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7th meeting of the Committee of the Whole

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state that those rules were not applicable by virtue of the convention. The last part of sub-paragraph (*b*) was not clear and for that reason the Swiss delegation had proposed its deletion. The amendment was one of drafting only, and the Swiss delegation was prepared to withdraw it in favour of the Gabon amendment (A/CONF.39/C.1/L.41).

48. Mr. DE CASTRO (Spain) explained that his delegation's amendment (A/CONF.39/C.1/L.34) was only concerned with a matter of drafting in the Spanish text.

The meeting rose at 1.10 p.m.

SEVENTH MEETING

Monday, 1 April 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 3 (International agreements not within the scope of the present articles) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 3 of the International Law Commission's draft [1].

2. Mr. JENKS (Observer for the International Labour Organisation), speaking at the invitation of the Chairman, said he was gratified at the Committee's decision to recommend that the question of agreements to which subjects of international law other than States were parties should be examined by the International Law Commission. The International Labour Office would be glad to co-operate fully in that task, which must include the question of how any codification of such rules was to become binding on the international organizations concerned, how it was to provide for any adaptations of the general rules necessary to meet the special circumstances of particular organizations and how it was to permit future development and growth.

3. Articles 3 and 4 of the draft stated principles of vital significance for the long-term development of international organizations and of international law. Article 4 stated both a rule and an exception. The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned.

4. The rule was important because it would create confusion if there were a different law of treaties for the instruments adopted within each of the forty international and regional organizations, a number which might continue to increase. Few of them could be expected to evolve a distinctive body of practice and none could claim that its practice or needs were special in respect of the whole of the law of treaties. The ILO certainly made no such claim.

5. The exception was equally important because there were cases in which an organization had special rules and a well-established body of practice governing conventions which created a body of international obligations more coherent, stable and better-adapted to requirements of the situation than could be secured by applying the more flexible provisions of the general law. The International Labour Organisation was responsible for 128 international labour conventions ratified by over 115 member States, and some 1,200 declarations of application in respect of other territories. That network of obligations was governed by the provisions of the ILO Constitution and by a well-established body of practice tested over almost fifty years. The ILO was not the only organization with a distinctive body of treaty practice, but only the League of Nations and the United Nations together possessed comparable experience as to duration, scale and variety of action. The Conference was entitled to know how the draft articles would affect the ILO's discharge of its responsibilities, and the ILO was entitled to expect that the Conference would give full regard to the obligations of members of the United Nations as members of the International Labour Organisation.

6. In some cases there was a clear incompatibility between ILO's rules and practice and the provisions of the draft articles and a change in the former, which could not in any case operate retroactively in respect of conventions to which member States had already become parties, would be inconsistent with the Organisation's constitutional structure and with the object of labour conventions. In other cases, the ILO's rules and practice and the provisions of the draft articles could be rendered compatible only by a strained interpretation of the one or the other or by some artificial modification of the ILO's existing rules, for which there was no particular need. In still other cases, in order to obtain a reasonable and equitable result, the draft articles would have to be read in the light of established ILO rules and practice.

7. In some instances it would be unprofitable to discuss to which of those categories a case belonged.

8. Article 8 provided that the adoption of a text drawn up at an international conference took place by a vote of two-thirds of the states participating in the conference, unless by the same majority it was decided to apply a different rule. The ILO rule was quite different; there a two-thirds majority was required of the votes cast by the delegations present, and half of the delegates eligible to vote did not represent Governments.

9. Article 9 provided that the text of a treaty was established as authentic and definitive by such a procedure as might be provided for in the text or was agreed upon by participating States, or failing that by authentication of the representatives of States, whereas under the ILO Constitution, ILO conventions were authenticated by the signatures of the President of the Conference and the Director-General.

10. Article 12 dealt with accession. ILO conventions were concluded within the constitutional obligations relating to their application, and accessions which did not include those obligations were therefore inconceivable.

[1] For the list of the amendments submitted, see 6th meeting, footnote 4.

11. Articles 16 to 20 dealt with reservations. According to ILO practice, reservations incompatible with the object and purpose of the treaty were inadmissible, and that principle had been maintained consistently. The procedural arrangements concerning reservations embodied in the draft articles were inapplicable to the Organisation because of its tripartite character. Great flexibility was necessary in the application of certain international labour conventions to widely varying circumstances, but the provisions regarded by the International Labour Conference as wise and necessary were embodied in the terms of the conventions, and if proved inadequate could be revised at any time in accordance with regular procedures. Any other method would destroy the international labour code as a code of common standards.

12. ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28.

13. On the subject of the relationship between successive treaties on the same subject and the amendment and modification of treaties, the ILO had wide experience and had created a substantial body of law and practice.

14. The ILO's rules governing the procedure for the revision of conventions and the legal consequences of revision differed from and were better adapted to those needs than article 36, which contained the saving clause " unless the treaty otherwise provides ". Only some of the relevant rules were contained in the conventions; some derived from the Constitution and some from the procedural rules in the form of standing orders.

15. A few international labour conventions expressly permitted the modification of certain provisions by *inter se* agreements generally, on condition that the rights of other parties were not affected and that the *inter se* agreement provided equivalent protection. However, in the majority of labour conventions such agreements would be regarded as incompatible with the effective execution of the object and purpose of the treaty as a whole, as would be the case with a convention relating to one of the fundamental human rights. Such problems could not conveniently be dealt with by reference to article 37 of the draft. The ILO Constitution conferred rights to initiate proceedings relating to the application of a convention upon interested parties other than governments that were parties to the convention, and those rights which flowed directly from the Constitution would not be affected by any *inter se* arrangements.

16. Article 57 defined the consequences of a material breach of a multilateral treaty, while articles 62 to 64 set out the procedure to be followed when a breach was alleged. Articles 24 to 34 of the ILO Constitution specified the procedures applicable in the event of any failure by a member to secure the effective observance of an international labour convention it had ratified. They included provision for the appointment by the Governing Body, in appropriate cases, of a commission of inquiry to examine the alleged failure. Those articles of the Constitution constituted a *lex specialis* more appropriate for the application of international labour conventions than the necessarily general provisions of article 62 to 64.

17. He was not suggesting any modification of the general law as proposed in the draft articles, but asked for a clear recognition that an international organization might have a *lex specialis* that could be modified by regular procedures, in accordance with established constitutional processes. The questions at issue were not limited to procedural ones and were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. The practical importance of those procedures for member States depended on the extent to which they were parties to international labour conventions and must be assessed in the light of long-range considerations of general international policy.

18. The principle that conventions adopted within an international organization might be subject to a *lex specialis* was of long term as well as immediate importance.

19. International legislative techniques remained so defective that the way must be left open to develop specialized procedures for special purposes as the need arose. One of the prior requirements in codifying international law had been to ensure that it did not operate as a bar rather than as a stimulus to progressive development. If the law of treaties had been codified a generation ago, much of the present draft would have found no place in it. Article 4 provided the necessary flexibility for the progressive attainment of the long-term purposes of the United Nations Charter, and he hoped that it would be adopted substantially in its present form.

20. Mr. AUGÉ (Gabon) said his delegation had submitted an amendment (A/CONF.39/C.1/L.41) which was intended for the Drafting Committee's consideration and the purpose of which was to achieve greater clarity in article 3. The words " to which they would be subject independently of these articles " had been dropped, as no mention was made of them in the Commission's commentary. The introductory phrase " the fact that the present articles do not relate " had also been dropped.

21. Mr. KEBRETH (Ethiopia) said that article 3 was an important one, the purpose of which was to state the binding character of oral agreements and those concluded between States and other subjects of international law or between such other subjects. The Commission's main concern appeared to have been the question whether oral agreements and agreements not concluded strictly between States remained outside the purview of the law of treaties. The draft convention being worked out would have to become a parent instrument providing substantive rules to cover as far as possible all international agreements, for in the final analysis international organizations were the creation of States. In a broader sense, it might be said that article 3 was intended to serve as a vital link between the convention on the law of treaties and the customary laws of treaties that were as yet uncodified.

22. His delegation felt considerable uncertainty about the words " to which they would be subject independently of these articles ". Through the use of those words, customary laws and the many practices and procedures, especially of international organizations, would apply. But the question remained of the application of the progressive and substantial principles contained in the convention. Any suggestion of a difference between the

laws of inter-State treaties and other treaties should be avoided at the present stage of the law.

23. The purpose of the Ethiopian amendment (A/CONF.39/C.1/L.57 and Corr.1) was to eliminate the words "to which they would be subject independently of these articles" and to get rid of the suggestion that oral agreements between States were excluded from the application of the convention under its article 1. They were only implicitly excluded from the application of the rules of the convention by virtue of article 2, paragraph 1 (*a*).

24. The intention of paragraph (*b*) of the Ethiopian amendment was to state that the convention should apply to all other agreements; the words "so far as possible" had been included in that paragraph in order to emphasize the fact that the convention would not apply to agreements not strictly between States in a literal sense.

25. There seemed to be some overlapping in the existing text of article 3, and he hoped that the amendment would be of assistance to the Drafting Committee.

26. Mr. MATINE-DAFTARY (Iran) said that his delegation's amendment (A/CONF.39/C.1/L.63) aimed at achieving a progressive development of international law. He failed to understand why the Commission had refused to tackle the problem of treaties concluded with or between international organizations, which were such a prominent feature of modern life, and why it had not succeeded in producing a more comprehensive draft.

27. Precedents must be examined in order to establish the legal status of an oral agreement. That form of agreement seemed to have belonged mainly to the era of secret diplomacy and colonialism, and was totally at variance with the principles of open diplomacy proclaimed in the Covenant of the League of Nations and the United Nations Charter, notably in Article 102. It seemed difficult to imagine that that article could cover oral agreements, since they could not be registered with the Secretariat.

28. Another obvious objection to oral agreements was that they could not be subjected to the scrutiny of internal state organs and the processes of ratification.

29. He was unable to understand the meaning of paragraph (3) of the Commission's commentary to article 3, or why it should have assigned equal importance to oral agreements and treaties with international organizations. In his opinion, because of the dangers attaching to oral agreements, they should be regulated separately and not dealt with in the present draft. He would therefore be satisfied if the Chinese amendment (A/CONF.39/C.1/L.14) was adopted.

30. Mr. SEPULVEDA AMOR (Mexico) said that, in order to make the meaning of article 3 clearer, his delegation had submitted an amendment (A/CONF.39/C.1/L.65) to delete the concluding phrase "independently of these articles". The reason for the proposal was the following: the undoubted meaning of the phrase was that the legal force of the agreement referred to in the text of article 3 rested on rules other than "the present articles", rules which might form part of another convention or be rules of customary law; in other words, it rested on international law.

31. Consequently his delegation proposed that the concluding phrase should be altered to read "in accordance with international law".

32. At the same time, his delegation considered that the wording proposed in the amendment by Gabon (A/CONF.39/C.1/L.41) would improve the drafting and it should therefore be taken into consideration by the Drafting Committee.

33. Mr. YASSEEN (Iraq) said that he was in favour of retaining article 3 as it stood. It correctly stated that the legal force of certain forms of agreement was not affected by the fact that the present articles did not relate to them. The reservation was an important one, because the present convention could not be regarded as the sole source of rules on the law of treaties.

34. He could not support the Swiss amendment (A/CONF.39/C.1/L.26) to delete the phrase "independently of these articles". In his view, those words were necessary, for they emphasized the fact that the rules set forth in the articles under discussion could be applied not only as written law but because they were custom or general principles of international law.

35. Mr. ALVAREZ TABIO (Cuba) said that it was essential to adjust the text of article 3 so that it expressed the intention of the International Law Commission. It was explained in paragraph (5) of the commentary to article 2 that the fact that the scope of the draft articles had been limited to treaties between States was not "in any way intended to deny that other subjects of international law" had the capacity to conclude treaties; it was added that "the reservation in article 3 regarding the legal force of and the legal principles applicable to their treaties was inserted by the Commission expressly for the purpose of refuting any such interpretation of its decision to confine the draft articles to treaties concluded between States".

36. Paragraphs (2) and (3) of the commentary to article 3 explained even more clearly the purpose of the article. Altogether, it was apparent that the Commission's intention had been threefold: first, to state that the draft articles did not affect the legal force of those types of international agreements which had been excluded from their scope; secondly, that those agreements were governed by the relevant legal principles, the application of which was also in no way affected by the draft articles; thirdly, that the substantive rules set forth in the draft articles could be applied to those agreements. In other words, the Commission had intended to make a reservation regarding the application of those substantive rules to types of agreements excluded from the scope of the draft by the terms of paragraph 1 (*a*) of article 2.

37. That intention was not clearly expressed by article 3, especially its concluding words "to which they would be subject independently of these articles", the interpretation of which could give rise to doubts. Those doubts were not completely removed by the Spanish amendment (A/CONF.39/C.1/L.34), although its wording represented an improvement. The best solution would be to adopt the Mexican amendment (A/CONF.39/C.1/L.65) and combine it which the Spanish amendment, so that the concluding words of article 3 would read:

"... shall not affect in any way the legal force of such agreements or the application to them of any of the rules set forth in the present articles independently of the rules of international law to which they might be subject ".

38. Mr. CHAO (Singapore) said that he could not support the Spanish amendment (A/CONF.39/C.1/L.34) as it would only lead to uncertainty. Nor could he support the Swiss amendment to delete the final phrase in article 3, the purpose of which was fully explained in the commentary. Brevity did not always make for clarity. Perhaps article 3 did state an obvious rule of customary international law, but there would be no harm in keeping it for reasons of caution and he did not therefore support the Chinese amendment to drop the article altogether.

39. He could accept the amendment of Gabon, provided the final phrase reading " to which they would be subject independently of those articles " was added at the end, and the word " convention " substituted for the word " articles " at the beginning of the text.

40. Mr. MIRAS (Turkey) said that article 3 was not indispensable. If, however, the Commission decided to retain it, the language of its sub-paragraph (*b*) should be amended so as to express the idea that international agreements not in written form could in certain circumstances have legal force. The present text might give the impression that all oral international agreements without exception had legal force, a proposition which would not be true. He suggested that the Drafting Committee take that remark of his into consideration in the final drafting of article 3, if it were ultimately decided to retain it.

41. Mr. PINTO (Ceylon) said that although the total legal effect of article 3 was minimal, it did, like articles 69 and 70, serve some purpose in that it helped to delimit the scope of the draft articles. His own suggestion would be to replace those articles by a general reservation to cover all the aspects of treaty law which had been left outside the scope of the draft articles. Paragraphs 28 to 34 of the International Law Commission's report on its eighteenth session (A/6309/Rev.1, part II) [2] dealing with the scope of the draft articles, set out a number of areas of treaty law which had been excluded, many of which did not form the subject of articles such as articles 3, 69 and 70. It would therefore be more satisfactory to deal with the whole matter in a general provision, which he suggested should be formulated by the Drafting Committee for incorporation in the preamble to the future convention on the law of treaties.

42. Should the Committee decide to retain article 3, he would prefer the existing text to that proposed by Switzerland (A/CONF.39/C.1/L.26): without the concluding phrase the article would seem to say that the non-applicability of the draft articles to two categories of treaties would not affect the application to those same treaties of the rules set forth in those articles themselves —a proposition which would be self-contradictory. He believed that the same objection applied to the amendment by Gabon (A/CONF.39/C.1/L.41).

43. Mr. FRANCIS (Jamaica) said that there was no fundamental disagreement on the substance of article 3, but there was obviously room for improvement in the drafting of the article.

44. He was opposed to the amendment to delete article 3 (A/CONF.39/C.1/L.14), since that would reintroduce the uncertainties which it had been the International Law Commission's purpose to remove. He also opposed the amendments by Spain (A/CONF.39/C.1/L.34) and Iran (A/CONF.39/C.1/L.63).

45. He could support the amendment by Gabon (A/CONF.39/C.1/L.41), provided the ideas contained in the Mexican amendment (A/CONF.39/C.1/L.65) were introduced at the end of the text; the reference, however, should be to the rules of general international law rather than simply to " international law ". It was necessary to introduce the Mexican amendment in some form because, without it, the text proposed by Gabon would contain a contradiction.

46. The CHAIRMAN said he wished to point out that the Swiss delegation's amendment (A/CONF.39/C.1/L.26) had not been withdrawn. Its sponsor had merely stated that if the Committee were to adopt the amendment by Gabon (A/CONF.39/C.1/L.41), he would withdraw his own amendment (A/CONF.39/C.1/L.26) .[3]

47. Mr RUDA (Argentina) said it was essential to retain article 3 in order to safeguard the legal effect of the two categories of treaties excluded from the scope of the draft articles by virtue of the provisions of article 1 and article 2, paragraph 1 (*a*). He therefore opposed the proposal (A/CONF.39/C.1/L.14) to delete article 3; deletion would create grave problems of interpretation.

48. Although the codification of the law of treaties related exclusively to treaties concluded between States, some of the rules contained in the draft could be relevant to treaties concluded between States and other subjects of international law, or between such other subjects of international law; whence the necessity for sub-paragraph (*a*).

49. Sub-paragraph (*b*) was even more necessary, since the draft articles, as indicated in article 2, paragraph 1 (*a*), dealt only with treaties in written form. It was essential to state that the exclusion of international agreements not in written form did not affect the legal force of those agreements, and he therefore strongly opposed the amendment by Iran (A/CONF.39/C.1/L.63).

50. The amendments by Switzerland (A/CONF.39/C.1/L.26) and Mexico (A/CONF.39/C.1/L.65) derived from the same idea, although it was better expressed in the Mexican amendment; the idea was that the international agreements excluded by articles 1 and 2 remained subject to the rules set forth in the draft in so far as those rules were applicable to them by virtue of the rules of international law in force.

51. The amendment by Gabon (A/CONF.39/C.1/L.41) represented a valuable attempt to simplify the text and should be referred to the Drafting Committee, on the understanding that, as suggested by the Jamaican representative, a proviso would be added at the end that the rules referred to were those to which the international

[2] *Yearbook of the International Law Commission, 1966*, vol. II, pp. 176 and 177.

[3] See 6th meeting, para. 47.

agreements in question were subject by virtue of the rules of international law.

52. Mr. RICHARDS (Trinidad and Tobago) said that the clear purpose of article 3 was to remove doubts; those doubts, however, would not have arisen if article 1 had been drafted, as suggested by his delegation, to state that the future convention related exclusively to treaties concluded between States. If, however, the Committee did not accept his idea for article 1, an article on the lines of article 3 became necessary.

53. With regard to the wording of article 3, he favoured the language proposed by Gabon (A/CONF.39/C.1/L.41), but would like the opening words to take the form proposed in the United States amendment (A/CONF.39/C.1/L.20); he understood the reasons for the withdrawal of that amendment,[4] but regretted it as far as the drafting was concerned. He now suggested that article 3 be worded to read:

> " Nothing in the present articles shall affect the legal force of international agreements not in written form or of agreements concluded between States and other subjects of international law or between such other subjects of international law or the application to them of any of the rules of international law."

54. The other amendments, and especially the amendment by Iran (A/CONF.39/C.1/L.63), were not acceptable to his delegation.

55. Mr. SECARIN (Romania) said that article 3 was necessary because the previous articles limited the scope of application of the whole draft convention *ratione materiae* to treaties in written form and *ratione personae* to treaties between States. It had to be made clear that the limited scope of the codification in no way meant that other categories of treaties were outside the ambit of international law. Many of the provisions of the draft did no more than restate existing rules of international law. Those rules would continue to apply to all treaties, including those which had been specifically excluded from the scope of the draft, and were binding by virtue of their original source. For those reasons, although he appreciated the efforts of a number of delegations to improve the drafting of article 3, he urged the Committee to adopt it in the form in which the International Law Commission had formulated it.

56. Mr. VIRALLY (France) said that article 1 and paragraph 1 (*a*) of article 2 clearly defined the scope of the convention and excluded from it treaties concluded by subjects of international law other than States and agreements not in written form. Accordingly, the convention could have no legal effect on those two categories of agreements, and it might be said that article 3 merely stated the situation created by articles 1 and 2. Nevertheless, the International Law Commission had wisely decided to include in article 3 a clause stressing that rules of customary international law continued to apply to agreements falling outside the scope of the convention. The French delegation could therefore accept article 3 in its original form, but considered that the wording gave rise to some difficulties of interpretation.

57. The Gabon amendment (A/CONF.39/C.1/L.41) would have been an improvement on the Commission's text, being both clearer and more concise, but it unfortunately omitted the crucial phrase of the whole article, and might therefore be combined with the Mexican amendment (A/CONF.39/C.1/L.65), which specified that the rules to which agreements in the two categories were subject were those applicable to them in accordance with international law. The French delegation would, however, prefer to see the word " general " inserted before the words " international law ".

58. Mr. MARESCA (Italy) said that, since article 3 represented a counterweight to articles 1 and 2, its accurate wording was highly important to the entire system of the convention.

59. He could not agree with the Chinese delegation that the article should be deleted, or with the Iranian delegation that paragraph (*b*) should be omitted, for agreements not in written form were widely used in modern treaty, making arrangements. The deletion of the last phrase-proposed by Switzerland, would remove the *raison d'être* of the entire article, for without that phrase the rules set out in the convention would apply to the two categories of agreements referred to in article 3.

60. The Drafting Committee should take into serious consideration the Mexican proposal to alter the last phrase to read " in accordance with international law ", since that seemed to be the most flexible formulation.

61. Mr. KRISHNA RAO (India) said that his delegation had no objection to the Mexican amendment (A/CONF.39/C.1/L.65), which might be referred to the Drafting Committee.

62. It could not support either the Chinese amendment (A/CONF.39/C.1/L.14), for the reasons given in the commentary to the article, or the Swiss amendment (A/CONF.39/C.1/L.26), the adoption of which would deprive the article of much of its value.

63. It would also have difficulty in accepting the Ethiopian amendment (A/CONF.39/C.1/L.57), which restated in positive form what the Commission had stated in a negative form, for reasons given in the commentary. That restatement, however, led to somewhat different results. For example, the use of the words " so far as possible " in paragraph (*a*) of the Ethiopian amendment made the provision weaker than the Commission's paragraph (*b*). Moreover, the Ethiopian paragraph (*b*) would have the effect of extending the scope of the application of the convention, which was limited to treaties concluded between States in article 1. The International Law Commission had recognized the validity of treaties in the two other categories and had emphasized that only rules deriving from customary international law were applicable to such agreements, whereas the Ethiopian amendment made all the rules of the convention automatically applicable to such agreements. Thus, the Commission provided for an objective criterion, based on recognized sources of international law, but the Ethiopian amendment set up a subjective and controversial criterion. Moreover, the Commission's reasons for drafting its text in that form were stated in the last two sentences of paragraph (2) of its commentary to article 3. The Indian delegation therefore appealed to the Ethiopian delegation to reconsider its amendment.

[4] *Ibid.*, para. 46.

64. Mr. FATTAL (Lebanon) said that article 3 was obviously not substantive and he urged the sponsors of amendments to withdraw their proposals or to agree to have them referred to the Drafting Committee. Articles 3 and 4 should really be voted on in their original form.

65. Mr. KRISPIS (Greece) said that, since the scope of the convention was clearly limited in article 1 and paragraph 1 (*a*) of article 2, the advocates of the deletion of article 3 probably had in mind that the rule in question should be interpreted *a contrario*. Nevertheless, it seemed advisable to retain the article, taking great care not to create difficulties by extending the scope of the convention through inaccurate wording.

66. His delegation was in sympathy with the intention of the Mexican amendment (A/CONF.39/C.1/L.65), which made it clear that the rules applicable to the two categories of agreements referred to in article 3 were customary rules of international law, not necessarily those set out in the convention; on the other hand, the convention itself restated some of those customary rules, for the distinction between the codification and the progressive development of international law was difficult to draw. He therefore suggested that the Mexican amendment be redrafted to read " so far as they represent a restatement of customary international law ".

67. Mr. KEARNEY (United States of America) said that the debate had centred largely on the ambiguity of the concluding phrase of article 3. In his delegation's opinion, the Gabon and Mexican amendments went a long way towards eliminating that ambiguity, and the Jamaican suggestion seemed valuable. The article might be referred to the Drafting Committee for consideration in the light of comments made in the Committee.

68. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that article 3 played an important part in the entire system of the draft convention, by stating clearly the rules governing the two classes of agreements to which the rules of the convention did not relate. Furthermore, it provided that the fact that such agreements did not lie within the scope of the convention did not affect their legal force, and admitted the possibility of the application to them of the rules of the convention, under certain specific conditions. It was obvious that certain provisions of the convention, such as, for instance, article 27, paragraph 1, were applicable to the agreements in question. The article therefore established a proper balance, and any deletion from it could only imperil that balance; on the other hand, the Commission's wording might be regarded as a little cumbersome.

69. The USSR delegation therefore could not support either the proposal to delete the article, or the United States amendment (A/CONF.39/C.1/L.20), which would have had the effect of extending the scope of the convention. The Swiss and Gabon amendments (A/CONF. 39/C.1/L.26 and L.41), which both omitted the crucial last phrase of the article, were also unacceptable, since their effect would be to make all the rules of the convention applicable to the two types of agreement in question. Nor could his delegation support the Ethiopian amendment, for the reasons stated by the Indian representative, and also because, at all events in the Russian text, the word " oral " was used instead of " not in written form "; agreements were frequently expressed in writing, but not concluded in written form. The Iranian proposal (A/CONF.39/C.1/L.63) to delete paragraph (*b*) was also unacceptable, since it would not make clear what rules would apply to international agreements not in written form. Finally, although the Mexican amendment (A/CONF.39/C.1/L.65) might be regarded as a drafting proposal, it should be borne in mind that the convention itself would ultimately become international law. For all these reasons, the USSR delegation considered that it would be wiser to retain the original text of article 3.

70. Mr. ALVARO ALVAREZ (Uruguay) said that the substance of the International Law Commission's text for article 3 should be retained. The decision to limit the scope of the draft to treaties concluded between States did not imply that all the rules set out in the convention would be inapplicable to treaties concluded by subjects of international law other than States. It in no way interfered with the legal force of such agreements or with that of international agreements not in written form. The ruling of the Permanent Court of International Justice in the *Eastern Greenland* case,[5] for example, should be borne in mind. Another aspect of the legal force of agreements not in written form had arisen in connexion with Article 102 of the United Nations Charter, which imposed on Member States the obligation to register treaties; the fact that a treaty, whether or not in written form, had not been registered did not mean that it had no legal force; it simply meant that it could not be invoked by the parties before any organ of the United Nations. Moreover, it was agreed, as a matter of interpretation, that those organs themselves could invoke the treaty in question if it had come to their notice.

71. His delegation considered that the amendment by Gabon (A/CONF.39/C.1/L.41) might help to improve the Commission's wording, but that it should be amalgamated with the Mexican amendment (A/CONF.39/C.1/L.65).

72. Mr. YAPOBI (Ivory Coast) said that his delegation fully supported the substance of the Gabon amendment (A/CONF.39/C.1/L.41), but hoped that the text could be reworded. The amendment consisted of two ideas: that the convention would not affect the legal force of the agreements in question, and that it would not affect the application to such agreements of the rules set forth in the convention. It was illogical, however, to state that the convention could not " affect " the application of the agreements when it was clearly stated that they did not fall within the scope of the convention. Perhaps the last phrase of the amendment should be reworded to read: "... or prevent the application to such agreements of the rules set forth in the present convention ".

73. Mr. SUPHAMONGKHON (Thailand) said his delegation believed that it would be unwise to delete any part of a text which had been carefully elaborated by the International Law Commission. He appealed to the sponsors of substantive amendments to withdraw them, and thought that the Drafting Committee would have no difficulty in dealing satisfactorily with all those amendments which affected the wording only.

74. Mr. BROCHES (Observer for the International Bank for Reconstruction and Development), speaking at the invitation of the Chairman, said that IBRD, and its

[5] P.C.I.J., Series A/B, No. 53.

affiliate, the International Development Association (IDA), were parties to over 700 international agreements and were therefore vitally concerned with the retention of the essence of article 3, which would be seriously affected, if not destroyed, by some of the proposed amendments. Thus, the Swiss and Gabonese amendments (A/CONF.39/C.1/L.26 and L.41), though very differently worded, were similar in that they eliminated the essential qualifying phrase at the end of the article. If those amendments were adopted, the article might be paraphrased as follows: " the fact that the convention does not apply to the agreements in question shall not affect their legal force or the application to them of the rules of the convention. " Such a text would be internally inconsistent, since it was hard to see how the fact that the convention did not apply to certain agreements could fail to affect the application to those agreements of its rules. Moreover, the proposed formulations would be inconsistent with article 1 as it stood and would appear to accomplish indirectly what the Committee had refused to do directly when it declined to extend the scope of the proposed convention to the agreements concluded by international organizations. Some of the rules expressed in the convention might well be applicable to those agreements, but only because they were rules of customary law. It was therefore essential to retain the qualifying words at the end of the text, otherwise the scope of the convention would be indirectly extended to treaties concluded by international organizations.

75. The International Bank therefore strongly urged the Committee to retain the International Law Commission's text, which had been formulated with great precision.

76. The CHAIRMAN said that the majority of the Committee seemed to be against the Chinese and Iranian amendments (A/CONF.39/C.1/L.14 and L.63) and substantially in favour of retaining the article in its original form. He suggested that article 3 be referred to the Drafting Committee, together with the Swiss, Spanish, Gabonese, Ethiopian and Mexican amendments (A/CONF.39/C.1/L.26, L.34, L.41, L.57 and L.65).

It was so agreed.[6]

The meeting rose at 6.10 p.m.

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

EIGHTH MEETING

Tuesday, 2 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 4 (Treaties which are constituent instruments of international organizations or which are adopted within international organizations) [1]

1. Mr. SAINT-POL (Observer for the Food and Agriculture Organization of the United Nations), speaking at the invitation of the Chairman, said that a large number of agreements had been concluded within the framework of FAO,which had drawn up rules governing the preparation of agreements and conventions adopted within that organization. Those rules applied to agreements concluded between States within FAO and to agreements concluded between a group of States and FAO.

2. The Food and Agriculture Organization had always tried to follow the principles of international law and comply with the decisions of the United Nations General Assembly, but it had sometimes had to depart from them owing to the highly technical nature of its work, which was evident from the titles alone of most of its agreements: for example, the Constitution of the European Commission for the Control of Foot-and-Mouth Disease and the International Plant Protection Convention.

3. The rules relating to treaties concluded within FAO were to be found in the basic texts of the organization; some of them were even included in its Constitution.

4. Naturally, there were differences between those rules and the provisions of the draft articles before the Committee. For example, the procedure followed by FAO in negotiations differed slightly from the rules laid down in the draft articles. It was important to note in that respect that the FAO Committee responsible for preparing draft agreements did not necessarily include the member States which might become parties to the agreements.

5. The main rules laid down in the FAO Constitution concerned the entry into force of agreements, the authentication of the text, the functions of the organization as a depositary, the registration of treaties and the full powers of representatives signing agreements. The rules applied by FAO to treaties met the requirements of both developed and developing countries.

6. The provisions of the draft convention could be applied without difficulty both to treaties concluded between States independently and to treaties concluded between States under the auspices of FAO. With regard to treaties concluded between States within the general framework of FAO in accordance with article XIV of its Constitution and treaties concluded between a group of States on the one hand and FAO on the other, with a view to the establishment of a commission or an institution, in accordance with article XV of the Constitution, the rules of the organization which were already in force should apply. In addition, the rules applicable to technical assistance treaties concluded between FAO and States and to treaties concluded between FAO and other international organizations could be codified in the near future.

7. He pointed out that the application of any provision of the draft articles which conflicted with the rules adopted by FAO on treaty law would entail an amendment

[1] The following amendments had been submitted: Ukrainian Soviet Socialist Republic, A/CONF.39/C.1/L.12; United States of America, A/CONF.39/C.1/L.21; Spain, A/CONF.39/C.1/L.35/Rev.1; United Kingdom of Great Britain and Northern Ireland, A/CONF.39/C.1/L.39; Gabon, A/CONF.39/C.1/L.42; Sweden and the Philippines, A/CONF.39/C.1/L.52 and Add.1; Ceylon, A/CONF.39/C.1/L.53; France, A/CONF.39/C.1/L.55; Peru, A/CONF.39/C.1/L.58; Zambia, A/CONF.39/C.1/L.73; Jamaica and Trinidad and Tobago, A/CONF.39/C.1/L.75; Congo (Brazzaville), A/CONF.39/C.1/L.76.