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Seventeenth 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)*

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.

considering the question of acquiescence, had ruled that silence alone could not create a bond.

5. In the Latin American countries, the question of the validity of treaties tended to centre on the date of their independence, which had been 1810 for the South American countries and 1821 for Mexico and Central America. Following those dates, enormous tracts of land which had formerly belonged to Spain and Portugal had become available for exploitation. Since fatal dissensions might otherwise have ensued, the newly independent countries had exercised the right of eminent domain and had subjected themselves to the rule of law. Frontiers had become clearer in the course of time, but the question of State succession, throughout the developing world, was still very widely subject to the principle of *uti possedetis*. He suggested that, since States Members of the United Nations and of the present Conference were ruled by law and not by mere *de facto* principles, one of the main tasks of the International Law Commission should be to determine the true principle concerning State succession, a question which was wrongly prejudged in article 42, if not in article 69.

6. His delegation appealed to all delegations, particularly those of the new developing countries, to oppose the principle set forth in sub-paragraph (*b*), which would force them to accept and endorse the acts of their former overlords. His delegation proposed to ask for a separate vote on that sub-paragraph, since otherwise it would be compelled to vote against article 42 as a whole.

7. Mr. ALVAREZ TABIO (Cuba) said it would be illogical to admit that an instrument which was void from the outset could possibly be revalidated: only something which had been validly affirmed could be confirmed. The possibility of revalidation could only be conceived in the case of a treaty which had at first been validly concluded but had later been voided as a result of subsequent events. In that case, it was logical to allow for the possibility that the interested party could claim that it had been confirmed. Since the treaty was not void *ab initio,* it was presumed to be valid until the contrary was established. The whole dispute came within the scope of the autonomy of the will of the parties and there was no danger of any violation of the international public order.

8. In the case of a treaty that was void *ab initio,* on the other hand, the well-known maxim applied that an instrument which was radically void could not be validated either by the passage of time or by agreement. It was, for example, inadmissible that a party guilty of fraud or corruption should be allowed to invoke against the injured party the " own conduct " doctrine, according to which no one was permitted to benefit from his own blameworthy conduct. Under article 65, paragraph 3, the party to which the fraud or act of corruption was imputable was not permitted to claim as lawful acts performed in bad faith before the nullity had been invoked. It would thus be inconsistent with the provisions of article 65 to treat in article 42 certain cases of *ab initio* nullity in the same way as cases of mere voidability.

9. His delegation also objected to the presumption of tacit consent in sub-paragraph (*b*) in the case of silence or abstention by the injured party. That presumption based on conduct, with its ill-defined scope, gave too wide a margin for discretion in its application. Article 42, with the ambiguous formulation of sub-paragraph (*b*), did not provide any guidance for determining what type of conduct was to be construed as acquiescence. The position would be particularly grave if those provisions were to be applied to a treaty in respect of which one of the parties had not had any freedom of choice. Sub-paragraph (*b*) carried to its ultimate conclusions the so-called doctrine of " estoppel ", and would in effect impose on the injured party in a case of fraud or corruption an obligation to take some action. The provision in sub-paragraph (*b*) that failure by the injured party to act was to be construed as acquiescence, for the benefit of the party to which the fraud or corruption was imputable, appeared to be based on the legally unacceptable maxim that silence was equivalent to consent. In fact, in the public and administrative law of a great many countries, the contrary rule prevailed: where a decision rested with an authority, its silence was invariably interpreted as a rejection of the request or application and never as an acceptance. Sub-paragraph (*b*) did not even take into account the possibility that the State whose conduct was being interpreted might not have had any freedom of action in certain circumstances. Mere abstention or silence, in all circumstances, was considered as automatically equivalent to tacit consent.

10. His delegation could not accept article 42, not only because it gave unlimited scope to the " own conduct " doctrine, but also because of the ambiguous language in which it was couched.

11. Mr. SARIN CHHAK (Cambodia) said that the concept of good faith, which was explicitly set out in article 23, formed the very basis of the convention, and article 42 was intended to consolidate it. In paragraph (1) of its commentary, the International Law Commission had said that article 42 expressed the generally admitted and expressly recognized principle that a party was not permitted to benefit from its own inconsistencies, a principle based essentially on good faith and fair dealing.

12. A State lost the right to invoke a ground for invalidating a treaty if, after becoming aware of a possible cause of invalidity, it had expressly recognized that the treaty was valid, or if it had behaved in such a way as to be considered as having asquiesced in the validity of the treaty. In such a case, the State in question was not allowed to adopt a legal attitude incompatible with that which its previous behaviour had led the other parties to consider to be its attitude towards the validity of the treaty. In other words, an allegation by a State which conflicted with its previous behaviour could not be taken into consideration, because such an allegation was merely a subterfuge or a device used for a specific purpose. According to the Expert Consultant, the article under consideration involved a general principle of law, which would be applicable in any case even without such a provision.[2]

[2] See 67th meeting of the Committee of the Whole, para. 104.

13. Article 42, as drafted by the International Law Commission, fulfilled the dual purpose of guaranteeing the stability of international relations and providing protection against bad faith in the application of the rules stated in Part V. The article had received general support in the Sixth Committee of the General Assembly and had been unanimously approved by the International Law Commission. The previous year it had received substantial support in the Committee of the Whole. His delegation therefore supported the retention of article 42 in its present form.

14. Mr. BINDSCHEDLER (Switzerland) said that his delegation agreed in principle with article 42, except for one small detail. He regretted, for the reasons which he had stated at the 67th meeting of the Committee of the Whole, that it contained no reference to article 49. If, in a treaty containing an element of coercion, that element disappeared after a certain time, and if States agreed to continue to apply the treaty in future, there was no reason to forbid them to act in that manner. Professor Georges Scelle, a great master of international law and one of the most passionate opponents of the use of force in international relations, had stated that even certain treaties containing an element of force might be in the interests of the international community and should be accepted as an element of international legislation.

15. His delegation fully agreed with the principle set out in article 42 concerning acquiescence in the validity of treaties containing defects of origin. Such recognition of validity by acquiescence was a long established legal principle, it might even be said a principle of international law. The principle was just because it would be contrary to justice if a State could invoke invalidity or a defect in consent in relation to a treaty after applying that treaty for a more or less lengthy period of time or after freely and expressly consenting to it.

16. It had been said that the subject involved an analogy with civil law, which should be avoided. He agreed that prudence was needed in all such analogies, but there was no branch of public international law which was so close to internal law and presented so many analogies with it as the law of treaties, which had been developed on the basis of contract law, or more precisely of Roman law; such analogies were therefore quite admissible in the sphere of the law of treaties.

17. Further reasons supporting the principle of the recognition of validity by acquiescence were the principle of effectiveness, which still played a part in international law, the security and stability of law and international relations and the principle of good faith. It was inadmissible, and he was referring particularly to sub-paragraph (*b*), that a State should apply a treaty for a number of years and suddenly, for some reason, invoke a defect in consent. Such behaviour threatened the stability of the contractual system and the foundations of international law and was contrary to good faith.

18. He could not see any connexion between the principle involved and the struggle against colonialism; the principle was one which benefited all States, including the small and weak. The problem was of a legal nature and must be solved in accordance with legal criteria. His delegation was in favour of article 42 as a whole and would oppose a separate vote on sub-paragraph (*b*).

19. Mr. MOLINA ORANTES (Guatemala) said that his delegation strongly opposed the inclusion of the principle of acquiescence or estoppel in sub-paragraph (*b*), and entirely shared the views just expressed by the Venezuelan representative.

20. Although he did not contest the existence in law of the doctrine which precluded a party from impeaching the validity of acts by which it had benefited, he was convinced that there were some acts which were legally void *ab initio;* such acts could never be rendered valid by a supposed acquiescence, which would merely perpetuate an injustice. Moreover, sub-paragraph (*b*) would deprive articles 49, 57 and 59 of all value.

21. The only argument which had been advanced in favour of sub-paragraph (*b*) was the supposed need to ensure the stability of treaties, even when such treaties suffered from fatal defects. But the existence of peace and justice in relations between States was much more important than the perpetuation of a *status quo* of convenience. He would therefore vote against the inclusion of sub-paragraph (*b*), and supported the Venezuelan request for a separate vote on that paragraph.

22. Sir John CARTER (Guyana) said that, at its 67th meeting, the Committee of the Whole had rejected an eight-State amendment (A/CONF.39/C.1/L.251 and Add.1-3) to delete sub-paragraph (*b*) of article 42.

23. Two principal arguments had been put forward in support of the deletion of sub-paragraph (*b*). The first questioned the advisability of including in a convention of that type the notion of preclusion, which was indigenous to municipal legal systems and did not form a part of traditional international law; the second emphasized the danger of inferring consent from conduct. Those arguments were either of little relevance to the issue under dispute or were based on a misapprehension of the juridical issues involved.

24. In the first place, sub-paragraph (*b*) stated the principle that a party must not be permitted to benefit from its own inconsistencies in terms of implied consent and not in terms of preclusion, as had been asserted by two previous speakers. The confusion was due to the fact that the International Law Commission in its commentary appeared to have discussed the issue in the context of two decisions of the International Court, in the *Temple of Preah Vihear* case [3] and *The Arbitral Award made by the King of Spain* case,[4] both of which stated the principle negatively in terms of preclusion. But a careful reading of paragraph (4) of the commentary to article 42, particularly the last sentence, together with the remarks of the Special Rapporteur [5] would show that sub-paragraph (*b*) was not intended to state, and did not in fact state, the principle of preclusion.

[3] *I.C.J. Reports, 1962,* p. 6.

[4] *I.C.J. Reports, 1960,* p. 192.

[5] See *Yearbook of the International Law Commission, 1966,* vol. II, p. 7, para. 6.

25. It would be noted that the present sub-paragraph (*b*) was substantially the same as the one recommended for adoption by the Special Rapporteur, and it should be clear therefore that its drafting stated the principle that a party must not be allowed to approbate and reprobate for its own benefit positively in terms of implied consent. That fact could be more easily appreciated if the text of article 42 were compared with that of the corresponding article adopted by the International Law Commission in 1963.[6] The comparison showed that, whereas the text adopted by the Commission in 1963 had stated the principle in terms of preclusion, sub-paragraph (*b*) of the present article 42 addressed itself to a positive statement of the principle in terms of implied consent.

26. The second argument put forward against sub-paragraph (*b*) centred around the danger of accepting the notion of implied consent from conduct. But the International Law Commission appeared to have accepted the well-founded view that intention could be inferred from conduct, as could be seen from the formulation of various articles in the draft convention. Sub-paragraph (*b*) did no more than express the principle that consent might be inferred from conduct, a principle long established in international law, confirmed in the text of the Commission's draft articles, and reaffirmed by the Committee of the Whole and by the Conference itself by its adoption of various articles of the convention. In some instances where the principle had not been clearly stated, the Conference had rectified the omission, for example by amending the text of article 6, paragraph 1 (*b*) by the insertion of the words " the practice of the States concerned or from other circumstances ", and by accepting the explanation of the Chairman of the Drafting Committee that the word " confirmed " in article 7 included both express and tacit confirmation.[7]

27. His delegation therefore hoped that, in view of the importance of article 42 to the convention and to the security and stability of treaties, it would be adopted as it stood. His delegation would oppose the request for a separate vote on sub-paragraph (*b*), in view of the unity of the article and the difficulty of adopting one part without the other.

28. Mr. DE CASTRO (Spain) said that he had already expressed his reservations regarding sub-paragraph (*b*) and he concurred with the arguments put forward by the representatives of Venezuela, Cuba and Guatemala.

29. Article 42 dealt with a case of renunciation of a right or faculty, the right or faculty to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty. If that renunciation were to apply to a treaty that was null and void, it would have the effect of validating an instrument which had no legal existence. The operation of the provisions of article 42 would thus bring into being a treaty without requiring due compliance with the various formal and substantive conditions specified in the convention on the law of treaties.

30. In the case of a treaty which was voidable because of a defect in consent, the provisions of sub-paragraph (*b*) would establish a presumptive waiver of the right to invoke the ground of invalidity, and waiver in such cases could not be presumed. In addition, the wording of sub-paragraph (*b*) was not at all clear. The reference to the " conduct " of the State concerned seemed to suggest that some positive act must be performed. At the same time, the term " acquiescence " could be taken as meaning that waiver could be implied from mere silence, or from the failure to resort to certain international authorities. Such a proposition was totally unacceptable to his delegation; much more than a mere abstention was required for it to be possible to say that confirmation had legally taken place. A clear and unequivocal expression of intention was essential.

31. The principle of good faith had been mentioned during the discussion, but it was not relevant to article 42. The negligence or bad faith of a party could not have the effect of bringing into being a new treaty. The question of good faith in connexion with the invalidity of a treaty was dealt with in article 65.

32. He supported the request for a separate vote on sub-paragraph *(b)*. His delegation would vote against that sub-paragraph and, if it were retained, it would have to vote against article 42 as a whole.

33. Mr. BAYONA ORTIZ (Colombia) said that article 42 would have the effect of restricting the application of a number of articles of the convention, in particular those of Part V dealing with invalidity, termination and suspension of the application of treaties.

34. Admittedly, the provisions of Part V were open to abuse, but the same was true of the provisions contained in sub-paragraph (*b*) of article 42, and abuse of those provisions could be a source of injustice.

35. The loss of the right to invoke a ground of invalidity was a very serious matter. It was understandable that such a right should be lost in the case envisaged in sub-paragraph (*a*), because the State concerned would then be expressly consenting to the application of the treaty. That sub-paragraph was therefore acceptable to his delegation. It was, however, a totally different matter to assert that the right could be lost as a result of the conduct of the State concerned. It was extremely difficult to determine the reasons why a State decided to act in a particular way, and even more difficult to determine its real intentions. Viewed in that light, the provisions of sub-paragraph (*b*) appeared not merely superficial but imprecise.

36. His delegation's serious misgivings about the wording of sub-paragraph (*b*) were not based on any special interest. His delegation's concern was to prepare a convention on the law of treaties that would be on an effective instrument laying down clear and precise legal rules which would contribute to international understanding. For those reasons, his delegation supported the request by the Venezuelan delegation for

[6] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 212, article 47.

[7] See 8th plenary meeting, para. 58.

a separate vote on sub-paragraph (*b*) and would vote against that sub-paragraph.

37. Mr. ROMERO LOZA (Bolivia) said that his delegation agreed that it was important to proceed with caution where provisions on the invalidity of treaties were concerned. At the same time, the stability of international relations might be upset by closing the door to the possibility of invoking the invalidity of a treaty that was vitiated, or by establishing procedures which would ultimately result in validating a treaty that was null and void from the start.

38. In paragraph (5) of its commentary to article 42, the International Law Commission had stated its view that the rule embodied in the article would not operate if the State in question " had not been in a position freely to exercise its right to invoke the nullity of the treaty ". For that reason it had stated that it " did not think that the principle should be applicable at all in cases of coercion of a representative under article 48 or coercion of the State itself under article 49 ", and had continued: " To admit the application of the present article in cases of coercion might, in its view, weaken the protection given by articles 48 and 49 to the victims of coercion ".

39. Nevertheless, sub-paragraph (*b*), by establishing a presumption of acceptance based on the conduct of the State, introduced a subjective and nebulous element which was capable of dangerous interpretations, to the detriment of States which had at one time been prevented from exercising their sovereignty or of rejecting provisions imposed upon them. The Bolivian delegation could not possibly accept the text of article 42 and had been instructed by its Government to formulate immediately its reservations to article 42 if it was adopted in its present form. His country did not consider itself bound to comply with the terms of the article.

40. Sir Francis VALLAT (United Kingdom) said that at the first session his delegation had already put on record its views on article 42 and it was therefore not necessary for him to dwell at length on his reasons for supporting the article as it now stood.

41. The discussion had turned on the question of the inclusion or exclusion of sub-paragraph (*b*), dealing with acquiescence by conduct. In his delegation's view, it was not possible to divide the provisions of article 42. The opening sentence, with its essential phrase " after becoming aware of the facts ", governed both sub-paragraphs (*a*) and (*b*). Neither the provisions of sub-paragraph (*a*) nor those of sub-paragraph (*b*) would apply unless the State concerned had become aware of the facts; that requirement provided the key to the whole article. It was connected with the essential element of good faith. If a State became aware of the facts, it was inadmissible that it should go on benefiting from the provisions of a treaty and still be allowed to dispute the validity of the treaty at a later stage. It was right and proper that if a State, either expressly or by its conduct, had in those circumstances affirmed the validity of the treaty, it should no longer be permitted to impugn that validity.

42. The deletion of sub-paragraph (*b*) would distort the application of the rule embodied in article 42. Without sub-paragraph (*b*), the article would be unsatisfying and it would be undesirable to retain it. His delegation therefore urged that article 42 be accepted as it stood.

43. Mr. CONCEPCION (Philippines) said he noted that there had not been any objection to the general principle contained in article 42. With regard to sub-paragraph (*b*), the main objection seemed to be that its wording was not sufficiently specific and, in particular, that the term " acquiescence " could lead to abuse in the interpretation and application of the rule in the article. He therefore suggested that sub-paragraph (*b*) be referred to the Drafting Committee, which could examine the possibility of making the wording clearer so as to specify that acquiescence must be evident or manifest. A drafting change of that kind would bring the provisions of sub-paragraph (*b*) more into line with those of sub-paragraph (*a*) and might allay the apprehensions of those delegations that had expressed misgivings during the discussion.

44. At the same time, the Drafting Committee could take into account the distinction between treaties that were void and treaties that were merely voidable. It was a fundamental principle, acknowledged in private law, that a void instrument could not be revalidated and he was not satisfied that, for purposes of international law, there should be any departure from that fundamental principle.

45. Mr. ALVAREZ (Uruguay) said he had serious misgivings regarding the vague and subjective character of the provisions of sub-paragraph (*b*). Similarly vague and subjective expressions were to be found in certain passages of the commentary to the article, such as the second sentence of paragraph (4) which read: " In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty ".

46. In any case, the terms of sub-paragraph (*b*) did not adequately reflect the basic idea which the Commission had recognized as underlying article 42 when it stated in the first sentence of paragraph (5) of the commentary " that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith ". The two elements mentioned in that sentence were not reflected in the text of sub-paragraph (*b*). That text established a questionable formal presumption which took no account of the real situation in any given case.

47. It must be remembered that the cases dealt with in article 42 were not clear situations in which a State benefited from a treaty, but doubtful situations in which it would be dangerous to make assumptions. Inevitably, the interpretation of the provisions of sub-paragraph (*b*) would be influenced by the interests of the State which invoked them. Those provisions raised a number of very difficult questions of interpretation, in particular the question whether silence or abstention should be construed as acceptance. In fact, they posed

a large number of problems without providing any solution for them.

48. His delegation considered that, although the principle in sub-paragraph (*b*) was legally admissible, the terms in which the sub-paragraph was drafted were unacceptable. He suggested that sub-paragraph (*b*) be referred to the Drafting Committee for rewording in clear and explicit terms, so as to make it possible for all States to accept article 42. In particular, he urged that the rewording should take into account the two elements to which he had referred: first, that the application of the rule in any given case would necessarily turn upon the facts, and secondly, that the governing consideration would be that of good faith.

49. He therefore supported the motion for a separate vote on sub-paragraph (*b*) and, if sub-paragraph (*b*) were not reworded as he had suggested, he would have to vote against it because its provisions could give rise to injustice.

50. Mr. DE LA GUARDIA (Argentina) said that his delegation would support the Venezuelan request for a separate vote on sub-paragraph (*b*) and would vote against that paragraph. If it were decided to retain sub-paragraph (*b*), Argentina would vote against article 42 as a whole.

51. Mr. RATTRAY (Jamaica) said that his delegation had explained his views on article 42 at the 67th meeting of the Committee of the Whole. Jamaica understood article 42 to state the principle that States were free to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty only under certain unambiguous conditions. The conduct of a State on the basis of which it might be regarded as having acquiesced in the validity of a treaty was subject to its having become aware of the facts. Thus, sub-paragraph (*b*) established a standard of proof and, if the conduct in question was open to a variety of interpretations and was therefore ambiguous, it would not constitute acquiescence for the purposes of article 42. Moreover, since the first session, more specific machinery for establishing the grounds of invalidity had been provided in articles 62 and 62 *bis*. Accordingly, the objection that sub-paragraph (*b*) would allow a party to decide unilaterally what conduct might be regarded as acquiescence was unfounded, and article 42 did not contain the ambiguities that had been alleged.

52. The PRESIDENT said that the Philippine representative's suggestion that sub-paragraph (*b*) be referred back to the Drafting Committee could not be accepted, since it gave rise to substantive questions which the Conference must settle for itself.

53. The delegations of Switzerland and Guyana had objected to the Venezuelan request for a separate vote on sub-paragraph (*b*). In view of those objections, under rule 40 of the rules of procedure, the motion for division would have to be put to the vote.

54. Mr. TAYLHARDAT (Venezuela) said that a request for a separate vote represented the right of every State to express its views on a part of a proposal. The Conference had never yet denied any such request, and he appealed to it not to set a precedent in that regard.

55. Sir John CARTER (Guyana) said that every delegation also had a right to object to a request for a separate vote.

56. The PRESIDENT invited the Conference to vote on the Venezuelan request for a separate vote on sub-paragraph (*b*).

At the request of the Venezuelan representative, the vote was taken by roll-call.

Sierra Leone, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Spain, Thailand, Uruguay, Venezuela, Afghanistan, Argentina, Bolivia, Burma, Colombia, Congo (Brazzaville), Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Morocco, Nepal, Peru, Philippines.

Against: Sierra Leone, Singapore, South Africa, Sudan, Switzerland, Trinidad and Tobago, Tunisia, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Zambia, Algeria, Austria, Barbados, Belgium, Brazil, Cambodia, Cameroon, Central African Republic, Congo (Democratic Republic of), Dahomey, Denmark, France, Gabon, Ghana, Guyana, India, Indonesia, Italy, Ivory Coast, Jamaica, Japan, Kenya, Kuwait, Lebanon, Lesotho, Liberia, Liechtenstein, Luxembourg, Madagascar, Malaysia, Mauritius, Monaco, Netherlands, Nigeria, Pakistan, Senegal.

Abstaining: Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Australia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Ceylon, Chile, China, Cyprus, Czechoslovakia, Ethiopia, Federal Republic of Germany, Finland, Greece, Holy See, Hungary, Iran, Iraq, Ireland, Israel, Libya, Mongolia, New Zealand, Norway, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Saudi Arabia.

The Venezuelan request of a separate vote on sub-paragraph (b) *was rejected by 47 votes to 21, with 37 abstentions.*

57. Mr. REDONDO-GOMEZ (Costa Rica) said his delegation greatly regretted that the Conference had denied certain delegations the opportunity of having their views taken into account. Costa Rica wished to place on record its protest against that anti-democratic gesture.

58. The PRESIDENT invited the Conference to vote on article 42.

Article 42 was adopted by 84 votes to 17, with 6 abstentions.

59. Mr. BILOA TANG (Cameroon) said that his delegation had voted for article 42 because of the safeguards it provided. Nevertheless, his Government wished to express its view that the conduct referred to

in sub-paragraph (*b*) must be unambiguously determined and that the provision did not cover mere silence.

60. Mr. AMATAYAKUL (Thailand) said that in order to prevent his delegation's silence during the discussion of article 42 from being taken as implying its consent to the adoption of the article, he wished to state that his delegation maintained the view it had expressed at the 67th meeting of the Committee of the Whole and had therefore abstained from voting on the article.

61. Mr. BAYONA ORTIZ (Colombia) said that his delegation had voted against article 42 for the reasons it had given earlier in the meeting. It had intended to vote against sub-paragraph (*b*) but, since the request for a separate vote on that clause had been rejected, it had been obliged to vote against the article as a whole, without prejudice, however, to its views on sub-paragraph (*a*).

62. Mr. CARMONA (Venezuela) said he had received instructions from his Government to announce that the Republic of Venezuela would enter an express reservation in respect of article 42.

63. Mr. BIKOUTHA (Congo, Brazzaville) said that, in his delegation's opinion, the work of codifying the law of treaties should not be based on short-term political considerations or an selfish motives. His delegation had explained its views on article 42, especially on sub-paragraph (*b*), at the 67th meeting of the Committee of the Whole. It was not opposed to the principle laid down in sub-paragraph (*b*), but feared that the inclusion of the phrase " by reason of its conduct " might open the door to subjective and loose interpretations and, consequently, to abuse. It had therefore abstained in the vote on the article as a whole.

64. Mr. GALINDO-POHL (El Salvador) said that his delegation had voted against article 42, although it approved of the first part of it, because of the serious reservations it had to sub-paragraph (*b*). The Conference had, of course, exercised its right under the rules of procedure in rejecting the request for a separate vote on sub-paragraph (*b*), but his delegation could not help thinking that it had thereby shown a certain lack of flexibility. El Salvador had always upheld the view that it was inadvisable to deny delegations the opportunity of expressing their opinions by means of a separate vote on part of a text and thus to force them to vote against the whole provision. He would suggest that in future every effort be made to meet requests for separate votes.

65. Mr. SINHA (Nepal) said that his delegation had voted in favour of the Venezuelan motion for division and against article 42. Nepal supported a just and honourable international legal order, and did not want to be a party to any action which might create a possibility of that order being vitiated by coercion. Sub-paragraph (*b*) as now worded might open the door to legalizing treaties obtained by fraud and coercion, since even silence might be construed as acquiescence in the validity of an unjust treaty or in its maintenance in force or in operation.

66. U BA CHIT (Burma) said that his delegation approved of the first part of article 42, but had reservations concerning sub-paragraph (*b*). Since it had been given no opportunity to express its attitude towards that sub-paragraph, it had had no alternative but to vote against article 42 as a whole.

Message from the President of India

67. The PRESIDENT said that the Indian delegation had requested him to convey to the Conference a message received from the President, Government and people of India.

68. The President had been deeply touched by the expressions of condolence and the kind references by delegations to the United Nations Conference on the Law of Treaties on the sudden passing of Dr. Zakir Husain, the late President of India. The President wished to convey to the Conference, both on his own behalf and on behalf of the Government and people of India, his grateful thanks for their sympathy in India's great loss. The Conference's condolences had been conveyed to the family of the late President, who also wished to express their thank to the Conference.

The meeting rose at 6 p.m.

EIGHTEENTH PLENARY MEETING

Friday, 9 May 1969, at 3.15 p.m.

President: Mr. ZEMANEK (Austria)

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)*

Statement by the Chairman of the Drafting Committee on articles 43-50

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 43 to 50 constituted Section 2 (Invalidity of treaties) of Part V of the convention.

2. The Drafting Committee had made several drafting changes in the titles prepared by the International Law Commission and in the texts adopted by the Committee of the Whole. Two of those changes affected all the language versions. The first related to the opening phrase of article 44, " If the authority of a representative to express the consent of his State ". As it had also done elsewhere, and in particular in article 7, the Committee had replaced the words " of his State " by the words " of a State ", since it was possible for a State to be represented by a person who was not a national of that State.

3. The second change related to article 46, on fraud. The article dealt with a situation which had some analogy with that envisaged in article 47, entitled " Corruption of a representative of a State ". The