United Nations Conference on the Law of Treaties

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Thirty-fifth 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)*

120. Mr. USTOR (Hungary) said that his delegation would vote for the report, subject to the same reservations as those expressed in its paragraph 6.

121. Mr. KEARNEY (United States of America) said that in the view of his delegation, it was enough that the countries whose credentials had been attacked had been duly invited to participate in the Conference by the Secretary-General under General Assembly resolution 2166 (XXI).

The report of the Credentials Committee (A/CONF. 39/23/Rev.1) was adopted unanimously.

The meeting rose at 8.20 p.m.

THIRTY-FIFTH PLENARY MEETING

Thursday, 22 May 1969, at 12 noon

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)*

Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution (resumed from the previous meeting)

Explanations of vote

1. The PRESIDENT invited representatives to explain their votes on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the previous meeting.

2. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that, from the legal point of view, there was no link, in his delegation's opinion, between the two quite different questions dealt with in document A/CONF.39/L.47 and Rev.1. But the Conference had had to vote on the two questions together. In the circumstances, his delegation had abstained in the vote on the proposals in the document. On the one hand, it disapproved of the draft declaration on universal participation in and accession to treaties, but on the other, it had already supported article 62 *bis* and was still in favour of the part of the proposal relating to procedures for adjudication.

3. Mr. HU (China) said that the text proposed in document A/CONF.39/L.47 and Rev.1 was in two parts, which were independent of each other. The document had been submitted as a compromise formula. Since it had been impossible to take a vote by division, the Chinese delegation had been placed in a very difficult position, as it was in favour of the second part and strongly opposed to the first. It had therefore decided to abstain, but had reserved the right to explain its vote. Its abstention should in no way be construed as indicating approval of the first part of the proposal, since it was opposed to the declaration on the principle of universality, which it regarded as a mere recommendation with no mandatory force. The General Assembly remained the sole judge. He reserved his Government's right to express its view when the question of universality was discussed in the General Assembly.

4. Mr. SHUKRI (Syria) said he had abstained in the vote on document A/CONF.39/L.47 and Rev.1 because the formula did not go as far as his delegation would have wished where the principle of universality was concerned, and further than it would have wished on the question of the settlement of disputes. It had not, however, cast a negative vote, because it had wished to contribute to the success of the convention and to express its appreciation of the arduous efforts of the representative of Nigeria and his colleagues. If a separate vote had been taken on the declaration, the Syrian delegation would have voted in favour of it; but it regarded the declaration as merely a minimun. The Syrian Government would not only strive to achieve the object of that declaration at the next session of the General Assembly, but would also continue its efforts in all organizations and conferences to bring about the universal recognition of the principle of universality; for his country that was a matter of principle.

5. Mr. KHLESTOV (Union of Soviet Socialist Republics) explained that his delegation had voted against document A/CONF.39/L.47 and Rev.1 as a whole because the vote had not been taken by division. The document was composed of two unbalanced parts, and the second part, which provided for recourse to the International Court of Justice and had serious financial implications, was unacceptable.

6. The declaration contained merely a feeble appeal to the United Nations and the General Assembly to ensure that the question of universality should remain under consideration. Nevertheless, it had been adopted, and sixty-one States, including a large number of delegations of western States, had voted in favour of it. That meant that the Conference recognized the existence of the principle of universality in relation to multilateral treaties. Recognition of that principle was clearly expressed in the first paragraph, and confirmed what the USSR delegation had so often advocated. The USSR delegation supported the principle and the declaration.

7. Mr. CARMONA (Venezuela) said his delegation had already explained its position on the problem of arbitration and compulsory adjudication in the Committee of the Whole. That position had not changed. The Venezuelan delegation had taken the view that it should not intervene to influence the result of the vote on document A/CONF.39/L.47 and Rev.1 at the previous meeting. It had abstained, leaving the final decision to its Government.

8. Mr. FUJISAKI (Japan) said he wished to express his appreciation of the efforts made by those representatives who, until the last moment, had worked so hard to

arrive at the compromise formula submitted in document A/CONF.39/L.47 and Rev.1. Since it was a compromise, it was only natural that that formula did not entirely satisfy anyone and Japan was no exception in that respect. His delegation had voted for the formula, not because it fully supported the contents of the compromise proposal, but solely because it believed that it was the only way of saving the convention as a whole.

9. Mr. ALVAREZ (Uruguay) explained that his delegation had voted for the text submitted in document A/CONF.39/L.47 and Rev.1 because it was anxious that the Conference should reach agreement on the questions that were the subject of controversy. The proposal was a first move towards recognizing compulsory adjudication as a means of settling international disputes, but its scope was too restricted and bore no relation to the position traditionally adopted by his Government for many years, which his delegation had explained on numerous occasions during the discussion. The formula did however make a positive contribution to the progressive development of international law and substantially improved the machinery provided for in article 62.

10. His delegation's attitude towards the principle of universality did not in any way commit his Government with regard to the position it might subsequently adopt when the principle in question was again discussed in the General Assembly.

11. Mr. SAULESCU (Romania) said that his delegation had emphasized from the very beginning of the Conference's work that the convention could only be effective in so far as it contained a provision establishing the principle of universality. For that reason his delegation had joined the other delegations which had submitted amendments to that effect to the Committee of the Whole and to the plenary Conference; it considered that the convention was, by definition, a multilateral treaty of interest to the entire international community. The Conference had unfortunately decided differently by adopting at the previous meeting the draft declaration on universal participation in and accession to the convention on the law of treaties.

12. His delegation realized that the draft declaration had certain merits, although it was still far from what should have been included in a convention of world-wide effect. He therefore desired to express his appreciation to the sponsors of the draft declaration, and in particular to the representative of Nigeria. If the draft declaration had been put to the vote separately, Romania would have voted for it.

13. In the absence of a separate vote, his delegation had had to take a position on the proposals as a whole. It could not support the principle of the procedures for the settlement of disputes included in the compromise proposal. It had on several occasions explained why it supported the procedures provided for in article 62 and why it rejected machinery for compulsory settlement set up in advance. In those circumstances, his delegation had been compelled to vote against the proposals submitted together in document A/CONF.39/L.47 and Rev.1.

14. Mr. SINHA (Nepal) said he had voted for the draft declaration, the new article and the draft resolution. His delegation had, however, voted against article 62 *bis:* the Conference had been deeply divided on the issue of compulsory arbitration in case of dispute; moreover, the provision proposed in article 62 *bis* had been defective in respect of many important points. In particular, his Government did not like the idea of *ad hoc* tribunals giving decisions on vital but nebulous questions of *jus cogens.* Such tribunals might well have given conflicting decisions, particularly as there was no institution to make them uniform. Moreover, the proposed article 62 *bis* adopted a negative attitude towards the International Court of Justice which was after all the judicial organ of the world order. Again, the adoption of that provision would have prevented a considerable number of countries from acceding to the convention.

15. On the other hand, the new article just adopted on procedures for adjudication, arbitration and conciliation, although not ideal since it was a compromise solution, at least filled some of the gaps on the institutional side of the convention. It restored confidence in the International Court of Justice; although many delegations had reason to doubt the wisdom of some decisions of the International Court, the Court was an international creation and could not therefore be blamed for its merely congenital weaknesses. In future it was sure to grow in wisdom and stature.

16. His delegation had also voted for the draft declaration contained in document A/CONF.39/L.47 and Rev.1. Although the declaration did not guarantee participation by all nations in multilateral conventions of interest to the international community as a whole, it nevertheless emphasized the principle of universality. For his delegation at all events the declaration was morally binding on States; they would feel themselves called on to bring it to fruition by voting for it in the General Assembly. Nepal, at least, would not fail in its duty in that respect. It was a tragedy that at that stage, when article 1 of the convention made it applicable to treaties concluded between all States and article 5 empowered all States to conclude treaties, the convention did not provide that it was open to all States. It was because of its desire to correct that injustice that his delegation had associated itself with the sponsors of a new article laying down the principle of universality (A/CONF.39/L.36). That article had not been adopted, but he was convinced that the principle of universality would eventually triumph and his delegation would continue to work to that end.

17. His delegation had not voted against the so-called "Vienna formula", which remained the only one acceptable in the circumstances, and had simply abstained.

18. As a result of the adoption of the compromise proposal (A/CONF.39/L.47 and Rev.1) which had provided a happy solution to the crisis in the Conference's work, the convention on the law of treaties was manifestly a success.

19. Mr. SEOW (Singapore) said that in his view the draft declaration, the new article and the draft resolution contained in document A/CONF.39./L.47 and Rev.1 represented a genuine attempt to bridge differences

of opinion so deep that they had threatened to bring about the failure of the Conference. His delegation had therefore wished to support the proposals in which those efforts had resulted, primarily in order to ensure the success of the convention. He wished to pay a tribute to the sponsors of those compromise solutions.

20. Mr. JAGOTA (India) said he wished to explain exactly why his delegation had abstained in the vote at the preceding meeting on the proposals contained in document A/CONF.39/L.47 and Rev.1.

21. The dissensions that had made themselves felt in the Conference related essentially to articles 5 *bis* and 62 *bis*. The Indian delegation had supported the principle of article 5 *bis*, and its various formulations, without involving itself in any political issue arising from those proposals. As to article 62 *bis*, his delegation had been opposed to the idea of compulsory settlement procedures, and had been determined to do everything possible to prevent its adoption. The proponents of article 62 *bis* were equally determined on the opposite course, and had spent the year between the two sessions of the Conference in intensive lobbying to ensure that the article was accepted. In the process the Asian and African States had been deeply divided. When both article 5 *bis* and article 62 *bis* had been rejected the Conference had been in a mood of despondency. Yet the Conference had adopted the basic proposal of the International Law Commission by a very large majority, much larger than that by which it had adopted the proposals in document A/CONF.39/L.47 and Rev.1. Thus it could not be said that the seventeen years of work by the International Law Commission had been in jeopardy. All that had been in jeopardy had been the new proposals making additions to the draft articles prepared by the International Law Commission.

22. At that juncture, the Asian and African States, on the initiative of Nigeria and India, among others, had sought to find a fair and reasonable solution. The delegations of Nigeria and India had given shape to certain ideas that were regarded as representing a basis for negotiation, and so document A/CONF.39/L.47 had been born.

23. India had intended to support the proposal if it had received broad support from all groups in the Conference, especially the Asian and African States. Since the proposal, if adopted, would have imposed definite legal obligations upon Governments, the promotion of the proposal had had to be left to those delegations whose Governments were already prepared to go beyond article 62. Consequently the Indian delegation had been unable to join the other delegations concerned in promoting the proposal without consulting the Government of India. But the Indian delegation had decided that in any case it would not oppose it. And if the proposal had received widespread support, his delegation had decided to support it also, and to recommend it to the Indian Government for acceptance. Unfortunately, when the proposal had been put to the Asian-African group, it had not received widespread support, and it consequently became impossible to present it to the Conference on behalf of that group. Thereafter, the sponsors of the proposal had decided to put it to the Conference on their own behalf at the 34th plenary meeting. The Indian delegation's position had remained unchanged. The result of the vote — 61 votes to 20, with 26 abstentions — had clearly indicated the measure of support and the measure of opposition and caution with which the proposal had been received. India had neither supported nor opposed the proposal.

24. His delegation had not wished to oppose it principally because of its close association with the subject-matter of the proposal, and because of its deep respect for the sponsors, the representative of Nigeria and the representative of Ghana. It must also be admitted that the proposal had restored hope to the Conference.

25. The Indian delegation would continue to adopt a positive attitude towards the convention on the law of treaties as a whole, and would vote for it. India would be guided by the convention in its treaty relations, in anticipation of the entry into force of the convention. And if in the near future the sixty-one States which had supported the proposals contained in document A/CONF.39/L.47 and Rev.1 became parties to the convention without any reservation whatever on Part V, the Indian Government might very well also be inclined to follow their example.

26. Miss LAURENS (Indonesia) said that her delegation had abstained in the vote on the compromise formula consisting of the draft declaration, the new article and the draft resolution.

27. The Indonesian delegation had come to the Conference prepared to accept in principle the draft articles presented by the International Law Commission after so many years of work. At the first session of the Conference, Indonesia had stated on several occasions that it was quite satisfied with that text and was ready to subscribe to it without major changes. At the second session, her delegation had restated its position, which remained unchanged, on such major unsolved issues as the principle of universality and the compulsory settlement of disputes arising from Part V of the convention and from the interpretation and application of the other articles in general. At the plenary stage, as in the Committee of the Whole, her delegation had voted in accordance with the position it had adopted from the very beginning.

28. However, the compromise formula on which the Conference had taken action at the previous meeting represented something new. Indonesia had unequivocally stated its position, which was that it could not agree to the insertion in the convention on the law of treaties of a provision on the compulsory settlement of disputes. It had nevertheless refrained from opposing the draft declaration, the new article and the draft resolution presented together in document A/CONF.39/L.47 and Rev.1, because that formula represented a final attempt to find a solution acceptable to the great majority. In that connexion, her delegation wished to express its appreciation to those who had carried through the negotiations. Moreover, the draft declaration forming part of the proposal was quite acceptable to Indonesia. That being the case, her delegation had not wished to

stand in the way of the efforts undertaken by a number of friendly delegations and had simply abstained. It wished nevertheless to make it clear that, had there been a separate vote, it would have voted against what was in effect a new article 62 *bis*.

29. In any case, her delegation considered the convention as a whole to be acceptable and it would therefore vote in favour of it.

30. Mr. RAMANI (Malaysia) said that his delegation had voted against the compromise formula (A/CONF.39/L.47 and Rev.1) because it considered the inclusion of a declaration and a new article in a single proposal to be an unusual procedure.

31. If the sponsors had not objected to a separate vote, the Malaysian delegation would have supported the draft declaration, because the Conference, having been convened by the General Assembly, should leave it to the General Assembly to decide which States should be invited to participate in the convention on the law of treaties.

32. During the consideration of article 62 *bis*, the Malaysian delegation had already explained why it objected to the procedure laid down in that article. It continued to believe that the world had not yet reached the stage where it could accept a compulsory arbitral procedure or international jurisdiction.

33. The basic principle of international law was that every State must respect the dignity and independence of other States. There was no common ground beyond that principle. Every State applied that principle in its own way and every State had applied it in a different way. The declaration adopted by the Conference at the previous meeting jeopardized that essential principle, on which the United Nations Charter was based. For, when referring to the role of the Security Council in the pacific settlement of disputes, the United Nations Charter did not provide that legal disputes must be submitted to the International Court of Justice; it merely stated that, in making its recommendations, the Security Council should take into consideration that legal disputes should as a general rule be referred to the International Court of Justice.

34. Moreover, adoption of the new article had *ipso facto* extended the jurisdiction of the International Court of Justice, under Article 36, paragraph 1, of its Statute, to disputes arising from the convention. Accordingly, in the case of a dispute between two States concerning the existence of a norm of *jus cogens* or on the question whether a new norm had emerged, all the parties to the convention had a right to be heard by the International Court under Article 63 of its Statute. That argument should provide food for thought to those delegations which had expressed undue enthusiasm following the adoption of the compromise formula.

35. When the time came to sign the convention, the Government of Malaysia would reserve its position on that article in order to refute in advance arguments based on estoppel.

36. Mr. WYZNER (Poland) said that he had voted against the proposals contained in document A/CONF.39/L.47 and Rev.1 simply because, in the opinion of the Polish delegation, they did not represent a really balanced compromise.

37. He noted, however, that the draft declaration on universal participation in and accession to the convention on the law of treaties had been approved by an overwhelming majority. It gave him especial satisfaction that the declaration stated the principle of universality as clearly as it had previously been stated in draft article 5 *bis*. Moreover, the declaration contained a particularly important element in that it invited the General Assembly to ensure the widest possible participation in the convention. He wished to say that his delegation fully approved of the declaration and would have voted for it if it had been put to the vote separately.

38. Mr. MITSOPOULOS (Greece), explaining his delegation's vote, said that the compromise text adopted at the previous meeting was not satisfactory; the Greek delegation had always considered that the Conference's task was limited to the codification of the law of treaties and that it was therefore not competent to deal with highly political problems such as the status and legal capacity of certain territorial entities which were not recognized by the great majority of States. Moreover, the Greek delegation did not think it possible to trade legal principles against political considerations without impairing the quality and efficacy of the new system of written international law elaborated by the Conference.

39. Nevertheless, in view of the desire of most delegations to safeguard the work accomplished by the Conference, the Greek delegation had voted in favour of the compromise formula. He need hardly say that in approving that formula, his delegation was not entering into any undertaking; moreover, his powers did not permit him to commit Greece with regard to the question dealt with in the first part of the compromise formula. That question must be examined at the next session of the General Assembly, without prejudice to the right of every Member State to decide freely and without any prior obligation.

40. Mr. REY (Monaco), explaining his vote, said that the delegation of Monaco had made considerable efforts to introduce the rule of morality into the international law of obligations, to find a reasonable and clear definition of public order in the form of *jus cogens* and to make it possible to establish and organise a real system of settlement for any disputes that might arise in the future.

41. The gulf separating the results obtained and the great hopes which had been raised by the opening of the Conference had prevented his delegation from supporting the compromise text submitted.

42. For various reasons, his delegation had not voted against the text. In the first place, most of its sponsors were developing countries, and the formula showed that they were aware of the considerable part played by conciliation in international relations. Moreover, a real system of compulsory settlement — limited, it was true, but of great moral significance — had been devised for

the first time, a system entrusted to the International Court of Justice which remained the finest achievement of international law and jurisdiction. Lastly, his delegation had thought that it was not possible to do better in existing circumstances and that the present wording of the compromise formula could always be improved in the future.

43. Mr. YU (Republic of Korea) said that his delegation had abstained because it was not satisfied with the present wording of the compromise formula, which combined two different questions of substance.

44. His delegation could not accept the idea contained in the draft declaration but would have been prepared to vote in favour of the second part of the formula, relating to the compulsory procedures for the settlement of disputes arising from the application of Part V of the convention.

45. Since, however, the vote had been taken on both questions at the same time, his delegation had considered it preferable to abstain.

46. Mr. SMEJKAL (Czechoslovakia), explaining his negative vote, said that his delegation's attitude had been determined mainly by the fact that, although that part of the proposal relating to article 62 *bis* and the proposed declaration on universality did not balance one another, the two proposals had been submitted as a compromise formula.

47. The Czechoslovak delegation appreciated the efforts made by certain delegations and, if a motion for a separate vote had been accepted, it would have voted without hesitation in favour of the declaration. It regretted that it should not have been possible to arrive at a solution generally acceptable to the majority of States and one which would have made it possible to make decisive progress in the field of international relations. Nevertheless, his delegation was optimistic and hoped that the General Assembly of the United Nations would take the necessary measures to create a climate favourable to the work of exceptional importance which the Conference had just completed.

48. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that his delegation had voted against the proposed solution because it did not regard the proposed formula as a genuine compromise that took the opinions of all parties into account.

49. Since the sponsors of that formula had refused to convert the second part of the text into an optional protocol, his delegation had voted against the proposed solution.

50. If the motion for division had been accepted, his delegation would have voted in favour of the declaration, which proclaimed a principle of vital importance.

The meeting rose at 1 p.m.

THIRTY-SIXTH PLENARY MEETING

Thursday, 22 May 1969, at 3.30 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)*

Draft declaration on universal participation in and accession to the convention on the law of treaties, proposed new article on procedures for adjudication, arbitration and conciliation and draft resolution (continued)

Explanations of vote (continued)

1. The PRESIDENT said that the representative of Algeria wished to explain his vote on the draft declaration, new article and draft resolution (A/CONF.39/L.47 and Rev.1) adopted at the 34th plenary meeting.

2. Mr. KELLOU (Algeria) said that his delegation's abstention in the vote should not be interpreted as a refusal to accept the compromises necessary to enable the Conference to arrive at a general agreement. His delegation greatly appreciated the efforts made by the delegation of Nigeria to lead the Conference out of an impasse.

3. The draft declaration (A/CONF.39/L.47 and Rev.1) was acceptable to his delegation despite its imperfections, but the new article on procedures for adjudication, arbitration and conciliation was not, since it provided for a compulsory procedure for the settlement of disputes which did not meet the objections put forward by his delegation.

Report by the Chairman of the Drafting Committee

4. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had only been able to devote one meeting to the examination of the declaration, new article, annex and resolution adopted at the 34th plenary meeting and, in the short time available, it had not been able to give to those texts the same attention as it had given to other provisions of the convention.

5. The Drafting Committee had therefore confined itself to essential drafting changes, of which he need mention only the change in the title of the declaration. The title in the proposal adopted by the Conference (A/CONF.39/L.47 and Rev.1) was " Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties ". The Drafting Committee had taken the view that the adjective " universal " could not be applied to " accession ". Accession was only one of several means whereby a State could express its consent to be bound by a treaty. To refer to accession in the title could thus appear to exclude other means of expressing consent to be bound, such as ratification or approval. The Drafting Committee had therefore