United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/SR.16

Sixteenth plenary meeting

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)*

64. The PRESIDENT said that the Drafting Committee would take note of the suggestion by the representative of Trinidad and Tobago.

65. Mr. REDONDO-GOMEZ (Costa Rica) said that Costa Rica, like other Latin American countries, formed part of a legal system that was more developed than many rules of international law and he must state, with regret, that in any conflict that might arise between a customary rule of international law and the principles of inter-American law, Costa Rica could not accept the authority of the former.

66. Mr. SHUKRI (Syria) said that he had understood the representative of Nepal to have confined his amendment to the deletion of the words " or a general principle of law ", and had not intended also to delete the words " recognized as such ".

67. The PRESIDENT said that was also his understanding.

The meeting rose at 5.20 p. m.

SIXTEENTH PLENARY MEETING

Thursday, 8 May 1969, at 10.50 a.m.

President: Mr. TABIBI (Afghanistan)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

1. The PRESIDENT invited the Conference to continue its consideration of the articles approved by the Committee of the Whole.

Article 35 [1]

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 35 was adopted by 86 votes to none.

Article 36 [2]

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (*b*), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 36 was adopted by 91 votes to none.

Article 37 [3]

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Article 37 was adopted by 91 votes to none.

2. The PRESIDENT said that the Committee of the Whole had decided at the first session to delete article 38.[4] He therefore suggested that the Conference take up articles 39 to 42, forming Section 1 of Part V.

Statement by the Chairman of the Drafting Committee on articles 39-42

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had circulated a document (A/CONF.39/L.28) containing a communication from the Expert Consultant with regard to articles 41 and 42.

4. Before taking up Part V, the Drafting Committee

---

[1] For the discussion of article 35 in the Committee of the Whole, see 36th, 37th and 78th meetings.

[2] For the discussion of article 36 in the Committee of the Whole, see 36th, 37th, 86th and 91st meetings.

[3] For the discussion of article 37 in the Committee of the Whole, see 37th, 86th and 91st meetings.

[4] See 38th meeting of the Committee of the Whole, para. 60.

had considered a point of terminology concerning the French version. It had been unable to find a French term which expressed all the connotations of the English word " termination ", which, in the French text of the draft convention, was rendered either by " *extinction* " or by " *fin* ". The Drafting Committee had considered that " *extinction* " was preferable to " *fin* " and had decided to use it in place of the latter term wherever the context permitted, in particular in article 39 and in the title of Part V. Apart from that change, which concerned only the French version, the Drafting Committee had retained the International Law Commission's title for Part V. It wished to make it clear that the word " termination " in the English version of the title and the corresponding words in the other languages were to be understood in a general sense as covering all the means of ending a treaty.

5. The Drafting Committee had made several changes in the titles and texts of the articles forming Section 1 of Part V. In article 39, paragraph 1, it had replaced the words " or the consent of a State " by " or of the consent of a State ", and in the French and Spanish versions the words " *ne peuvent être contestés* " (*no podrá ser impugnado*) by " *ne peut être contestée* " (*no podrá ser impugnada*), since the paragraph concerned the impeachment of the validity of the consent and not the impeachment of the consent itself.

6. In article 39, the Drafting Committee had also amended the first sentence of paragraph 2, the English version of which, as approved by the Committee of the Whole, had read: " A treaty may 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 Convention. " That sentence, like its counterpart in the Russian version, seemed to cover only the termination of a treaty as a result of the action of a party, since the words " by a party " could refer not only to " denounced " and " withdrawn from " but also to " terminated ". The French and Spanish versions of the sentence, on the other hand, described the termination of a treaty in terms which did not mention the action of the parties, and therefore were wider in scope. The French expression " *un traité ne peut prendre fin* " and the Spanish version " *ningún tratado podrá darse por terminado* " seemed to reflect the intention of the Committee of the Whole better than the wording of the English and Russian versions. The Drafting Committee had therefore decided to bring the latter into line with the wording of the French and Spanish versions.

7. It had further considered that the French version of the first sentence of article 39, paragraph 2, could be simplified to read: " *L'extinction d'un traité, sa dénonciation ou le retrait d'une partie ne peuvent avoir lieu qu'en application des dispositions du traité ou de la présente Convention.* "

8. Corresponding changes had been made in the other language versions of the same sentence.

9. With regard to article 40, the Drafting Committee had decided that the concluding part should be brought into line with article 3 (*b*). It had therefore redrafted that part of the article to read: " [any obligation] . . . to which it would be subject, in accordance with international law, independently of the treaty ", and the title of the article to read: " Obligations imposed by international law independently of a treaty. "

10. In article 41, the Drafting Committee had inserted a reference to article 53 at the beginning of paragraph 1. That had been made necessary by the addition by the Committee of the Whole to article 53, paragraph 1, of a sub-paragraph (*b*) referring to a right of denunciation or withdrawal " implied from the nature of the treaty ".

Article 39 [5]

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 39 was adopted by 90 votes to 1.

Article 40 [6]

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject, in accordance with international law, independently of the treaty.

11. Mr. SINCLAIR (United Kingdom) said that his delegation approved in substance the text of article 40 as presented by the Drafting Committee, but wished to make a few comments strictly related to questions of terminology.

12. Article 39, paragraph 1 laid down the general rule that " the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention ". Article 40 spoke only of the invalidity, termination or denunciation of a treaty, but that expression must be read in conjunction with later articles. Articles 43 to 47 set out various grounds which a State might invoke as invalidating its consent to be bound by a treaty. In the case of a bilateral treaty it must of course be conceded that if a State did invoke a defect in its consent to be bound and if the ground of invalidating its consent was, if necessary, upheld as the result of the aplication of the procedures envisaged in articles 62 and 62 *bis*, the result would be the invalidation of the treaty as a whole because the consent of one of the two States involved was vitiated.

[5] For the discussion of article 39 in the Committee of the Whole, see 39th, 40th, 76th, 81st and 83rd meetings.

[6] For the discussion of article 40 in the Committee of the Whole, see 40th and 78th meetings.

13. The position would be different in the case of a multilateral treaty. The State involved would have established incontrovertibly a defect in its consent to be bound by the treaty, but the result would not normally be the invalidity of the treaty as a whole; it would simply be that the consent of the particular State to be bound by the treaty would be invalidated. The treaty would still, however, be operative as between the remaining contracting parties.

14. A close analysis of the texts of articles 41 and 42 showed clearly that that was the effect of the various provisions set out in articles 43 to 47. Article 41, paragraph 2, used the expression " a ground for invalidating... a treaty ", but paragraphe 4 made particular reference to articles 46 and 47, which simply established grounds which a State might invoke as invalidating its consent to be bound by a treaty.

15. More significantly, article 42 established the conditions in which a State " may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 ". It was therefore clear from the reference to articles 43 to 47 that the expression " invalidity of a treaty " as used in article 40, or " invalidating a treaty " as used in articles 41 and 42, must be interpreted as including, in addition to the cases in which the treaty as a whole was invalid, those cases where it was the consent of one party alone to a multilateral treaty which was invalidated.

16. The United Kingdom delegation had wished to place on record its understanding of the terminology in order to prevent any misunderstanding.

17. Mr. ESCUDERO (Ecuador) said it would be better in the Spanish text to use the word " *retiro* " rather than " *retirada* ", which was more of a military term.

18. Mr. DE LA GUARDIA (Argentina) endorsed the Ecuadorian representative's comment.

19. Mr. BILOA TANG (Cameroon) reminded the Conference of the statements he had made in connexion with articles 4 and 35 and explained that his delegation would vote for article 40, on the understanding that the Cameroonian Government would not consider itself bound by the rules laid down in that article unless they were accepted by the overwhelming majority of States.

Article 40 was adopted by 99 votes to none, with 1 abstention.

20. Mr. STEVENSON (United States of America) said he wished to make his delegation's position clear as the Conference began the discussion of Part V of the draft convention.

21. Like a great many other delegations, the United States delegation had consistently taken the position throughout the Conference that an adequate procedure for the settlement of disputes arising under Part V was an indispensable element of the convention on the law of treaties. The convention could become an instrument of justice and peace only if it included such a procedure.

22. Article 62 *bis* provided a fair and simple procedure. It was a compromise between the positions of the delegations which had opposed any form of automatic arbitration and those which had insisted that the International Court of Justice should have compulsory jurisdiction in all disputes arising under Part V.

23. The United States delegation, like a very considerable majority of the delegations in the Committee of the Whole, had supported article 62 *bis* and trusted that a larger number of delegations would support it when it came before the plenary Conference.

24. He hoped that all delegations would understand that his delegation's positive vote on articles in Part V remained subject to the widely shared view that Part V must contain an adequate procedure for the settlement of invalidity disputes.

Article 41 [7]

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 53, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(*a*) The said clauses are separable from the remainder of the treaty with regard to their application;

(*b*) It appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(*c*) Continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 46 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

25. Mr. CASTRÉN (Finland) said that at the first session his delegation had voted for the text of article 41. He thought, however, that the Committee of the Whole had gone too far by unnecessarily limiting the possibility of applying the principle of separability of treaty provisions. Article 41, paragraph 5 provided that in cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty was permitted. Article 50 dealt with treaties which conflicted with a norm of *jus cogens*. Since it was possible that a treaty might contain only one or two minor provisions which were in conflict with *jus cogens*, it would be preferable merely to declare the doubtful clauses void, if they were separable from the rest of the

[7] For the discussion of article 41 in the Committee of the Whole, see 41st, 42nd, 66th and 82nd meetings.

treaty, rather than to destroy the whole treaty. *Jus cogens* was a new principle and prudence was necessary if that principle was to be accepted by all within reasonable limits. His delegation's opinion appeared to be shared by several others. When the Finnish amendment (A/CONF.39/C.1L.144) to delete the reference to article 50 in article 41, paragraph 5, had been put to the vote in the Committee of the Whole, the result had been 39 against, 27 in favour and 17 abstentions. His delegation therefore requested a separate vote on the maintenance of the reference.

26. Sir Francis VALLAT (United Kingdom) said he supported the request for a separate vote on the words " and 50 " by the Finnish representative, whose intention was obviously to obtain the view of the Conference on whether separability of treaty articles, as permitted in many cases under article 41, should also be permitted where a separable provision of a treaty conflicted with a peremptory norm of international law. If the reference to article 50 was deleted, it would not of course affect the case in which the treaty as a whole offended against article 50. Article 41 would only apply where one provision, which could clearly be separated from the rest of the treaty, was in conflict with a rule of *jus cogens*. As he had already said at the 82nd meeting of the Committee of the Whole, the reference to article 50 in article 41, paragraph 5, was not essential and even entailed a danger, since it would enable a party to use a relatively unimportant conflict of a treaty provision with a peremptory norm of international law as a pretext for repudiating the entire treaty. Moreover, in view of the development of *jus cogens* in international law and the corresponding growth in complex treaty relations, the risk of a comparatively minor provision of a treaty conflicting with a peremptory norm would increase as time went on. If the Conference did not delete the reference to article 50, that article might prove to be a means of undermining treaties by attacking comparatively small and isolated portions of them, rather than a protection for the international community. It was easy to imagine the disastrous effect it might have, for example, in the realm of treaties on extradition, commerce, friendship and so on.

27. In explaining his vote on article 50 at the 80th meeting of the Committee of the Whole, he had said that the United Kingdom delegation reserved its position, pending the decisions to be taken on the separability of treaties in article 41 and on procedures in article 62. There was a close connexion between those articles, and the decision taken on article 41 would be a factor affecting his Government's attitude towards the convention on the law of treaties.

28. Mr. HAYTA (Turkey) supported the Finnish representative's request.

29. Mr. MARESCA (Italy) said that while his delegation supported article 41, it had a reservation to make. It could not agree to the idea that separability could be invoked unilaterally. Adequate procedures must be provided to guarantee that requests concerning the separability of treaty provisions were justified.

30. Mr. KOULICHEV (Bulgaria) said he understood the practical considerations which had prompted the Finnish proposal to make the principle of the separability of treaties applicable in the cases referred to in article 50. Nevertheless, that was not the kind of consideration which should prevail in the case in question. The rules of *jus cogens* were fundamental, and it was therefore difficult to imagine that treaty provisions which conflicted with one of them would be unimportant, thus justifying the application of the principle of separability. Nor did it seem conceivable that the parties to a treaty could infringe such a rule inadvertently; the bad faith of the parties would therefore be evident and the invalidation of the whole treaty would be a proper sanction in such a case. The Bulgarian delegation would therefore vote against the Finnish proposal.

31. Mr. ALVAREZ TABIO (Cuba) said that his delegation would vote for article 41 and against the Finnish proposal. The Cuban delegation entirely approved of the International Law Commission's commentary to paragraph 5. If one of the clauses of a treaty was incompatible with a norm of *jus cogens,* the treaty must be considered to be void in its entirety. The parties could then amend the treaty so as to render it compatible with the peremptory norms of international law.

32. Mr. KRISHNA RAO (India) said he had been surprised to hear the United States representative say that his delegation's acceptance of the provisions of Part V of the convention depended on the decision that the Conference would take on article 62 *bis.* Part V actually consisted of three groups of articles: first, articles 39 to 42, which set out general provisions; secondly, articles 43 to 61, which set out substantive rules; and thirdly, articles 62 to 68, concerning the settlement of disputes. Although it was true that there was an organic link between the three groups, it was not clear how acceptance of the second group could depend on the third. It was inaccurate to say that article 62 *bis* represented a satisfactory solution for Part V; the result of the vote on that article in the Committee of the Whole might be regarded as satisfactory for some and unsatisfactory for others.

33. The International Law Commission had referred to Part V in connexion with various articles, and it was interesting to refer to paragraph (13) of the commentary to article 59, which contained the following passage: " [The Commission] did not think that a principle . . . could . . . be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification . . . was to minimise those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; . . . having regard to the extreme importance of the stability of treaties to the security of international relations, it has attached to the present article . . . the specific procedural safeguards set out in article 62. " The Commission had not referred to article 62 *bis.* Every delegation was free to

give its views on an article and to state its own interpretation of it; but it could not invoke guarantees not contemplated by the Commission which had prepared the draft articles.

34. Mr. RATTRAY (Jamaica) said that frequent discussions had been held on the true nature of *jus cogens*, and the precise tenor of its rules had been difficult to determine. Everyone agreed, however, that *jus cogens* censured all really reprehensible conduct. Some delegations had proposed that the reference to article 50 at the end of article 41 should be deleted; but the Jamaican delegation considered that prohibition of separability in the case of treaties conflicting with a rule of *jus cogens* would enhance the significance of that term and facilitate the interpretation of the concept of *jus cogens*. It would thus be made evident that the infringement of those rules was so serious that it would suffice for one clause of a treaty to conflict with the principle for the entire treaty to be void. His delegation was therefore not in favour of deleting the reference to article 50 from paragraph 5 of article 41.

35. The PRESIDENT said that the representative of Finland, supported by the Uniter Kingdom representative, had asked for a separate vote on paragraph 5 of article 41. In accordance with rule 40 of the rules of procedure, he invited the Conference to vote for or against the retention of the words " and 50 ".

The result of the vote was 63 in favour and 33 against, with 6 abstentions.

36. Sir Francis VALLAT (United Kingdom) pointed out that, since the required two-thirds majority had not been obtained, the words " and 50 " were deleted.

37. Mr. JAGOTA (India), speaking on a point of order, asked the President to explain what the Conference had voted on. The representative of Finland had requested a separate vote on paragraph 5, but the result of the vote did not seem to be clear.

38. Mr. SINHA (Nepal) said that according to the result of the vote, the words " and 50 " should be retained in the text.

39. Mr. SEATON (United Republic of Tanzania) said that, in his opinion, the purpose of the Finnish proposal had been twofold: first, a separate vote on paragraph 5 and, secondly, an amendment to paragraph 5 to delete the words "and 50 ". In the normal course the vote was taken on an amendment before the basic proposal, but, in that particular instance, the request for a separate vote had also to be taken into account. In actual fact, the vote which had been taken had been on the retention of the words " and 50 ", not on the Finnish amendment to delete the words " and 50 ".

40. The PRESIDENT said that, in his opinion, the subject of the vote had been perfectly clear, namely the retention of the words " and 50 ". As the required two-thirds majority had not been obtained, the words had been deleted. But the Conference was master of its own procedure and it could decide by a vote whether it wished a second vote to be taken on the Finnish proposal.

41. Mr. JAGOTA (India) said that the representative of the United Republic of Tanzania had described the position correctly. If sixty-three delegations had voted for the retention of the words " and 50 " in article 41, paragraph 5, that meant that, so far as they were concerned, the Finnish proposal to delete those words had been rejected, not adopted, as some speakers claimed. A second vote should accordingly be taken, so that the Conference could know exactly where it stood.

42. Mr. CASTRÉN (Finland) said he had simply requested a separate vote on the words " and 50 " in article 41, paragraph 5. As a result of the vote the words had been deleted, since their retention would have required one more vote than had been obtained, as a two-thirds majority was necessary.

43. He was opposed to the idea of taking a second vote, a procedure to which the Conference had never had recourse. In any event, the principle that a second vote should be taken would have to be put to the vote first, and it would have to adopted by a two-thirds majority.

44. Sir Francis VALLAT (United Kingdom) pointed out that he had not proposed any amendment to article 41, paragraph 5, but, like the representative of Finland, he had requested a separate vote under rule 40 of the rules of procedure. The vote had been taken in a regular manner and the proper conclusion was that the words " and 50 " had been deleted from article 41, paragraph 5.

45. However, as some delegations were still in doubt, it would perhaps be wiser to postpone voting on article 41 as a whole for the time being.

46. Mr. LAMPTEY (Ghana) said he believed that the proposal had been to delete the words " and 50 " in article 41, paragraph 5. He knew of at least one delegation which had not taken part in the voting because it had not known exactly what was being put to the vote. He would therefore like a second vote.

47. The PRESIDENT said that of the two suggestions — to postpone the final vote on article 41 or to take a second vote on the Finnish proposal relating to paragraph 5 — he preferred the second, and he invited the Conference to vote forthwith on the principle that the Finnish proposal should be put to the vote a second time.

48. Sir Francis VALLAT (United Kingdom), speaking on a point of order, said that, in his opinion, such a vote would be a motion to reconsider, under rule 33 of the rules of procedure.

49. Mr. KRISHNA RAO (India) protested that it could not be a question of a motion to reconsider under rule 33 of the rules of procedure, since many delegations had not known what exactly they had been voting on. For all practical purposes, there had been no vote.

50. Mr. ESCUDERO (Ecuador) said that many delegations had thought they were voting for the retention of the words " and 50 " in article 41, paragraph 5, while many others had believed they were voting for their deletion. The normal parliamentary procedure, both in national parliaments and in the United Nations, in cases where confusion of that kind had arisen, was simply to take another vote. The President could call for a fresh vote without requesting the Conference to vote first on the principle of taking a second vote.

51. Mr. FATTAL (Lebanon) said it would not be a matter of taking another vote; the Conference would definitely be voting on the Finnish proposal for the first time.

52. The PRESIDENT said that, in accordance with the normal procedure laid down in rule 40 of the rules of procedure, he had put to the vote the proposal by Finland, supported by the United Kingdom, and had then announced the result of the vote. A second vote would undoubtedly be a motion to reconsider under rule 33. He suggested that the meeting be suspended to enable negotiations to be held.

The meeting was suspended at 12.15 p.m. and resumed at 12.30 p.m.

53. The PRESIDENT announced that the delegations of Finland and the United Kingdom agreed that the Conference should vote again on the words " and 50 " in article 41, paragraph 5, on the basis of rule 40 of the rules of procedure.

54. Mr. JAGOTA (India), speaking on a point of order, said the Finnish motion had been for a separate vote. That motion should be voted on first, in accordance with rule 40 of the rules of procedures the Indian delegation would vote against it. Only then should the vote be taken, if need be, on the words " and 50 ".

55. Mr. SINCLAIR (United Kingdom) said that an objection to the motion for a vote by division was not admissible at that stage of the debate. The delegations of Finland and the United Kingdom agreed that the vote should be taken again on the words " and 50 " in article 41, paragraph 5, but they might very well insist on asserting that the point at issue was a motion to reconsider, under rule 33 of the rules of procedure.

56. The PRESIDENT called for a vote on the words " and 50 " in article 41, paragraph 5. He said that the vote would be by roll-call: delegations supporting the retention of those words in article 41 should vote in favour; those supporting their deletion should vote against.

Zambia, having been drawn by lot by the President, was called upon to vote first.

In favour: Zambia, Algeria, Argentina, Barbados, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Central African Republic, Ceylon, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Dominican Republic, Ecuador, El Salvador, Ethiopia, Ghana, Guatemala, Guyana, Holy See, Hungary, India, Indonesia, Iran, Iraq, Ivory Coast, Jamaica, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Libya, Madagascar, Mongolia, Morocco, Nepal, Nigeria, Pakistan, Panama, Peru, Poland, Romania, Saudi Arabia, Sierra Leone, Spain, Sudan, Syria, Thailand, Trinidad and Tobago, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Venezuela, Yugoslavia.

Against: Australia, Austria, Belgium, Canada, Chile, China, Denmark, Federal Republic of Germany, Finland, France, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Portugal, South Africa, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

Abstaining: Gabon, Israel, Malaysia, Mauritius, Republic of Korea, Republic of Viet-Nam, Senegal, Singapore, Tunisia.

The words " and 50 " were retained in article 41, paragraph 5 by 66 votes to 30, with 9 abstentions.

Article 41 as a whole was adopted without change by 96 votes to none, with 8 abstentions.

57. Mr. WERSHOF (Canada) said that at the 42nd meeting of the Committee of the Whole he had opposed article 41, paragraph 5. He had always thought it a mistake to include the words " and 50 " in that paragraph and he remained convinced that the prohibition of separability might have regrettable consequences for all. However, although the words " and 50 " had been retained in the paragraph by the necessary two-thirds majority, his delegation had felt that it should vote in favour of article 41 as a whole.

Statement by the Observer for the Asian-African Legal Consultative Committee

58. Mr. SEN (Observer, Asian-African Legal Consultative Committee), speaking at the invitation of the President, said that since its creation in November 1966 the Asian-African Legal Consultative Committee had been dealing with major questions of international law of concern to the international community as a whole. It carefully examined the reports of the International Law Commission and made recommendations thereon to the Governments of the Committee's member countries. The Committee was also working on subjects which were before other United Nations organs such as the United Nations Conference on Trade and Development and the United Nations Commission on International Trade Law.

59. The Committee had been considering the question of the law of treaties since 1965, and some of the suggestions it had made at its recent sessions had been communicated to the Conference at its first session in 1968.[8] With a view to preparations for

[8] See document A/CONF.39/7.

the second session of the Conference, the Committee had invited a number of non-member States to participate in its tenth regular session at Karachi at the beginning of 1969; twenty-six Asian and African States had accepted. Ten other countries had said that they would give consideration to any recommendations the Committee might adopt at that session. Distinguished jurists from other regions had also attended the session as observers.

60. At the Karachi meeting it had been agreed that discussion should concentrate on articles 2, 5 *bis*, 12 *bis*, 16, 17, 62 *bis*, 69 *bis* and 76 and the final clauses of the draft convention. A full and constructive exchange of views had taken place. For example, in connexion with article 62 *bis*, the participants at the Karachi meeting had gone so far to envisage five different solutions, including an optional protocol, the choice of one compulsory method of settlement, the possibility of contracting out of the provisions of article 62 *bis* and the possibility of recognizing the compulsory jurisdiction of the International Court of Justice. The reports of the Karachi meeting had been transmitted to the Governments of Asian and African countries for information and consideration.

61. He reminded the Conference that the Committee was a consultative organ and as such it confined its activities to the scientific examination of legal problems. However, it was rendering increasing assistance to Governments in the region, and its activities now covered not only questions of public international law but also legal issues connected with economic problems of trade and commerce. Some of those questions would be on the agenda of the session which the Committee was to hold at Accra at the beginning of 1970.

The meeting rose at 1.10 p.m.

SEVENTEENTH PLENARY MEETING

Thursday, 8 May 1969, at 3.20 p.m.

President: Mr. BOULBINA (Algeria)

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

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Article 42 [1]

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 or articles 57 and 59 if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(*b*) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

1. Mr. CARMONA (Venezuela) said that at the first session some delegations had considered that article 42, sub-paragraph (*b*), referred to a case of estoppel while others had viewed it merely as a *de facto* situation. In neither case, however, could that sub-paragraph be considered to lay down a rule of general international law, since its only practical application was in private municipal law, in cases where an individual had to be prevented from undoing what had manifestly been his original intention. The situation under international law, though analogous, was one which could never lead to the formulation of a peremptory rule, since the history of nations had presented too many widely different situations. The adoption of sub-paragraph (*b*) would prejudice young developing nations which had only recently achieved independence, since it would only bind them more closely to their former colonial masters and thus serve to perpetuate the injustices of the past.

2. It had been said that some such provision as that envisaged in sub-paragraph (*b*) was necessary in order to ensure the stability of international treaties. How far, however, was it necessary to go in that direction? To defend all existing treaties would only consolidate the *status quo* and safeguard privileges which had sometimes been obtained by coercion and force. The Conference, which was concerned with the progressive development of international law, could not and should not recognize unequal treaties which had been imposed upon weaker nations by the more powerful nations of a former era.

3. It had been alleged that acquiescence in the validity of a treaty, even for a comparatively short time, was sufficient to confirm it; acceptance of that principle, however, would represent an obstacle to the revision of unequal treaties and would therefore be a step backward in the field of international law. It had been argued that article 42 provided certain safeguards against bad faith on the part of States parties to a treaty, but he wondered whether it afforded any protection against those who had originally been guilty of bad faith. In his opinion, the article only served to erect barriers against the revision of illegal instruments and thus to close the door to any honourable solution of situations which were patently unjust because they had been imposed by the strong upon the weak.

4. Article 42 was divided into two parts: sub-paragraph (*a*) dealt with an express agreement concerning the validity of a treaty, while sub-paragraph (*b*) dealt with a tacit agreement. Sub-paragraph (*a*) involved a *de jure* question of the will of the State, while sub-paragraph (*b*) covered *de facto* cases where a State was considered to have acquiesced in the validity of a treaty. Sub-paragraph (*b*), however, involved a dangerous, subjective judgment; in several cases, in fact, the International Court of Justice, when

[1] For the discussion of article 42 in the Committee of the Whole, see 42nd, 43rd, 66th and 82nd meetings.