (A/CONF.39/C.1/L.391) displayed great legal skill, but was perhaps rather too cumbersome.

61. Since his delegation strongly supported the principle of arbitration, it would support the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), although it tended to give the Secretary-General quasi-judicial powers which were perhaps greater than what was envisaged in the Charter, and did not ensure that the conciliation procedure had the necessary confidential character.

The meeting rose at 10.35 p.m.

NINETY-EIGHTH MEETING

Tuesday, 22 April 1969, at 11 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. WARIOBA (United Republic of Tanzania) said that the debate on article 62 *bis* had convinced him of the impossibility of resolving, either by argument alone or by parliamentary manœuvre, the sharp division of opinion in the Committee. Certain delegations had made it clear, in some cases repeatedly, that their Governments could not ratify a convention which did not contain a provision of the kind proposed in article 62 *bis*, whereas others had said that a provision of that kind would make it difficult for their Governments to adopt the convention. In both cases, the work of the Conference would ultimately be frustrated either intentionally or unintentionally.

2. Yet it was still of paramount importance that the convention should be ratified by as many States as possible, and to that end, as he had already said at the 90th meeting,[1] individual interests would have to be overridden. That was the spirit in which his delegation had agreed to co-sponsor the sub-amendment (A/CONF.39/C.1/L.398) to the nineteen-State proposal for article 62 *bis* (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2).

3. The fact that the new amendment made it optional to apply the procedure for the settlement of disputes arising from the application of Part V of the convention on the law of treaties was not the only reason why his delegation had agreed to co-sponsor it. His delegation continued to believe that any automatic machinery for compulsory settlement would be illusory and it had the same doubts and reservations as it had expressed at the 93rd meeting[2] about the procedures envisaged in the nineteen-State proposal. Moreover, there was also a possibility that the competent organs of the United Nations might refuse to meet the cost of the bodies it was proposed to set up.

4. But above all the United Republic of Tanzania wished to see a spirit of compromise prevail. As the Indian representative had said, an empty victory would be useless. The United Republic of Tanzania hoped that other delegations would reconsider their position in the same spirit. His own delegation was fully prepared to consider suggestions which would improve the wording of its sub-amendment.

5. Mr. KEARNEY (United States of America) said that from the beginning of the discussion on article 62 his delegation had expressed its concern about the provisions of Part V of the draft articles, which were susceptible of unilateral abuse. An arbitrary decision by a State that a treaty was invalid might lead not only to injustice in individual cases but also to quarrels which could be a threat to peace.

6. Unless accompanied by some other provision, article 62 would give parties unrestricted freedom for abusive action, and would thus constitute a threat to the stability of the entire system of international treaties.

7. On the other hand, automatic machinery for conciliating and settling disputes concerning the invalidity of treaties would assist in the development of the legal concepts expressed in Part V of the draft articles, just as domestic tribunals had helped in the development of complex notions such as public order, for example. The principles expressed in Part V were present in various forms in all municipal systems of law and functioned as instruments of social justice and progress in municipal law precisely because of the existence of effective domestic machinery for the compulsory settlement of disputes.

8. The United States had therefore maintained from the outset that the convention on the law of treaties must provide for compulsory procedures for the impartial settlement of disputes concerning the invalidity of a treaty, and it continued to believe that such procedures were absolutely indispensable.

9. It might well be contended that the International Court of Justice, established under the Charter of the

[1] Para. 10.

[2] Paras. 48-58.