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11th meeting of the Committee of the Whole

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be, of the joint amendment sponsored by his delegation and that of Trinidad and Tobago (A/CONF.39/C.1/L.75).

45. The CHAIRMAN asked the sponsors of the joint amendment to say whether they would agree to their amendment being referred to the Drafting Committee without any express decision on it being taken by the Committee of the Whole.

46. Mr. FRANCIS (Jamaica) said that, when introducing the amendment, he had indicated that the sponsors wished it to be referred to the Drafting Committee. In any case, they did not desire the amendment to be put to the vote, and therefore withdrew it.

47. Sir Francis VALLAT (United Kingdom) said that the amendment in document A/CONF.39/C.1/L.53 raised a problem of substance which required a decision by the Committee of the Whole before it was referred to the Drafting Committee.

48. The CHAIRMAN said that he too thought it preferable that the Committee should take a decision on the amendment, which he then put to the vote.

The amendment by Ceylon (A/CONF.39/C.1/L.53) was rejected by 70 votes to 5, with 5 abstentions.

49. Mr. DE CASTRO (Spain) said that he withdrew his amendment (A/CONF.39/C.1/L.35/Rev.1).

50. The CHAIRMAN observed that the amendments in documents A/CONF.39/C.1/L.12, L.39, L.42, L.55 and L.58 were still before the Committee. Those amendments seemed to him to be of a drafting character, so that they should be referred to the Drafting Committee without any previous vote on them by the Committee of the Whole.

51. Mr. MERON (Israel) said he thought the amendment submitted by the Ukrainian SSR (A/CONF.39/C.1/L.12) raised a question of substance, inasmuch as it would make the provisions of the convention take precedence over any other provisions. The Committee of the Whole should therefore take a decision on that amendment.

52. Sir Lalita RAJAPAKSE (Ceylon) said that the amendment submitted by France (A/CONF.39/C.1/L.55) also raised a question of substance which called for a decision by the Committee of the Whole.

53. Mr. VIRALLY (France) said that he was not asking for a vote on his delegation's amendment, but if the Committee wished to vote on it he would not, of course, object.

54. The CHAIRMAN put to the vote the amendment submitted by the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.12).

The amendment was rejected by 42 votes to 26, with 19 abstentions.

55. Mr. KRISHNA RAO (India), speaking on a point of order, reminded the Committee that the Chairman had first decided that the remaining amendments were drafting amendments and would not be voted on. If any representatives challenged the Chairman's decision, a vote should be taken on that decision itself.

56. The CHAIRMAN said he had changed his decision in order to avoid difficulties in the Drafting Committee's work.

57. Mr. BINDSCHEDLER (Switzerland) observed that if there was to be voting on all the amendments, it should, in accordance with the rules of procedure, begin with that furthest removed from the text submitted to the Committee, namely, the Peruvian amendment (A/CONF. 39/C.1/L.58).

58. Mr. VIRALLY (France) supported the Swiss representative with regard to the order of the amendments. He also supported the Indian representative: the Chairman's decision to refer the remaining amendments to the Drafting Committee should be put to the vote if it was challenged by some representatives.

59. The CHAIRMAN said he would put his decision to the vote if it was challenged. He then proposed that the Committee of the Whole should refer all the remaining amendments (A/CONF.39/C.1/L.39, L.42, L.55 and L.58) to the Drafting Committee.

It was so decided.[3]

The meeting rose at 1.35 p.m.

[3] For resumption of the discussion on article 4, see 28th meeting.

ELEVENTH MEETING

Wednesday, 3 April 1968, at 3.15 p.m.

Chairman: Mr. ELIAS (Nigeria)

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

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts proposed by his Committee.

Article 1 (The scope of the present convention) [1]

2. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had examined the various amendments to article 1, and had reached agreement on the following text (A/CONF.39/C.1/1):

"*The scope of the present Convention*

" The present Convention applies to treaties concluded between States."

3. That text differed from the International Law Commission's draft in that the words " The present articles " had been replaced by the words " The present Convention " as proposed in the amendment by Congo (Brazzaville) (A/CONF.39/C.1/L.32), both in the title and in the article itself; that change was in line with the practice of codification conferences. The words " relate to " had also been changed to " applies." The Drafting Committee had deemed it useful to retain the term " concluded " and had not accepted the wording " which are concluded " for reasons of style, although it wished to emphasize that the draft covered both treaties which had been concluded in the past and treaties which might be concluded in the future. It had rejected the proposal to delete the article because it considered that article necessary for the purpose of defining the scope of the convention at the outset.

[1] For earlier discussion of article 1, see 2nd and 3rd meetings.

4. Mr. KRISPIS (Greece) said that in the form in which it had emerged from the Drafting Committee, article 1 had more the appearance of a title or of a clause of a preamble. In fact, if the convention were to be entitled " convention on the law of treaties between States " article 1 would have no meaning. The same would be true if the preamble to the convention included a clause to the effect that it applied to treaties between States.

5. If it were desired to express a genuine legal rule in article 1, in other words, a rule stating the area of application of the convention, it would seem more appropriate to insert the word " only " or the word " solely " either immediately after " applies " or immediately before " between." He was not, however, making a formal proposal to that effect.

6. The CHAIRMAN said he would put article 1 to the vote as proposed by the Drafting Committee.

Article 1 was adopted by 63 votes to none, with 1 abstention.

Draft resolution approved by the Drafting Committee.

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the draft resolution adopted by the Drafting Committee on 1 April (A/CONF.39/C.1/2) reflected the views which had been expressed in the Committee of the Whole.[2] Its operative paragraph recommended to the General Assembly that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations.

The draft resolution (A/CONF.39/C.1/2) was adopted unanimously.

8. The CHAIRMAN invited the Committee to resume its discussion of the draft articles adopted by the International Law Commission.

Title of Part II, Section 1

9. The CHAIRMAN said that it would perhaps be difficult for the Committee to decide on the title of Section 1 of Part II until it had examined all the articles in that section.

10. Mr. MOUDILENO (Congo, Brazzaville) said he agreed and that he would introduce his amendment to the title of Section 1 (A/CONF.39/C.1/L.79) when the Committee had concluded its discussion of the various articles in that section.

Article 5 (Capacity of States to conclude treaties)[3]

11. The CHAIRMAN said that he had been informed that the proposers of a new article 5 *bis* (A/CONF. 39/C.1/L.74 and Add.1) wished their proposal to be kept entirely separate from the discussion of article 5 itself. He would therefore invite the Committee to consider only article 5 and the amendments to it.

12. Mr. ZEMANEK (Austria), introducing his amendment (A/CONF.39/C.1/L.2), said that its purpose was to introduce a new paragraph which would establish an international obligation for a federal union to confirm or approve the powers of its constituent member which entered into a treaty in the circumstances set forth in paragraph 2. That was in conformity with established practice. If paragraph 2 were retained in its present form, the other party to the treaty would have the delicate task of examining the internal law of the federal union to which its treaty partner belonged. The Austrian amendment would release it from that obligation.

13. The proposed new paragraph had been couched in terms analogous to the provisions of article 6 (Full powers to represent the State in the conclusion of treaties) and article 43 (Provisions of internal law regarding competence to conclude a treaty).

14. The confirmation extended by the competent authority of the federal union would have the effect of precluding the federal State from invoking, as grounds of invalidity of the treaty, any violation of its constitutional law by its constituent member.

15. A provision on those lines had been included by the International Bank in its Convention on the settlement of investment disputes between States and nationals of other States of 18 March 1965, article 25; paragraph (3) of that Convention[4] required the approval of the federal State for any agreement between one of its constituent members or sub-divisions and a foreign investor.

16. His delegation would be prepared to vote for the deletion of article 5. If, however, the Committee decided to retain the article, his amendment should be put to the vote, since it was not of a mere drafting character.

17. Mr. CASTREN (Finland) said that the International Law Commission had experienced great difficulties when attempting to draft an article on capacity to conclude treaties. The Commission's various drafts had attracted much criticism from Governments and some had suggested the deletion of the article altogether. The Commission had ultimately dropped certain portions of the text and the article had emerged in its present unsatisfactory form.

18. It was undeniable that capacity to conclude treaties was one of the most important prerogatives of States, which were the main subjects of international law. There existed, however, considerable differences between States, and some had only a limited capacity to conclude treaties. Some constituent members of composite States had full internal autonomy but no capacity to conclude treaties; many political sub-divisions were mere provinces.

19. The wording of paragraph 1 was much too general and did not reflect the real position in international law. In fact, there was no need for an express provision of that type, because the capacity of both sovereign States and semi-sovereign States to conclude treaties was implied in all the provisions of Section 1 of Part II of the draft. Neither the 1961 Vienna Convention on Diplomatic Relations nor the 1963 Vienna Convention on Consular Relations contained any express provision that States had the right to maintain diplomatic or

[2] See, in particular, 3rd meeting, paras. 5 and 75.

[3] The following amendments had been submitted: Austria, A/CON.39/C.1/L.2; Finland, A/CONF.39/C.1/L.54; New Zealand A/CONF.39/C.1/L.59; Australia, A/CONF.39/C.1/L.62; Mexico and Malaysia, A/CONF.39/C.1/L.66 and Add.1; Nepal, A/CONF. 39/C.1/L.77/Rev.1; Congo (Brazzaville), A/CONF.39/C.1/L.80; Republic of Viet-Nam, A/CONF.39/C.1/L.82. Subsequently, a sub-amendment to the Austrian amendment was submitted by the Byelorussian Soviet Socialist Republic (A/CONF.39/C.1/L.92), and Finland submitted a revised version of its proposal (A/CONF. 39/C.1/L.54/Rev.1 and Corr.1).

[4] United Nations, *Treaty Series*, vol. 575, p. 176.

consular relations; that right had been considered as inherent.

20. The provisions of paragraph 2 were much too narrow. First, they only referred to one particular kind of composite State, whereas unions of States other than federal unions had existed in which the constituent members had some capacity to conclude international treaties. Secondly, they referred only to the federal constitution, ignoring the constituent instruments which had preceded the adoption of the constitution, such as the international agreements between the States which had become members of a federal union.

21. His delegation had accordingly proposed the deletion of article 5 (A/CONF.39/C.1/L.54) but would not press the proposal if the Drafting Committee agreed to consider two amendments to the present text.[5] First, to insert in paragraph 1, after the word " State," the words " which is a subject of international law "; that qualification was necessary in order to limit the unduly broad and vague language of that paragraph. That proposal was based on paragraph (4) of the International Law Commission's commentary, which defined a State for the purposes of the draft; that definition should be incorporated in the text of article 5 and not just left in the commentary. A similar proposal had been put forward by the delegation of the Congo (Brazzaville) (A/CONF.39/C.1/L.80).

22. Secondly, to reword paragraph 2 to read on the following lines: " States members of a union of States may possess a capacity to conclude treaties if such capacity is admitted by the constitution or the other constituent instruments of the union, and within the limits laid down in the said instruments."

23. Mr. SMALL (New Zealand), introducing his delegation's amendment (A/CONF.39/C.1/L.59), said that, like other delegations, he had considerable doubts about the utility of article 5, especially paragraph 2. The existing text was only the incomplete fragment which had survived the International Law Commission's extensive debates on the intractable subject of international personality and State capacity, debates which had ranged far beyond the scope of the law of treaties.

24. If article 5, and especially paragraph 2, were to be retained, his delegation believed, and had so proposed in document A/CONF.39/C.1/L.59, that it was advisable to avoid the use of the word " State " with two completely different meanings in the two paragraphs of the article. In paragraph 1, the word " State " was used in the general sense of the ordinary contractual entity at international law to which all the draft articles related. In paragraph 2, however, the words " States members of a federal union " were used to describe the component members of that union. In order to avoid the confusion which might result from that duality in the use of the word " State ", he proposed that the words " States members " in paragraph 2 be replaced by the words " Political sub-divisions ". If that wording raised any difficulty, he would suggest as possible alternatives: " Constituent members " or " Constituent elements ".

[5] These amendments were circulated in document A/CONF. 39/C.1/L.54/Rev.1 and Corr.1.

25. In making that proposal, the New Zealand delegation assumed that there was general agreement in the Committee that, in the case of a State with a federal constitution, solely the federal union itself constituted a " State " for the purpose of international law. The proposed amendment was put forward as a measure which might be considered if paragraph 2 were eventually retained; it did not prejudge the more general question whether it was necessary to preserve that paragraph.

26. Mr. HARRY (Australia) said that he could support the proposal to delete the whole of article 5; alternatively, he would not have any strong objection to the Austrian proposal to add a new paragraph, but he considered it preferable to delete paragraph 2, as proposed in his delegation's amendment (A/CONF.39/C1./62).

27. The statement in paragraph 2 that some States possessed the capacity to conclude treaties only if their constitution so permitted conflicted with paragraph 1, which said that every State possessed that capacity. It was also inconsistent with article 1 which specified that the convention would apply only to States, in other words, to entities having the status described in the Commission's commentary to article 5. Part of the difficulty arose from the fact that the same word, " State " with a capital *S*, was used with two different meanings in the two paragraphs of the article.

28. Under the constitution of the Australian Federation, the six constituent states, with a small *s*, had no international standing and the making of treaties was a function of the Federal executive alone. He was well aware, of course, that in some federal unions the constituent members could and did possess a capacity to conclude treaties; to take an example, the Byelorussian SSR and the Ukrainian SSR, two of the component members of the USSR, had for over twenty years been parties to multilateral treaties. Their treaty-making capacity had never been questioned since they had become members of the United Nations. Paragraph 2 was clearly not necessary to establish the treaty-making capacity of States in that class: a country accepted by the general political international organization as a member did not need a special article to establish its treaty-making capacity in international law.

29. The purpose of paragraph 2 appeared therefore to be to cover such federal component units as the German *Länder* and the Swiss Cantons, with their limited treaty-making power. He saw no reason for singling out such units, among all the subjects of international law, for special mention, important though their status was historically.

30. There was no need to retain that paragraph, which was merely a survival from earlier drafts by the International Law Commission covering also other unions, international organizations and dependent States. The paragraph would in any case require amendment as proposed by Austria (A/CONF.39/C.1/L.2) and New Zealand (A/CONF.39/C.1/L.59), in order to make clear the role and responsibility of the federal authorities. Its removal, on the other hand, would neither impair the functioning of any federal system nor affect the rights of any component unit under a federal constitution.

31. Mr. SEPULVEDA AMOR (Mexico), introducing the proposal by his country and Malaysia to delete

article 5 (A/CONF.39/C.1/L.66 and Add. 1), said that paragraph 1 was superfluous. It was not necessary to reaffirm the treaty-making capacity of States in the international legal order; that capacity was inherent in the international personality of States. It was implicit both in the terms of article 1 which the Committee had just adopted, and in the definition of " treaty " in paragraph 1 (*a*) of article 2. Moreover, the capacity to conclude treaties was not confined to States and that fact was not clearly reflected in paragraph 1 of article 5.

32. The deletion of paragraph 2 was all the more necessary because it dealt with matters pertaining to the domestic legal order of federal unions. The capacity of a component member of a federal union to conclude treaties was based on the federal constitution, in other words on internal law and not on international law. If paragraph 2 were maintained, it would introduce an element of uncertainty into the conclusion of treaties. The purpose of the Mexican amendment was to restore the subject to the domestic legal order, where it properly belonged.

33. Sardar BHIM BAHADUR PANDE (Nepal), introducing his delegation's amendment, (A/CONF.39/C.1/L.77/Rev.1), said that it was of a drafting character: its purpose was to place on the same footing all States which had a capacity to conclude treaties. Once it was recognized that a state member of a federal union possessed that capacity, there was no reason to make any difference between it and other States in the wording of article 5. That was why his delegation proposed that the two paragraphs of article 1 be combined in a single formulation. He did not wish his amendment to be put to the vote, but would request that it be referred to the Drafting Committee.

34. Mr. MOUDILENO (Congo, Brazzaville), introducing his amendment (A/CONF.39/C.1/L.80), said that its purpose, as far as paragraph 1 was concerned, was to clarify the meaning of the word " State " by adding the words " which is a subject of international law." The reasons for introducing that idea had already been outlined by the representative of Finland. His amendment possessed the additional advantage of avoiding the confusion which arose from the use of the word " State " with two different meanings in the two paragraphs of the article.

35. The purpose of the changes proposed to paragraph 2 was to clarify its meaning. Since his whole amendment was of a drafting character, he requested that it be referred to the Drafting Committee.

36. Mr. PHAN-VAN-THINH (Republic of Viet-Nam) said that his delegation had submitted its proposal for the deletion of article 5 (A/CONF.39/C.1/L.82) because, since article 1 already stated that the convention applied to treaties between States, it was undesirable to restate that fact in a different form in paragraph 1 of article 5. Furthermore, paragraph 2 might be regarded as an attempt to interfere in essentially domestic matters.

37. On the other hand, in view of the lengthy deliberations in the International Law Commission which had resulted in the existing text, he understood the reluctance of some delegations simply to delete the clause, and could therefore support the new proposal by the Finnish delegation (A/CONF.39/C.1/L.54/Rev.1 and Corr.1).

38. Mr. BLOMEYER-BARTENSTEIN (Federal Republic of Germany) said that his country, which had a long tradition of federal structure, had refrained from submitting an amendment to paragraph 2, because the effects of that provision, if it were retained, would by and large correspond to its constitutional practices. Nevertheless, his delegation was not entirely satisfied with the clause, because it went beyond the scope of the draft as defined in article 1. Under both article 1 and article 3, the draft related only to treaties concluded between States, not to those concluded by other subjects of international law; yet most constituent members of federations, even if they possessed some treaty-making capacity, did not have the status of States in international law. Thus, the *Länder* of the Federal Republic of Germany possessed only a very limited treaty-making capacity and, in the context of the draft convention, might be regarded as " other subjects of international law." Paragraph 2 could therefore be deleted, particularly in view of the provisions of article 3.

39. If, however, the prevailing opinion in the Committee was in favour of retaining paragraph 2, two points should be carefully considered. First, the Committee should study the question whether the paragraph applied equally to all the draft articles: his delegation had some doubts in that regard, particularly in connexion with article 43. The special relationship between a federal union and its component members could not be ignored, especially with regard to possible violations of the federal law by a member. The Austrian amendment (A/CONF.39/C.1/L.2) was designed to settle that question, but the provision might still create constitutional difficulties for some countries. Secondly, if the paragraph were retained, the term " states members of a federal union " should be re-examined. Although the term fitted into the structure of the Federal Republic of Germany, that might not be the case with all federal constitutions.

40. Mr. MALITI (United Republic of Tanzania) said that paragraph 1 should be retained in its original form. Although the statement was self-evident, it was sometimes essential to state the obvious.

41. With regard to paragraph 2, the Austrian amendment (A/CONF.39/C.1/L.2) was acceptable to his delegation, since it would serve to eliminate the serious difficulty of deciding whether a given constitution allowed the component members of the federal union to make treaties. The problem might arise even if the written constitution provided a clear answer, for subsequent practice tended to refine the original provisions of a constitution. Moreover, the Austrian amendment would be useful for outside States contemplating the conclusion of a treaty with a member of a federal union.

42. His delegation had no strong views on the New Zealand amendment (A/CONF.39/C.1/L.59), since the International Law Commission's wording seemed quite clear. Perhaps the New Zealand amendment could be referred to the Drafting Committee.

43. Mr. CHEA DEN (Cambodia) said that the International Law Commission's text of article 5 had considerable merit. It made no claim to laying down a new rule of the law of treaties, but represented a general rule, derived from international custom and practice.

Its codification was advisable to eliminate uncertainties with regard to the scope of the capacity to conclude treaties. It would constitute no interference in the organic domestic law of sovereign States, and, moreover, laid down the principle that all States, large and small, irrespective of their structure, had equal capacity to conclude treaties.

44. Sir Lalita RAJAPAKSE (Ceylon) said he supported the proposals to delete paragraph 2. The clause was incomplete in that it merely recognized that constituent members of a federal union might possess the capacity to conclude treaties, if such capacity was admitted by the federal constitution. If the reference was to domestic procedure only, it was unnecessary; but the paragraph also seemed to entail certain external consequences, even though they were not elaborated. The International Law Commission pointed out in paragraph (5) of its commentary that there was no rule of international law which precluded the component States from being invested with the power to conclude treaties with third States, but his delegation doubted whether that practice was sufficiently developed to warrant codification at that stage.

45. Paragraph 2 as it stood left too many questions unanswered. For example, did the clause apply to all the draft articles? Who issued full powers for treaty-making in the absence of an authority dealing with foreign affairs in the component State? Did the treaty bind the member of the union or the federation? In the latter case, was the federation bound only in respect of the member's territory and assets? Those and other questions were too complex to be dealt with in the time available to the Conference. His delegation considered that nothing would be lost by omitting the provision.

46. Mr. WERSHOF (Canada) said that the International Law Commission's text was unsatisfactory for three reasons. The first was the terminological question of the contradictory use of the word " State "; the second was a matter of the interpretation and application of paragraph 2, especially in its reference to the constitution of a federal State; and the third was the omission of certain additional legal considerations relating to treaty-making capacity as exercised in federal States.

47. With regard to the first point, the word " State " was used in article 1 and in paragraph 1 of article 5 to refer to the fully sovereign international person, but was used in quite a different sense in paragraph 2 of article 5. Since it was the federal union rather than the political sub-division which should be designated as a State, his delegation fully supported the New Zealand amendment (A/CONF.39/C.1/L.59).

48. As to the interpretation and application of the article, paragraph 2 provided that the extent to which a political sub-division might enjoy treaty-making capacity depended on the federal constitution. But since the federal constitution was an internal law of the federal State, its interpretation fell within the exclusive jurisdiction of the internal tribunal of the federal State having jurisdiction in constitutional matters. No sovereign State could agree that an outside body might have the power to interpret its constitution. That opinion was confirmed by Article 2(7) of the United Nations Charter and in General Assembly resolution 2131 (XX). Moreover, it was stated in paragraph (8) of the Commission's commentary to article 43 that any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. That view did not, however, seem to be embodied in paragraph 2 of article 5, and it would be most unfortunate if the article were interpreted as an invitation to outside States to purport to interpret the constitution of a federal State.

49. From the practical point of view, the article would in many cases place States dealing with federal States in a very awkward position. Whereas the legal capacity of political sub-divisions might be clear in the case of federal States with written constitutions, it would be less readily ascertainable to outsiders in the case of federal States whose constitutions were unwritten or partly written. To avoid situations in which other States and depositaries of treaties might be placed in the invidious position of concerning themselves with the interpretation of the constitutions of federal States, further consideration should be given to clarifying the scope of the paragraph, if it was retained. Accordingly, the Canadian delegation could support the Austrian amendment (A/CONF.39/C.1/L.2), which set out the principle that the question of any treaty-making capacity of a component unit must be confirmed by an authority of the federal union.

50. Finally, with regard to the omission of certain essential legal elements from the article, it had been pointed out that paragraph 2 recognized a practice which already existed in certain federal States. But the precise legal implications of the practice were not adequately reflected; for example it raised the important questions of international personality, State responsibility and recognition, which could not be dealt with in the convention. On the other hand, without those provisions the rule would be incomplete, since it embodied only some of the many elements to be considered. If the convention was to contribute to the stability of treaty relations between States, all the rules formulated therein must be clear, accurate and complete. The best solution would therefore be to delete the article, or at least paragraph 2. Failing that, article 5 would be generally acceptable only if it incorporated the Austrian and New Zealand amendments (A/CONF.39/C.1/L.2 and L.59).

51. Mr. ZEMANEK (Austria) said that his delegation was concerned with three terminological questions in article 5. The first was the use of the word " State " in paragraph 2: it obviously had a different meaning in paragraph 1. The Austrian delegation wondered whether the meaning ascribed to the word in article 1 was the same as in article 5, paragraph 2; the same doubts were evident from the New Zealand amendment (A/CONF. 39/C.1/L.59) and the amendment of the Congo (Brazzaville) (A/CONF.39/C.1/L.80). Secondly, his delegation was puzzled by the use of the term " federal union " in paragraph 2: Austria was a federal State, but his delegation was not aware of any instance of the term " union " being used to mean anything other than a union of sovereign States. Finally, his delegation questioned the use of word " may " in paragraph 2: if the treaty-making capacity of a member of a federation was admitted by a federal constitution, the member

possessed that capacity, but no constitution would stipulate that the member " might " possess that capacity.

52. Mr. KRISHNA RAO (India) said his delegation strongly supported the retention of paragraph 1 without any substantive changes and endorsed the Commission's reasoning in paragraphs (3) and (4) of the commentary in favour of it. It noted that it was stated in paragraph (3) that the Commission had decided to retain the two provisions, subject to minor drafting changes, but it was not clear whether those changes had already been made by the Commission or were to be made during the Conference.

53. Paragraph (5) of the commentary on the other hand raised some doubts concerning the need to retain paragraph 2. Clearly, the source of the treaty-making capacity of component units was the power vested in them by the federal constitution. Since, however, there were few examples in practice of such treaty-making capacity, the question had not attracted international recognition, and was pre-eminently a domestic matter. It would therefore suffice to leave each federal State to decide whether its component units were to have treaty-making capacity, how that capacity was to be admitted and the extent of the treaty-making powers granted. Moreover, since it was stated in paragraph (5) of the commentary that there was no rule of international law which precluded the component States from being invested with the power to conclude treaties, it seemed unnecessary to include a positive rule in the convention, particularly since special problems might arise in connexion with articles 43 and 62 of the draft. The Indian delegation therefore supported the Australian and Nepalese proposals (A/CONF.39/C.1/L.62 and L.77/Rev.1) to delete paragraph 2.

54. Mr. SINCLAIR (United Kingdom), referring to the history of article 5, pointed out that the final Special Rapporteur on the law of treaties had proposed in 1962 a comprehensive article dealing with the capacity of unitary and federal States, of other subjects of international law invested with treaty-making capacity by treaty or international custom, of States the conduct of whose international relations had been entrusted to another State, and of international organizations.[6] The International Law Commission had decided in 1962, however, that it would be inappropriate to enter into all the detailed problems of capacity which might arise, and had confined itself to three broad provisions on capacity covering States and other subjects of international law, member States of a federal union, and international organizations.[7] Thus, even at that stage the Commission had been aware that its preliminary draft did not deal comprehensively with the variety of entities possessing treaty-making capacity. The Commission's subsequent decision to exclude international organizations and other subjects of international law had resulted in the submission of a truncated provision on treaty-making capacity.

55. The United Kingdom shared the view of those members of the Committee who considered that article 5 was unnecessary and liable to lead to confusion. Particular difficulties arose in connexion with paragraph 2. There were many different types of federal States, and the treaty-making capacity of their component members might be non-existent, might be subject to severe limitations imposed by the federal constitution or might, in certain cases, be of some significance. But the Mexican representative had rightly suggested that the Committee might be trespassing beyond the boundary between international law and domestic law in seeking to include a provision on the treaty-making capacity of component members of a federation. It must in any event be recognized that the extent of such capacity must be determined exclusively by the supreme constitutional authority of the federation concerned.

56. His delegation would therefore be in favour of deleting paragraph 2, but if that course were followed, the question would then arise whether it was necessary or even desirable to retain paragraph 1, which seemed merely to repeat what was already stated in article 1 and paragraph 1 (*a*) of article 2. The decision that the convention would apply to treaties concluded between States, in conjunction with the definition of the term " treaty," logically led to the assumption that States were entitled to conclude and had the capacity to conclude treaties.

57. The United Kingdom therefore supported the Mexican and Malaysian proposal (A/CONF.39/C.1/L.66 and Add.1) to delete the entire article, but if the Committee decided to retain the provision in whole or in part, his delegation would be prepared to support the Austrian and New Zealand amendments (A/CONF.39/C.1/L.2 and L.59).

58. Mr. ALCIVAR-CASTILLO (Ecuador) said that the term " State " was used in article 5 in the sense assigned to it in the Charter of the United Nations, the Statute of the International Court of Justice, the Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; in other words, it meant a State for the purposes of international law. A State must possess independence in order to have obligations and rights.

59. The condition laid down in paragraph 2 would need to be amplified in order to avoid disputes about the constitutional powers of members of a federal union, but that task could be left to the Drafting Committee.

60. Mr. OSIECKI (Poland) said he was opposed to the deletion of article 5 which was both concise and lucid. Paragraph 1 stated the indisputable principle that all States were sovereign, and eliminated all discrimination. It would be a mistake to drop paragraph 1, since states members of a federal union could conclude treaties within the limitations fixed by the federal constitution.

61. He could not support the New Zealand amendment, because the expression " political sub-divisions " was too vague and would cause difficulties of interpretation. Nor could he support the amendment by the Congo (Brazzaville) (A/CONF.39/C.1/L.80), because paragraph 1 should be consistent with the terms of article 1 as just adopted.

62. Mr. BRODERICK (Liberia) said he was in favour of retaining paragraph 1 and the principles set out in paragraph 2, even though its drafting might need modification on the lines of the amendment submitted by the

[6] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 35 and 36.

[7] *Ibid.*, p. 164.

Congo (Brazzaville). Sovereign States *ipso facto* had the capacity to conclude treaties, and though that might be self evident, it needed stating. Article 5 should therefore be retained as it stood.

63. Mr. TALALAEV (Union of Soviet Socialist Republics) said that the draft discussed by the International Law Commission in 1962 had contained a provision which stated that all independent States possessed the capacity to conclude treaties and that dependent States possessed a restricted capacity; the latter provision had, however, been abandoned lest it should appear to sanction colonial dependence, which was wholly contrary to the principles of the Charter and other international instruments. The present terms of article 5 recognized the full equality of States and were consistent with the provision adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Paragraph 1 expressed an important principle and must certainly be retained.

64. Paragraph 2 should also be retained since, under the federal constitutions of certain States such as Switzerland, the Federal Republic of Germany and the Soviet Union, states members of the Union had the capacity to conclude treaties. Two of the constituent republics of the Soviet Union, namely, the Ukrainian Soviet Socialist Republic and the Byelorussian Soviet Socialist Republic, were parties to numerous multilateral and bilateral treaties. Any question as to whether a state member of a federal union possessed capacity to conclude treaties must be decided in accordance with the constitutional rules of the State concerned, and no outside State was entitled to regulate the question.

65. Mr. JAMSRAN (Mongolia) said that article 5 must be retained because it enunciated the important right of each State to conclude treaties, regardless of its political and legal system. The equal right of all States to possess such a capacity derived from the fact that they were subjects of international law. The principle was upheld in the Declaration on the Granting of Independence to Colonial Countries and Peoples. Article 5 had special significance for newly independent States, now that the old concept of dependent States had disappeared for ever.

66. Mr. FRANCIS (Jamaica) said that article 5 should be retained, but with the proper safeguards which would be provided by the adoption of the Austrian amendment.

67. Mr. MUTUALE (Democratic Republic of the Congo) said he had some doubts about the New Zealand amendment, because States were masters of their own constitutions and free to choose how their constituent entities should be named. The question was not one of concern to public international law. Generally speaking, he was in favour of the Commission's draft.

68. Mr. EEK (Sweden) said that article 5 could be omitted, although he could agree to the retention of paragraph 1 in order to restate a basic principle; paragraph 2, on the other hand, was complicated and of doubtful validity. He did not question the capacity of political sub-divisions to become parties to a treaty, but it did not seem correct to equate that capacity under international law with their capacity under internal constitutional law. Evidently other States would have to rely on a federal government's interpretation of its own constitutional structure; it did not seem, however, that the time was ripe for regulating the matter. He was therefore in favour of dropping paragraph 2.

69. Mr. KRISPIS (Greece) said that the crux of article 5 was in paragraph 2. His delegation favoured the deletion of that paragraph, as was proposed in the amendments submitted by Finland (A/CONF.39/C.1/L.54), Mexico and Malaysia (A/CONF.39/C.1/L.66 and Add.1), and the Republic of Viet-Nam (A/CONF.39/C.1/L.82) and for the reasons put forward by the respective sponsors. It was also his belief that article 3 covered the case dealt with in article 5, paragraph 2. Paragraph 1 had a logical place as the introduction to paragraph 2, and if paragraph 2 were dropped, paragraph 1 would have to be dropped as well, as the relevant rule was contained in article 1 and article 2, paragraph 1 (*a*). If the majority were in favour of keeping article 5 his delegation would support the Austrian amendment (A/CONF.39/C.1/L.2); the idea in that amendment was very important, in view of the fact that there was no rule of international law permitting States to examine the constitutions of other States. The amendment submitted by the Congo (Brazzaville) (A/CONF.39/C.1/L.80) would improve the drafting.

70. Mr. CUENDET (Switzerland) said that he was in favour of retaining article 5 and that he could support the amendments submitted by Austria (A/CONF.39/C.1/L.2) and New Zealand (A/CONF.39/C.1/L.59). The provision in paragraph 1 of the article might be superfluous, but its inclusion was justified by the fact that the capacity to conclude treaties was a condition of their validity.

71. The Swiss delegation also thought it useful to retain paragraph 2 of article 5, despite the objections that had been made to it. The question was not one of domestic law, for although it was the federal constitution that divided international competence between the federal State and the member states, it could not confer on the latter the capacity to conclude valid international treaties; that capacity could be recognized only under international law.

72. The Swiss delegation agreed with the Canadian delegation that only the federal State was competent to interpret the federal constitution within the meaning of article 5, paragraph 2. Accordingly, it was in favour of the Austrian amendment which dispelled any doubts that might exist in that regard.

73. The representatives of Canada and Ceylon had criticized the text because it contained no provisions on the responsibility of the federal State for treaties concluded by member states; but those were questions with which the draft convention was not designed to deal.

74. Mr. MYSLIL (Czechoslovakia) said that his delegation had no doubt that paragraph 1 should be retained because the capacity to conclude treaties was one of the fundamental attributes of sovereignty. That paragraph also formed a logical introduction to part II of the draft convention and could not be omitted on the ground that the point was already covered in articles 1 and 2, which served quite different purposes. The argument

that it was self-evident could apply to a number of other articles, and its omission would only lead to a gap in a work of codification.

75. He was in favour of retaining paragraph 2, but in view of the difficulty of providing for all present and future federal arrangements and of the borderline between national and international law, he was willing to consider amendments aiming at the improvement of the wording.

76. Mr. TARAZI (Syria) said that article 5 should be retained. It formulated a rule analogous to the municipal rules of contract law concerning the capacity of individuals to enter into contracts. Now that the concept of dependent States had given way to full sovereign equality between States which were subjects of international law, an article on capacity was fully justified.

77. Paragraph 2 dealt with a practical problem that was perfectly relevant to the draft and should be retained with the clear separation between internal and international law established by the Commission, so that no conflict on that score could arise. The Austrian amendment did not quite fill the bill and the other amendments could be referred to the Drafting Committee.

The meeting rose at 6 p.m.

TWELFTH MEETING

Thursday, 4 April 1968, at 11 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1866 *(continued)*

Article 5 (Capacity of States to conclude treaties) *(continued)*[1]

1. Mr. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said he unreservedly supported the text of article 5 as drafted by the International Law Commission. In connexion with paragraph 1, he stressed that the basis of the capacity of States to conclude treaties was sovereignty. Sovereignty was an inalienable attribute of the independent State; it was also the basis of the universal participation of States in international affairs. In addition, at the root of international law lay the problem of maintaining peace and it was beyond question that in order to ensure lasting peace the fundamental rights of all members of the international community, including the right to conclude treaties, must be safeguarded.

2. The importance of paragraph 1 could not be overestimated, but paragraph 2 was also very important. The Byelorussian people had gained its freedom and independence as a result of the October revolution, and the Byelorussian SSR had been a sovereign State since 1919. It had concluded a large number of bilateral and multilateral agreements and was a founder member of the United Nations. It was a member of many specialized agencies and of the International Atomic Energy Agency, and it participated in the work of numerous bodies in the United Nations system. The status of the Byelorussian SSR as a subject of international law was affirmed in its Constitution and recognized in the Constitution of the USSR. The Byelorussian SSR was thus fully qualified to establish and maintain direct relations with foreign States. Paragraph 2 was, accordingly, consonant with the legislation and practice of the Byelorussian SSR. The text was the result of a compromise reached after long and patient work by the International Law Commission, and as it stood, it was entirely acceptable to the other participants in the Conference. Although in some federal States only the federal government had the capacity to conclude treaties, in others the component members of the union enjoyed that capacity. Paragraph 2 reflected that situation and was in conformity with international practice. He would, however, be prepared to accept the Austrian amendment (A/CONF.39/C.1/L.2), provided that the following phrase was added to it: "if it is provided for in the constitutional law of a federation, or of States members of a federation".[2] He asked that that addition be treated as a formal sub-amendment to the Austrian amendment.

3. Mr. MARESCA (Italy) said he thought it unnecessary to state rules which merely repeated what had already been said. The use of the words "concluded between States" in articles 1 and 2 implied the capacity of States to conclude international treaties. The old principle *pacta sunt servanda inter gentes* itself confirmed that capacity.

4. The 1961 and 1963 Vienna Conferences provided a useful precedent in that connexion. It had been proposed that the notion of *jus legationis* should be introduced into the 1961 and 1963 Conventions. It had been concluded, however, that that was unnecessary, as the point was so self-evident. Article 5, paragraph 1 was not essential, therefore, and could be deleted without impairing the clarity of the convention.

5. Paragraph 2 dealt with the more limited problem of federal States. To refer to the constitution of a State in connexion with international relations raised great difficulties. The paragraph therefore appeared to present more dangers than advantages. As it was not essential, it could also be deleted; or at least it should be modified on the lines of the Austrian amendment, which was calculated to reduce the uncertainty created by the reference to the internal law of a State.

6. Mr. KEARNEY (United States of America) also thought that article 5, paragraph 1 merely repeated what was implicit in articles 1 and 2. If, however, some representatives were very anxious to retain the paragraph, the United States delegation would not object.

7. Paragraph 2 raised a different problem. A number of federal States represented at the Conference believed that the retention of paragraph 2 would cause them difficulties, whereas it had not been shown that its deletion would cause difficulties for the other federal States. Paragraph 2 left too many questions unanswered, owing to the wide constitutional differences between one federal State and another. Failure to answer those questions would sooner or later cause difficulties for federal States.

[1] For the list of the amendments submitted, see 11th meeting, footnote 3.

[2] This sub-amendment was circulated as document A/CONF. 39/C.1/L.92.