

Department of External Affairs

CLASSIFIED

File No. 20-3-1-6

Subject: POLITICAL AFFAIRS

TREATIES AND AGREEMENTS

TREATY MAKING POWERS

LAW OF TREATIES

ILC CODIFICATION PROJECT

Vol. 9

From FEB/69

To FEB28/69

References to Related Files

File No.

Subject

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PUBLIC RECORDS ORDER

P.C. 1966-1749 - AUTHORITY

PUBLIC ARCHIVES APPROVALS

NOS 68/001 & 69/063

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Feb 11
DATED FROM ~~12~~ 69 FILE No. 20-3-1-6
Feb 28
TO ~~12~~ 69 VOLUME No. 9

CLOSED VOLUME

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Jul 20-3-1-6
Sub 164

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It was a pleasure working with you in Vienna at the first session of the Conference on the Law of Treaties and I am looking forward to seeing you again at the second session. I trust that you will be able to attend this important meeting as your experience of the first session will be most valuable in finding solutions for the difficult problems which still confront us.

The United States Ambassador to _____ has been requested to call upon your Foreign Minister in order to make clear the gravity with which the United States views the need for adequate procedures for the settlement of disputes which may arise under Part V of the draft Convention. As you know, the Government of the United States is convinced that if the draft Convention is to be acceptable to a great many nations, including the United States, it should include provision for conciliation and, if required, impartial adjudication, of differences between States over claims that a treaty is no longer binding.

We believe that your Government is also concerned over the problem of how to deal with treaty disputes. Because of this mutual concern, the Government of the United States hopes that it will be possible to agree with your Government, and other like-minded governments, upon the text of a draft amendment for a joint submission at the opening of the 1969 session of the Conference.

The United States Government considers that the thirteen-State proposal for an Article 62 is contained in Conference document A/Conf. 39/Cl./L.352/Rev. 2 should be taken as the basis for an agreed amendment. There is substantial support

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-2-

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for a proposal of this nature, and it contains safeguards which are adequate to ensure that a claim, made under Part V of the Convention, that a treaty is no longer binding will, if another party to the treaty objects, be submitted to review by conciliators and, if conciliation is unsuccessful, to an arbitral procedure.

Some of the procedures proposed in the thirteen-nation proposal need a degree of revision in order to make sure that they will function effectively. One example is the fact that the procedures are designed to deal with disputes over bilateral treaties, or at the most, disputes between two of the parties to a multilateral treaty.

If one party to a multilateral treaty has a dispute with three other parties, the Conciliation Commission should not consist of two conciliators chosen by the one party, six conciliators chosen by the three parties on the other side and a chairman chosen by the eight conciliators. In the original draft, however, this could be the result of paragraph 2 of the Annex to Article 62 bis.

Conciliation panels which deal with disputes arising out of multilateral treaties should be large enough to permit the parties on each side a reasonable range in the selection of conciliators but not so large as to impair efficiency or impede compliance with the prescribed time limits. If there is a five-member panel the difficulty of all the parties on one side agreeing on the two members to be selected by that side could be substantial. A seven-member panel would afford considerably greater tolerance in selection and, at the same time not be so large as to be cumbersome. Accordingly, we are suggesting that multilateral treaty disputes be dealt with by seven-man conciliation panels, with each side choosing three members. At least two of the three would be chosen from the U.N. permanent list of conciliators. In accordance with the general practice regarding national judges when there is more than one party

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-3-

one side of a dispute, only one of the three panel members could be a national of any party on that side. The seventh member, the Chairman, would be chosen in the same fashion as the Chairman of a five-man panel, that is, by a majority of the other members or, if they fail to agree, by the Secretary General of the United Nations.

The duties of the Secretary General with respect to a request for conciliation are clarified in our proposals for paragraph 2 of Annex I. In addition we have attempted to make the time periods within which conciliators must be appointed more precise. However, while recognising the need for prompt appointment as a general rule, there seemed to be no reason why different time limits could not be applied if all of the parties to the dispute agreed and a clause to this effect has been included.

Annex I, as originally drafted, provides that the Conciliation Commission shall reach conclusions regarding the facts. We propose, in the revision, that it should also reach conclusions regarding the issues to avoid assertions that a Commission must limit itself strictly to a fact-finding. It would not be possible for a Commission to function effectively without dealing with all the aspects of a dispute including, if necessary, any legal issues.

And because every party to a multilateral treaty has an interest in how it is applied, even if not directly affected by that application, we believe every party to the treaty should be permitted to make submissions to a Conciliation Commission.

In order to assist the conciliators in dealing expeditiously with disputes, the revised draft, while it leaves them free to adopt their own rules of procedure, provides that the Secretary General will prepare draft rules. These model rules would be available to guide the Commission in formulating their individual rules.

An issue which is of great importance to every State is how to deal with cases in which some form of interim action

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-4-

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is needed in order to prevent injury or loss to a party while the conciliation and, if necessary, arbitration procedures are being carried out. While, normally, the ~~status quo~~ would be maintained during the carrying out of the procedures, it is possible to imagine emergency cases which could require some adjustments prior to completion of the procedures.

To handle the problem we suggest that the Conciliation Commission should have authority to issue interim reports containing recommendations as to what action a party is entitled to take in order to preserve rights. Thus, if the Commission found as a preliminary matter that suspension of a treaty was justified to avoid or reduce injury to a party, it could so recommend; if it found that suspension was not justified, it could recommend that performance under the treaty be continued pending final decision of the matter; and if it found that some lesser temporary action than total suspension of a treaty was the appropriate step, then it could recommend partial suspension.

The reports of the Conciliation Commission should contain conclusions on the issues as well as on the facts in order to avoid being incomplete. Furthermore, it seems most important that the recommendations of the Commission be set forth in the report. These recommendations will be the basis for settlement of the dispute, if a settlement is to be achieved. We have included a specific requirement for recommendations in the revised Annex.

In its present form, the Annex is imprecise regarding the time period within which a dispute may be referred to arbitration. The draft amendment lays down a six-month period but subject to the parties agreeing to a longer period. We have also substantially shortened the time periods for appointments on the basis that in view of the time which has already elapsed the parties should be able to act fairly rapidly.

Another proposal is that the 1907 Hague Convention rules of procedure should apply whenever an arbitral tribunal has failed to include provision on a point in the

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rules which it has adopted. This affords a reasonable precaution against arguments over a procedural gap in any specific arbitral proceeding.

In addition to these revisions, we have made a number of other changes of a technical nature. I am enclosing our revision of Article 62 bis, which I hope will merit your support.

We continue to be concerned about two issues raised at Vienna which pressure of time prevented the Committee of the Whole from examining in detail. First, is the Conciliation mechanism in Annex I the best one for the resolution of treaty disputes and the development of the legal concepts embodied in the Convention? Second, should there be a provision in the Convention through which a Conciliation Commission might seek an advisory opinion from the International Court of Justice on a legal question in a treaty dispute?

The United States believes that the conciliation mechanism in Annex I could be improved. Given the large number of conciliators on the U.N. permanent list, it is unlikely that any jurist would serve in more than one or two disputes. None would acquire the valuable experience in resolving treaty disputes that a smaller body of experienced conciliators might be expected to build up over the years. We believe that effectiveness in handling recurring disputes is more likely to be achieved by the selection of experts within an organized framework than by conciliators selected, for practical purposes, on an ad hoc basis. For this reason we would favor the election by the General Assembly of a small representative body of conciliators. The non-national members and the chairmen of individual conciliation commissions would be selected from this body. There are a number of United Nations precedents for such a body.

But there is a second and more important reason why we favor the selection of conciliators from a small body.

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-6-

We believe that the interpretation and development of legal concepts embodied in Part V are of substantial importance to the international community. You will agree, I am sure, that a number of the concepts such as "error in a treaty", "fraudulent conduct", "corruption...directly or indirectly", "peremptory norm of international law" and "fundamental change of circumstances" do not have a well-established meaning in international law. It will be necessary, over many years, to build up a body of practice and jurisprudence which gives definite meaning and content to these phrases. The prospects for the orderly development of these concepts would be significantly enhanced by the continuity of a small body. Within the framework proposed in Annex I such development is likely to be sporadic and incidental.

The second issue is whether there should be some channel through which a Conciliation Commission should be able to seek an advisory opinion from the International Court of Justice. While a Commission might not make use of such authority frequently, there are clearly cases which will arise in which an advisory opinion would be of great value. Some of the legal questions dealt with by Commissions may be of high importance and great complexity. The views of the International Court regarding such questions would be of great assistance to the Commissions.

Article 96 of the Charter of the United Nations provides that the General Assembly or the Security Council may request the Court to give an advisory opinion "on any legal question". The Assembly may authorize other organs of the UN to request such opinions. We believe that a Conciliation Commission established under the Convention ought to be so authorized.

States, of course, can bring a case before the Court under Article 40 of the Statute either by notification of the special agreement which they have concluded or by a written application addressed to the Registrar. There may be treaty disputes, however, where the parties would be willing to have a legal question decided by the Court but would be reluctant to submit the entire dispute for adjudication. If authorized to seek an advisory opinion in such a case,

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o/s

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-7-

with the consent of the parties, the Commission might be able to improve prospects for settlement of the dispute by reducing the issues between the parties. An important collateral result would be the interpretation or development of treaty law concepts embodied in the Convention by the principal judicial organ of the United Nations.

Our revisions to Article 62 bis do not provide for either of those suggested changes as we recognize they concern matters of principle rather than the more technical type of change. We would hope, however, that changes along the lines suggested would be wholly acceptable.

If you have any questions on the revised amendment, any suggestions with respect to the unresolved issues I have discussed, or any additional views regarding the general problem of achieving a satisfactory disputes-settlement procedure, I would be pleased to hear from you either directly or through diplomatic channels. The difficulties of attempting to work out an agreed draft by correspondence clearly are substantial and one of the greatest problems is that of time. Our aim is to obtain agreement on a draft Article 62 bis which would be cosponsored by your Government, by the United States and by the many other States concerned with this problem.

An early response from you would, therefore, be most welcome.

May I extend my best wishes and express the hope that I will see you in Vienna next April, if not before.

Sincerely,

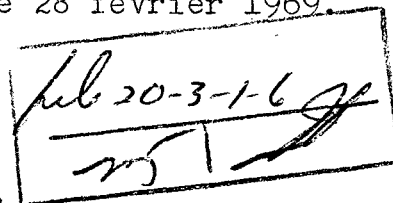
Richard D. Kearney
Ambassador

Enclosure:

Revised Article 62 bis.

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Berne, le 28 février 1969.



A i d e - M é m o i r e

Codification du droit des traités;
deuxième session de la Conférence
de Vienne 1969

1) Le Gouvernement suisse a pris connaissance avec un vif intérêt des améliorations proposées par le Gouvernement des Etats-Unis au projet du nouvel article 62 bis déposé par treize pays à la première session, ainsi que des autres propositions avancées pour donner le plus d'efficacité possible à la procédure de règlement.

Les amendements proposés par le Gouvernement des Etats-Unis à la proposition des treize puissances ont certainement rendu son texte plus clair et plus précis, et mieux défini les pouvoirs des organismes appelés à résoudre le différend. En particulier, la possibilité prévue pour la Commission de conciliation de recommander des mesures provisoires, la référence expresse à la Convention de La Haye de 1907 pour la procédure du Tribunal arbitral, les délais plus brefs et plus contraignants représentent un progrès très utile sur le texte précédent.

Le Gouvernement suisse a en revanche quelques hésitations au sujet de la distinction entre traités bilatéraux et multilatéraux. Le projet semble partir de l'idée que dans un différend portant sur un traité multilatéral, toutes les parties à ce différend se diviseront en deux camps, à chacun desquels incombera la nomination d'un groupe de conciliateurs. Cette situation est plausible, mais elle ne se produira pas dans tous les cas. Il est possible qu'il existe plus de deux

positions, et donc plus de deux camps dans un différend donné. Il pourrait également se produire des difficultés quant à la nationalité des conciliateurs si les parties sont très nombreuses. D'autre part, si, bien que le traité soit multilatéral, le différend n'oppose que deux parties, il est difficile de voir pourquoi un nombre plus élevé de conciliateurs devrait être désigné. D'ailleurs la proposition ne prévoit pas une procédure spéciale pour l'arbitrage. De l'avis du Gouvernement suisse, les problèmes qui peuvent se présenter dans le cas d'un traité multilatéral devraient être résolus par l'emploi d'une procédure d'intervention, telle qu'elle est prévue par le Statut de la Cour Internationale de Justice (art. 62 et 63), solution plus simple et plus satisfaisante.

2) Le Gouvernement suisse se doit cependant de souligner que le principe même qui est à la base de la proposition des treize puissances et des Etats-Unis lui paraît ouvert à certaines critiques.

Tout d'abord la procédure envisagée est lourde et compliquée et prendrait beaucoup de temps, même si les délais originellement prévus étaient raccourcis.

On peut se demander si une procédure de conciliation est vraiment nécessaire et utile dans le contexte dont il s'agit. En général il y aura une certaine urgence d'arriver à un règlement du litige. L'organe chargé de cette mission aura en premier lieu à trancher des questions juridiques et moins à examiner des faits. La conciliation est une procédure efficace pour trouver une transaction et un compromis entre les parties. Elle est moins apte à trancher des questions juridiques. On voit mal comment une transaction pourra être trouvée dans des cas où, par exemple, une partie demande l'annulation d'un traité ayant été imposé par la contrainte ou étant en contradiction avec le "ius cogens". Il serait peut-être indiqué de rendre la conciliation facultative, dépendant d'un commun accord des parties. Une autre solution consisterait à maintenir la conciliation comme la règle, mais en ajoutant une

disposition permettant aux parties de recourir directement au Tribunal arbitral.

L'exclusion totale de la Cour Internationale de Justice qui a pour tâche principale d'assurer l'unité de la jurisprudence internationale est regrettable. Parmi les litiges interétatiques ceux concernant l'interprétation et l'application de traités sont des plus importants et devraient donc relever de la Cour.

A plusieurs reprises le Secrétaire général des Nations Unies est appelé à intervenir. Il s'agit de fonctions dans une procédure judiciaire et non pas de missions politiques. Or, le Secrétaire général est un organe administratif et politique; il n'est pas un magistrat. Sa personne peut être contestée pour des raisons politiques. Il serait donc préférable de confier les fonctions dont il s'agit au Président ou, le cas échéant, au Vice-président de la Cour Internationale de Justice, ou alors au Secrétaire général de la Cour Permanente d'Arbitrage de La Haye.

La composition de la Commission de conciliation semble être inadéquate. En effet, chacune des parties désigne deux conciliateurs. En pratique, ce sera donc le cinquième membre, c'est-à-dire le président qui décidera. Il serait préférable de prévoir une commission composée d'un seul membre désigné de chaque partie et de trois membres neutres nommés d'un commun accord. Pour les mêmes raisons, il serait souhaitable de remplacer le Tribunal arbitral composé de trois membres par un Tribunal de cinq membres dont trois neutres. On pourrait donner aux parties la faculté de choisir d'un commun accord un Tribunal de trois membres, si elles le désirent, pour simplifier la procédure.

L'établissement d'une liste permanente de conciliateurs composée de juristes qualifiés présente certainement des avantages. Or, il existe déjà une telle liste, c'est-à-dire la Cour Permanente d'Arbitrage de La Haye. Cette Cour dispose également d'un bureau capable de rendre les services nécessaires pour le déroulement de la procédure. Il faudrait éviter la création de nouveaux organes

faisant double emploi. La Cour Permanente d'Arbitrage pourra parfaitement s'acquitter des tâches prévues dans la proposition.

Pour toutes ces raisons le Gouvernement suisse préférerait une autre solution du problème des règlements des différends.

3) Le Gouvernement des Etats-Unis soumet à l'examen encore deux autres propositions, l'une concernant la nomination d'un petit groupe permanent de conciliateurs et l'autre la possibilité de demander un avis consultatif à la Cour Internationale de Justice.

a. L'argument invoqué en faveur d'un groupe permanent de conciliateurs, c'est-à-dire d'assurer l'interprétation et le développement des notions juridiques complexes contenues dans le projet de convention d'une manière ordonnée et intégrée ne semble pas pertinent aux autorités suisses. Il ne s'agit pas de juridiction mais de conciliation. Le but de cette dernière est de faciliter les négociations entre les parties et de trouver un compromis les satisfaisant. Les aspects particuliers du cas d'espèce l'emporteront donc de beaucoup sur les principes généraux. Dans ce contexte, la continuité dans les travaux de la Commission de conciliation ne joue qu'un rôle secondaire. La conciliation n'est par définition pas à même d'assurer la continuité dans l'application et le développement du droit et de créer des précédents ayant un effet dépassant le cas particulier.

Un groupe permanent de conciliateurs fera concurrence à la Cour Internationale de Justice dont une des principales missions est tout juste de maintenir la stabilité du droit et de le développer d'une manière ordonnée.

Quant à l'élection du groupe par l'Assemblée générale des Nations Unies il est à craindre qu'elle ne contribue à donner à cette institution une coloration politique qu'elle ne devrait pas avoir. Il aurait été préférable de confier l'élection au Conseil d'administration de la Cour Permanente d'Arbitrage de La Haye devant faire son choix parmi les membres de cette Cour.

b. L'idée de donner à la Commission de conciliation le droit de demander un avis consultatif à la Cour Internationale de Justice est en soi souhaitable. Mais elle aura le désavantage de prolonger la procédure et pourra nuire à l'autorité de la Cour si la Commission s'écarte de l'avis de cette dernière. Etant donné que le recours à la Cour ne pourra de toute façon avoir lieu qu'avec l'assentiment des parties, il serait peut-être plus logique de donner aux parties la faculté de remplacer d'un commun accord la procédure de conciliation ou d'arbitrage par la procédure litigieuse devant la Cour.

4) Le Gouvernement suisse se permet de rappeler à cette occasion que sa délégation avait également déposé un projet d'article 62 bis, qui repose, croit-il, sur des principes simples et conséquents et vise à garantir de la manière la plus efficace possible la règle "pacta sunt servanda". Il en joint le texte en annexe avec ./.

l'espoir que les Gouvernements des autres Etats membres du Groupe occidental voudront bien lui faire connaître leur avis à ce propos et appuyer sa proposition.

Les avantages que le Gouvernement suisse voit dans son projet sont les suivants:

- a. Il appartient au gouvernement qui entend mettre fin au traité d'obtenir à cet effet en cas de contestation la sanction d'un tribunal international.
- b. Le sort du traité pendant la procédure est clairement réglé.
- c. La procédure ne comporte aucune fissure.
- d. Les procédures sont simples.
- e. La partie qui demande l'annulation d'un traité a le choix entre la Cour Internationale de Justice et un Tribunal arbitral ad hoc, ce qui ménage les objections de certains Etats à l'égard de la Cour sans la passer complètement sous silence.
- f. Les parties sont libres de recourir avant la procédure litigieuse à la conciliation si elles le désirent. Quoiqu'il ne soit pas

nécessaire de le dire expressément la proposition suisse pourrait être amendée et complétée dans ce sens.

5) En dépit de l'importance considérable que la Suisse attache à la question examinée plus haut, elle n'est pas d'avis que sa solution favorable rendrait le texte actuel de la convention acceptable en tout point. Elle estime au contraire qu'il serait illusoire de penser que des garanties juridictionnelles peuvent suffire à neutraliser les dangers considérables qui résultent de certaines dispositions du projet actuel. Tel est en particulier le cas des articles 49 et 50.

L'article 49, qui de par sa nature met en danger les traités de paix et les accords d'armistice, c'est-à-dire des instruments qui ont une très grande importance pour le maintien de l'ordre international, n'est guère un texte dont l'application puisse être confiée à un tribunal, comme d'ailleurs la sanction prévue n'est pas celle qui est adéquate en l'espèce et qui correspond à l'état de la société internationale. Si l'emploi de la force a permis d'imposer des traités injustes, c'est une tâche éminemment politique que celle de redresser les torts qui en résultent; elle ne peut être l'affaire du juge. L'article 50 suppose une autorité législative internationale dont on ne voit guère jusqu'ici comment elle pourrait être constituée. Aucune Cour et encore moins une Commission de conciliation ne disposent en ce moment de l'autorité qui lui permettrait de proclamer des principes auxquels le reste du droit international serait subordonné.

Par conséquent, de l'avis du Gouvernement suisse, il ne saurait suffire de résoudre les problèmes juridictionnels posés par la partie V du projet de convention si les modifications de fond indispensables ne sont pas apportées.

6) Le Gouvernement suisse désire attirer l'attention des Gouvernements au fait que la question du règlement obligatoire des

différends ne se pose pas seulement pour l'application du chap. V du projet de convention mais également pour la convention en général. Des différends sur d'autres parties pourront surgir, notamment en ce qui concerne les articles très compliqués sur les réserves. Le projet ne contient pas de dispositions de règlement obligatoire des différends en général. C'est pour ces raisons que la délégation suisse a proposé lors de la première session de la Conférence d'ajouter un nouvel article 76 qui comblera cette lacune. Le Gouvernement suisse exprime l'espoir que les Gouvernements appuieront cette proposition.

1 annexe.

NATIONS UNIES

ASSEMBLEE
GENERALE



Distr.
LIMITEE

A/CONF.39/C.1/L.377
23 mai 1968

Original : FRANCAIS

CONFERENCE DES NATIONS UNIES
SUR LE DROIT DES TRAITES

Commission plénière

Nouvel article 62 bis

Suisse : amendement au projet d'articles

Insérer un nouvel article 62 bis ayant la teneur suivante :

"1. Si les parties ne sont parvenues à aucun accord sur la procédure de règlement dans un délai de trois mois après l'objection prévue à l'article 62, paragraphe 3, la partie qui a fait la notification peut porter, au plus tard six mois après l'objection, le différend devant la Cour internationale de Justice par simple requête ou devant une commission d'arbitrage conformément aux dispositions du paragraphe 2.

2. A moins que les parties n'en conviennent autrement, la procédure d'arbitrage se déroulera de la manière suivante :

a) La commission d'arbitrage sera composée de cinq membres. Les parties en nommeront chacune un. Les trois autres arbitres seront désignés d'un commun accord par les parties parmi les ressortissants d'Etats tiers. Ils devront être de nationalités différentes, ne pas avoir leur résidence habituelle sur le territoire des parties ni se trouver à leur service.

b) Le président de la commission d'arbitrage sera nommé par les parties parmi les arbitres désignés en commun.

c) Si dans un délai de trois mois, les parties n'ont pu se mettre d'accord sur la désignation des arbitres nommés en commun, le Président de la Cour internationale de Justice procédera à cette désignation. Si l'une des parties n'a pas désigné l'arbitre dont la désignation lui incombe dans un délai de trois mois, le Président de la Cour internationale de Justice procédera à cette désignation.

A/CONF.39/C.1/L.377

P. 2

d) Si le Président de la Cour internationale de Justice se trouve empêché ou s'il a la nationalité de l'une des parties, c'est le Vice-Président de la Cour internationale de Justice qui procède aux désignations nécessaires. Si le Vice-Président de la Cour internationale de Justice se trouve empêché et s'il a la nationalité de l'une des parties, il est remplacé par le membre le plus ancien de la Cour qui n'a la nationalité d'aucune des parties.

e) A moins que les parties n'en conviennent autrement, la commission d'arbitrage fixera elle-même sa procédure. A titre subsidiaire, les dispositions du chapitre III de la Convention de La Haye sur le règlement pacifique des différends internationaux du 18 octobre 1907 seront applicables.

f) La commission d'arbitrage statuera à la majorité simple sur les questions qui lui auront été soumises et ses décisions seront obligatoires pour les parties.

3. Pendant toute la durée du différend, sauf accord contraire entre les parties ou mesures provisoires ordonnées par la juridiction saisie, le traité reste applicable entre les parties au différend.

4. Si la partie qui a fait la notification ne recourt pas dans le délai prescrit de six mois à l'une des juridictions prévues au paragraphe 1, elle est censée avoir renoncé à la procédure d'annulation ou à la mesure envisagée."

DEPARTMENT OF THE SECRETARY OF STATE
TRANSLATION BUREAU
FOREIGN LANGUAGES DIVISION



CANADA

SECRETARIAT D'ÉTAT

BUREAU DES TRADUCTIONS
DIVISION DES LANGUES ÉTRANGÈRES

cc. Latin Am. Div. / March 13/69
Quito, Ecuador
20-3-1-6
CITY
VILLE
Ottawa

YOUR NO. VOTRE NO° Note 18-2-69	DEPARTMENT MINISTÈRE External Affairs	DIVISION/BRANCH DIVISION/DIRECTION Legal(J.S. Stanford)	
OUR NO. NOTRE NO° 7121	LANGUAGE LANGUE Spanish	TRANSLATOR (INITIALS) TRADUCTEUR (INITIALES) C. K.	DATE Feb. 28, 69

Republic of Ecuador
Ministry of External Affairs

No. 1 DAO-NU

Quito, January 30, 69

The Hon. Mr. Mitchell Sharp,
Secretary of State for External Affairs,
O t t a w a .

Dear Sir :-

I have the honour to reply to your note of last December the 20th, in which you refer to certain aspects of the Draft of the Convention on the Law of Treaties, which is to be considered by the Conference of Plenipotentiaries during the second stage to be held at Vienna starting on April 9th next.

The Government of Ecuador has been pleased to take note of the position of the Government of Canada with respect to its vigorous opposition to the threat or use of force as a means for succeeding in concluding treaties, a vital aspect for the maintenance of international peace and security.

On the other hand, the Government of Ecuador is carefully studying your Excellency's preoccupation with respect to paragraph two of article 5 of the Draft Convention, which refers to the ability of Federal States to conclude treaties in speci-

fic circumstances.

I take this opportunity to renew to Your Excellency
the assurances of my highest consideration.

signed:

Rogelio Valdivieso Eguiguren
Minister of External Affairs



REPUBLICA DEL ECUADOR
MINISTERIO DE RELACIONES EXTERIORES

Nº 1 DAO-NU

Quito, a 30 de enero de 1969

Excelentísimo Señor:

Tengo a honra dar respuesta a la atenta nota de 20 de diciembre pasado, por la que Vuestra Excelencia se ha dignado referirse a determinados aspectos del Proyecto de Convención sobre el Derecho de los Tratados, que será considerado por la Conferencia de Plenipotenciarios cuya segunda etapa tendrá lugar en la ciudad de Viena a partir del 9 de abril próximo.

El Gobierno del Ecuador ha tomado nota, con satisfacción, de la posición del Ilustrado Gobierno de Canadá respecto a su vigorosa oposición a la amenaza o uso de la fuerza como medio para conseguir la celebración de tratados, aspecto vital para el mantenimiento de la paz y seguridad internacionales.

Por otra parte, el Gobierno del Ecuador estudia con toda atención la preocupación de Vuestra Excelencia respecto del párrafo segundo del artículo 5 del Proyecto de Convención, que se refiere a la capacidad de los Estados Federales para celebrar tratados en determinadas circunstancias.

/.....

Al Excelentísimo Señor Don Mitchell Sharp,
Ministro de Asuntos Exteriores
OTTAWA.-

TR-129

AFFAIRES EXTÉRIEURES	
Traduction	
Reçu le.....	15/2/69
Envoyé le.....	
Initiales.....	F.P.

003216




REPUBLICA DEL ECUADOR
MINISTERIO DE RELACIONES EXTERIORES

2.

/.....

Me valgo de esta ocasión para reiterar a Vuestra
Excelencia los sentimientos de mi más alta y distinguida
consideración.



Rogelio Valdivieso Eguiguren
Ministro de Relaciones Exteriores

20-3-1-6
20-3-1-6
Berne, le 28 février 1969.

A i d e - M é m o i r e

Codification du droit des traités;
deuxième session de la Conférence
de Vienne 1969

018
1) Le Gouvernement suisse a pris connaissance avec un vif intérêt des améliorations proposées par le Gouvernement des Etats-Unis au projet du nouvel article 62 bis déposé par treize pays à la première session, ainsi que des autres propositions avancées pour donner le plus d'efficacité possible à la procédure de règlement.

Les amendements proposés par le Gouvernement des Etats-Unis à la proposition des treize puissances ont certainement rendu son texte plus clair et plus précis, et mieux défini les pouvoirs des organismes appelés à résoudre le différend. En particulier, la possibilité prévue pour la Commission de conciliation de recommander des mesures provisoires, la référence expresse à la Convention de La Haye de 1907 pour la procédure du Tribunal arbitral, les délais plus brefs et plus contraignants représentent un progrès très utile sur le texte précédent.

Le Gouvernement suisse a en revanche quelques hésitations au sujet de la distinction entre traités bilatéraux et multilatéraux. Le projet semble partir de l'idée que dans un différend portant sur un traité multilatéral, toutes les parties à ce différend se diviseront en deux camps, à chacun desquels incombera la nomination d'un groupe de conciliateurs. Cette situation est plausible, mais elle ne se produira pas dans tous les cas. Il est possible qu'il existe plus de deux

Mr. Barclay
This was left with me by
de Hardt, Counselor of the Swiss
Embassy, at 11:50 am 12/3. I am
concerned solely with the question
of disputes settlement and reports
presented by Hardt in Paris.
I told de Hardt, as he said in Paris, that we
support Swiss position in principle and
also consider it useful tactically.
I would prefer to do it about separate
votes, which I promised to report to Bern. I feel
representative of my own as unlikely to be
effective at this stage.

positions, et donc plus de deux camps dans un différend donné. Il pourrait également se produire des difficultés quant à la nationalité des conciliateurs si les parties sont très nombreuses. D'autre part, si, bien que le traité soit multilatéral, le différend n'oppose que deux parties, il est difficile de voir pourquoi un nombre plus élevé de conciliateurs devrait être désigné. D'ailleurs la proposition ne prévoit pas une procédure spéciale pour l'arbitrage. De l'avis du Gouvernement suisse, les problèmes qui peuvent se présenter dans le cas d'un traité multilatéral devraient être résolus par l'emploi d'une procédure d'intervention, telle qu'elle est prévue par le Statut de la Cour Internationale de Justice (art. 62 et 63), solution plus simple et plus satisfaisante.

2) Le Gouvernement suisse se doit cependant de souligner que le principe même qui est à la base de la proposition des treize puissances et des Etats-Unis lui paraît ouvert à certaines critiques.

Tout d'abord la procédure envisagée est lourde et compliquée et prendrait beaucoup de temps, même si les délais originellement prévus étaient raccourcis.

On peut se demander si une procédure de conciliation est vraiment nécessaire et utile dans le contexte dont il s'agit. En général il y aura une certaine urgence d'arriver à un règlement du litige. L'organe chargé de cette mission aura en premier lieu à trancher des questions juridiques et moins à examiner des faits. La conciliation est une procédure efficace pour trouver une transaction et un compromis entre les parties. Elle est moins apte à trancher des questions juridiques. On voit mal comment une transaction pourra être trouvée dans des cas où, par exemple, une partie demande l'annulation d'un traité ayant été imposé par la contrainte ou étant en contradiction avec le "ius cogens". Il serait peut-être indiqué de rendre la conciliation facultative, dépendant d'un commun accord des parties. Une autre solution consisterait à maintenir la conciliation comme la règle, mais en ajoutant une

disposition permettant aux parties de recourir directement au Tribunal arbitral.

L'exclusion totale de la Cour Internationale de Justice qui a pour tâche principale d'assurer l'unité de la jurisprudence internationale est regrettable. Parmi les litiges interétatiques ceux concernant l'interprétation et l'application de traités sont des plus importants et devraient donc relever de la Cour.

A plusieurs reprises le Secrétaire général des Nations Unies est appelé à intervenir. Il s'agit de fonctions dans une procédure judiciaire et non pas de missions politiques. Or, le Secrétaire général est un organe administratif et politique; il n'est pas un magistrat. Sa personne peut être contestée pour des raisons politiques. Il serait donc préférable de confier les fonctions dont il s'agit au Président ou, le cas échéant, au Vice-président de la Cour Internationale de Justice, ou alors au Secrétaire général de la Cour Permanente d'Arbitrage de La Haye.

La composition de la Commission de conciliation semble être inadéquate. En effet, chacune des parties désigne deux conciliateurs. En pratique, ce sera donc le cinquième membre, c'est-à-dire le président qui décidera. Il serait préférable de prévoir une commission composée d'un seul membre désigné de chaque partie et de trois membres neutres nommés d'un commun accord. Pour les mêmes raisons, il serait souhaitable de remplacer le Tribunal arbitral composé de trois membres par un Tribunal de cinq membres dont trois neutres. On pourrait donner aux parties la faculté de choisir d'un commun accord un Tribunal de trois membres, si elles le désirent, pour simplifier la procédure.

L'établissement d'une liste permanente de conciliateurs composée de juristes qualifiés présente certainement des avantages. Or, il existe déjà une telle liste, c'est-à-dire la Cour Permanente d'Arbitrage de La Haye. Cette Cour dispose également d'un bureau capable de rendre les services nécessaires pour le déroulement de la procédure. Il faudrait éviter la création de nouveaux organes

faisant double emploi. La Cour Permanente d'Arbitrage pourra parfaitement s'acquitter des tâches prévues dans la proposition.

Pour toutes ces raisons le Gouvernement suisse préférerait une autre solution du problème des règlements des différends.

3) Le Gouvernement des Etats-Unis soumet à l'examen encore deux autres propositions, l'une concernant la nomination d'un petit groupe permanent de conciliateurs et l'autre la possibilité de demander un avis consultatif à la Cour Internationale de Justice.

a. L'argument invoqué en faveur d'un groupe permanent de conciliateurs, c'est-à-dire d'assurer l'interprétation et le développement des notions juridiques complexes contenues dans le projet de convention d'une manière ordonnée et intégrée ne semble pas pertinent aux autorités suisses. Il ne s'agit pas de juridiction mais de conciliation. Le but de cette dernière est de faciliter les négociations entre les parties et de trouver un compromis les satisfaisant. Les aspects particuliers du cas d'espèce l'emporteront donc de beaucoup sur les principes généraux. Dans ce contexte, la continuité dans les travaux de la Commission de conciliation ne joue qu'un rôle secondaire. La conciliation n'est par définition pas à même d'assurer la continuité dans l'application et le développement du droit et de créer des précédents ayant un effet dépassant le cas particulier.

Un groupe permanent de conciliateurs fera concurrence à la Cour Internationale de Justice dont une des principales missions est tout juste de maintenir la stabilité du droit et de le développer d'une manière ordonnée.

Quant à l'élection du groupe par l'Assemblée générale des Nations Unies il est à craindre qu'elle ne contribue à donner à cette institution une coloration politique qu'elle ne devrait pas avoir. Il aurait été préférable de confier l'élection au Conseil d'administration de la Cour Permanente d'Arbitrage de La Haye devant faire son choix parmi les membres de cette Cour.

b. L'idée de donner à la Commission de conciliation le droit de demander un avis consultatif à la Cour Internationale de Justice est en soi souhaitable. Mais elle aura le désavantage de prolonger la procédure et pourra nuire à l'autorité de la Cour si la Commission s'écarte de l'avis de cette dernière. Etant donné que le recours à la Cour ne pourra de toute façon avoir lieu qu'avec l'assentiment des parties, il serait peut-être plus logique de donner aux parties la faculté de remplacer d'un commun accord la procédure de conciliation ou d'arbitrage par la procédure litigieuse devant la Cour.

4) Le Gouvernement suisse se permet de rappeler à cette occasion que sa délégation avait également déposé un projet d'article 62 bis, qui repose, croit-il, sur des principes simples et conséquents et vise à garantir de la manière la plus efficace possible la règle "pacta sunt servanda". Il en joint le texte en annexe avec l'espoir que les Gouvernements des autres Etats membres du Groupe occidental voudront bien lui faire connaître leur avis à ce propos et appuyer sa proposition.

Les avantages que le Gouvernement suisse voit dans son projet sont les suivants:

- a. Il appartient au gouvernement qui entend mettre fin au traité d'obtenir à cet effet en cas de contestation la sanction d'un tribunal international.
- b. Le sort du traité pendant la procédure est clairement réglé.
- c. La procédure ne comporte aucune fissure.
- d. Les procédures sont simples.
- e. La partie qui demande l'annulation d'un traité a le choix entre la Cour Internationale de Justice et un Tribunal arbitral ad hoc, ce qui ménage les objections de certains Etats à l'égard de la Cour sans la passer complètement sous silence.
- f. Les parties sont libres de recourir avant la procédure litigieuse à la conciliation si elles le désirent. Quoiqu'il ne soit pas

nécessaire de le dire expressément la proposition suisse pourrait être amendée et complétée dans ce sens.

5) En dépit de l'importance considérable que la Suisse attache à la question examinée plus haut, elle n'est pas d'avis que sa solution favorable rendrait le texte actuel de la convention acceptable en tout point. Elle estime au contraire qu'il serait illusoire de penser que des garanties juridictionnelles peuvent suffire à neutraliser les dangers considérables qui résultent de certaines dispositions du projet actuel. Tel est en particulier le cas des articles 49 et 50.

L'article 49, qui de par sa nature met en danger les traités de paix et les accords d'armistice, c'est-à-dire des instruments qui ont une très grande importance pour le maintien de l'ordre international, n'est guère un texte dont l'application puisse être confiée à un tribunal, comme d'ailleurs la sanction prévue n'est pas celle qui est adéquate en l'espèce et qui correspond à l'état de la société internationale. Si l'emploi de la force a permis d'imposer des traités injustes, c'est une tâche éminemment politique que celle de redresser les torts qui en résultent; elle ne peut être l'affaire du juge. L'article 50 suppose une autorité législative internationale dont on ne voit guère jusqu'ici comment elle pourrait être constituée. Aucune Cour et encore moins une Commission de conciliation ne disposent en ce moment de l'autorité qui lui permettrait de proclamer des principes auxquels le reste du droit international serait subordonné.

Par conséquent, de l'avis du Gouvernement suisse, il ne saurait suffire de résoudre les problèmes juridictionnels posés par la partie V du projet de convention si les modifications de fond indispensables ne sont pas apportées.

6) Le Gouvernement suisse désire attirer l'attention des Gouvernements au fait que la question du règlement obligatoire des

différends ne se pose pas seulement pour l'application du chap. V du projet de convention mais également pour la convention en général. Des différends sur d'autres parties pourront surgir, notamment en ce qui concerne les articles très compliqués sur les réserves. Le projet ne contient pas de dispositions de règlement obligatoire des différends en général. C'est pour ces raisons que la délégation suisse a proposé lors de la première session de la Conférence d'ajouter un nouvel article 76 qui comblera cette lacune. Les Gouvernements suisses exprime l'espoir que les Gouvernements appuieront cette proposition.

1 annexe.

NATIONS UNIES

ASSEMBLEE
GENERALE



Distr.
LIMITEE

A/CONF.39/C.1/L.377
23 mai 1968

Original : FRANCAIS

CONFERENCE DES NATIONS UNIES
SUR LE DROIT DES TRAITES

Commission plénière

Nouvel article 62 bis

Suisse : amendement au projet d'articles

Insérer un nouvel article 62 bis ayant la teneur suivante :

"1. Si les parties ne sont parvenues à aucun accord sur la procédure de règlement dans un délai de trois mois après l'objection prévue à l'article 62, paragraphe 3, la partie qui a fait la notification peut porter, au plus tard six mois après l'objection, le différend devant la Cour internationale de Justice par simple requête ou devant une commission d'arbitrage conformément aux dispositions du paragraphe 2.

2. A moins que les parties n'en conviennent autrement, la procédure d'arbitrage se déroulera de la manière suivante :

a) La commission d'arbitrage sera composée de cinq membres. Les parties en nommeront chacune un. Les trois autres arbitres seront désignés d'un commun accord par les parties parmi les ressortissants d'Etats tiers. Ils devront être de nationalités différentes, ne pas avoir leur résidence habituelle sur le territoire des parties ni se trouver à leur service.

b) Le président de la commission d'arbitrage sera nommé par les parties parmi les arbitres désignés en commun.

c) Si dans un délai de trois mois, les parties n'ont pu se mettre d'accord sur la désignation des arbitres nommés en commun, le Président de la Cour internationale de Justice procédera à cette désignation. Si l'une des parties n'a pas désigné l'arbitre dont la désignation lui incombe dans un délai de trois mois, le Président de la Cour internationale de Justice procédera à cette désignation.

A/CONF.39/C.1/L.377

p 2

d) Si le Président de la Cour internationale de Justice se trouve empêché ou s'il a la nationalité de l'une des parties, c'est le Vice-Président de la Cour internationale de Justice qui procède aux désignations nécessaires. Si le Vice-Président de la Cour internationale de Justice se trouve empêché et s'il a la nationalité de l'une des parties, il est remplacé par le membre le plus ancien de la Cour qui n'a la nationalité d'aucune des parties.

e) A moins que les parties n'en conviennent autrement, la commission d'arbitrage fixera elle-même sa procédure. A titre subsidiaire, les dispositions du chapitre III de la Convention de La Haye sur le règlement pacifique des différends internationaux du 18 octobre 1907 seront applicables.

f) La commission d'arbitrage statuera à la majorité simple sur les questions qui lui auront été soumises et ses décisions seront obligatoires pour les parties.

3. Pendant toute la durée du différend, sauf accord contraire entre les parties ou mesures provisoires ordonnées par la juridiction saisie, le traité reste applicable entre les parties au différend.

4. Si la partie qui a fait la notification ne recourt pas dans le délai prescrit de six mois à l'une des juridictions prévues au paragraphe 1, elle est censée avoir renoncé à la procédure d'annulation ou à la mesure envisagée."

DEPARTMENT OF THE SECRETARY OF STATE
TRANSLATION BUREAU
FOREIGN LANGUAGES DIVISION



SECRÉTARIAT D'ÉTAT
BUREAU DES TRADUCTIONS
DIVISION DES LANGUES ÉTRANGÈRES

Jul 20-3-1-6
17/3

YOUR NO. VOTRE N°	DEPARTMENT MINISTÈRE	DIVISION/BRANCH DIVISION/DIRECTION	CITY VILLE
Note 18-2-69	External Affairs	Legal (J.S.Stanford)	Ottawa
OUR NO. NOTRE N°	LANGUAGE LANGUE	TRANSLATOR (INITIALS) TRADUCTEUR (INITIALES)	DATE
7121	Spanish	C. K.	28-2-69

Embassy of Ecuador
O t t a w a

Ecuadorian charge called on me 17/3 - gave him copy of SSER's letter of 20/12/68
17/3
Note No. 4-2-6

The Hon. Mr. Mitchell Sharp,
Secretary of State for External Affairs,
O t t a w a .

Dear Sir :-

I have the honour to refer your attention to the forthcoming second phase of the Conference on the Law of Treaties, to be held at Vienna.

As Your Excellency is well aware during the first phase of the United Nations Conference on the Law of Treaties, (Vienna, March 26 to May 24, 1968), the following text of article 49 of the future Convention on the Law of Treaties was approved- with a sufficiently broad majority of votes so as to demonstrate its approval by the international community:

" any and all treaties are null and void if their conclusion has been obtained by means of threat or the use of force in violation of the principles of international law which principles have been incorporated in the United Nations Charter "

It will be during the second phase of the Conference (to be held at Vienna from the 9th of April to the 21st of May)

23/10/3

That said Convention is to be subscribed and in conformity with the respective Regulations the approval of each and every one of the articles will require the favourable vote of two thirds of the delegations present and voting.

My country attaches special importance to the subscription of the Convention in question and particularly to the approval of article 49. In this connection, I take the liberty to mention to Your Excellency the interest of my Government in that the Canadian Delegation to the Vienna Conference may be kind to support during the forthcoming vote, the final approval of article 49 as it is presently drawn up; this support will be greatly appreciated by the Government of Ecuador.

In conclusion I should like to express my appreciation for the preferred attention which may be given to this note.

I take this opportunity to renew the assurances of my highest consideration.

signed:

Arturo Lecaro B.

Charge d' Affaires of Ecuador

*Embajada del Ecuador
Ottawa*

No. 4-2- 6

Ottawa, a 13 de febrero de 1969

Excelencia:

Tengo a honra dirigirme a Vuestra Excelencia con oportunidad de la próxima celebración de la segunda fase de la Conferencia sobre el Derecho de los Tratados, en Viena.

Como es del cabal conocimiento de Vuestra Excelencia durante la primera fase de la Conferencia de las Naciones Unidas sobre el Derecho de los Tratados (Viena, del 26 de marzo al 24 de mayo de 1968) se aprobó -por una mayoría de votos suficientemente amplia como para demostrar la aceptación de la comunidad internacional- el siguiente texto del artículo 49, de la futura Convención sobre el Derecho de los Tratados:

"Es nulo todo tratado cuya celebración se haya obtenido por la amenaza o el uso de la fuerza o violación de los principios de derecho internacional incorporados a la Carta de las Naciones Unidas"

Será en la segunda fase de la Conferencia (Viena, del 9 de abril al 21 de mayo próximo) en donde se suscribirá dicha Convención y de conformidad con el Reglamento respectivo, la aprobación de todos y cada uno de los artículos necesitará el voto favorable de los dos tercios de las delegaciones presentes y votantes.

Mi país asigna particular importancia a la suscripción de la indicada Convención y, especialmente, a la aprobación del artículo 49. En esta virtud, me permito expresar a Vuestra Excelencia el interés de mi Gobierno porque la Delegación del Canadá que asistirá a Viena se sirviera apoyar, durante la próxima votación, la aprobación definitiva del artículo 49, en los términos en que se halla actualmente redactado, lo cual sería altamente apreciado por el Gobierno del Ecuador.

A Su Excelencia Mitchell Sharp,
Secretario de Estado para Asuntos Externos,
Ottawa.

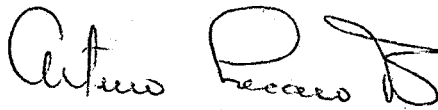
E. Bajada del Ecuador
Ottawa

Nota 4-2-6, febrero 13/69

- Página dos -

Para terminar, manifiesto a Vuestra Excelencia mi agradecimiento por la preferente atención que se sirva dispensar a la presente nota.

Aprovecho la oportunidad para reiterar a Vuestra Excelencia los sentimientos de mi más alta consideración.



Arturo Leoro B
Chargé d' Affaires of Ecuador

Embajada del Ecuador
Ottawa

No. 4-2- 6

me maw...
given to me by
Chargé d'affaires
Ecuador on Feb. 13
at 12.20 hrs.

AMB.

Ottawa, a 13 de febrero de 1969

Excelencia:

Tengo a honra dirigirme a Vuestra Excelencia con oportunidad de la próxima celebración de la segunda fase de la Conferencia sobre el Derecho de los Tratados, en Viena.

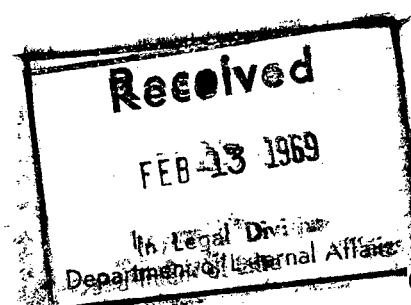
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A Su Excelencia Mitchell Sharp,
Secretario de Estado para Asuntos Externos,
Ottawa.



003231

13.2.20(05) 16.13.2

*Embajada del Ecuador
Ottawa*

Nota 4-2-6, febrero 13/69

- Página dos -

Para terminar, manifiesto a Vuestra Excelencia mi agradecimiento por la preferente atención que se sirva dispensar a la presente nota.

Aprovecho la oportunidad para reiterar a Vuestra Excelencia los sentimientos de mi más alta consideración.



Arturo Lecaro B
Chargé d' Affaires of Ecuador

ACTION COPY

L

File 20-3-1-6
37 J 28/2 MR

FM COPEN FEB27/69 CONFD NO/NO STANDARD

TO TT EXTER 108 DE HAGUE

INFO TT ANKRA DE LDN

REF ANKRA TEL 230 FEB20

LAW OF TREATIES ARTICLE 5(2)

IN LEGAL LOGIC TURK ASPIRATIONS FOR CYPRUS FEDERALISM WILL NOT/NOT
BE PREJUDICED BY TURK VOTE AGAINST PARA(2) AND IF PARA HAD NEVER BEEN
INSERTED BY ILC TURKS WOULD NOT/NOT MISS IT. HOWEVER LOGIC IS NOT/NOT
ALL AND IT IS DIFFICULT TO ARGUE AGAINST TURKISH INSTINCTIVE POLITICS
WISH TO VOTE FOR RETENTION OF PARA.

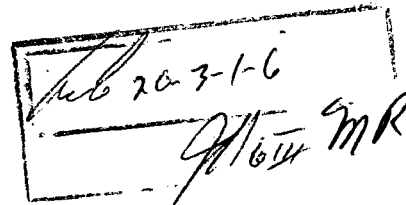
2. MY ADVISE IS NOT/NOT TO PRESS TURKS TO VOTE AGAINST PARA(2)
BUT THEY MIGHT CONSIDER ABSTAINING. WHAT IS MORE IMPORTANT IS TO GET
TURKISH PROCEDURAL VOTE IN FAVOUR OF PERMITTING SEPARATE VOTE;
HAYTA WAS CAUTIOUSLY SYMPATHETIC TO THIS IDEA. IT IS PERFECTLY REASON-
ABLE FOR TURK GOVT TO FEEL THAT ITS POLITICS REQUIRE IT TO VOTE
FOR RETENTION OF PARA(2) WHILE AT SAME TIME IT PERMITS (BY PROCEDURAL
VOTE) CDA TO SEEK SEPARATE DECISION ON THAT PARA

WERSHOF

22.26.2

003233

ACTION COPY



FM RIO FEB26/69 CONFD

TO EXTER 99 PRIORITY

REF OURTEL 43 JAN24

LAW OF TREATIES CONFERENCE

FORMAL REPLY SAYS BRAZIL WILL MAINTAIN SAME POSITION AS IN
FIRST SESSION WHEN DELEGATION VOTED AGAINST PARA2 OF ARTICLE 5
AND ABSTAINED ON ARTICLE AS A WHOLE.

10.26.2

EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

Memorandum

Finance Division

Legal Division

Restricted

TO
À

SECURITY
Sécurité

February 26, 1969

FROM
De

DATE

REFERENCE
Référence

NUMBER
Numéro

SUBJECT
Sujet

U.N. Conference on the Law of Treaties
Second Session, Vienna, April 9-May 21, 1969
Entertainment expenses.

FILE	DOSSIER
OTTAWA 20-3-1-6	
MISSION 37	

ENCLOSURES
Annexes

DISTRIBUTION

The sum of \$500 was, we believe, allocated for entertainment expenses of the Canadian delegation to the first session of the U.N. Conference on the Law of Treaties from March 26-May 24, 1968. The purpose of this memorandum is to request the allocation of a further sum of money for entertainment expenses at the second session.

2. After consultation with Mr. Wershof, who is the Head of the Canadian delegation to this Conference, we wish to request that the amount allocated for the second session be larger than the \$500 allocated for the first session. The primary reason for this is that Canada will be conducting, at the second session, a major diplomatic initiative intended to obtain the deletion of a provision of the draft convention on the Law of Treaties which we consider inimical to our national interest. Our delegation has been strengthened for this purpose by the addition of a fourth member. The necessary lobbying in support of the Canadian position among the representatives of more than 100 governments attending the Conference will take the form largely of bilateral lunches and dinners. These will be in addition to the reception to be held by the Canadian delegation, as was done last year.

3. Of the four members of the delegation, two (Messrs. Wershof and Robertson) are at present stationed abroad and two (Messrs. Beesley and Stanford) are stationed in Ottawa.

4. We should be grateful if you could inform us in due course of the amount allocated to the delegation for entertainment expenses.

D. M. MILLER

Legal Division.

PS. We attach a copy of a memorandum concerning entertainment expenses for another delegation. You will note in the lower left-hand corner the Under-Secretary's handwritten reference to the Law of Treaties conference "where the Canadian interest is specific and urgent".

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LAW OF TREATIES CONFERENCE-ARTICLE5-LUXEMBOURG

WE HAVE DISCUSSED POINTS RAISED IN YOUR REFTL WITH RETTEL, LEGAL ADVISER LUXEMBOURG MFA AND WITH HIS ASST, HOSTERT OF MFA.

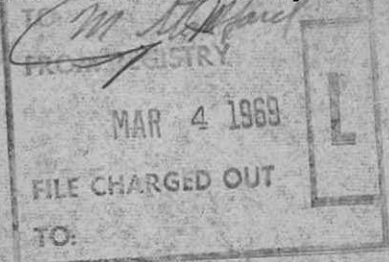
2. HOSTERT PLANS TO ATTEND SECOND SESSION IN VIENN BUT IS UNCERTAIN WHETHER HE CAN REMAIN FOR ENTIRE PERIOD IF CONFERENCE EXTENDS MORE THAN WEEK. LUXEMBOURG FOREIGN SERVICE IS UNDERSTANDABLY SMALL WITH MOST MEMBERS PERFORMING SEVERAL FUNCTIONS. HOSTERT SAID HE WOULD HAVE TO EXAMINE DEMANDS ON HIS TIME CLOSE TO EVENT BUT WILL MAKE SPECIAL EFFORT TO BE ON HAND.

3. AS FOR SUPPORTING CDN POSITION ON ARTICLE5, BOTH RETTEL AND HOSTERT CLAIM NEW GOVT HAS NOT/NOT YET TAKEN FORMAL DECISION BUT IN VIEW OF FOREIGN POLICY CONSULTATION WITHIN BENELUX THEY EXPECT LUXEMBOURG TO JOIN BELGIUM AND HOLLAND ON THIS QUESTION. WE TOOK THIS OPPORTUNITY OF AGAIN OUTLINING ORALLY CONSIDERATIONS PREVIOUSLY PRESENTED ON OCT14/68.

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cc: External Affairs ✓
Ottawa, Ontario

filed 4/1/69
NEW YORK, N.Y.,
February 26, 1969



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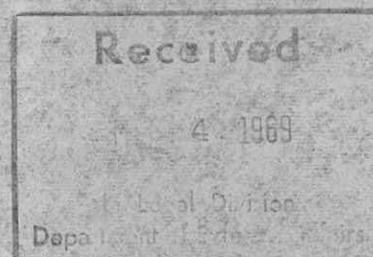
Sir,

I have the honour to refer to your letter under reference LE 113(5-2-1)GOV of January 31, 1969 enquiring if Canada would participate in the second session of the United Nations Conference on the Law of Treaties and concerning the delegation to that conference.

The Canadian authorities wish me to inform you that Canada will participate in the second session. The Canadian representative (Chairman of the delegation) will once again be Mr. M. H. Wershof, Canadian Ambassador to Denmark. The alternate representative (Vice-Chairman of the delegation) will be Mr. J. Alan Beesley, Head of the Legal Division of the Department of External Affairs. Mr. Beesley will probably be in Vienna only for the first two or three weeks of the Conference. The Canadian delegates to the second session

...../

Mr. Constantin A. Stavropoulos,
Legal Counsel,
United Nations Headquarters,
NEW YORK, N.Y.



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2.

will be Mr. A.W. Robertson, First Secretary, Permanent Mission of Canada to the United Nations and Mr. J. S. Stanford, Head of the Treaty Section of the Legal Division, Department of External Affairs.

Accept, Sir, the assurances of my highest consideration.

GORDON E. COX

Gordon E. Cox,
Chargé d'Affaires, a.i.

cc: Mr. Bissoanette
Mr. Deesley
Mr. Wershof (Copen)
Mr. Robertson (Persia, NY)

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File: 20-3-1-6

File ✓
Diary
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LAW OF TREATIES: PRELIMINARY MEETINGS - London, February 4, 1969

Present:

United Kingdom:	Sir Francis Vallat, Messrs. Ian Sinclair and P. de Courcy-Ireland of the Foreign Office
United States:	Mr. Salans of the State Department and Mr. James of the U.S. Embassy, London
Australia:	Mr. Pat Brazil, Australian DSA
Canada:	Messrs. Wershof, Stanford and Lee
New Zealand:	Miss Annette Finlayson, N.Z.M.C., London.

Agenda:

- 1 - Peaceful Settlement of Disputes
- 2 - The "All States" question
- 3 - Article 5(2) on federal states
- 4 - Articles 16 and 17 on the effect of reservations and objections
- 5 - Article 41 on severability
- 6 - Final clauses
- 7 - Tactics at the Paris meeting.

1 - Peaceful Settlement of Disputes

Mr. Salans (US) reported on the results to date of the U.S. canvass for support on a new article 62 bis. Of about 75 states approached, 36 replies had been received: 9 states had indicated support for the U.S. proposal (Belgium, Ethiopia, Finland, Germany, Ireland, Norway, Pakistan, Switzerland, Turkey); 7 states had indicated general sympathy

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-2-

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with the concept of compulsory independent settlement (Central African Republic, Chile, Iran, Mexico, Nigeria, Portugal, Uruguay); 14 states had given non-committal replies (Argentina, Austria, Bolivia, China, Ghana, Greece, Guatemala, Italy, Kuwait, Malaysia, Panama, Saudi Arabia, Spain, Yemen); 6 states indicated opposition to the U.S. proposal (Barbados, Brazil, India, Malawi, Philippines, Thailand).

Mr. Salans noted no clear pattern emerged from the replies to date. He reported that, at the Karachi meeting of the AALCC the majority had opposed the western position but adoption of a consensus against the western position was avoided. Half the states at Karachi believed present Article 62 was satisfactory by itself while half thought something more was required. Many favoured an optional protocol or a compulsory settlement procedure with an opting out feature. The majority believed the disputes settlement procedure should apply only to future treaties (i.e. treaties which entered into force after the entry into force of the treaties convention). Virtually all states at Karachi were prepared to accept some form of 62 bis (though not necessarily with a compulsory binding settlement procedure) if they believe this is necessary in order to get a generally acceptable Convention.

Sir Francis Yallat (U.K.) reported on the meeting of Commonwealth officials on peaceful settlement of disputes which took place at the time of the Commonwealth Prime Ministers' meeting. This information is summarized in a report prepared by the U.K. and attached to this report. It is not possible yet to forecast acceptance of a satisfactory disputes article, but reports of both the Commonwealth and Karachi meetings indicate a greater degree of flexibility on the part of Afro-Asian states than was evident at the first session in Vienna. It is necessary to determine (i) what is the acceptable western minimum requirement, and (ii) how this can best be achieved.

Mr. Marshak (Canada) reiterated Canadian support for the compulsory settlement of Part V disputes and indicated Canada would be prepared to co-sponsor an article 62 bis provided the proposal enjoyed significant Afro-Asian support. He enquired, however, how the U.S. proposed to handle its proposal tactically at Vienna in view of the 13-power proposal already on the table. He also enquired whether the U.S. and U.K. would be prepared to settle for compulsory conciliation. Both the U.K. and U.S. indicated that, initially at least, they would be seeking

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-3-

CONFIDENTIAL

compulsory arbitration. Mr. Sinclair (U.K.) could not say what the U.K. position would be if only compulsory conciliation were achieved. Mr. Brasill (Australia) said his government would prefer deletion of Part V altogether but would accept it only if there is provision for compulsory settlement.

The general discussion which followed focussed on two related points, (i) the merits of the amendments to the 13-power proposal put forward by the U.S. and (ii) the best means of attaining support for an acceptable 62 bis. A general comment relevant to both points was that the simpler the 62 bis proposal put forward, the more likely it is to achieve support. Complicated procedural provisions could discourage support and provide ammunition for opponents of compulsory settlement. In this connection it was noted that while the U.S. proposal for tightening up the time periods was desirable, the proposal for a special expanded procedure for multilateral treaties was probably an unnecessary complication. The U.S. proposal for recommendations by the conciliation commission for interim measures was favourably regarded. It was considered, however, that drafting changes should be made to make it clear that the conciliation commission may make recommendations during, not just at the end of, the conciliation process. With respect to the two additional proposals set forth in the U.S. Note but not incorporated in its proposed 62 bis, the establishment of a permanent body of conciliators and provision for reference to the ICJ for advisory opinions, it was generally agreed that while both proposals were objectively desirable they might unnecessarily complicate the proposed new article and, in the case of the reference to the ICJ, alienate potential co-sponsors and supporters.

With respect to the tactics of placing the U.S. proposal before Vienna II, it was generally considered that the best procedure would be to start at Vienna II with the 13-power proposal. In the meantime the U.S. would continue to seek support (as opposed to co-sponsorship) for its proposal and, at an appropriate (presumably early) stage in the debate the U.S. and its supporters would join with the 13 powers to put forward a revised 62 bis with considerably broadened sponsorship. Mr. Marshof pointed out the procedural difficulties which could ensue if the 13 power co-sponsors declined to join in co-sponsoring (or at least withdraw their proposal in favour of) the U.S. proposal.

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2 - The "All States" question

Sir Francis Vallat stated that the all states problems in Article 5 bis and the final clauses were inextricable. Mr. Sinclair reported that at exploratory meetings at the UNGA the Soviets had hinted they would concede compulsory conciliation in connection with Part V in return for at least an "all states" final clause. German opposition to "all states", in either 5 bis or the final clauses, was as firm as ever.

It was generally agreed Article 5 bis could be defeated but that it would be more difficult to defeat an "all states" final clause, although Mr. Salans reported that at Karachi there had been a consensus in favour of both 5 bis and an all states final clause. Mr. Werahof referred to the difficulty in western countries appearing outraged at an "all states" final clause when it had been accepted in the disarmament treaties and when the difficulties for the Secretary-General as depositary (which had been the major argument for the Vienna formula) could be circumvented by use of multiple depositaries. It was generally agreed to continue opposition to both 5 bis and an "all states" final clause. If it becomes necessary for western states to give way on the final clauses, however, it will be essential that the P.C.R. be convinced that the Vienna formula is unattainable. The bargaining might take place at the Plenary stage after both the proponents and opponents of an "all states" final clause had succeeded in obtaining a blocking third, thus creating the possibility of a convention without an accession clause.

3 - Article 5(2) on Federal States

Mr. Werahof reviewed the nature of the Canadian representations to governments and Mr. Stanford reported on the results to date of these representations which indicated that a separate vote could be obtained on paragraph 2 and the paragraph defeated, but that if no separate vote was permitted it was still uncertain whether a blocking third could be mustered against Article 5 as a whole. There were general expressions of support for the Canadian position.

4 - Articles 16 and 17 - Reservations and Objections

Mr. Brazil referred to the fact that some delegates considered the formulation of these articles at Vienna I to be deficient in failing to provide a procedure for invalidating incompatible reservations and he wondered whether other governments proposed to seek improvements to the articles. Messrs.

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-5-

CONFIDENTIAL

Salans and Sinclair both indicated that their governments agreed the present texts were not entirely satisfactory but had concluded that the chances of securing improvements to the present texts were slim, that efforts to alter the texts might indeed result in their being worsened and that they had consequently decided to concentrate their efforts in other areas.

5 - Article 41 - Separability

Sir Francis Vallat stated the strong view of the U.K. government that the principle of separability should apply to treaties only parts of which conflict with norms of jus cogens and that, consequently, the reference to Article 50 in Article 41(5) should be deleted. He said that it is the intention of the U.K. delegation to seek a separate vote on the words "and 50" in 41(5). There were general expressions of support for the U.K. position.

6.- Final Clauses

Retroactivity - Mr. Salans stated it is still the U.S. view that the convention should contain an express provision that it does not apply to pre-existing treaties. The U.S. does not propose, however, to take any initiatives of its own in this matter but would support any initiatives in this sense by other delegations. Mr. Wershof said that the Canadian position was similar to that of the U.S. and he drew attention to the relevance of the distinction between those parts of the draft which were mere codification and those which were progressive development. Mr. Brazil said Australia may take an initiative on this question. Mr. Sinclair suggested there was a danger if any such initiative were defeated, since it would create a presumption in favour of retroactivity. He suggested it might be preferable not to have a final article on retroactivity but to leave the question to be governed by Article 24, the general retroactivity article, and seek to interpret that article as confining the operation of the convention to future treaties only.

Reservations - Sir Francis Vallat considered that the likelihood of securing a satisfactory reservations article was very remote and it would therefore be preferable to allow articles 16 and 17 to operate. Mr. Brazil stated that, assuming a satisfactory Article 62 bis were secured, Australia would consider a reservation respecting that article as incompatible with Part V. Mr. Salans said any final article restricting reservations would create difficulties for the treaty in the U.S. Senate.

-6-

CONFIDENTIAL

Entry Into Force - There was general agreement that the number of ratifications required to bring the convention into force should be high. In view of the general law-making nature of the treaty and the recent NFI precedent, a figure approximating one-third of the U.N. membership, i.e. 45, was considered appropriate. Sir Francis Vallat stated that, while he recognized a requirement that the ratifiers include the permanent members of the Security Council was unlikely to be achievable, there would be some merit in seeking a formula which would require participation by the various geographic and political groups.

Article 76 - This is the Swiss proposal that all disputes arising under any provision of the convention (not just Part V) be subject to the compulsory jurisdiction of the ICJ. There was general agreement that the conference does not take the Swiss proposal seriously, that the proposal has no chance of adoption and that western efforts in support of the Swiss proposal would be likely only to jeopardize the possibility of securing an acceptable Article 62 bis.

7 - Tactics at the Paris meeting

The U.S. and U.K. representatives specified two objectives for the Paris meeting; first to determine what measure of agreement existed on the more important issues, especially on the peaceful settlement of disputes and "all states" questions, and second to display a firm position on the necessity of an adequate 62 bis so that reports of the Paris meetings which are passed on to non-participating governments will convince them of the importance which the western group attaches to this question.

RECORD OF MEETING OF COMMONWEALTH REPRESENTATIVES
TO DISCUSS THE LAW OF TREATIES CONFERENCE

10 JANUARY, 1969

Sir F. Vallat welcomed those present and briefly outlined the U.K.'s views as set out in the Aide-Mémoire distributed at the meeting. In answer to several questions, he explained that the purpose of the meeting was not to reach a Commonwealth consensus nor to hammer out a draft article on settlement procedures, but merely to exchange views. Each country represented was then invited to give its comments.

2. Australia (Mr. P. Henderson, Australian High Commission) said that they supported the views set out in our paper. They had the gravest reservations about Part V of the draft Convention (containing those articles dealing with the invalidity of treaties) in its present form, and regretted that amendments designed to improve it had not been accepted at the first session. They could only accept the Convention in its present form if it included adequate third party settlement procedures.

3. Canada (Mr. M.H. Wershof, Ambassador in Copenhagen) said that their views were similar to ours. The most difficult issue of the Conference was whether the majority would be willing to stipulate that, after the parties had exhausted all other procedures, there should be some provision for compulsory third party settlement. It was in the interests of all powers, whether large or small, that the Convention should contain the principle of compulsory arbitration for use in the last resort.

4. Ceylon (Mr. C.W. Pinto, Legal Adviser, Ministry of Defence and External Affairs) said that they wanted some form of automatically applicable settlement procedures, particularly in relation to the articles in Part V. They did not wish to take a firm position on individual proposals at this stage, and they thought that any new mechanism should apply only in respect of treaties concluded after the entry into force of the Convention. However, the "13-power" proposal was most in line with their thinking. If such a mechanism were included in the Convention, as it should be, it was unlikely to be used frequently, but it would serve as a watchdog to prevent needless claims of invalidity.

5. Ghana (Mr. V. Owusu, Attorney-General) said that at the first session their delegation had had a flexible mandate. In the end, they had come round to the general Afro-Asian view that Article 62 was adequate in its present form. However, their position was flexible, and they were open to persuasion. The "13-power" proposal had much to commend it, subject to satisfactory arrangements on such issues as the costs of proceedings and the procedures for selecting arbitrators.

.. / 6 ..

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6. Guyana (Sir L. Luckhoo, High Commissioner, who also spoke for Barbados) supported our views. There was a need to have procedural arrangements on which one could rely, instead of leaving a void. Some form of automatic third party settlement procedures should therefore be included.

7. India (Mr. E. Gonsalves, Ministry of External Affairs) said that they had not yet taken a position on this question. (We know from other sources that they are anxious to avoid committing themselves for as long as possible - at least until after the Asian-African Legal Consultative Committee meeting - but that they are reconsidering their position and may be prepared to be a little less inflexible.)

8. Kenya (Mr. I.S. Bhoi, Under Secretary, Ministry of Foreign Affairs) spoke eloquently and forcefully against any change in Article 62, which represented the highest measure of common ground among Governments. Article 33 of the U.N. Charter did not ascribe any priority to the various means of peaceful settlement listed, and did not compel members to use any one rather than another. The world was not ready to move beyond this. The cost of arbitration was high and the history of the use of compulsory arbitration was not very encouraging: there had been few successful cases. If there were compulsory arbitration procedures, what would happen if one party refused to implement the award? The other party could only fall back on the principle pacta sunt servanda - the parties must fulfil their obligations in good faith - which was exactly the present position. It was therefore pointless to impose compulsory arbitration. Moreover, at previous codification conferences, proposals for compulsory settlement procedures had always failed of adoption, and the device of an optional protocol had been the eventual solution.

9. Mauritius (Mr. E. Venchard, Senior Crown Counsel) said that they were not familiar with all the issues involved, as their delegation had not been present for that debate. However, they felt that there should be provisions to safeguard against abuse of the articles relating to invalidity. They found the "13-power" proposal acceptable in principle, but thought it could be improved. They supported procedures for conciliation followed by arbitration, but reserved their position as to whether the arbitral award should be binding.

10. Nigeria (Mr. Adediran) said that as Dr. Elias held the Chairmanship of the Committee of the Whole (and of the African Afro-Asian Groups) it would not be proper for them to state a position. (We have been told, however, that Dr. Elias personally favours compulsory arbitration, although he believes it unrealistic to hope for more than compulsory conciliation leading, if necessary, to arbitration with the consent of the parties.)

11. Pakistan (Mr. M.A. Bhatti, Counsellor, High Commission) said that they shared our views. Both in the context of the Law of Treaties Conference and in general, there was a need to strengthen the machinery of international law. They hoped that others could agree to strengthen Article 62 and that the Conference could accept provisions for compulsory arbitration.

.. / 12 ..

CONFIDENTIAL

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12. Sierra Leone (Mr. A. Metzger, Parliamentary Counsel) said that their views were well known, although they were open to persuasion. They were opposed in general to compulsory third party settlement procedures, and supported the principle that the parties had complete freedom of choice of the means of settlement.
13. Trinidad and Tobago (Mr. J.A.V. Harper) said that in substance they shared the views expressed by Guyana. While they had considerable sympathy with our views, they needed a little more time to crystallise their position; they might wish to draw a distinction between existing and future treaties as they had a number of problems with respect to treaties inherited on independence.
14. Malaysia (Mr. Sathiah), New Zealand (Miss A. Finlayson, Second Secretary, High Commission) and Swaziland (Mr. M.D. Ntiwane, High Commissioner) all said that they were only present as observers. Botswana and Tanzania had nominated officials to attend, but they did not turn up.

cc: Mr. Bissonnette
Mr. Beesley
Mr. Wershof (Copenhagen)
Mr. Robertson (Permis, N.Y.)

File ✓
Diary
Div. Diary

CONFIDENTIAL

February 24, 1969.

LAW OF TREATIES:
Preliminary Meetings of the WEO Group
Paris, February 6-7, 1969

The Governments represented at these meetings were:

Council of Europe: Austria, Belgium, Denmark, France,
FRG, Ireland, Italy, Luxembourg,
Malta, Netherlands, Norway, Sweden,
Switzerland, Turkey, United Kingdom.

Others: Australia, Canada, Finland, Japan,
New Zealand, Portugal, Spain, U.S.A.

The agenda proposed by the Council of Europe Secretariat and adopted by the meeting consisted of three parts: first, those matters not disposed of in Committee of the Whole at Vienna I; second, matters which had been dealt with at Vienna I but concerning which governments had indicated they would like additional discussion; and third, any additional items which representatives wished to raise.

I - Matters Deferred for Consideration in Committee
of the Whole at the Second Session.

1. The Right of Participation in Treaties. This question concerns the proposal to add to Article 2 a definition of general multilateral treaties, the proposed new Article 5 bis, the Czech amendment to Article 12 and the final clause on accession.

The FRG representative reaffirmed the traditional opposition of his government to any "all States" formula. It consequently opposed the concept of a general multilateral treaty, proposed 5 bis and the Czech amendment to Article 12, and could accept only the Vienna formula in the accession clause of the treaties convention. The issue exists not only in respect of East Germany, but also in respect of such entities as Rhodesia and Biafra as well. German objection to the "all states" clause would not be overcome by the use of multiple depositaries, which

-2-

CONFIDENTIAL

had been used only in very special cases. The FRG counts upon the support of the western group on this question.

The U.S. representative said his government opposes the concepts of both general and restricted multilateral treaties as restricting the freedom of states to decide with which states they will or will not engage in treaty relations. The effect of the general multilateral treaties and "all state" concepts is to permit would-be states to impose their views unilaterally on the international community. Exception had been made in the case of the disarmament treaties only because they affected international peace and security.

The U.K. representative said his government strongly opposed any attempt to introduce in this convention provisions which would restrict the freedom of international conferences to decide participation for themselves. The concepts of general and restricted multilateral treaties could not be defined permanently and governments should not be bound for all time to an "all states" formula. He noted however that many representatives at Vienna will support 5 bis and that efforts at a compromise on this issue may focus on the accession clause in the final clauses. The U.K. would prefer the Vienna formula but the conference may reach the position of either accepting a compromise on the accession article or having no participation clause and therefore no convention. The U.K. therefore reserved its position on whether it would be necessary to compromise on the final clause on accession.

The Swiss representative said his government would prefer the Vienna formula in the final clause. With respect to Articles 5 bis and 12, it was not clear whether these articles are claimed to be mandatory. If they are not mandatory they would not be all that important since parties to subsequent negotiations could exclude their operation. His government reserved its position on Articles 5 bis and 12.

The representative of Canada said that his government supported the Vienna formula in the final clauses. It also opposed 5 bis and, as a necessary consequence, the concept of general multilateral treaties. The introduction of the concept of either general or restricted multilateral treaties would make it very difficult to exclude an article 5 bis.

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The representative of Italy said that the will of the treaty partners was the juridical basis of treaties and that 5 bis and the proposed amendment to Article 12 restricted the freedom of the treaty partners. His government would oppose the concept of general multilateral treaties, proposed article 5 bis and the amendment to Article 12. On the final clauses, Italy would prefer the Vienna formula.

The Swedish representative said that western opposition to the "all states" formula is clear but it was necessary for the western group to consider the position of other delegates at the second session. Intersessional discussions indicate a strong drive for a compromise package involving 62 bis and 5 bis (the latter would be compulsory) and an "all states" final clause. The Soviet Government was interested in a settlement and many Afro-Asian states, though opposed to compulsory arbitration, would accept compulsory conciliation in return for 5 bis and an "all states" final clause. This connection of two separate questions presented a difficult tactical problem and he wondered whether the FRG had an assessment of voting strength on 5 bis. He also wondered whether there was any possibility of varying the Vienna formula.

The FRG representative replied that his government's assessment of voting strength indicated that the chances of securing a blocking third on 5 bis and general multilateral treaties was very good. It was more difficult to assess the voting position on an "all states" final clause. With respect to the proposed bargain, a compromise offer in which the eastern bloc and Afro-Asians accepted conciliation only, and not arbitration, did not appear to be a good package deal. His government considered that bargaining in respect of Article 62 bis would be more suitably linked to other provisions of the convention such as the substantive provisions on Part V, e.g. articles 50 and 61.

The Spanish representative said that the position of his government had not yet been decided. He had some sympathy for the concepts of general and restricted multilateral treaties and at the same time favoured an adequate 62 bis. Spain was therefore interested in the package deal suggested by the eastern bloc and Afro-Asians.

The U.S. representative shared the FRG view that the proposed bargain was not a true compromise. The west would be required to settle for conciliation in return for full acceptance of the "all states" issue in 5 bis and the final clauses. Each of these questions should continue to be dealt with separately.

-4-

CONFIDENTIAL

The representative of Japan said his government opposed 5 bis and favoured the Vienna formula in the final clauses. This position might have to be reconsidered, however, in the light of the situation in Vienna. Japan had been represented at the AALCC meeting in Karachi and could confirm that the Afro-Asian governments were considering a compromise on these questions and were not rigid on any of the points involved.

The representative of Portugal said his government opposed 5 bis and the amendment to 12. The proposed bargain of 5 bis for 62 bis was unacceptable and the western group should take a strong position against this effort to link the two questions.

The representative of Finland said his government opposed 5 bis and the Czech amendment to 12. In connection with the Swiss point, these provisions appeared from the text to be mandatory even though they are not formally jus cogens. Finland favours the Vienna formula in the final clauses.

The representative of Australia said his government opposed 5 bis and the concept of general multilateral treaties and supported the Vienna formula for the final clauses. The suggested package deal was not a reasonable compromise; 5 bis and 62 bis are separate issues and should be dealt with separately.

The representative of Sweden agreed that 5 bis and 62 bis should be dealt with separately. In reply to Afro-Asian efforts to link the two, the west should say that 62 bis is related to Part V and should refer to the fact that at the first session many western governments had specifically stated that acceptance of substantive articles in Part V was conditional upon an acceptable 62 bis. The Afro-Asians appeared to think that the substantive provisions of Part V were assured of adoption. It must be made clear to them that this is not the case. It was probable that the Afro-Asians, in their package proposal, would accept conciliation only and not arbitration.

The Chairman observed that a consensus appeared to exist in the meeting against the "all states" principle both in the body of the convention and in the final clauses.

The U.K. representative said there was no prospect of a compromise linking 5 bis and 62 bis. The "all states" question must be considered separately from the question of settlement of disputes. With respect to the final clause in

the convention, the U.K. would continue to support the Vienna formula but western governments must consider what the position might be if no final clause on participation obtains a two-thirds majority.

2. Restricted Multilateral Treaties. The Chairman, in his capacity as representative of France, said that acceptance of a definition of restricted multilateral treaties did not necessarily mean acceptance of the concept of general multilateral treaties. There was no link between the two. The concept of restricted multilateral treaties is found in Article 17(2) and relates not only to participation in treaties but to other problems as well.

The representative of the Netherlands enquired whether France had considered re-formulating its position. If the concept of restricted multilateral treaties is based upon a voluntary association of states there is no need to define a further special category. The effort might be made to deal with this matter in a more technical way and omit the proposed definition of restricted multilateral treaties. The representative of France indicated his government would look into this possibility.

3. Settlement of Disputes Arising Under Part V.

The U.S. representative said its proposal tabled in Vienna was still on the table but the U.S. has circulated a revision which it proposes to put forward at the second session.

The Swedish representative enquired first, whether the U.S. will submit amendments to the 13-power proposal or a complete new proposal and second, what reactions the U.S. had received to its most recent proposal.

The U.S. representative reviewed his government's position on 62 bis. The U.S. has decided to accept Part V as adopted at the first session provided safeguards can be achieved against unilateral subjective application of the substantive provisions of Part V. The 13-power proposal provides the best basis for negotiation; the U.S. alterations were designed to achieve technical improvements to that proposal. The U.S. representative reviewed the U.S. proposed 62 bis and concluded by noting that reports from the AALCC meeting indicate that the Afro-Asian group would be ready to compromise on 62 bis in order to get a convention. He expressed the hope that the western group would take a firm stand on the necessity for a satisfactory 62 bis.

The U.K. representative said that if the convention is to contain the innovations found in Part V it is of first importance to have satisfactory independent third party procedures for the application of the articles in Part V. While reference to the ICJ would be the ideal solution, particularly in relation to jus cogens disputes, the U.K. recognized that a large majority at Vienna would be unwilling to accept the ICJ. What is important is the acceptance of some third party provisions. The U.K. supported both the 13-power and U.S. proposals and considered that the best procedural approach might be for the 13-power sponsors to submit amendments based upon the U.S. proposals. With respect to the details of the U.S. proposal, the U.K. considered it unnecessary and perhaps undesirable to provide a special procedure for multilateral treaties, particularly since the element of simplicity provides a tactical advantage. Further, the U.K. considered that the U.S. proposal should clearly permit recommendations by the Conciliation Commission during the course of conciliation. Finally, 62 bis would have to contain a procedure which would preserve the operation of acceptances of the compulsory jurisdiction of the ICJ under Article 36 and its Statute.

The German representative said his government attached particular importance to satisfactory disputes settlements procedure, particularly since it had not proven possible to obtain improvements in the substantive content of Part V. He expressed general support for the U.S. proposal.

The Swiss representative said a satisfactory 62 bis was necessary, otherwise Part V would be unacceptable. Switzerland proposes to maintain before the second session and continue to seek support for its proposed 62 bis. The 13-power proposal is defective because it is too complicated, too long, too costly and insists too much upon conciliation. Conciliation should be made optional by agreement between the parties. Treaty litigation represented the most important of international law disputes and there should therefore be some reference to the ICJ, perhaps by authorizing a choice between the ICJ and an ad hoc tribunal. The U.N. Secretary General is a political and administrative personality, not a judicial personality, and is therefore not an appropriate person to carry out the role accorded to him under the U.S. proposal. This could be done by the President of the ICJ or the Secretary General of the Permanent Arbitration Tribunal of the Hague. The composition of the Conciliation Commission and Arbitral Tribunal under the 13-power and U.S. proposals is defective in that it results in a tribunal of one person; it would be preferable to have a body of 5 members with each party nominating one and three being nominated by agreement or by an independent person. The U.S. proposal is a considerable

improvement on the 13-power proposal but retains many of its defects. The suggested small group of conciliators to assure continuity is not necessary because their purpose is conciliation, which is not necessarily based on legal considerations. Only where legal matters are paramount is continuity necessary. Continuity would accordingly be desirable for arbitration. Even a satisfactory 62 bis would not make all of Part V acceptable. Certain questions such as the relationship of Article 49 (use of force) to peace treaties are too important to be left even to the ICJ. Similarly, neither the ICJ nor the UNGA should be able to decide what is jus cogens; consequently Articles 50 and 61 should be deleted. The Swiss proposed 62 bis leaves the choice of forum to the plaintiff and is simple and inexpensive.

The representative of Japan said that the issue of peaceful settlement of disputes under Part V is the most important problem before the Conference. He stressed the importance of the ICJ and said the Japanese proposed 62 bis would not be withdrawn at the second session although he recognized it was unlikely to be accepted. There is a need for common action by the western group and Japan is prepared to study the 13-power and U.S. proposals in the interests of western solidarity.

The Swedish representative said he preferred the term "automatic" to "compulsory" settlement procedures for presentational reasons. He stressed that it was of considerable tactical importance to know whether, in addition to the U.S. and U.K., other members of the western group would also consider Part V unacceptable without a satisfactory 62 bis. Part V was certainly unacceptable to Sweden without a satisfactory 62 bis. He stressed that western countries which consider compulsory third party settlement procedures important should be prepared to take a firm stand at Vienna that Part V is not acceptable without a satisfactory 62 bis. The firm positions taken by Switzerland and Japan were tactically useful and their proposals should remain on the table so that the 13-power and U.S. proposals are seen as compromises. The 13-powers will seek to expand sponsorship of their proposal. The U.S. and Swiss suggestions concerning the 13-power proposal might lead to an amended 13-power proposal; this possibility could be discussed in a smaller group. He agreed that 62 bis should not exclude the possibility of reference to the ICJ if the parties so desired. He noted that the procedure set out in the 13-power proposal would not be jus cogens and subsequent treaties could exclude the operation of 62 bis.

The Australian representative said his government had the gravest reservations on the substance of Part V, especially Articles 49, 50, 58 and 61. A satisfactory 62 bis would be indispensable to the acceptance of Part V. The 13-power proposal appeared to be the best basis upon which to seek a satisfactory 62 bis.

The Spanish representative said that his government did not share many western reservations to Part V. It regards 62 bis as a means of putting Part V into effect rather than as a safety measure. He agreed that there should be a common western position at Vienna and he regarded the 13-power proposal as the best basis for this position. While the U.S. proposal improved the 13-power draft in some respects, the western position should aim at maximum simplicity.

The Italian representative said the group must consider the diplomatic realities as they appeared at the first session. The ICJ is unacceptable to the majority and arbitration is an unwelcome concept. The 13-power proposal was the best the western group could hope for. The U. S. proposal is a considerable technical improvement and, in bringing the procedures under the U.N., offers strong presentational advantages. It will be necessary for western governments to consider what their positions will be if there is no satisfactory 62 bis.

The Canadian representative said his government agreed that Part V would be unsatisfactory in the absence of a provision for the compulsory settlement of disputes. He could not say however what the position of the Canadian Government would be towards the convention if no satisfactory 62 bis were obtained. He agreed that the Swiss and Japanese proposals were preferable to the 13-power proposal and should be pursued even though they are exceedingly unlikely to be adopted. The 13-power proposal together with most of the amendments proposed by the U.S. appears to offer the best basis for a 62 bis which would be acceptable to the west and at the same time had some chance of adoption. The chances of adoption of a satisfactory 62 bis would be improved if the Afro-Asians were convinced that the major western powers considered a satisfactory 62 bis as indispensable to an acceptable convention. If the western group agreed that a 62 bis along the lines of the 13-power and U.S. proposals was indispensable, the meeting should then consider the tactical question of who should sponsor any new proposal to be put before the second session.

The Austrian representative did not agree with a representative who had suggested earlier that omission of reference to the ICJ in 62 bis was unimportant since "the ICJ is always there and parties could agree to submit their dispute to it". He doubted this was true in the case of multilateral

treaties. While two parties to a dispute involving a multilateral treaty may themselves agree to submit the dispute to the ICJ, other parties to the treaty may be interested in the dispute but unwilling to intervene before the ICJ. Such parties would insist upon the application of the provisions of Article 62 bis.

The representative of Portugal agreed with the Japanese and Swiss proposals but realized there was little likelihood of their acceptance. His government was therefore prepared to accept the 13-power proposal with some of the U.S. improvements. While he had doubts concerning some of these improvements, he attached considerable importance to a unanimous western position on this issue and would go along with the wishes of the majority.

The Netherlands representative agreed that the 13-power proposal could be improved though he did not agree with all the U.S. proposed amendments. In particular, he did not consider that the Conciliation Commission should determine the legal issues for the arbitral tribunal. The tribunal should do this for itself. He did not know what the answer was to the sponsorship question. He considered that a proposal sponsored by countries from various groups had a better chance of success, but much would depend upon whether there is more Latin American and Afro-Asian sponsorship available for the 13-power proposal. This could only be determined at the Conference.

The U.K. representative noted that 62(4) applies only to article 62 and not to 62 bis. Some additional provision in 62 bis would be required to preserve acceptances of the compulsory jurisdiction of the ICJ and the wording of 62(4) might not be sufficient for this purpose. He was disappointed at the Austrian view that states which wished to use the ICJ could be prevented from doing so in the case of multilateral treaties. A judgement of the ICJ binds only the parties to the dispute and does not restrict the freedom of action of other states.

The Austrian representative said there appeared to be a misunderstanding. He did not mean to speak against the ICJ but merely to note that states will oppose the idea that if they wished to intervene they must do so before the ICJ because the parties to the dispute had chosen that forum. They would insist upon their right to invoke articles 62 and 62 bis.

The representative of Sweden suggested that existing disputes may deter certain states from accepting an article 62 bis. Acceptability of such an article might therefore be improved if it were specified that it applied only to disputes

-10-

CONFIDENTIAL

(or only to treaties concluded) after the entry into force of the treaties convention.

The U.S. representative expressed gratitude for the comments on the U.S. proposals and noted the existence of a consensus on the necessity for common action by the western group on disputes settlement and the fact that the absence of a satisfactory 62 bis would make Part V unacceptable. He stressed the importance of the western group being agreed in principle on this issue and of this western position being made known to other delegates.

The representative of Japan said that many Afro-Asian states were concerned about the fate of the convention. They want a broadly acceptable convention and are prepared to compromise but he did not know to what extent. The Afro-Asian states were concerned about the possible retroactive application of 62 bis. There were three types of cases: the first being that of an already existing dispute; the second being that of a future dispute over a prior treaty; and the third being that of a future dispute over a future treaty. Afro-Asian states were particularly concerned about the second of these three situations. Would it be possible to apply Part V without 62 bis to the second situation or to make the whole of Part V inapplicable to such a situation. Further, would it be possible to contract out of 62 bis? If the 13-power proposal was not suitable to the case of multilateral treaties this could be used as a ground for attacking it at the second session and the western group must therefore be prepared to deal with this possibility. Afro-Asian states were also concerned about the question of cost both in relative terms (the wealthier side will have the better lawyers) and in absolute terms, i.e. the direct costs of disputes settlement procedures.

The French representative said that a judge must have clear law to apply and he wondered about the vagueness of certain articles, e.g. 49, 50 and 61. The vagueness of these articles will place the judge in the position not of interpreting law but of creating it, which is properly the function of states. This is an important consideration in determining whether to accept a 62 bis. France considers it most important to improve the substantive articles in Part V, especially Article 50. France does not oppose 62 bis but wants to be sure that it works properly. While France favours the Swiss and Japanese proposals, the practicalities make the 13-power proposal, with some of the U.S. improvements, acceptable. France was opposed to the idea of a conciliation tribunal and the publication of the report of the Conciliation Commission.

..11

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-11-

CONFIDENTIAL

The representative of Denmark said that compulsory third party disputes settlement was essential if Part V is to be accepted and for this reason Denmark had joined in co-sponsoring the 13-power proposal. The Japanese representative said that each government must state how far it is prepared to go on this issue. Would states agree to accept Part V only in their relations with states accepting Article 62 bis? He considered that this was probably not a good idea because the result might support the views of many that Part V was merely codification.

The Swedish delegate noted three general attitudes in the meeting. First, concern over the substantive articles, including 49 and 50. Second, a desire for a 62 bis procedure as the price which the Afro-Asians must pay for the inclusion in Part V of articles such as Article 50; and third, the view of many delegations that Part V would be unacceptable without a satisfactory 62 bis.

The representative of Switzerland noted that while an optional protocol had disadvantages, it might become necessary for western governments to choose among unsatisfactory solutions. If an optional protocol did become necessary it should not be along the lines of the 13-power proposal but rather should provide for the compulsory jurisdiction of the ICJ.

4. Settlement of Disputes Arising out of the
Convention as a Whole - Article 76.

The Swiss representative noted that disputes might arise in respect of articles other than Part V, e.g. reservations and the application of treaties to third parties. He realized the Swiss proposal was unlikely to be adopted but considered that compromise proposals, e.g. for an arbitral tribunal, would be unlikely to secure additional support. Switzerland will leave its proposed article 76 on the table at the second session but may revise it. If there is to be an optional protocol there should also be a right to limit the application of the convention to other states accepting the protocol.

The representative of the Netherlands wondered whether adoption of Article 76 would not have the effect of making all treaties subject to the ICJ. Such a consequence would make it difficult for many other states to accept the Swiss proposal.

5. Retroactivity.

The Australian representative said that his government felt strongly that the Vienna convention should apply only to future treaties, without prejudice to the application of pre-existing rules of customary international law. Ideally the convention should deal specifically with the question of retroactivity, but he wondered whether it was realistic to hope for an express provision on retroactivity. If no express provision is adopted, article 24 of the draft would apply and the question whether, under article 24, the treaties convention would apply to existing treaties can be argued both ways.

The German representative noted that the 1961 and 1963 Vienna Conventions contained in their preambles reference to the application of rules of customary international law and suggested that a similar provision should appear in the preamble to this convention.

The representative of the U.K. said that the Vienna convention should apply only to future treaties without prejudice to pre-existing rules of international law. Not all of Part V is progressive development but it is difficult to determine what is progressive development and what is codification. The U. K. would accept the application of article 24 to the treaties convention. He believed that the record of the conference as a whole supports the view that the convention would apply only to future treaties. He considered it would be extremely difficult to obtain a satisfactory article on the retroactivity of the treaties convention.

The representative of Canada agreed that the treaties convention should not be retroactive. He also agreed that it would probably not be possible to obtain a satisfactory article on retroactivity and considered that we should therefore simply go on the assumption that the convention is not retroactive. There was a problem however in respect of the Afro-Asian position, referred to by Japan, that Part V should be retroactive but article 62 bis should not be retroactive. A provision to this effect would be undesirable for Part V and would carry contrary implications for the rest of the treaty convention. States should therefore oppose any amendment specifically restricting the application of 62 bis.

The representative of Switzerland said it would be unacceptable to limit 62 bis to future treaties but he could accept its limitation to future disputes.

The Swedish representative agreed that it was not likely we could obtain an express article on non-retroactivity but we should seek a provision in the preamble. It would be inconvenient if, for example, the articles on reservations were to apply to existing treaties; retroactivity on technical details of this kind could be dangerous. This point should be persuasive and if pursued with respect to certain provisions, would help secure adoption of the rule that the convention applies only to future treaties without prejudice to existing rules of international law.

The representative of Japan expressed agreement with the representatives of Australia and the U.K. that the convention should apply only to future treaties but he did not consider that article 24 is wholly satisfactory for this purpose. This article does not deal with the problem of the application of the convention to future disputes arising out of existing treaties. If an effort is made to obtain a specific article on retroactivity and it fails, a contrary presumption may be created. It is possible however that Afro-Asian and Latin American states may accept an article on retroactivity and this possibility should be explored. Afro-Asian states might accept the non-retroactivity of all of Part V, not just 62 bis.

The U. S. representative considered that it would be impossible to obtain an express provision on the retroactivity of the present convention. The U.S. would not object to others seeking to obtain such provision but their efforts may leave an unfavourable record. The burden should be on those advocating retroactivity to show that a rule was part of pre-existing customary international law.

6. Reservations to the Treaties Convention.

The U. K. representative said there were probably various articles, even outside Part V, on which various states may wish to make reservations. Consequently an article prohibiting reservations could make it difficult to obtain adherences. On the other hand if one sought to insert an article allowing reservations there would be difficulties in determining which reservations should be allowed. Consequently it would appear preferable not to seek a specific reservations article but to let articles 16 and 17 operate in respect of this convention. The U.S. and Netherlands representatives expressed agreement with this view, the former observing that the U.S. Senate would react unfavourably to any article restricting reservations.

-14-

CONFIDENTIAL

The Australian representative agreed with the U.S. representative that Articles 16 and 17 were "in a mess". He expressed some reservation respecting the possibility of Articles 16 and 17 operating in the event there is a satisfactory 62 bis. Some means of preventing reservations concerning a satisfactory 62 bis would be desirable.

The Swedish representative reserved his government's position on this question, commenting that unlimited reservations to the treaties convention (e.g. a U.S. reservation to the articles on interpretation) could leave the law of treaties in a very confused state.

The representative of Switzerland did not know what the solution to the reservations question should be. There is a need to be free to make reservations, especially concerning Part V, but reservations must not be allowed to destroy the treaty. It might be acceptable to omit a reservations article if Articles 16 and 17 were properly drafted, but they are not. One possible solution would be to break the draft convention up into separate conventions as was done in the case of the 1958 Geneva Law of the Sea Conventions.

The Austrian representative noted that, if article 50 is accepted, the conference may seek to declare certain articles jus cogens and thereby prevent reservations in respect of such articles.

7. Final Clauses of the Treaties Convention.

The U.S. representative suggested that the number of ratifications necessary for the entry into force of the convention should be high because of the quasi-constitutional character and importance of the treaties convention. He noted that the 1961 Single Convention on Narcotics Drugs required 40 ratifications and the NPT required 40 plus 3 nuclear states. The treaties convention would be of similar importance and should require a similar number of ratifications, possibly in the order of 45. The Finnish representative agreed with this position, however the Austrian representative noted that other delegations would probably suggest smaller numbers. In this connection he referred to the fact that the convention on Statutory Limitations in Respect of War Crimes required only 10 ratifications.

The Italian representative said that the treaties convention had no precedent; no other convention had the breadth or danger of this one which sought to establish universal rules.

-15-

CONFIDENTIAL

He referred particularly to the fact that the possibility of the provisions of the treaties convention evolving into customary international law was directly related to the number of ratifications required for its entry into force. He agreed the number should be high. With reference to earlier suggestions concerning a requirement that ratification by the permanent members of the Security Council be required, he was opposed to this suggestion because the treaties convention is not within the ambit of the Security Council's responsibilities.

The German representative had studied U.N. codification precedents, including the Geneva Law of the Sea Conventions, the 1961 and 1963 Vienna Conventions and the U.N. Human Rights Convention. The practice appeared to be to require ratification by one-third of the members of the U.N. which, under the present membership, would mean a figure between 40 and 45. He believed the convention should require at least this number of ratifications for its entry into force.

There was a general consensus in favour of a requirement for 40-45 ratifications.

II - Provisions of the Draft Convention Provisionally Adopted at the First Session.

1. Separability - Article 41. The U.K. and Finnish representatives said they would request a separate vote on the reference to Article 50 in paragraph 5 of Article 41 because they believed the principle of separability should apply even in the case where part of the treaty contravened jus cogens.

The Netherlands representative suggested that the group might be giving too much importance to Article 50. This article refers to treaties conflicting with rules of jus cogens at the time of conclusion. Since there were very few rules of jus cogens the danger of not applying separability to Article 50 was not very great.

The German representative saw some merit in the present text of Article 41(5). He considered that it could have a restrictive effect on recourse to Article 50 if the state invoking the article knew that it would thereby destroy the whole treaty. He was prepared to consider the matter further however in the light of the U.K. views and the outcome on Article 5 bis which, in its present form, had the appearance of jus cogens.

The U. K. representative said, with respect to the Netherlands point, that there was still considerable doubt about the scope of Article 50 and many delegations would suggest that there exists a wide range of rules of jus cogens.

The Canadian representative shared the U.K. and Finnish views that the reference to Article 50 should be deleted from 41(5). He did not agree with the German representative's view on the likely effect of 41(5) in its present form. He referred to the procedural aspects of securing deletion and noted that it would be preferable not to table an amendment to Article 41, which would require a two-thirds vote, but simply to ask for a separate vote on the reference to Article 50. The request for a separate vote would require only simple majority support. The representative of Austria agreed that this procedure was a proper one to follow.

2. Loss of a Right to Invoke a Ground
for Invalidity, etc. - Article 42.

The representative of Switzerland said that the amendment tabled by Switzerland at the first session, though rejected, was sound. The operation of Article 42 should be extended to Articles 48 and 49 (coercion) to avoid uncertainty in respect of treaties. He said his delegation may re-submit its amendment at the second session.

3. Coercion - Article 49 and Related Resolution.

The Swiss representative said that his government's concern on this article was closely related to its concern over Article 42. He considered the resolution on economic coercion to be unsound. It was impossible to draw a line between acceptable and unacceptable pressure and the result was to place the whole treaty system in doubt.

The Swedish representative said that it would be preferable not to reopen the debate on this issue. The outcome secured at the first session was as favourable to the west as could be expected and any effort to reopen the question might result in a formulation of Article 49 even less acceptable to western states. The representative of the Netherlands agreed with this assessment.

The representative of Canada requested the views of other delegates on whether and to what extent reference should be made at the second session to events in Czechoslovakia should the communist governments, in their speeches, accuse western governments of the use of force elsewhere. The U. S. representative said this question could only be decided in the atmosphere of debate at the second session. Soviet action in Czechoslovakia had been referred to in other discussions. The U.S. had no objection in principle to raising it and would be

prepared to raise it at the second session in appropriate circumstances. The U.K. representative expressed a preference to avoid any reference to the Czech situation. All delegates would be aware of the recent events in Czechoslovakia and any express reference to them would only raise the temperature and make the remainder of our work more difficult.

The U.K. representative went on to refer to the fact that while the record of the first session shows a large vote in favour of Articles 49, 50 and 62, adoption of these articles was, in the eyes of many delegations, dependent upon acceptance of an article on the peaceful settlement of disputes. It should not be assumed, therefore, that all the articles in Part V will be accepted. This would be particularly true if no satisfactory 62 bis is achieved in Committee of the Whole.

4. Jus Cogens - Article 50.

The U.S. and U.K. representatives expressed the view that the terms of Article 50 adopted at the first session were as favourable as the western group was likely to obtain and that any effort to reopen the text would probably result in a less favourable article. Consequently it would be preferable not to seek to amend Article 50 in Plenary.

The U.S. and Swedish delegates stated that Article 50 and certain other articles in Part V would be unacceptable if there was no satisfactory 62 bis.

The Austrian representative agreed that no effort should be made to amend Article 50, but there remained the problem of determining which provisions in the convention are to be considered as jus cogens. He referred particularly to Articles 23 (Pacta sunt servanda), 43 (Provisions of Internal Law) and 49 (Coercion).

The representative of Switzerland stated that a satisfactory 62 bis would not remove the difficulty with Article 50. Arbitration tribunals should not have the power to determine rules of jus cogens, this is a legislative and constitutional problem to be decided by the consensus of an overwhelming majority of states. Article 50 should therefore be deleted. The representative of Australia had the gravest reservations concerning Article 50. He agreed that tactically it would be preferable not to seek a better formulation but Article 50 and others in Part V could be acceptable only if there is a satisfactory 62 bis.

The representative of France also objected to Article 50. His government was studying the question of introducing new criteria for identifying rules of jus cogens and would inform other delegates of the results of its studies.

6. Breach of a Treaty - Article 57.

The U.K. representative considered that Article 57 in its present form had many drafting deficiencies and his delegation intends to propose drafting amendments to the article at the second session.

III - Further Questions Raised by Governments

The German representative raised the question of whether states are free to deviate from provisions in the convention which contain no escape clause. There was a presumption that rules of international law are dispositive. The Swedish and Swiss statements on Article 4 and the U.K. question to Sir Humphrey Waldock on Article 53 serve to confirm in the travaux the dispositive character of the convention. But the text itself may be contrary to this presumption. The inclusion in some articles of formulae such as "unless the parties otherwise agree" raises the argumentum a contrario that provisions which do not contain such a reference are not dispositive. Germany could not accept that such articles be considered as mandatory. States should be free to contract out from their operation. It may be desirable to seek clarification of this point, however there was the danger that if such an effort were defeated a contrary presumption might be raised. The German delegation was considering proposing an amendment to deal with this question.

The Netherlands representative suggested the best procedure might be to add an "escape clause" to additional articles as required. The Swedish representative considered it simpler to have one article of general application rather than to repeat the "escape clause" at frequent intervals. He agreed however that it would be difficult to get an express clause on this point.

The representative of Switzerland said that the entire treaty was dispositive and this should be reflected in the body of the convention, the preamble or the final act. He did not

consider that there was any article of jus cogens in the draft. In fact he doubted that it was possible to lay down a law of treaties in another treaty and suggested instead that the ILC draft articles take the form of a code rather than a convention.

The representative of Sweden referred to the articles on coercion and fraud and said that it would be difficult for the conference to accept the view that there are no rules of jus cogens in the draft articles.

The U.K. representative said that a rule of jus cogens does not acquire that character by being included in a treaty. The question here is not whether certain articles are rules of jus cogens but whether they are obligatory or permissive.

The representative of Japan said that his delegation had proposed amendments at the first session to Articles 16 and 17 on reservations and objections designed to introduce objective criteria for determining compatibility. His government had not yet decided whether to introduce similar amendments at the second session and would like the views of other delegates on this question. A majority of states represented at the AALCC meeting in Karachi had expressed sympathy with the Japanese proposal.

The Australian representative said his government was unsatisfied with these articles and would support any move to introduce a greater degree of objectivity.

The U.S. representative agreed that Articles 16 and 17 were unsatisfactory but because of the lack of support for the Japanese proposals at the first session and the U.S. Government's own soundings they had decided to accept these articles in their present form. The views expressed at Karachi were encouraging however and he hoped the Japanese would maintain their efforts.

The Netherlands representative noted a possible objection to the Japanese proposal in that, whereas you needed a two-thirds majority to secure an article in a convention prohibiting a reservation, under the Japanese proposal a simple majority of the contracting parties could act to prohibit a reservation.

-20-

CONFIDENTIAL

The Swedish representative said there was a need for an objective mechanism to determine incompatibility. A majority decision would not necessarily be objective. A procedure for third party determination was required but was unlikely to be achievable. The German representative referred to the technical difficulty in the Japanese proposal in that it left a 12-month period of uncertainty. The representative of Canada was sympathetic to the Japanese desire to improve the articles and hoped they could devise an acceptable formula. With respect to the question of who is to determine compatibility, Sir Humphrey Waldock had replied to a Canadian question on this point by saying that the joint effect of Articles 16 and 17 was to make the text of compatibility purely subjective.

The U.K. representative enquired about the procedure for dealing with the final clauses. Were these to be referred first to the Committee of the Whole as with other articles, first to the Drafting Committee and then to Plenary, or direct to Plenary. He found no authority for direct reference to the Drafting Committee. The final clauses will involve important political issues and he believed they should go first to the Committee of the Whole in the usual way.

The representative of Canada confirmed that there is no authority for referring the final clauses to the Drafting Committee. The Secretariat draft final clauses will have no status of themselves and it will be for the conference to decide where to send the Secretariat draft. The Austrian representative said all final clauses should go first to the Committee of the Whole for discussion of any amendments. The U.S. representative said that the practice at the 1961 and 1963 Vienna Conventions had been to submit the final clauses to the Committee of the Whole and this was the proper procedure. The representative of France agreed that the final clauses should go first to the Committee of the Whole.

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By: Air Bag

Ottawa 2, February 26, 1969

Personal & Confidential

Mr. Max H. Wershof, Q.C.,
Ambassador,
The Canadian Embassy,
Copenhagen, Denmark.

Dear Mr. Wershof:

I enclose copies of the summaries which I have prepared of the discussions which took place in London and Paris on the Law of Treaties.

Some months ago, Allan Gotlieb suggested I publish a short note on the first session of the Law of Treaties Conference. The result is attached. I am forwarding this to you not because it has any particular merit but simply because I assume you would wish to be aware of its existence and content. When returning the galley proofs of the article to the printers I included a footnote stating that the views expressed were my personal views and not those of the Canadian Government. This footnote was omitted, however, by the printers.

You will be interested to know that we received yesterday the first indication of opposition to our request for a separate vote on paragraph 2 of Article 5. This came from Indonesia, and, while the reply was stated to be tentative only, it is probable that it represents a firm Indonesian position arrived at after consultation with, among others, probably the USSR. The Indonesian reply thus appears to confirm what we have suspected all along would be the case, namely that the proponents of paragraph 2 will seek to fight us on the procedural issue of a separate vote.

Yours sincerely,

J. S. STANFORD

J. S. Stanford.

cc: Mr. A.W. Robertson, Permis, N.Y.
(with enclosures)

003268

TRANSMITTAL SLIP

TO: INTERNAL AFFAIRS, Ottawa.

Legal Division, ATTN: Mr. J. S. Stanford

Security: UNCLASSIFIED

Date: Feb. 25/69

FROM:

Air or Surface

No. of enclosures

The documents described below are for your information.

Despatching Authority: G.I. Warren/po

20-3-1-6

37

Copies

Description

Also referred to:

1

Note. No. 36 dated Feb. 25/69 to the Ministry of Commonwealth and Foreign Affairs, Malta.

Ref: Your telegram No. L-251, Feb. 20/69.

INSTRUCTIONS

1. This form may be used in sending material for informational purposes from the Department to posts abroad and vice versa.
2. This form should *NOT* be used to cover documents requiring action.
3. The name of the person responsible for authorizing the despatch of the material should be shown opposite the words "Despatching Authority". This may be done by signature, name stamp or by any other suitable means.
4. The form should bear the security classification of the material it covers.
5. The column for "Copies" should indicate the number of copies of each document transmitted. The space for "No. of Enclosures" should show the total number of copies of all documents covered by the transmittal slip. This will facilitate checking on despatch and receipt of mail.

c.c. ✓ External Affairs, Ottawa, Legal Division,
Attn: Mr. J. S. Stanford.
(Ref: Your telegram No. L-251, Feb.20/69)

No. 36

The Office of the High Commissioner for Canada presents its compliments to the Ministry of Commonwealth and Foreign Affairs and has the honour to refer to the Office of the High Commissioner's Note No. 278 of November 29, 1968 requesting information concerning the position which the Government of Malta will take on specific questions to be considered at the second session of the international conference to draft a Convention on the Law of Treaties to take place in Vienna from April 9 to May 21, 1969.

The Office of the High Commissioner has been advised that Malta was represented by Dr. M. Tuffino, Crown Advocate General, at the meetings of the West European and Others Group, which were held in Paris in February, to discuss the Convention prior to the second session. Accordingly, as requested in Note No. 278, the Office of the High Commissioner would be grateful to receive an indication of the position which the Government of Malta will take at the second session.

The Office of the High Commissioner for Canada avails itself of this opportunity to renew to the Ministry of Commonwealth and Foreign Affairs the assurances of its highest consideration.

Pierre Dumas

Ministry of Commonwealth and Foreign Affairs,
VALLETTA, Malta.

ROME, February 25, 1969.

9/5/3

TRANSMIT, AL 311

TO: Under-Secretary of State for External Affairs.

Security UNCLASSIFIED

Canadian Embassy, Copenhagen

Date February 25, 1969

FROM: Canadian Embassy

Air or Surface Air

Vienna

No. of enclosures 1

The documents described below are for your information.

Despatching Authority J.A. McCordick/hmp

20-3-1-6
37

Copies	Description	Also referred to:
1	Letter to Dr. Erik Nettel, Federal Ministry of Foreign Affairs, Vienna re: Law of Treaties - Article V	

Received
4 1969
In Legal Division
Department of External Affairs

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VIENNA, February 25, 1969.

Dear Dr. Nettel:

It is my understanding that the Canadians in Paris for the recent discussions on the second session of the Conference on the Law of Treaties had very useful and helpful conversations with you and other Austrian officials. In this connection I have been asked to pass on to you a few comments. I had hoped to do this by telephone, but since I shall be out of my office for the rest of the week attending meetings of the Board of Governors of the IAEA, I thought it better to write you a letter.

With regard to paragraph 2 of Article V, it is still the view of the Canadian authorities that the best solution for those like ourselves who are opponents of paragraph 2 would be its deletion, and that we should work toward this objective. With regard to a possible Austrian amendment to Article V, the Canadian authorities naturally fully appreciate that the final decision whether or not to table such an amendment rests with the Austrian authorities. Furthermore we are most appreciative of the indications we have received of your wish to improve paragraph 2 in a way that would make it acceptable to us. However, we believe that under the rules of procedure an amendment to Article V would have to be voted upon before the vote on the adoption of paragraph 2, and that an unsuccessful attempt to amend Article V might lead to confusion over the voting in respect of paragraph 2 and thus create difficulties in securing a separate vote on paragraph 2.

Consequently the Canadian view is that unless there were reason to be convinced that a two-thirds majority for the Austrian amendment could be obtained at the second session, despite the fact that it did not get a simple majority at the first session, the re-introduction of the amendment could lead to voting confusion and the possible retention of paragraph 2 in its present objectionable form. To reiterate what is now very familiar to you: we would like to see the deletion of paragraph 2 and we would be most grateful for any help the Austrian delegation will be prepared to give us in this respect.

Yours sincerely,

SIGNED) J. A. McCORDICK

J.A. McCordick
Ambassador.

Dr. Erik Nettel,
Völkerrechtsbüro,
Federal Ministry of Foreign Affairs,
VIENNA.

Tel File/File/Diary/Div.Diary/JSS

MESSAGE

FM/DE

EXTERNL OTT

DATE	FILE/DOSSIER	SECURITY SECURITE
Feb.25 1969	20-3-1-6	CONFID.

TO/A

DJAKARTA

NO

PRECEDENCE

L-275

ROUTINE

INFO

REF YOURTEL 78 OF FEB.20

SUB/SUJ LAW OF TREATIES CONFERENCE - ARTICLE 5

MISS LAURENS' OBSERVATION THAT QUOTE CANADA APPEARED TO BE ALONE AT FIRST SESSION IN TAKING INITIATIVE TO HAVE PARA 2 ELIMINATED UNQUOTE IS TOTALLY INCORRECT AS IS HER IMPLICATION THAT OTHER FEDERAL STATES DID NOT SHARE OUR OPPOSITION TO PARA 2. ^{NP?} CANADA DID NOT TABLE FORMAL PROPOSAL AT FIRST SESSION TO DELETE PARA 2 ALTHO WE SPOKE AGAINST THE PARA AND VOTED AGAINST IT. AMONG FEDERAL STATES AT FIRST SESSION, MEXICO AND MALAYSIA BOTH PROPOSED DELETION OF ENTIRE ARTICLE 5 WHILE AUSTRALIA PROPOSED DELETION OF PARA 2 AND AUSTRIA PROPOSED AMENDMENT TO PARA 2 REFERRED TO IN PARA 3 OF OURLET L-992 OCT.29. THERE WERE TWO ROLL CALL VOTES ON PARA 2 AT FIRST SESSION. OF THE FEDERAL STATES REPRESENTED, NINE (AUSTRALIA, BRAZIL, CANADA, FGR, INDIA, MALAYSIA, MEXICO USA, VENEZUELA) VOTED AGAINST PARA 2 ON BOTH OCCASIONS. TWO OTHERS (ARGENTINA AND AUSTRIA) VOTED AGAINST PARA 2 ON FIRST VOTE AND FOR IT ON SECOND VOTE. BOTH HAVE INFORMED US THEY WILL VOTE AGAINST PARA 2 AT SECOND SESSION. ONLY FOUR FEDERAL STATES

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D.M. MILLER

1-275

-2- CONFIDENTIAL

(NIGERIA, SWITZERLAND, USSR, YUGOSLAVIA) VOTED FOR PARA 2 ON BOTH
OCCASIONS. OVERWHELMING OPPOSITION OF FEDERAL STATES TO PARA 2
CONFIRMS US IN OUR VIEW THAT PARA 2 AS DRAFTED IS UNSATISFACTORY
AS A RULE OF INTERNATIONAL LAW ^{AND} GENERAL APPLICATION TO FEDERAL
STATES.

2. GRATEFUL IF YOU COULD BRING FOREGOING FACTS TO MISS LAURENS'
ATTENTION, PREFERABLY BY FURTHER AIDE-MEMOIRE, FOR HER CONSIDERATION
IN DETERMINING INDONESIAN POSITION ON SUBSTANCE OF PARA 2 AND OUR
PROCEDURAL REQUEST FOR A SEPARATE VOTE.

** **

MESSAGE

FM/DE	EXTERNAL OTT	DATE	FILE/DOSSIER	SECURITY SECURITE	
		Feb.24/69	IN 20-3-1-6 37	RESTRICTED	
TO/A	ANKARA	NO		PRECEDENCE	
		L-269		ROUTINE	
INFO		COPENHAGEN (BY BAG)			

REF YOURTEL 230 FEB.20/69

SUB/SUJ LAW OF TREATIES CONFERENCE - ARTICLE 5

IF TURKISH POSITION ON ARTICLE 5 IS MOTIVATED ESSENTIALLY BY POLITICAL CONSIDERATIONS RELATING TO CYPRUS AND IF, IN YOUR VIEW, POLITICAL IMPORTANCE WHICH TURKS ATTACH TO CYPRUS QUESTION IS LIKELY TO MAKE IT FRUITLESS FOR US TO SEEK TURKISH OPPOSITION OR ABSTENTION IN RESPECT OF PARAGRAPH 2, YOU SHOULD CONCENTRATE YOUR EFFORTS ON SEEKING TURKISH AGREEMENT TO SUPPORT OUR REQUEST FOR ~~A~~ SEPARATE VOTE ON PARA 2. FOR YOUR INFORMATION ONLY, RESULTS OF REPRESENTATIONS TO DATE INDICATE THAT WE WILL BE ABLE TO SECURE BLOCKING THIRD AGAINST PARA. 2 PROVIDED WE CAN OBTAIN SIMPLE MAJORITY SUPPORT FOR SEPARATE VOTE ON PARA.2. AT PRESENT, THEREFORE, ~~THE~~ CRUCIAL ISSUE FOR US IS ~~THE~~ PROCEDURAL MATTER OF A SEPARATE VOTE.

2. IN URGING TURKS TO SUPPORT OUR REQUEST FOR SEPARATE VOTE ON PARA. 2, YOU SHOULD STRESS THAT ~~THE~~ TWO PARAS. OF ARTICLE 5

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-2- RESTRICTED

RELATE TO QUITE DIFFERENT MATTERS. PARA. 1 CONCERNS TREATY-
MAKING CAPACITY OF INDEPENDENT SOVEREIGN STATES. PARA. 2 HOWEVER
CONCERNS ~~THE~~ TREATY-MAKING CAPACITY OF AN ENTITY WHICH IS NOT AN
INDEPENDENT SOVEREIGN STATE, I.E. A MEMBER OF A FEDERAL STATE.
THE VIEW THAT A MEMBER OF ~~FEDERAL STATES~~ IS NOT SOVEREIGN STATE
AS THE WORD QUOTE STATE UNQUOTE IS USED IN ARTICLE 1 AND ARTICLE
5(1) WAS CONFIRMED BY THE DELETION OF THE WORD QUOTE STATES UNQUOTE
FROM PARAGRAPH 2 OF ARTICLE 5 AT THE FIRST SESSION.

Feb 20-3-1-6 94
CONFIDENTIAL
February 24, 1969.

LAW OF TREATIES:
Preliminary Meetings of the WEO Group
Paris, February 6-7, 1969

The Governments represented at these meetings were:

Council of Europe: Austria, Belgium, Denmark, France,
FRG, Ireland, Italy, Luxembourg,
Malta, Netherlands, Norway, Sweden,
Switzerland, Turkey, United Kingdom.

Others: Australia, Canada, Finland, Japan,
New Zealand, Portugal, Spain, U.S.A.

The agenda proposed by the Council of Europe Secretariat and adopted by the meeting consisted of three parts: first, those matters not disposed of in Committee of the Whole at Vienna I; second, matters which had been dealt with at Vienna I but concerning which governments had indicated they would like additional discussion; and third, any additional items which representatives wished to raise.

I - Matters Deferred for Consideration in Committee of the Whole at the Second Session.

1. The Right of Participation in Treaties. This question concerns the proposal to add to Article 2 a definition of general multilateral treaties, the proposed new Article 5 bis, the Czech amendment to Article 12 and the final clause on accession.

The FRG representative reaffirmed the traditional opposition of his government to any "all States" formula. It consequently opposed the concept of a general multilateral treaty, proposed 5 bis and the Czech amendment to Article 12, and could accept only the Vienna formula in the accession clause of the treaties convention. The issue exists not only in respect of East Germany, but also in respect of such entities as Rhodesia and Biafra as well. German objection to the "all states" clause would not be overcome by the use of multiple depositaries, which

-2-

CONFIDENTIAL

had been used only in very special cases. The FRG counts upon the support of the western group on this question.

The U.S. representative said his government opposes the concepts of both general and restricted multilateral treaties as restricting the freedom of states to decide with which states they will or will not engage in treaty relations. The effect of the general multilateral treaties and "all state" concepts is to permit would-be states to impose their views unilaterally on the international community. Exception had been made in the case of the disarmament treaties only because they affected international peace and security.

The U.K. representative said his government strongly opposed any attempt to introduce in this convention provisions which would restrict the freedom of international conferences to decide participation for themselves. The concepts of general and restricted multilateral treaties could not be defined permanently and governments should not be bound for all time to an "all states" formula. He noted however that many representatives at Vienna will support 5 bis and that efforts at a compromise on this issue may focus on the accession clause in the final clauses. The U.K. would prefer the Vienna formula but the conference may reach the position of either accepting a compromise on the accession article or having no participation clause and therefore no convention. The U.K. therefore reserved its position on whether it would be necessary to compromise on the final clause on accession.

The Swiss representative said his government would prefer the Vienna formula in the final clause. With respect to Articles 5 bis and 12, it was not clear whether these articles are claimed to be mandatory. If they are not mandatory they would not be all that important since parties to subsequent negotiations could exclude their operation. His government reserved its position on Articles 5 bis and 12.

The representative of Canada said that his government supported the Vienna formula in the final clauses. It also opposed 5 bis and, as a necessary consequence, the concept of general multilateral treaties. The introduction of the concept of either general or restricted multilateral treaties would make it very difficult to exclude an article 5 bis.

..3

-3-

CONFIDENTIAL

The representative of Italy said that the will of the treaty partners was the juridical basis of treaties and that 5 bis and the proposed amendment to Article 12 restricted the freedom of the treaty partners. His government would oppose the concept of general multilateral treaties, proposed article 5 bis and the amendment to Article 12. On the final clauses, Italy would prefer the Vienna formula.

The Swedish representative said that western opposition to the "all states" formula is clear but it was necessary for the western group to consider the position of other delegates at the second session. Intersessional discussions indicate a strong drive for a compromise package involving 62 bis and 5 bis (the latter would be compulsory) and an "all states" final clause. The Soviet Government was interested in a settlement and many Afro-Asian states, though opposed to compulsory arbitration, would accept compulsory conciliation in return for 5 bis and an "all states" final clause. This connection of two separate questions presented a difficult tactical problem and he wondered whether the FRG had an assessment of voting strength on 5 bis. He also wondered whether there was any possibility of varying the Vienna formula.

The FRG representative replied that his government's assessment of voting strength indicated that the chances of securing a blocking third on 5 bis and general multilateral treaties was very good. It was more difficult to assess the voting position on an "all states" final clause. With respect to the proposed bargain, a compromise offer in which the eastern bloc and Afro-Asians accepted conciliation only, and not arbitration, did not appear to be a good package deal. His government considered that bargaining in respect of Article 62 bis would be more suitably linked to other provisions of the convention such as the substantive provisions on Part V, e.g. articles 50 and 61.

The Spanish representative said that the position of his government had not yet been decided. He had some sympathy for the concepts of general and restricted multilateral treaties and at the same time favoured an adequate 62 bis. Spain was therefore interested in the package deal suggested by the eastern bloc and Afro-Asians.

The U.S. representative shared the FRG view that the proposed bargain was not a true compromise. The west would be required to settle for conciliation in return for full acceptance of the "all states" issue in 5 bis and the final clauses. Each of these questions should continue to be dealt with separately.

The representative of Japan said his government opposed 5 bis and favoured the Vienna formula in the final clauses. This position might have to be reconsidered, however, in the light of the situation in Vienna. Japan had been represented at the AALCC meeting in Karachi and could confirm that the Afro-Asian governments were considering a compromise on these questions and were not rigid on any of the points involved.

The representative of Portugal said his government opposed 5 bis and the amendment to 12. The proposed bargain of 5 bis for 62 bis was unacceptable and the western group should take a strong position against this effort to link the two questions.

The representative of Finland said his government opposed 5 bis and the Czech amendment to 12. In connection with the Swiss point, these provisions appeared from the text to be mandatory even though they are not formally jus cogens. Finland favours the Vienna formula in the final clauses.

The representative of Australia said his government opposed 5 bis and the concept of general multilateral treaties and supported the Vienna formula for the final clauses. The suggested package deal was not a reasonable compromise; 5 bis and 62 bis are separate issues and should be dealt with separately.

The representative of Sweden agreed that 5 bis and 62 bis should be dealt with separately. In reply to Afro-Asian efforts to link the two, the west should say that 62 bis is related to Part V and should refer to the fact that at the first session many western governments had specifically stated that acceptance of substantive articles in Part V was conditional upon an acceptable 62 bis. The Afro-Asians appeared to think that the substantive provisions of Part V were assured of adoption. It must be made clear to them that this is not the case. It was probable that the Afro-Asians, in their package proposal, would accept conciliation only and not arbitration.

The Chairman observed that a consensus appeared to exist in the meeting against the "all states" principle both in the body of the convention and in the final clauses.

The U.K. representative said there was no prospect of a compromise linking 5 bis and 62 bis. The "all states" question must be considered separately from the question of settlement of disputes. With respect to the final clause in

the convention, the U.K. would continue to support the Vienna formula but western governments must consider what the position might be if no final clause on participation obtains a two-thirds majority.

2. Restricted Multilateral Treaties. The Chairman, in his capacity as representative of France, said that acceptance of a definition of restricted multilateral treaties did not necessarily mean acceptance of the concept of general multilateral treaties. There was no link between the two. The concept of restricted multilateral treaties is found in Article 17(2) and relates not only to participation in treaties but to other problems as well.

The representative of the Netherlands enquired whether France had considered re-formulating its position. If the concept of restricted multilateral treaties is based upon a voluntary association of states there is no need to define a further special category. The effort might be made to deal with this matter in a more technical way and omit the proposed definition of restricted multilateral treaties. The representative of France indicated his government would look into this possibility.

3. Settlement of Disputes Arising Under Part V.

The U.S. representative said its proposal tabled in Vienna was still on the table but the U.S. has circulated a revision which it proposes to put forward at the second session.

The Swedish representative enquired first, whether the U.S. will submit amendments to the 13-power proposal or a complete new proposal and second, what reactions the U.S. had received to its most recent proposal.

The U.S. representative reviewed his government's position on 62 bis. The U.S. has decided to accept Part V as adopted at the first session provided safeguards can be achieved against unilateral subjective application of the substantive provisions of Part V. The 13-power proposal provides the best basis for negotiation; the U.S. alterations were designed to achieve technical improvements to that proposal. The U.S. representative reviewed the U.S. proposed 62 bis and concluded by noting that reports from the AALCC meeting indicate that the Afro-Asian group would be ready to compromise on 62 bis in order to get a convention. He expressed the hope that the western group would take a firm stand on the necessity for a satisfactory 62 bis.

-6-

CONFIDENTIAL

The U.K. representative said that if the convention is to contain the innovations found in Part V it is of first importance to have satisfactory independent third party procedures for the application of the articles in Part V. While reference to the ICJ would be the ideal solution, particularly in relation to jus cogens disputes, the U.K. recognized that a large majority at Vienna would be unwilling to accept the ICJ. What is important is the acceptance of some third party provisions. The U.K. supported both the 13-power and U.S. proposals and considered that the best procedural approach might be for the 13-power sponsors to submit amendments based upon the U.S. proposals. With respect to the details of the U.S. proposal, the U.K. considered it unnecessary and perhaps undesirable to provide a special procedure for multilateral treaties, particularly since the element of simplicity provides a tactical advantage. Further, the U.K. considered that the U.S. proposal should clearly permit recommendations by the Conciliation Commission during the course of conciliation. Finally, 62 bis would have to contain a procedure which would preserve the operation of acceptances of the compulsory jurisdiction of the ICJ under Article 36 and its Statute.

The German representative said his government attached particular importance to satisfactory disputes settlements procedure, particularly since it had not proven possible to obtain improvements in the substantive content of Part V. He expressed general support for the U.S. proposal.

The Swiss representative said a satisfactory 62 bis was necessary, otherwise Part V would be unacceptable. Switzerland proposes to maintain before the second session and continue to seek support for its proposed 62 bis. The 13-power proposal is defective because it is too complicated, too long, too costly and insists too much upon conciliation. Conciliation should be made optional by agreement between the parties. Treaty litigation represented the most important of international law disputes and there should therefore be some reference to the ICJ, perhaps by authorizing a choice between the ICJ and an ad hoc tribunal. The U.N. Secretary General is a political and administrative personality, not a judicial personality, and is therefore not an appropriate person to carry out the role accorded to him under the U.S. proposal. This could be done by the President of the ICJ or the Secretary General of the Permanent Arbitration Tribunal of the Hague. The composition of the Conciliation Commission and Arbitral Tribunal under the 13-power and U.S. proposals is defective in that it results in a tribunal of one person; it would be preferable to have a body of 5 members with each party nominating one and three being nominated by agreement or by an independent person. The U.S. proposal is a considerable

improvement on the 13-power proposal but retains many of its defects. The suggested small group of conciliators to assure continuity is not necessary because their purpose is conciliation, which is not necessarily based on legal considerations. Only where legal matters are paramount is continuity necessary. Continuity would accordingly be desirable for arbitration. Even a satisfactory 62 bis would not make all of Part V acceptable. Certain questions such as the relationship of Article 49 (use of force) to peace treaties are too important to be left even to the ICJ. Similarly, neither the ICJ nor the UNGA should be able to decide what is jus cogens; consequently Articles 50 and 61, should be deleted. The Swiss proposed 62 bis leaves the choice of forum to the plaintiff and is simple and inexpensive.

The representative of Japan said that the issue of peaceful settlement of disputes under Part V is the most important problem before the Conference. He stressed the importance of the ICJ and said the Japanese proposed 62 bis would not be withdrawn at the second session although he recognized it was unlikely to be accepted. There is a need for common action by the western group and Japan is prepared to study the 13-power and U.S. proposals in the interests of western solidarity.

The Swedish representative said he preferred the term "automatic" to "compulsory" settlement procedures for presentational reasons. He stressed that it was of considerable tactical importance to know whether, in addition to the U.S. and U.K., other members of the western group would also consider Part V unacceptable without a satisfactory 62 bis. Part V was certainly unacceptable to Sweden without a satisfactory 62 bis. He stressed that western countries which consider compulsory third party settlement procedures important should be prepared to take a firm stand at Vienna that Part V is not acceptable without a satisfactory 62 bis. The firm positions taken by Switzerland and Japan were tactically useful and their proposals should remain on the table so that the 13-power and U.S. proposals are seen as compromises. The 13-powers will seek to expand sponsorship of their proposal. The U.S. and Swiss suggestions concerning the 13-power proposal might lead to an amended 13-power proposal; this possibility could be discussed in a smaller group. He agreed that 62 bis should not exclude the possibility of reference to the ICJ if the parties so desired. He noted that the procedure set out in the 13-power proposal would not be jus cogens and subsequent treaties could exclude the operation of 62 bis.

The Australian representative said his government had the gravest reservations on the substance of Part V, especially Articles 49, 50, 58 and 61. A satisfactory 62 bis would be indispensable to the acceptance of Part V. The 13-power proposal appeared to be the best basis upon which to seek a satisfactory 62 bis.

The Spanish representative said that his government did not share many western reservations to Part V. It regards 62 bis as a means of putting Part V into effect rather than as a safety measure. He agreed that there should be a common western position at Vienna and he regarded the 13-power proposal as the best basis for this position. While the U.S. proposal improved the 13-power draft in some respects, the western position should aim at maximum simplicity.

The Italian representative said the group must consider the diplomatic realities as they appeared at the first session. The ICJ is unacceptable to the majority and arbitration is an unwelcome concept. The 13-power proposal was the best the western group could hope for. The U. S. proposal is a considerable technical improvement and, in bringing the procedures under the U.N., offers strong presentational advantages. It will be necessary for western governments to consider what their positions will be if there is no satisfactory 62 bis.

The Canadian representative said his government agreed that Part V would be unsatisfactory in the absence of a provision for the compulsory settlement of disputes. He could not say however what the position of the Canadian Government would be towards the convention if no satisfactory 62 bis were obtained. He agreed that the Swiss and Japanese proposals were preferable to the 13-power proposal and should be pursued even though they are exceedingly unlikely to be adopted. The 13-power proposal together with most of the amendments proposed by the U.S. appears to offer the best basis for a 62 bis which would be acceptable to the west and at the same time had some chance of adoption. The chances of adoption of a satisfactory 62 bis would be improved if the Afro-Asians were convinced that the major western powers considered a satisfactory 62 bis as indispensable to an acceptable convention. If the western group agreed that a 62 bis along the lines of the 13-power and U.S. proposals was indispensable, the meeting should then consider the tactical question of who should sponsor any new proposal to be put before the second session.

The Austrian representative did not agree with a representative who had suggested earlier that omission of reference to the ICJ in 62 bis was unimportant since "the ICJ is always there and parties could agree to submit their dispute to it". He doubted this was true in the case of multilateral

treaties. While two parties to a dispute involving a multilateral treaty may themselves agree to submit the dispute to the ICJ, other parties to the treaty may be interested in the dispute but unwilling to intervene before the ICJ. Such parties would insist upon the application of the provisions of Article 62 bis.

The representative of Portugal agreed with the Japanese and Swiss proposals but realized there was little likelihood of their acceptance. His government was therefore prepared to accept the 13-power proposal with some of the U.S. improvements. While he had doubts concerning some of these improvements, he attached considerable importance to a unanimous western position on this issue and would go along with the wishes of the majority.

The Netherlands representative agreed that the 13-power proposal could be improved though he did not agree with all the U.S. proposed amendments. In particular, he did not consider that the Conciliation Commission should determine the legal issues for the arbitral tribunal. The tribunal should do this for itself. He did not know what the answer was to the sponsorship question. He considered that a proposal sponsored by countries from various groups had a better chance of success, but much would depend upon whether there is more Latin American and Afro-Asian sponsorship available for the 13-power proposal. This could only be determined at the Conference.

The U.K. representative noted that 62(4) applies only to article 62 and not to 62 bis. Some additional provision in 62 bis would be required to preserve acceptances of the compulsory jurisdiction of the ICJ and the wording of 62(4) might not be sufficient for this purpose. He was disappointed at the Austrian view that states which wished to use the ICJ could be prevented from doing so in the case of multilateral treaties. A judgement of the ICJ binds only the parties to the dispute and does not restrict the freedom of action of other states.

The Austrian representative said there appeared to be a misunderstanding. He did not mean to speak against the ICJ but merely to note that states will oppose the idea that if they wished to intervene they must do so before the ICJ because the parties to the dispute had chosen that forum. They would insist upon their right to invoke articles 62 and 62 bis.

The representative of Sweden suggested that existing disputes may deter certain states from accepting an article 62 bis. Acceptability of such an article might therefore be improved if it were specified that it applied only to disputes

-10-

CONFIDENTIAL

(or only to treaties concluded) after the entry into force of the treaties convention.

The U.S. representative expressed gratitude for the comments on the U.S. proposals and noted the existence of a consensus on the necessity for common action by the western group on disputes settlement and the fact that the absence of a satisfactory 62 bis would make Part V unacceptable. He stressed the importance of the western group being agreed in principle on this issue and of this western position being made known to other delegates.

The representative of Japan said that many Afro-Asian states were concerned about the fate of the convention. They want a broadly acceptable convention and are prepared to compromise but he did not know to what extent. The Afro-Asian states were concerned about the possible retroactive application of 62 bis. There were three types of cases: the first being that of an already existing dispute; the second being that of a future dispute over a prior treaty; and the third being that of a future dispute over a future treaty. Afro-Asian states were particularly concerned about the second of these three situations. Would it be possible to apply Part V without 62 bis to the second situation or to make the whole of Part V inapplicable to such a situation. Further, would it be possible to contract out of 62 bis? If the 13-power proposal was not suitable to the case of multilateral treaties this could be used as a ground for attacking it at the second session and the western group must therefore be prepared to deal with this possibility. Afro-Asian states were also concerned about the question of cost both in relative terms (the wealthier side will have the better lawyers) and in absolute terms, i.e. the direct costs of disputes settlement procedures.

The French representative said that a judge must have clear law to apply and he wondered about the vagueness of certain articles, e.g. 49, 50 and 61. The vagueness of these articles will place the judge in the position not of interpreting law but of creating it, which is properly the function of states. This is an important consideration in determining whether to accept a 62 bis. France considers it most important to improve the substantive articles in Part V, especially Article 50. France does not oppose 62 bis but wants to be sure that it works properly. While France favours the Swiss and Japanese proposals, the practicalities make the 13-power proposal, with some of the U.S. improvements, acceptable. France was opposed to the idea of a conciliation tribunal and the publication of the report of the Conciliation Commission.

..11

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-11-

CONFIDENTIAL

The representative of Denmark said that compulsory third party disputes settlement was essential if Part V is to be accepted and for this reason Denmark had joined in co-sponsoring the 13-power proposal. The Japanese representative said that each government must state how far it is prepared to go on this issue. Would states agree to accept Part V only in their relations with states accepting Article 62 bis? He considered that this was probably not a good idea because the result might support the views of many that Part V was merely codification.

The Swedish delegate noted three general attitudes in the meeting. First, concern over the substantive articles, including 49 and 50. Second, a desire for a 62 bis procedure as the price which the Afro-Asians must pay for the inclusion in Part V of articles such as Article 50; and third, the view of many delegations that Part V would be unacceptable without a satisfactory 62 bis.

The representative of Switzerland noted that while an optional protocol had disadvantages, it might become necessary for western governments to choose among unsatisfactory solutions. If an optional protocol did become necessary it should not be along the lines of the 13-power proposal but rather should provide for the compulsory jurisdiction of the ICJ.

4. Settlement of Disputes Arising out of the
Convention as a Whole - Article 76.

The Swiss representative noted that disputes might arise in respect of articles other than Part V, e.g. reservations and the application of treaties to third parties. He realized the Swiss proposal was unlikely to be adopted but considered that compromise proposals, e.g. for an arbitral tribunal, would be unlikely to secure additional support. Switzerland will leave its proposed article 76 on the table at the second session but may revise it. If there is to be an optional protocol there should also be a right to limit the application of the convention to other states accepting the protocol.

The representative of the Netherlands wondered whether adoption of Article 76 would not have the effect of making all treaties subject to the ICJ. Such a consequence would make it difficult for many other states to accept the Swiss proposal.

5. Retroactivity.

The Australian representative said that his government felt strongly that the Vienna convention should apply only to future treaties, without prejudice to the application of pre-existing rules of customary international law. Ideally the convention should deal specifically with the question of retroactivity, but he wondered whether it was realistic to hope for an express provision on retroactivity. If no express provision is adopted, article 24 of the draft would apply and the question whether, under article 24, the treaties convention would apply to existing treaties can be argued both ways.

The German representative noted that the 1961 and 1963 Vienna Conventions contained in their preambles reference to the application of rules of customary international law and suggested that a similar provision should appear in the preamble to this convention.

The representative of the U.K. said that the Vienna convention should apply only to future treaties without prejudice to pre-existing rules of international law. Not all of Part V is progressive development but it is difficult to determine what is progressive development and what is codification. The U. K. would accept the application of article 24 to the treaties convention. He believed that the record of the conference as a whole supports the view that the convention would apply only to future treaties. He considered it would be extremely difficult to obtain a satisfactory article on the retroactivity of the treaties convention.

The representative of Canada agreed that the treaties convention should not be retroactive. He also agreed that it would probably not be possible to obtain a satisfactory article on retroactivity and considered that we should therefore simply go on the assumption that the convention is not retroactive. There was a problem however in respect of the Afro-Asian position, referred to by Japan, that Part V should be retroactive but article 62 bis should not be retroactive. A provision to this effect would be undesirable for Part V and would carry contrary implications for the rest of the treaty convention. States should therefore oppose any amendment specifically restricting the application of 62 bis.

The representative of Switzerland said it would be unacceptable to limit 62 bis to future treaties but he could accept its limitation to future disputes.

The Swedish representative agreed that it was not likely we could obtain an express article on non-retroactivity but we should seek a provision in the preamble. It would be inconvenient if, for example, the articles on reservations were to apply to existing treaties; retroactivity on technical details of this kind could be dangerous. This point should be persuasive and if pursued with respect to certain provisions, would help secure adoption of the rule that the convention applies only to future treaties without prejudice to existing rules of international law.

The representative of Japan expressed agreement with the representatives of Australia and the U.K. that the convention should apply only to future treaties but he did not consider that article 24 is wholly satisfactory for this purpose. This article does not deal with the problem of the application of the convention to future disputes arising out of existing treaties. If an effort is made to obtain a specific article on retroactivity and it fails, a contrary presumption may be created. It is possible however that Afro-Asian and Latin American states may accept an article on retroactivity and this possibility should be explored. Afro-Asian states might accept the non-retroactivity of all of Part V, not just 62 bis.

The U. S. representative considered that it would be impossible to obtain an express provision on the retroactivity of the present convention. The U.S. would not object to others seeking to obtain such provision but their efforts may leave an unfavourable record. The burden should be on those advocating retroactivity to show that a rule was part of pre-existing customary international law.

6. Reservations to the Treaties Convention.

The U. K. representative said there were probably various articles, even outside Part V, on which various states may wish to make reservations. Consequently an article prohibiting reservations could make it difficult to obtain adherences. On the other hand if one sought to insert an article allowing reservations there would be difficulties in determining which reservations should be allowed. Consequently it would appear preferable not to seek a specific reservations article but to let articles 16 and 17 operate in respect of this convention. The U.S. and Netherlands representatives expressed agreement with this view, the former observing that the U.S. Senate would react unfavourably to any article restricting reservations.

-14-

CONFIDENTIAL

The Australian representative agreed with the U.S. representative that Articles 16 and 17 were "in a mess". He expressed some reservation respecting the possibility of Articles 16 and 17 operating in the event there is a satisfactory 62 bis. Some means of preventing reservations concerning a satisfactory 62 bis would be desirable.

The Swedish representative reserved his government's position on this question, commenting that unlimited reservations to the treaties convention (e.g. a U.S. reservation to the articles on interpretation) could leave the law of treaties in a very confused state.

The representative of Switzerland did not know what the solution to the reservations question should be. There is a need to be free to make reservations, especially concerning Part V, but reservations must not be allowed to destroy the treaty. It might be acceptable to omit a reservations article if Articles 16 and 17 were properly drafted, but they are not. One possible solution would be to break the draft convention up into separate conventions as was done in the case of the 1958 Geneva Law of the Sea Conventions.

The Austrian representative noted that, if article 50 is accepted, the conference may seek to declare certain articles jus cogens and thereby prevent reservations in respect of such articles.

7. Final Clauses of the Treaties Convention.

The U.S. representative suggested that the number of ratifications necessary for the entry into force of the convention should be high because of the quasi-constitutional character and importance of the treaties convention. He noted that the 1961 Single Convention on Narcotics Drugs required 40 ratifications and the NPT required 40 plus 3 nuclear states. The treaties convention would be of similar importance and should require a similar number of ratifications, possibly in the order of 45. The Finnish representative agreed with this position, however the Austrian representative noted that other delegations would probably suggest smaller numbers. In this connection he referred to the fact that the convention on Statutory Limitations in Respect of War Crimes required only 10 ratifications.

The Italian representative said that the treaties convention had no precedent; no other convention had the breadth or danger of this one which sought to establish universal rules.

-15-

CONFIDENTIAL

He referred particularly to the fact that the possibility of the provisions of the treaties convention evolving into customary international law was directly related to the number of ratifications required for its entry into force. He agreed the number should be high. With reference to earlier suggestions concerning a requirement that ratification by the permanent members of the Security Council be required, he was opposed to this suggestion because the treaties convention is not within the ambit of the Security Council's responsibilities.

The German representative had studied U.N. codification precedents, including the Geneva Law of the Sea Conventions, the 1961 and 1963 Vienna Conventions and the U.N. Human Rights Convention. The practice appeared to be to require ratification by one-third of the members of the U.N. which, under the present membership, would mean a figure between 40 and 45. He believed the convention should require at least this number of ratifications for its entry into force.

There was a general consensus in favour of a requirement for 40-45 ratifications.

II - Provisions of the Draft Convention Provisionally Adopted at the First Session.

1. Separability - Article 41. The U.K. and Finnish representatives said they would request a separate vote on the reference to Article 50 in paragraph 5 of Article 41 because they believed the principle of separability should apply even in the case where part of the treaty contravened jus cogens.

The Netherlands representative suggested that the group might be giving too much importance to Article 50. This article refers to treaties conflicting with rules of jus cogens at the time of conclusion. Since there were very few rules of jus cogens the danger of not applying separability to Article 50 was not very great.

The German representative saw some merit in the present text of Article 41(5). He considered that it could have a restrictive effect on recourse to Article 50 if the state invoking the article knew that it would thereby destroy the whole treaty. He was prepared to consider the matter further however in the light of the U.K. views and the outcome on Article 5 bis which, in its present form, had the appearance of jus cogens.

The U. K. representative said, with respect to the Netherlands point, that there was still considerable doubt about the scope of Article 50 and many delegations would suggest that there exists a wide range of rules of jus cogens.

-16-

CONFIDENTIAL

The Canadian representative shared the U.K. and Finnish views that the reference to Article 50 should be deleted from 41(5). He did not agree with the German representative's view on the likely effect of 41(5) in its present form. He referred to the procedural aspects of securing deletion and noted that it would be preferable not to table an amendment to Article 41, which would require a two-thirds vote, but simply to ask for a separate vote on the reference to Article 50. The request for a separate vote would require only simple majority support. The representative of Austria agreed that this procedure was a proper one to follow.

2. Loss of a Right to Invoke a Ground
for Invalidity, etc. - Article 42.

The representative of Switzerland said that the amendment tabled by Switzerland at the first session, though rejected, was sound. The operation of Article 42 should be extended to Articles 48 and 49 (coercion) to avoid uncertainty in respect of treaties. He said his delegation may re-submit its amendment at the second session.

3. Coercion - Article 49 and Related Resolution.

The Swiss representative said that his government's concern on this article was closely related to its concern over Article 42. He considered the resolution on economic coercion to be unsound. It was impossible to draw a line between acceptable and unacceptable pressure and the result was to place the whole treaty system in doubt.

The Swedish representative said that it would be preferable not to reopen the debate on this issue. The outcome secured at the first session was as favourable to the west as could be expected and any effort to reopen the question might result in a formulation of Article 49 even less acceptable to western states. The representative of the Netherlands agreed with this assessment.

The representative of Canada requested the views of other delegates on whether and to what extent reference should be made at the second session to events in Czechoslovakia should the communist governments, in their speeches, accuse western governments of the use of force elsewhere. The U. S. representative said this question could only be decided in the atmosphere of debate at the second session. Soviet action in Czechoslovakia had been referred to in other discussions. The U.S. had no objection in principle to raising it and would be

-17-

CONFIDENTIAL

prepared to raise it at the second session in appropriate circumstances. The U.K. representative expressed a preference to avoid any reference to the Czech situation. All delegates would be aware of the recent events in Czechoslovakia and any express reference to them would only raise the temperature and make the remainder of our work more difficult.

The U.K. representative went on to refer to the fact that while the record of the first session shows a large vote in favour of Articles 49, 50 and 62, adoption of these articles was, in the eyes of many delegations, dependent upon acceptance of an article on the peaceful settlement of disputes. It should not be assumed, therefore, that all the articles in Part V will be accepted. This would be particularly true if no satisfactory 62 bis is achieved in Committee of the Whole.

4. Jus Cogens - Article 50.

The U.S. and U.K. representatives expressed the view that the terms of Article 50 adopted at the first session were as favourable as the western group was likely to obtain and that any effort to reopen the text would probably result in a less favourable article. Consequently it would be preferable not to seek to amend Article 50 in Plenary.

The U.S. and Swedish delegates stated that Article 50 and certain other articles in Part V would be unacceptable if there was no satisfactory 62 bis.

The Austrian representative agreed that no effort should be made to amend Article 50, but there remained the problem of determining which provisions in the convention are to be considered as jus cogens. He referred particularly to Articles 23 (Pacta sunt servanda), 43 (Provisions of Internal Law) and 49 (Coercion).

The representative of Switzerland stated that a satisfactory 62 bis would not remove the difficulty with Article 50. Arbitration tribunals should not have the power to determine rules of jus cogens, this is a legislative and constitutional problem to be decided by the consensus of an overwhelming majority of states. Article 50 should therefore be deleted. The representative of Australia had the gravest reservations concerning Article 50. He agreed that tactically it would be preferable not to seek a better formulation but Article 50 and others in Part V could be acceptable only if there is a satisfactory 62 bis.

The representative of France also objected to Article 50. His government was studying the question of introducing new criteria for identifying rules of jus cogens and would inform other delegates of the results of its studies.

6. Breach of a Treaty - Article 57.

The U.K. representative considered that Article 57 in its present form had many drafting deficiencies and his delegation intends to propose drafting amendments to the article at the second session.

III - Further Questions Raised by Governments

The German representative raised the question of whether states are free to deviate from provisions in the convention which contain no escape clause. There was a presumption that rules of international law are dispositive. The Swedish and Swiss statements on Article 4 and the U.K. question to Sir Humphrey Waldock on Article 53 serve to confirm in the travaux the dispositive character of the convention. But the text itself may be contrary to this presumption. The inclusion in some articles of formulae such as "unless the parties otherwise agree" raises the argumentum a contrario that provisions which do not contain such a reference are not dispositive. Germany could not accept that such articles be considered as mandatory. States should be free to contract out from their operation. It may be desirable to seek clarification of this point, however there was the danger that if such an effort were defeated a contrary presumption might be raised. The German delegation was considering proposing an amendment to deal with this question.

The Netherlands representative suggested the best procedure might be to add an "escape clause" to additional articles as required. The Swedish representative considered it simpler to have one article of general application rather than to repeat the "escape clause" at frequent intervals. He agreed however that it would be difficult to get an express clause on this point.

The representative of Switzerland said that the entire treaty was dispositive and this should be reflected in the body of the convention, the preamble or the final act. He did not

-19-

CONFIDENTIAL

consider that there was any article of jus cogens in the draft. In fact he doubted that it was possible to lay down a law of treaties in another treaty and suggested instead that the ILC draft articles take the form of a code rather than a convention.

The representative of Sweden referred to the articles on coercion and fraud and said that it would be difficult for the conference to accept the view that there are no rules of jus cogens in the draft articles.

The U.K. representative said that a rule of jus cogens does not acquire that character by being included in a treaty. The question here is not whether certain articles are rules of jus cogens but whether they are obligatory or permissive.

The representative of Japan said that his delegation had proposed amendments at the first session to Articles 16 and 17 on reservations and objections designed to introduce objective criteria for determining compatibility. His government had not yet decided whether to introduce similar amendments at the second session and would like the views of other delegates on this question. A majority of states represented at the AALCC meeting in Karachi had expressed sympathy with the Japanese proposal.

The Australian representative said his government was unsatisfied with these articles and would support any move to introduce a greater degree of objectivity.

The U.S. representative agreed that Articles 16 and 17 were unsatisfactory but because of the lack of support for the Japanese proposals at the first session and the U.S. Government's own soundings they had decided to accept these articles in their present form. The views expressed at Karachi were encouraging however and he hoped the Japanese would maintain their efforts.

The Netherlands representative noted a possible objection to the Japanese proposal in that, whereas you needed a two-thirds majority to secure an article in a convention prohibiting a reservation, under the Japanese proposal a simple majority of the contracting parties could act to prohibit a reservation.

-20-

CONFIDENTIAL

The Swedish representative said there was a need for an objective mechanism to determine incompatibility. A majority decision would not necessarily be objective. A procedure for third party determination was required but was unlikely to be achievable. The German representative referred to the technical difficulty in the Japanese proposal in that it left a 12-month period of uncertainty. The representative of Canada was sympathetic to the Japanese desire to improve the articles and hoped they could devise an acceptable formula. With respect to the question of who is to determine compatibility, Sir Humphrey Waldock had replied to a Canadian question on this point by saying that the joint effect of Articles 16 and 17 was to make the text of compatibility purely subjective.

The U.K. representative enquired about the procedure for dealing with the final clauses. Were these to be referred first to the Committee of the Whole as with other articles, first to the Drafting Committee and then to Plenary, or direct to Plenary. He found no authority for direct reference to the Drafting Committee. The final clauses will involve important political issues and he believed they should go first to the Committee of the Whole in the usual way.

The representative of Canada confirmed that there is no authority for referring the final clauses to the Drafting Committee. The Secretariat draft final clauses will have no status of themselves and it will be for the conference to decide where to send the Secretariat draft. The Austrian representative said all final clauses should go first to the Committee of the Whole for discussion of any amendments. The U.S. representative said that the practice at the 1961 and 1963 Vienna Conventions had been to submit the final clauses to the Committee of the Whole and this was the proper procedure. The representative of France agreed that the final clauses should go first to the Committee of the Whole.

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LAW OF TREATIES

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Deesky
Stanford

Feb 21/2

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20-3-1-6
14 | MR

I SAW MISS LAURENS MFA TODAY WHO SAID ARTICLE 5 OF LAW TREATY WAS NOT/NOT RAISED AT KRCHI CONFERENCE AFRO-ASIAN LEGAL CONSULTATIVE GROUP, ALTHOUGH OTHER DRAFT ARTICLES WERE DISCUSSED.

2. ON OUR REPRESENTATION RE DRAFT PARA2 ARTICLE 5, MISS LAURENS INDICATED THAT INDONESIAN GOVT HAD STUDIED CAREFULLY OUR AIDE MEMOIRE AND ORAL ARGUMENT BUT SAW NO/NO REASON TO CHANGE INDONESIAS SUPPORT OF PARA2, AS PRESENTLY DRAFTED, AT SECOND SESSION.

ON INDONESIAS POSITION RE REQUEST FOR SEPARATE VOTE ON PARA2, SHE IMPLIED INDONESIA WOULD PROBABLY OPPOSE SUCH A REQUEST. I AGAIN STRESSED IMPORTANCE WE ATTACHED TO THIS ISSUE AND OUR SINCERE HOPE FRIENDLY GOVTS LIKE INDONESIA WOULD NOT/NOT OPPOSE REQUEST FOR SEPARATE VOTE. I ALSO INDICATED THAT, IF INDONESIA COULD NOT/NOT SUPPORT SUCH REQUEST, WE HOPED IT WOULD CONSIDER, AS A MINIMUM POSITION, POSSIBILITY OF ABSTAINING ON RELEVANT VOTE. SHE UNDERTOOK TO REVIEW INDONESIAS POSITION ON THE QUESTION OF SEPARATE VOTE BUT SAID FINAL DECISION WOULD NOT/NOT BE TAKEN UNTIL MATTER CAME UP AT VIENN.

*with friends
like this
who needs
enemies?*

3. MISS LAURENS ASKED AGAIN ABOUT PUBLIC ATTITUDE RE POSSIBLE AMENDMENT TO PARA2 WHICH MIGHT MEET OUR WISHES. I CITED POINTED MENTIONED IN PARA3 YOURLET L992 OCT29. SHE ACKNOWLEDGED PRESENT TEXT OF PARA2 WAS VAGUE AND THAT AN AMENDMENT WOULD HAVE TO PROVIDE FOR DEFINITE PROCEDURES TO OVERCOME INHERENT DIFFICULTIES FROM OUR VIEWPOINT.

...2

19.25.2

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PAGE TWO 78 CONFD NO/NO STANDARD

SHE APPEARED FAVOURABLY INCLINED TO SUCH AN AMENDMENT PROVIDED IT WAS QUOTE NOT/NOT TOO SPECIFIC UNQUOTE.

4.MISS LAURENS OBSERVED THAT CDA APPEARED TO BE ALONE AT FIRST SESSION IN TAKING INITIATIVE TO HAVE PARA2 ELIMINATED.SHE PERSONALLY THOUGHT WE WOULD PROBABLY GAIN MORE SUPPORT IF OTHER FEDERAL STATES WERE SEEN TO BE SUPPORTING OUR POSITION ACTIVELY AT SECOND SESSION.SHE EXPECTS TO LEAD INDONESIA'S DEL

BRANSCOMBE

*concentration
signature*

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*Mr. Beff
Mr. Stupp
reply Feb 24/2*

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LAW OF TREATIES CONFERENCE

I SPOKE TO HAYTA TO DAY ABOUT RLPS I HAD MADE TO SLOGEN IFA LAST OCT. HAYTA SAID HE HAD NOT/NOT YET HAD TIME TO BECOME CONVERSANT WITH ISSUES POSED BY DRAFT CONVENTION. HE IS INTENDING, OVER NEXT WEEK OR SO, TO GO OVER ALL THE BACKGROUND WITH DEPTL OFFICIALS. IN THE PROCESS, HE WILL BE PAYING PARTICULAR ATTN TO POINTS WHICH HAVE BEEN RAISED WITH TURK GOVT BY OTHER COUNTRIES INCLUDING USA, GERMANY AND CDA. HE SAID HE HAD HAD A VERY USEFUL CONVERSATION WITH WERSHOF WHICH, ALONG WITH AIDEMEMOIRE AND TALKING POINTS I HAD LEFT WITH SLOGEN, WILL ENABLE HIM TO FOCUS ON CDN CONCERNS. AT HIS SUGGESTION, HE AGREED TO MEET IN FIRST WEEK OF MAR BY WHICH TIME HE WOULD EXPECT TO BE ABLE TO GIVE ME HIS PRELIMINARY REACTIONS.

2. I BELIEVE WERSHOF IS RIGHT IN THINKING THAT CYPRUS LIES AT BACK OF TURK VOTE ON ARTICLE 5. YOU WILL RECALL THAT THIS WAS ALSO GULFS OF SLOGEN ALTHOUGH NO/NO ONE HERE SEEMS TO KNOW PRECISELY WHY TURK VOTED AS IT DID. WERSHOF IS RIGHT, OF COURSE, IN ARGUING THAT ABSENCE OF PARA 2 OF ARTICLE 5 WOULD NOT/NOT IN ITSELF BE PREJUDICIAL TO WHATEVER ARRANGEMENTS MAY BE AGREED IN CYPRUS. WE HAVE TO RECOGNIZE, HOWEVER, THAT TURK WILL LOOK AT PROBLEM OF TREATY-MAKING CAPACITY OF MEMBERS OF A FEDERAL UNION FROM OPTIC WHICH IS PRETTY WELL REVERSE OF OURS AND THAT THEY MAY NOT/NOT BE AVERSE TO RESERVING FOR THEMSELVES SOME

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6/21/2

PAGE TWO 230 CONFD NO/NO STANDARD

MARGINAL RIGHTS OF INTERPRETATION OF CYPRUS CONSTITUTION. ONCE THAT IS
RECOGNIZED, IT MAY NOT/NOT BE UNNATURAL FOR TURKS TO LOOK FOR PRECI-
SELY KIND OF SUPPORT WHICH AN INTERNATLY ACCEPTED FORMULATION ALONG
LINES OF ARTICLE 5(2) OF PROPOSED CONVENTION MIGHT BE DEEMED TO
AFFORD TO THEIR POSITION.

3. I WOULD VERY MUCH APPRECIATE ANY FURTHER COMMENTS YOU OR WERSHOF
COULD MAKE ON ASSUMPTION THAT TURK VOTE WAS MOTIVATED BY CONSIDERA-
TIONS SUCH AS THOSE SET OUT ABOVE

GOLDSCHLAG

EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

MemorandumTO
AThe Under-Secretary (through the Legal
Adviser and European Division)SECURITY
Sécurité

CONFIDENTIAL

FROM
De

Legal Division

DATE

February 20, 1969

REFERENCE
RéférenceNUMBER
NuméroSUBJECT
SujetLaw of Treaties Conference, Article 5(2) -
Representations to Switzerland.

FILE	DOSSIER
OTTAWA	
	20-3-1-6
MISSION	37

ENCLOSURES
Annexes

DISTRIBUTION

On February 7 in Paris Messrs. Wershof and Stanford had a two-hour discussion on Article 5(2) with Mr. Bindschedler, Legal Adviser in the Swiss Foreign Ministry, and his colleague Mr. Cuendet. During these discussions the Canadian legal and political objections to paragraph 2 of Article 5 were stressed at considerable length. Bindschedler and Cuendet, although they listened to the presentation of the Canadian position attentively, made it clear that they do not agree with the legal objections which Canada has adduced to paragraph 2. While they gave no firm reply to our request for support in seeking deletion of paragraph 2, their reaction gave no reason to believe that such support would be forthcoming.

2. With respect to our request for a separate vote on paragraph 2, Bindschedler and Cuendet argued that paragraph 1, standing alone, might be interpreted as the equivalent of a general "all States" clause. (It would read as follows: "Every state possesses capacity to conclude treaties."). Since the Swiss, as well as the rest of the Western group, are opposed to an "all States" clause in the Convention, the implication is (though neither Bindschedler nor Cuendet specifically said so) that Switzerland would oppose a separate vote on paragraph 2.

3. On the basis of the representations made to date to the Swiss, we have no reason to believe that they will alter their opposition to the Canadian efforts to delete paragraph 2. The question therefore arises whether further representations should be made to the Swiss Government with respect to this question and, if so, what form these representations should take. It appears clear that, so far, the only person in the Swiss Government who has considered the Canadian request is Bindschedler himself, and that the

.. 2

present Swiss position reflects his own personal disagreement with the legal aspects of the Canadian position. (Our experience with Bindschedler both in the Law of Treaties and in New York on the Special Missions question is that he is extremely legalistic and not at all receptive to political realities.) It must therefore be decided whether we now wish to make an approach to the Swiss on the political side, designed to secure some modification of Bindschedler's opposition to our position by bringing to bear, within the Swiss Foreign Ministry, political as distinct from purely legal considerations.

4. Mr. Wershof, in his report on his discussion with Bindschedler, refers to the fact that Bindschedler appears to be in charge of all aspects of Swiss participation in the Law of Treaties Conference and points out the danger that an appeal to the political side of the Swiss Foreign Ministry might be viewed by Bindschedler as an attempt to go over his head and might thus irritate him. Our Ambassador in Berne has suggested, however, that there might be some advantage in his seeing Spuhler, Head of the Political Department in the MFA, in an effort to enlist his personal goodwill toward Canada in support of our position.

5. It is our view that further representations should be made to the Swiss Government, on the political side, in an effort to obtain at least their support for a separate vote on paragraph 2. If there is a debate in Vienna on our request for a separate vote, an unfavourable Swiss intervention in this debate could be exceedingly harmful to our chances of securing a separate vote. Mr. Wershof's concern that such representations not be made in a way which might offend Bindschedler could be met if the representations were made to the Swiss Ambassador in Ottawa rather than by our Ambassador in Berne. In this way we would avoid making it obvious, by the choice of the Swiss representative to whom we were speaking, that we were making our representations on the political rather than the legal level. To be effective, of course, representations in Ottawa would have to be made at a very high level; it appears unlikely that our representations would achieve their objective unless the Swiss Ambassador were to be seen either by you or by the Minister.

-3-

CONFIDENTIAL

6. We should therefore be grateful to know:

- (a) whether you agree that further representations, of a political nature, should be made to the Swiss Government on the federal states question;
- (b) if so, whether these representations should be made here or in Berne, and
- (c) if the representations are to be made here, whether you would wish to see the Swiss Ambassador yourself or would prefer to ask the Minister to see him.

J. A. BEESLEY

Legal Division.

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EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

Memorandum

TO
À

Mr. J. A. Beesley

SECURITY
Sécurité

RESTRICTED

FROM
De

J. S. Stanford

DATE February 20, 1969

REFERENCE
Référence

NUMBER
Numéro

SUBJECT
Sujet

Law of Treaties Conference - Article 5
Representations Progress Report.

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	121

ENCLOSURES
Annexes

DISTRIBUTION

We have now made representations to 74 governments on Article 5 and have received firm or tentative replies from 49.

2. On the issue of a separate vote on paragraph 2, 48 governments have indicated they will support a separate vote and one has indicated it will abstain. None has indicated it would oppose a separate vote. There are eight governments who voted with us on paragraph 2 at the first session but from whom we have not yet received replies. Adding these eight "friends", we have a projected total of 56 votes in favour of a separate vote on paragraph 2. 93 votes (including abstentions) were cast in the voting on Article 5 at the first session. Even allowing for an increase in voting numbers at the second session, and considering the likelihood of some abstentions, it appears we will be able to secure the necessary simple majority for a separate vote on paragraph 2.

3. On the issue of the vote on paragraph 2, 45 states have indicated they will oppose paragraph 2, 4 have indicated they will abstain and none has indicated it will support paragraph 2. Adding our eight "friends" to the 45 opponents of paragraph 2 gives a projected vote of 53 against the paragraph, certainly a blocking third and probably a simple majority against the paragraph.

4. On the issue of the vote on Article 5 as a whole if a separate vote on paragraph 2 is refused, 2 governments have indicated they will vote for the article, 23 have indicated they will oppose it and 2 have indicated they will abstain. A blocking third on the article as a whole would appear to be somewhere between 25 and 30. Thus the outcome of such a vote is at present in doubt though the outlook appears favourable.

.. 2

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RESTRICTED

5. Of particular interest are the changes of position indicated by the replies to date. All four governments which at the first session, voted once for and once against paragraph two have indicated they will oppose the paragraph at the second session. Similarly four governments which abstained at least once on paragraph 2 have indicated they will oppose the paragraph. Of four states which abstained once and voted for paragraph 2 once, 3 have indicated they will oppose and one that it will abstain. Of five states which voted for the paragraph at the first session, two have indicated they will oppose it and three that they will abstain. On Article 5 as a whole, two states which voted for the Article at the first session and six which abstained have indicated they will oppose the Article at the second session if necessary. In addition, one state which voted for the article has indicated it will abstain.

6. It appears clear from the foregoing that we will probably go to Vienna with sufficient strength to defeat paragraph 2 and possibly even the whole of Article 5 if necessary. Our tasks during the first three weeks, until the Plenary vote on Article 5, will be:

- (a) to check with each of the approximately 75 delegates to make sure that undertakings given in capitals have been reflected in instructions to delegates;
- (b) to withstand the inevitable counterattack by the USSR and her allies and France and her allies, which was largely responsible for the failure to defeat paragraph 2 at the first session;
- (c) to counteract any tendency which our largely passive support in Committee of the Whole for a compulsory settlement article and our opposition to the "all States" position may have to alienate sympathy among Afro-Asians for our position on Article 5.

I believe it is Mr. Wershof's intention, during the initial three weeks, to meet personally with all the delegates from whom we have been promised support in order to go over the ground with them again and make sure that they have received and understand their instructions. This exercise will, of course, involve a great deal of activity by the other members of our delegation as well.

J. S. STANFORD

J. S. Stanford.

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20-3-1-6
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REPUBLIC OF KOREA
PERMANENT OBSERVER TO THE UNITED NATIONS

Aide-Memoire

In accordance with the request made by the Canadian Delegation on the position of the Korean Government on the proposed International Convention on the Law of Treaties of Article 5, paragraph 2, the Permanent Observer of the Republic of Korea to the United Nations makes known the followings to the Canadian Delegation upon instructions of the Korean Government;

(1). In the light of the vote cast by the Korean Delegation in the first session of the Conference which took place in Vienna 1968 in favour of the omission of paragraph 2 of Article 5, the Korean Government shall maintain the same position in regard to paragraph 2 of Article 5 of the proposed International Convention on the Law of Treaties.

(2). The Korean Government is prepared to support a separate vote, should the such vote bring about the omission of the paragraph 2 of Article 5.

(3). If a separate vote on paragraph 2 of Article 5 is denied, the Korean Government would extend a favorable consideration to possible counter-measures to be proposed by the Canadian Government.

REPUBLIC OF KOREA
PERMANENT OBSERVER TO THE UNITED NATIONS

Article 5 bis

All States have the right to participate in general multilateral treaties in accordance with the principle of sovereign equality.

Document disclosed under the Access to Information Act -
Document divulgué en vertu de la loi sur l'accès à l'information

CONSEIL DE L'EUROPE COUNCIL OF EUROPE

Strasbourg, le 20 février 1969

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Confidentiel

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COMITE AD HOC SUR LE DROIT DES TRAITES

Résumé des discussions
de la réunion tenue à Paris
du 6 au 8 février 1969

1. Le Comité ad hoc sur le droit des traités, composé de représentants des Etats membres du Conseil de l'Europe et des autres Etats appartenant au Groupe "Europe occidentale et autres" auprès de l'Assemblée Générale des Nations Unies, s'est réuni au Bureau du Conseil de l'Europe à Paris, du 6 au 8 février 1969.
 2. Le Comité a eu pour tâche de préparer, par un échange de vues, la 2ème session de la Conférence diplomatique de Vienne sur le droit des traités qui s'ouvrira le 8 avril 1969.
 3. La réunion a été ouverte au nom du Secrétaire Général du Conseil de l'Europe par M. H. GOLSONG, Directeur des Affaires juridiques du Conseil de l'Europe. Sur proposition de Sir Francis VALLAT (Royaume-Uni), M. Lucien HUBERT (France) a été élu Président par acclamation. La liste des participants est annexée au présent document.
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GR/Traités (69) 3

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4. Sur proposition du Président, il a été convenu de suivre, aux fins de l'échange de vues, le plan établi par le Secrétariat Général du Conseil de l'Europe (document GR/Traités (69) 1), qui comprend deux parties groupant les dispositions du projet de Convention sur le droit des traités, dont l'examen final a été renvoyé à la 2ème Session de la Conférence de Vienne, et un certain nombre de dispositions dudit projet qui ont été adoptées provisoirement à la 1ère Session de la Conférence de Vienne et que certains Gouvernements ont proposé de discuter à nouveau au sein du Comité.

5. Le présent document donne ci-après un résumé non officiel des discussions. Ce résumé ne dévoile pas, sauf dans quelques cas exceptionnels en vue de la compréhension de la suite des débats, les prises de position individuelles de chaque participant. Ce document a été établi à la demande des participants par le Secrétariat Général du Conseil de l'Europe et sous sa seule responsabilité.

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PARTIE I

Dispositions du projet de Convention sur
le droit des traités dont l'examen final
a été renvoyé à la 2ème Session de la
Conférence de Vienne

I. Le droit d'être partie aux traités

6. En se référant aux initiatives prises à Vienne quant au problème général de la participation aux traités multilatéraux (proposition de l'Algérie, etc., ad article 5 bis, et de la Tchécoslovaquie, ad article 12), plusieurs participants se sont déclarés opposés en principe à la clause "tout Etat", par rapport à la catégorie des traités multilatéraux généraux. Ils ont notamment fait observer qu'une telle clause introduirait un élément de coercition dans la conclusion des traités en limitant la liberté des Etats de déterminer, lors de la négociation d'un traité multilatéral, le cercle des parties à celui-ci ; par ailleurs, cette objection serait, de l'avis de certains participants, également valable à l'encontre de la tentative de définir la catégorie de traités multilatéraux restreints qui seraient fermés, aux termes de la future Convention de Vienne, à l'adhésion d'Etats autres que ceux ayant participé à leur négociation (cf. point II ci-dessous). Or, cette restriction de la liberté contractuelle détruirait les bases mêmes du droit des traités. En outre, ces mêmes participants ont partagé la crainte que la clause "tout Etat" ne permette à des entités politiques non reconnues comme Etats d'imposer leur existence dans le cadre des relations internationales ; le caractère particulier des traités dans le domaine de la limitation des armements et du droit de l'espace interdirait de considérer le système de la pluralité des dépositaires comme précédent valable pour tous les traités multilatéraux. Enfin, il semble impossible de trouver une définition précise et satisfaisante des catégories des traités multilatéraux généraux et restreints.

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7. Le représentant de la République Fédérale d'Allemagne a souligné l'importance que son Gouvernement attache à cette question, étant donné notamment, mais non exclusivement, la situation politique actuelle en Europe. Aux yeux de ce Gouvernement, il serait une grave erreur politique d'abandonner dans la future Convention de Vienne la pratique constante en pareille matière, à savoir de définir dans le traité multilatéral, d'une manière explicite, le cercle des Etats qui peuvent devenir parties à ce traité multilatéral. En ce qui concerne l'aspect général de la question, à savoir la participation des Etats aux traités multilatéraux couverts par la future Convention de Vienne, ni la proposition de l'Algérie, etc., tendant à insérer un nouvel article 5 bis (droit d'être partie aux traités multilatéraux généraux, clause "tout Etat"), ni la proposition de la Tchécoslovaquie concernant un nouveau paragraphe 2 de l'article 12 (adhésion par tout Etat à un traité multilatéral) ne peuvent être acceptées, étant donné qu'en l'absence d'une instance compétente de décider avec force obligatoire de la qualification d'Etat, elles ouvriraient la possibilité à n'importe quelle entité qui se qualifie elle-même d'Etat d'imposer sa présence au sein de la communauté internationale. En outre, ces propositions sont défectueuses du fait de l'absence de toute définition du terme "participation" et du caractère trop vague de la définition de la catégorie des "traités multilatéraux généraux" telle que proposée par le Congo, etc., ad article 2, paragraphe 1. Quant à l'aspect particulier de la question, à savoir la participation à la future Convention de Vienne, la clause classique, dite "formule de Vienne", qui ouvre cette participation aux Etats membres des Nations Unies et de ses Institutions spécialisées, aux Etats parties au Statut de la Cour Internationale de Justice et aux Etats qui seront invités par l'Assemblée Générale des Nations Unies, continue à correspondre parfaitement aux besoins de la communauté internationale. Le système d'une pluralité de dépositaires, tel qu'il a été adopté pour le traité sur l'interdiction des essais nucléaires dans l'atmosphère, pour le traité de non-prolifération des armes nucléaires et pour des traités sur le droit de l'espace (matières liées à des questions de sécurité et de sauvegarde de la paix qui exigent des compromis sur le plan politique) ne peut être transposé sur le plan des traités multilatéraux en général.

8. Au cours de l'échange de vues, il a été souligné qu'un certain nombre d'Etats semblent attacher un grand intérêt à l'insertion d'une clause "tout Etat" à l'instar de celles proposées

par l'Algérie etc., par la Tchécoslovaquie dans la future Convention de Vienne ; il n'était donc pas exclu qu'une solution soit recherchée ou offerte à Vienne en vue d'obtenir un compromis par l'acceptation d'une part d'une clause "tout Etat" et d'autre part de la proposition concernant un nouvel article 62 bis relatif au règlement des différends relevant de la Partie V du projet de Convention (cf. point III, ci-dessous). Il s'agirait alors de connaître la position à adopter par les Etats participant à la présente réunion en regard d'une telle initiative. A ce sujet, plusieurs participants ont insisté sur la nécessité de séparer strictement ces deux problèmes en question, qui ne pouvaient être examinés et résolus qu'en fonction des critères propres à chacune d'elles. Il a notamment été observé que la proposition d'insérer un article 62 bis concernant le règlement des différends relevant de la Partie V du projet de Convention constituait déjà un élément d'une tentative de compromis, étant donné qu'elle est destinée à introduire une sauvegarde de nature procédurale, comme contre-poids au caractère defectueux de certaines des dispositions de fond figurant dans ladite Partie V qui seraient considérées comme difficilement acceptables sans cette sauvegarde procédurale ; dès lors, il serait inconcevable d'en faire un élément d'une seconde solution de compromis en échange d'une acceptation de la clause "tout Etat". Par ailleurs, des doutes ont été exprimés quant à la question de savoir si les promoteurs de cette clause sont disposés à admettre, dans le cadre du règlement automatique à prévoir à l'article 62 bis l'arbitrage obligatoire et d'aller ainsi au-delà d'un engagement à recourir à la simple conciliation. Or, l'arbitrage obligatoire devrait rester la condition sine qua non d'une acceptation de la Partie V du projet de Convention. Enfin, un participant a rappelé que la clause "tout Etat" devrait être soutenue à Vienne pour être adoptée par une majorité de deux tiers. Son Gouvernement persiste à espérer qu'une telle majorité ne se trouvera pas réunie et c'est dans cette perspective qu'il voterait contre toute proposition en matière de clause "tout Etat".

9. Certains participants ont indiqué que la position de leurs Gouvernements n'était pas aussi définitive. Ainsi, selon un point de vue, la clause "tout Etat" pourrait à la rigueur être acceptable, à condition qu'il soit clairement établi que cette clause est de nature dispositive et ne fait pas partie du jus cogens ; toutefois, il y a été répondu que le libellé des propositions de l'Algérie, etc. ad article 5 bis et de la Tchécoslovaquie ad article 12 avait sans aucun doute un caractère impératif. De l'avis d'un autre participant, il y aurait

lieu de séparer le problème de la participation aux traités de celui de la reconnaissance des Etats : si les parties à un traité multilatéral gardent la possibilité de refuser la reconnaissance comme Etat d'une autre partie au même traité, la clause "tout Etat" ne devrait pas poser de problème majeur. En outre, ce même participant s'est opposé à la thèse selon laquelle la volonté des Etats constituait la seule base du droit conventionnel : de même qu'il faut accepter l'existence de règles impératives en droit international (jus cogens), de même il conviendrait d'admettre qu'il n'existe pas d'objection de principe à l'idée d'un droit de tout Etat de participer aux traités multilatéraux généraux. En conséquence, son Gouvernement serait disposé à accepter une solution de compromis englobant l'acceptation et de la clause "tout Etat", et de l'article 62 bis.

10. En ce qui concerne la participation à la future Convention de Vienne, il a été admis par la plupart des participants qu'il faudra soutenir la formule classique, dite "de Vienne", telle qu'elle figure dans les clauses finales des Conventions de Vienne de 1961 et 1963 sur les relations diplomatiques et consulaires ; une modification substantielle de cette formule dans la Convention sur le droit des traités risquerait de bouleverser l'économie du système conventionnel établi par ces deux Conventions antérieures. Mais, selon l'un des participants, il ne faudrait pas exclure d'avance toute modification de nature moins importante, telle que l'addition d'une qualification de l'Etat "membre d'une organisation régionale" ou reconnu par un nombre à déterminer d'Etats membres de l'O.N.U.

11. Un des participants a avancé l'hypothèse qu'aucune des clauses finales sur ce point n'obtiendrait la majorité de deux tiers ; le Groupe devrait alors reconsidérer le problème à Vienne.

II. Traités multilatéraux restreints

(par rapport à l'adoption, aux réserves, à l'application, à l'amendement, à la modification, à la suspension temporaire et aux conséquences de l'extinction d'un traité).

12. Le représentant de la France a expliqué que les propositions de son Gouvernement relatives aux articles 2, 8, 17, 26, 36, 37, 55 et 66 du projet de Convention n'avaient qu'un caractère technique sans implications de nature politique, étant donné qu'elles visent uniquement à préciser une disposition figurant déjà dans le projet de la Commission du droit international (article 17, paragraphe 2) et à assurer son application à des problèmes autres que celui visé par cette disposition. Par ailleurs, la définition de la catégorie des traités multilatéraux restreints n'entraîne pas la nécessité de définir également une catégorie de traités multilatéraux généraux et ne préjuge donc en rien la position à prendre à l'égard de la proposition tendant à introduire la notion de tels traités multilatéraux généraux" (cf. point I ci-dessus).

13. En réponse à une question sur l'opportunité d'une proposition tendant à définir les traités multilatéraux restreints, notamment en prenant en considération le refus, par la plupart des participants, d'une définition des traités multilatéraux généraux, en vue d'éviter toute entrave à la liberté contractuelle, le représentant de la France a déclaré que son Gouvernement examinera avec intérêt toute suggestion tendant à résoudre, sans recours à une définition des traités multilatéraux restreints, le problème technique qui est à la base de ses propositions.

14. Le représentant de l'Australie a confirmé la proposition d'amendement déjà faite à Vienne par sa délégation et tendant à insérer au début de l'article 37, paragraphe 1 et de l'article 55 les mots suivants (cf. A/Conf. 39/C.1/L.237 et A/Conf. 39/C.1/L.324) :

"Sauf dans le cas d'un traité de la catégorie visée /du type visé/ au paragraphe 2 de l'article 17".

III. Règlement des différends en cas de nullité, d'extinction
de retrait ou de suspension d'application d'un traité

15. D'une manière générale, les participants ont souligné que les dispositions de fond de la Partie V du projet de Convention sur le droit des traités, telles qu'elles avaient été adoptées provisoirement à la 1ère Session de la Conférence de Vienne, n'étaient toujours pas satisfaisantes, malgré certaines améliorations par rapport au projet présenté par la Commission du droit international. Les imperfections de ces dispositions comportent des risques graves pour la stabilité des relations conventionnelles internationales et sont de nature à soulever de sérieuses difficultés d'application qui devraient être résolues ou au moins diminuées, dans l'intérêt tant des Parties contractantes aux traités internationaux que de la communauté internationale dans son ensemble, par une procédure satisfaisante de règlement des différends en cette matière.

16. Plusieurs participants ont en outre souligné qu'aux yeux de leurs Gouvernements, les dispositions de fond de la Partie V seraient inacceptables si elles n'étaient pas assorties d'une sauvegarde procédurale adéquate, en vue du règlement des différends relatifs à leur interprétation ou application. Par contre, quelques participants, bien que considérant une telle sauvegarde comme hautement souhaitable, n'étaient pas en mesure de préciser si leurs Gouvernements considéreraient l'insertion de dispositions relatives au règlement des différends comme une condition indispensable de leur acceptation de la Partie V du projet de Convention. Néanmoins, d'une manière générale, il a été admis que les dispositions de procédure dont il y a lieu de proposer l'insertion dans la Partie V du projet devraient prévoir un mode effectif de règlement des différends, à savoir le recours automatique à une procédure permettant d'aboutir à une décision définitive et obligatoire, rendue par une instance indépendante des parties au différend.

17. Dans cette perspective, les participants ont procédé à un échange de vues très détaillé sur les propositions d'amendement au projet de Convention présentées par un certain nombre de Gouvernements et tendant à l'insertion d'un nouvel article 62 bis relatif au règlement des différends relevant de la Partie V du projet. En ce qui concerne tout d'abord la proposition d'amendement présentée par la Colombie, la Côte d'Ivoire, le Dahomey, le Danemark, la Finlande, le Gabon, le Liban, Madagascar, les Pays-Bas, le Pérou, la République Centrafricaine, la Suède et la

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Tunisie ("proposition des 13", document A/CONF.39/C.1/L.352, Rev. 2, et GR/Traités (69) 1, Addendum 1, point I), le représentant des Etats-Unis d'Amérique a expliqué le contenu et la portée des modifications proposées par son Gouvernement dans une note adressée à un certain nombre de Gouvernements (cf. document GR/Traités (69) 1, Addendum 2). Ces modifications, destinées à améliorer le texte de la Proposition des 13, concernent une définition plus précise et plus détaillée des fonctions du Secrétaire Général des Nations Unies, des dispositions spéciales relatives aux différends se rapportant aux traités multilatéraux, l'accélération de la procédure au moyen de délais plus courts, la possibilité pour la Commission de conciliation de faire des rapports et des recommandations intérimaires en cours de procédure, et la réduction des périodes prévues pour la désignation des membres du tribunal arbitral. En outre, le Gouvernement des Etats-Unis a fait deux propositions supplémentaires, l'une tendant à la création dans le cadre des Nations Unies d'un Comité permanent de conciliateurs, chargé d'assurer une certaine continuité de la mise en oeuvre de la Partie V de la future Convention de Vienne, l'autre attribuant à la Commission de conciliation le pouvoir de demander, avec l'accord des parties au différend, un avis consultatif à la Cour Internationale de Justice sur des questions juridiques d'une importance particulière.

18. Le Représentant de la Suisse a confirmé l'intention de son Gouvernement de maintenir à la 2ème Session de la Conférence de Vienne sa proposition d'amendement concernant un nouvel article 62 bis (A/CONF.39/C.1/L.377 et GR/Traités (69) 1, Addendum 1, point III). Cette proposition présenterait, de l'avis du Gouvernement suisse, des avantages considérables par rapport à la proposition des 13, en ce sens qu'elle prévoit le recours à la juridiction de la Cour Internationale de Justice par simple requête d'une des parties au litige et qu'elle met à la disposition des parties au différend une procédure d'arbitrage très simple. Par contre, la proposition des 13 se prêterait à maintes critiques : Tout d'abord, la procédure y prévue est trop lourde, trop coûteuse et trop longue, alors que les différends qu'elle est censée régler sont en général très urgents. Ensuite, elle accorde une place de choix à la conciliation, bien qu'il soit douteux que ce mode de règlement des différends soit le plus approprié à des cas où normalement il n'y a pas lieu de déterminer les faits et de rechercher une transaction politique, mais de trancher des questions de droit; la conciliation pourrait tout au plus être prévue comme mode de règlement supplémentaire et facultatif. En outre, l'absence

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de toute référence à la Cour Internationale de Justice, organe juridictionnel appelé à assurer la continuité de la jurisprudence internationale et à sauvegarder l'intégralité du droit international public, est très déplorable. En ce qui concerne les fonctions confiées au Secrétaire Général des Nations Unies, il ne faut pas perdre de vue que ce haut fonctionnaire administratif et politique s'expose, de par ses fonctions normales, à des risques de contestations et à des doutes sur son impartialité; dès lors, il serait préférable de confier les tâches prévues à l'article 62 bis soit au Président de la Cour Internationale de Justice, soit au Secrétaire Général de la Cour permanente d'Arbitrage de La Haye. La composition de la Commission de conciliation et du Tribunal arbitral, telle qu'elle est prévue dans la proposition des 13, est défectueuse du fait qu'elle ne comprend qu'un seul membre neutre sur cinq. De plus, la procédure établie dans la proposition des 13 comporte une lacune en ce qui concerne la constatation de l'échec de la conciliation, lacune qui ouvre la voie à des abus. Enfin, il serait préférable de ne pas contribuer à la prolifération des organes internationaux en créant une nouvelle liste de conciliateurs dans le cadre des Nations Unies, alors qu'il existe d'ores et déjà une liste analogue pour la Cour permanente d'Arbitrage de La Haye. Pour ce qui est des améliorations proposées par les Etats-Unis, le Gouvernement suisse ne les considère pas de nature à remédier aux défauts principaux de la proposition des 13, tels qu'ils viennent d'être exposés. La distinction entre les différends relatifs aux traités bilatéraux et ceux relevant de traités multilatéraux soulève plus de problèmes qu'elle ne peut en résoudre; dès lors, il serait préférable de s'inspirer de l'institution de l'intervention telle qu'elle est réglée dans le Statut de la Cour Internationale de Justice. Quant aux propositions supplémentaires des Etats-Unis, telles qu'elles résultent également de la proposition d'amendement faite en 1968 à Vienne (A/CONF.39/C.1/L.355), le Représentant de la Suisse s'est prononcé en faveur de la possibilité de demander des avis consultatifs à la Cour Internationale de Justice, mais a exprimé des hésitations à l'égard de la création d'une Commission permanente de conciliateurs, le souci de continuité n'étant pas de première importance quand il s'agit de la conciliation qui cherche à régler des cas d'espèce plutôt que de toucher des questions de droit.

19. Le Représentant du Japon a indiqué que son Gouvernement, bien que disposé à étudier avec attention les propositions des 13 et des Etats-Unis, n'était pas en mesure de retirer sa proposition d'amendement concernant un nouvel article 62 bis (A/CONF.39/C.1/L.339 et GR/Traités (69) 1, Addendum 1, point II) qui, à l'instar de la proposition suisse, met l'accent sur la procédure judiciaire devant la Cour Internationale de Justice.

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20. Au cours de l'échange de vues, les participants se sont notamment interrogés sur les chances de succès de l'une ou de l'autre des propositions présentées en vue de l'insertion d'un nouvel article 62 bis dans la Partie V du projet de Convention. Il a été souligné que ces chances dépendaient de la disposition des Etats qui n'ont pas en principe une position favorable au règlement arbitral ou judiciaire obligatoire des différends, à accepter un compromis sur ce point en vue d'obtenir de la part des autres Etats l'acceptation de l'ensemble de la Convention sur le droit des traités et, en particulier, de sa Partie V. Or, le désir évident de nombre d'Etats afro-asiatiques d'aboutir à la conclusion d'une Convention universelle en cette matière permettrait de présumer favorablement les chances d'une proposition concernant le règlement obligatoire des différends relevant de cette Partie V, à condition, d'une part, qu'elle soit soutenue fermement par ses auteurs et présentée comme élément indispensable d'une solution de compromis pour l'acceptation des dispositions de fond de la Partie V et, d'autre part, qu'elle tienne compte du refus certain de la part de beaucoup d'Etats d'admettre des solutions extrêmes dans ce domaine. Dans cet ordre d'idées, plusieurs participants, bien que déclarant qu'ils étaient en principe très favorables aux propositions faites par la Suisse et par le Japon, ont, néanmoins indiqué qu'ils préféreraient se rallier à une proposition selon les lignes esquissées dans les amendements proposés par les 13 et les Etats-Unis, plutôt que de s'engager dans une bataille perdue d'avance et dont l'issue certaine ne laisserait guère de solution de rechange. En outre, la proposition des 13, éventuellement améliorée selon certaines des suggestions faites par les Etats-Unis, leur semblait apporter une solution satisfaisante, le recours obligatoire à la juridiction de la Cour Internationale de Justice ne revêtant pas une importance primordiale, alors que le principe d'un règlement automatique et objectif des différends peut être mis en oeuvre par d'autres moyens appropriés. C'est dans cet esprit que les participants ont procédé à un examen approfondi de la proposition des 13 et des suggestions des Etats-Unis, en vue de rechercher un texte susceptible de rallier le plus grand nombre possible d'Etats et comportant une solution optimale, réalisable dans le contexte politique actuel.

21. Cet examen a porté sur les points ci-après :

- i) Quelques participants ont regretté que ni la proposition des 13, ni celle des Etats-Unis ne comprenne une référence à la Cour Internationale de Justice; une telle référence ne devrait pas nécessairement comporter l'obligation d'avoir recours à la procédure judiciaire

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de cette Cour, mais uniquement en indiquer la possibilité éventuellement en ajoutant une réserve en faveur des obligations découlant des déclarations d'acceptation de la juridiction de la Cour. Dans ce contexte, l'attention a été attirée sur la disposition de portée analogue figurant au paragraphe 4 de l'article 62 du projet de Convention; l'absence d'une disposition semblable à l'article 62 bis pourrait être interprétée comme excluant le recours à la Cour Internationale de Justice pour les différends visés par cet article. D'autres participants ont cependant estimé qu'étant donné l'hostilité existant dans certains milieux contre la Cour de La Haye, il ne serait pas opportun d'engager une bataille sur ce point; un participant a fait observer que, malgré la limitation des effets des jugements de la Cour aux parties au litige, un argument négatif pourrait être tiré du fait que la Cour pourrait être appelée à trancher des différends sur des traités multilatéraux dont certains Etats Contractants, en raison de leur attitude négative à l'égard de la Cour, pourraient refuser toute idée d'intervention dans la procédure sur de tels différends.

- ii) Plusieurs participants ont exprimé des doutes quant à l'opportunité de la distinction entre des différends relatifs aux traités bilatéraux et ceux relatifs aux traités multilatéraux introduite par les Etats-Unis en ce qui concerne la procédure de conciliation. En premier lieu, il a été observé que cette distinction alourdirait considérablement la proposition d'amendement qui devrait être la plus simple possible pour garder des chances de succès. En outre, les parties à un différend sur un traité multilatéral ne peuvent pas toujours être réduites à deux camps opposés; dans de tels cas, la suggestion des Etats-Unis ne serait pas de nature à résoudre le problème. Enfin et surtout, les effets de la suggestion des Etats-Unis sur la position des parties au traité qui ne sont pas en même temps parties au différend, ont soulevé un certain nombre d'objections: ainsi, il a été remarqué que la transmission de la requête à toutes les parties au traité et leur faculté automatique de soumettre oralement ou par écrit des observations à la Commission de conciliation n'étaient pas appropriées à la nature même de la conciliation qui, tendant à aboutir à une transaction amiable entre les parties au différend, devait nécessairement garder un

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caractère secret; de même, il serait difficile de déterminer la valeur des observations faites par des parties extérieures au différend, pour les recommandations à faire par la Commission de conciliation. Pour toutes ces raisons, plusieurs participants étaient d'avis que le problème posé par les différends sur des traités multilatéraux pourrait être résolu d'une manière plus simple par le moyen de la procédure d'intervention, à l'instar de celle prévue dans le Statut de la Cour Internationale de Justice. D'autres participants ont fait observer que l'on pourrait se limiter, au stade de la conciliation, à donner à la Commission de conciliation le pouvoir d'inviter, avec l'accord des parties au différend, les autres parties au traité en cause de lui soumettre leurs vues.

- iii) Certains participants ont attiré l'attention sur la différence non seulement de degré, mais de nature, entre la conciliation et l'arbitrage; cette différence semblait être négligée dans les propositions d'amendement en question, qui tendent à attribuer à la conciliation la fonction d'une procédure de première instance, l'arbitrage ayant le caractère d'une procédure d'appel. Cette tendance apparaissait notamment dans la proposition des Etats-Unis selon laquelle le rapport de la Commission de conciliation devrait également contenir des conclusions quant aux questions de fond du différend. En vue de garder le caractère propre de la procédure de conciliation, il serait préférable de ne pas retenir cette proposition, malgré les avantages qu'elle pourrait présenter dans les cas où la conciliation n'est pas suivie par une procédure d'arbitrage.
- iv) La proposition des Etats-Unis tendant à conférer à la Commission de conciliation le pouvoir de faire des recommandations en cours de procédure, visant des mesures provisoires en vue de la protection des droits respectifs des parties au différend, n'a pas soulevé d'objections à part celle d'un participant qui s'y est opposé dans le souci de présenter un texte aussi simple que possible.
- v) En ce qui concerne les délais de la procédure, les propositions des Etats-Unis ont en général été considérées comme des améliorations par rapport à la procédure des 13, malgré une certaine appréhension quant à la durée totale de ceux-ci.

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- vi) Le rôle confié par les propositions en question au Secrétaire Général des Nations Unies n'a pas été apprécié de la même manière par tous les participants. Alors qu'un participant a déclaré se rallier à l'opinion exprimée par le Représentant de la Suisse (ci-dessus, point 18), d'autres ont été d'avis que le Secrétaire Général, élu avec l'accord des Grandes Puissances représentées au Conseil de Sécurité des Nations Unies, pouvait être considéré comme bénéficiant d'une confiance suffisante pour l'accomplissement impartial des fonctions prévues au projet de l'article 62 bis.
- vii) Quant au coût de la procédure de règlement des différends à prévoir à l'article 62 bis, un participant a observé qu'il faudrait prendre en considération non seulement les frais directs (fonctionnement des organes à instituer pour la procédure), mais aussi les autres dépenses (représentation des parties à la procédure). Il s'agit là d'un aspect qui préoccupe réellement un grand nombre d'Etats afro-asiatiques.
22. En outre, les participants ont examiné quelques problèmes d'ordre plus général soulevés par le projet d'un nouvel article 62 bis, à savoir :
- i) Il a été observé que les dispositions de cet article ont un caractère dispositif; ainsi, les Etats auront la faculté de prévoir dans un traité qu'elles ne s'appliqueront pas aux différends relatifs à ce traité. Dans un ordre d'idées analogue, la question a été soulevée de savoir s'il serait opportun d'exclure d'une manière générale du champ d'application de ces dispositions certaines catégories de traités, tels que les traités de paix et d'armistice, qui se prêtent mal à des procédures de règlement des différends du genre de celles prévues à l'article 62 bis.
- ii) Il n'a pas été contesté que l'article 62 bis ne pouvait avoir d'effet rétroactif. Toutefois, si ce principe ne soulève pas de problème en ce qui concerne les différends nés avant l'entrée en vigueur de la future Convention de Vienne, il subsiste un doute, selon l'opinion exprimée par un participant quant aux différends survenus ultérieurement au sujet de traités conclus antérieurement à cette date. En outre, il reste à déterminer si ce principe vise l'application du seul article 62 bis ou de l'ensemble de la Partie V de la future Convention de Vienne.

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23. En ce qui concerne les propositions avancées par les Etats-Unis à Vienne (voir document A/CONF.39/C.1/L.355) les avis étaient partagés au sujet de la création, dans le cadre des Nations Unies, d'une Commission permanente de conciliation : alors que quelques participants ont fait valoir que l'idée de la continuité de la jurisprudence n'avait que peu de valeur en matière de conciliation qui vise à la solution ex aequo et bono de cas d'espèce, un autre participant a estimé qu'une telle institution pourrait être considérée comme contribution valable à la mise en oeuvre progressive d'un mécanisme approprié pour le changement pacifique des relations conventionnelles internationales. - Par contre, l'attribution à la Commission de conciliation du pouvoir de demander des avis consultatifs à la Cour Internationale de Justice sur des questions juridiques d'une importance particulière, a été jugée favorablement; toutefois, certains participants n'ont pas caché leurs doutes quant aux chances de succès d'une telle proposition.

24. En conclusion, plusieurs participants ont insisté sur la nécessité d'une action commune et consistante de tous les Etats participant à la présente réunion en faveur de la proposition relative à l'article 62 bis dont le texte définitif devrait être établi à la lumière de l'échange de vues relaté ci-dessus et, au moyen de discussions ultérieures dans le cadre plus restreint des Etats directement intéressés par cette proposition. - En réponse à une question relative au nombre et au cercle les plus opportuns des auteurs de cette proposition d'amendement définitive, il a été admis qu'il était de la plus haute importance de rallier autour de ce texte le plus grand nombre possible d'Etats appartenant aux différents Groupes auprès de l'Assemblée Générale des Nations Unies; l'avantage certain d'un tel procédé ne devrait pas être échangé contre les mérites moins certains d'un nombre élevé d'auteurs appartenant à un seul et même Groupe.

25. Un participant ayant rappelé la possibilité d'un Protocole facultatif concernant le recours à l'arbitrage ou à la juridiction obligatoire, à prévoir en cas d'échec des propositions tendant à l'insertion d'un nouvel article 62 bis dans la Partie V de la Convention, plusieurs participants ont estimé préférable de ne pas envisager une telle solution. En effet, même si un tel Protocole facultatif était assorti de la faculté de faire une réserve quant à l'acceptation de la Partie V à l'égard de tout Etat qui n'aurait pas ratifié ce Protocole, l'Etat qui fait usage de cette faculté risquerait toujours de se voir opposer les dispositions de la Partie V, considérées par l'autre partie au différend comme l'expression du droit coutumier en la matière.

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26. Enfin, un certain nombre de participants ont été d'avis que même en cas de succès des propositions relatives à un nouvel article 62 bis, leurs Gouvernements conserveraient des hésitations à accepter certaines dispositions de fond de la Partie V du projet de Convention, telles qu'elles ont été adoptées provisoirement à la 1ère Session de la Conférence de Vienne, en particulier les dispositions des articles 49 (contrainte) et 50 (jus cogens). En effet, l'arbitre ou le juge appelé à trancher les différends au sujet de leur interprétation ou application ne peut remédier au caractère toujours vague et defectueux de ces dispositions, le rôle du juge n'étant pas de créer le droit à partir d'un cadre mal défini, mais de dire le droit sur des bases légales solides et à l'intérieur de limites précises tracées par le législateur. Ceci est particulièrement vrai en ce qui concerne des dispositions susceptibles d'être invoquées dans un contexte d'une importance politique considérable. Dès lors, ces participants espèrent qu'il sera possible de revenir, lors de la 2ème Session de la Conférence de Vienne, sur les dispositions de fond les plus importantes de la Partie V du projet de Convention, en vue d'en améliorer la rédaction de manière à enlever leurs appréhensions profondes à leur sujet.

IV. Différends résultant de l'interprétation ou de l'application de la Convention sur le droit des traités

27. Le Représentant de la Suisse a exposé les motifs qui ont inspiré la proposition de son Gouvernement tendant à l'insertion, à la fin du projet de Convention, d'une clause stipulant alternativement le recours obligatoire à la juridiction de la Cour Internationale de Justice ou à l'arbitrage pour le règlement des différends résultant de l'interprétation ou de l'application des dispositions de la Convention (nouvel article 76; document A/CONF.39/C.1/L.250 et GR/Traités (69) 1, point IV). De l'avis de ce Gouvernement, une disposition de cette nature applicable aux dispositions de la seule Partie V de la Convention (article 62 bis, cf. ci-dessus, point III) ne serait pas suffisante, étant donné que de nombreuses dispositions de fond d'autres Parties de la Convention sont également susceptibles de donner lieu à des conflits d'interprétation ou d'application (p. ex. les dispositions relatives aux réserves, à la portée de la signature et de la ratification, aux droits et obligations des Etats tiers, à la position des membres d'un Etat fédéral, etc.). La proposition de la Suisse est fondée sur les formules classiques en cette matière, mais le Gouvernement de la Suisse se réserve le droit de la modifier ultérieurement à la lumière des débats de la 2ème Session de la Conférence de Vienne. Toutefois, eu égard aux expériences faites lors de la négociation des Conventions de Vienne sur les relations diplomatiques et consulaires, ce Gouvernement est très sceptique quant aux chances de succès de cette proposition. Au cas où la Conférence de Vienne préférerait faire figurer une telle clause dans un Protocole facultatif, il serait nécessaire de prévoir la faculté de faire une réserve selon laquelle une Partie contactante au Protocole facultatif n'accepte d'être liée par la Convention qu'à l'égard des Etats ayant également ratifié ce Protocole.

28. Un participant a fait remarquer que la proposition de la Suisse, bien que souhaitable du point de vue de son Gouvernement, pourrait se heurter au refus d'un grand nombre d'autres Etats qui hésiteraient de soumettre à la Cour Internationale de Justice, par le biais d'une acceptation de sa juridiction concernant la future Convention sur le droit des traités, leurs différends résultant de la mise en oeuvre de n'importe quel traité international régi par cette Convention.

V. Le problème de l'effet rétroactif de la Convention

29. Un participant a estimé que le problème de la rétroactivité des dispositions de la Convention était un faux problème, tout instrument international, comme d'ailleurs tout acte législatif national n'entraînant, en principe, des effets juridiques qu'à partir de son entrée en vigueur et non pas rétroactivement, sauf disposition expresse contraire. Ce participant a donc préféré de ne pas aborder la question à Vienne ; car si la question était posée, l'on risquerait de se voir confronter à une proposition prévoyant la rétroactivité des dispositions de la future Convention.

30. La grande majorité des autres participants n'a pas partagé cette manière de voir. En règle générale, il a été reconnu qu'une Convention ne peut s'appliquer au passé ; cependant en examinant le contenu du projet de Convention sur le droit des traités de plus près, le sujet paraît plus complexe. Il s'agit en réalité de rechercher la réponse aux trois questions suivantes :

- i) la Convention affecte-t-elle ou non des traités conclus avant son entrée en vigueur ?
- ii) la Convention affecte-t-elle l'application ou l'interprétation de traités conclus dans le passé dans la mesure où des différends surviennent après son entrée en vigueur ?
- iii) la Convention affecte-t-elle les différends portant sur l'application ou l'interprétation des seuls traités conclus depuis son entrée en vigueur ?

31. Il a été généralement admis que ces questions ne pourraient se référer à telles parties de la Convention qui contiennent des règles dites progressives du Droit international, et que les matières couvertes par des dispositions reprenant uniquement des règles du droit coutumier déjà existantes ne pourraient être affectées par l'existence ou l'absence d'une réglementation expresse quant à la portée ratione temporis de la future Convention, bien qu'il y ait lieu de reconnaître que plusieurs dispositions du projet de Vienne comportent à la fois des éléments tirés du droit coutumier et des aspects d'une codification dite "progressive".

32. Plusieurs participants ont été d'avis qu'en raison de la complexité de la matière, il était très souhaitable d'obtenir, à Vienne, une disposition expresse excluant toute portée rétroactive de la Convention de manière que seuls les traités futurs tombent sous le champ d'application de la Convention. Une telle règle expresse pourrait bien entendu être assortie d'une mention selon

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laquelle toute disposition de la Convention basée sur le droit coutumier pourrait s'appliquer à des traités conclus dans le passé s'il est établi qu'il s'agit d'une règle du droit coutumier. Aussi souhaitable qu'une telle disposition expresse puisse paraître, il a été néanmoins admis combien il était difficile d'obtenir une majorité à ce sujet à Vienne. Toutefois, une délégation a déclaré que même le groupe afro-asiatique pourrait avoir un intérêt à une clarification de ce point et, dès lors, être disposé à soutenir un amendement relatif à la portée de la Convention dans le temps. Il faudrait donc sonder les intentions d'autres pays avant de décider si une proposition d'amendement sur ce point peut avoir des chances réelles de succès, tout en gardant à l'esprit que la situation se trouverait singulièrement aggravée par l'échec d'une proposition d'amendement en ce sens.

33. D'autres délégués étaient persuadés dès à présent de l'impossibilité d'obtenir une majorité de 2/3 en faveur d'une disposition expresse contre toute rétroactivité.

34. Un certain nombre de participants ont défendu la thèse qu'une règle expresse sur ce point n'était nullement nécessaire, puisque l'article 24 du projet de Vienne confirme assez clairement le principe de la non-rétroactivité d'un traité international. Pour ces participants il était même préférable de ne rien dire à ce sujet à Vienne ; l'article 24 donnerait dans un cas d'espèce suffisamment d'arguments, au moins en ce qui concerne la présomption en faveur de la non-rétroactivité de la Convention de Vienne qui, en cas d'aboutissement, revêtira la forme d'un traité international.

35. Quant à l'idée avancée lors de la réunion à Paris en 1968 (voir WEO/Traités (68) 1, rév. §§ 32 et 33) concernant une rétroactivité limitée à une date fixe antérieure à la conclusion du traité, qui serait à déterminer, par exemple le 24 octobre 1945, date de l'entrée en vigueur de la Charte des Nations Unies, un seul participant a estimé qu'une telle suggestion peut être utile au cas où un courant d'opinions considérable se manifesterait à Vienne pour couvrir les différends qui surgiront au sujet de traités conclus dans le passé, par exemple si un Etat invoque les articles 49 ou 50 du projet de Vienne pour se dégager d'obligations conventionnelles contractées dans le passé.

36. Un autre participant a jugé que le problème le plus important consisterait à régler l'emprise de la Convention sur des différends futurs surgis au sujet de traités conclus dans le passé. De son avis, il serait parfaitement possible qu'un certain nombre d'autres Etats s'efforceront de réserver à la Partie V du projet de Vienne une portée rétroactive, tout en

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limitant celle de l'article 62 bis - s'il est retenu - à des différends surgis à l'avenir au sujet de traités à conclure dans le futur. Devant une telle hypothèse, nombre de participants ont souligné que leurs gouvernements n'accepteraient aucunement une telle solution qui affaiblirait d'une manière intolérable la valeur de l'article 62 bis comme élément de compromis dans le cadre de la Partie V.

37. Un délégué a déclaré qu'il ne fallait pas avoir trop de préoccupations en cette matière ; la Commission de Droit international aurait déjà abordé ces problèmes. A titre d'exemple, il s'est référé à l'article 61 du projet. Ce même délégué préférerait laisser le règlement de toute la question à la pratique.

38. Sur proposition d'un participant il a été envisagé de proposer à Vienne l'insertion, dans le préambule de la Convention, d'un paragraphe identique à celui figurant dans les Conventions de 1961 et 1963, ainsi libellé : "affirmant que les règles du droit international coutumier continueront à régir les questions qui n'ont pas été expressément réglées dans les dispositions de la présente Convention".

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VI. La faculté de faire des réserves à la Convention sur le droit des traités

39. Les participants ont considéré que, d'une manière générale, les Etats devraient avoir la faculté de faire des réserves en ce qui concerne des dispositions de la future Convention sur le droit des traités. Toutefois, aucune solution acceptable aux représentants à la présente réunion et offrant à Vienne des chances réelles de succès, n'a pu être trouvée.

40. Tout d'abord, la plupart des participants ont estimé qu'aucune réserve à l'article 62 bis ne devrait être admise.

41. En ce qui concerne les autres articles du projet, la question a été posée de savoir s'il était indiqué d'oeuvrer à Vienne en faveur d'une disposition expresse en matière de réserves ; une telle disposition pourrait soit prévoir l'interdiction de toute réserve, soit énumérer les articles qui peuvent faire l'objet d'une réserve.

42. A ce sujet, la plupart des participants ont été d'avis que l'interdiction de toute réserve ne serait point acceptable, bien qu'il y ait lieu de s'efforcer d'exclure la possibilité de réserves en ce qui concerne l'article 62 bis. Quant à une disposition énumérant les articles qui peuvent faire l'objet d'une réserve, il serait quasiment impossible d'obtenir un consentement général concernant la liste des articles à mentionner, étant donné notamment la position à Vienne de certains Etats appartenant à d'autres groupes, et qui désirent sans doute obtenir la reconnaissance du caractère impératif (jus cogens) de l'une ou l'autre règle contenue dans le projet.

43. Un participant a souligné que toute réglementation stricte en matière de réserves rencontrerait inévitablement une très nette opposition des organes parlementaires de son pays et risquerait de rendre l'adhésion de son Etat à la future Convention de Vienne sinon impossible, du moins très difficile.

44. Un autre participant a déclaré que le courant d'opinions à Vienne contre la faculté de faire des réserves serait certainement très fort et pourrait avoir comme conséquence une disposition interdisant toute réserve sauf en ce qui concerne les articles expressément mentionnés. Il serait, dès lors, opportun que tous les Etats examinent dès maintenant quels articles ils souhaiteraient voir figurer dans une telle disposition.

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45. Reconnaissant la difficulté d'aboutir en ce domaine à une solution à la fois acceptable et réalisable, plusieurs participants ont estimé qu'il serait préférable de s'abstenir à Vienne de toute initiative à ce sujet. Afin de ne pas courir le risque de se voir imposer une disposition restrictive en la matière, ces participants ont en effet considéré qu'il serait plus opportun d'appliquer, à la Convention de Vienne, les dispositions qu'elle prévoit à ses articles 16 et 17 quant aux réserves, bien que ces articles soient rédigés d'une manière confuse et contradictoire à certains égards.

46. Tout en se déclarant en principe d'accord avec cette attitude, l'un des participants s'est demandé si une telle procédure n'offrirait pas la possibilité de faire une réserve au sujet de l'article 62 bis, redoutée à juste titre. Un autre participant a soulevé le problème de l'interprétation de l'article 16 et notamment de la portée des mots "l'objet et le but du traité". Il pense que pour chaque réserve un autre Etat pourrait contester la compatibilité de celle-ci avec "l'objet et le but" du traité. Il se demande, dès lors, si une solution plus heureuse ne consisterait pas dans le partage du projet de Vienne en plusieurs Conventions, suivant en cela l'exemple des Conventions de Genève sur le droit de la mer. Certes, les matières traitées à Genève se prêtaient davantage à une coupure que le droit des traités ; l'on pourrait néanmoins concevoir trois instruments distincts couvrant respectivement i) la conclusion et l'entrée en vigueur des traités ; ii) l'application et l'interprétation des traités et iii) Nullité, fin et suspension des traités.

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VII. Clauses finales de la Convention sur le droit des traités

47. Les participants étaient unanimes à considérer que l'élaboration des clauses finales lors de la 2ème Session de la Conférence de Vienne devrait suivre la procédure normale de cette Conférence : en conséquence, elle devrait tout d'abord faire l'objet d'une discussion et de votes éventuels au sein de la Commission plénière ; ce n'est que par la suite que les textes des clauses finales seraient renvoyés au Comité de rédaction et soumis à l'adoption par la Conférence en séance plénière.

48. Les clauses finales devraient, de l'avis de tous les participants prévoir un nombre élevé de ratifications pour l'entrée en vigueur de la future Convention de Vienne et ce en raison de l'importance de la matière couverte par cet instrument. A cet égard, il a été estimé que ce nombre devrait être de 40 à 45, ce qui correspondrait environ à un tiers des Etats membres des Nations Unies.

49. Tous les participants qui sont intervenus dans la discussion sur ce point ont été d'avis que l'entrée en vigueur ne pouvait pas être conditionnée par la ratification de la Convention par tous les Membres permanents du Conseil de Sécurité.

PARTIE II

Dispositions du projet de Convention qui
ont été adoptées provisoirement à la
1ère Session de la Conférence

Articles 16 et 17

50. Le Représentant du Japon, après avoir rappelé la proposition faite par son Gouvernement lors de la 1ère Session de la Conférence de Vienne et visant l'introduction d'un critère objectif pour déterminer la compatibilité d'une réserve avec l'objet et le but du traité [article 16 (c) du projet de Convention, cf. A/CONF. 39/C.1/L.133/Rev.17], a indiqué que ce Gouvernement procédait actuellement à un examen de l'opportunité de présenter à nouveau une telle proposition à la 2ème Session de la Conférence.

51. En réponse, plusieurs participants se sont prononcés en faveur de l'objectif de cette proposition ; toutefois, ils ont rappelé l'issue négative du vote y relatif lors de la 1ère Session de la Conférence et se sont demandés si une seconde initiative aurait de meilleures chances. Un participant a révélé une certaine contradiction entre la règle de la majorité des deux tiers, requise pour l'adoption du texte d'un traité multilatéral par une Conférence internationale, et la règle de la majorité des Etats contractants, requise selon la proposition japonaise pour le refus d'une réserve parce que considérée comme étant incompatible avec l'objet et le but du traité en cause. Un autre participant a fait observer que l'opinion majoritaire des Etats contractants ne pouvait être considérée comme un critère objectif ; mais il a convenu qu'il serait impossible de faire accepter une procédure devant une instance indépendante en vue de l'appréciation des réserves. Enfin, un participant s'est demandé si la participation au traité, d'un Etat qui s'est vu refuser une réserve conformément à la proposition japonaise, devrait être considérée comme étant sans effet à partir de la date de la signature, de la ratification ou de l'adhésion, ou seulement à partir de la constatation du refus de la réserve.

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Article 41

52. En ce qui concerne le principe de la divisibilité des traités, plusieurs participants ont marqué leur soutien pour l'amendement finlandais présenté à la 1ère Session de la Conférence de Vienne [A/CONF.39/C.1/L.144] et tendant à supprimer au paragraphe 5 de l'article 41 la mention de l'article 50. Pour ces mêmes participants, le principe de la divisibilité devrait aussi jouer en cas d'invocation d'une règle de jus cogens au sujet d'une partie seulement d'un traité international. Le délégué de la Finlande a d'ailleurs confirmé l'intention de son Gouvernement de réintroduire cet amendement à Vienne qui lors de la 1ère Session n'a été rejeté qu'avec une faible majorité (39 contre 27 avec 17 abstentions).

53. A cet égard il a été estimé important de choisir la meilleure procédure à suivre. Pour plusieurs participants un amendement formel tendant à la suppression de la mention de l'article 50 a moins de chances de succès - puisqu'il exige une majorité de 2/3 - qu'une demande de procéder à un vote séparé au sujet des différentes mentions qui figurent au paragraphe 5 de l'article 41, lors d'un tel vote séparé une minorité d'un tiers plus une voix suffisant à faire échec à l'insertion de la mention de l'article 50.

54. Une délégation a déclaré qu'elle s'était abstenue à Vienne lors du vote sur l'amendement finlandais, cette délégation estimant que le maintien de la mention à l'article 50 s'avèrerait en pratique plus utile que sa suppression. En effet, un Etat contractant hésiterait sans doute à invoquer l'article 50 s'il sait que le traité dans son ensemble en serait affecté, alors que la suppression de la mention à l'article 50 lui permettrait de se débarrasser, par le biais de l'article 50, de certaines dispositions d'un traité qui ne lui sont pas très favorables. Cette même délégation a cependant affirmé son intention de réexaminer sa position antérieure.

55. Pour un autre participant il serait erroné de donner à la mention de l'article 50 trop d'importance. L'article 50 a été modifié lors de la 1ère Session et se réfère, dans sa version actuelle, uniquement à des règles de jus cogens existant au moment de la conclusion du traité.

56. En réponse à cette déclaration il a été fait valoir que les Etats avaient des vues divergentes en ce qui concerne des règles impératives existantes ou nouvelles à ce sujet.

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Article 42

57. Le délégué de la Suisse a annoncé l'intention de son Gouvernement de réintroduire à Vienne son amendement [A/CONF.39/C.1/L.340] rejeté à la 1ère Session et ayant pour objet d'inclure au paragraphe 1er de l'article 42 une référence aux articles 48 et 49. Cette délégation estime, en effet, que l'omission de toute mention à ces deux articles a donné à l'article 42 - qui en soi consacre un principe très utile et important - un aspect nettement politique. Suite à cette omission un Etat, partie à un traité de paix ou d'armistice, pourrait parfaitement invoquer, même après 50 ans, l'article 48 ou l'article 49 pour mettre unilatéralement fin, avec effet rétro-actif, à ce traité. Or, une telle conséquence serait intolérable. Elle ouvrirait la porte à toute sorte d'abus.

Article 49

58. Pour le délégué de la Suisse le problème de l'article 49 est lié à celui déjà mentionné par lui au sujet de l'article 42. L'application de l'article 49 pourrait, en effet, mettre en cause pratiquement tout traité, car de nombreux traités, notamment dans le domaine économique, ne sont pas toujours conclus entre des partenaires à position ou à "force" égale. Cette délégation souhaiterait donc la suppression de l'article 49 comme d'ailleurs aussi la Déclaration approuvée par la 1ère Session de la Conférence de Vienne sur proposition des Pays-Bas [A/CONF.39/C.1/L.323]. Le délégué des Pays-Bas, de son côté, a défendu l'utilité de ladite Déclaration et a ajouté que si cette Déclaration n'avait pas été adoptée, d'autres délégations auraient certainement essayé d'introduire le contenu de cette Déclaration dans l'article 49, ce qui évidemment aurait conduit à d'autres conséquences juridiques.

59. Un autre participant a déconseillé d'ouvrir à Vienne la discussion au sujet de l'article 49, car de nouveaux problèmes risqueraient alors de surgir. Par ailleurs, l'article 49 pourrait, sous sa forme actuelle, influencer les Etats dans une certaine mesure pour ne pas exploiter une position de force lors de la conclusion d'un traité.

60. Pour d'autres délégations, l'acceptation de l'article 49 reste conditionnée par le sort qu'on réservera à Vienne à l'article 62 bis.

Article 50

61. D'une manière générale, les participants étaient d'avis que l'article 50, comme d'ailleurs l'article 49 et même toute la Partie V du projet, n'étaient pas acceptables pour eux à moins que la Conférence n'accepte une procédure satisfaisante du règlement des différends visée à l'article 62 bis.

62. Plusieurs délégués vont plus loin. Pour eux la rédaction des articles 49 et notamment 50 est tellement vague qu'il appartiendrait finalement à la pratique des organes de conciliation ou d'arbitrage de décider de l'application de la notion "jus cogens" par rapport à une règle déterminée, ce qui ne serait évidemment pas souhaitable, car le conciliateur ou l'arbitre se verrait alors confier la tâche d'un "législateur". Dans cet ordre d'idées, un délégué a déclaré que son Gouvernement accepterait à la rigueur que la Cour Internationale de Justice, et non un autre organe ad hoc, se prononce sur le caractère impératif d'une règle de droit international. Une autre délégation a maintenu son opposition de principe à l'égard du libellé actuel de l'article 50 ; elle a fait savoir son intention d'élaborer une proposition d'amendement tendant à introduire à l'article 50 quelques critères nouveaux de caractère objectif, tels que la notion de "durée" etc. Cette délégation informera les autres délégués incessamment des résultats de ses recherches à ce sujet.

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PARTIE III

Caractère dispositif ou obligatoire des
dispositions du projet de Convention

63. Se référant à certaines dispositions du projet de Convention qui contiennent une clause expresse de sauvegarde de la liberté des Etats de déroger aux règles posées par celles-ci, le Représentant de la République Fédérale d'Allemagne a fait état de l'absence d'une telle clause dans d'autres dispositions qui, pourtant, ne peuvent être considérées comme ayant un caractère impératif et comme excluant toute dérogation. Afin de clarifier ce point, son Gouvernement avait l'intention de proposer à la 2ème Session de la Conférence de Vienne l'adoption du texte suivant :

"Les références, figurant dans certains articles de la présente Convention, à une intention différente des Etats contractants d'un traité particulier, résultant des dispositions de ce traité ou établies d'une autre manière, sont sans préjudice à l'admissibilité d'un accord dérogeant à d'autres articles de la présente Convention, à moins qu'il ne s'agisse de normes ayant un caractère impératif."

64. Le délégué allemand a ajouté qu'une telle disposition confirmerait la présomption que la Convention contenait des règles de caractère dispositif et qu'elle aurait pour conséquence de mettre la preuve à la charge de l'Etat qui défendrait la thèse contraire.

65. Certains participants ont estimé qu'une telle proposition n'avait pas de chances de succès, étant donné les discussions de la 1ère Session de la Conférence de Vienne concernant la suppression de toute référence à une intention différente des parties à un traité. Par ailleurs, elle risquait de provoquer un nouveau débat sur une liste des normes de caractère impératif énoncées dans la Convention, question sur laquelle il semblait impossible de trouver un accord. Le problème soulevé par le Représentant de la République Fédérale d'Allemagne n'était peut-être pas d'une importance considérable, étant donné qu'il était évident qu'un grand nombre d'articles qui ne contiennent pas la référence en question n'ont

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pas un caractère impératif et que, dès lors, il existe une présomption générale en faveur du caractère dispositif des dispositions de la Convention. Un participant a fait remarquer que ce problème ne devrait pas être lié à celui du jus cogens, faisant partie du droit coutumier ou énoncé dans la Convention de Vienne ; il s'agissait plutôt d'une question se situant dans le cadre général de l'interprétation de règles conventionnelles en vue de déterminer leur caractère facultatif ou obligatoire. Un autre participant a suggéré de faire mention de l'idée avancée par la proposition allemande dans l'Acte final de la Conférence de Vienne.

- 30 -

GR/Traités (69) 3

A N N E X E
A P P E N D I X

LISTE DES PARTICIPANTS
LIST OF PARTICIPANTS

I. Etats membres du Conseil de l'Europe
Member States of the Council of Europe

AUTRICHE
AUSTRIA

M. S. VEROSTA

Professeur à l'Université de
Vienne
Ancien Ambassadeur
Ministère des Affaires
Etrangères
Ballhausplatz 2
VIENNE

M. E. NETTEL

Deputy Legal Adviser
Federal Ministry for Foreign
Affairs
Ballhausplatz 2
VIENNA

M. W. LANG

Attaché à l'Ambassade
d'Autriche
6, rue Faber
PARIS VIIe

BELGIQUE
BELGIUM

M. G. DENIS

Magistrat délégué au
Ministère des Affaires
Etrangères
2, rue des Quatre Bras
BRUXELLES

CHYPRE
CYPRUS

excusé

./.

GR/Traités (69) 3

- 31 -

DANEMARK DENMARK	Mrs. A. ADAMSEN	Head of Section Ministry for Foreign Affairs <u>COPENHAGEN</u>
FRANCE	M. L. HUBERT (Président)	Ministre Plénipotentiaire Chef de la Délégation française 1, avenue Emile Deschanel <u>PARIS VIIème</u>
	M. O. DELEAU	Directeur adjoint des Affaires des Nations Unies Ministère des Affaires Etrangères 37, Quai d'Orsay <u>PARIS</u>
	M. D. HADOT	Secrétaire des Affaires Etrangères Service juridique du Ministère des Affaires Etrangères 37, Quai d'Orsay <u>PARIS</u>
REP. FED. D'ALLEMAGNE FED. REP. OF GERMANY	M. H. GROEPPER	Directeur du Service juridique du Ministère des Affaires Etrangères <u>BONN</u>
	M. H. BLOMEYER	Conseiller Ministère des Affaires Etrangères <u>BONN</u>
	M. C. FLEISCHHAUER	Deuxième Secrétaire au Ministère des Affaires Etrangères <u>BONN</u>
GREECE GREECE	excusé	
ISLANDE ICELAND	excusé	
IRLANDE IRELAND	M. F.M. HAYES	Assistant Legal Adviser Department of External Affairs <u>DUBLIN 2</u>

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- 32 -

GR/Traités (69) 3

ITALIE ITALY	M. A. MARESCA	Ministre plénipotentiaire Chef du Contentieux diplomatique Ministère des Affaires Etrangères <u>ROME</u>
	M. E. GIUFFRIDA	Conseiller d'Ambassade Chef du Service des Nations Unies Ministère des Affaires Etrangères <u>ROME</u>
LUXEMBOURG	M. J.M. HOSTERT	Secrétaire de Légation 32, rue des Roses <u>LUXEMBOURG</u>
MALTE MALTA	Dr. M. TUFIGNO	Crown Advocate General Crown Advocate General's Chambers The Palace <u>VALLETTA</u>
PIYS-BAS NETHERLANDS	M. W. RIPHAGEN	Jurisconsulte au Ministère des Affaires Etrangères <u>LA HAYE</u>
	M. G. MAAS GEESTERANUS	Conseiller juridique adjoint au Ministère des Affaires Etrangères <u>LA HAYE</u>
NORVEGE NORWAY	M. E. DONS	Ambassadeur Ministère des Affaires Etrangères <u>OSLO</u>
	M. B. SOLHEIM	Chef de Division Ministère des Affaires Etrangères <u>OSLO</u>
SUEDE SWEDEN	M. H. BLIX	Special Legal Adviser Ministry for Foreign Affairs Box 16121 103 23 <u>STOCKHOLM</u> 16
	M. H. EEK	Professeur de droit international à l'Université de Stockholm Norrtullsgatan 2 113 29 <u>STOCKHOLM</u>

./.

GR/Traités (69) 3

- 33 -

SUISSE SWITZERLAND	M. R. BINDSCHIEDLER	Ambassadeur plénipotentiaire Jurisconsulte du Département politique fédéral 3003 <u>BERNE</u>
	M. J. CUENDET	Collaborateur diplomatique I Département politique fédéral 3003 <u>BERNE</u>
TURQUIE TURKEY	M. C.S. HAYTA	Ambassadeur Conseiller supérieur au Ministère des Affaires Etrangères <u>ANKARA</u>
	M. N. TAYLAN	Premier Secrétaire de l'Ambassade de Turquie à Paris 17, rue d'Ankara <u>PARIS XVIIe</u>
ROYAUME-UNI UNITED KINGDOM	Sir Francis VALLAT	Head of Delegation Foreign Commonwealth Office <u>LONDON, S.W.1</u>
	M. I. SINCLAIR	Legal Councillor Foreign and Commonwealth Office <u>LONDON, S.W.1</u>

./.

II. Etats non membres du Conseil de l'Europe
Non Member States of the Council of Europe

AUSTRALIE AUSTRALIA	M. P. BRAZIL	Legal Adviser Department of External Affairs Australian Embassy Rue Las Casas <u>PARIS</u>
CANADA	M. M. WERSHOF	Ambassadeur du Canada au Danemark c/o Ambassade du Canada 35, avenue Montaigne <u>PARIS</u>
	M. J. STANFORD	Head of Treaty Section Legal Division Department of External Affairs c/o Ambassade du Canada 35, avenue Montaigne <u>PARIS</u>
FINLANDE FINLAND	M. E. CASTREN	Professeur d'Université Wecksellintie 4 <u>HELSINKI 15</u>
	M. P. GUSTAVSSON	Head of Legal Department Ministry for Foreign Affairs <u>HELSINKI</u>
JAPON JAPAN	M. N. MATSUNAGA	Conseiller de l'Ambassade du Japon Ambassade du Japon 7, avenue Hoche <u>PARIS VIIIe</u>
	M. H. OWADA	Premier Secrétaire près la Délégation du Japon à l'ONU 866 United Nations Plaza <u>NEW YORK, N.Y. 10471</u>

GR/Traités (69) 3

- 35 -

NOUVELLE-ZELANDE Mlle A. FINLAYSON Second Secrétaire
NEW ZELAND Haut-Commissariat de Nouvelle-
Zélande
Haymarket
LONDRES, S.W.1.

PORTUGAL M. A. PATRICIO Counsellor of Embassy
Head of International
Political Organisations
Department of the Ministry
for Foreign Affairs
LISBONNE

ESPAGNE M. S. MARTINEZ-CARO
SPAIN Deputy Legal Adviser
Ministry for Foreign Affairs
MADRID

U.S.A. M. C. SALANS Deputy Legal Adviser
Department of State
American Embassy
2, avenue Gabriel
PARIS VIIIe

SECRETARIAT M. H. GOLSONG Directeur des Affaires
juridiques
Conseil de l'Europe
STRASBOURG

M. H.P. FURRER Administrateur
Direction des Affaires
juridiques
Conseil de l'Europe
STRASBOURG

Legal Div./J.S.Stanford/zs

EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

file 20-3-1-6

Memorandum

TO
À

Mr. J. A. Beesley

FROM
De

J. S. Stanford

REFERENCE
Référence

SUBJECT
Sujet

Law of Treaties Conference - Article 5
Representations Progress Report.

SECURITY
Sécurité

RESTRICTED

DATE

February 20, 1969

NUMBER
Numéro

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	

ENCLOSURES
Annexes

DISTRIBUTION

USSEA
Mr. Bissonnette
Mr. Wershof
(Copenhagen)
Mr. Robertson
(PermisNY)
CoOrd.Div.

We have now made representations to 74 governments on Article 5 and have received firm or tentative replies from 49.

2. On the issue of a separate vote on paragraph 2, 48 governments have indicated they will support a separate vote and one has indicated it will abstain. None has indicated it would oppose a separate vote. There are eight governments who voted with us on paragraph 2 at the first session but from whom we have not yet received replies. Adding these eight "friends", we have a projected total of 56 votes in favour of a separate vote on paragraph 2. 93 votes (including abstentions) were cast in the voting on Article 5 at the first session. Even allowing for an increase in voting numbers at the second session, and considering the likelihood of some abstentions, it appears we will be able to secure the necessary simple majority for a separate vote on paragraph 2.

3. On the issue of the vote on paragraph 2, 45 states have indicated they will oppose paragraph 2, 4 have indicated they will abstain and none has indicated it will support paragraph 2. Adding our eight "friends" to the 45 opponents of paragraph 2 gives a projected vote of 53 against the paragraph, certainly a blocking third and probably a simple majority against the paragraph.

4. On the issue of the vote on Article 5 as a whole if a separate vote on paragraph 2 is refused, 2 governments have indicated they will vote for the article, 23 have indicated they will oppose it and 2 have indicated they will abstain. A blocking third on the article as a whole would appear to be somewhere between 25 and 30. Thus the outcome of such a vote is at present in doubt though the outlook appears favourable.

.. 2

-2-

RESTRICTED

5. Of particular interest are the changes of position indicated by the replies to date. All four governments which at the first session, voted once for and once against paragraph two have indicated they will oppose the paragraph at the second session. Similarly four governments which abstained at least once on paragraph 2 have indicated they will oppose the paragraph. Of four states which abstained once and voted for paragraph 2 once, 3 have indicated they will oppose and one that it will abstain. Of five states which voted for the paragraph at the first session, two have indicated they will oppose it and three that they will abstain. On Article 5 as a whole, two states which voted for the Article at the first session and six which abstained have indicated they will oppose the Article at the second session if necessary. In addition, one state which voted for the article has indicated it will abstain.

6. It appears clear from the foregoing that we will probably go to Vienna with sufficient strength to defeat paragraph 2 and possibly even the whole of Article 5 if necessary. Our tasks during the first three weeks, until the Plenary vote on Article 5, will be:

- (a) to check with each of the approximately 75 delegates to make sure that undertakings given in capitals have been reflected in instructions to delegates;
- (b) to withstand the inevitable counterattack by the USSR and her allies and France and her allies, which was largely responsible for the failure to defeat paragraph 2 at the first session;
- (c) to counteract any tendency which our largely passive support in Committee of the Whole for a compulsory settlement article and our opposition to the "all States" position may have to alienate sympathy among Afro-Asians for our position on Article 5.

I believe it is Mr. Wershof's intention, during the initial three weeks, to meet personally with all the delegates from whom we have been promised support in order to go over the ground with them again and make sure that they have received and understand their instructions. This exercise will, of course, involve a great deal of activity by the other members of our delegation as well.


J. S. Stanford.

003348

COUNCIL OF EUROPE

SECRETARIAT GENERAL

J/960

Strasbourg, 20th February 1969

Sir,

I have the honour to refer to the meeting of the Ad hoc Committee on the Law of Treaties which took place in Paris from 6th to 8th February 1969, in order to proceed to an exchange of views with regard to the preparation of the 2nd Session of the Vienna Diplomatic Conference on the Law of Treaties.

Please find enclosed herewith, document GR/Traités (69) 3 in French, which contains an unofficial resumé of the discussions of the above-mentioned meeting. The English version will be sent in due course.

This resumé has been drawn up by the Secretariat under its own responsibility and has not been approved by the participants of that meeting. As this resumé is intended as an aide-mémoire in connection with the work of the ad hoc Committee, it should be regarded as confidential.

Should you wish any modification to be made to this resumé, I would be most grateful if any eventual observations could be sent to me as soon as possible. The Secretariat will then prepare a revised version of the above-mentioned document.

Further copies of the document are available upon request.

I remain, Sir,

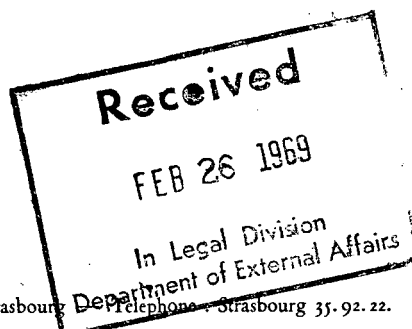
Your obedient Servant,

H. Golsong
H. GOLSONG

Director of Legal Affairs

Mr. J. STANFORD
Head of Treaty Section,
Legal Division,
Department of External Affairs,
c/o Ambassade du Canada
35, avenue Montaigne

PARIS



Telegraphic Address : EUROPA Strasbourg Telephone : Strasbourg 35.92.22.

Telex : Strasbourg 87.943

003349

14/26/2

file, diary, div.diary,
tel file.

MESSAGE

FM/DE

EXTERNAL OTT

DATE	FILE/DOSSIER	SECURITY SECURITE
19 FEB. 1969	20-3-1-6 121	Unclassfd.

TO/A

VIENNA

NO

PRECEDENCE

L-246

Routine

INFO

COPENHAGEN AND PERMISSNY

REF YOURTEL 82 FEB.3/69

SUB/SUJ

MESSRS. WERSHOP, BEESLEY, ROBERTSON AND STANFORD WILL
ARRIVE VIENNA APRIL 7. MISS TAYLOR WILL ARRIVE APRIL 8.

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DIVISION

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APPROVED/AUTORISE

SIG.....
J.S.Stanford/rs

LEGAL

2-5406

SIG.....
J.A.BEESLEY

file, diary, div.diary, tel. file

MESSAGE

FM/DE EXTERNL OTT

TO/A ROME

INFO

DATE	FILE/DOSSIER	SECURITY SECURITE
19 FEB. 1969	20-3-1-6	RESTRICTED

NO	PRECEDENCE
L-251	ROUTINE

REF

YOUR LETTER 836 A DEC.9/68

SUB/SUJ

LAW OF TREATIES CONFERENCE -ARTICLE 5 - MALTA

AS MALTA WAS REPRESENTED (BY DR.M.TUFGINO, CROWN ADVOCATE
GENERAL^E, THE PALACE, VALLETTA) AT PRELIMINARY MEETINGS
OF WEO GROUP IN PARIS FEB. '6-7 TO DISCUSS LAW OF TREATIES
PRIOR TO SECOND SESSION, VIENNA CONFERENCE, WE ASSUME
DECISION HAS BEEN TAKEN THAT MALTA WILL BE REPRESENTED
AT SECOND SESSION. GRATEFUL THEREFORE IF YOU COULD
FOLLOW UP EARLIER REPRESENTATIONS AND SEEK AT LEAST PRELIMINARY
INDICATION OF MALTESE POSITION ~~OF~~ ARTICLE 5.

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LOCAL/LOCALE

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ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG.....J.S.Stanford/rs	Legal	2-5406 XXXX	SIG.....J.A.BEESLEY...J.A.Beesley.....

MESSAGE

FM/DE	EXTERNAL OTT	DATE	FILE/DOSSIER	SECURITY
		19 Feb 1969	20-3-1-6	SECURITE
TO/A	BRUSSELS		NO	PRECEDENCE
			L-252	ROUTINE
INFO				

REF YOURTEL 1950 OCT 16/68

SUB/SUJ LAW OF TREATIES CONFERENCE -ARTICLE 5 - LUXEMBOURG

AS LUX. WAS REPRESENTED (BY J.M.HOSTERT DESCRIBED SIMPLY AS SECRETAIRE DE LEGATION, 32 RUE DES ROSES, LUXEMBOURG) AT PRELIMINARY MEETINGS OF WEO GROUP IN PARIS FEB.6-7 TO DISCUSS SECOND SESSION OF LAW OF TREATIES CONFERENCE WE ASSUME DECISION HAS BEEN TAKEN THAT LUX. WILL BE REPRESENTED AT SECOND SESSION. GRATEFUL, THEREFORE, IF YOU COULD FOLLOW UP EARLIER REPRESENTATIONS ON ARTICLE 5, PARA 2 AND SEEK CONFIRMATION OF EARLIER INDICATION THAT LUX. WILL JOIN BELGIUM AND ~~N~~ETHERLANDS IN SUPPORTING CANADIAN POSITION.

DISTRIBUTION
LOCAL/LOCALE

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ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG..... J.S. STANFORD:ZS	LEGAL	2-5406	SIG..... J. A. BEESLEY J. A. BEESLEY

2. THEY WOULD BE GRATEFUL TO KNOW OUR POSITION ON ARTICLE 5BIS (ON WHICH ACCORDING TO REPORT OF CDN DEL TO FIRST SESSION NO/NO VOTE WAS TAKEN AT 1968 CONFERENCE.) WE ASSUME WE WOULD OPPOSE BUT GRATEFUL CONFIRMATION.

20-3-1-6
14 | J.R.

20-3-1-6

19/2

5.19.2.

file,
diary
div. diary
EXTERNAL AFFAIRS



AFFAIRES EXTÉRIEURES

TO
À

The Permanent Mission of Canada to the
United Nations - NEW YORK, N.Y.

SECURITY
Sécurité

Unclassified

FROM
De

The Under-Secretary of State for External
Affairs - OTTAWA, Canada.

DATE

February 18, 1969

REFERENCE
Référence

U.N. Secretariat Letter LE113(5-2-1)GOV
of January 31, 1969

NUMBER
Numéro

L-243

SUBJECT
Sujet

U.N. Conference on the Law of Treaties
Second Session

FILE	DOSSIER
OTTAWA	
	20-3-1-6
MISSION	14

ENCLOSURES
Annexes

DISTRIBUTION

Please inform Secretariat, in reply to their
letter under reference, that Canada will be represented
at the second session of the U.N. Conference on the Law
of Treaties from April 9 - May 21, 1969.

2. With respect to the composition of the Canadian
Delegation, please inform Secretariat that Mr. Beesley
will be a member of the Delegation from the period April 9
to approximately 30 and, during that period, will be the
second ranking member of the Delegation. Mr. McKinnon,
who was a member of the Delegation at the first session,
will not attend the second session. We would hope that
these changes in the composition of the Canadian Delegation
will not make it necessary for us to submit new credentials
for the Delegation. We should be grateful if you could
confirm this point with the Secretariat.

J. A. BEESLEY

Under-Secretary of State
for External Affairs.

File, Diary, Div.Diary, Tel. File
MESSAGE

FM/DE	EXTERNAL OTT	DATE	FILE/DOSSIER	SECURITY SECURITE	
		18 FEB. 1969	20-3-1-6	RESTRICTED	
TO/A			NO	PRECEDENCE	
			L-240	ROUTINE	
INFO					

REF YOURTEL 144 - FEB. 4/69

SUB/SUJ LAW OF TREATIES CONFERENCE - ARTICLE 5 - SUDAN

PLEASE MAKE REPRESENTATIONS TO SUDANESE GOVERNMENT CONCERNING ARTICLE 5 IN ACCORDANCE WITH INSTRUCTIONS CONTAINED IN OURLET L-737(M) OF SEPT.10/68, A COPY OF WHICH WAS FORWARDED TO YOU UNDER COPY OF OURLET L-70 OF JAN.8/69 ASKING THAT YOU MAKE SIMILAR REPRESENTATIONS TO THE UAR.

2. IF YOU OR A SENIOR MEMBER OF THE EMBASSY EXPECT TO BE IN KHARTOUM BEFORE END OF MARCH, REPRESENTATIONS COULD BE MADE ORALLY AT THAT TIME. OTHERWISE AIDE MEMOIRE SHOULD BE SUBMITTED UNDER COVER OF A PERSONAL LETTER TO APPROPRIATE SUDANESE GOVERNMENT REPRESENTATIVE.

DISTRIBUTION
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ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG.....	LEGAL	2-5406	SIG..... J. A. BEESLEY

MESSAGE

FM/DE	EXTRNL OTT	DATE	FILE/DOSSIER	SECURITY SECURITE
		18 Feb. 1969	20-3-1-6	RESTRICTED
TO/A	PT. AU SPAIN	NO	PRECEDENCE	
		L-241	ROUTINE	
INFO				

REF YOURTEL 209 JAN. 31/69

SUB/SUJ LAW OF TREATIES CONFERENCE - BARBADOS - ARTICLE 5

AS SOON AS YOU RECEIVE CONFIRMATION OF BARBADIAN INTENTION TO
BE REPRESENTED AT SECOND SESSION, LAW OF TREATIES CONFERENCE,
YOU SHOULD MAKE FULL REPRESENTATIONS DESCRIBED IN OURLET
L-737(M), INCLUDING DELIVERY OF AIDE MEMOIRE ~~WE~~ AND INFORM
US ACCORDINGLY.

DISTRIBUTION
LOCAL/LOCALE

NO STANDARD

ORIGINATOR/REDACTEUR

DIVISION

TELEPHONE

APPROVED/AUTORISE

SIG.....

LEGAL

2-5406

SIG.....

J.A. BEESLEY

J.A. BEESLEY

FILE, DIARY, DIV. DIARY, TEL. FILE

MESSAGE

EXTERNL OTT

FM/DE

DATE	FILE/DOSSIER	SECURITY SECURITE
18 FEB. 1969	20-3-1-6	RESTRICTED

VIENNA

TO/A

NO

PRECEDENCE

L-242

ROUTINE

COPENHAGEN

INFO

REF COPENHAGEN TELEGRAM 68 OF FEB.10/69

SUB/SUJ LAW OF TREATIES - ARTICLE 5

WE AGREE THAT, UNDER RULES OF PROCEDURE, ANY AUSTRIAN AMENDMENT TO ARTICLE 5 WOULD HAVE TO BE VOTED UPON BEFORE VOTE ON ADOPTION OF PARA 2. WE ALSO RE CONCUR IN VIEW THAT AN UNSUCCESSFUL ATTEMPT TO AMEND ARTICLE 5 MAY LEAD TO CONFUSION OVER VOTING IN RESPECT OF PARA 2 AND CREATE DIFFICULTIES IN SECURING SEPARATE VOTE ON PARA 2.

2. WE SHOULD BE GRATEFUL THEREFORE IF YOU COULD INFORM NETTEL THAT, WHILE WE APPRECIATE FINAL DECISION WHETHER OR NOT TO TABLE AMENDMENT RESTS WITH AUSTRIANS, IT IS OUR OWN STRONGLY HELD VIEW THAT, UNLESS AUSTRIANS ARE FIRMLY CONVINCED THEY CAN SECURE TWO-THIRDS MAJORITY FOR AMENDMENT WHICH FAILED TO OBTAIN SIMPLE MAJORITY AT FIRST SESSION, REINTRODUCTION OF AUSTRIAN AMENDMENT WOULD LIKELY LEAD TO VOTING CONFUSION AND POSSIBLE RETENTION OF PARA 2. YOU SHOULD INFORM NETTEL THAT WE APPRECIATE THEIR OBJECTIVE IS TO IMPROVE PARA 2 IN A WAY THAT WOULD MAKE IT .. CONTD.

DISTRIBUTION
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NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG..... ISSTANFORD:25	LEGAL	2-5406	SIG..... J. A. BEESLEY J. A. BEESLEY

-2- RESTRICTED

ACCEPTABLE TO US. WE ARE CONVINCED HOWEVER, IN THE LIGHT OF
FAILURE OF ADOPTION OF AUSTRIAN AMENDMENT AT FIRST SESSION, THAT
DELETION OF PARA 2 IS BEST WE CAN HOPE FOR AND THAT EFFORTS OF
OPPONENTS OF PARA 2 SHOULD BE DIRECTED TOWARD THIS OBJECTIVE.

**

CANADIAN EMBASSY



AMBASSADE DU CANADA

Prinsesse Maries Allé 2,
1908 COPENHAGEN V, Denmark,
February 17, 1969.

20-3-1-6

371

Re: Law of Treaties Conference -
Second Session-Credentials

Dear Joe,

Someone has sent me a copy of the Circular Letter dated January 31 addressed by Stavropoulos to the SSEA and presumably to the Foreign Ministers of all governments. In addition to asking for confirmation that the Canadian Government intends to participate in the Second Session, the letter refers to the question of Credentials.

I cannot seem to find a copy of the Credentials issued last year for the Canadian Delegation. Presumably those credentials included your name and that of Robertson in addition to mine. The Credentials are valid for the Second Session.

I doubt that it is necessary to ask the SSEA to sign new Credentials for the Second Session, but it may be desirable for you, in the reply you will send to the letter of January 31st to the U.N., to give a revised list of the members of the Canadian Delegation.

Incidentally, it might be appropriate for Beesley to be listed as Deputy-Chairman of the Delegation, rather than as "an Adviser".

Yours sincerely,

M.H. Wershof

J.S. Stanford, Esq.,
Treaty and Economic Section,
Legal Division,
Department of External Affairs,
OTTAWA

UNITED NATIONS  NATIONS UNIES

NEW YORK

CABLE ADDRESS • UNATIONS NEWYORK • ADRESSE TELEGRAPHIQUE

REFERENCE:

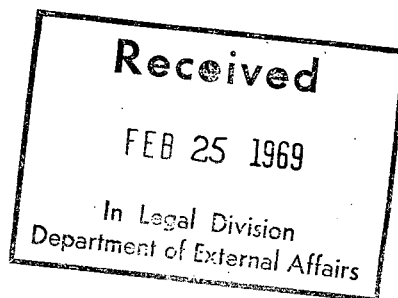
LE 113(5-2-1) GOV

TO: <i>M. St. Pierre</i>
FROM REGISTRY
FEB 24 1969
FILE CHARGED OUT
TO:

20-3-1-6	
14	MR

The Secretary-General of the United Nations presents his compliments to the Secretary of State for External Affairs of Canada and, with reference to his letter LE 113(5-2-1) GOV of 31 January 1969 concerning the second session of the United Nations Conference on the Law of Treaties to begin in Vienna on 9 April 1969, has the honour to transmit herewith a circular supplied by the Government of Austria, regarding hotel accommodations for delegations, and a postcard by which reservations may be requested. Additional copies of these enclosures may be obtained upon request to the Codification Division, Office of Legal Affairs.

17 February 1969

YB*23/25/2*

SENDER / EXPEDITEUR:

Name

.....
First name / Prénom:

.....
Street / Rue:

.....
City / Ville:

.....
Country / Pays:

CARTE POSTALE
POST-CARD

KONGRESSBÜRO
ÖSTERREICHISCHES
VERKEHRSBÜRO

KÄRNTNERSTRASSE 21-23
A-1010 WIEN
(Austria)

003361

Announcement for the
Bulletin d'inscription pour la

**UNITED NATIONS CONFERENCE ON THE LAW OF STATE RESPONSIBILITY
CONFERENCE DES NATIONS UNIES SUR LE DROIT DES TRAITES
Vienna, 9. 4.-21. 5. 1969, 2nd Session**

Name:
Nom:

First Name:
Prénom:

Title:
Titre:

Country:
Pays:

Address:
Résidence:

Street:
Rue:

As participant in the Conference, I order / Comme participant à la Conférence, je commande

single room
.... chambre à un lit

double room
.... chambre à deux lits

with bath
avec bain

without bath
sans bain

category:
catégorie: A1 A B

Day of arrival in Vienna:
Jour d'arrivée à Vienne:

Day of departure:
Jour de départ:

• Please delete non applicable figures
Biffez la mention inutile s.v.p.

Date/Date:

Deadline of Application: March 15th, 1969

Fin d'inscription: le 15 mars 1969

.....
Signature/Signature

003362

UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES
CONFERENCE DES NATIONS UNIES SUR LE DROIT DES
TRAITES

Vienna, 9. 4. - 21. 5. 1969

HOTEL ACCOMMODATION

The Austrian Travel Agency, ÖSTERREICHISCHES VERKEHRSBÜRO, in charge of hotel accommodation, kindly requests all participants to apply for room-reservations mailing the annexed card to the Austrian Travel Agency, Congress-Department, Kärntnerstrasse 21 - 23, 1010 Vienna. Upon receipt of your application card we shall inform you about the provisional booking that has been made for you. Kindly confirm the reservation by return mail. Please let us know immediately of any changes of arrival and departure time or of any cancellations. We regret that we shall have to charge you with the cancellation-fees and for changes not notified in due time. Before making your choice of the desired hotel-category kindly consult the price-list below. Prices are given in Austrian Schillings per night, including service, taxes and breakfast in category A1 and B, and including demi-pension in category A.

LOGEMENT D'HOTEL

L'Agence de Voyages Autrichienne, ÖSTERREICHISCHES VERKEHRSBÜRO, a été officiellement chargée de la réservation de chambres et prie les congressistes de commander leurs chambres au moyen de la carte ci-jointe, laquelle nous vous prions de retourner au ÖSTERREICHISCHES VERKEHRSBÜRO, bureau de congrès, Kärntnerstrasse 21 - 23, 1010 Vienne. Dès réception de cette carte de commande nous vous enverrons une carte sur laquelle sera indiquée le nom de l'hôtel dans lequel nous avons effectué la réservation préliminaire. Veuillez nous envoyer votre confirmation par retour du courrier. Veuillez bien nous faire connaître, au plus tôt possible, tous changements de dates d'arrivée et de départ ou, le cas échéant, une éventuelle annulation. Les frais, résultant d'une annulation prononcée trop tard, seront imputés au client. Pour une chambre retenue et non occupée vous encourrez les frais, que l'hôtel nous charge pour la première nuit. Avant de fixer votre choix, veuillez bien consulter la liste ci-dessous. Les prix signalés s'entendent en Schillings autrichiens pour la chambre, services et taxes compris, dans les catégories A1 et B le petit déjeuner inclus, dans la catégorie A la demi-pension incluse.

category/catégorie	A1	A	B
single/single			
with bath/avec bain	400,-/ 600,-	300,-/420,-	180,-/250,-
without bath/sans bain	-----	250,-/350,-	95,-/180,-
double/double			
with bath/avec bain	670,-/1.010,-	500,-/650,-	265,-/400,-
without bath/sans bain	-----	450,-/600,-	170,-/350,-

DEADLINE OF APPLICATION/FIN D'INSCRIPTION: 15. 3. 1969

003363

UNITED NATIONS



NATIONS UNIES

NEW YORK

~~CABLE ADDRESS~~—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

LE 113(5-2-1) GOV

REFERENCE:

et, se référant à sa lettre LE 113(5-2-1) GOV du 31 janvier 1969 relative à la deuxième session de la Conférence des Nations Unies sur le droit des traités, qui s'ouvrira à Vienne le 9 avril 1969, a l'honneur de lui transmettre ci-joint une circulaire, établie par le Gouvernement autrichien, qui concerne les logements prévus pour les délégations dans les hôtels, ainsi qu'une carte postale que les délégations peuvent utiliser pour réserver des chambres. Des exemplaires supplémentaires des pièces jointes peuvent être obtenus sur demande auprès de la Division de la codification (Service juridique).

Le 17 février 1969

ylb

File 20-3-1-6
1137
ACTION COPY

Received

FEB 17 1969

**In Legal Division
Department of External Affairs**

FM COPEN FEB17/69 CONF NO/NO STANDARD

TO TT EXTER 37 DE HAGUE

STANFORD, LEGAL DIV DE WERSHOF

LAW OF TREATIES-PART V SETTLEMENT OF DISPUTES

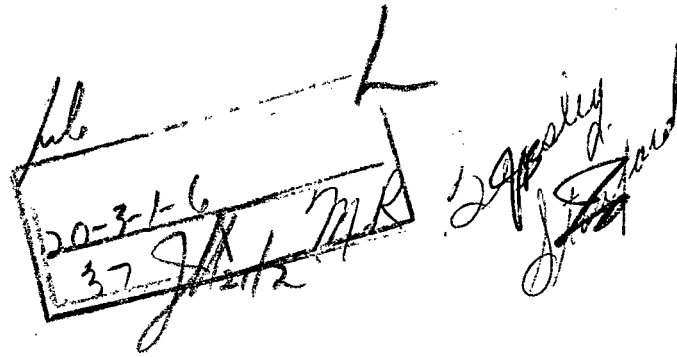
*If Blix
does it
we
might
consider
doing
it*
WHEN REVIEWING THIS PROBLEM PLEASE DISCUSS BLIX SUGGESTING THAT THOSE
WESTERN COUNTRIES THAT CONSIDER IT IMPORTANT HAVE COMPULSORY
THIRD PARTY SETTLEMENT PROCEDURES SHOULD BE PREPARED TO SAY AT VIENN
(BOTH PUBLICLY AND IN CORRIDORS) THAT PART V IS QUOTE NOT/NOT ACCEPT-
ABLE UNQUOTE WITHOUT SUCH PROCEDURES. HIS BELIEF IS THAT A FIRM WEST-
ERN LINE ON THIS MAY INFLUENCE MANY AFROASIANS WHO ARE ANXIOUS TO
COMPLETE A CONVENTION THAT IS LIKELY TO BE SIGNED BY WESTERN COUNT-
RIES.

Parham
2. YOU KNOW SPECIAL CDN TACTICAL PROBLEM RESULTING FROM TIMING OF
DEBATE ON ARTICLE 62 IS PRIOR TO CONSIDERATION IN PLENARY OF
ARTICLE 5(2). NEVERTHELESS I THINK CDA WILL FIND IT AWKWARD TO LAG
BEHIND WESTERN FRIENDS IF MOST OF THEM (INCLUDING USA AND UK)
SPEAK AS BLIX SUGGESTS.

003365

13/17/2

ACTION COPY



FM COPEM FEB14/69 CONF NO/NO STANDARD

TO IT EXTER 85 DE HAGUE

LEGAL DIV ONLY DE WERSHOF

REF BERN TEL 85 FEB11

LAW OF TREATIES ART 5(2)SWISS POSITION

I PRESUME YOUR REPLY TO BERN WILL BE CONSIDERED WHEN STAFORD RETURNS. MY VIEWS ON BERN'S POINTS FOLLOW. (B) AS STATED OURTEL 67 THERE IS DANGER THAT APPROACH TO SPULER (UNLESS EMB COULD TALK TO HIM) AND BINDSCHLDLER JOINTLY) WOULD ANNOY LATTER. (C) OF COURSE POSITION FO SWITZERLAND IS PARTICULARLY IMPORTANT AS IT IS SOLE WESTERN FEDERAL STATE THAT CLEARLY OPPOSED CDA ON THIS ISSUE AND SWISS EXAMPLE IS INFLUENTIAL ON THE MATTER. (D) OBJECTIVELY ADOPTION OF 5(2) WOULD NOT/NOT GIVE THE QUOTE LEGAL JUSTIFICATION UNQUOTE PREFERRED TO BUT IN PRACTICE IT WILL HELP FRANCE/QUEBEC.

2. I AGREE IT IS DIFFICULT TO ASK SWISS TO VOTE SUBSTANTIVELY AGAINST 5(2) WHICH COINCIDES EXACTLY WITH ITS CONSTITUTION (ALTHOUGH GERMANY FINDS NO/NO SUCH DIFFICULTY). HOWEVER SWISS DO NOT/NOT NEED PRETENCE OF 5(2) AND WOULD NOT/NOT MISS IT IF IT WERE NOT/NOT THERE. IT FOLLOWS IN MY VIEW THAT THERE IS A CASE FOR ASKING SWISS TO VOTE FOR (OR AT LEAST ABSTAIN ON) OUR PROCEDURAL REQUEST THAT SEPARATE VOTE ON PARA1 AND 2 OF ARTICLE 5 COULD JUST AS WELL HAVE BEEN SEPARATE ARTICLES AND IS ALSO JUSTIFIABLE IN FAIRNESS TO CDA. IF WE CAN WIN PROCEDURAL VOTE SWISS COULD THEN PERFECTLY LOGICALLY WISH TO RETAIN PARA2 AS BEING IN ACCORD WITH THEIR CONSTITUTION.

1.17.2

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COP4/13

RR VNA RR OTT

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FM COPEN FEB13/69 NO/NO STANDARD

TO VIENN 83

INFO EXTER(LEGAL DIV)

REF LDN TEL 599 FEB4

LAW OF TREATIES-HOTEL

MISS TAYLOR FROM COPEN WILL BE SECRETARY FOR FIRST PART

ARRIVING APR3 RPT 3 AND DEPARTING MAY6. OTT WILL SELECT HER SUCCE-
SOR TO ARRIVE MAY5 OR 6 AND REMAIN TO END OF CONFERENCE

WERSHOF

cc TO BISSONNETTE

cc Pers Ops (Miss Shea)

done Feb. 19/69 38
file 1/18/2

20-3-1-6
14 | MR

2.14.2

NNNN

003367

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

20-3-1-6

Strasbourg, 12th February 1969

Confidential
GR/Traité (69) 3

Or. Fr.

publ. 6

AD HOC COMMITTEE ON THE LAW OF TREATIES

Summary account of the
discussions of the meeting
held in Paris from
6th to 8th February 1969

1. The ad hoc Committee on the law of treaties, composed of representatives of the member States of the Council of Europe and other States belonging to the "Western European and Others" Group at the General Assembly of the United Nations, met at the Paris Office of the Council of Europe from 6th to 8th February 1969.
2. The task of the Committee was to prepare, through an exchange of views, the 2nd Session of the Vienna Diplomatic Conference on the law of treaties which will open on 8th April 1969.
3. The meeting was opened on behalf of the Secretary General of the Council of Europe by Mr. H. GOLSONG, Director of Legal Affairs of the Council of Europe. On the motion of Sir Francis VALIAT (United Kingdom), Mr. Lucien HUBERT (France) was elected Chairman by acclamation. A list of those who attended the meeting is appended hereto.

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GR/Traités (69) 3

- 2 -

4. On a motion from the Chair it was agreed to follow, during the exchange of views, the plan prepared by the Council of Europe Secretariat (document GR/Traités (69) 1), which consists of two parts grouping together the provisions of the draft Convention on the law of treaties, the final examination of which was deferred to the 2nd Session of the Vienna Conference, and a certain number of articles of the said draft which were provisionally adopted at the 1st Session of the Vienna Conference and which certain Governments had proposed for further discussion in this Committee.

5. This document gives below an unofficial summary of the discussions. This summary does not disclose, except in certain rare cases where necessary for the understanding of the course of the discussions, the individual positions adopted by each participant. This document was drawn up at the request of the participants by the Council of Europe on its own responsibility.

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Provisions of the draft Convention
on the law of treaties, the
decision on which has been deferred
to the 2nd Session of the Vienna
Conference

I. The right of participation in treaties

6. Referring to the initiatives taken at Vienna concerning the general problem of participation in multilateral treaties (Algerian proposal, etc., on Article 5 bis, and Czechoslovakian proposal on Article 12), several participants stated that they were in principle opposed to the "all States" clause as regards the category of general multilateral treaties. They pointed out in particular that such a clause would introduce an element of coercion in the conclusion of treaties, by limiting the freedom of States to determine, at the time of the negotiation of a multilateral treaty, the circle of parties thereto; moreover, this objection would, in the opinion of certain participants, be equally valid in respect of the attempt to define the category of restricted multilateral treaties which would, under the future Vienna Convention, not be open to accession by States other than those which took part in their negotiation (cf. point II below). This restriction on contractual freedom would, in fact, destroy the very basis of the law of treaties. Furthermore, the same participants shared the fear that the "all States" clause permits political entities not recognised as States to assert their existence in the field of international relations; the special character of treaties in the context of limitation of armaments and space law would prevent consideration of the system of plurality of depositaries as a valid precedent for all multilateral treaties. Finally, it seems impossible to find a precise and satisfactory definition of categories of general and restricted multilateral treaties.

7. The Representative of the Federal Republic of Germany stressed the importance attached by his Government to this question, granted in particular, though not exclusively, the existing political situation in Europe. In this Government's view, it would be a grave political error to abandon, in the future Vienna Convention, the constant practice in such a matter, namely to define in the multilateral treaty explicitly, the circle of States which can become parties to that multilateral treaty. As regards the general aspect of the question, namely the participation of

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States in multilateral treaties covered by the future Vienna Convention, neither the proposal of Algeria, etc., seeking to insert a new Article 5 bis (right of participation in general multilateral treaties "all States" clause), nor the Czechoslovakian proposal concerning a new Article 12, paragraph 2 (accession by all States to a multilateral treaty) can be accepted, since in the absence of a competent tribunal to determine with binding force the requirements of Statehood, they would open the possibility for any entity whatsoever, which terms itself a State, to impose its presence in the international community. Furthermore, these proposals are defective on account of the absence of any definition of the category of "general multilateral treaties" such as proposed by the Congo etc., in respect of Article 2, paragraph 1. As to the particular aspect of the question, namely participation in the future Vienna Convention, the classic clause, called the "Vienna formula", which opens this participation to member States of the United Nations and its specialised Agencies to States Parties to the Statute of the International Court of Justice and to States which shall be invited by the General Assembly of the United Nations, continues to correspond perfectly to the needs of the international community. The system of a plurality of depositaries, such as was adopted for the treaty on the prohibition of nuclear tests in the atmosphere, for the treaty on the non-proliferation of nuclear weapons, and for the treaties on space law (matters which are bound up with security and the preservation of peace which require compromises at a political level) cannot be transposed into the field of multilateral treaties in general.

8. In the course of the exchange of views, it was emphasised that a certain number of States seemed to attach great importance to the insertion of an "all States" clause similar to those proposed by Algeria etc., and by Czechoslovakia in the future Vienna Convention; it was not therefore out of the question that a solution might be sought or offered at Vienna seeking to obtain a compromise by the acceptance of, on the one hand, an "all States" clause and, on the other, the proposal relating to a new Article 62 bis concerning the settlement of disputes arising out of Part V of the draft Convention (cf. point III below). It would therefore be useful to know the position which would be adopted by the States participating in this meeting in the face of such an initiative. On this point, several participants insisted on the necessity of a strict separation of the two problems in question which

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could be examined and resolved only according to the criteria appropriate to each. It was in particular observed that the proposal to insert an Article 62 bis concerning the settlement of disputes arising out of Part V of the draft Convention already constituted one element of an attempted compromise, since it was destined to introduce a safeguard of a procedural nature, as a counter balance to the defective character of some of the substantive provisions appearing in Part V which were considered as being difficult to accept in the absence of this procedural safeguard; consequently it would be inconceivable to treat it as an element in a second compromise solution in exchange for the acceptance of an "all States" clause. Moreover, doubts had been expressed on the question of whether the promoters of this clause were prepared to accept, within the automatic settlement provided for in Article 62 bis, compulsory arbitration and thus to go beyond an engagement to have recourse to mere conciliation. In any event, compulsory arbitration should remain the sine qua non of acceptance of Part V of the draft Convention. Finally, one participant recalled that the "all States" clause needed, for its adoption, to be supported at Vienna by a two-thirds majority. His Government continued to hope that such a majority would not be obtained and it was with this in view that he would vote against proposals concerning the "all States" clause.

9. Certain participants stated that their Governments' positions were less rigid. Thus according to one point of view, the "all States" clause might just be acceptable, on condition that it were clearly laid down that this clause is of a dispositive nature and not part of the jus cogens; however, it was replied that the wording of proposals of Algeria, etc. concerning Article 5 bis and of Czechoslovakia concerning Article 12, were without doubt of an imperative character. In the opinion of another participant it was necessary to separate the problem of participation in treaties from that of recognition of States: If the parties to a multilateral treaty retain the possibility of refusing to recognise as a State another Party to the same treaty, the "all States" clause should not pose a major problem. Furthermore, the same participant was opposed to the thesis according to which the will of States constitutes the only basis of treaty law; in the same way as it is necessary to accept the existence of imperative rules in international law (jus cogens), so it ought to be accepted that there exists in principle no objection to the idea of each State's right to participate in general multilateral treaties. In consequence, his Government would be prepared to accept a compromise solution containing the acceptance of the "all States" clause, and of Article 62 bis.

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GR/Traités (69) 3

- 6 -

10. As regards participation in the future Vienna Convention, it was agreed by the majority of the participants that the classical formula, the "Vienna formula", should be upheld, namely that which appears in the final clauses of the Vienna Conventions of 1961 and 1963 on diplomatic and consular relations; a substantial modification of this formula in the Convention on the law of treaties would risk undermining the treaty system established by these two earlier Conventions. According to one of the participants, however, there should be no exclusion in advance of any modification of less importance such as the addition of the qualification of a State which is a "member of a regional organisation" or recognised by a number of member States of the United Nations to be determined.

11. One of the participants advanced the hypothesis that none of the final clauses on this matter would obtain the two-thirds majority; the Group should therefore reconsider the problem at Vienna.

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II. Restricred multilateral treaties

(with respect to adoption, reservations, application, amendment, modification, temporary suspension and consequences of the termination of a treaty)

12. The Representative of France explained that his Government's proposals concerning Articles 2, 8, 17, 26, 36, 37, 55 and 66 of the draft Convention were of a technical nature without any political implications, since they sought only to clarify a provision already appearing in the International Law Commission's draft (Article 17, paragraph 2), and to ensure its application to problems other than those already covered by that provision. Besides, the definition of the category of restricted multilateral treaties does not involve the necessity of defining also a category of general multilateral treaties and therefore in no way prejudices the position to be adopted in respect of the proposal seeking to introduce the notion of such general multilateral treaties (cf. point I above).

13. In reply to a question on the advisability of a proposal seeking to define restricted multilateral treaties, in particular taking into consideration the refusal, by the majority of participants, of a definition of general multilateral treaties, with a view to avoiding any fetter on contractual freedom, the Representative of France declared that his Government will examine with interest any suggestion seeking to resolve, without recourse to a definition of restricted multilateral treaties, the technical problem underlying its proposals.

14. The Representative of Australia confirmed the proposed amendment already tabled by his delegation at Vienna which seeks to insert at the beginning of Article 37, paragraph 1, and of Article 55, the following words (cf. A/CONF.39/C.1/L.237 and A/CONF.39/C.1/L.324):

"Except in the case of a treaty of the type referred to in paragraph 2 of Article 17".

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III. Settlement of disputes in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

15. In a general manner, the participants emphasised that the substantive provisions of Part V of the draft Convention on the law of treaties, as provisionally adopted at the 1st Session of the Vienna Conference, were not satisfactory in their entirety, in spite of certain improvements on the draft presented by the International Law Commission. The imperfections of these provisions involve serious risks for the stability of international treaty relations and are of such a nature as to raise considerable difficulties in application which should be resolved, or at least reduced, in the interests both of the Contracting Parties to international treaties, and of the international community in general, by a satisfactory procedure for the settlement of disputes in this matter.

16. Several participants furthermore emphasised that in the opinion of their Government, the substantive provisions of Part V would be unacceptable if not accompanied by an adequate procedural safeguard, with a view to the settlement of disputes relating to their interpretation or application. On the other hand, some participants, although considering such a safeguard as being highly desirable, were unable to state whether their Governments would consider the insertion of provisions concerning the settlement of disputes as a condition indispensable for their acceptance of Part V of the draft Convention. Even so, it was in general agreed that the procedural provisions, the insertion of which in Part V of the draft should be proposed, ought to provide an effective method of settling disputes, namely automatic recourse to a procedure permitting a final and binding decision to be arrived at, given by a tribunal independent of the parties to the dispute.

17. With this in view, the participants proceeded to a very detailed exchange of views on the proposed amendments to the draft Convention presented by a certain number of Governments, seeking to insert a new Article 62 bis relating to the settlement of disputes arising out of Part V of the draft. As regards first the proposed amendment tabled by the Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, the Netherlands, Peru, Sweden and Tunisia ("proposal of the 13", document A/CONF.39/C.1/L.352, Rev.2 and GR/Traités (69) 1, Addendum 1, point 1), the

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Representative of the United States of America explained the content and scope of the modifications proposed by his Government in a note addressed to a certain number of Governments (cf. document GR/Traités (69) 1, Addendum 2). These modifications, designed to improve the text of the Proposal of the 13, concern a more precise and detailed definition of the duties of the Secretary General of the United Nations, special provisions for handling disputes over multilateral treaties, speeding up of procedures through shorter time periods, the possibility for the Conciliation Commission to make interim reports and recommendations during the proceedings, and the reduction of the time periods provided for selection of the arbitral tribunal. Furthermore, the United States Government made two supplementary proposals, one seeking the creation within the United Nations of a permanent body of conciliators, responsible for ensuring a certain continuity in the application of Part V of the future Vienna Convention, the other attributing to the Conciliation Commission the power of requesting, subject to the agreement of the parties to the dispute, an advisory opinion of the International Court of Justice on legal questions of special importance.

18. The Representative of Switzerland confirmed his Government's intention to maintain at the 2nd Session of the Vienna Conference its proposed amendment concerning a new Article 62 bis (A/CONF.39/C.1/L.377 and GR/Traités (69) 1, Addendum 1, point III). This proposal would, in the opinion of the Swiss Government, present considerable advantages as against the "proposal of the 13", in that it provides for recourse to the jurisdiction of the International Court of Justice by the simple request of one of the parties to the dispute and that it puts at the disposition of the parties to the dispute a very simple arbitral procedure. On the other hand, the proposal of the 13 is open to many criticisms: First, the procedure provided for is too weighty, too costly and too long, whereas the disputes which it is supposed to settle are in general very urgent. Secondly, it gives a choice of conciliation, although it is doubtful whether this mode of settling disputes is the most appropriate in cases where normally it is not necessary to determine the facts and to seek a political settlement, but to deal with questions of law; conciliation could at the most be provided for as a supplementary and optional method of settlement. Furthermore, the absence of any reference to the International Court of Justice, the judicial organ called upon to ensure the continuity of international case law and to guarantee the integrality of public international law, is highly deplorable. As regards the duties conferred on the Secretary General of the United Nations, it should not be forgotten that

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this highly placed administrative and political official is exposed by reason of his normal duties, to risks of his actions being questioned and doubts being cast on his impartiality; consequently it would be preferable to entrust the tasks provided for by Article 62 bis either to the President of the International Court of Justice or to the Secretary General of the Permanent Court of Arbitration at The Hague. The composition of the conciliation commission and the arbitral tribunal, as provided for in the proposal of the 13, is defective since it includes only one neutral member out of five. Moreover, the procedure laid down in the proposal of the 13 contains a lacuna as regards the finding of the failure of conciliation which opens the door to abuse. Lastly, it would be preferable not to contribute to the proliferation of international organs by creating a new list of conciliators within the United Nations when there exists already a similar list for the Permanent Court of Arbitration of The Hague. As regards the improvements proposed by the United States, the Swiss Government does not consider them suitable to remedy the principal defects of the proposal of the 13 as set out above. The distinction between disputes over bilateral treaties and those over multilateral treaties raises more problems than it solves; consequently it would be preferable to follow the institution of intervention as laid down in the Statute of the International Court of Justice. As for the supplementary proposals of the United States, as they appear also from the proposed amendment tabled at Vienna in 1968 (A/CONF.39/C.1/L.355), the Representative of Switzerland pronounced himself in favour of the possibility of requesting advisory opinions of the International Court of Justice but expressed doubts as regards the creation of a permanent body of conciliators, the desire for continuity not being of prime importance in respect of conciliation, which seeks to settle a particular dispute rather than to deal with questions of law.

19. The Representative of Japan stated that his Government, although prepared to study alternatively the proposals of the 13 and those of the United States, was unable to withdraw its proposed amendment concerning a new Article 62 bis (A/CONF.39/C.1/L.339 and GR/Traités (69) 1, Addendum 1, point II), which, like the Swiss proposal, stresses judicial proceedings before the International Court of Justice.

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20. During the exchange of views, the participants considered in particular the chances of success of the proposal presented aiming at the insertion of a new Article 62 bis in Part V of the draft Convention. It was emphasised that these chances depended on the willingness of States, which were not, in principle, favourable to compulsory arbitral or judicial settlement, to accept a compromise on this point with a view to obtaining from other States the acceptance of the whole of the Convention on the law of treaties and, in particular, Part V. The evident desire of a number of Afro-Asian States to bring about the conclusion of a universal Convention on this matter allowed a certain optimism concerning the chances of a proposal relating to the compulsory settlement of disputes arising out of Part V on condition, on the one hand, that it was vigorously upheld by its authors and presented as an indispensable element of a compromise solution for the acceptance of the substantive provisions of Part V, and on the other, that it took account of the certain refusal by many States to accept extreme solutions of the question. Several participants, while declaring themselves in principle very favourable to the proposals made by Switzerland and Japan, nevertheless indicated that they preferred to give their support to a proposal along the lines stated in the amendments proposed by the 13 and by the United States, rather than to involve themselves in a battle, lost from the very outset, the certain result of which would scarcely leave any alternative solution. Furthermore, the proposal of the 13, possibly improved by certain suggestions made by the United States, seemed to them to provide a satisfactory solution, compulsory recourse to the jurisdiction of the International Court of Justice not possessing an overriding importance, while the principle of an automatic and objective settlement of disputes could be achieved by other appropriate means. It was in this frame of mind that the participants proceeded to an examination in depth of the proposal of the 13, and of the United States suggestions, with a view to finding a text capable of gaining the support of the largest possible number of States and giving the best possible solution in the present political context.

21. This examination concerned the following points:

- (i). Some participants regretted that neither the proposal of the 13, nor that of the United States included a reference to the International Court of Justice; such a reference should not necessarily include the obligation to have recourse to

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legal proceedings before this Court, but only to indicate the possibility, perhaps adding a reservation in favour of obligations flowing from declarations of acceptance of the Court's jurisdiction. In this context, attention was drawn to the provision of similar scope which appears in paragraph 4 of Article 62 of the draft Convention; the absence of a provision similar to Article 62 bis might be interpreted as excluding recourse to the International Court of Justice for the disputes covered by that Article. Other participants, however, were of the opinion that on account of the hostility existing in certain quarters to The Hague Court, it would not be advisable to enter into a battle on this point; one participant observed that, in spite of the limitation on the effects of judgments of the Court to the parties to the dispute, a negative argument could be drawn from the fact that the Court could be called upon to deal with disputes on multilateral treaties certain Contracting Parties to which, by reason of their negative attitude towards the Court, might refuse any idea of intervention in the proceedings on such disputes.

- (ii) Several participants expressed doubts as to the advisability of the distinction between disputes over bilateral treaties and those over multilateral treaties introduced by the United States in respect of the conciliation procedure. In the first place it was observed that this distinction would complicate considerably the proposed amendment which should be as simple as possible to have a chance of success. Furthermore, the parties to a dispute over a multilateral treaty cannot always be reduced to two opposing camps; in such cases the United States suggestion would not be capable of solving the problem. Finally, and most important, the effects of the United States suggestion on the position of the parties to the treaty who are not at the same time parties to the dispute, raised a certain number of objections: Thus it was observed that the transmission of the application to all the parties to the treaty and their automatic power to submit orally or in writing, observations to the conciliation Commission were not appropriate for conciliation which, seeking to achieve a friendly settlement between the parties to the dispute, must necessarily remain secret; it would be difficult to determine the value of the observations made by parties not involved in the dispute, for the recommendations to be made to the conciliation Commission. For all these reasons, several participants were of the opinion that the problems

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posed by disputes over multilateral treaties could be solved in a simpler manner by the intervention procedure, similar to that provided for in the Statute of the International Court of Justice. Other participants pointed out that at the conciliation stage, the power of the conciliation Commission might be limited to inviting, with the agreement of the parties to the dispute, the other parties to the treaty in question to submit their views to it.

- (iii) Certain participants drew attention to the difference, not only in degree, but also in kind, between conciliation and arbitration; this difference seemed to be neglected in the proposed amendments in question which sought to attribute to conciliation the rôle of a first instance procedure, arbitration having the character of an appeal procedure. This tendency was particularly apparent in the United States proposal under which the report of the conciliation Commission would also include conclusions on the questions of substance of the dispute. With a view to maintaining the true nature of conciliation, it would be better not to endorse this proposal in spite of the advantages which it might offer in cases where conciliation is not followed by arbitration.
- (iv) The United States proposal seeking to confer on the conciliation Commission the power of making recommendations during the proceedings, dealing with the respective rights of the parties to the dispute, raised objections from one participant only, who opposed it on the grounds that the text to be presented should be as simple as possible.
- (v) As regards the time limits for the proceedings, the United States proposals were in general considered as representing improvements on the procedure envisaged by the 13, notwithstanding a certain apprehension as to their total length.
- (vi) Not all the participants expressed the same reactions to the rôle entrusted by the proposals in question to the Secretary General of the United Nations. While one participant declared support for the opinion expressed by the Representative of Switzerland (above, point 18), others were of the opinion that the Secretary General, elected with the agreement of the Great Powers represented at the Security Council of the United Nations, could be considered as enjoying sufficient confidence for the impartial discharge of the duties provided for in the draft of Article 62 bis.

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(vii) As regards the costs of the proceedings of the settlement of disputes to be provided for in Article 62 bis, one participant observed that there should be taken into consideration not only the direct costs (functioning of the organs to be set up for the proceedings), but also the indirect costs (participation of the parties in the proceedings). This aspect of the question caused considerable anxiety to a large number of Afro-Asian States.

22. Furthermore, the participants examined certain more general problems raised by the draft of a new Article 62 bis, namely:

- (i) It was observed that the provisions of this Article are of a dispositive character; thus, States will have the power of making provision in a treaty that they will not apply them to disputes relating to that treaty. Similarly, the question was raised whether it would be advisable to exclude in a general way from the field of application of these provisions, certain categories of treaties, such as peace and armistice treaties, which are not really suited to the procedures for the settlement of disputes of the type for which provision is made in Article 62 bis.
- (ii) That Article 62 bis could not have any retroactive effect was not disputed. However, while this principle raises no problems as regards disputes arising before the entry into force of the future Vienna Convention, there is a doubt, according to the opinion expressed by one participant, concerning disputes arising later with respect to treaties concluded before that date. Furthermore, it remains to be decided whether this principle concerns the application of Article 62 bis only or rather the whole of Part V of the future Vienna Convention.

23. As regards the proposals advanced by the United States at Vienna (see document A/CONF.39/C.1/L.355) opinions were divided on the question of the creation within the United Nations of a permanent conciliation commission: While some participants observed that the idea of the continuity of the case law had little value in connection with conciliation which seeks a solution ex aequo et bono in the particular case, another participant was of opinion that such an institution could be considered

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a valuable contribution to the progressive application of a mechanism appropriate for the peaceful development of international treaty relations. - On the other hand, the attribution to the conciliation Commission of the power to request advisory opinions from the International Court of Justice on legal questions of special importance was favourably commented upon; however, certain participants did not conceal their doubts as to the chances of success of such a proposal.

24. In conclusion, several participants insisted on the necessity of concerted and consistent action on the part of all the States participating in this meeting in favour of the proposal relating to Article 62 bis, the final text of which should be drawn up in the light of the exchange of views set out above and through later discussions within the more restricted framework of States directly interested in this proposal. - In reply to a question concerning the most suitable number and circle of authors of the final proposed amendment, it was agreed that it was of the greatest importance to gain for the text the support of the largest possible number of States belonging to the different Groups at the General Assembly of the United Nations; the certain advantage of such a line of action should not be sacrificed for the less certain merits of a large number of authors belonging to one and the same Group.

25. One participant having recalled the possibility of concluding an optional Protocol concerning recourse to compulsory arbitration or legal proceedings to be provided for in the event of the rejection of the proposals aiming at the insertion of a new Article 62 bis in Part V of the Convention, several participants considered it preferable not to envisage such a solution. Even if such an optional Protocol were accompanied by the power to make a reservation as to the acceptance of Part V in respect of any State which had not ratified the Protocol, the State availing itself of this power would always risk having the provisions of Part V invoked against it, these being considered by the other party as a statement of customary international law on the matter.

26. Finally, a certain number of participants were of the opinion that even in the event of the success of the proposals relating to a new Article 62 bis, their Governments would still be

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reluctant to accept certain substantive provisions of Part V of the draft Convention, as provisionally adopted at the 1st Session of the Vienna Conference, in particular the provisions of Article 49 (coercion) and Article 50 (jus cogens). The arbitrator or judge called upon to deal with disputes concerning their interpretation or application cannot rectify the vague and defective nature of this provision, the rôle of the judge not being to create the law from an ill defined base, but rather to enunciate it on solid legal bases and within the precise limits laid down by the legislator. This is particularly true as regards provisions which may be invoked in a context of special political importance. Consequently, the participants expressed the hope that it will be possible, at the 2nd Session of the Vienna Conference, to come back to the most important substantive provisions of Part V of the draft Convention with a view to improving their drafting so as to remove certain deep apprehensions concerning them.

IV. Disputes arising out of the interpretation or application of the Convention on the law of treaties

27. The Representative of Switzerland stated the reasons which lay behind his Government's proposal for the insertion at the end of the draft Convention, of a clause providing for compulsory recourse to the jurisdiction of the International Court of Justice or to arbitration for the settlement of disputes arising out of the interpretation or application of the provisions of the Convention (new Article 76; document A/CONF.39/C.1./L.250 and GR/Traités (69) 1, point IV). In his Government's opinion, a provision of this nature applicable to the provisions of Part V only of the Convention (Article 62 bis, cf. above point III) would not be sufficient, since many substantive provisions of other Parts of the Convention are equally capable of giving rise to conflicts of interpretation or application (e.g. the provisions concerning reservations, the significance of signature and ratification, rights and obligations of Third Parties, and the position of members of a Federal State, etc.). The Swiss proposal is based on the classic formulae employed in this matter but the Swiss Government reserves the right to modify it later in the light of the debates of the 2nd Session of the Vienna Conference. Moreover, in the view of the experiences of the negotiations concerning the Vienna Conventions on diplomatic and consular relations, this Government was very sceptical as to the chances of success of such a proposal. In the event of the Vienna Conference preferring such a clause appearing in an optional Protocol, it would be necessary to provide for the possibility of making a reservation whereby a Contracting Party to the optional Protocol accepts to be bound by the Convention only in respect of States which have likewise ratified the Protocol.

28. One participant observed that the Swiss proposal, while desirable from his Government's point of view, could run up against the refusal of a large number of other States which would hesitate to submit to the International Court of Justice their disputes arising from the application of any international treaty governed by that Convention; through the acceptance of its jurisdiction concerning the future Convention on the law of treaties.

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V. The problem of the retroactive effect of the Convention

29. One participant was of the opinion that the problem of the retroactivity of the provisions of the Convention was a false one as all international instruments, like all national legislative acts, in principle give rise to legal effects only from their entry into force and not retroactively, in the absence of an express provision to the contrary. This participant preferred, therefore, not to deal with the question at Vienna; For if the question were posed, there would be the risk of being confronted with a proposal providing for the retroactivity of the provisions of the future Convention.

30. The large majority of the other participants did not share this point of view. As a general rule, it is recognised that a Convention is inapplicable to past acts; however, in examining the contents of the draft Convention on the law of treaties more closely, the subject seems more complex. In reality the matter resolves itself into the three following questions:

- (i) does the Convention affect treaties concluded before its entry into force?
- (ii) does the Convention affect the application or interpretation of treaties concluded in the past as regards disputes arising after its entry into force?
- (iii) does the Convention affect disputes concerning the application or interpretation only of treaties concluded since its entry into force?

31. It was generally agreed that these questions could not concern those parts of the Convention which contain so called progressive rules of international law, and that the matters covered by provisions based only on rules of customary international law could not be affected by the presence or absence of express rules concerning the scope ratione temporis of the future Convention, although it was necessary to recognise that several provisions of the Vienna draft include, at the same time, elements drawn from customary law and aspects of a so-called "progressive" codification.

32. Several participants were of the opinion that by reason of the complexity of the matter, it was highly desirable to obtain at Vienna an express provision excluding any retroactive scope

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of the Convention so that only treaties concluded in the future would fall within the Convention's field of application. Such an express rule could certainly be accompanied by a statement to the effect that any provision of the Convention based on customary law could be applied to treaties concluded in the past provided that it were established that the rule is one of customary law. Desirable as such an express provision might appear to be, it was nevertheless agreed that it would be most difficult to obtain a majority on this point in Vienna. However, one delegation stated that even the Afro-Asian Group might be interested in a clarification on this point and, consequently, disposed to support an amendment relating to the scope of the Convention on this matter. It was therefore necessary to sound out the intentions of other countries before deciding whether a proposed amendment on this point could have a real chance of success, while at the same time bearing in mind that the situation would be seriously worsened by the failure of such a proposed amendment.

33. Other delegates were already convinced of the impossibility of obtaining a two-thirds majority in favour of an express provision against retroactivity.

34. A certain number of participants defended the view that an express rule on this point was totally unnecessary since Article 24 of the Vienna draft confirms clearly enough the principle of the non-retroactivity of an international treaty. For these participants it was even preferable not to discuss this question at Vienna; Article 24 would give sufficient arguments in a particular case at least as regards the presumption in favour of the non-retroactivity of the Vienna Convention which, if it were to be successfully concluded, would be in the form of an international treaty.

35. As regards the idea put forward at the Paris meeting of 1968 (see WE0/Traités (68) 1, rev., paras. 32 and 33) concerning retroactivity limited to a fixed date prior to the conclusion of the treaty, which would have to be decided upon, for example 24th October 1945, the date of the entry into force of the United Nations Charter, only one participant considered that this suggestion could be useful in the event of a considerable current of opinion manifesting itself at Vienna in favour of covering disputes arising over treaties concluded in the past, for example, if a State invokes Articles 49 and 50 of the Vienna draft to avoid treaty obligations contracted in the past.

36. Another participant considered that the most important problem lay in settling the position of the Convention on future disputes arising over treaties concluded in the past. In his opinion it would be perfectly possible that a certain number of other States will seek to give a retroactive character to Part V of the Vienna draft, while limiting that of Article 62 bis - if it is accepted - to disputes arising in the future out of treaties to be concluded in the future. Faced with such a possibility, a number of participants stressed that their Governments would never accept such a solution which would weaken intolerably the value of Article 62 bis as an element of compromise as regards Part V.

37. One delegate declared that it was unnecessary to be unduly worried over this matter; the International Law Commission had already examined these problems. As an example, he referred to Article 61 of the draft. This delegate preferred to leave the settlement of the whole question to practice.

38. On the proposal of one participant, it was envisaged preparing, at Vienna, the inclusion in the preamble of the Convention, of a paragraph identical to that appearing in the 1961 and 1963 Conventions, drafted as follows: "affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

VI. The possibility of making reservations to the future
Conventions on the law of treaties

39. The participants considered that, generally speaking, States should have the possibility of making reservations to the provisions of the future Convention on the law of treaties. However, no solution acceptable to the representatives at the present meeting which offered real chances of success at Vienna had as yet been found.

40. First, the majority of the participants considered that no reservation to Article 62 bis should be accepted.

41. As regards the other Articles of the draft, the question was raised whether there ought to be a move at Vienna in favour of an express provision as regards reservations; such a provision could either provide for the prohibition of all reservations, or enumerate the Articles which might be open to reservations.

42. On this question, the majority of the participants were of the opinion that the prohibition of all reservations would not be acceptable, although it was necessary to strive to prevent the possibility of reservations being made to Article 62 bis. As for a provision listing the Articles open to reservations, it would be almost impossible to obtain general agreement on the list of Articles to be mentioned, particularly on account of the position adopted at Vienna by certain States belonging to other Groups, who probably wished to obtain recognition of the imperative character (*jus cogens*) of one or another rule contained in the draft.

43. One participant stressed that any strict rules on reservations would inevitably encounter very stern opposition from the parliamentary organs in his country and would risk rendering his State's accession to the future Vienna Convention at the least very difficult, if not impossible.

44. Another participant stated that the current of opinion against the possibility of making reservations would certainly be very strong and could have the consequences of leading to a provision prohibiting all reservations except in respect of the Articles expressly mentioned. It would, in consequence, be opportune for all States to examine, from now on, which Articles they would wish to see appear in such a provision.

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45. Recognising the difficulty of reaching a solution of the question, both acceptable and capable of success, several participants considered that it would be preferable at Vienna to avoid taking any initiative in the matter. In order to avoid running the risk of a restrictive provision being adopted, these participants considered it more advisable to apply to the Vienna Convention, the provisions provided for in Articles 16 and 17 concerning reservations, even though these Articles were drafted in a confused and contradictory manner in some respects.

46. While stating, in principle, that he was in agreement with this attitude, one of the participants wondered whether such a provision did not offer the possibility of making a reservation to Article 62 bis, on which subject justified apprehensions existed. Another participant raised the problem of the interpretation of Article 16 and in particular the significance of the words "the object and purpose of the treaty". He thought that in respect of each reservation another State might be able to contest its compatibility with "the object and purpose" of the treaty. He wondered, therefore, whether a better solution might not consist in the division of the Vienna draft into several Conventions, thereby following the example of the Geneva Conventions on the Law of the Sea. It was true that the subjects dealt with at Geneva lent themselves rather better to such division than the law of treaties; even so it was possible to imagine three distinct instruments covering respectively (i) the conclusion and entry into force of treaties; (ii) the application and interpretation of treaties and (iii) invalidity, termination and suspension of the operation of treaties.

VII. Final clauses of the Convention on the law of treaties

47. The participants were unanimous in considering that the drawing up of the final clauses at the 2nd Session of the Vienna Conference should follow the normal procedure of that Conference: Consequently, it would first be necessary to proceed to a discussion and possibly a vote, in the Committee of the Whole; only afterwards could the texts of the final clauses be sent back to the drafting Committee and submitted for adoption by the Conference in plenary session.

48. In the opinion of all the participants, the final clauses should provide for a high number of ratifications for the entry into force of the future Vienna Convention in view of the importance of the matter covered by that instrument. In this context, it was considered that the number should be between 40 and 45, which would correspond to about one third of the member States of the United Nations.

49. All the participants who took part in the discussion on this point were of the opinion that entry into force could not be subject to ratification of the Convention by all the permanent Members of the Security Council.

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PART II

Provisions of the draft Convention which
have been provisionally adopted at the
1st Session of the Conference

Articles 16 and 17

50. The Representative of Japan, after recalling the proposal made by his Government at the 1st Session of the Vienna Conference which sought the introduction of an objective criterion for the determining the compatibility of a reservation with the object and purpose of the treaty (Article 16 (c) 1 of the draft Convention, cf. A/CONF.39/C.1/L.133/Rev.1), stated that his Government was at present examining the advisability of again presenting a similar proposal to the 2nd Session of the Conference.

51. In reply, several participants declared themselves in favour of the objective of the proposal; however, they recalled the negative outcome of the vote thereon at the 1st Session of the Conference and wondered whether a second initiative stood any better chance. One participant pointed out a certain contradiction between the rule of the two-thirds majority, required for the adoption of the text of a multilateral treaty by an international Conference, and the rule of the majority of Contracting States, required by the Japanese proposal for the refusal of a reservation considered as being incompatible with the object and purpose of the treaty in question. Another participant observed that the opinion of the majority of the Contracting States could not be considered as an objective criterion; it was however agreed that it would be impossible to gain acceptance of a procedure before an independent tribunal with a view to evaluating reservations. Finally, one participant wondered whether participation in the treaty by a State which had had a reservation refused in accordance with the Japanese proposal, should be regarded as being ineffective from the time of signature, of ratification or of accession, or only from the decision to refuse the reservation.

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Article 41

52. As regards the principle of the divisibility of treaties, several participants expressed their support for the Finnish amendment tabled at the 1st Session of the Conference of Vienna (A/CONF.39/C.1/L.144) seeking the deletion of the reference to Article 50 in paragraph 5 of Article 41. In the view of these participants, the principle of divisibility should always apply in cases of invocation of a rule of jus cogens concerning one part only of an international treaty. The delegate of Finland confirmed his Government's intention of reintroducing the amendment at Vienna, it having been rejected at the 1st Session by a narrow majority (34 against 27 with 17 abstentions).

53. In this context it was considered important to choose the best procedure to be followed. In the opinion of several participants, a formal amendment seeking the deletion of the reference to Article 50 had less chances of success - since it required a two-thirds majority - than a request to proceed to a separate vote on the various references in paragraph 5 of Article 41; in such a separate vote a minority of one third plus one vote would be sufficient to block the inclusion of the reference to Article 50.

54. One delegation stated that it had abstained at Vienna in the vote on the Finnish amendment, considering that the retention of the reference to Article 50 would in practice be more useful than its deletion. Indeed, a Contracting State might possibly hesitate to invoke Article 50 if it knew that the whole of the treaty would thereby be affected, while the deletion of the reference to Article 50 would allow it, through Article 50, to unburden itself of certain provisions in a treaty which were not very favourable to it. This delegation affirmed, however, its intention of re-examining its earlier position.

55. Another participant was of the opinion that it would be wrong to give too much importance to the reference to Article 50. Article 50 had been amended during the 1st Session and now refers only to rules of jus cogens existing at the time of the conclusion of the treaty.

56. In reply to this statement it was observed that States had different views as to the existing or new imperative rules in this matter.

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Article 42

57. The delegate of Switzerland announced his Government's intention to reintroduce at Vienna its amendment (A/CONF.39/C.1/L.340) which was rejected at the 1st Session. The object of this amendment was to include in paragraph 1 of Article 42 a reference to Articles 48 and 49. This delegation in fact considered that the omission of any reference to these two Articles gave to Article 42 - which in itself enshrines a very useful and important principle - a decidedly political aspect. As a result of this omission a State, being party to a peace or armistice treaty, could perfectly well invoke, even after 50 years, Article 48 or Article 49 to terminate the treaty with retroactive effect. Such a consequence would be intolerable and would open the door to all manner of abuse.

Article 49

58. In the view of the delegate of Switzerland, the problem of Article 49 was linked to that mentioned by him in connection with Article 42. The application of Article 49 could, in fact, jeopardise almost every treaty, for many treaties particularly in the economic field, are not always concluded between partners of equal strength or on an equal footing. This delegation desired, therefore, the deletion of Article 49 as also that of the Declaration approved by the 1st Session of the Vienna Conference on the proposal of the Netherlands (A/CONF.39/C.1/L.323). The delegate of the Netherlands, for his part, defended the utility of the Declaration and added that had it not been adopted, other delegations would certainly have pressed for the introduction of its substance in Article 49, which would evidently have given rise to different legal consequences.

59. Another participant advised against opening, at Vienna, a discussion on Article 49, for there would be a risk of new problems arising. Moreover, Article 49, could, in its present form, influence States to a certain degree not to exploit their position of strength when concluding a treaty.

60. Other delegations felt that acceptance of Article 49 was conditioned by the fate at Vienna of Article 62 bis.

Article 50

61. In a general way, the participants were of opinion that Article 50, like Article 49 and even the whole of Part V of the draft, were unacceptable unless the Conference adopted a satisfactory procedure for the settlement of disputes covered by Article 62 bis.

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62. Some delegations went further. For them the drafting of Article 49 and especially Article 50 was so vague that it would ultimately be left to the practice of the conciliation or arbitral organs to decide upon the application of the concept "jus cogens" in respect of a particular rule, which would evidently be undesirable, for the conciliator or arbitrator would thus have conferred upon him the rôle of "legislator". One delegate then stated that his Government might conceivably be prepared for the International Court of Justice, although not another ad hoc organ, to pronounce upon the imperative character of a rule of international law. Another delegation maintained its opposition in principle to the present wording of Article 50; it made known its intention to prepare a proposed amendment seeking to introduce into Article 50 some new criteria of an objective character, such as the notion of "time-limits". This delegation would keep the other delegates constantly informed of the results of its work on the question.

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A P P E N D I X

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GR/Traités (69) 3.

- 31 -

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- 32 -

GR/Traités (69) 3

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GR/Traités (69) 3

- 33 -

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GR/Traités (69) 3

- 35 -

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COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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Strasbourg, 12th February 1969

Confidential
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Or. Fr.

AD HOC COMMITTEE ON THE LAW OF TREATIES

Summary account of the
discussions of the meeting
held in Paris from
6th to 8th February 1969

1. The ad hoc Committee on the law of treaties, composed of representatives of the member States of the Council of Europe and other States belonging to the "Western European and Others" Group at the General Assembly of the United Nations, met at the Paris Office of the Council of Europe from 6th to 8th February 1969.
2. The task of the Committee was to prepare, through an exchange of views, the 2nd Session of the Vienna Diplomatic Conference on the law of treaties which will open on 8th April 1969.
3. The meeting was opened on behalf of the Secretary General of the Council of Europe by Mr. H. GOLSONG, Director of Legal Affairs of the Council of Europe. On the motion of Sir Francis VALLAT (United Kingdom), Mr. Lucien HUBERT (France) was elected Chairman by acclamation. A list of those who attended the meeting is appended hereto.

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States in multilateral treaties covered by the future Vienna Convention, neither the proposal of Algeria, etc., seeking to insert a new Article 5 bis (right of participation in general multilateral treaties "all States" clause), nor the Czechoslovakian proposal concerning a new Article 12, paragraph 2 (accession by all States to a multilateral treaty) can be accepted, since in the absence of a competent tribunal to determine with binding force the requirements of Statehood, they would open the possibility for any entity whatsoever, which terms itself a State, to impose its presence in the international community. Furthermore, these proposals are defective on account of the absence of any definition of the category of "general multilateral treaties" such as proposed by the Congo etc., in respect of Article 2, paragraph 1. As to the particular aspect of the question, namely participation in the future Vienna Convention, the classic clause, called the "Vienna formula", which opens this participation to member States of the United Nations and its specialised Agencies to States Parties to the Statute of the International Court of Justice and to States which shall be invited by the General Assembly of the United Nations, continues to correspond perfectly to the needs of the international community. The system of a plurality of depositaries, such as was adopted for the treaty on the prohibition of nuclear tests in the atmosphere, for the treaty on the non-proliferation of nuclear weapons, and for the treaties on space law (matters which are bound up with security and the preservation of peace which require compromises at a political level) cannot be transposed into the field of multilateral treaties in general.

8. In the course of the exchange of views, it was emphasised that a certain number of States seemed to attach great importance to the insertion of an "all States" clause similar to those proposed by Algeria etc., and by Czechoslovakia in the future Vienna Convention; it was not therefore out of the question that a solution might be sought or offered at Vienna seeking to obtain a compromise by the acceptance of, on the one hand, an "all States" clause and, on the other, the proposal relating to a new Article 62 bis concerning the settlement of disputes arising out of Part V of the draft Convention (cf. point III below). It would therefore be useful to know the position which would be adopted by the States participating in this meeting in the face of such an initiative. On this point, several participants insisted on the necessity of a strict separation of the two problems in question which

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could be examined and resolved only according to the criteria appropriate to each. It was in particular observed that the proposal to insert an Article 62 bis concerning the settlement of disputes arising out of Part V of the draft Convention already constituted one element of an attempted compromise, since it was destined to introduce a safeguard of a procedural nature, as a counter balance to the defective character of some of the substantive provisions appearing in Part V which were considered as being difficult to accept in the absence of this procedural safeguard; consequently it would be inconceivable to treat it as an element in a second compromise solution in exchange for the acceptance of an "all States" clause. Moreover, doubts had been expressed on the question of whether the promoters of this clause were prepared to accept, within the automatic settlement provided for in Article 62 bis, compulsory arbitration and thus to go beyond an engagement to have recourse to mere conciliation. In any event, compulsory arbitration should remain the sine qua non of acceptance of Part V of the draft Convention. Finally, one participant recalled that the "all States" clause needed, for its adoption, to be supported at Vienna by a two-thirds majority. His Government continued to hope that such a majority would not be obtained and it was with this in view that he would vote against proposals concerning the "all States" clause.

9. Certain participants stated that their Governments' positions were less rigid. Thus according to one point of view, the "all States" clause might just be acceptable, on condition that it were clearly laid down that this clause is of a dispositive nature and not part of the jus cogens; however, it was replied that the wording of proposals of Algeria, etc. concerning Article 5 bis and of Czechoslovakia concerning Article 12, were without doubt of an imperative character. In the opinion of another participant it was necessary to separate the problem of participation in treaties from that of recognition of States: If the parties to a multilateral treaty retain the possibility of refusing to recognise as a State another Party to the same treaty, the "all States" clause should not pose a major problem. Furthermore, the same participant was opposed to the thesis according to which the will of States constitutes the only basis of treaty law; in the same way as it is necessary to accept the existence of imperative rules in international law (jus cogens), so it ought to be accepted that there exists in principle no objection to the idea of each State's right to participate in general multilateral treaties. In consequence, his Government would be prepared to accept a compromise solution containing the acceptance of the "all States" clause, and of Article 62 bis.

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10. As regards participation in the future Vienna Convention, it was agreed by the majority of the participants that the classical formula, the "Vienna formula", should be upheld, namely that which appears in the final clauses of the Vienna Conventions of 1961 and 1963 on diplomatic and consular relations; a substantial modification of this formula in the Convention on the law of treaties would risk undermining the treaty system established by these two earlier Conventions. According to one of the participants, however, there should be no exclusion in advance of any modification of less importance such as the addition of the qualification of a State which is a "member of a regional organisation" or recognised by a number of member States of the United Nations to be determined.

11. One of the participants advanced the hypothesis that none of the final clauses on this matter would obtain the two-thirds majority; the Group should therefore reconsider the problem at Vienna.

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II. Restricted multilateral treaties

(with respect to adoption, reservations, application, amendment, modification, temporary suspension and consequences of the termination of a treaty)

12. The Representative of France explained that his Government's proposals concerning Articles 2, 8, 17, 26, 36, 37, 55 and 66 of the draft Convention were of a technical nature without any political implications, since they sought only to clarify a provision already appearing in the International Law Commission's draft (Article 17, paragraph 2), and to ensure its application to problems other than those already covered by that provision. Besides, the definition of the category of restricted multilateral treaties does not involve the necessity of defining also a category of general multilateral treaties and therefore in no way prejudices the position to be adopted in respect of the proposal seeking to introduce the notion of such general multilateral treaties (cf. point I above).

13. In reply to a question on the advisability of a proposal seeking to define restricted multilateral treaties, in particular taking into consideration the refusal, by the majority of participants, of a definition of general multilateral treaties, with a view to avoiding any fetter on contractual freedom, the Representative of France declared that his Government will examine with interest any suggestion seeking to resolve, without recourse to a definition of restricted multilateral treaties, the technical problem underlying its proposals.

14. The Representative of Australia confirmed the proposed amendment already tabled by his delegation at Vienna which seeks to insert at the beginning of Article 37, paragraph 1, and of Article 55, the following words (cf. A/CONF.39/C.1/L.237 and A/CONF.39/C.1/L.324):

"Except in the case of a treaty of the type referred to in paragraph 2 of Article 17".

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III. Settlement of disputes in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

15. In a general manner, the participants emphasised that the substantive provisions of Part V of the draft Convention on the law of treaties, as provisionally adopted at the 1st Session of the Vienna Conference, were not satisfactory in their entirety, in spite of certain improvements on the draft presented by the International Law Commission. The imperfections of these provisions involve serious risks for the stability of international treaty relations and are of such a nature as to raise considerable difficulties in application which should be resolved, or at least reduced, in the interests both of the Contracting Parties to international treaties, and of the international community in general, by a satisfactory procedure for the settlement of disputes in this matter.

16. Several participants furthermore emphasised that in the opinion of their Government, the substantive provisions of Part V would be unacceptable if not accompanied by an adequate procedural safeguard, with a view to the settlement of disputes relating to their interpretation or application. On the other hand, some participants, although considering such a safeguard as being highly desirable, were unable to state whether their Governments would consider the insertion of provisions concerning the settlement of disputes as a condition indispensable for their acceptance of Part V of the draft Convention. Even so, it was in general agreed that the procedural provisions, the insertion of which in Part V of the draft should be proposed, ought to provide an effective method of settling disputes, namely automatic recourse to a procedure permitting a final and binding decision to be arrived at, given by a tribunal independent of the parties to the dispute.

17. With this in view, the participants proceeded to a very detailed exchange of views on the proposed amendments to the draft Convention presented by a certain number of Governments, seeking to insert a new Article 62 bis relating to the settlement of disputes arising out of Part V of the draft. As regards first the proposed amendment tabled by the Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, the Netherlands, Peru, Sweden and Tunisia ("proposal of the 13", document A/CONF.39/C.1/L.352, Rev.2 and GR/Traités (69) 1, Addendum 1, point 1), the

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Representative of the United States of America explained the content and scope of the modifications proposed by his Government in a note addressed to a certain number of Governments (cf. document GR/Traités (69) 1, Addendum 2). These modifications, designed to improve the text of the Proposal of the 13, concern a more precise and detailed definition of the duties of the Secretary General of the United Nations, special provisions for handling disputes over multilateral treaties, speeding up of procedures through shorter time periods, the possibility for the Conciliation Commission to make interim reports and recommendations during the proceedings, and the reduction of the time periods provided for selection of the arbitral tribunal. Furthermore, the United States Government made two supplementary proposals, one seeking the creation within the United Nations of a permanent body of conciliators, responsible for ensuring a certain continuity in the application of Part V of the future Vienna Convention, the other attributing to the Conciliation Commission the power of requesting, subject to the agreement of the parties to the dispute, an advisory opinion of the International Court of Justice on legal questions of special importance.

18. The Representative of Switzerland confirmed his Government's intention to maintain at the 2nd Session of the Vienna Conference its proposed amendment concerning a new Article 62 bis (A/CONF.39/C.1/L.377 and GR/Traités (69) 1, Addendum 1, point III). This proposal would, in the opinion of the Swiss Government, present considerable advantages as against the "proposal of the 13", in that it provides for recourse to the jurisdiction of the International Court of Justice by the simple request of one of the parties to the dispute and that it puts at the disposition of the parties to the dispute a very simple arbitral procedure. On the other hand, the proposal of the 13 is open to many criticisms: First, the procedure provided for is too weighty, too costly and too long, whereas the disputes which it is supposed to settle are in general very urgent. Secondly, it gives a choice of conciliation, although it is doubtful whether this mode of settling disputes is the most appropriate in cases where normally it is not necessary to determine the facts and to seek a political settlement, but to deal with questions of law; conciliation could at the most be provided for as a supplementary and optional method of settlement. Furthermore, the absence of any reference to the International Court of Justice, the judicial organ called upon to ensure the continuity of international case law and to guarantee the integrality of public international law, is highly deplorable. As regards the duties conferred on the Secretary General of the United Nations, it should not be forgotten that

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this highly placed administrative and political official is exposed by reason of his normal duties, to risks of his actions being questioned and doubts being cast on his impartiality; consequently it would be preferable to entrust the tasks provided for by Article 62 bis either to the President of the International Court of Justice or to the Secretary General of the Permanent Court of Arbitration at The Hague. The composition of the conciliation commission and the arbitral tribunal, as provided for in the proposal of the 13, is defective since it includes only one neutral member out of five. Moreover, the procedure laid down in the proposal of the 13 contains a lacuna as regards the finding of the failure of conciliation which opens the door to abuse. Lastly, it would be preferable not to contribute to the proliferation of international organs by creating a new list of conciliators within the United Nations when there exists already a similar list for the Permanent Court of Arbitration of The Hague. As regards the improvements proposed by the United States, the Swiss Government does not consider them suitable to remedy the principal defects of the proposal of the 13 as set out above. The distinction between disputes over bilateral treaties and those over multilateral treaties raises more problems than it solves; consequently it would be preferable to follow the institution of intervention as laid down in the Statute of the International Court of Justice. As for the supplementary proposals of the United States, as they appear also from the proposed amendment tabled at Vienna in 1968 (A/CONF.39/C.1/L.355), the Representative of Switzerland pronounced himself in favour of the possibility of requesting advisory opinions of the International Court of Justice but expressed doubts as regards the creation of a permanent body of conciliators, the desire for continuity not being of prime importance in respect of conciliation, which seeks to settle a particular dispute rather than to deal with questions of law.

19. The Representative of Japan stated that his Government, although prepared to study alternatively the proposals of the 13 and those of the United States, was unable to withdraw its proposed amendment concerning a new Article 62 bis (A/CONF.39/C.1/L.339 and GR/Traités (69) 1, Addendum 1, point II), which, like the Swiss proposal, stresses judicial proceedings before the International Court of Justice.

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20. During the exchange of views, the participants considered in particular the chances of success of the proposal presented aiming at the insertion of a new Article 62 bis in Part V of the draft Convention. It was emphasised that these chances depended on the willingness of States, which were not, in principle, favourable to compulsory arbitral or judicial settlement, to accept a compromise on this point with a view to obtaining from other States the acceptance of the whole of the Convention on the law of treaties and, in particular, Part V. The evident desire of a number of Afro-Asian States to bring about the conclusion of a universal Convention on this matter allowed a certain optimism concerning the chances of a proposal relating to the compulsory settlement of disputes arising out of Part V on condition, on the one hand, that it was vigorously upheld by its authors and presented as an indispensable element of a compromise solution for the acceptance of the substantive provisions of Part V, and on the other, that it took account of the certain refusal by many States to accept extreme solutions of the question. Several participants, while declaring themselves in principle very favourable to the proposals made by Switzerland and Japan, nevertheless indicated that they preferred to give their support to a proposal along the lines stated in the amendments proposed by the 13 and by the United States, rather than to involve themselves in a battle, lost from the very outset, the certain result of which would scarcely leave any alternative solution. Furthermore, the proposal of the 13, possibly improved by certain suggestions made by the United States, seemed to them to provide a satisfactory solution, compulsory recourse to the jurisdiction of the International Court of Justice not possessing an overriding importance, while the principle of an automatic and objective settlement of disputes could be achieved by other appropriate means. It was in this frame of mind that the participants proceeded to an examination in depth of the proposal of the 13, and of the United States suggestions, with a view to finding a text capable of gaining the support of the largest possible number of States and giving the best possible solution in the present political context.

21. This examination concerned the following points:

- (i) Some participants regretted that neither the proposal of the 13, nor that of the United States included a reference to the International Court of Justice; such a reference should not necessarily include the obligation to have recourse to

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legal proceedings before this Court, but only to indicate the possibility, perhaps adding a reservation in favour of obligations flowing from declarations of acceptance of the Court's jurisdiction. In this context, attention was drawn to the provision of similar scope which appears in paragraph 4 of Article 62 of the draft Convention; the absence of a provision similar to Article 62 bis might be interpreted as excluding recourse to the International Court of Justice for the disputes covered by that Article. Other participants, however, were of the opinion that on account of the hostility existing in certain quarters to The Hague Court, it would not be advisable to enter into a battle on this point; one participant observed that, in spite of the limitation on the effects of judgments of the Court to the parties to the dispute, a negative argument could be drawn from the fact that the Court could be called upon to deal with disputes on multilateral treaties certain Contracting Parties to which, by reason of their negative attitude towards the Court, might refuse any idea of intervention in the proceedings on such disputes.

- (ii) Several participants expressed doubts as to the advisability of the distinction between disputes over bilateral treaties and those over multilateral treaties introduced by the United States in respect of the conciliation procedure. In the first place it was observed that this distinction would complicate considerably the proposed amendment which should be as simple as possible to have a chance of success. Furthermore, the parties to a dispute over a multilateral treaty cannot always be reduced to two opposing camps; in such cases the United States suggestion would not be capable of solving the problem. Finally, and most important, the effects of the United States suggestion on the position of the parties to the treaty who are not at the same time parties to the dispute, raised a certain number of objections: Thus it was observed that the transmission of the application to all the parties to the treaty and their automatic power to submit orally or in writing, observations to the conciliation Commission were not appropriate for conciliation which, seeking to achieve a friendly settlement between the parties to the dispute, must necessarily remain secret; it would be difficult to determine the value of the observations made by parties not involved in the dispute, for the recommendations to be made to the conciliation Commission. For all these reasons, several participants were of the opinion that the problems

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posed by disputes over multilateral treaties could be solved in a simpler manner by the intervention procedure, similar to that provided for in the Statute of the International Court of Justice. Other participants pointed out that at the conciliation stage, the power of the conciliation Commission might be limited to inviting, with the agreement of the parties to the dispute, the other parties to the treaty in question to submit their views to it.

- (iii) Certain participants drew attention to the difference, not only in degree, but also in kind, between conciliation and arbitration; this difference seemed to be neglected in the proposed amendments in question which sought to attribute to conciliation the rôle of a first instance procedure, arbitration having the character of an appeal procedure. This tendency was particularly apparent in the United States proposal under which the report of the conciliation Commission would also include conclusions on the questions of substance of the dispute. With a view to maintaining the true nature of conciliation, it would be better not to endorse this proposal in spite of the advantages which it might offer in cases where conciliation is not followed by arbitration.
- (iv) The United States proposal seeking to confer on the conciliation Commission the power of making recommendations during the proceedings, dealing with the respective rights of the parties to the dispute, raised objections from one participant only, who opposed it on the grounds that the text to be presented should be as simple as possible.
- (v) As regards the time limits for the proceedings, the United States proposals were in general considered as representing improvements on the procedure envisaged by the 13, notwithstanding a certain apprehension as to their total length.
- (vi) Not all the participants expressed the same reactions to the rôle entrusted by the proposals in question to the Secretary General of the United Nations. While one participant declared support for the opinion expressed by the Representative of Switzerland (above, point 18), others were of the opinion that the Secretary General, elected with the agreement of the Great Powers represented at the Security Council of the United Nations, could be considered as enjoying sufficient confidence for the impartial discharge of the duties provided for in the draft of Article 62 bis.

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(vii) As regards the costs of the proceedings of the settlement of disputes to be provided for in Article 62 bis, one participant observed that there should be taken into consideration not only the direct costs (functioning of the organs to be set up for the proceedings), but also the indirect costs (participation of the parties in the proceedings). This aspect of the question caused considerable anxiety to a large number of Afro-Asian States.

22. Furthermore, the participants examined certain more general problems raised by the draft of a new Article 62 bis, namely:

- (i) It was observed that the provisions of this Article are of a dispositive character; thus, States will have the power of making provision in a treaty that they will not apply them to disputes relating to that treaty. Similarly, the question was raised whether it would be advisable to exclude in a general way from the field of application of these provisions, certain categories of treaties, such as peace and armistice treaties, which are not really suited to the procedures for the settlement of disputes of the type for which provision is made in Article 62 bis.
- (ii) That Article 62 bis could not have any retroactive effect was not disputed. However, while this principle raises no problems as regards disputes arising before the entry into force of the future Vienna Convention, there is a doubt, according to the opinion expressed by one participant, concerning disputes arising later with respect to treaties concluded before that date. Furthermore, it remains to be decided whether this principle concerns the application of Article 62 bis only or rather the whole of Part V of the future Vienna Convention.

23. As regards the proposals advanced by the United States at Vienna (see document A/CONF.39/C.1/L.355) opinions were divided on the question of the creation within the United Nations of a permanent conciliation commission: While some participants observed that the idea of the continuity of the case law had little value in connection with conciliation which seeks a solution ex aequo et bono in the particular case, another participant was of opinion that such an institution could be considered

a valuable contribution to the progressive application of a mechanism appropriate for the peaceful development of international treaty relations. - On the other hand, the attribution to the conciliation Commission of the power to request advisory opinions from the International Court of Justice on legal questions of special importance was favourably commented upon; however, certain participants did not conceal their doubts as to the chances of success of such a proposal.

24. In conclusion, several participants insisted on the necessity of concerted and consistent action on the part of all the States participating in this meeting in favour of the proposal relating to Article 62 bis, the final text of which should be drawn up in the light of the exchange of views set out above and through later discussions within the more restricted framework of States directly interested in this proposal. - In reply to a question concerning the most suitable number and circle of authors of the final proposed amendment, it was agreed that it was of the greatest importance to gain for the text the support of the largest possible number of States belonging to the different Groups at the General Assembly of the United Nations; the certain advantage of such a line of action should not be sacrificed for the less certain merits of a large number of authors belonging to one and the same Group.

25. One participant having recalled the possibility of concluding an optional Protocol concerning recourse to compulsory arbitration or legal proceedings to be provided for in the event of the rejection of the proposals aiming at the insertion of a new Article 62 bis in Part V of the Convention, several participants considered it preferable not to envisage such a solution. Even if such an optional Protocol were accompanied by the power to make a reservation as to the acceptance of Part V in respect of any State which had not ratified the Protocol, the State availing itself of this power would always risk having the provisions of Part V invoked against it, these being considered by the other party as a statement of customary international law on the matter.

26. Finally, a certain number of participants were of the opinion that even in the event of the success of the proposals relating to a new Article 62 bis, their Governments would still be

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reluctant to accept certain substantive provisions of Part V of the draft Convention, as provisionally adopted at the 1st Session of the Vienna Conference, in particular the provisions of Article 49 (coercion) and Article 50 (jus cogens). The arbitrator or judge called upon to deal with disputes concerning their interpretation or application cannot rectify the vague and defective nature of this provision, the rôle of the judge not being to create the law from an ill defined base, but rather to enunciate it on solid legal bases and within the precise limits laid down by the legislator. This is particularly true as regards provisions which may be invoked in a context of special political importance. Consequently, the participants expressed the hope that it will be possible, at the 2nd Session of the Vienna Conference, to come back to the most important substantive provisions of Part V of the draft Convention with a view to improving their drafting so as to remove certain deep apprehensions concerning them.

IV. Disputes arising out of the interpretation or application of the Convention on the law of treaties

27. The Representative of Switzerland stated the reasons which lay behind his Government's proposal for the insertion at the end of the draft Convention, of a clause providing for compulsory recourse to the jurisdiction of the International Court of Justice or to arbitration for the settlement of disputes arising out of the interpretation or application of the provisions of the Convention (new Article 76; document A/CONF.39/C.1./L.250 and GR/Traités (69) 1, point IV). In his Government's opinion, a provision of this nature applicable to the provisions of Part V only of the Convention (Article 62 bis, cf. above point III) would not be sufficient, since many substantive provisions of other Parts of the Convention are equally capable of giving rise to conflicts of interpretation or application (e.g. the provisions concerning reservations, the significance of signature and ratification, rights and obligations of Third Parties, and the position of members of a Federal State, etc.). The Swiss proposal is based on the classic formulae employed in this matter but the Swiss Government reserves the right to modify it later in the light of the debates of the 2nd Session of the Vienna Conference. Moreover, in the view of the experiences of the negotiations concerning the Vienna Conventions on diplomatic and consular relations, this Government was very sceptical as to the chances of success of such a proposal. In the event of the Vienna Conference preferring such a clause appearing in an optional Protocol, it would be necessary to provide for the possibility of making a reservation whereby a Contracting Party to the optional Protocol accepts to be bound by the Convention only in respect of States which have likewise ratified the Protocol.

28. One participant observed that the Swiss proposal, while desirable from his Government's point of view, could run up against the refusal of a large number of other States which would hesitate to submit to the International Court of Justice their disputes arising from the application of any international treaty governed by that Convention, through the acceptance of its jurisdiction concerning the future Convention on the law of treaties.

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V. The problem of the retroactive effect of the Convention

29. One participant was of the opinion that the problem of the retroactivity of the provisions of the Convention was a false one as all international instruments, like all national legislative acts, in principle give rise to legal effects only from their entry into force and not retroactively, in the absence of an express provision to the contrary. This participant preferred, therefore, not to deal with the question at Vienna; For if the question were posed, there would be the risk of being confronted with a proposal providing for the retroactivity of the provisions of the future Convention.

30. The large majority of the other participants did not share this point of view. As a general rule, it is recognised that a Convention is inapplicable to past acts; however, in examining the contents of the draft Convention on the law of treaties more closely, the subject seems more complex. In reality the matter resolves itself into the three following questions:

- (i) does the Convention affect treaties concluded before its entry into force?
- (ii) does the Convention affect the application or interpretation of treaties concluded in the past as regards disputes arising after its entry into force?
- (iii) does the Convention affect disputes concerning the application or interpretation only of treaties concluded since its entry into force?

31. It was generally agreed that these questions could not concern those parts of the Convention which contain so called progressive rules of international law, and that the matters covered by provisions based only on rules of customary international law could not be affected by the presence or absence of express rules concerning the scope ratione temporis of the future Convention, although it was necessary to recognise that several provisions of the Vienna draft include, at the same time, elements drawn from customary law and aspects of a so-called "progressive" codification.

32. Several participants were of the opinion that by reason of the complexity of the matter, it was highly desirable to obtain at Vienna an express provision excluding any retroactive scope

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of the Convention so that only treaties concluded in the future would fall within the Convention's field of application. Such an express rule could certainly be accompanied by a statement to the effect that any provision of the Convention based on customary law could be applied to treaties concluded in the past provided that it were established that the rule is one of customary law. Desirable as such an express provision might appear to be, it was nevertheless agreed that it would be most difficult to obtain a majority on this point in Vienna. However, one delegation stated that even the Afro-Asian Group might be interested in a clarification on this point and, consequently, disposed to support an amendment relating to the scope of the Convention on this matter. It was therefore necessary to sound out the intentions of other countries before deciding whether a proposed amendment on this point could have a real chance of success, while at the same time bearing in mind that the situation would be seriously worsened by the failure of such a proposed amendment.

33. Other delegates were already convinced of the impossibility of obtaining a two-thirds majority in favour of an express provision against retroactivity.

34. A certain number of participants defended the view that an express rule on this point was totally unnecessary since Article 24 of the Vienna draft confirms clearly enough the principle of the non-retroactivity of an international treaty. For these participants it was even preferable not to discuss this question at Vienna; Article 24 would give sufficient arguments in a particular case at least as regards the presumption in favour of the non-retroactivity of the Vienna Convention which, if it were to be successfully concluded, would be in the form of an international treaty.

35. As regards the idea put forward at the Paris meeting of 1968 (see WEO/Traités (68) 1, rev., paras. 32 and 33) concerning retroactivity limited to a fixed date prior to the conclusion of the treaty, which would have to be decided upon, for example 24th October 1945, the date of the entry into force of the United Nations Charter, only one participant considered that this suggestion could be useful in the event of a considerable current of opinion manifesting itself at Vienna in favour of covering disputes arising over treaties concluded in the past, for example, if a State invokes Articles 49 and 50 of the Vienna draft to avoid treaty obligations contracted in the past.

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36. Another participant considered that the most important problem lay in settling the position of the Convention on future disputes arising over treaties concluded in the past. In his opinion it would be perfectly possible that a certain number of other States will seek to give a retroactive character to Part V of the Vienna draft, while limiting that of Article 62 bis - if it is accepted - to disputes arising in the future out of treaties to be concluded in the future. Faced with such a possibility, a number of participants stressed that their Governments would never accept such a solution which would weaken intolerably the value of Article 62 bis as an element of compromise as regards Part V.

37. One delegate declared that it was unnecessary to be unduly worried over this matter; the International Law Commission had already examined these problems. As an example, he referred to Article 61 of the draft. This delegate preferred to leave the settlement of the whole question to practice.

38. On the proposal of one participant, it was envisaged preparing, at Vienna, the inclusion in the preamble of the Convention, of a paragraph identical to that appearing in the 1961 and 1963 Conventions, drafted as follows: "affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention".

VI. The possibility of making reservations to the future
Conventions on the law of treaties

39. The participants considered that, generally speaking, States should have the possibility of making reservations to the provisions of the future Convention on the law of treaties. However, no solution acceptable to the representatives at the present meeting which offered real chances of success at Vienna had as yet been found.

40. First, the majority of the participants considered that no reservation to Article 62 bis should be accepted.

41. As regards the other Articles of the draft, the question was raised whether there ought to be a move at Vienna in favour of an express provision as regards reservations; such a provision could either provide for the prohibition of all reservations, or enumerate the Articles which might be open to reservations.

42. On this question, the majority of the participants were of the opinion that the prohibition of all reservations would not be acceptable, although it was necessary to strive to prevent the possibility of reservations being made to Article 62 bis. As for a provision listing the Articles open to reservations, it would be almost impossible to obtain general agreement on the list of Articles to be mentioned, particularly on account of the position adopted at Vienna by certain States belonging to other Groups, who probably wished to obtain recognition of the imperative character (jus cogens) of one or another rule contained in the draft.

43. One participant stressed that any strict rules on reservations would inevitably encounter very stern opposition from the parliamentary organs in his country and would risk rendering his State's accession to the future Vienna Convention at the least very difficult, if not impossible.

44. Another participant stated that the current of opinion against the possibility of making reservations would certainly be very strong and could have the consequences of leading to a provision prohibiting all reservations except in respect of the Articles expressly mentioned. It would, in consequence, be opportune for all States to examine, from now on, which Articles they would wish to see appear in such a provision.

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45. Recognising the difficulty of reaching a solution of the question, both acceptable and capable of success, several participants considered that it would be preferable at Vienna to avoid taking any initiative in the matter. In order to avoid running the risk of a restrictive provision being adopted, these participants considered it more advisable to apply to the Vienna Convention, the provisions provided for in Articles 16 and 17 concerning reservations, even though these Articles were drafted in a confused and contradictory manner in some respects.

46. While stating, in principle, that he was in agreement with this attitude, one of the participants wondered whether such a provision did not offer the possibility of making a reservation to Article 62 bis, on which subject justified apprehensions existed. Another participant raised the problem of the interpretation of Article 16 and in particular the significance of the words "the object and purpose of the treaty". He thought that in respect of each reservation another State might be able to contest its compatibility with "the object and purpose" of the treaty. He wondered, therefore, whether a better solution might not consist in the division of the Vienna draft into several Conventions, thereby following the example of the Geneva Conventions on the Law of the Sea. It was true that the subjects dealt with at Geneva lent themselves rather better to such division than the law of treaties; even so it was possible to imagine three distinct instruments covering respectively (i) the conclusion and entry into force of treaties; (ii) the application and interpretation of treaties and (iii) invalidity, termination and suspension of the operation of treaties.

VII. Final clauses of the Convention on the law of treaties

47. The participants were unanimous in considering that the drawing up of the final clauses at the 2nd Session of the Vienna Conference should follow the normal procedure of that Conference: Consequently, it would first be necessary to proceed to a discussion and possibly a vote, in the Committee of the Whole; only afterwards could the texts of the final clauses be sent back to the drafting Committee and submitted for adoption by the Conference in plenary session.

48. In the opinion of all the participants, the final clauses should provide for a high number of ratifications for the entry into force of the future Vienna Convention in view of the importance of the matter covered by that instrument. In this context, it was considered that the number should be between 40 and 45, which would correspond to about one third of the member States of the United Nations.

49. All the participants who took part in the discussion on this point were of the opinion that entry into force could not be subject to ratification of the Convention by all the permanent Members of the Security Council.

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PART II

Provisions of the draft Convention which
have been provisionally adopted at the
1st Session of the Conference

Articles 16 and 17

50. The Representative of Japan, after recalling the proposal made by his Government at the 1st Session of the Vienna Conference which sought the introduction of an objective criterion for the determining the compatibility of a reservation with the object and purpose of the treaty (Article 16 (c) 1 of the draft Convention, cf. A/CONF.39/C.1/L.133/Rev.1), stated that his Government was at present examining the advisability of again presenting a similar proposal to the 2nd Session of the Conference.

51. In reply, several participants declared themselves in favour of the objective of the proposal; however, they recalled the negative outcome of the vote thereon at the 1st Session of the Conference and wondered whether a second initiative stood any better chance. One participant pointed out a certain contradiction between the rule of the two-thirds majority, required for the adoption of the text of a multilateral treaty by an international Conference, and the rule of the majority of Contracting States, required by the Japanese proposal for the refusal of a reservation considered as being incompatible with the object and purpose of the treaty in question. Another participant observed that the opinion of the majority of the Contracting States could not be considered as an objective criterion; it was however agreed that it would be impossible to gain acceptance of a procedure before an independent tribunal with a view to evaluating reservations. Finally, one participant wondered whether participation in the treaty by a State which had had a reservation refused in accordance with the Japanese proposal, should be regarded as being ineffective from the time of signature, of ratification or of accession, or only from the decision to refuse the reservation.

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Article 41

52. As regards the principle of the divisibility of treaties, several participants expressed their support for the Finnish amendment tabled at the 1st Session of the Conference of Vienna (A/CONF.39/C.1/L.144) seeking the deletion of the reference to Article 50 in paragraph 5 of Article 41. In the view of these participants, the principle of divisibility should always apply in cases of invocation of a rule of jus cogens concerning one part only of an international treaty. The delegate of Finland confirmed his Government's intention of reintroducing the amendment at Vienna, it having been rejected at the 1st Session by a narrow majority (34 against 27 with 17 abstentions).

53. In this context it was considered important to choose the best procedure to be followed. In the opinion of several participants, a formal amendment seeking the deletion of the reference to Article 50 had less chances of success - since it required a two-thirds majority - than a request to proceed to a separate vote on the various references in paragraph 5 of Article 41; in such a separate vote a minority of one third plus one vote would be sufficient to block the inclusion of the reference to Article 50.

54. One delegation stated that it had abstained at Vienna in the vote on the Finnish amendment, considering that the retention of the reference to Article 50 would in practice be more useful than its deletion. Indeed, a Contracting State might possibly hesitate to invoke Article 50 if it knew that the whole of the treaty would thereby be affected, while the deletion of the reference to Article 50 would allow it, through Article 50, to unburden itself of certain provisions in a treaty which were not very favourable to it. This delegation affirmed, however, its intention of re-examining its earlier position.

55. Another participant was of the opinion that it would be wrong to give too much importance to the reference to Article 50. Article 50 had been amended during the 1st Session and now refers only to rules of jus cogens existing at the time of the conclusion of the treaty.

56. In reply to this statement it was observed that States had different views as to the existing or new imperative rules in this matter.

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Article 42

57. The delegate of Switzerland announced his Government's intention to reintroduce at Vienna its amendment (A/CONF.39/C.1/L.340) which was rejected at the 1st Session. The object of this amendment was to include in paragraph 1 of Article 42 a reference to Articles 48 and 49. This delegation in fact considered that the omission of any reference to these two Articles gave to Article 42 - which in itself enshrines a very useful and important principle - a decidedly political aspect. As a result of this omission a State, being party to a peace or armistice treaty, could perfectly well invoke, even after 50 years, Article 48 or Article 49 to terminate the treaty with retroactive effect. Such a consequence would be intolerable and would open the door to all manner of abuse.

Article 49

58. In the view of the delegate of Switzerland, the problem of Article 49 was linked to that mentioned by him in connection with Article 42. The application of Article 49 could, in fact, jeopardise almost every treaty, for many treaties particularly in the economic field, are not always concluded between partners of equal strength or on an equal footing. This delegation desired, therefore, the deletion of Article 49 as also that of the Declaration approved by the 1st Session of the Vienna Conference on the proposal of the Netherlands (A/CONF.39/C.1/L.323). The delegate of the Netherlands, for his part, defended the utility of the Declaration and added that had it not been adopted, other delegations would certainly have pressed for the introduction of its substance in Article 49, which would evidently have given rise to different legal consequences.

59. Another participant advised against opening, at Vienna, a discussion on Article 49, for there would be a risk of new problems arising. Moreover, Article 49, could, in its present form, influence States to a certain degree not to exploit their position of strength when concluding a treaty.

60. Other delegations felt that acceptance of Article 49 was conditioned by the fate at Vienna of Article 62 bis.

Article 50

61. In a general way, the participants were of opinion that Article 50, like Article 49 and even the whole of Part V of the draft, were unacceptable unless the Conference adopted a satisfactory procedure for the settlement of disputes covered by Article 62 bis.

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62. Some delegations went further. For them the drafting of Article 49 and especially Article 50 was so vague that it would ultimately be left to the practice of the conciliation or arbitral organs to decide upon the application of the concept "jus cogens" in respect of a particular rule, which would evidently be undesirable, for the conciliator or arbitrator would thus have conferred upon him the rôle of "legislator". One delegate then stated that his Government might conceivably be prepared for the International Court of Justice, although not another ad hoc organ, to pronounce upon the imperative character of a rule of international law. Another delegation maintained its opposition in principle to the present wording of Article 50; it made known its intention to prepare a proposed amendment seeking to introduce into Article 50 some new criteria of an objective character, such as the notion of "time-limits". This delegation would keep the other delegates constantly informed of the results of its work on the question.

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PART III

Dispositive or obligatory character of the
provisions of the draft
Convention

63. Referring to certain provisions in the draft Convention which contain an express clause preserving the freedom of States to derogate from the rules laid down in them, the Representative of the Federal Republic of Germany drew attention to the absence of such a clause in other provisions which, however, could not be considered as having an imperative character and as excluding all derogations. With a view to clarifying this point, his Government intended to propose, at the 2nd Session of the Vienna Conference, the adoption of the following text:

"The references in some of the Articles of the present Convention to a different intention of the parties to a particular treaty, appearing from the provisions of that treaty or otherwise established, does not prejudice the admissibility of agreements deviating from other Articles of the present Convention unless peremptory norms of international law are concerned".

64. The German delegate added that such a provision would confirm the presumption that the Convention contained rules of a dispositive character and that it would consequently place the burden of proof upon the State invoking the contrary thesis.

65. Certain participants were of the opinion that such a proposal stood no chance of success in view of the discussions at the 1st Session of the Vienna Conference concerning the deletion of any reference to a different intention of the parties to a particular treaty. Furthermore, it risked provoking a new debate on a list of norms of an imperative character laid down in the Convention, a question on which it seemed impossible to reach agreement. The problem raised by the Representative of the Federal Republic of Germany was not perhaps of very great importance, as it was evident that a large number of Articles which do not contain the reference in question are not of an

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imperative character and that consequently there exists a general presumption in favour of the dispositive character of the provisions of the Convention. One participant observed that this problem should not be linked to that of jus cogens, forming part of customary law or enounced in the Convention of Vienna; it was rather a question belonging to the general one of the interpretation of treaty rules with a view to determining their optional or obligatory character. Another participant suggested mentioning the idea contained in the German proposal in the Final Act of the Vienna Conference.

- 30 -

GR/Traités (69) 3

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GR/Traités (69) 3

- 31 -

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GR/Traités (69) 3

- 33 -

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GR/Traités (69) 3

- 35 -

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J. A. BEESLEY

20-3-1-6
1/3

we have to try -
pan then former
as she is a left-
over from the
previous regime
and is deeply
into a Communist
plot
in N.Y.

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FM JKRTA MAR11/69 CONF NO/NO STANDARD

TO EXTEROTT 106 PRIORITY

REF YOURTEL L275 FEB66

GRATEFUL FOR HELPFUL INFO IN REFTEL WHICH WE CONVEYED ORALLY AND BY
AID MEMOIRE TO MISS LAURENS ON MAR10. SHE WAS TAKEN SOMEWHAT ABACK
BY OUR FACTUAL(GP CORRUPT) STATEMENT THAT CDA SEEMED TO BE ALONE IN
ACTIVELY OPPOSING PARA2. SHE ADMITTED HER COMMENTS HAD BEEN MADE WITHOUT
BENEFIT OF DETAILED RESEARCH REFLECTED IN REFTEL. (WE HAD REVIEWED
VOTING RECORD ON PAR2 AT OUR PREVIOUS MTG OF COMMUNICATIONS BUT UN-
FORTUNATELY DID NOT/HAVE DETAILED INFO PROVIDED IN REFTEL.)
SHE ALSO SAID CDA HAD BEEN ONLY STATE TO DATE TO MAKE REPRESENTATION
TO MFA ON PAR2.

WE DISCUSSED AGAIN WHOLE RANGE OF CDN REPRESENTATION ON PAR2.
MISS LAURENS SEEMED LESS CATEGORICALLY THAN PREVIOUS ON INDONESIAS
POSITION RE SUBSTANCE OF PARA2 AND QUESTIONED SEPARATE NOTE. SHE
ASSURED US THAT CDN VIEW WOULD BE CAREFULLY STUDIED AGAIN, BUT INDON-
ESIANS POSITION ON POINTS RAISED BY US WOULD BE FINALLY DETERMINED
IN LIGHT OF DEVELOPMENTS AT SECOND SESSION. '*****'

4/14/3

M. D. COPITHORNE

ACTION COPY

L draft memo dictated 18/2
Feb 20-3-1-6
JHR 25/2.

FM BERN FEB11/69 CONFD NO/NO STANDARD

TO EXTER 85

INFO TT COPEN DE HAGUE

REF COPEN TEL 67 FEB10

LAW OF TREATIES ART5

HAD BRIEFEST WORD WITH AMB ROBERTS BEFORE HE LEFT FOR ALGERIA
TODAY. ALTHOUGH HE WAS NOT/NOT ABLE TO EXAMINE ANY PAPERS HE
THOUGHT YOU MIGHT WISH TO WEIGH FOLLOWING BEFORE FORMULATING
INSTRUCTIONS FOR HIS RETURN APROX FEB25:(A)SWISS OWE US A REPLY
AS A RESULT OF OUR APPROACH TO SEC GEN FPD(COURTEL 652 NOV5/68 PARA2)
AND ESPECIALLY FOLLOWING TALK WITH BINDSCHEDLER.(B)IF THEY HAVE
NOT/NOT GIVEN US A REPLY BY THAT TIME, THERE MIGHT BE SOME
ADVANTAGE IN SEEING WILLY SPUHLER, HEAD OF POLITICAL DEPT, AS LATTER
BEARS OBVIOUS GOODWILL TOWARDS CDA FOLLOWING HIS CROSS-COUNTRY
TOUR AS SWISS VICE PRES IN 1967.(C)STICKING POINT IN MR ROBERTS
MIND IS YOUR ATTACHING PARTICULAR IMPORTANCE TO POSITION OF
SWITZERLAND(YOURTEL L766 SEP12/68). SWITZERLAND PRESUMABLY HAS
ONLY ONE VOTE LIKE EVERY OTHER COUNTRY AND IS THERE ANY POINT IN
TRYING TO PERSUADE IT TO VOTE AGAINST A PROPOSAL WHICH COINCIDES
EXACTLY WITH ITS CONSTITUTION, WHEN OTHER VOTES BY OTHER COUNTRIES
COULD PROBABLY BE BAGGED MORE EASILY.(D)WILL ADOPTION OF ART5 AS
IT STANDS REALLY GIVE THIRD COUNTRIES A LEGAL JUSTIFICATION TO TRY
TO INTERPRET CONSTITUTIONS OF FEDERAL COUNTRIES WHERE TREATY MAKING
CAPACITY OF PARTICIPATING UNITS OF FEDERATION IS UNCLEAR. WE
GENERALLY GET IMPRESSION FROM SWISS THAT OUR SUPREME COURT LIKE

...2
9/11/2

003435

PAGE TWO 85 CONFD NO/NO STANDARD

THEIRS INTERPRETS CONSTITUTION AND ARGUMENT ABOUT THIRD POWERS IS
SOMEWHAT SPECIOUS.

2. AT RISK OF GROSSLY OVER-SIMPLIFYING MR ROBERTS THOUGHT HE SEEMED
QUITE READY TO RAISE THIS MATTER AT MINISTERIAL LEVEL, IF YOU
FEEL WE HAVE A SOLID CASE.

ACTION COPY

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DE BERUT FEV11/69 CONF D

A EXTER148

REF VOTRETEL L52 DEC7

CONFERENCE SUR LES DROITS DES TRAITES

AU COURS DUNE COURTE VISITE CE MATIN AU DIR DES AFFAIRES

POLITIQUES DU MAE CE DERNIER MA DIT QUE LE SEC GEN DU MIN AVAIT FORT BIEN ACCUEILLI LES ARGUMENTS PRESENTES DANS NOTRE AIDE-MEMOIRE REMIS LE SEP 20 DERNIER ET IL NOUS A CONSEILLE DE RAPPELER LA CHOSE AU SEC GEN UN MOIS AVANT LOUVERTURE DE LA CONFERENCE AFIN DE NOUS ASSURER QUE LES INSTRUCTIONS QUI SERONT PREPAREES POUR LA DEL LIBANAISE SOIENT CONFORMES A NOS VOEUX. NOUS COMPTONS DONC NOUS ENTRE-tenir avec lui. PREMIERE QUINZAINE DE MARS.

2. AMBASSADEUR PRESENTERA UN MEMOIRE SEMBLABLE AU MAE JORDANIEN LORS DUNE VISITE QUIL COMPTE EFFECTUER TRES PROCHAINEMENT A AMMAN.

Mr. G. J. ...
Mr. ...
Mr. ...
20-3-1-6
18/2 14 | 9 M R

18.12.2