United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/C.1/SR.98

98th meeting of the Committee of the Whole

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

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.

United Nations, was the judicial body best qualified to settle disputes concerning treaties. However, in view of the early and manifest opposition to the Court, the United States had attempted, with other States, to devise different procedures; at the first session it had proposed (A/CONF.39/C.1/L.355) a fairly detailed conciliation and arbitration procedure which would have solved a number of difficult problems, including disputes in which a party claimed a material breach of a treaty under article 57.

10. Between the first and second sessions of the Conference, the United States had held consultations with many Governments on the basis of the new article 62 *bis* proposed by various countries (A/CONF.39/C.1/L.352/Rev.2). In its revised form (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), the proposal at present before the Committee constituted a logical and integrated whole. Its sponsors had obviously sought to take into account the interests of the international community. Several passages concerning the conciliation and arbitration procedure had been reworded to make them acceptable to many delegations which had raised objections. The procedure envisaged was that if a party claimed that a treaty was invalid, the parties to the dispute would agree to amend the treaty or resolve the dispute by other means; the nineteen-State text made it clear that the parties were entirely free to do so. Failing agreement, there would be a conciliation procedure, which in his opinion ought normally to be successful, since the mere possibility of either party invoking compulsory arbitration as a last resort in a particular dispute was the best guarantee that the conciliation procedure would be successful.

11. On the other hand, the revised wording of the nineteen-State proposal for a new article 62 *bis* did not fully satisfy the United States, several of whose suggestions had not been taken up. After careful consideration, however, his delegation had concluded that the wording in question provided for a settlement procedure which should function justly and efficiently and adequately protect the interests of all parties to any treaty. Accordingly, the United States was finally abandoning its proposal (A/CONF.39/C.1/L.355) in favour of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), which it would support whole-heartedly.

12. In a conference such as the one in progress, and in dealing with a subject of such complexity, any solution acceptable to the majority must obviously be a compromise, and the nineteen-State proposal was the result of a whole series of compromises. Unlike those for whom a compromise had only a distasteful connotation, he considered that in the case in point the compromise was a reasonable one and the most likely to guarantee a just and fair solution for all parties to a dispute.

13. That being so, his delegation would vote for the nineteen-State text and would abstain from voting on otherwise acceptable proposals which stood little chance of being accepted by the Conference, in particular those submitted by Japan (A/CONF.39/C.1/L.339) and Switzerland (A/CONF.39/C.1/L.377). Those two proposals nevertheless had the advantage of providing for a strictly judicial settlement of certain possible disputes, which was particularly desirable in the case of disputes based on articles 50 or 61, in view of the abstract and novel character of the concept of *jus cogens* in such a context.

14. The Spanish proposal (A/CONF.39/C.1/L.391) had attractive technical features, such as the creation of a permanent conciliation body, an idea which was on the lines of what had been suggested earlier by the United States (A/CONF.39/C.1/L.355). However, before referring a dispute to arbitration, the conciliation commission in question would have to decide whether it was to be classified as a legal dispute. That provision would be difficult to apply, because a claim against a treaty under any of the provisions of Part V of the draft articles was bound to give rise to a legal dispute, even though that dispute might also involve questions of fact and have important political consequences. The issue would always be whether a provision of the convention on the law of treaties really justified a claim that a treaty should be invalidated or terminated. Accordingly, his delegation could not support the Spanish proposal.

15. The sub-amendment (A/CONF.39/C.1/L.398) submitted by India, Indonesia, the United Republic of Tanzania and Yugoslavia to the nineteen-State proposal would make the settlement procedures in that proposal optional rather than compulsory. It would go even further in that direction than the proposal by Thailand (A/CONF.39/C.1/L.387): it would not merely allow the parties to enter a reservation against the application of a compulsory settlement procedure but would also make article 62 *bis* inapplicable unless a party had taken the affirmative step of declaring that it accepted the provisions of article 62 *bis*. His delegation would vote against both those proposals because it could not agree that the clause on the settlement of disputes should be optional.

16. Mr. ESCUDERO (Ecuador) noted that the discussion had brought out two radically opposing arguments, one of them deriving from the idea that article 62 gave sufficient safeguards owing to the rule stated in paragraph 3 that a solution to any dispute arising from the application of the provisions of Part V should be settled through the means indicated in Article 33 of the Charter of the United Nations, the other stressing the inadequacy of article 62 and the absolute necessity for providing, in an article 62 *bis*, rules for compulsory procedure to settle such disputes.

17. As things stood, the wearisome repetition of contradictory arguments before the Committee was simply aggravating the divergences instead of leading to a constructive solution; the Ecuadorian delegation would confine itself to stating its position when the time came to vote.

18. It did, however, feel constrained to take the floor to state forthwith that it categorically refused to accept an idea advanced on several occasions, whereby certain delegations were trying to muster the support of as many delegations as possible for the inclusion of an article 62 *bis* in the convention. The idea was to introduce into a convention on the law of treaties a rule that

the convention would be applicable only to future treaties, in other words to treaties concluded after the convention had entered into force.

19. He failed to see how it could reasonably be suggested that the whole system of rules laid down in the convention, those, for example, relating to reservations to multilateral treaties, to the observance of treaties, to the amendment of treaties and to the invalidity or suspension of treaties, would not apply to treaties existing before the convention entered into force, whose number was, and would be, legion. That would be tantamount to suggesting that before the convention came into force, treaties had been perfect and all models of their kind, and that international relationships had been such that the modern world was a paradise. Only future treaties would, in that view, contain every possible defect.

20. If that were accepted, what would become of the patient work and the valiant efforts of the International Law Commission, and what would become of the work of the Conference itself? Neither the Commission nor the Committee of the Whole had ever dreamed of so unjust a formula, positively calculated to undermine the very foundations of law. Furthermore, no such rule had ever been put up to Governments for consideration, as had been done with all the other provisions of the draft articles. It would, moreover, be hard to justify such an unusual formula which purported to include treaties existing before the convention from its application, seeing that the purpose of the draft convention, both in the spirit and in the letter, was to treat past, present and future treaties on an absolutely equal footing from the legal point of view, as indeed law and mere common sense demanded. It was clear, too, that such a formula would violate the principle of the sovereign equality of States on which the United Nations was based by giving States parties to future treaties a privileged position, to the disadvantage of States parties to past treaties. That would be as unfair as keeping a new wonder drug for future patients alone, thereby condemning existing patients to death. The adoption of such a formula would suffice to prevent many States, basing themselves on the higher claims of justice, from becoming parties to the convention on the law of treaties.

21. Mr. ABDEL MEGUID (United Arab Republic) said that his delegation had defined its position with regard to article 62 at the first session of the Conference and had supported the article in the form presented by the International Law Commission. It could not contemplate an automatic procedure for settling all disputes arising out of Part V of the convention.

22. Article XIX of the Charter of the Organization of African Unity [3] and article 5 of the Pact of the League of Arab States [4] stipulated procedures for solving any disputes between the parties, and they were based on the free consent of the parties. They were regional agreements accepted by a large number of States which had not considered it necessary to set up a compulsory system for settling their disputes.

23. His delegation had carefully examined all the arguments put forward by the sponsors of article 62 *bis*, and in particular the Spanish proposal, which tried to differentiate between legal and political disputes. It felt that it would be better not to mortgage the future and that it would be more realistic to leave it to the parties concerned to find the best means of settling their disputes. The sponsors of the sub-amendment (A/CONF.39/C.1/L.398) had submitted a formula which, combined with the text of the revised nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), might be a happy solution to the difficulties now confronting the Committee regarding the procedure for settling disputes.

24. Mr. DOHERTY (Sierra Leone) said that his delegation could not accept the proposal to introduce automatic machinery for settling disputes arising out of Part V into the convention. It was by no means certain that such machinery would guarantee the settlement of such disputes, for that depended mainly on the parties' good faith. It must be admitted, too, that there were no effective sanctions against a State which, in spite of a provision for compulsory arbitration, refused to implement the decision of an arbitral tribunal. The smaller States could therefore not be assured of protection, and experience had shown that such States were subjected to pressures by stronger States. Thus, though his delegation believed that a system of compulsory jurisdiction was a good thing in principle, it did not think that the time had yet come to include such a provision in a convention on the law of treaties. States should be free to choose whatever settlement procedures they preferred. Article 62, paragraph 3 stated that the parties should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. The main aim should be a rapid settlement of disputes, based on the principle of the sovereign equality of States.

25. The Sierra Leone delegation, however, had not taken up any inflexible position. In its view, the ideal would be to find a formula acceptable to the large majority of States. It was therefore ready to consider any reasonable formula which would give some measure of freedom in the choice of means of settling disputes such as, for instance, the adoption of the system of an optional protocol, as had been done in certain conventions. That formula would enable States to accept compulsory arbitration when they thought it useful to do so.

26. Some of the great Powers had objected to rising costs in the United Nations. It was surprising, therefore, that anyone should wish to impose further financial obligations on the United Nations, as article 62 *bis* implied.

27. It was in the light of the foregoing considerations that his delegation would cast its vote on the various proposals and amendments before the Committee.

28. Mr. MATOVU (Uganda) said that certain safeguards were included in the nineteen-State proposal.

[3] United Nations, *Treaty Series*, vol. 479, p. 80.

[4] United Nations, *Treaty Series*, vol. 70, p. 254.

The provisions would be applicable only to future treaties. States which were parties to treaties could always contract out of their treaty obligations, as provided in the Ceylonese amendment. Furthermore, the award, though binding, would not be enforceable. Lastly, the provisions in article 62 *bis* were favourable to the smaller States. Draft article 62 *bis* was certainly not yet perfect, but it was based on principles which merited the Committee's approval.

29. Mr. AL-RAWI (Iraq) said it was generally recognized that all States were bound to comply with the rules of international law, but that violations of those rules did occur. There was therefore a general desire for the progress and development of international law and the setting up of international courts to administer international justice. There was no doubt that States often wished to settle peacefully any disputes which arose between them, but it was equally certain that they were not ready to accept a compulsory means of settlement for that purpose. In such circumstances they could resort to the means provided in Chapter VI of the Charter. It would be a long time before States generally would accept a system of compulsory settlement and clearly some States were over-ambitious in attempting to get that rule adopted by the Conference.

30. A large number of States refused to accept the compulsory jurisdiction of the International Court of Justice. The optional clause therefore constituted the most appropriate means of settling international disputes. The main object of contemporary international law was to settle disputes by peaceful means, and the United Nations Charter enumerated those means, leaving the freedom of choice in the matter to the States themselves. That principle had been approved by the international community and was confirmed by practice. Compulsory jurisdiction had not been accepted in a large number of international conventions such as the Conventions on the Law of the Sea and the Conventions on Diplomatic and Consular Relations. The absence of that rule had not impeded the development of international relations. On the contrary, practice had shown that those relations had developed.

31. Article 62, approved by the Committee at the first session, reflected the attitude of the international community at the present stage and, as the International Law Commission, had already said, it represented the highest measure of common ground that could be found among Governments. The reference in that article to the means of settlement of disputes indicated in Article 33 of the Charter was realistic. That did not mean that States could violate unilaterally the principles of international law and the provisions of treaties they had concluded. The *pacta sunt servanda* principle must be respected. Resort to force could no longer be admitted today, and States must have recourse to the peaceful means indicated in Article 33 of the Charter.

32. For those reasons, the delegation of Iraq had not so far been able to accept any of the proposals concerning the establishment of procedures other than those mentioned in article 62. However, having studied the proposal submitted by the Indian and other delegations (A/CONF.39/C.1/L.398), it would be able to vote in favour of that proposal.

33. Mr. SIDDIQ (Afghanistan) said that at the first session his delegation had supported article 62. It was still convinced that that article provided an adequate procedure for the settlement of disputes arising out of Part V of the convention. The article envisaged speedy, impartial and just settlement of disputes by peaceful means freely chosen in conformity with the fundamental principle of the sovereign equality of States.

34. His delegation had given careful thought to the amendments which proposed to establish compulsory settlement procedures, but it was unable to support them, for it believed that the text of article 62 represented the highest measure of common ground that could possibly be found on the subject.

35. His delegation earnestly hoped that, as a result of possible consultations between the different groups, it would be possible to find a solution acceptable to all members of the Conference.

36. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the question of the compulsory judicial settlement of disputes was not new. It had been examined by many bodies and at numerous conferences. The International Law Commission had studied the problem at great length and had proposed a text of article 62 based on the provisions of the United Nations Charter which the Committee of the Whole had decided to adopt without change.

37. Attempts were now being made to introduce into the convention new provisions designed to establish a system for the compulsory settlement of disputes arising out of the application of Part V of the convention. Many arguments had been advanced in favour of such a system. The United States representative had even said that those provisions represented a compromise; the assertion was inadmissible, since the proposed new article was an attempt by a group of States to impose on other delegations a concept unacceptable to them.

38. The fact was that article 62 *bis* was not in conformity with Article 33 of the United Nations Charter, which was based on the principle of the sovereign equality of States and which urged States to settle their disputes by whatever peaceful means they chose. By applying the method advocated in the Charter to the law of treaties, the States parties to a treaty could jointly consider which were the best methods for the peaceful settlement of their disputes, bearing in mind the particular nature of the treaty. That was a very reasonable method, for there were many different kinds of treaty. In 1966, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had examined that problem and had concluded that disputes should be settled in accordance with the principles of State sovereignty and of freedom to choose the means of peaceful settlement.[5]

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

The thirty-two States members of that Committee had all accepted those principles, and the Sixth Committee of the General Assembly had approved them. Accordingly, proposals for compulsory jurisdiction ran counter to the principles of the Charter and of international law.

39. Some delegations had asserted that the introduction of a provision on compulsory jurisdiction in the convention was in the interests of small States. That was not the case, for the proposal to establish compulsory jurisdiction had been prompted by powerful States. As the United States representative had just said, consultations among those States had taken place between the two sessions of the Conference, and it was obvious that article 62 *bis* had been proposed by a group of States which wished to use it for definite political ends. Compulsory arbitration would be used for the benefit of the developed countries and to protect their particular interests. It was, of course, conceivable that certain small developing countries might occasionally profit by machinery of that kind, but the procedure was primarily designed to serve, and would serve, the interests of the Western countries and in the first place those of the United States, the United Kingdom and the Federal Republic of Germany.

40. It should be borne in mind that it was the developing countries which had wished above all to introduce into the convention the provisions of Part V which gave them the right to terminate unequal treaties imposed on them against their will. It was therefore surprising that those States could contemplate accepting a compulsory arbitration procedure. That point was brought out in the Luxembourg amendment, under which a State must either accept arbitration or be debarred from availing itself of the provisions of Part V.

41. Article 62 *bis* provided for the establishment of a special organ for dealing with the settlement of disputes. The sponsors of that proposal had tried to demonstrate that the establishment of a new organ could solve all problems. That was not the case, however, as was shown by the fact that the organs which already existed — the Permanent Court of Arbitration and the International Court of Justice — were not very often resorted to by States. It was obvious that States preferred other means, and the proposal for the establishment of new organs was therefore based, not on reality and practice, but on an idealistic concept. In the opinion of the Soviet Union delegation, the establishment of new organs should be avoided.

42. The advocates of compulsory arbitration had tried to show during the debate that that procedure would not restrict the freedom of States. The arguments advanced to that end were unconvincing. Freedom to choose the means of settlement should be interpreted in its broadest sense. It had already been pointed out that in practice a single arbitrator might finally settle a dispute. Moreover, if a special list of arbitrators were established, its membership would be limited by Western lawyers, and that would restrict the right of developing countries to choose the persons they wanted to have as their arbitrators.

43. Certain delegations had submitted amendments with a view to altering or supplementing article 62 *bis*. The Japanese amendment amounted to providing that the International Court of Justice should be given the power of determining *jus cogens* in the particular case, and that would be unacceptable. Nor was the proposal for the establishment of a " United Nations Commission for Treaties " any more admissible, for there seemed to be no reason why, for instance, two African States which wished to settle a dispute arising from a treaty should necessarily apply to the commission within the framework of the United Nations. A dispute relating to a regional treaty should be settled at the regional level. Otherwise, the freedom of the States concerned would be restricted.

44. The arbitration provided for in article 62 *bis* would be inapplicable to political treaties. The delegations which supported article 62 *bis* could not deny that, in the event of a dispute arising out of a political treaty, their countries would not wish to apply to such a commission. The proposal therefore failed to take the contemporary world situation into account.

45. The provisions of article 62 *bis* also raised a financial question. According to the draft, the expenses were to be borne by the United Nations; but there seemed to be no reason why, for example, in the event of a dispute between the Federal Republic of Germany and Switzerland, which were not members of the United Nations, that Organization should bear the costs. If a dispute arose between two States, it was for those two States to pay the expenses for arbitration.

46. The Soviet Union delegation considered that the text of article 62 proposed by the International Law Commission was acceptable and it saw no reason for adopting article 62 *bis*. It was extremely anxious to ensure the success of the work on the law of treaties and was prepared to accept a common denominator, likely to cater for the interests of the various groups of States, in connexion with all important problems. But article 62 *bis* and its variants could not constitute such a common denominator. The Western countries were incurring a serious responsibility by insisting on the adoption of that provision. They wanted a vote to be taken immediately; they wanted to impose their will on the Conference; but it would be a Pyrrhic victory, for many States would then refuse to accede to the Convention. The important thing was to find a reasonable compromise, on the basis of which a generally acceptable text could be prepared. The USSR delegation would support any efforts that might be made in that direction.

47. Mr. ESCHAUZIER (Netherlands), speaking as a sponsor of the nineteen-State proposal (A/CONF.39/C.1/L.352/Rev.3 and Corr.1 and Add.1 and 2), said the procedure for compulsory settlement of disputes would not serve the interests of the western or developed countries alone, as the representative of the Soviet Union had stated; that was shown by the fact that a representative group of delegations from the developing areas of the world had co-sponsored the proposal.

48. His delegation agreed with other delegations, among them those of India, Indonesia, Saudi Arabia and the Soviet Union, on the predominant importance of negotiation as a means of settling disputes. It should, however, be stressed that article 62 *bis* would become operative only in case negotiations failed to produce a result or if one of the parties refused to negotiate. In that connexion the Indian representative had quoted from a recent judgement by the International Court of Justice in the *North Sea Continental Shelf* cases,[6] in which the Court had stated that the parties were under an obligation to enter into negotiations with a view to arriving at an agreement. No delegation could fail to concur in that statement. However, in summing up the judgement the Indian representative had not placed sufficient emphasis on certain points. The Court not only did not deny the wisdom of the parties in asking its guidance on the rules of law in force between the parties, but, as an impartial authority, had indicated what were the rules of law prevailing in that particular case in order that the parties might know the legal basis on which to negotiate successfully. Indeed, the judgement referred to by the Indian delegation was a striking example of the fruitful interplay of impartial adjudication and negotiation.

49. Some delegations had quite rightly observed that the mere existence of an automatically available arbitration machinery would have a beneficial influence on negotiation as well as on conciliation.

50. The sponsors of the nineteen-State proposal agreed with other delegations that the very nature of conciliation called for a confidential procedure. In paragraph 4 of the proposed annex the sponsors had not said that the conciliation commission's report should be published. If the wording of the paragraph did not reflect the sponsors' intention clearly enough, the Drafting Commitee would certainly be able to improve it.

51. Some delegations had mentioned that conciliation and arbitration procedures would entail a great deal of expense. It was for that very reason, however, that the sponsors had proposed that the expenses of the conciliation commission — and, if arbitration should be resorted to, the expenses of the tribunal — should be borne by the United Nations. For that matter, failure to settle a dispute might entail far heavier expense.

52. The sponsors of the nineteen-State amendment had taken note of the Mexican representative's contention that disputes on the interpretation of an arbitral award ought to be settled by the arbitral tribunal itself.[7] It was constant practice in international adjudication that a dispute as to the meaning or scope of an award was decided by the arbitrator or the tribunal which had delivered the award. That rule was well established and did not need repetition, but if the Drafting Committee preferred to include a provision covering the matter, that would be in conformity with the sponsors' intention.

53. The representative of Pakistan has asked whether the arbitral tribunal was empowered to indicate, if it considered that circumstances so required, any provisional measures which ought to be taken to preserve the respective rights of the parties.[8] The point had been considered by the sponsors with the representative of Pakistan. The arbitral tribunal might, pending its final decision on the question, and at the request of any party to the dispute, indicate such measures as might be appropriate; but the suspension of a treaty in whole or in part could not be decided except in order to avoid irreparable damage. Paragraph 6 of the annex probably already met the point by providing that the tribunal would decide its own procedure. The sponsors recognized, however, that the provision might be worded more clearly and hoped that the Drafting Committee would take that point into consideration.

54. Some delegations had objected that the nineteen-State amendment went too far; they would have preferred not to include any compulsory settlement procedure in the convention. Other delegations would have preferred a clause providing for adjudication by the International Court of Justice. The nineteen-State amendment met both those arguments by providing a compromise formula.

55. The sponsors of the nineteen-State amendment believed that it could hardly be reconciled with the proposals by Thailand (A/CONF.39/C.1/L.387) and by India, Indonesia, the United Republic of Tanzania, and Yugoslavia (A/CONF.39/C.1/L.398), since those proposals dissociated Part V from the procedure for settling disputes. One of the sponsors of the four-State amendment had said that he hesitated to accept specific means of settling disputes for an indefinite period and for an unknown number of treaties since, in his opinion, that would be an infringement of the sovereign rights of States. He (Mr. Eschauzier) would point out that all the means of settlement indicated in Article 33 of the Charter remained available.

56. In reply to the Soviet Union representative's observations about a dispute which might arise between two African States, he said that the States in question would always be at liberty to resort to the arbitration procedures laid down in the Charter of the Organization of African Unity.

57. Articles 62 and 62 *bis* dealt only with the preliminary question whether a treaty was or was not valid. Those articles did not, therefore, regulate the application or interpretation of future treaties.

58. The nineteen-State amendment was an organic whole, all the main elements of which were inseparable. Some delegations had observed that it would be wrong for a majority to impose a solution on a minority which might find it difficult to accept the proposed settlement procedure. The sponsors wished to stress that their text had been drafted in such a way as to allay the misgivings of delegations opposed to their proposal and that, if a provision of that kind was not included in the draft convention, a number of other States would find it hard to accept it.

59. The Netherlands delegation believed that after the full discussion at the first session and at the immediately

[6] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3.

[7] See 94th meeting, para. 69.

[8] *Ibid.*, para. 87.

preceding meetings, the time had come to take a decision by vote.

60. Mr. MARTINEZ CARO (Spain) said that the main objections raised by delegations to the Spanish amendment (A/CONF.39/C.1/L.391) concerned either the difficulty of drawing a distinction between legal disputes and other disputes which might arise from the application of Part V of the convention, or the practical aspects of setting up a " United Nations Commission for Treaties ".

61. His delegation knew how difficult it was to lay down objective criteria for dividing international disputes once and for all into the two major categories of legal disputes and political disputes. Although disputes relating to the validity or maintenance in force of a treaty, or to similar questions, were legal in nature, it was also true that the actions of States parties to a treaty were always politically motivated and likely to have political repercussions.

62. Nevertheless, means obviously had to be devised for the impartial and fair settlement of disputes which might arise from the application of the convention on the law of treaties, and it was clear that disputes between States were not all alike. Experience had shown that to solve some disputes a flexible formula was needed, whereas in other cases pre-established rules should be applied. Article 36 of the United Nations Charter and Article 36 of the Statute of the International Court of Justice expressed that distinction by referring to " legal disputes ".

63. The basis of the Spanish proposal was the fact that, in the international community as it now was, States were not prepared to submit all their treaty disputes to a judicial or arbitral organ. That was obvious from the reservations to the declarations of acceptance of what had been called the compulsory jurisdiction of the International Court of Justice and from the reservations and provisos concerning domestic jurisdiction and vital interests in many existing treaties.

64. The Spanish delegation believed that attitude on the part of States to be due both to the absence of an international legislative organ and to the climate of mutual suspicion which was still a characteristic feature of the international scene. A means must therefore be sought to facilitate the success of the task of codification which the General Assembly had entrusted to the Conference on the Law of Treaties, and it could take the form of recognizing, as his delegation had urged, that some disputes arising from the application of Part V of the convention, namely legal disputes, could be settled by an arbitration procedure.

65. The fundamental point was to distinguish between disputes which should be referred to arbitration and disputes which could be settled by negotiation. His delegation considered that it should be the task of the proposed commission for treaties, which would be responsible to the General Assembly, to settle that point.

66. The establishment of the commission would entail no serious institutional or practical difficulties. The proposed " United Nations Commission for Treaties " would at any given moment reflect the composition of the General Assembly of the United Nations and would develop on a par with the international community; it would be an essential factor in solving treaty disputes. Its recommendations to the parties would make it the vital and progressive element which the international order at present lacked. Moreover, if circumstances so required and if the state of positive law so permitted, it could decide that the dispute would be settled by an arbitral tribunal, whose award would rest on *lex lata*; that would help to establish a body of jurisprudence on treaty law. The balanced composition of the commission would also ensure the impartial appointment of the chairmen of the conciliation and arbitration bodies better than any other procedure.

67. The representative of Kuwait had asked [9] whether the proposed United Nations commission for treaties would be empowered, subject to the authorization of the United Nations General Assembly and in accordance with Article 96(2) of the Charter, to request an advisory opinion from the International Court of Justice on the disputes submitted to it. That was an interesting question because it focused attention on the commission's function with regard to the future convention. The Spanish proposal was based on the idea that the convention on the law of treaties would occupy a place of fundamental importance in the international legal order in the coming years. It was not merely a codification convention but also the most important result of United Nations work on progressive development and codification. If the proposed commission for treaties was to settle only individual cases between States, recourse to the advisory opinion provided for in Article 96 of the Charter would seem inappropriate; the opinion of the International Court would not be particularly useful in a specific case and that procedure would merely delay the solution of the dispute. But the proposed " United Nations Commission for Treaties " would be an organ for administering the convention, and it would deal not only with concrete problems arising from disputes between two States but also with general problems deriving from the application or interpretation of the convention. A request for an advisory opinion would then be appropriate.

68. Further, the commission could undertake various tasks concerning the settlement of disputes arising from Part V and from the interpretation or application of the convention, as suggested by the Spanish delegation in its proposal for a new article 76 (A/CONF.39/C.1/L.392). The comment by the representatives of Switzerland and the Federal Republic of Germany concerning the participation of States which were not members of the United Nations but were parties to the future convention was of great interest and deserved consideration.

69. The five suggestions which the Mexican representative had made [10] were implicit in the Spanish proposal. They could be regarded as substantially improving the operation of the conciliation and arbitration bodies; they

[9] *Ibid.*, para. 23.

[10] *Ibid.*, paras. 66-70.

also safeguarded the lawful rights of the parties to the dispute.

70. Mr. KRISHNA RAO (India), replying to representatives who had criticized the relevance of the passage he had quoted at the 96th meeting, said that the Court, in its judgement in the *North Sea Continental Shelf* cases, had stated that the parties were under an obligation to enter into negotiations with a view to arriving at an agreement; it had shown itself more realistic on that point than the sponsors of article 62 *bis* by stating that judicial or arbitral settlement was not universally accepted. The representative of the Federal Republic of Germany had referred to that passage at the previous meeting and had given his interpretation of the Court's decision. Delegations could form their own opinion on the subject by consulting the relevant portion of the Court's judgement.

71. In reply to the comments of the Netherlands representative on the same point, he said that the case in question had been referred to the Court by mutual consent of the parties and not by the means advocated in the nineteen-State amendment, namely arbitration or judicial settlement.

The meeting rose at 1 p.m.

NINETY-NINTH MEETING

Tuesday, 22 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 *and 62* quater (continued) [1]

1. The CHAIRMAN invited the Committee to reach a decision on the three proposed new articles 62 *bis*, 62 *ter* and 63 *quater*.

2. Mr. DADZIE (Ghana) said that at its first session the Conference had reached the point when it had become saturated with proposals for machinery for the settlement of disputes regarding the application of treaties. Although some proposals had been carefully thought out, it had been obvious that none would obtain general acceptance. Wisdom had prevailed at that stage, and a vital decision had been taken which had made it possible to resume consideration of the subject at the present session with great hopes. Once again, however, a similar situation had been reached. Was the Conference now to run the risk of ruining the achievements of two years' painstaking effort? In his view, it would be far wiser to continue the attempt to reach a compromise solution, and his delegation was working on such a compromise at that moment. He therefore formally moved the adjournment of the debate on the proposed new article 62 *bis* for forty-eight hours, under rule 25 of the rules of procedure.

3. The CHAIRMAN said that, under rule 25, two representatives might speak in favour of, and two against, the motion for adjournment.

4. Mr. ABED (Tunisia) said that to adjourn the debate at that stage after spending many days in discussing article 62 *bis* did not, in his delegation's view, constitute a solution. Continued postponement would merely delay the Committee's work, and the time had come to proceed to a vote, particularly since the proposed article 62 *bis* already represented a compromise.

5. Mr. NEMECEK (Czechoslovakia) said that his delegation supported the Ghanaian representative's proposal for adjournment, since informal discussions were still continuing which should lead to a compromise proposal. Adjournment could not do any harm, and should help to promote a harmonious atmosphere in the Committee's work.

6. Mr. NASCIMENTO E SILVA (Brazil) said that, although his delegation was a prospective loser in the vote about to be taken, he was in favour of proceeding to the vote immediately. The Committee had had a whole year in which to consider the subject, and another forty-eight hours was not likely to make any difference. Once the vote had been taken, delegations would know how they stood and what further action to take. If no proposal received a two-thirds majority, further efforts could be made to reach a compromise solution.

7. Mr. BHOI (Kenya) said he supported the motion for adjournment since he believed that a last-ditch effort might help to achieve a compromise.

8. The CHAIRMAN put to the vote the Ghanaian representative's motion for adjournment of the debate for forty-eight hours.

The motion for adjournment was rejected by 46 votes to 44, with 7 abstentions.

9. The CHAIRMAN said that one or two delegations wished to explain their intended votes in advance. As soon as they had done so he would put to the vote all the amendments before the Committee for, or relating to, the proposed new articles 62 *bis*, 62 *ter* and 62 *quater*.

10. Mr. EL HASSIN EL HASSAN (Sudan) said that his delegation was against the inclusion in the convention of any form of provision for the compulsory settlement of disputes. The convention was intended to apply to all treaties and it was therefore essential that the freedom of choice of the parties should be safeguarded. Article 62 was adequate for that purpose. Moreover, since its purpose was to codify international law, the convention should be acceptable to as many delegations as possible. The opposition expressed to article 62 *bis* would lessen the chances of the convention

[1] For the resumption of the discussion of the proposed new article 76, see 100th meeting.