Philippines

Thank you for giving us a chance to speak on the subject of the Law of Treaties. Now being permitted as an Observer, I would just say that we are taking notes of the things now being expressed in the Committee's meetings.

Korea

Mr. President, I would reserve my comments for an opportunity to state at a later stage.

Singapore

I reserve my right to speak at a later stage during the deliberations of the Committee's meetings.

Turkey

Thank you, Mr. President. I think I have nothing much at this stage to say for your reflection. I feel very much happy to represent my country in such a distinguished gathering. I would follow with great interest the proceedings of the Committee and try to inform myself since this is the first time that I am attending a conference. If I get a chance, I will make my statement on other occasions, whenever we discuss the topic of compulsory settlement of disputes and also I will speak on Article 62.

American Society of International Law

(*Professor Myres S. McDougal*)

Mr. President, distinguished Delegates, and fellow Observers :

It is a great honor and pleasure to be permitted to be an observer at this tenth session of the Asian-African Legal Consultative Committee. Mr. Oscar Schachter, the President of the American Society of International Law, has asked me to express his deep appreciation of your courtesy in allowing

us to be present here, and I should like to add my own warm thanks.

For more than two years the American Society of International Law has had a special committee, of which I have been a member, studying this draft convention upon the law of treaties and making recommendations to the United States Delegation to the Vienna Conference. It was my privilege also to be a member of the United States Delegation to the first Vienna Conference. Insofar as possible, however, on this occasion I should like to follow the advice given yesterday by Dr. Nagendra Singh and try to divest myself of all special identities. I hope, with appropriate humility and with awareness of my position as an observer, I will simply speak to you as one human being to another and as a citizen of the larger community of mankind.

From this prespective, it has seemed to me that those of us who favour provision of some ultimate recourse to third party decision making for application of the new treaties' convention, when negotiations between the parties break down, have not begun to make as strong a case for our position as we might make. It seems to me that the grounds for providing some ultimate recourse to third party decision are much more fundamental than fears about the vagaries of Part V on Validity. These grounds cut deep into our common interests in establishing and applying any law of international agreements and into the complexities and difficulties in applying any general law to particular instances of conflict.

The excellent documentation upon this problem prepared by your Secretariat has come to my hand too late for me to consider it in making this statement. I did, however, attend some of the sessions in Vienna and I have just reviewed the summary record of the discussions on Articles 62 and 62 *bis*. I have also listened with appreciation and enlightenment to

the eloquent statements made here yesterday and this morning.

The arguments against the provision of some ultimate recourse to third party decision making would appear to build upon five different themes. In the brief time available to me, I should like to advert to each of these types of arguments, indicating what seems to me to be presuasive reasons for rejecting each, and then to sketch in broad outline certain more positive, fundamental reasons for the establishment of some form of third party decision for last resort when negotiations fail.

The first argument against the establishment of some form of ultimate third party decision making is that such decision making in some mysterious way impairs the sovereignty of States. With all deference, it is submitted that this is not so. One might with equal realism argue that the establishment of courts within our national communities impairs the freedom of individuals. It is no more an impairment of the sovereignty of a State for it to agree to appropriate procedure for the settlement of disputes with other States than for it to agree to certain substantive provisions, such as in the draft convention, for regulating such settlement. For most peoples today sovereignty is defined as the freedom which States enjoy under international law, and it is regarded as the highest expression—not the impairment—of sovereignty for a State to engage with other States in the making and application of law. Even within our national communities a "lawful" decision is regarded as one made not merely in accord with certain policies but also by certain established procedures—whether in courts, administrative bodies, arbitration boards, and so on.

Certainly the procedures proposed in Articles 62 and 62 *bis* do not interfere with any genuine freedom of choice of States. The principal trust of these articles is to keep the parties in negotiation as long as possible and, when negotiation

fails, to provide them the widest measure of choice among modalities of settlement. It is only when consensus falters, and one or both of the parties seek to impose a unilateral will upon the other, that recourse to third party assistance is stipulated.

The second argument against ultimate recourse to third party decision making is that it may be partial or biased and may take extra-legal considerations into account. Again, it is submitted with deference, the facts cut exactly the opposite way. If there is to be no resort to a third party when there is ultimate disagreement between the parties, then the State with greatest effective power is left free to impose its will upon the other. From the standpoint of the State so imposed upon, no decision could be more partial, arbitrary, and unequal. When decisions are taken by unilateral choice only, naked power, and not law, is the governor. When there is only unilateral appreciation of facts and law, certainly partiality and extra-legal considerations are afforded their freest sway. Since it is not to be supposed that any one State, or group of States, or types of State—new or old, large or small, located in one part of the world or another—will always have the naked power to secure what it regards as its special interests, there would appear a common interest in all States in reducing this type of decision.

The third principal argument against ultimate recourse to third party decision is that there is no modern, acceptable law for such decision making to apply. This argument, again, would appear to be belied by the facts. This new convention, in the drafting and prescribing of which so many States have had a hand offers a relevant and comprehensive formulation, adequately reflecting common interest.

The gravest danger is not that there will be no law, but that there will be no procedures for the application of what could otherwise be good law. The danger is that the broad policy formulations in the new convention may be still born

because they are not complemented by appropriate procedures for their application.

It has been suggested that procedures for application are not necessary parts of a law of agreements. This would appear profoundly mistaken. Many branches of the law within our national communities require unique procedures and are incomplete without such procedures : witness the law of crime or that of torts or *delicts*. Similarly, a law adequate to regulate the making, interpretation, performance and termination of agreements—whether within national or international arenas —must require its own specific and especially adapted procedures.

The fourth argument against ultimate recourse to third party decision is that such decision might be employed to keep parties subjected to outmoded, oppressive agreements based more on coercion than on genuine mutual commitment. This fear, again, would appear unfounded. The new convention has many flexibilities written into it and embodies concepts about consent to be bound and invalidity, at least as old as Roman law, designed to secure and protect the genuine mutual consent of the parties. Similarly, the formulations of the convention about termination are most generous in taking into account the relevance of change, making explicit provision for fundamental change in circumstances and for supervening impossibility of performance.

It is common ground in most legal systems today that there is no virtue in authority, law or agreement *per se*. The virtue of authority, law, and agreement is in the common purposes and interests they serve, and when conditions so change that common purposes and interests can no longer be served, authoritative arrangements should also be changed. Law, appropriately conceived, has no built in preference for the *status quo*.

It would appear that the new convention is adequately expressive of these contemporary conceptions of authority and affords full opportunity for a changing response to changing conditions. Certainly third party decision guided by its generous provisions is likely to be less destructive of the common interest than unilateral appreciation of the relevance of change by any particular State which happens at any given time to have the effective power to make its will prevail.

The fifth and final major argument against the establishment of third party decision for the ultimate application of the convention on treaties is based on precedent : we should not do in the future what we have not done in the past. It is argued that compulsory third party decision has not been stipulated in many great conventions of the past, such as those with respect to the law of the sea, diplomatic and consular immunities, and so on ; hence there should be no such stipulation in this convention. This argument reminds me of what is known in my country as "the Goofus bird". The Goofus bird flies backwards ; though he dosen't care where he is going, he likes to know where he has been.

The States of the world, and particularly the Asian-African States, have been bold in their demands for provision of a new substantive content for the law of treaties. Why should they not be equally bold in their demands for new procedures to assure that this new substantive content will in fact be put into controlling practice in particular instances. If boldness halts at mere aspiration for new policy, it may turn out to be symbolic gesture only rather than movement towards genuine reform.

In controversies relating to the law of the sea and to diplomatic and consular immunities, third party decision is not so immediately required, since each party has within its effective control certain potentialities for reciprocity and retaliation which it can invoke to secure common interest. In contro-

versies relating to the law of treaties, one party is likely always to be at a disadvantage and no State can be sure of always being the party with advantage. In shaping a law for the future we should be guided not so much by the mistakes and failures of the past as by the urgent necessities of securing common interest under the conditions of the future.

In the few moments that I may be permitted to continue to trespass upon your patience, I should like to turn from this negative rebutting of the arguments of others to the brief outline of a more positive, affirmative case for third party decision. It is frequently urged that third party decision is indispensable to minimize the dangers of abuse in unilateral appreciation of the many vague concepts employed in the "Validity" sections of the convention and to afford a dis-interested procedure for the creation of a more precise reference for these concepts in terms of common interest. It is obvious that this suggestion has some basis in realism. It seems to me, however, that a much stronger case derives from the importance of agreement making generally to the establishment and maintenance of world public order and from the complexities and difficulties of applying any law, not merely that relating to validity or invalidity, to the ambiguous features of any particular case.

In world public order, as in our national communities, agreement serves the function of organizing an economy or society for the production and distribution of goods and services and other values. In the world arena, however, agreement serves still other, more explicitly governmental or constitutive, functions. It is a principal modality by which law is made and by which constitutions—universal, regional, or specialised—are established and maintained.

Agreement can serve these important functions and maintain an increasingly productive world society only if a certain stability in peoples' expectations about the performance of agreements is secured and maintained. Even large States,

which might otherwise rely upon their naked power to secure their special interests, have an abiding, common interest with all States, large and small, in securing this stability. In an inter-dependent world, the advantages in an arbitrary, unilateral repudiation of agreements can never reside wholly on one side, or with a few States, or even with certain types of States. The security and internal prosperity of all States are irrevocably bound together, and not even the strongest State can make itself secure in all its values by the exercise of naked power. Neither large States nor small States can have a permanent interest in securing a special share of a melting block of ice, their permanent, common interest is in an ever-expanding, more secure, and more abundant world society.

Similarly, the application of a law of international agreements designed to secure an appropriate stability in peoples' expectations can never be easy or automatic. The dangers which are anticipated in the application of the validity sections of the new convention are but dramatic examples of the delicate nature of the application of general concepts to specific facts in any case. In any instance in which claim is made for the application of a general prescription to the facts of a particular case, a series of delicate appreciations are required; the potential facts and potentially relevant laws must be explored, and the relevant laws must be interpreted and appraised in terms of basic constitutional policy (*e.g. jus cogens*); the facts must be finally characterised and the relevant laws carefully related to facts; a choice or decision must be made in terms of the projection of a future policy; and, finally appropriate measures must be taken or recommended to secure conformity of the parties to the decision. It should require little argument that all these delicate appreciations are more likely to be made in terms of common interest through the assistance of third party decision than by the unilateral, naked power decisions of either party.

I thank you for your great patience; I wish you the greatest success in your Conference; and I very much hope that your boldness of vision in the creation of new policies will be matched by an equal boldness and realism in inventing and establishing new procedures to make these policies effective. Thank you.

President:

I thank Prof. Myres S. McDougal of the American Society of International Law. If the distinguished representative of the International Law Association of the USSR wishes to say anything he can have the floor.

USSR

I have no statement to make at this moment.

President

The distinguished representative of the German Section. If he wishes to say anything.

International Law Association
(German Section)

Mr. President, thank you. As you have permitted me to take the floor this moment I first take this opportunity to thank you, Mr. President, and the distinguished members of this Committee to have admitted me in my capacity as President of German Branch of the International Law Association. I wish to make it clear, I am here not in an official capacity, but in a personal capacity as a member of the Association of German scholars. In our Association, we have started to solve the problems of the Law of Treaties since long time and we hope for success of the efforts to codify the Law of Treaties. For the moment, unfortunatly, I have not been able to come here earlier, so I have missed the opening speeches of many of your distinguised members. But I am sure that I will follow the proceedings with deep interest

because as a scholar I am very much interested to know the opinions of the Asian and African countries in these matters. In the last, I cannot do any more at the moment than to wish your Committee the greatest success in its proceedings and I hope that your meeting will conclude with success. Thank you very much, Mr. President.

President

Now it is proposed to have two Sub-Committees. As we have discussed yesterday the Sub-Committee one will deal with Articles 62 *bis*, 76 and final clauses. On this Sub-Committee each of the delegations can send its nominee. There will be a second Sub-Committee to deal with other clauses. We will be taking down the names if they are suggested by the Delegates here. The distinguished delegate from Ceylon. First Sub-Committee.

Ceylon

From my Delegation, Mr. Pinto.

Ghana

First Sub-Committee, Mr. Vanderpuye.

India

Dr. S.P. Jagota.

Indonesia

H.E. Miss E.H. Laurens.

Japan

Mr. Hisashi Owada.

Jordan

Mr. President, as I have already intimated on the previous occasion that if I can find it convenient and possible I will certainly attend the meeting.

Pakistan :

I will nominate Mr. M.A. Samad.

Sierra Leone :

Mr. Albert Metzger. My Delegation will be represented only in the first Sub-Committee.

Thailand :

Leader of the Delegation.

U.A.R. :

Mohammaed Said El Dessouki.

President :

For the Presidentship of the first sub-committee, we propose the name of the distinguished Delegate of Indonesia, if we have no objection. I think it has the approval of the distinguished delegates.

India seconded the proposal. (Unanimously elected.)

President :

Now for the second Sub-Committee.

Ceylon :

I am not very clear. I understood at the moment from Dr. Sen when he looked at me that the proposal I had made yesterday was accepted and that both the question of Article 62 *bis* and the question of multilateral treaties and Article 5 *bis* should be put before a full Committee. If you do not agree at all, then there can be a separate Sub-Committee to deal with other matters.

Secretary-General :

5 *bis* will be dealt with by Sub-Committee No. 1.

Ceylon :

May I ask for one more concession. Any Leader of the Delegation can take the place of his nominee ?

Secretary-General :

At any stage.

President :

Now the names of the Second Sub-Committee in respect of residual clauses or other matters.

Ceylon:

Mr. P. Naguleswaram.

Ghana :

Mr. President, I am sorry in view of the decision to bring 5 *bis* also in the first Sub-Committee, I would revise my delegation. I will be on the First Sub-Committee myself and Mr. Vanderpuye would be on the other.

India :

Dr. (Mrs.) K. Thakore.

Indonesia :

Mr. Sos Wisudha.

Japan :

Mr. Hiroyuki Yushita.

Pakistan :

Mr. Zahid Saeed.

Sierra Leone :

Because of physical impossibility it would not be possible but I would come on both.

President

Whenever you wish you can come.

Thailand

Our Delegation would like to know if the two Sub-Committees will be meeting at the same time ?

Secretary-General

At the same time.

Thailand

We want to be present in both the Sub-Committees, but it would be impossible if both are held at the same time.

President

Most of the time they will be held simultaneously.

Sierra Leone

We would like to be present at one time on one committee and at the other on the second committee.

U.A.R.

Dr. Ahmad Sadek Alkosheri.

India

Mr. President, this is a mere suggestion. Since there are Delegations with one member only, it may be possible for them to attend the First Committee but it would be difficult for them to simultaneously attend the meetings of the Second Committee. Why not make the Second Committee more compact consisting of about three or four delegations ? If any Delegation wishes to attend, it would be open for them to come and attend that session but it should be restricted to three or four. This is a mere suggestion. You might like to ask for the comments of other Delegates.

President :

Any comments from any other member ? The Secretary-General feels that a Sub-Committee of two or three would be too small and as it is there are only six. So, other members whenever they are available they will be able to attend. As to the presidentship of the Second Sub-Committee, the nominee of the United Arab Republic should head this Committee. If there is no objection we take it that it has your approval. (Approved)

Break

President

Distinguished Observers and Delegates, the meeting is called to order. As you all know we have constituted two Sub-Committees. You know the reference made to Sub-Committee No. 1. As to Sub-Committee No. 2, it will be desirable if we have an indication of the points which would be considered by them.

Ceylon

I have no doubt that members of the other Delegations will have various proposals as to clauses which have to be considered by this Sub-Committee. My Delegation suggests that there are two matters which appear to us to need investigation. The first is the applicability of this Convention to past Treaties.

Secretary-General

That will be taken care of by the Final Clauses.

Ceylon

The second point is, matters relating to contracting out of this Convention. It seems to me the questions to be discussed are firstly, whether under the Draft Convention as it

stands, contracting out is possible. Secondly, whether contracting out is desirable at all. And thirdly, whether there should not be express provision in the Convention that there can be no contracting out in this Convention.

Secretary-General :

That will go to the Second Sub-Committee.

Ghana :

Mr. President, we ourselves have not proposed any article outside the main ones that are put before the first meeting. I believe that some Delegates have already proposed certain Articles to be considered, and I think the Second Sub-Committee will concern itself with those points and "any other matter" which falls out the First Sub-Committee.

India :

I, too, agree with what the distinguished Delegate from Ghana has said. Most of the important ones are covered by the terms of reference which you have formulated for the first Sub-Committee. The only point which remains is one relating to restricted multilateral treaties. That could be taken up by the Second Sub-Committee. Most of the items mentioned have been covered by the First Sub-Committee.

Ceylon :

In my understanding the main purpose of the definition of multilateral treaty is to give a meaning to Article 5 *bis*. It seems to me, therefore, that the Sub-Committee which considers 5 *bis* should be charged with this aspect of multilateral treaties.

India :

I have no particular observations to make. You can do exactly as the Delegate from Ceylon has said.

Indonesia :

My Delegation has no additional articles to propose for consideration. We feel that those articles that have been left over and which were proposed for consideration—we will have our hands full and it will be a heavy task to solve those problems.

As for the remark made by the distinguished Delegate from Ceylon, I think he has a point. I think, it will be difficult to separate the consideration of Article 2 from Article 5 *bis*. However, it is a matter entirely in your hands.

Japan :

Mr. President, when I spoke yesterday I did reserve to speak something more concrete on the question of settlement of disputes. But in view of the fact that we are going to establish a Sub-Committee in which to deal with this problem more concretely, I have nothing to add except to say that I am encouraged by the atmosphere of compromise and conciliation in this Committee and also by the existence of genuine concern for the need of really an effective machinery for the settlement of disputes in the last resort.

On the matter of procedure to be followed, my Delegation in the previous notice to the Secretariat did suggest a number of articles for a possible subject of discussion. However, as I said yesterday, my Delegation believes and agrees in this respect with the distinguished Delegates of Ghana and India that the primary concern for us is the question of settlement of disputes and the relevant questions involved therein, that is to say Articles 62 and 63 primarily and, therefore, we would be advised to concentrate primarily on this question which is the key to the whole problem. I think that it would be useful to make an exchange of views and arrive at a mutual understanding on this question in the First Sub-Committee. I do not exclude the possibility of taking up other questions