United Nations Conference on the Law of Treaties

Vienna, Austria
First session
26 March – 24 May 1968

Document:-
A/CONF.39/C.1/SR.5

5th 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)*

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.

graph 1(*c*) the term " document " by the more appropriate term " instrument ", to describe the full powers. He also supported the Swedish amendment (A/CONF.39/C.1/L.11) to paragraph 1(*d*), because in many cases a reservation was made for the purpose of limiting the legal effect of a treaty.

4. He was prepared to accept the proposal for a new sub-paragraph dealing with general multilateral treaties and found the new text proposed in document A/CONF. 39/C.1/L.19/Rev.1 preferable to the earlier version (A/CONF.39/C.1/L.19 and Add.1 and 2). He would prefer, however, a formulation to the effect that the expression " general multilateral treaty " meant a treaty concluded in the general interest of the international community.

5. He would accept the Hungarian amendment to paragraph 1(*d*) (A/CONF.39/C.1/L.23), which could be combined with the Swedish amendment (A/CONF. 39/C.1/L.11), so that the concluding part of the paragraph would read: " ... to exclude, to limit the interpretation or to vary the legal effect of certain provisions of the treaty in their application to that State ".

6. He would also accept the French amendment (A/CONF.39/C.1/L.24) to introduce definitions of the expressions " adoption of the text of a treaty " and " restricted multilateral treaty ".

7. He supported the Spanish proposal to delete the word " international " before the word " agreement " in paragraph 1(*a*) (A/CONF.39/C.1/L.28, para. 1); since the passage referred to an international agreement " between States ", the word " international " was unnecessary. The second amendment (A/CONF.39/C.1/L.28, para. 2) was also acceptable in so far as it shortened the French text.

8. He could not, however, accept the United States proposal (A/CONF.39/C.1/L.16) to eliminate from paragraph 1 (*b*) the definitions of the terms " acceptance " and " approval ". Those terms were used in a large number of multilateral treaties and were sanctioned by usage, contrary to what was stated by way of explanation in the United States amendment.

9. Lastly, he was prepared to accept the amendment by Ecuador to paragraph 1(*a*) (A/CONF.39/C.1/L.25); the detailed formulation of that proposal was preferable to the language used in the somewhat similar proposals by Chile (A/CONF.39/C.1/L.22) and by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1).

10. Mr. EUSTATHIADES (Greece) said that the proposal made both by Chile (A/CONF.39/C.1/L.22) and by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) to mention the fact that a treaty produced legal effects was not objectionable in itself but was somewhat doctrinal in character.

11. The proposal by Ecuador (A/CONF.39/C.1/L.25) to introduce the concepts of good faith, licit object and free consent should be examined by the Drafting Committee, bearing in mind that good faith was dealt with in article 23 of the draft, that the question of the licit object was one of *jus cogens* dealt with in article 50, and that free consent related to the subject-matter of articles 48 and 49.

12. With regard to the joint proposal to include a definition of " general multilateral treaty " (A/CONF. 39/C.1/L.19/Rev.1), it must be noted that that was not to be found anywhere in the draft. All the references to multilateral treaties were unqualified. That remark applied also to the French proposal (A/CONF.39/C.1/L.24, para. 3) to introduce a definition of " restricted multilateral treaty ".

13. The proposal by India (A/CONF.39/C.1/L.40) to delete sub-paragraphs (*e*) and (*f*) of paragraph 1 deserved consideration, but should be left aside until the Committee had agreed the final text of the articles to which the sub-paragraphs related.

14. He was not in favour of the Chinese proposal (A/CONF.39/C.1/L.13) to introduce a new sub-paragraph specifying that the term " State " meant a sovereign State, and in that connexion would draw attention to paragraphs (3) and (4) of the International Law Commission's commentary to article 5.

15. The proposal to replace in paragraph 1 (*c*) the term "document" by the term "an instrument" (A/CONF.39/C.1/L.1 and Add.1) should be examined by the Drafting Committee.

16. With regard to paragraph 1(*d*), he preferred the Hungarian proposal (A/CONF.39/C.1/L.23) to the Swedish proposal (A/CONF.39/C.1/L.11).

17. Finally, he supported the amendment by Ceylon (A/CONF.39/C.1/L.17) to add a passage at the end of paragraph 2, although admittedly the whole paragraph did not contain much substance.

18. Mr. OGUNDERE (Nigeria), referring to the proposal to include a definition of " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1), said that Nigeria had consistently maintained that all States had a right to participate in general multilateral treaties. He noted, however, that the International Law Commission had discussed the question at length and had decided not to include any provision on the subject in its draft for the reasons given in paragraph (8) of the commentary to article 2 and in paragraph (4) of the section on " Question of participation in a treaty " which followed the commentary to article 12. For those reasons, his delegation would be unable to support either the proposal in question or the French proposal to introduce a definition of " restricted multilateral treaty " (A/CONF.39/C.1/L.24, para. 3).

19. Mr. MARESCA (Italy) said that definitions were always dangerous, but in the present instance there was the additional danger that the definitions might be used for purposes other than the very limited one of article 2. As was indicated by the title of the article, " Use of terms ", the only purpose of those particular provisions was to avoid unnecessary repetition.

20. Some of the amendments proposed were of a purely drafting character. Of those, he opposed the proposal by Spain (A/CONF.39/C.1/L.28) to delete the word " international " before the word " agreement " in paragraph 1 (*a*), because there were agreements between States which did not constitute international agreements.

21. A second category of amendments attempted to introduce new concepts into some of the sub-paragraphs. They included a proposal by Ecuador (A/CONF.39/

C.1/L.25) which was commendable in its inspiration; but the references to such matters as good faith, licit object and free consent would be better placed in other articles of the draft than in article 2; the point was one which should be decided by the Drafting Committee. Of the others in the same category, he opposed the Chilean proposal (A/CONF.39/C.1/L.22) to mention the legal effects and the Chinese proposal (A/CONF.39/C.1/L.13) to specify that " State " meant a sovereign State; both those proposals amounted only to a statement of the obvious.

22. He would place in a third category the amendments by Hungary (A/CONF.39/C.1/L.23) and Sweden (A/CONF.39/C.1/L.11) to paragraph 1 (*d*) on the subject of reservations. He supported those proposals, but thought that they should be combined.

23. He also supported the proposal by France to introduce definitions of the expressions " adoption of the text of a treaty " and " restricted multilateral treaty " (A/CONF.39/C.1/L.24).

24. With regard to the proposal to introduce a definition of " general multilateral treaty ", the revised version (A/CONF.39/C.1/L.19/Rev.1) was an improvement on the earlier one (A/CONF.39/C.1/L.19 Add.1 and 2). However, the proposal focused attention on the content of the treaty, whereas the whole concept of a multilateral treaty was based on the number of parties. He suggested that the Drafting Committee should be invited to examine the point.

25. Mr. SMEJKAL (Czechoslovakia), speaking as one of the sponsors of the joint amendment (A/CONF.39/C.1/L.19/Rev.1) said that its purpose was to fill a gap in the draft. Until 1962, the International Law Commission's drafts had included references to general multilateral treaties, but since then all such references had unfortunately been dropped. Amendments would, however, now be proposed to a number of subsequent articles which would have the effect of introducing references to general multilateral treaties, so that it would become necessary to define that expression in article 2.

26. The sponsors of the proposal would welcome any suggestions for improvements in the wording of the proposed additional paragraph, and he thanked the representative of Syria for his valuable suggestion in that respect.

27. Speaking as the representative of Czechoslovakia, he said that, of the other amendments proposed, he supported the amendment by Sweden to paragraph 1 (*d*) (A/CONF.39/C.1/L.11) which made that paragraph more precise.

28. He did not support the United States proposal to drop the definitions of " acceptance " and " approval ". That proposal was based on the limited practice of a few States; the expressions in question were in general use elsewhere.

29. The proposal of Ceylon (A/CONF.39/C.1/L.17) involved a question of substance rather than of drafting, and his delegation doubted the advisability of adopting it.

30. He supported the amendment by Hungary (A/CONF.39/C.1/L.23) to clarify paragraph 1 (*d*) by introducing the adjective " multilateral " before the word " treaty ". In the case of a bilateral treaty, a so-called reservation merely constituted an offer to conclude a new treaty.

31. As the representative of a small country, he warmly supported the Chilean proposal (A/CONF.39/C.1/L.22) to introduce a reference to the fact that a treaty should produce legal effects.

32. The Indian amendment (A/CONF.39/C.1/L.40) deserved careful consideration.

33. Finally, the amendments contained in documents A/CONF.39/C.1/L.1 and Add.1, A/CONF.39/C.1/L.28 and A/CONF.39/C.1/L.33 and Add.1 should be referred to the Drafting Committee.

34. Mr. EL-ERIAN (United Arab Republic) said that he would not discuss in detail the various amendments which had been put forward but would offer some general remarks on the nature of article 2 and the character of the decision which the Committee was called upon to take on it.

35. Article 2 merely served to indicate the use made in the draft of a number of terms; it was not intended to provide comprehensive definitions. The International Law Commission had advisedly entitled the article " Use of terms " and not " Definitions ", which was the title of the corresponding article in others of the Commission's drafts, such as those on diplomatic and consular relations. Moreover, the article did not, and indeed could not, indicate the use of all terms, but only of those which appeared most frequently in the draft. Consequently, whatever decision the Committee took on article 2 could only be provisional. The article was not an independent provision; it could be read only in conjunction with the various other articles to which each of the sub-paragraphs of its paragraph 1 related.

36. He would accept the proposal to set up a working group to examine the various proposals and determine which were of a drafting character and which involved points of substance, but would also agree to that task being entrusted to the Drafting Committee, if the majority so desired. He shared the Legal Counsel's views regarding the interpretation of the role of the Drafting Committee, provided of course that all controversial issues were decided by the Committee of the Whole.

37. His delegation had joined the sponsors of the proposal to include a new paragraph indicating the use of the expression " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1); the introduction of that new element in article 2 was necessary in order to take into account the increasingly important role being played by international organizations in the making of international law. The future convention on the law of treaties should take note of the fact that international law was no longer a set of fragmentary rules largely embodied in bilateral treaties or treaties with a limited number of parties. General multilateral treaties, which were constantly increasing in number and in importance, were often virtually acts of international legislation; they related to matters of concern to the whole community of States and that fact should be emphasized in article 2.

38. Mr OSIECKI (Poland) said that the second French amendment (A/CONF.39/C.1/L.24) and the joint amendment (A/CONF.39/C.1/L.19/Rev.1) deserved especially careful attention, since they both sprang from a desire to fill gaps in article 2, the former with regard to restricted

multilateral treaties, and the latter in respect of general multilateral treaties.

39. His delegation could not support the United States proposal (A/CONF.39/C.1/L.16) to delete the words " acceptance " and " approval " in paragraph 1 (*b*). In many countries, the term " ratification " was used in a narrow sense to mean the solemn procedure of consent to a treaty expressed by the Head of State, whereas many treaties were not subject to that procedure, but were merely approved by the Council of Ministers or by the Chairman of that Council. Acceptance, too, was a widely used practice, as the International Law Commission had explained in its commentary to article 11. Deletion of those words might therefore place a number of States in an embarrassing position.

40. Mr. FATTAL (Lebanon), referring to the United States amendment (A/CONF.39/C.1/L.16), said he agreed that the terms " acceptance " and " approval " were disputable. In paragraph (10) of its commentary to article 11, the International Law Commission pointed out that, on the international plane, " acceptance " was an innovation which was more one of terminology than of method, while in paragraph (12) it merely stated that the introduction of the term " approval " into the terminology of treaty-making was even more recent than that of " acceptance ".

41. In his opinion, the Commission had been unwise to cite the practice of the League of Nations, instead of entering into more detailed explanations. In his dictionary of the terminology of international law, Basdevant [2] deplored the use of the term " acceptance ", and ascribed to it four different meanings: first, a term used in certain international agreements to denote ratification; secondly, a term used exceptionally in a treaty to describe simultaneously two different acts, one a statement that signature did not require ratification and the other ratification of a previous signature; thirdly, a term used in some international instruments to describe accession; and fourthly, a term sometimes used to describe both ratification and accession in respect either of an international agreement negotiated and signed, or of provisions laid down by an international organ, which provisions the act thus described had the effect of rendering binding for the State from which the act emanated. Basdevant was even more severe in his castigation of the use of the term " approval ". He stated that, since the use of that term in the sense of ratification by a State of a treaty signed on its behalf resulted from confusion between the internal measure authorizing the organ representing the State abroad to ratify, and the external act which was the ratification given by the organ, the term should be avoided and the term " ratification " only should be used instead, since its meaning had long been established by custom.

42. Consequently, he suggested that sub-paragraph 1 (*b*) be amended to read " 'Acceptance ' means the international act whereby a State establishes on the international plane its consent to be bound by a treaty. It may consist, as the case may be, of signature, ratification, accession or approval ". In that context " approval " would mean all procedures *sui generis* expressing consent to be bound by a treaty which differed from the first three. That solution, moreover, might help to simplify the texts of articles 10, 11 and 12.

43. The Lebanese delegation could support the amendment by Austria and Spain to sub-paragraph 1 (*c*) (A/CONF.39/C.1/L.1 and Add.1) and the Hungarian amendment (A/CONF.39/C.1/L.23) to sub-paragraph 1 (*d*).

44. On the other hand, it considered that the Chinese amendments (A/CONF.39/C.1/L.13) were not justified. With regard to the first, it was not correct to say that a State meant a sovereign State for the purposes of the draft articles, since non-sovereign States had been known to conclude treaties. The Chinese representative's arguments in favour of his last amendment were also unconvincing, for the United Nations was as yet far from being a supra-State organization and, indeed it was undesirable that it should become one; the ideal international community was one governed by the rule of law.

45. The Chilean amendment (A/CONF.39/C.1/L.22) seemed unnecessary since the phrase " which produces legal effects " was amply covered by the phrase " governed by international law ".

46. Similarly, the reference to " justice and equity " in the Ecuadorian amendment (A/CONF.39/C.1/L.25) was inaccurate, for although justice and equity might be among the factors which determined rules of law, that was by no means always the case.

47. The Ceylonese amendment (A/CONF.39/C.1/L.17) might be made clearer by adding the words " previously concluded " after the word " treaty ".

48. Finally, he could not support the joint amendment (A/CONF.39/C.1/L.19/Rev.1) since the effect of the definition would be to suggest that for a treaty between three States to be on a subject of general interest would be enough to make it a general multilateral treaty; he was sure that the sponsors had not wished to go as far as that in their definition.

49. Mr. BINDSCHEDLER (Switzerland) said he wished to begin by raising a procedural point. The list of terms in article 2 clearly could not be exhaustive and must contain only the absolutely necessary definitions; it was impossible to decide which those were until the entire draft convention had been studied. The Committee should therefore follow the procedure of the Conference on Consular Relations, and take no decision on article 2 until it had examined all the draft articles.

50. The Swiss delegation would not support the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) because it was not sure that the definition proposed was correct; in its opinion, it was the number of parties to a treaty, rather than the subject, that determined whether a multilateral treaty was general or restricted.

51. Nor could it support the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1), because it added nothing new to the text: all treaties naturally established a legal relationship between the parties.

52. The Ecuadorian amendment (A/CONF.39/C.1/L.25) seemed to run counter to the purpose of article 2, since its content was substantive rather than descriptive; moreover, references to justice and equity, which were

[2] *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), pp. 5, 6 and 49.

vague terms, opened the door to differences of interpretation liable to jeopardize the entire structure of treaty law.

53. He agreed with the Lebanese representative that the new sub-paragraph proposed by the Chinese delegation (A/CONF.39/C.1/L.13) was unacceptable, since treaties had been entered into by non-sovereign States. The Chinese representative had foreseen that difficulty, and had suggested that it would be met by the provision of article 5, paragraph 2; but in that event there would be a contradiction between the two articles, and it seemed wiser not to introduce the somewhat loose subject of sovereignty into the definitions. Furthermore, the Chinese amendment to sub-paragraph 1 (*i*) seemed unnecessary.

54. He could support the Hungarian and Swedish amendments (A/CONF.39/C.1/L.23 and L.11) and also welcomed the French proposals (A/CONF.39/C.1/L.24): it was most important to define the adoption of the text of a treaty, in order to avoid misinterpretation in such contexts as that of article 6, paragraph 2 (*b*), and also to include a definition of a restricted multilateral treaty. He also fully endorsed the amendment by Austria and Spain (A/CONF.39/C.1/L.1 and Add.1).

55. On the other hand, his delegation could not agree to the United States proposal (A/CONF.39/C.1/L.16) to delete the references to acceptance and approval from sub-paragraph 1 (*b*). Those procedures had been introduced into the formalities of treaty-making by the League of Nations, and their history was set out in the commentary to article 11, paragraph 2, of the draft. The United States proposal to deal with the question in a new article 9 *bis* would make the text less clear, and the original wording should be retained.

56. The Swiss delegation also could not support the Chilean amendment (A/CONF.39/C.1/L.22), for all treaties by their very nature produced legal effects.

57. Finally, his delegation had not had time to examine the Indian amendment (A/CONF.39/C.1/L.40) with due care, but on preliminary consideration it was inclined to think that sub-paragraph 1 (*e*) and 1 (*f*) should be maintained.

58. Mr. KOUTIKOV (Bulgaria) said that his delegation whole-heartedly supported the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1), in the belief that a definition of a general multilateral treaty was indispensable to the convention.

59. Bulgaria had already drawn attention to the limiting legal effects of certain provisions of treaties in their application to States making reservations, and fully supported the Hungarian and Swedish amendments (A/CONF.39/C.1/L.23 and L.11) to sub-paragraph 1 (*d*), but agreed with other delegations that the Drafting Committee should be asked to consider the possibility of amalgamating those two amendments.

60. Mr MWENDWA (Kenya) said his delegation felt strongly that the draft articles, which were the result of lengthy deliberations in the International Law Commission, should not be the subject of hasty amendment. With regard to article 2, the Commission had wisely decided to use the word " treaty " as a generic term, covering all agreements between States in written form and governed by international law, and to abandon the distinction made in its 1962 draft between treaties in simplified form and general multilateral treaties. Moreover, the term " governed by international law " brought out clearly the difference between agreements governed by international law and those subject to the national law of one of the parties.

61. He could not agree with the United States delegation that the words " acceptance " and " approval " should be omitted from paragraph 1 (*b*), since those terms had acquired an importance of their own. Perhaps mention should also be made of " adhesion ", a term widely used in treaties and juridical works, especially those of French-speaking countries. Finally, the text of sub-paragraph 1 (*h*) seemed to be somewhat ambiguous: the Drafting Committee might be asked to find clearer wording.

62. With regard to the amendments before the Committee, he observed that some of the proposals represented attempts to force the issue and to anticipate decisions which should properly be taken in connexion with substantive articles. In his delegation's opinion, only amendments designed to clarify the definitions should be referred to the Drafting Committee at that stage; indeed, it would go so far as to suggest that the original article should be taken as a basis for the consideration of the draft as a whole, and that the Committee should take no decisions on article 2 until all the articles had been examined.

63. Mr. SMALL (New Zealand), referring to the amendments by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) and Chile (A/CONF.39/C.1/L.22), pointed out that the International Law Commission had regarded the intention to create a legal relationship as an essential element of its draft until 1962, but had since abandoned the idea of including an explicit reference to that intention. The Drafting Committee might consider whether such a reference was necessary; the New Zealand delegation believed that the element was already implicit in the phrase " governed by international law " in paragraph 1 (*a*).

64. With regard to the Austrian and Spanish amendment (A/CONF.39/C.1/L.1 and Add.1), his delegation assumed that the International Law Commission had used the word " document " deliberately in sub-paragraph 1 (*c*) to cover the widely-used practice of having full powers conveyed by telegraph. The Expert Consultant might clarify that point; if the New Zealand delegation's assumption was incorrect, it could support the Austrian amendment.

65. Mr. ARIFF (Malaysia) said that the definition of " treaty " in paragraph 1 (*a*) was insufficiently comprehensive, since it failed to indicate the intention of the parties to a treaty. It was a generally accepted principle of municipal law that the intention of the parties was to establish a legal relationship, and he therefore supported the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1), with the possible insertion of the word " legal " before " relationship ".

66. Mr. RUDA (Argentina) said he agreed with earlier speakers that the current debate should be a provisional discussion of article 2, pending the approval of all the other articles.

67. Some of the amendments submitted to paragraph 1 (*a*) were substantive, while others related to drafting points. Although the Argentine delegation had been impressed by efforts to improve the substance of the International Law Commission's text, it tended to prefer the original version. On the other hand, the amendments by Mexico and Malaysia (A/CONF.39/C.1/L.33 and Add.1) and Chile (A/CONF.39/C.1/L.22) deserved consideration, although his delegation believed that the last two phrases of the Commission's text must be retained.

68. The United States amendment to paragraph 1 (*b*) (A/CONF.39/C.1/L.16) should be debated more thoroughly, especially in connexion with article 11. It was certainly inappropriate to take a decision on the deletion of the words " acceptance " and " approval " at that stage.

69. With regard to the Swedish and Hungarian amendments (A/CONF.39/C.1/L.11 and L. 23), he considered that the word " multilateral " should be inserted before " treaty " in the fourth line of paragraph 1 (*d*). He also agreed that the words " or to interpret " should be inserted before the words " the legal effect " in the fifth line, because interpretation might be regarded as a form of reservation. He was not sure whether the word " vary " did not cover " limit ", and whether the Swedish amendment was therefore indispensable; if other delegations considered a reference to limitation necessary, however, the Argentine delegation could accept that addition.

70. The Indian delegation alone had proposed the deletion of two provisions (A/CONF.39/C.1/L.40); it seemed premature to express an opinion on that proposal, and the amendment might be reconsidered after all the draft articles had been examined.

71. Where additions to the Commission's text were concerned, the Argentine delegation was inclined to support the French amendments (A/CONF.39/C.1/L.24), particularly the new definition of the adoption of the text of a treaty. The definition of a restricted multilateral treaty might well be included, but the French text was not quite clear, and might be reworded by the Drafting Committee.

72. Finally, with regard to the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1), although the heading of article 2, " Use of terms ", indicated that the purpose of the article was to define certain terms used in the draft articles, the term " general multilateral treaty " did not appear anywhere in the text. It would be paradoxical to insert the definition of a term which was not used in the draft convention. The question of participation in a treaty was highly important, since it affected the essence of the contractual relations entered into; moreover, in its comments and amendments (A/CONF. 39/6/Add.2), the Hungarian delegation proposed the insertion of a new article 5 (*a*) entitled " Participation in a treaty ". It might therefore be wise to await the consideration of that proposal before taking any decision.

73. Mr. KEMPFF MERCADO (Bolivia) said that the definition of " treaty " in paragraph 1 (*a*) was incomplete. In his delegation's opinion, the definition should contain the fundamental concepts of the validity of a treaty, and he therefore supported the Ecuadorian amendment (A/CONF.39/C.1/L.25). It was necessary that the definition should include a reference to the capacity of the parties and to their freedom of consent, to good faith and to the need for the treaty to deal with a licit object.

74. Mr. SEATON (United Republic of Tanzania) said he supported the amendment by Ecuador (A/CONF.39/C.1/L.25) because the principle of good faith should apply at the negotiating stage as well as to the performance of a treaty in accordance with article 23. The amendment also laid down the essential element of free consent as well as the requirement that the object of the treaty should be licit. The amendment set forth all the elements necessary for a treaty to be binding.

75. In his view the appearance of general multilateral treaties was one of the most promising elements in modern life and he hoped that a satisfactory definition of them would be found. However, opinions differed; for example, the Swiss representative believed that the determining factor was the number of participating States, whereas the Lebanese representative had argued that a treaty could deal with a subject of general interest, even though concluded by only three parties. The Argentine representative's objection did not appear persuasive, since he supported the inclusion of a clause on restricted multilateral treaties though there was no mention of them elsewhere in the text, but was against defining multilateral treaties because the draft articles were silent on the matter.

76. Mr. HARRY (Australia) said that one essential element of a treaty was the intention of the parties to create legal rights and obligations, and that was only implicity suggested in the Commission's text. Its views on that point were set out in paragraph (6) of its commentary. It would be preferable for the text to be more precise in the manner suggested in the first Chilean and the Mexican and Malaysian amendments. Suitable wording could be found by the Drafting Committee.

77. The qualification " international " in paragraph 1 (*a*) of article 2 should be maintained to make clear that the article was dealing with agreements between States that were full subjects of international law.

78. He sympathized with the amendment of Ecuador but thought its wording too long and complicated.

79. He was not inclined to favour the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) since no mention was made of a general multilateral treaty anywhere in the text.

80. He was not yet ready to express any final view of the French amendment (A/CONF.39/C.1/L.24). The Committee would have to come back to the whole question of definitions when it had concluded discussion on the rest of the articles.

81. On the question of interpretative statements, he considered that the Commission's view had been sound and that they should be treated as reservations only if they excluded, limited or otherwise varied the legal effects of certain provisions in a treaty.

82. Sub-paragraphs (*e*) and (*f*) should be retained, as well as sub-paragraph (*b*). The distinctions made were useful.

83. Mr. MUTUALE (Democratic Republic of the Congo) said that it would appear from the commentary that States were free to choose whether a treaty was to be

governed by international law or by the internal law of a certain State. That did not seem entirely satisfactory and he therefore subscribed to the Chilean amendments (A/CONF.39/C.1/L.22) which made the position perfectly clear.

84. He hoped that the eight-country amendment, which filled an obvious gap, would not create difficulties. In fact, it reintroduced an element which had previously existed in an earlier draft by the Commission, and was important because a special category of new treaties had come into existence.

85. He agreed with the United Arab Republic representative that the Committee should take provisional decisions on article 2 and then come back to it when it had a clear idea of the terms used throughout the draft.

86. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the Hungarian (A/CONF.39/C.1/L.23) and Swedish (A/CONF.39/C.1/L.11) amendments were well founded.

87. He presumed that the United States amendment to sub-paragraph (*a*) was withdrawn in view of the decision not to extend the draft to treaties between States and international organizations or between two or more international organizations.

88. He could not agree with the United States proposal to drop the words " acceptance " and " approval " in sub-paragraph (*b*), because the process of submitting treaties for approval by the appropriate organs was used in a number of countries, notably his own and various African and Asian countries. The sub-paragraph should be comprehensive and take into account the practice of all States. The Commission had wisely not defined what was meant by acceptance or approval but had simply indicated that they were methods whereby a State established its consent to be bound.

89. The Ceylonese amendment was acceptable but it would be preferable to refer to the constitutions of international organizations rather than to their practice.

90. He was in favour of including the definition of general multilateral treaties because of the large number which had come into existence and because of their special features. He therefore supported the eight-country amendment, as well as the French amendment which dealt with a special category of multilateral treaty.

91. The wording of the Ecuadorian amendment (A/CONF.39/C.1/L.25) was perhaps a little tortuous but it deserved consideration. On the other hand, he had serious doubts about the Chilean amendment (A/CONF. 39/C.1/L.22), because the proposition it contained was self-evident. It was the essence of an international agreement that it created legal obligations.

92. He would comment at a later stage on the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1).

93. Sub-paragraphs (*e*) and (*f*) in the Commission's draft were self-evident and could be dropped.

94. He agreed with the suggestion that only provisional decisions need be taken on article 2 pending consideration of the rest of the draft.

95. Sir Francis VALLAT (United Kingdom) said that his delegation was inclined to agree with the Commission's draft, which was the result of very careful thought, and did not favour amendments which departed greatly from it. The definitions should be kept to the minimum required for the needs of the substantive articles.

96. He doubted whether the Hungarian amendment to sub-paragraph (*d*) (A/CONF.39/C.1/L.23) was an improvement and the point was already covered elsewhere.

97. He was concerned about the statement made in the third sentence of paragraph (2) of the commentary because, in the experience of his Government, many agreed minutes could certainly not be regarded as international agreements.

98. His delegation favoured the Chilean and the Mexican and Malaysian amendments, and considered that the French amendment to sub-paragraph (*c*) would usefully amplify the article with a definition of what was meant by adoption.

99. He agreed with the Argentine representative that it was undesirable to add a definition of general multilateral treaties, particularly in view of the disagreement about what constituted such an instrument.

100. The Ceylonese amendment (A/CONF.39/C.1/L.17) was perhaps useful but little purpose would be served by inserting the words " or in any treaty ".

101. He favoured the Canadian representative's suggestion that the amendments should be referred to the Drafting Committee for consideration in the light of the decisions taken on the substantive articles.

102. Mr. BLIX (Sweden) said that he had some doubts about the Hungarian amendment, because an interpretative statement which did not purport to vary obligations under a treaty was not a reservation.

103. Such amendments as the Spanish amendment (A/CONF.39/C.1/L.28), the second Chilean amendment (A/CONF.39/C.1/L.22), the amendment of the Republic of Viet-Nam (A/CONF.39/C.1/L.29), the Indian amendment (A/CONF.39/C.1/L.40) and the Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1) were of a drafting character and should be referred to the Drafting Committee.

104. He reserved his position on certain amendments which contained additions to article 2, such as the United States amendment to delete the reference to " acceptance " and " approval ". Little purpose would be served in discussing the eight-country amendment (A/CONF.39/C.1/L.19/Rev.1) at that stage, as it raised the difficult problem of the right of accession to general multilateral treaties. Similarly, a decision on the French amendment concerning restricted multilateral treaties should be deferred until the substantive articles had been dealt with.

105. Perhaps provisional decisions could be taken on the amendments of a terminological character. He doubted whether the first Chinese amendment (A/CONF.39/ C.1/L.13) was necessary.

106. The Ecuadorian amendment (A/CONF.39/C.1/L.25) was too detailed and failed in its aim of describing a valid treaty, since it omitted such elements as the competence of the negotiators. Furthermore, an instrument could be a treaty even if its object was illicit and it had not been freely consented to.

107. The Chilean amendment did not seem necessary, since legal effects would follow under the terms of the other articles.

108. Mr. ALCIVAR-CASTILLO (Ecuador) said that the purpose of his amendment (A/CONF.39/C.1/L.25) was to reintroduce into the draft some reference to the requirements for the essential validity of a treaty. Good faith was one of those requirements and the reference thereto in article 23 did not suffice, since that article only stipulated the need to perform a treaty in good faith; good faith was equally necessary with regard to the actual conclusion of the treaty and in relation to the intention of the parties when entering into the agreement.

109. Provisions on the essential validity of treaties had been included in the Special Rapporteur's draft, following the example of his predecessor, but the International Law Commission had eliminated them, with the sole exception of draft article 5 on the capacity of States to conclude treaties. His amendment (A/CONF.39/C.1/L.25) was designed to fill that gap by specifying, even if only in the article on the use of terms, that a treaty, to be a valid treaty, must be concluded in good faith, deal with a licit object, be freely consented to, and be based on justice and equity. He had not of course included capacity, because capacity was already mentioned in article 5.

110. The requirement of a licit object was not covered by article 50, since the violation of a rule of *jus cogens* was clearly not the only case of an illicit object. With regard to free consent, a treaty required the concurrence of the parties and not merely a meeting of their wills.

111. It was perhaps a platitude to say that a treaty must be based on justice and equity, but it was a platitude well worth stressing in view of the large number of unequal treaties. The same charge of uttering platitudes had been levelled at those who, at the San Francisco Conference of 1945, had succeeded in introducing into the Charter the words " justice " and " law ", which had been significantly omitted from the Dumbarton Oaks draft of 1944.

112. Mr. BEVANS (United States of America) explained that his proposal to omit " acceptance " and " approval " from paragraph 1 (*b*) was based on the fact that those terms were not sanctioned by traditional international usage; internal procedures were totally irrelevant to that proposal. At the same time, there was no intention to exclude acceptance and approval as possible means of expressing the consent of a State to be bound by a treaty; his delegation would propose a new article 9 to make clear that signature, ratification and accession were not the only means of expressing such consent. In that connexion, he would draw the Drafting Committee's attention to the second paragraph of the rationale for the United States amendment (A/CONF.39/C.1/L.16).

113. The amendment by Ecuador (A/CONF.39/C.1/L.25) struck him as an attempt to include in paragraph 1 (*a*) of article 2 all the provisions of Part V of the draft.

114. He had some doubts regarding the proposal (A/CONF.39/C.1/L.1 and Add.1) to replace in paragraph 1 (*c*) the word " document " by " instrument ", since an instrument usually had a seal, and it was his experience that many full powers did not bear a seal.

115. His delegation had given thought to the suggestion to delete the word "international" before "agreement" in paragraph 1 (*a*) (A/CONF.39/C.1/L.28) but, on balance, had reached the conclusion that it should be retained.

116. He did not favour the proposals which had been made to treat interpretative statements as reservations. If the wording of paragraph 1 (*d*) were to be expanded to include interpretation, it would be necessary to introduce other terms as well, such as " understanding ". He therefore preferred leaving the text of the paragraph unchanged.

117. The Mexican and Malaysian amendment (A/CONF.39/C.1/L.33 and Add.1) contained some useful elements and should be referred to the Drafting Committee.

118. Lastly, the proposed definition of " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1) lacked the necessary precision for inclusion in article 2. The concept of a treaty which dealt with " matters of general interest for the international community of States " was not exact enough: it could be held to cover such instruments as a treaty of alliance between three powerful States, or an agreement on currency problems between three or four States, treaties which were undoubtedly of interest to other States.

119. Mr. de BRESSON (France) said that his amendment (A/CONF.39/C.1/L.24, para. 3) relating to restricted multilateral treaties was not of the same order as the proposal (A/CONF.39/C.1/L.19/Rev.1) to introduce the concept of general multilateral treaty. The French amendment was intended to define the type of treaty to which the provisions of article 17, paragraph 2, related. It did not introduce any new idea into the draft and, of course, did not raise the same difficulties as the attempt to introduce the concept of a " general multilateral treaty ". Moreover, the introduction of that concept would raise problems of substance which it would be unwise to underestimate.

120. He supported the Rapporteur's recommendation that article 2, with all the amendments thereto, should be referred to the Drafting Committee; if that Committee found that any amendment involved a question of substance, it would defer its decision on it until that question had been settled in the Committee of the Whole.

The meeting rose at 6.45 p.m.

SIXTH MEETING

Monday, 1 April 1968, at 10.50 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) *(continued)* [1]

1. Mr. JAMSRAN (Mongolia) said that he favoured the amendment in document A/CONF.39/C.1/L.19/Rev.1, which would add a definition of a general multilateral

[1] For a list of the amendments to article 2, see 4th meeting, footnote 1.