United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/SR.12

Twelfth plenary meeting

Extract from the *Official Records of the United Nations Conference on the Law of Treaties, Second Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

102. Mr. YU (Republic of Korea) said that he had abstained from voting on article 22. While the practical need for the article was understandable, the legal definition of the provisional application of a treaty was not really clear to his delegation, and furthermore, the article might place his Government in a difficult position because of constitutional considerations.

103. Mr. GALINDO-POHL (El Salvador) said that although article 22 raised certain problems for his delegation, he had voted for the article.

104. El Salvador considered that its Constitution took precedence over all treaties, and moreover certain kinds of treaties — formal treaties — required ratification by the Legislature. Nevertheless, he had voted for the article in recognition of the importance of the international practice involved. It was certain that no representative of El Salvador would invoke the provisions of the article in relation to formal treaties, because its constitutional law did not permit an affirmative answer to the hypothetical questions in the article. However, the provisions of the article could be applied to certain treaties of a less formal character with respect to which the Executive had constitutional authority to bind the State.

105. Mr. VEROSTA (Austria) said that he had stated during the debate that in order not to delay the work of the Conference he was prepared to vote for article 22 on the clear understanding that the Drafting Committee would take into account the suggestions put forward during the discussion by several delegations. He realized that a lot was being asked of the Drafting Committee, since those suggestions might involve questions of substance. However, since the text of article 22 in its final form had been made available to the Conference only such a short time before the debate, delegations had not been fully prepared to take a firm position. He therefore hoped that the Drafting Committee would take full account of the comments made during the discussion.

106. The PRESIDENT said he could assure the representative of Austria that the Drafting Committee would take due note of his request.

The meeting rose at 6.20 p.m.

TWELFTH PLENARY MEETING

Tuesday, 6 May 1969, at 10.40 a.m.

President: Mr. AGO (Italy)

Tribute to the memory of Mr. Zakir Husain, President of the Republic of India

On the proposal of the President, representatives observed a minute's silence in tribute to the memory of Mr. Zakir Husain, President of the Republic of India, who had died on 3 Mai 1969.

1. Mr. DADZIE (Ghana), Mr. OGUNDERE (Nigeria), Mr. TABIBI (Afghanistan), Mr. LATUMETEN (Indonesia), Mr. MATINE-DAFTARY (Iran), Mr. KHLESTOV (Union of Soviet Socialist Republics), Mr. SINHA (Nepal), Sir Francis VALLAT (United Kingdom) on behalf of all the Western European delegations, Mr. GONZALEZ GALVEZ (Mexico), Mr. PINTO (Ceylon), Mr. KEARNEY (United States of America), Mr. TEYMOUR (United Arab Republic), Mr. WERSHOF (Canada) and Mr. JACOVIDES (Cyprus) paid tributes to the memory of the President of the Republic of India.

2. Mr. KRISHNA RAO (India) said he was deeply moved by the expressions of sympathy from the delegations of Asia, America, Africa, Western Europe and the socialist countries. He would certainly communicate them to the Government and people of India.

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

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

Article 23 [1]

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

3. Mr. ALVAREZ TABIO (Cuba) said he did not propose to submit an amendment to article 23, since he had become convinced that the text produced by the Drafting Committee now seemed to satisfy the Conference. However, the Conference was not unanimous in regard to defining the scope of the *pacta sunt servanda* rule, as the debate in the Committee of the Whole at the first session had shown.

4. His first concern was the precise meaning of the words " treaty in force ". Since article 23 came immediately after the provisions relating to the entry into force of treaties, it would seem that it simply referred to a treaty concluded in accordance with the formal requirements laid down in Part II of the draft articles. If that was so, the words " in force " were superfluous, because they added nothing new. It was obvious that no one could be required to perform a treaty unless it was in force. The words " treaty in force " must therefore mean something more. In point of fact, the expression " in force " referred not only to the obligations incumbent upon the parties during the process of concluding the treaty but also to the obligations deriving from the conditions essential for the very creation of treaties, particularly the requirement

[1] For the discussion of article 23 in the Committee of the Whole, see 28th, 29th and 72nd meetings.

An amendment was submitted to the plenary Conference by Yugoslavia (A/CONF.39/L.21).

of freedom of consent. The International Law Commission had clearly recognized that, since in paragraph (3) of its commentary to article 23, it had stated that the words gave expression to an element which formed part of the rule and that, having regard to other provisions of the draft articles, it was necessary on logical grounds to include them. Those provisions related to the causes of the invalidity and termination of treaties, among other matters. The Commission had therefore thought it necessary to specify that it was to treaties in force " in accordance with the provisions of the present articles " that the *pacta sunt servanda* rule applied. The Commission was referring to all the articles of the convention on the law of treaties and not merely to the provisions of Part II concerning the conclusion and entry into force of treaties.

5. But it was interesting to consider another aspect of the text of article 23, namely the question of " good faith ". The inclusion of that principle in the *pacta sunt servanda* rule created a link between that provision and Article 2 (2) of the United Nations Charter, which established the principle of good faith. Three conclusions were to be drawn from that link with the Charter: that there was a limit to the *pacta sunt servanda* rule, namely good faith; that the onus of fulfilling the obligations imposed by good faith was subordinate to the fact that those obligations had been contracted in accordance with the Charter; and that no one was required to perform a treaty which contradicted the principles laid down in the Charter.

6. Seen in that light, the rule in article 23 had clearly defined limits which would prevent abuse. Performance in good faith did not merely mean abstaining from acts which might prevent the treaty from being carried out; it also presupposed a fair balance between reciprocal obligations.

7. In short, the rule would strengthen legal security, but it must be a security whose purpose was to achieve the ideal of justice mentioned in the Preamble to the Charter, which spoke of establishing "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ". It should be noted that justice was placed highest in the scale of values established by the Charter. A treaty to which consent had been extorted by unjust coercion could not be protected by the *pacta sunt servanda* rule.

8. His delegation would therefore vote in favour of article 23, since in the form in which it was worded it tended to remove all the defects attached to the *pacta sunt servanda* rule. The Cuban delegation understood the words " treaty in force " as meaning " valid treaty ", in other words a treaty freely consented to, having a licit object and with a just cause.

9. Mr. ESCUDERO (Ecuador) said that the *pacta sunt servanda* rule formed part of the general principles of law referred to in Article 38, paragraph 1 (*c*) of the Statute of the International Court of Justice. The rule had existed from the very earliest times, and in those days it had derived its mandatory character from purely religious considerations; later, it had taken a more ethical form, that of good faith. But that had not prevented treaties from being concluded or disregarded on the redoubtable and overriding grounds of " reasons of State ".

10. In fact, although the rule was certainly part of general international law, it could not be regarded as a rule of *jus cogens,* since it admitted of exceptions. The first suggestion that an exception to that principle was contained in the *rebus sic stantibus* clause was to be found in the thinking of St. Thomas Aquinas; the circumstances surrounding the conclusion of a treaty could alter, and so entail its revision.

11. At the first session of the Conference, the Ecuadorian delegation, along with others, had proposed (A/CONF.39/C.1/L.118) that the word " treaty in force " be replaced by the words " valid treaty ", so that the term used would indicate both the formal and the substantive conditions which gave a treaty its full validity. The most imperative of those substantive conditions were that the treaty must have been freely consented to and that it must have been concluded in good faith. But the Chairman of the Drafting Committee, in reporting the Committee's decision on that amendment at the 72nd meeting,[2] had said that the Drafting Committee had regarded it " as a drafting amendment which it had not thought it advisable to adopt ". The logical inference was that there was no fundamental difference in meaning between "treaty in force " and " valid treaty ".

12. There was however good reason for insisting that the rule should be reduced to its proper proportions. If it was to be recognized as a fundamental rule, there would have to be an equally forceful statement that the element of good faith was essential in all the stages of the preparation and conclusion of treaties. That should have caused the International Law Commission to state a rule, antecedent to the *pact sunt servanda* rule, that would have embodied as a *sine qua non* of the validity of treaties good faith and the free consent of the contracting parties, on the ground that it would be no less unjust to require good faith in performing treaties but not in concluding them than to require it in the conclusion of treaties but not in their performance. That was a higher philosophical principle which was the very basis of the law of treaties.

13. Part V of the draft convention contained provisions about the invalidity, termination and suspension of the operation of treaties. Those provisions were mainly of a procedural nature, but even so, they ought to derive from a rule of substantive law having just as much authority as the *pacta sunt servanda* rule since good faith and the free consent of the contracting States were also essential ingredients of the validity of treaties.

14. Reference had been made to Article 2 (2) of the United Nations Charter in connexion with that rule; but the principle laid down in that Article could only be invoked by way of analogy, since the reference was solely to the obligations imposed by the Charter on Member States.

---

[2] Para. 34.

15. Some speakers had mentioned the reference in the Preamble of the Charter to " respect for the obligations arising from treaties ". But it should be noted that the Preamble referred to the establishment of the conditions under which justice and respect for the obligations arising from treaties could be maintained. And those conditions could only be that treaties must not be unjust and must not have been imposed by force or by fraud, for instance. Seen in that light, the Preamble of the Charter was a major pronouncement condemning unjust treaties and stating that they should be regarded as invalid.

16. The inevitable conclusion to be drawn from that was that at least the preamble to the draft convention on the law of treaties should state the principle that good faith and the free consent of the contracting States were the foundation of the validity of treaties.

17. Those views had alrealy been expressed by his delegation during the discussion in the Committee of the Whole. In the light of the interpretative statement he had just made, his delegation would vote in favour of article 23.

18. Mr. PASZKOWSKI (Poland) said that in his view the principle that treaties were binding upon the parties and must be performed in good faith should be stated as precisely as possible because of its fundamental importance. As the Italian representative had said at the 29th meeting of the Committee of the Whole, the mere statement " *pacta sunt servanda* " would be enough.

19. It was not easy, however, to render the Latin into other languages, and that had led to the lengthy debates on article 23 and the amendments submitted to it in the Committee of the Whole. Nevertheless, viewed in the context of the convention as a whole, the wording used by the International Law Commission was satisfactory, as it properly emphasized the fundamental nature of the obligation to perform treaties in good faith.

20. There was obviously no such obligation in the case of treaties which were null and void, but the relevant provisions concerning invalidity, termination and suspension of the operation of treaties were set out elsewhere in the convention. Article 23 did not therefore need any further qualification, and the Polish delegation would vote for the text of the article as submitted by the Drafting Committee.

21. Mr. JACOVIDES (Cyprus) said he approved of the text of article 23 as now submitted to the Conference, on the understanding that the *pacta sunt servanda* rule had the meaning given to it by the delegation of Cyprus in the Sixth Committee of the General Assembly and in the Committee of the Whole at the 72nd meeting. It was clear that the principle stated in article 23 was subject to all the rules of international law concerning invalidity, termination and so forth stated in the draft convention, in other words that it was subject to all the rules under which it was generally recognized that a treaty was not " in force ". It was only when the *pacta sunt servanda* principle was thus delimited that it should take its due place in the over all structure of the law of treaties.

22. Mr. SMEJKAL (Czechoslovakia) recalled the statement made by the Czechoslovak representative at the 29th meeting of the Committee of the Whole with regard to the proposal to replace the words " treaty in force " by the words " valid treaty " in article 23. Czechoslovakia had been one of the co-sponsors of that proposal (A/CONF.39/C.1/L.118).

23. His delegation would not press the proposal that article 23 should be amended in that way and would vote for the text submitted by the Drafting Committee, on the understanding that a treaty " in force " meant exclusively a treaty concluded in accordance with the fundamental principles of international law.

24. Mr. MOE (Barbados) said he had no objection to the inclusion in the convention on the law of treaties of a principle expressing the importance attributed to the *pacta sunt servanda* rule, which, in fact, simply transferred to international law the elementary rule of municipal law that every person must perform his contracts.

25. In the form given to it by the International Law Commission, however, and in the form finally submitted by the Drafting Committee the *pacta sunt servanda* rule had two particular aspects : it referred to treaties " in force " and it stated that such treaties must be performed " in good faith ".

26. The element of good faith was certainly essential in almost every aspect of international relations, but he could not quite see what legal meaning the phrase " in good faith " had in the context of article 23. If a treaty was not being performed, the question arose whether that was so under the terms of the treaty or in accordance with the relevant articles of the convention. Further, when article 23 was read together with article 39, it was clear that the obligations of a party to a treaty which sought to impeach its validity subsisted until, after the application of the relevant procedural provisions, it was decided that those obligations had terminated. During the whole period, which might be a very long one, while the decision was pending, could it truly be said that the party in question would be performing the treaty "in good faith "?

27. He feared that legally the phrase " in good faith " was devoid of real meaning. There were many who considered it essential to state in a legal rule the need to observe treaty obligations " in good faith ", yet refused " in good faith " to subject disputes on those matters to impartial and independent adjudication. His delegation, like some other delegations, believed, however, that good faith should be referred to in the preamble to the convention on the law of treaties, in other words at the point where the aim of the convention was stated.

28. It would have been safer to omit the words " in force ", as indeed the International Law Commission had at first been inclined to do, so as to prevent any misunderstanding about the expression " treaty in force ". Without those words article 23 would cover all international agreements concluded between States within the meaning of article 2; furthermore, as under article 15 certain obligations had to be fulfilled even

before the treaty entered into force, provisionally or definitively, the *pacta sunt servanda* rule would apply to the obligations under article 15 just as it did to those incurred under the treaty itself.

29. In his delegation's view, it would be enough if article 23 read: " Every treaty is binding upon the parties to it and must be performed by them ". In fact, the Latin maxim " *pacta sunt servanda* " used as the heading for article 23 was clear and unambiguous and would have made an admirable text. In any case, the delegation of Barbados accepted the rule, which should unquestionably be stated in the convention on the law of treaties.

30. Mr. SOLHEIM (Norway) reminded the Conference that the International Law Commission had stated in paragraph (3) of its commentary that " from a drafting point of view, it seemed necessary to specify that it is treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applies," and that " the words ' in force ' of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21 ".

31. The title and the text of article 22 as originally drafted by the International Law Commission concerned entry into force provisionally. However, the text had been considerably changed in the previous year by the Committee of the Whole, though the original title had been kept. Since then, the title had also been changed and now read " provisional application ".

32. Article 23 as now worded stated that " every treaty in force is binding upon the parties ". Article 22, adopted at a previous meeting, used the expression " party to the treaty ", which had not been used in the International Law Commission's draft of article 22. It was true that the word " party " had been given a special meaning in the convention under article [2], paragraph 1 (*g*), but it was necessary to be careful and to take into consideration all the different elements of interpretation, so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.

33. It was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application, and the Norwegian delegation believed that no other intention could be inferred from the text as it now stood.

34. In other words, his delegation considered that the words " in force " used in article 23 covered treaties applied provisionally under article 22 as well as treaties which entered into force definitively under article 21.

35. Mr. MATINE-DAFTARY (Iran) said it would have been better if the word "treaty " had not been qualified and if the text had simply conformed to the Latin phrase used for the title of article 23.

36. The Iranian delegation, though concurring in the arguments put forward by the sponsors of amendments during the first session and the interpretative statements made at that meeting, requested the inclusion in the preamble of a formal declaration specifying the scope of the principle, which was stated in the United Nations Charter.

37. Mr. DE CASTRO (Spain), replying to the arguments put forward by some representatives that the words " in force " related also to validity, said that quite clearly the expression " in force " in its strict sense meant no more than the fact of being in force, as was apparent from Article 37 of the Statute of the International Court of Justice. The expression therefore referred to treaties which definitely had legal effects, in other words, treaties whose application was not subject to certain conditions.

38. Consequently the text of article 23 did not in itself cover the conditions for validity. Moreover, that restrictive interpretation might be regarded as corroborated by article 2, paragraph 1 (*a*), where the definition of the word " treaty " did not mention the obligation of validity, and by Part V, which dealt with the invalidity of treaties. Treaties might be in force inasmuch as they were being performed, but they might be void and not binding upon the parties because their provisions were at variance with the basic rules of international law.

39. In accordance with the distinction which existed between the legal effects of a treaty and its validity, article 23 appeared to refer only to the legal effects of treaties and to leave aside their validity.

40. His delegation therefore thought it should be made clear that article 23 covered treaties which were both in force and valid. The convention was an organic whole and it should be emphasized that the treaties which must be performed in accordance with article 23 were those which fulfilled the conditions for validity and were not vitiated by the grounds for invalidity set out in Part V.

41. Finally, his delegation thought that the criterion of good faith should be applied not only during the performance of the treaty but also at the preceding stage — despite the deletion of sub-paragraph (*a*) of article 15 — and at the subsequent stage, when the treaty was no longer in force.

42. Mr. BAYONA ORTIZ (Colombia) said that the *pacta sunt servanda* rule and the principle of good faith ensured the stability of international relations and peace and solidarity among men.

43. The International Law Commission had succeeded in setting out the *pacta sunt servanda* rule and the principle of good faith in a clear and simple manner. But the drafting of article 23 gave rise to some difficulties.

44. The Norwegian representative had pointed out that if articles 22 and 23 were taken together it might be wondered whether the *pacta sunt servanda* rule and the principle of good faith were also valid for treaties being applied provisionally.

45. In his delegation's view, it should be made clear that article 23 also related to treaties which were being applied provisionally. It therefore formally proposed as an oral amendment that the words " or being applied

provisionally " should be inserted after the words " in force ".

46. Mr. ROMERO LOZA (Bolivia) said that, at the 72nd meeting of the Committee of the Whole, his delegation had supported article 23, on the understanding that the expression " treaty in force " meant a treaty that was valid in accordance with the provisions of the convention. That interpretation must be emphasized, because it would be inadmissible for the *pacta sunt servanda* rule to be applied to treaties in force even though such treaties had been imposed in violation of the rules of freedom of consent or by the threat or use of force.

47. The amendment co-sponsored by his delegation (A./CONF.39/C.1/L.118) had not been adopted by the Committee of the Whole, and several representatives had pointed out that there might be valid treaties which were not in force. That situation might indeed arise, but it was also possible that some treaties might be in force and yet might not comply with the essential conditions laid down by the United Nations Charter and by various articles of the draft convention.

48. It should be specified that States could not be required to perform treaties, even treaties in force, if those treaties did not fulfil the essential conditions for validity.

49. His delegation would vote for article 23, in the light of the statement he had just made concerning its interpretation.

50. Mr. MARKOVIC (Yugoslavia), submitting his delegation's amendment (A/CONF.39/L.21), said that article 23 was a key article of the convention and constituted a peremptory norm or at least a norm akin to a rule of that nature. It was therefore desirable that the wording of the article should be precise and that, in particular, it should cover treaties applied provisionally, the subject of article 22. It was questionable, however, whether article 23 actually covered that kind of treaty. With the original wording of article 22, which referred to provisional entry into force, the present formula in article 23, which used the expression " in force ", might perhaps have been acceptable. But the fact that article 22 had been redrafted, made it necessary to alter the text of article 23 as well. Moreover, that was apparent from paragraph (3) of the commentary to article 23, in which the International Law Commission had pointed out that the words " in force " also covered treaties which were in force provisionally.

51. The amendment submitted by his delegation would eliminate the possibility of any arbitrary interpretation of the last part of article 22. His delegation would of course also be in favour of a separate article if the Conference so decided.

52. Mr. REDONDO-GOMEZ (Costa Rica) said that his country was firmly convinced that the principle of good faith as applied to international obligations was not only a factor of special importance in establishing lasting peace between States but could also lead to the creation of a new type of international society in which the essential purposes of justice could be achieved through the law.

53. In his country, the principle of good faith had ceased to be a mere abstract concept and had become one of the most important factors in its survival as an independent community and as a sovereign State. In fact, article 12 of its Constitution expressly prohibited the establishment of a national army as a permanent institution.

54. His delegation thought that good faith was an element which applied to the conclusion as well as to the performance of international conventions, and it would therefore have been desirable for both those aspects to be covered by article 23. However, in view of the objections raised by representatives who were opposed to replacing the words " in force " by the word " valid ", his delegation thought that the retention of the present text in no way affected the reservations of the delegations which had sponsored the amendment (A/CONF.39/C.1/L.118), for there was no reason to believe that good faith had ceased to be a fundamental factor in the conclusion of treaties; moreover, the provisions concerning the possibility of revising unequal treaties or treaties imposed by force were derived by implication from the idea on which article 23 was based.

55. His delegation would therefore vote in favour of article 23, which it considered satisfactory.

56. Mr. SINHA (Nepal) said he did not share the concern expressed by certain delegations about the words " in force ". It was obvious from international law and practice that a treaty in force was a valid treaty. A treaty which conflected with a peremptory norm of general international law was void *ab initio,* as stated in article 50, and consequently was excluded from the field of application of article 23. In the opinion of his delegation, the rule in article 23 was one of the most just norms of the law of treaties. The Drafting Committee had been right not to depart from the International Law Commission's text, which was both simple and precise. His delegation would therefore vote in favour of the present text of article 23, on the understanding that the rule in question was subject to the principle of *jus cogens* and the doctrine of *rebus sic stantibus* and also applied to treaties which were in force provisionally.

57. Mr. SAULESCU (Romania) said that his delegation thought, as the International Law Commission had indicated in paragraph (5) of its commentary, that the *pacta sunt servanda* rule should be inserted in the actual preamble to the convention.

58. In the opinion of his delegation, the *pacta sunt servanda* principle applied to valid treaties, in other words treaties whose conclusion and performance were in conformity with the principles and rules of international law and which therefore by their substance encouraged a mutual respect for national sovereignty and independence, for the equal rights of States and for non-interference in matters within the domestic jurisdiction of States. It was equally obvious that the principle was just as applicable to treaties which were in force

provisionally as to treaties which had entered into force definitively.

59. The *pacta sunt servanda* rule was one of the mainstays of international treaty relations and it was from that principle that the obligation on the parties to take all appropriate steps to carry out a treaty was derived.

60. In the light of that statement concerning its interpretation of article 23, his delegation would vote for it.

61. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said his delegation was in favour of article 23 as submitted by the Drafting Committee, because the fact that a treaty was binding upon the parties and must be performed in good faith was an essential condition for the achievement of the basic aim of international law, which was the maintenance of peace and the development of international relations. The Ukrainian delegation also supported the Yugoslav amendment (A/CONF. 39/L.21) because it added to the *pacta sunt servanda* rule a new element which would usefully supplement that norm of international law by specifying that it held good equally for treaties applied provisionally — the subject of article 22 already adopted by the Conference.

62. Mr. ROSENNE (Israel) said he was in favour of article 23 in the form submitted by the Drafting Committee. His delegation doubted the usefulness of the Yugoslav amendment (A/CONF.39/L.21); indeed, it might endanger the stability of treaties and even the very principle stated in article 23. It would be remembered that the text of article 22 had been changed at the first session so as to show clearly that the provisional application of a treaty was in every case the result of agreement between the parties. It would not therefore be wise to adopt a provision which might throw doubt on the validity and applicability of such an agreement.

63. The PRESIDENT noted that all delegations were in favour of article 23 as submitted, and that no one doubted the soundness of the Yugoslav and Colombian amendments. In the light of the interpretative statements just made, it was obvious that the expression " treaty in force " also covered treaties applied provisionally and that the same was true of the expression " in good faith ". It should be borne in mind, however, that article 23 was of a declaratory nature which would be somewhat impaired if it included points of detail, as proposed in the amendments in question. Since all delegations were agreed on the way in which article 23 was to be interpreted, perhaps the sponsors of the amendments would agree to withdraw them. He suggested that the meeting should be suspended to enable the delegations concerned to hold consultations.

It was so decided.

The meeting was suspended at 12.25 p.m. and resumed at 12.30 p.m.

64. Mr. TODORIC (Yugoslavia) said that, after consulting several delegations, his delegation agreed that its amendment should be referred to the Drafting Committee, which might submit it as a separate article. Article 23 could thus be put to the vote without change.

65. Mr. BAYONA ORTIZ (Colombia) supported the Yugoslav representative's suggestion.

66. Mr. WERSHOF (Canada) said the Yugoslav proposal was of some importance. It might perhaps be better if the text of the proposed new article were first submitted to the Conference, before being referred to the Drafting Committee.

67. The PRESIDENT pointed out that the new article would in any event have to be submitted to the Conference. It would be better, however, if the Drafting Committee examined it and submitted a revised text to the Conference. He therefore suggested that the amendments should be referred to the Drafting Committee and that the Drafting Committee's text of article 23 should be put to the vote.

It was so agreed.

Article 23 was adopted by 96 votes to none.[3]

New article proposed by Luxembourg

68. The PRESIDENT invited the Conference to consider the new article proposed by the Luxembourg delegation (A/CONF.39/L.15), which was to be inserted immediately after article 23. The article read:

> The parties shall take any measures of international law that may be necessary to ensure that treaties are fully applied.

69. Mr. HOSTERT (Luxembourg) explained that the purpose of his amendment (A/CONF.39/L.15) was to remind States that they must take any measures of internal law that might be necessary to ensure that treaties were fully applied. The proposed article would come immediately after article 23, on the *pacta sunt servanda* principle, and would become article 23 *bis;* the existing article 23 *bis,* which prohibited States from invoking internal law to justify failure to perform treaties would then become article 23 *ter.*

70. The comments by the Luxembourg Government [4] showed that the proposed amendment had been based on article 5 of the Treaty of Rome [5] establishing the European Economic Community. Under that provision, member States were required to take all appropriate measures to ensure that the obligations arising out of the Community's laws were carried out. It might perhaps be argued that a rule based on the system of law created by the Treaty of Rome could not be carried over into a convention codifying the law of treaties; but it had to be borne in mind that the system of law in question included not only provisions of a quasi-federal type, but also obligations incumbent upon States, and it was more particularly to those provisions that article 5 of the Treaty applied; it had amply proved its usefulness.

71. The Luxembourg delegation would like to see a

[3] The Drafting Committee reported that it did not recommend the adoption of the Yugoslav proposal. See 28th plenary meeting.

[4] See *Yearbook of the International Law Commission, 1966,* vol. II, p. 311.

[5] United Nations, *Treaty Series,* vol. 298, p. 17.

similar rule included in the convention on the law of treaties. The very nature of the provisions of certain treaties made it impossible for them to be carried out, even when they had entered into force between States, unless appropriate measures of internal law were taken. For example, treaties for the harmonization of certain national laws and regulations could be put into force only through parliamentary action. Articles which were not sufficient in themselves would be supplemented and made more explicit by rules of internal law. Other treaties embodying provisions directly creating rights and obligations for individuals — a possibility expressly accepted in an advisory opinion of the Permanent Court of International Justice [6] — could not be applied by the courts unless they had been published in proper form. There were few treaties which did not require parliamentary approval or publication in an official gazette. Many treaties prepared under United Nations auspices would remain a dead letter if the States parties did not put them into operation. Further, the number of treaties was constantly growing, as could be seen from the United Nations *Treaty Series;* that was firstly because the international community had become larger, and secondly because, as a result of the growing interdependence of States, more and more problems had to be solved on a regional, or even a world-wide, basis. The State's exclusive field of jurisdiction had contracted as a result, and nationals of a State were increasingly governed by rules of law that were international in origin and based on treaties. Again, though the problem of carrying out treaties was one common to all States, it could obviously be solved in different ways, even in countries connected by close ties. Among the member States of the European Economic Community some, such as Luxembourg, adopted and applied treaties as international and contractual law, whereas others incorporated them in legislative instruments and transformed them into internal law. Those difference were even more striking when it came to States with different economic, social and constitutional systems.

72. The Luxembourg delegation therefore believed that, in codifying the law of treaties, the international community could not hold itself entirely aloof from the question of the subsequent fate of treaties. Any such omission would be regrettable at a time when the life of States and peoples was increasingly governed by rules of law that were international and originated in treaties. The amendment might prove useful and might help to strengthen respect for treaties. The effective application of international instruments would then no longer be delayed for lack of adequate internal measures of implementation.

73. It might be objected that the amendment was outside the scope of the convention because it referred to internal law. But some articles already adopted by the Committee of the Whole contained references to national law, for example article 43 and article 23 *bis,* which would become article 23 *ter.* The mere fact that it referred to internal law should not, therefore, be adequate grounds for rejecting the amendment. Another objection might be that the Luxembourg amendment would be better placed in a future convention on State responsibility. But carrying out a treaty through national legislation was essentially a matter for the law of treaties and affected State responsibility only consequentially; the article had, therefore, a logical place in the convention. The same objection had been raised at the first session in connexion with article 23 *bis,* which prohibited States from invoking internal law to justify failure to perform a treaty, but it had not been taken into account by the Committee of the Whole.

74. The new article 23 *bis* would come as a separate article after article 23, which stated the *pacta sunt servanda* principle. The addition of a paragraph to article 23 would have weakened the fundamental importance of that provision. Again, it would not have been appropriate to present the Luxembourg amendment as the logical consequence of the performance of treaties in good faith, since it was seldom deliberate bad faith but rather mere inertia which stood in the way of carrying out treaties in internal law. A positive obligation to carry out treaties should logically precede the question of justifying failure to perform; for that reason, the former article 23 *bis* should become article 23 *ter.*

75. Mr. GALINDO-POHL (El Salvador) said that in his delegation's view article 23, which provided that every treaty in force was binding upon the parties to it and must be performed by them in good faith, was sufficient to ensure the observance of treaty obligations. By virtue of that rule, any State should be able to adopt the measures — financial, administrative, technical or legal — required to ensure the performance of a treaty. No difficulty would be encountered where the national rules were in keeping with the rules of international law. It might, however, happen that the rules of national law conflicted with the provisions of a treaty, although such questions ought to be studied and settled during negotiation or at the time of ratification. However, once concluded, the treaty must be performed. In countries such as El Salvador in which constitutional law took precedence over treaty provisions, the courts might be called on to give their opinion and might declare the provisions of a treaty unconstitutional. It was a sphere within the exclusive jurisdiction of the nation's highest courts. States could therefore hardly be asked to undertake, in as specific a manner as was proposed by the Luxembourg amendment, to take measures of internal law to ensure that treaties were fully applied. For that reason, the amendment, although its aim was praiseworthy and intended to promote international law, was unacceptable in practice. The rule set out in article 23 was sufficient to bind the contracting State and to guarantee the performance of international obligations.

The meeting rose at 1 p.m.

[6] See advisory opinion concerning the *Jurisdiction of the Courts of Danzig* (Series B, No. 15, p. 17).