United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.4

4th meeting of the Committee of the Whole

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

FOURTH MEETING

Friday, 29 March 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 1966 *(continued)*

Article 2 (Use of terms)

1. The CHAIRMAN invited the members of the Committee to introduce their amendments to article 2 of the draft convention.[1]

2. Mr. RODRIGUEZ (Chile), introducing his delegation's amendment (A/CONF.39/C.1/L.22), said he did not quite understand why the International Law Commission had included, at the end of sub-paragraph (*a*), the words " whether embodied in a single instrument or in two or more related instruments and whatever its particular designation ". It might, of course, be useful to express that idea in the convention in order to dispel all possible doubts, but the idea was out of place in an article containing definitions. Furthermore, the word " international " in the first line was unnecessary, as the international nature of an agreement followed from the fact that it was concluded between States. In addition, it was not essential for agreements to be concluded in written form in order to be valid, for under article 3 agreements not in written form also had legal force. Furthermore, even if conclusion in written form were a requirement for the validity of the treaty, that would not justify its inclusion in the definition, any more than other validity requirements. It appeared, however, appropriate to incorporate it in the definition in article 2 with the sole object of making it clear that the convention dealt with treaties in written form.

3. Lastly, the Chilean delegation thought it would be well to mention in sub-paragraph (*a*) that an agreement between States must produce legal effects. That idea had been included in the 1953 and 1956 drafts, but had been dropped from the latest draft. It was, however, a very important element in view of the object of the convention and experience of international relations. In the first place, the purpose of the convention was to regulate legal relationships created between States by treaties; it would therefore seem justified to define a treaty as producing legal effects. In the second place, it appeared essential to include that idea in the definition, so as to distinguish between agreements between States which produced legal effects and those which did not and reserve the term " treaty " solely for the former. It often happened that declarations made on the international plane represented, like treaties, a concurrence of wills, but did not produce legal effects. Such declarations were often the preliminaries to a real agreement, which was concluded later when circumstances permitted. It would be dangerous to confuse them with treaties and to make both of them subject to the rules of the convention, thereby gravely restricting freedom of expression in international affairs. For those reasons, the Chilean delegation had submitted an amendment replacing sub-paragraph (*a*) by the following text: " ' Treaty ' means a written agreement between States, governed by international law, which produces legal effects ". That wording also had the advantage of being very brief.

4. The purpose of his amendment to sub-paragraph (*d*) was to show that reservations were possible only to multilateral treaties and to preclude the possibility of making reservations to bilateral treaties. That might seem unnecessary at first sight, but it would be useful to make the position clear.

5. The Chilean delegation understood that the words " to vary the legal effect of certain provisions of the treaty " (sub-paragraph (*d*)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided. In view of that interpretation, the Chilean delegation had not submitted any amendment to the last part of sub-paragraph (*d*).

6. Mr. BENITES-VINUEZA (Ecuador) said that his amendment (A/CONF.39/C.1/L.25) was not designed to change the text of article 2 to any great extent, but to add to it some elements which had not been included. An international treaty was an agreement concluded voluntarily, with a view to creating rights and obligations, varying them or extinguishing them. Four elements had to be taken into consideration, namely, that a treaty must be concluded freely, that it must be concluded in good faith, that its object must be licit and that the legal nexus must be based on justice and equity. Good faith must be regarded as fundamental, as was shown by Article 2 of the United Nations Charter which provided that States must fulfil in good faith the obligations assumed by them. Clearly, if good faith was an essential element in fulfilling international obligations, as provided in the Charter, it must be an express, not an implied, condition of the contractual act which constituted the obligation.

7. It was equally clear that it should also be stipulated that the treaty must have a licit object and be freely consented to. In that connexion, the Government of Luxembourg had stated in its comments in 1964 that the object of a treaty was always to establish a legal relationship between the parties. Ecuador considered that the legal relationship created by the contractual act should be based on justice and equity.

8. Mr. KORCHAK (Ukrainian Soviet Socialist Republic), introducing the amendment in document A/CONF.39/C.1/L.19/Rev.1, said that general multilateral treaties were playing an increasingly important part in contemporary international relations; they were an element in the development of international law and international co-operation. Such agreements had characteristics of their own; they should therefore be mentioned

[1] The following amendments had been submitted to article 2: Austria and Spain, A/CONF.39/C.1/L.1. and Add.1; Sweden, A/CONF.39/C.1/L.11; China, A/CONF.39/C.1./L.13; United States of America, A/CONF.39/C.1/L.16; Ceylon, A/CONF.39/C.1/L.17; Congo (Democratic Republic of), Czechoslovakia, Hungary, Poland, Romania, Ukrainian Soviet Socialist Republic, United Arab Republic, United Republic of Tanzania, A/CONF.39/C.1/L.19/Rev.1; Chile, A/CONF.39/C.1/L.22; Hungary, A/CONF.39/C.1/L.23; France, A/CONF.39/C.1/L.24; Ecuador, A/CONF.39/C.1/L.25; Spain, A/CONF.39/C.1/L.28; Republic of Viet-Nam, A/CONF.39/C.1/L.29; Mexico and Malaysia, A/CONF.39/C.1/L.33 and Add.1; India, A/CONF.39/C.1/L.40.

and defined in article 2. Moreover, several States had already asked that such a definition be included in the convention and had advanced convincing arguments for it.

9. Mr. JAGOTA (India) explained the reasons why his delegation had submitted an amendment to article 2, paragraph 1 (A/CONF.39/C.1/L.40). Sub-paragraphs (*e*), (*f*) and (*g*) had been introduced at a fairly late stage in order to give definitions of the status of States at the various stages in the conclusion of a treaty. The International Law Commission's intention in inserting those definitions had been to show that at each of the three stages in question, States assumed certain obligations, as was clear from articles 15 and 23. As the terms " negotiating State ", " contracting State " and " party " were used in the draft convention it had been considered appropriate to define them. Unfortunately, those terms were to be found in many treaties concluded between States in which they were used interchangeably and without any precise interpretation. Furthermore, a definition would only be justified if the term was used in a special sense throughout the convention. But those terms were not used in article 15. Lastly, the definitions were incomplete. They were intended to show the precise point at which the obligations arose. But between the time when a State was regarded as a " negotiating State " and the time when it became a " contracting State " there was an interval which had not been allowed for, either in the definitions or in the body of the draft convention; in article 22, for example, the meaning given to the words " contracting States " did not fit the definition; at that stage, the State in question was neither a "negotiating State" nor a "contracting State". Moreover, sub-paragraphs (*f*) and (*g*) appeared to overlap to some extent; with the wording of those sub-paragraphs, which used the phrases " whether or not the treaty has entered into force " and " for which the treaty is in force " there were in fact two expressions to denote the same status.

10. The deficiencies could be remedied in various ways. Either definitions might be given which corresponded precisely to the various stages; or only the terms " negotiating State " and " party " might be defined; or else the definitions in sub-paragraphs (*e*) and (*f*) might be deleted and the various stages described in the main body of the convention. It was the third solution which the Indian delegation was advocating in its amendment.

11. Mr. HU (China) said that the first part of his amendment (A/CONF.39/C.1/L.13) was intended to bring out that only sovereign States had the legal capacity to make treaties. In sub-paragraph (*d*), the word " multilateral " should be added before the word " treaty ", because a reservation could be made only in respect of a multilateral treaty. Lastly, the commentary to article 2 made it cleac that the definition of international organizations was intended to exclude non-governmental organizations, but it would be better to say so explicitly in article 2, sub-paragraph (*i*).

12. Mr. BEVANS (United States of America) said that the amendments to article 2 submitted in document A/CONF.39/C.1/L.16 now applied only to sub-paragraphs (*b*) and (*d*); the United States delegation had decided to withdraw the amendment to sub-paragraph (*a*) because its amendment to article 1 had not been accepted.[2]

13. Mr. VEROSTA (Austria) said that the amendment by Austria and Spain (A/CONF.39/C.1/L.1) would replace the word " document ", in sub-paragraph (*c*), by the word " instrument ". The term " document " was used only in article 2, whereas " instrument " was the term employed throughout the remainder of the draft. The latter term should be retained, in principle, if the opinion of Oppenheim and the definitions in *The Shorter Oxford English Dictionary*, for example, were to be followed.

14. Mr. VIRALLY (France) said that the French amendment to article 2 (A/CONF.39/C.1/L.24) embodied two quite separate proposals. The first was to add a new sub-paragraph (*c*) to paragraph 1 giving a definition of the expression " adoption of the text of a treaty ". That expression appeared in various articles of the draft, but seemed not always to be used with the same meaning. In some cases it was apparently a synonym for " drafting the text of a treaty ", as in article 4; elsewhere it had a different meaning, as, for instance, in article 2, paragraph 1 (*c*). The purpose of the amendment submitted by France was to remove that ambiguity. The brackets in the first paragraph of document (A/CONF.39/C.1/L.24 had been inserted in error.

15. The second proposal was broader in scope. It was to add to article 2 a definition of the " restricted multilateral treaty " referred to in article 17, paragraph 2.

16. Article 17 made provision for the application of a special system for the acceptance of reservations to certain multilateral treaties. Paragraph 2 of that article was wholly justified, since it related to a very important class of treaties—those establishing very close co-operation between several States, such as treaties of economic integration, treaties between riparian States relating to the development of a river basin or treaties relating to the building of a hydroelectric dam, scientific installations, or the like. All those treaties had special characteristics. The very close co-operation they established required, first of all, that all the States expected to participate should in fact become parties to the treaty. If only a single one of those States fell out, the enterprise would have to be abandoned or put on a different basis, which would make it necessary to amend the treaty. The same applied if a further State associated itself with the original group. Moreover, the treaty had to be applied in its entirety.

17. The International Law Commission had been wise to propose that the rules on the acceptance of reservations to multilateral treaties should not apply to restricted multilateral treaties, but it had not carried the idea to its conclusion. For there were other rules applicable to ordinary multilateral treaties which conflicted with the special character of restricted multilateral treaties. That applied, in particular, to the adoption of the text of such treaties, which could only take place by unanimous consent (article 8), to the amendment of such treaties, which required the application of the same rule (article 36), and to agreements to modify such treaties between

[2] See 3rd meeting, para. 64.

certain of the parties only (article 37)—rules which were incompatible with that special class of treaty.

18. The definition submitted by France would make it possible to overcome that difficulty by means of purely drafting changes to eight articles embodying provisions applying specifically to multilateral treaties, which would not be appropriate for restricted multilateral treaties. The eight articles were articles 8, 17, 26, 36, 37, 55, 65 and 66.

19. In view of the nature of the proposed amendments to article 2, which he had just explained, he believed that, after discussion, they should be referred to the Drafting Committee for incorporation in article 2 when it was put into final form.

20. Mr. de CASTRO (Spain) explained that the purpose of his amendment (A/CONF.39/C.1/L.28) was to delete the word " international ", which he found unnecessary and liable to cause confusion. In the Spanish text the words " *por escrito* " should be placed between the words " *celebrado* " and " *entre Estados* ".

21. Mr. BLIX (Sweden) said that his amendment to article 2 (A/CONF.39/C.1/L.11) would insert the word " limit " after the word " exclude " in sub-paragraph (*d*). No doubt the phrase " to exclude or to vary " could also cover the ability to " limit " the legal effect of certain provisions, but it would be better to say so explicitly. That also seemed to be the opinion of the Bulgarian Government, as expressed in its comments on the draft.

22. He drew the Committee's attention to the fact that in sub-paragraph (*h*) it was stated that the term " third State " meant a State not a party to the treaty, so that the " negotiating State " and the " contracting State " referred to in sub-paragraphs (*e*) and (*f*) might both be regarded as " third States ". Under the terms of article 30, neither rights nor obligations could be created for them without their consent. Under article 15, however, they were obliged to refrain from acts tending to frustrate the object of a proposed treaty.

23. The Swedish delegation would not submit any amendment on that point, but it hoped that the Drafting Committee would look into the matter.

24. Mr. HARASZTI (Hungary) said that the purpose of his amendment (A/CONF.39/C.1/L.23) was to extend the scope of the term " reservation " to include declarations made by a State as to interpretation when it signed, ratified, acceded to, accepted or approved a treaty. The reason for the amendment was that, as the title of Part II, Section 2 showed, the draft articles only covered reservations formulated with respect to multilateral treaties.

25. When signing or ratifying a treaty, States sometimes made declarations as to interpretation, in which they attributed a specific meaning to certain of its provisions. The present wording of sub-paragraph (*d*) would not always make it clear whether the definition covered such declarations or not, and whether articles 16 to 20 applied to them. That situation could give rise to serious difficulties. It was therefore preferable to provide expressly that declarations as to interpretation were to be treated as reservations. The form of the amendment could be decided on by the Drafting Committee.

26. Mr. SEPULVEDA AMOR (Mexico), introducing the amendment in document A/CONF.39/C.1/L.33, pointed out that the International Law Commission's draft omitted an important element, namely, the intention to create rights and obligations. That element had been present in the earlier drafts, but in 1959 the Commission had decided against including it in the definition of a treaty, on the ground that it would be preferable to omit any reference to the object of a treaty, since it was impossible to cover all cases.[3] The Mexican delegation wished to point out, however, that the purpose of a treaty was to establish legal relations between the parties, which was not true of declarations of principle or political instruments such as the Atlantic Charter, which also constituted international agreements. The Mexican delegation therefore considered that the existence of a legal relationship between States which concluded a treaty should be regarded as an essential element of that legal act.

27. Sir Lalita RAJAPAKSE (Ceylon), introducing his delegation's amendment (A/CONF.39/C.1/L.17) to article 2, paragraph 2, said that the International Law Commission had found it necessary to state that the use of terms in the draft articles was without prejudice to the use of those terms or to the meaning which might be given to them in the internal law of any State. In order to avoid a possible conflict with the use of such terms in internal law, however, it seemed desirable to extend the proviso to areas in which the terms in question were used more frequently than in internal law.

28. Mr. WERSHOF (Canada), speaking on a point of order, moved " that article 2 and the amendments thereto be referred to the Drafting Committee, without any decision being taken on them by the Committee of the Whole, for consideration and subsequent report by the Drafting Committee to the Committee of the Whole as to the amendments to article 2 which may become necessary in the light of the action taken by the Committee of the Whole on the other articles of the draft convention ". He pointed out that of the many amendments submitted to article 2, some raised purely drafting points, some proposed terms which were not yet included in the other articles but might be added later, and others dealt with highly controversial questions which would be discussed when the articles concerned were taken up. He therefore considered that the Committee of the Whole would be in a better position to reach a decision on those amendments after the substance of the articles had been debated and the Drafting Committee's report on the amendments to article 2 had been discussed.

29. Mr. KHLESTOV (Union of Soviet Socialist Republics) observed that there was some duplication and overlapping among the numerous amendments proposed. He suggested that in order to speed up the Committee's work, a working group consisting of all the sponsors of amendments be set up under rule 47 of the rules of procedure, to reduce the various proposals to three or four amendments embodying the points discussed. The Drafting Committee already had a heavy task, and only texts already adopted by the Committee of the Whole should be referred to it, so that it could confine itself to

[3] *Yearbook of the International Law Commission, 1959*, vol. II, p. 96, paragraph (8) (*b*) of commentary to article 2.

points of drafting. The proposed working group, on the other hand, could do some useful consolidation work.

30. Mr. TABIBI (Afghanistan) agreed with the representative of the USSR that the Drafting Committee should confine itself to points of drafting. It was for the Committee of the Whole to settle questions of substance. If the amendments were referred to the Drafting Committee, the Committee of the Whole would be obliged to discuss them again after the Drafting Committee had revised them, which would delay progress. He therefore supported the Soviet representative's proposal.

31. Mr. FATTAL (Lebanon) said that in view of the interdependence of the articles, the Committee of the Whole might have to refer all seventy-five of them to the Drafting Committee. The proposal of the USSR representative therefore seemed the more practical.

32. Mr. JIMÉNEZ de ARÉCHAGA (Uruguay), Rapporteur, said that the amendments which added a new definition to the text, such as the definition of a general multilateral treaty or of adoption, should be discussed together with the substantive questions to which they related. The amendments which concerned different aspects of the same question could be dealt with by the method proposed by the USSR representative, the sponsors of related amendments endeavouring to replace them by a single text. The other amendments, which were the only ones of their kind, should either be the subject of an immediate decision by the Committee of the Whole or be referred to the Drafting Committee.

33. Sir Lalita RAJAPAKSE (Ceylon) pointed out that his country's amendment was the only one relating to article 2, paragraph 2, and asked whether the Committee's views on it could not be heard at once.

34. Mr. EUSTATHIADES (Greece) observed that the Canadian representative's motion only covered article 2, which contained the definitions and was suitable for the proposed procedure; it could not set a precedent for other articles of a different kind. The Soviet representative's proposal was useful in the case of related amendments. It was for the Committee of the Whole to reach a decision on the remainder, though the desire expressed by some sponsors to have their amendments referred to the Drafting Committee must be taken into account.

35. Mr. JAGOTA (India) said he feared that, by accepting the procedural motion as it stood, the Committee might set a precedent for any similar controversies which arose in the future. There would also be a risk, not only of overburdening the Drafting Committee, but of encountering problems relating to its competence, which was defined in rule 48 of the rules of procedure. Furthermore, from the point of view of speed, it would be better for the Committee of the Whole to take the necessary decisions itself. He therefore suggested that the Committee should adopt a practical approach and consider whether certain problems should be referred to the Drafting Committee. The Committee of the Whole could first examine article 2, paragraph 1, sub-paragraph by sub-paragraph and then discuss those amendments which proposed additions. After discussing each sub-paragraph and amendment, the Committee could decide whether to refer it to the Drafting Committee or to adopt the procedure proposed by the Soviet representative, depending on the circumstances. It could defer discussion of controversial issues connected with questions of substance arising out of other parts of the draft.

36. Mr. BEVANS (United States of America) supported the Canadian representative's motion, which he regarded as the more satisfactory proposal in practice. All the amendments raised points of drafting which it would be preferable to submit to the Drafting Committee.

37. Mr. STAVROPOULOS (Representative of the Secretary-General) observed that since 1961 there had been a remarkable development; the Drafting Committee was tending to become a conciliating body, through which decisions could be quickly reached. First of all, however, it must know the opinion of the Committee of the Whole, as otherwise it would itself become a seat of controversy.

38. The best method would be to take article 2 paragraph by paragraph and ask the sponsors of related amendments to agree on a single text.

39. The Canadian representative's motion seemed premature, in so far as the Committee's views were not yet known.

40. The CHAIRMAN suggested that the Committee should first hear those representatives who had asked to speak. He thought it preferable to hear what they had to say before referring the matter to the Drafting Committee. The amendment submitted by Ceylon, for example, was the only one of its kind, but the speakers on the list might have interesting points to raise concerning it. The discussion in the Committee of the Whole might make it possible to reduce the area of disagreement. He thought a distinction could usefully be made between amendments concerning matters of substance, related texts — whose authors should agree informally on only two or three amendments for submission to the Committee, and proposals which speakers themselves had asked to have referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

FIFTH MEETING

Friday, 29 March 1968, at 3.20 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)*

Article 2 (Use of terms) *(continued)* [1]

1. The CHAIRMAN invited the Committee to continue its consideration of article 2.

2. Mr. NACHABE (Syria) said that he would speak only on the amendments to paragraph 1 of article 2.

3. He supported the Austrian and Spanish proposal (A/CONF.39/C.1/L.1 and Add.1) to replace in para-

[1] For a list of the amendments submitted, see 4th meeting, footnote 1.