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Twenty-sixth plenary meeting

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articles were only acceptable to them if article 62 *bis* were adopted.

85. His delegation thought that article 62 *bis* was acceptable provided the final clauses as approved were not amended. In the Committee of the Whole, the proposal on the final clauses had obtained 60 votes to 26, in other words it had obtained a two-thirds majority. That vote too could not be ignored. Any attempt to introduce a new article to amend the final clauses, particularly an article which did not contain a reservation clause, would be unacceptable. Brazil, like the majority of Latin American countries, must submit the convention to its Parliament, and if the convention did not contain any reservation clause, Parliament might refuse to ratify it. In principle, Brazil was traditionally against the formulation of reservations, but every country was free to make reservations if it thought fit.

86. In general, Brazil was not over-enthusiastic about article 62 *bis*, but considering that the convention was an organic whole in which all the articles were interlinked, it would not raise any objection to that article.

The meeting rose at 1.5 p.m.

TWENTY-SIXTH PLENARY MEETING

Thursday, 15 May 1969, at 3.15 p.m.

President: Mr. AGO (Italy)

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)*

Article 62 bis (Procedures for conciliation and arbitration) *and annex I to the convention* (continued)

1. Mr. SECARIN (Romania) said that his delegation had already stated in the Committee of the Whole its reasons for supporting article 62 and for opposing the so-called supplementary machinery proposed in the form of article 62 *bis*.

2. The arguments put forward by the supporters of pre-established machinery to which one party to a dispute could resort independently of the other had demonstrated the complex character of the issues involved and had given his delegation additional reasons for supporting the International Law Commission's system set out in article 62, which was in keeping with the present stage of development of international relations and of international law. The flexible system which the Commission had adopted almost unanimously reflected the highest measure of common ground among governments and in the Commission itself. The International Law Commission had acted wisely and realistically in avoiding any formula for compulsory machinery that would tend to give one party a right of action against another.

3. The allegation by the critics of article 62 that there was a gap in the system embodied in the article was based on the assumption that one of the parties would be acting in bad faith. But experience showed that States were concerned to promote good faith in treaty relations and, despite all the difficulties of international life, those relations tended increasingly to strengthen the principles of morality, justice and the rule of law. No procedural system could avail against a party acting in bad faith.

4. It was always open to States to include an arbitration clause in a treaty; in doing so, they would take into consideration the special circumstances of the treaty and would accept the clause with foreknowledge of the type of disputes to be settled. If, however, the parties had not included an arbitration clause in their treaty, they had freedom of choice of peaceful means of settlement. They were under a legal obligation to make patient and responsible efforts in good faith to arrive at a peaceful settlement of their dispute.

5. If the hands of the parties were tied by adopting a pre-established system of procedure, they would no longer have the same freedom of choice with regard to means of settlement when they concluded a particular treaty, or when a dispute arose. There was also the danger that the existence of a pre-established procedure would encourage one of the parties to choose the line of least resistance and fall back immediately on that procedure, instead of making efforts to arrive at a peaceful settlement.

6. It had been claimed that under the provisions of article 62, a State would be both a judge and a party in its own dispute. That claim ignored both the fundamental differences between legal relations in private law and public law, and the differences between internal and international relations. Principles which were peculiar to private law could not be transferred bodily to the realm of international treaty relations. States were the best judges of the matters which concerned them and an amicable settlement based on the agreement of the parties and arrived at on the basis of the rules of international law was always preferable. Naturally, if the parties themselves decided to resort to adjudication or arbitration, they took the decision *in concreto* and bearing in mind the circumstances of the case.

7. The position with article 62 *bis* was completely different. It was proposed to include it in a treaty on treaties: the procedural machinery set forth in it would not apply to events or facts but to legal instruments — in fact to all treaties. It would be most unrealistic to establish in that way a procedure *in abstracto* and before the event.

8. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that his delegation had not been convinced by the arguments of the opponents of article 62 *bis* and would continue to support it. It did so because it believed that the International Law Commission's draft was lacking in balance.

9. The International Law Commission had carefully

codified the subject of the invalidity, termination and suspension of the operation of treaties and in so doing had introduced a number of new and in some cases revolutionary rules. Those rules, however desirable, involved real dangers for the stability of treaties and must be balanced by provisions on institutional machinery for the settlement of disputes. The system embodied in article 62, which merely referred to Article 33 of the Charter, adopted a traditional approach to the question of the settlement of disputes. That approach was totally inadequate when it came to applying original rules, sometimes of a revolutionary character, such as those to be found in Part V. It was therefore logical and necessary, without abandoning the provisions of Article 33 of the Charter, to endeavour to go beyond those provisions.

10. Some of the critics of article 62 *bis* had based their opposition to it on their objection, as a matter of principle, to compulsory adjudication. Compulsory adjudication was in fact beneficial to weak countries, whose independence it safeguarded and whom it protected against possible pressure by others. Moreover, provision for compulsory adjudication had been made in practice in the relations between many sovereign States.

11. In any case, it was an exaggeration to speak of compulsory adjudication in connexion with article 62 *bis*. Article 62 *bis* was merely intended to prevent a dispute leading to a deadlock which could constitute a threat to peace. Priority was still given to the application of Article 33 of the Charter; article 62 *bis* only came into play if a disagreement between the parties made it impossible to apply the provisions of Article 33 of the Charter.

12. Article 62 *bis* made provision mainly for conciliation under the auspices of the United Nations. That method of settlement, which was particularly flexible, was being used to an increasing extent because it was perfectly compatible with the character of the relations between sovereign States. Many States had accepted conciliation clauses and their acceptance did not imply any relinquishment of their sovereignty. In a sense, the task of conciliators under article 62 *bis* would not differ greatly from that which had devolved upon the Assembly of the League of Nations under Article 19 of the Covenant, which empowered the Assembly to " advise the reconsideration by Members of the League of treaties which have become inapplicable " and thereby conferred upon it competence to determine whether a treaty had become obsolete. No one had ever suggested that Article 19 of the Covenant in any way conflicted with the sovereignty of States Members of the League of Nations. It was only if the efforts of the conciliators were unsuccessful and no settlement was agreed upon by the parties that arbitration came into play under article 62 *bis*. The fact that the Secretary-General of the United Nations would participate in the initiation of the arbitration procedure offered adequate safeguards to all concerned.

13. His delegation strongly supported article 62 *bis* and would consider it a matter for regret if it were amended in any way in an effort to achieve a compromise; if any such amendment were made, his delegation would have to reconsider its position.

14. Mr. JELIC (Yugoslavia) said his delegation's view was that the convention on the law of treaties would be improved by the inclusion of strong provisions for the settlement of disputes in the event of the application of the provisions of article 62 not yielding any result. Even compulsory arbitration would be acceptable to his delegation. At the same time, it was a fact that compulsory arbitration was not acceptable to a considerable number of countries, and it would be bad policy to try to impose on those countries, even by a two-thirds majority, a solution which would make them reluctant to sign the convention.

15. The only possible course was to endeavour to reach a compromise solution. Between the system of article 62 and compulsory arbitration a whole range of possibilities lay open: all that was needed was the will to use them. The Conference was entitled to expect from the advocates and the opponents of compulsory arbitration that they should not persist in their irreconcilable attitudes but endeavour to find a compromise. The decision by the Conference at a previous meeting not to take a vote on article 62 *bis* before all possibilities of compromise had been exhausted was a clear indication of that desire. He therefore hoped that delegations would not find themselves obliged to vote for or against 62 *bis* in its present form, but would be given an opportunity to pronounce on a compromise solution.

16. Mr. N'DONG (Gabon) said that the Conference would fail in its purpose if it did not adopt a compulsory procedure for the settlement of disputes such as that embodied in article 62 *bis*.

17. The International Law Commission had suggested a timid procedure in article 62, which in fact referred to Article 33 of the Charter. Article 33 was in keeping with conditions prevailing at the time of the adoption of the Charter but it was now necessary to go further. Articles 23 and 27 of the Charter had already been amended in order to take into account the changing needs of the international community. It was essential, in the interests of the future success of the convention on the law of treaties, that the procedure set forth in article 62 *bis* should be included for the application of the various articles on invalidity, termination and suspension of the operation of treaties.

18. He wished now to clarify a point which had been raised during the discussion. The representative of Congo (Brazzaville) had referred to the statement by the Gabonese delegation at the 94th meeting of the Committee of the Whole, opposing the Spanish amendment (A/CONF.39/C.1/L.391). In fact, his delegation had pointed out that the Spanish amendment in question " would be harmful to newly-independent States like Gabon in that, for many years to come, they would not be in a position to appoint ' persons of recognized eminence ' for the purpose of article 1, paragraph 2 of the annex to the amendment ". In doing so, his delegation had merely drawn attention to existing conditions, but the dearth of " persons of recognized

eminence ", within the meaning of the Spanish amendment, had not prevented Gabon from joining the sponsors of article 62 *bis* and from subscribing to compulsory arbitration. In particular, at the regional African level, there should be no difficulty in finding suitable impartial arbitrators. The passage to which the representative of Congo (Brazzaville) had referred did not therefore provide any argument against adopting article 62 *bis*.

19. Article 62 *bis* had the advantage of flexibility, in that it made provision both for a diplomatic means of settlement, through conciliation, and for a judicial means of settlement, through arbitration. It was a necessary complement to article 62 in that it answered the question what would happen if resort to the means indicated in article 62 ended in deadlock. The article provided for arbitration to protect the weak and curb the ambitions of the strong. It would uphold the rule of law and prevent the rule of force.

20. It had been suggested that article 62 *bis* would allow violations of the sovereignty of States. He would like, therefore, to draw attention to the definition of arbitration contained in article 37 of the Hague Convention for the Pacific Settlement of International Disputes (Convention I) of 18 October 1907: " International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law ".[1] It would be seen from that definition that the essential basis for settlement by arbitration was the will of the parties to a dispute. A State which accepted compulsory arbitration renounced the exercise of its sovereign rights in that matter; since it did so of its own free will, there could be no question of any violation of sovereignty. A State could even renounce its sovereignty altogether for the purpose of joining a federation. It was high time to leave behind the retrograde notions of nationalism which could delay indefinitely the achievement of a peaceful international community.

21. It had also been objected that earlier codification conventions, such as the 1958 Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular relations, did not make provision for compulsory adjudication. The answer to that objection was that the convention on the law of treaties contained so many innovations that they must necessarily be accompanied by safeguards in the form of the key article 62 *bis* in order to protect the international legal order against abuses by powerful States.

22. Mr. ALVAREZ TABIO (Cuba) said that his delegation had already stated its position and could only add that it would maintain it regardless of circumstances. His delegation was not prepared to go any further than article 62 as already approved, and rejected as a matter of principle any kind of procedure not based on free choice. It would not accept any formula for general compulsory adjudication at a supra-national level which could be used to impose awards in disputes whose nature and scope could not be foreseen. His delegation would therefore vote against article 62 *bis* and its annex.

23. Mr. MUTUALE (Democratic Republic of the Congo) said that his delegation had used its best efforts during informal negotiations to endeavour to prevent a matter of such great importance to the convention on the law of treaties as article 62 *bis* from being decided by a majority vote. If the question was to be decided in that manner the convention would become a restricted multilateral treaty. That would represent a very limited achievement in return for the long years of work on the law of treaties. The Conference would thus have helped to discredit the whole idea of the codification of the law of treaties.

24. His country was a developing country; its development could not be achieved purely with its own resources and depended in great measure on co-operation with other States. His country was not at all opposed to the principle of compulsory international arbitration procedures, but it did not favour a formula which would submit to arbitration all future convention without any distinction. In its position as a developing country, the Democratic Republic of the Congo had signed a large number of treaties of all kinds and would undoubtedly continue to sign even more in the future. It was reluctant to accept a formula which would tie it to a pre-established procedure, and therefore did not view article 62 *bis* with favour. The most it could accept was compulsory conciliation.

25. Mr. ABAD SANTOS (Philippines) said that his delegation would vote for article 62 *bis,* or something substantially similar, since it represented a radical step towards the only satisfactory method of settling disputes, namely, compulsory adjudication. The solution provided for in article 62 was very inadequate, because the methods suggested in Article 33 of the United Nations Charter were merely optional and there was no way by which a State could be forced to submit to them. It had been claimed that those procedures were adequate for States which were inclined to use them, but unfortunately many States lacked the necessary inclination to do so. It had also been claimed that the community of States was not yet ready to accept a system of compulsory settlement; that was mere conjecture, however.

26. The reason behind the principle of compulsory settlement was a valid one and, as in the case of *jus cogens,* the Conference should not miss the opportunity to take a step forward in the right direction. The procedure provided for in article 62 *bis* was compulsory only if the parties had not agreed to some different procedure. What was compulsory was that they must settle their dispute. The parties were given the choice of the method of settlement and were not required to resort to the method of settlement provided for in article 62 *bis* if that was distasteful to them. Without article 62 *bis,* the legal order set up in the convention, providing for optional settlements, would provide for no settlement at all. All States were committed to the rule of law, but unless they also committed themselves to the

[1] J. B. Scott, *The Hague Conventions and Declarations of 1899 and 1907,* 3rd ed., p. 55.

principle of compulsory settlement, their original commitment would be no more than lip service paid to empty phrases. In the view of his delegation, any settlement of disputes which depended upon the whim of a State was intolerable and unacceptable.

27. Mr. ANDERSEN (Iceland) said he could not understand why such resistance was being offered to article 62 *bis*. His country had made a treaty with the United Kingdom on the subject of fishery limits, which was vital to Iceland, since 95 per cent of its exports consisted of fishery products. Nevertheless, there was a clause in that treaty to the effect that, if Iceland were to extend its fishery limits beyond 12 miles, which in his country's opinion was insufficient and, indeed, completely unsatisfactory, the United Kingdom could take the matter to the International Court of Justice. Iceland had agreed to that clause because it considered that the jurisdiction of the Court was a fundamental principle for States which believed in international justice and, consequently, that all peace-loving countries had a moral as well as a legal obligation to support article 62 *bis*. Recourse to the International Court seemed to be more appropriate than conciliation or arbitration, but since compulsory jurisdiction of the Court was not acceptable to the majority of the States represented at the Conference, Iceland was prepared to vote for article 62 *bis*.

28. Mr. KOULICHEV (Bulgaria) said that his delegation was firmly opposed to article 62 *bis*, since it doubted whether any system of compulsory arbitration could ever serve to resolve disputes of a political nature. At the present stage of international relations, any such system was unrealistic. In view of its universal character, the convention ought to be based on *lex lata* and be acceptable to all governments, as otherwise it would be merely a tool in the hands of a small group of States. His delegation, therefore, could not regard article 62 *bis* as a satisfactory compromise and would vote against it.

29. Sir Francis VALLAT (United Kingdom) said he wished to comment on some of the points raised earlier. First, many delegations would be unhappy if Part V did not contain satisfactory third party procedures. There had been continuing attempts to reach a compromise. The text of article 62 *bis* had been worked over by many delegations — probably every delegation had contributed something; it was in the truest sense a compromise. The vote in the Committee of the Whole and subequent discussions showed that the large majority of delegations were in favour of third party settlement procedures and it was no use trying to maintain that that was not so. Delegations should not be deceived into thinking that, if article 62 *bis* were rejected, that would be a satisfactory result in the eyes of the majority.

30. Secondly, some earlier remarks seemed to him to be entirely divorced from the reality of the situation; possibly he had misunderstood them. Some reference had been made to " gun-boat diplomacy " and " waving the big stick ", as though article 62 *bis* represented the modern version of those practices. If States, large or small, had the humility to submit to third party procedures, it was difficult to see how it could be a question of the " big stick ". It was rather the reverse: it was the substitution of legal methods for the outmoded methods of force and pressure. It was because of the fear that Part V might lead to unilateral " waving of the big stick " that article 62 *bis* was regarded as essential by the United Kingdom and many smaller States.

31. Thirdly, it had been alleged that article 62 *bis* was based on an ignorance of United Nations procedures and of the history of arbitration and judicial settlement. All representatives present had great experience of United Nations procedures and of both arbitration and judicial settlement. There was no such ignorance behind the drafting of the article.

32. Fourthly, it had been said that representative must keep their feet on the ground. But to which articles did that remark really refer? To article 50, whose content was completely unknown? To article 61, whose content was entirely in the future and concerned rules which had yet to emerge? Those were the articles which were in the clouds. Article 62 *bis* was the parachute which would bring the Conference back to earth again.

33. Some delegations had complained about the breadth of application of article 62 *bis*. Yet there had been no criticism of the breadth of application of articles 45 to 50, 57, 59 and 61. It was, however, maintained that article 62 *bis* must be narrowed. Its supporters were willing to examine any proposals, so long as the essential protection remained. There was surely no reason why in principle article 62 *bis* should be narrower than those articles to which it related or, indeed, than article 62.

34. It was true, as had been mentioned, that arbitration and adjudication had not been used to a great extent, but the number of members of the international community was not large and litigation was not to be expected every day. But the existence of those procedures themselves made States view their acts and responsibilities more closely and carefully. Experience showed that settlement through third party procedures was infinitely preferable to the results of an indefinite prolongation of a dispute.

35. Article 62 *bis* was reasonable and necessary, and represented the largest measure of common agreement. The vote on article 62 must be understood in the light of the fact that many delegations had voted for it in the hope that article 62 *bis* would be adopted.

36. Mr. MATINE-DAFTARY (Iran) said that his delegation did not share the doubts of those western representatives who had said that it would be difficult to adopt Part V of the convention unless provision was made for very strict procedural safeguards. After all, everything in the world was relative, and article 62 *bis*, while well formulated from the point of view of some countries, might be very dangerous for others. The developed, western countries already possessed efficient administrative machinery with which to tackle the problem of safeguards, but such machinery was unfortunately lacking in many of the developing countries. By the very nature of things, therefore, article 62 *bis*

tended to divide delegations into two groups, those which favoured it and those which opposed it, and both believed themselves to be in the right. In those conditions, he questioned the wisdom of putting the article to a vote. The Conference should rather work in the spirit of Article 33 of the United Nations Charter and try to produce a formula which would be acceptable to all.

37. Mr. MARESCA (Italy) said that his delegation considered article 62 *bis* an essential provision because it laid down a procedure for the settlement of disputes. International relations had to be governed by some form of procedure, a fact which ought to be recognized. Rules had already been accepted by the Conference with respect to the interpretation of treaties, *jus cogens,* prohibition of the use of force, fundamental change of circumstances and so forth. There was no reason why it should not also adopt rules for the settlement of disputes. Article 62 *bis* provided the proper machinery for settlement after all other means, including recourse to diplomatic channels, had been exhausted. It made available an objective procedure which allowed international law to develop naturally and to serve the cause of international co-operation. He appealed to the Conference to recognize the need for some sort of procedure for the settlement of disputes and hoped that article 62 *bis* would be adopted.

38. Mr. SAMAD (Pakistan) said that the arguments that had been adduced against article 62 *bis* compelled him to place the real issues involved in the article in the right perspective so that the fallacy of those arguments might become at once apparent.

39. First, all that had been said against compulsory procedures for the settlement of international disputes could be asserted against municipal law. Yet the fact remained that municipal law had long been in force in all civilized societies of the world. The representative of Malaysia had warned them against the danger of drawing a parallel between municipal and international law. But it was a fact that international law had all along been drawing and would continue to draw not only inspiration but also substance from municipal law. After all, States were merely international personalities, just as the individuals of a State were national personalities under the law of their land.

40. Secondly, it had been argued that the world was not yet ready for compulsory procedures. But the pace of the progress of mankind was swifter now than it had been in the past. Refusal to make any progress in the field of international relations would be a very sad reflection on the jurists of the world assembled at the Conference. Some had taken the view that it might be opportune at a later stage to introduce compulsory procedures in international law but not to-day. But why not do it now, in the interests of the stability of treaty relations and at a Conference engaged in the progressive development and codification of international law?

41. Thirdly, it had been said every State must trust in the sense of honour and self-respect of other States in the matter of the settlement of disputes rather than trust in a law which imposed compulsory procedures upon them. But laws were framed not for the law-abiding but for the delinquent. What should be done if the other State chose to be unreasonable and persisted in taking unilateral action? It was only then that compulsory procedures would be applied, as proposed in article 62 *bis,* in the interests of the weaker States in particular.

42. The delegation of Pakistan would therefore vote in favour of article 62 *bis,* which was an organic whole, as a step in the right direction in the present stage of development of international law.

43. Mr. YASSEEN (Iraq) said that article 62 *bis* would produce a complex system. It went beyond what could properly be recommended as a solution reflecting present-day international relations and one which would receive the broad support required for any initiative designed to bring about a drastic change. Those who felt that compulsory judicial settlement or arbitration were essential to the application of international law were unduly influenced by the analogy drawn with internal law; they were not taking into account the structural characteristics of the international community. International law had its own means of settling disputes; the procedure was laid down in Article 33 of the United Nations Charter. The basic concept was that States should in principle be free to choose a method for settling disputes while remaining bound by an essential obligation, that of refraining from the use of force in international relations.

44. The convention on the law of treaties would not have retroactive effect. Therefore States in favour of compulsory jurisdiction would not be in any difficulty if article 62 *bis* was not adopted. A decision on the settlement of disputes could be taken for each treaty and an agreed procedure selected, including recourse to arbitration or compulsory judicial settlement.

45. Mr. WYZNER (Poland) said that article 62 *bis* was unacceptable to his delegation for a number of reasons. First, the inclusion of rules which were already binding upon States should not be made dependent on acceptance of any pre-established procedure. Secondly, the article was contrary to contemporary international law and to the practice of States; the concept of compulsory jurisdiction had not been accepted in most of the earlier conventions codifying and progressively developing general international law. Thirdly, the codification of the law of treaties should not be used as a means of introducing the idea of compulsory jurisdiction, which lay outside the scope of the convention. Fourthly, the establishment of the procedure set out in article 62 *bis* would impose new and heavy burdens on the United Nations and its Member States. Fifthly, the idea of applying obligatory and automatic arbitration for all time to all treaties without exception, including those dealing with security, national defence and boundaries, was quite unrealistic. Finally, the proposed machinery would supersede the system of regional settlement of disputes which existed throughout the world; for instance, if one of the more than forty members of the Organization of African Unity requested that a dispute

involving the other Members of the Organization be submitted to a United Nations panel, that would have to be done, with the paradoxical result that strictly regional problems would be settled by international arbitrators, even against the wish of an overwhelming majority of the members of the regional group.

46. If article 62 *bis* were adopted, it would have a direct and negative bearing on the future of the convention as a whole, for no instrument containing unduly far-reaching ideas would ever attract a sufficient number of ratifications. Indeed, it was to be feared that even those States which so persistently defended article 62 *bis* might come to the ultimate conclusion that the convention was not acceptable to them. During the negotiation of the 1963 Convention on Consular Relations,[2] an influential group of States had pressed for the adoption of some far-reaching provisions which they declared to be a *sine qua non* of their participation in the Convention, but although nearly all their proposals had been adopted, they had still not become parties to the Convention. Strangely enough, many of those States were now among the most ardent supporters of article 62 *bis*. Another case was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[3] Some of the provisions of that instrument had been adopted only under the pressure of certain delegations, which had made their Governments' acceptance of the Convention conditional upon those clauses. The opposing delegations had reluctantly accepted the clauses in order to ensure the general application of the Convention, but now, fifteen years later, the States which had pressed these clauses had not yet become parties to the Convention.

47. The codification of the law of treaties should not be made dependent on the establishment of a compulsory jurisdiction, for disputes arising out of treaties had no particular features warranting the establishment of such jurisdiction; they were international disputes, like any others between States, and the principle that States must seek an early solution of any disputes in which they might be involved applied also to any that might arise in connexion with the application of the provisions of Part V of the convention. The only requirement imposed on the parties to a dispute under contemporary international law was that settlement was to be sought by peaceful means and in such a way that international peace and security were not endangered.

48. At the first session of the Conference, final consideration of article 62 *bis* had been deferred to the second session on the understanding that an effort would meanwhile be made to find compromise solutions acceptable to the great majority of the participants. It was obvious, however, that the advocates of article 62 *bis* had come to the second session without any great willingness to co-operate in seeking such solutions. Despite the sincere efforts of many delegations and despite dramatic appeals for the reconciliation of opposing views, the advocates of article 62 *bis* persisted in demanding unacceptable solutions and had gained a Pyrrhic victory in the Committee of the Whole.

49. The Polish delegation considered itself obliged to vote against article 62 *bis* and annex I. It was convinced that only through the rejection of that provision could the convention as a whole be saved, since only then could a generally acceptable compromise formula be evolved. If, however, article 62 *bis* were adopted, the Polish Government would not be in a position to accept the obligations arising out of its provisions.

50. Mrs. BOKOR-SZEGÓ (Hungary) said that the Conference should take into consideration the fact that strong opposition to article 62 *bis* had been expressed during the debate. That opposition was based, and rightly so, on the view that the provisions of the article were inconsistent with present-day international practice. Inclusion of the article might prevent a number of States from acceding to the convention and thus frustrate the desire of most States represented at the Conference that the convention should receive the broadest support.

51. The Hungarian delegation was firmly opposed to article 62 *bis* because it jeopardized a convention which had been carefully prepared first by the International Law Commission and then at two sessions of the Conference.

52. Mr. RAMANI (Malaysia) said that the United Kingdom representative had asked States to show humility and subject themselves to the legal procedures set out in article 62 *bis*. But that begged the whole question. What the Malaysian delegation had complained about at the previous meeting was the possibility of the other State being humiliated by the waving of the big stick of legal procedure.

53. The United Kingdom representative had gone on to say that many representatives had voted for article 62 in the expectation and hope that article 62 *bis* would be adopted. He would simply point out that many other representatives had voted for article 62 in the hope that article 62 *bis* would not secure a majority, or at least not the required majority.

54. Mr. BLIX (Sweden) said that Sweden took the view that, since the United Nations Charter contained a prohibition of the use of force, treaties extorted by force must not be rewarded by validity, and similarly, that there could be norms so fundamental to the international community that deviation from them by treaty could not be tolerated. International law was the law of the community, and there was no reason why the community should stamp the injunction *pacta sunt servanda* on contracts which it regarded as abhorrent.

55. However, his delegation was acutely aware that there was much disagreement as to what constituted a prohibited use of force, and what norms were so fundamental that no deviation from them could be tolerated. Such disagreement could well lead to differences in relation to specific treaties. Obviously there were also uncertainties connected with other concepts in Part V, and if there was no machinery automatically available to settle disagreements, there was a risk that the articles on invalidity might be abused. Consequently Sweden

[2] United Nations, *Treaty Series*, vol. 596, p. 261.

[3] United Nations, *Treaty Series*, vol. 249, p. 240.

was convinced that Part V of the convention must be coupled with automatically available procedures for the settlement of disputes. Or course, parties to disputes should always be free to choose by agreement in advance, or *ad hoc,* the methods of settlement they preferred. But that freedom was in no way restricted by articles 62 or 62 *bis.*

56. His delegation could not understand the criticisms of article 62 *bis* based on the grounds that the freedom of choice of parties as to methods of settling disputes was essential. That freedom already existed. Article 62 *bis* was designed to meet a situation which arose when the parties did not succeed in reaching agreement on a method of settlement. In fact article 62 *bis* could be regarded as a restriction on the freedom of a party unilaterally to keep a dispute open for ever. But it was not a restriction preventing parties from agreeing between themselves on methods of settlement. Indeed, contrary to the suggestion that the existence of automatically available machinery would provoke unconciliatory attitudes, it was likely to induce parties to reach agreement on methods of settlement of disputes, since obstruction would not pay.

57. The present convention did not embody the international law of the old States, but reflected the law accepted by all States. That was demonstrated by the votes cast at the Conference. Part V of the convention had been particularly welcomed by the new States. The procedures proposed in article 62 *bis* would assist therefore, not in upholding the old law, but in upholding the law accepted by the modern international community.

58. Various technical objections might be raised against article 62 *bis.* Some delegations might have preferred to transform the proposed conciliation commission into the arbitral tribunal, should conciliation fail. Sweden could not agree with that view, believing that the two functions were different. Others would have preferred to have three neutral umpires at the stage of arbitration. Many would have liked to see some role for the International Court of Justice, particularly in interpretation and the application of article 50. But although Sweden shared that view, it had supported the present structure of the machinery, which was more acceptable to the majority, although it was notable that the pleas for the use of the International Court of Justice had come from some of those delegations who had spoken most strongly against automatically available means of settlement. Sweden did not claim that article 62 *bis* was perfect, but it was convinced that the machinery proposed was of crucial importance if the progress achieved through the adoption of Part V was not to be undermined, and perhaps turned into a source of uncertainty in the treaty relations between States.

59. Article 62 *bis* would not impose heavy burdens upon States that were disinclined to accept arbitration. An article concerning the non-retroactivity of the convention, article 77, had been adopted by the Committee of the Whole, so that treaties concluded by States before the convention entered into force for them would not be subject to the procedures of article 62 *bis.* Furthermore, after the convention had entered into force for States, they would be free, in concluding future treaties, to agree upon other methods of settlement, or even to exclude the application of article 62 *bis* to such treaties. Therefore the contention that article 62 *bis* would be a straitjacket was unfounded. Nor was it correct to say that the article could lead to " involuntary legal procedures ". States would sign and ratify the present convention, including article 62 *bis,* of their own volition, just as they accepted the optional clause of the International Court of Justice of their own volition. There were many other conventions, including United Nations conventions, containing clauses of automatically available procedures for settlement of disputes, and such conventions were freely accepted by States. States reluctant to accept automatically available procedures must weigh the advantages that the substance of the convention might give them against the possible disadvantage that they saw in those procedures. Other States, on the contrary, might feel that the substance of some conventions might contain dangers for them if no automatically available procedures were provided for the impartial settlement of disputes.

60. At the previous meeting, the representative of India had stated that Sweden had expressed the view, in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, that international law was not created by votes; the representative of India had gone on to say that on crucial issues action should be by general agreement. Both views were correct. However, the problem was that Part V of the convention included certain rules regarded by some States as new and potentially dangerous to the stability of relations between States. Most of those States were prepared to accept those rules provided that they were coupled with safeguarding procedures, but not otherwise. Thus the problem was not one of the creation of an international legal procedure by vote, but one of seeking to include certain rules with the broadest possible measure of agreement. It was for that purpose that Sweden supported the procedures laid down in article 62 *bis,* and would vote for the article.

61. Mr. MANNER (Finland) said that his delegation supported the procedure of compulsory arbitration provided for in article 62 *bis* and would vote for the article. The Conference should work not only for the codification but also for the progressive development of international law, and the concept of progressive development was equally applicable to methods of international legal procedure. The very fact that so many States had expressed support for article 62 *bis* showed that a considerable body of opinion in present-day international legal thinking was in favour of compulsory jurisdiction, and the time might now have come to incorporate that principle into the convention.

62. Many representatives had stressed the practical difficulties of compulsory arbitration, particularly for small countries. His delegation did not consider such difficulties relevant but believed, on the contrary, that an optional procedure would not provide equal possibilities for all, and especially for the smaller States, to apply the provisions of the new law of treaties.

63. Mr. DE CASTRO (Spain) said that his delegation wished to explain its vote on article 62 *bis* by amplifying some of its earlier observations. Spain had always supported the idea of a jurisdictional or arbitral solution to the problem dealt with in article 62 *bis,* as a step in the progress and institutional development of the international community. Spain also considered that, for such a solution to be effective and acceptable to all States, it must be possible to establish a group of persons of absolute impartiality, and also to give the corresponding arrangements of an institutional character such authority that it could be said that the decision was in fact being left to the international community itself. It was with those aims in view that Spain had submitted a proposal (A/CONF.39/C.1/L.391) which had not, however, been voted upon by the Committee of the Whole. At that stage, Spain had abstained from voting on the nineteen-State amendment (A/CONF.39/C.1/L.352/Rev. 3 and Corr.1 and Add.1 and 2) proposing the insertion of a new article 62 *bis* for two main reasons. First, it had not attracted sufficient general support, and secondly, the proposal was not entirely satisfactory either in substance or in drafting.

64. On the other hand, his delegation could not accept the view that Part V and article 62 *bis* were interdependent. The principle intimately linked with Part V was the principle of *pacta sunt servanda:* there could be no agreement unless there was true consent by the parties. Nevertheless, his delegation had given careful consideration to the fears voiced by many delegations about the situation that might arise if Part V were not linked with a compulsory system for the settlement of disputes; those fears must be regarded as one of the realities with which the Conference had to deal.

65. At the 104th meeting of the Committee of the Whole, during the discussion of the final clauses, Spain had drawn attention to the importance of dealing with the question of reservations. His delegation had also stated that, although there was no logical relationship, there was an important political relationship between the question of compulsory jurisdiction and the question of universality, or the " all States " clause, and it might still be possible to arrive at a generally satisfactory compromise on those two issues.

66. Accordingly, the Spanish delegation had decided, not without misgivings, to vote for article 62 *bis,* as an expression of good faith and of the fact that it was not opposed to the principle of compulsory jurisdiction. He must emphasize, however, that Spain's vote for article 62 *bis* was linked with the question of reservations to the convention. Obviously, the meaning and value of article 62 *bis* would vary considerably according to the drafting of the reservations clause. There could be either a general reservations clause, or a provision that certain parts of the convention were not open to reservations, or, as the Spanish delegation had proposed (A/CONF.39/L.39) the reservations clause could provide that a State might declare that it did not consider itself bound by certain of the provisions of annex I to the convention with respect to certain categories of disputes. Attention should also be drawn to the possibility of affirming the principle of universality, with regard to which his delegation had submitted a draft resolution (A/CONF.39/L.38).

67. The Spanish delegation would vote in favour of the principle of article 62 *bis,* although it had serious doubts about the drafting, because Spain considered that the whole question was bound up with the question of reservations. Spain took that position on the understanding that even after the adoption of article 62 *bis,* it might still be possible to resolve the doubts of many delegations by providing a satisfactory system of reservations. That would help to achieve what everyone hoped for, a general agreement that would prove to be the salvation of the convention on the law of treaties.

68. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that his delegation would vote against article 62 *bis,* for several reasons. First, from the legal point of view, the article went beyond Article 33 of the United Nations Charter, and none of the attempts to prove that its application would not infringe the right of States to choose means of settlement of disputes had been at all convincing. Secondly, the wording was obviously divorced from reality and, moreover, had been criticized on that ground both by the advocates of a compulsory settlement procedure and by its opponents; moreover, its financial implications clearly conflicted with United Nations practice. Thirdly, from the political point of view, it was so formulated as to provide a tool for exercising pressure on the developing countries against their interests.

69. With regard to the question of seeking a compromise, the Soviet Union had appealed for such a compromise from the outset of the Conference, in order to meet the vital interests of all participating States. For a long time, all its proposals had been ignored, but at last some of the western Powers had begun to talk of a compromise. A distinction should, however, be drawn between those countries: some, such as Sweden and the Netherlands, had made genuine efforts to reach a satisfactory solution, but others had followed in the wake of one State which had blocked all possibility of reaching agreement. Thus, no compromise could be reached, through the fault of that one delegation.

70. The Soviet Union delegation was sure that the principle of universality, which was generally acknowledged, had been rejected because of the activity of a certain group of delegations. A similar group was now trying to impose on the Conference a system of compulsory arbitration which was contrary to existing State practice. A convention containing a compulsory arbitration clause would clearly be unsatisfactory to a large number of States, and the Government of the USSR would be unable to support such an instrument.

71. Mr. STAVROPOULOS (Representative of the Secretary-General) said that the representative of the Soviet Union had raised the question of the financial implications of certain provisions of the annex to article 62 *bis,* pursuant to which the United Nations would be responsible for the expenses of the conciliation commission or of the arbitral tribunal contemplated in that annex. It was impossible to estimate the costs that would be involved until a case occurred that was

referred to conciliation or arbitration. Nevertheless, as contingent expenses were involved, it would be necessary for the General Assembly of the United Nations to undertake expressly to assume the responsibility for such expenditure.

72. If article 62 *bis* and its annex were adopted by the Conference, it would be necessary to place an item on the agenda for the next session of the General Assembly to enable the Assembly to reach a decision. That could be done by a resolution of the Conference requesting the Secretary-General to do so; if the Conference did not agree to such a resolution, the Secretary-General himself would have to place such an item on the agenda in order to clarify the issue, and at that time the question of how to calculate the expenses would have to be answered to some extent by giving the General Assembly an idea of their scale.

73. Mr. HAYTA (Turkey) said that his Government's attitude, which had remained consistent throughout, had been stated by him at the 92nd meeting of the Committee of the Whole. For the reasons he had there given he would vote against article 62 *bis* and for the same reasons he had abstained in the vote on article 62.

74. Mr. FATTAL (Lebanon) said that some representatives had asked why a mere reference to Article 33 of the United Nations Charter should not be sufficient.

75. The congenital weakness of Article 33 of the Charter was that it placed negotiation on the same footing as other procedures for the peaceful settlement of disputes, whereas negotiations was in fact only a preliminary procedure which should be compulsory in all cases. What happened in practice was that, under Article 33, States contented themselves with undertaking negotiations, and if those negotiations broke down, no further efforts were made and the treaty was unilaterally denounced. If negotiation had been considered only as a preliminary phase, then when it failed, the parties in dispute would have been obliged to have recourse to a proper procedure for settlement. Under such conditions, a mere reference to Article 33 of the Charter would have been sufficient.

76. Mr. KRISHNA RAO (India), thanking the representative of the Secretary-General for his statement, said that if article 62 *bis* were adopted, it would be the first time that a plenipotentiary conference had adopted an article which would have financial implications for the General Assembly. He wondered what the status of the article would be if the General Assembly declined to accept those financial implications.

77. Mr. YAPOBI (Ivory Coast) said he would like to remind the representative who had stated that the supporters of article 62 *bis* appeared to be totally ignorant of United Nations procedure, that the supporters of article 62 *bis* were, like that representative, experienced lawyers and distinguished representatives of their Governments. The attitude they had adopted to article 62 *bis* was based on the most rigorous cartesian logic; that was crystal clear and undeniable.

78. In order finally to remove all misunderstandings, it must be made absolutely clear that article 62 *bis* had been proposed not just by western States, by strong and wealthy nations, but that its supporters were in the main the little, weak countries. Support for the article had nothing to do with considerations of wealth, politics or sentiment.

79. His own country had suported article 62 because it represented an essential stage in the procedure for the friendly settlement of disputes arising in connexion with international agreements. But article 62 failed to achieve its specific objective. The Indian representative had asked what would happen if no result was achieved by the application of the provisions of Article 33 of the Charter and had himself replied that if such an impasse were reached, each State must act in good faith. That was what the Indian representative called being realistic and other speakers had maintained the same pretence. In his view, it was quite ridiculous and utterly unrealistic to expect that, if the provisions of Article 33 of the Charter did not lead to a satisfactory result, then an amicable settlement could be reached merely by relying on the parties to the dispute to act in good faith.

80. It had been suggested that article 62 maintained the *status quo* and thus helped to safeguard peace and stability. But if, because national interests were at stake, a country decided to invoke a formal defect in a treaty and, acting solely in accordance with its own wishes, refused to seek agreement under Article 33, it might claim that it was maintaining the *status quo;* that could hardly be described as safeguarding peace and stability.

81. It was inconceivable that the Conference should permit the small nations thus to be left at the mercy of the strong. His country knew from its own experience that love among nations was not the general rule; good faith was not enough, and without a police force there would be a return to the law of the jungle. The small countries desperately needed and yearned for safeguards and guarantees and that was why it was essential to adopt article 62 *bis.*

82. In his view, certain nations were determined that article 62 *bis* should not be adopted and it was by those nations that no real attemps at compromise had been made.

The meeting rose at 6.10 p.m.

TWENTY-SEVENTH PLENARY MEETING

Friday, 16 May 1969, at 12.15 p.m.

President: Mr. AGO (Italy)

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)*