United Nations Conference on the Law of Treaties

Vienna, Austria
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88th meeting of the Committee of the Whole

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

International Law Commission was inadequate where the term " treaty " was concerned. The only element of substance to be found there was the expression " governed by international law". It was essential to include in the rules governing international law the rule concerning the freedom of consent of contracting States at the time of the conclusion of the treaty. Such freedom was essential for the existence of treaties. It was hardly possible to define a concept as complex as that of " treaty " in a few succinct words and at the same time omit any reference to the element of freedom of consent. In law, it was essential to have a clear idea of the various concepts, in order to avoid possible misunderstandings. His delegation, in presenting the revised version of its amendment, had retained only the essential element, namely, freedom of consent, because it had been anxious to meet the wishes of delegations which had not wanted too long a text.

47. In accordance with the decision taken by the Conference the previous year, his delegation hoped that its amendment would be referred to the Drafting Committee, which should make a careful study of the revised version and consider the possibility of retaining the reference to the notion of freedom of consent. The Chilean delegation had criticized the Ecuadorian amendment on the ground that it raised a question of substance concerning treaties, but the Chilean amendment (A/CONF.39/C.1/L.22), which proposed the addition of the words "which produces legal effects " also raised a question of substance. Logically that amendment should therefore also be considered as unacceptable.

48. Mr. BINDSCHEDLER (Switzerland) suggested that the Swiss amendment be referred to the Drafting Committee. The Chilean amendment (A/CONF.39/C.1/L.22), which was based on the same idea, had already been referred to the Drafting Committee, which could then choose between the two texts, or combine them in order to arrive at a better formulation.

49. The CHAIRMAN suggested that the Ecuadorian amendment (A/CONF.39/C.1/L.25/Rev.1) and the Swiss amendment (A/CONF.39/C.1/L.384/Corr.1) be referred to the Drafting Committee.

It was so agreed.

50. Mr. NETTEL (Austria) suggested that his delegation's amendment (A/CONF.39/C.1/L.383) be also referred to the Drafting Committee.[7]

It was so agreed.[8]

The meeting rose at 12.45 p.m.

[7] The amendment by Syria (A/CONF.39/C.1/L.385) to article 2 was taken up in connexion with article 5 *bis* (see 88th meeting).

[8] For the resumption of the discussion in the Committee of the Whole, see 105th meeting.

EIGHTY-EIGHTH MEETING

Monday, 14 April 1969, 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)*

Proposed new article 5 bis (The right of participation in treaties) [1]

1. The CHAIRMAN invited the Committee to consider the proposed new article 5 *bis* (A/CONF.39/C.1/L.74 and Add.1 and 2), which had not been formally introduced at the first session, when its consideration had been deferred.[2] The Committee would also remember that it had decided at its 80th meeting to defer consideration of all amendments relating to " general multilateral treaties ".[3]

2. Mr. WYZNER (Poland) said that the concept of universality, or the right of every State to participate in general multilateral treaties, was based on principles of international law embodied in the Charter of the United Nations and, in particular, on the principle of the sovereign equality of States. It was also closely linked with the undertaking by every State, formulated in the United Nations Charter, to fulfil in good faith the obligations assumed by it under the Charter. That undertaking could not be fully carried out if certain States were prevented from participating in treaties concluded in the interest of the community of States as a whole.

3. Poland's attitude towards those basic concepts of contemporary international law was evident from its sponsorship of an amendment to article 2 proposing a definition of the term " general multilateral treaty " (A/CONF.39/C.1/L.19/Rev.1). That attitude was based on the conviction that the principle of universality benefited not only individual countries but the community of States as a whole. It was only fair that a State whose participation might help towards the attainment of the aims of a general multilateral treaty should have the right to become a party to the treaty. Since participation in a treaty often imposed obligations which limited the freedom of action of States parties to the treaty, it was both unreasonable and harmful to debar from participation in a general multilateral treaty a State which wished to become a party thereto, particu-

[1] The proposal for a new article 5 *bis* (A/CONF.39/C.1/L.74 and Add. 1 and 2) was submitted at the first session by Algeria, Ceylon, Hungary, India, Mali, Mongolia, Romania, Syria, Ukrainian Soviet Socialist Republic, United Arab Republic and Yugoslavia. It read:

" Insert the following new article between articles 5 and 6:

' The right of participation in treaties

'All States have the right to participate in general multilateral treaties in accordance with the principle of sovereign equality.' "

[2] See 13th meeting, paras. 1 and 2.

[3] See 80th meeting, para. 67.

larly in the case of treaties the purpose of which was to strengthen international peace and security, to protect human rights or to facilitate international communications and transport.

4. While the principle of universality had never been challenged as a theory, its practical realization appeared to create insurmountable obstacles for some influential States whose aim was to discriminate against certain socialist countries. That was obvious from an analysis of the practice of States before and after the Second World War in the matter of general multilateral treaties. Colonialism and other forms of dependence had been at their peak in the period before the War, but it was never argued that participation in general multilateral treaties should be restricted on the ground that it was difficult to determine whether a given political entity constituted a State. That argument had not been adduced until the so-called " cold war ". Such discrimination, sometimes described as " consistent practice ", ran counter to the interests of the international community and should not be allowed to become law.

5. Poland was convinced that the convention on the law of treaties ought to include the general rule that general multilateral treaties were open to the participation of all States. That rule must also apply to the convention itself. Moreover, all States should have the right to participate in international conferences at which general multilateral treaties were drafted and adopted.

6. One of the arguments adduced by those opposed to the principle of universality in connexion with general multilateral treaties was that the concept of such a treaty could not be defined. Poland could not accept that argument. The concept of a general multilateral treaty was neither new nor vague. The term " general multilateral treaties " had been used in the title of item 70 of the agenda for the eighteenth session of the United Nations General Assembly as well as in the routine practice of the United Nations Secretariat. Poland had sponsored a draft definition of that term at the first session of the Conference and was prepared to co-operate with other delegations in seeking the most suitable description of that category of treaties which, under the draft convention, should be open to signature, ratification or accession by all States.

7. Another objection raised by opponents of the principle of universality was that to participate with an unrecognized State in a multilateral treaty would amount to recognizing that State. That view was not in conformity with established practice in international relations or with the opinion of such eminent legal authorities as Sir Hersch Lauterpacht. However, to allay the anxiety of certain delegations in that respect, any proposal which might help to remove the difficulty could be carefully considered.

8. It was also contended that the rule of universality limited the sovereign right of a State to choose its partners in a treaty. It should be realized, however, that that right was not confined to any particular group of States. The discrimination practised against some socialist States was also an encroachment upon the sovereign rigths of States which maintained relations with the socialist States concerned and wished those relations to be governed by general multilateral treaties. Many African, Asian and Latin American countries would benefit from the removal of those barriers. It was indeed paradoxical that a State such as the German Democratic Republic, which entertained diplomatic, consular and trade relations with countries all over the world, could not yet become a party to a number of general multilateral treaties.

9. A further argument adduced against the principle of universality was that if an international organization or its organ acted as the depositary of a treaty, it would not be able to determine whether a given political entity was a State unless the restrictive formula was applied. In point of fact, no problem would arise if the depositary, whether a State or an organ of an international organization, acted impartially. Almost six years had elapsed since the signing of the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the first treaty to combine the three depositaries system with the " all States " formula, yet none of the depositaries had reported any difficulty in determining whether or not an entity applying to accede to the treaty was a State. Some opponents of the application of the " all States " formula to treaties for which the United Nations Secretary-General was the depositary argued that they did not wish to impose on the Secretary-General the task of making controversial political decisions. That difficulty, if in fact it existed at all, could be overcome by a self-explanatory text in the convention itself or by a resolution of the Conference which would ask the United Nations General Assembly to provide the Secretary-General with the necessary guidance.

10. Failure to reaffirm the principle of the universality of general multilateral treaties when codifying the law of treaties and creating a legal system of norms which should govern the treaty relations of States could only have a negative effect on the development of international law and on relations between States; indeed, it might cause many States to reconsider their attitude towards the convention itself. On the other hand, an equitable solution of the question of universality in the convention itself would be consistent with contemporary international law. It would make an important and constructive contribution to the development of treaty relations among States and ensure the success of the present Conference, since it would help to solve other outstanding problems in a spirit of accommodation and compromise.

11. Mr. MARESCA (Italy) said that his delegation had considerable sympathy for the extra-juridical motives that had prompted the proposed new article 5 *bis*, since there were general rules the application of which to the largest possible number of States would undoubtedly be advantageous to the international community as a whole. Nevertheless, there was a clear margin of difference between such sociological considerations and the certitude of law. Similar proposals had been made in other connexions, and the results had not been those desired by the sponsors of the proposed article.

12. For instance, at the 1961 Conference on Diplomatic Intercourse and Immunities, the view had been

advanced that to send diplomatic missions was a sacred right of States, since it was an expression of international co-operation and a guarantee of peace, and again, in 1963, at the Conference on Consular Relations, those relations had been described as the surest expression of international co-operation, and a right of all States. But both conferences had concluded that the juridical limitations of their terms of reference did not allow them to follow the proposals before them to their logical conclusion.

13. Of course, the right to send diplomatic and consular missions was inherent in the sovereignty of a State, but it was *a priori* subject to the consent of the other party. From the purely legal point of view, the Conference must admit that a treaty, however broad its scope, represented a meeting of wills; the basic principle *pacta sunt servanda* must be read in its complete context, *pacta sunt servanda intra gentes intra quas signita,* not among all the countries of the international community.

14. Custom and consent were both sources of international law, but there was a wide difference between them: custom was a universal source, but the rules laid down in an agreement were binding only on the parties to it. Consequently, if the Conference took extra-juridical, not purely juridical, considerations as a basis, it would be faced with difficulties which had so far proved insurmountable: on a strictly legal basis, it could not be said that a treaty, irrespective of its scope, could be joined by subjects which had not participated in its drawing up and which were not regarded by some of the parties as capable of becoming parties to it.

15. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that the question of the universality of multilateral treaties was one of principle for his country, which strongly advocated the extension of participation to all States without exception, irrespective of their political, economic or social system. That position, based on the principle of the sovereign equality of States, was not new, ephemeral or expedient: it had been determined by the historic Decree on Peace, signed by the great Lenin. In that document, Lenin had stated that the sole basis of real co-operation was the equality of all States and the participation of all nations in international relations.

16. Accordingly, the Ukrainian delegation's attitude to the convention as a whole would depend on whether a provision on universality was included in it. To sign a convention which would prevent sovereign States from participating in international treaties would be tantamount to renouncing its principles, and that the Ukrainian Soviet Socialist Republic was unable to do. In other words, universality was a criterion of the viability of the convention on the law of treaties, of the extent to which the convention reflected the current stage of development of international law and of the extent to which it took into account the actual conditions of contemporary international life. The draft convention as it stood did not meet those criteria and consequently not only failed to develop international law but, on the contrary, was directed towards the past, in that it did not reflect actual contemporary conditions.

17. The right of all States to participate in multilateral treaties affecting their legitimate interests arose out of the universal nature of contemporary international law and was a direct consequence of the basic principles of that law, enshrined not only in such international instruments as the United Nations Charter, but even in the draft convention on the law of treaties. The most important of those principles was that of the obligation of States to co-operate with each other; and article 5 of the draft recognized the capacity of every State to conclude treaties.

18. No one seemed to deny that, in theory, universality was inherent in all the basic principles of contemporary international law. From the legal point of view, that meant that every one of those principles should be applicable to all States. Nor could it be denied that, in discussing articles of the draft convention, the participants in the Conference should be guided not only by legal considerations, but also by moral precepts. But the situation that had arisen in connexion with the consideration of the proposed new article 5 *bis* was completely illogical and devoid of moral or legal foundations. Attempts to divert the Conference into the paths of legal casuistry did not mean that any legal proofs had been adduced. Indeed, no arguments could be advanced which could controvert the fact of the existence in Central Europe and in Asia of States against which discrimination was practised by the opponents of the principle of universality. No legal argument could eliminate the fact that all States were equally subjects of international law.

19. The opponents of the principle of universality were guided exclusively by political motives, however much they might try to conceal it. They were concerned, not with the purposes and principles laid down in the United Nations Charter, but with their own selfish interests. Article 2(6) of the Charter stated that the Organization should ensure " that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security ": that clearly meant that such instruments as the General Disarmament Treaty, the Convention on the Prohibition of the Use of Nuclear Weapons and the Treaty on the Non-Proliferation of Nuclear Weapons should be open not only to States Members of the United Nations, but to all States.

20. That purely legal argument, however, was ignored by the opponents of the principle of universality, who were unwilling to face the fact that a sovereign State had existed and had developed successfully in Central Europe for some twenty years. Nor were they willing to take into account the General Assembly resolutions which were addressed to all States. For example, the fourth preambular paragraph of resolution 2030 (XX), on the question of convening a world disarmament conference, read " *Convinced* that all countries should contribute towards the accomplishment of disarmament and co-operate in taking immediate steps with a view to achieving progress in this field ". Similar provisions appeared in resolution 2028 (XX), on the non-proliferation of nuclear weapons, in resolution 2054 (XX), on

the policies of *apartheid* of the Government of the Republic of South Africa, and in other resolutions. A logical development of those provisions would be to open general multilateral treaties to the participation of all States, since an increase in the number of participants in multilateral treaties would undoubtedly promote their implementation. That was what the International Law Commission had had in mind when it had stressed in the report on its fourteenth session that general multilateral treaties " because of their special character should, in principle, be open to participation on as wide a basis as possible".[4]

21. When discrimination against certain States wishing to become members of the United Nations had first been encountered, the authors of the restricted formula had been more frank and had not even attempted to base their arguments on legal casuistry. Speaking against the admission to the United Nations of a group of States with a social system different from that of the United States, the United States representative had stated in 1949 that the policy that those States were pursuing at the time rendered them ineligible for membership, in the opinion of the United States; he had gone on to say, however, that the United States would be very pleased to support the admission of those countries if they were to change their policies.[5]

22. Twenty years later, no such crude appeals to States to change their policy in return for admission to the international community were heard, but subtler methods were used to try to close the door of international co-operation to certain countries of Europe and Asia. Those machinations were contrary to the recognized principles of international law and to such international obligations as those assumed by the parties to the Potsdam Agreement [6] which provided that the entire German people should be enabled to take its place among the free and peace-loving peoples of the world. Moreover, objection to the adoption of the new article was in flagrant contradiction to the purposes and principles of the United Nations — the maintenance of peace and security and the development of co-operation among nations.

23. The existence of the States which some wished to debar from participation in multilateral treaties was a historical fact, and recognition of that fact was a prerequisite for any rational approach to the problems of peace and security. Denial of the existence of those States could not be justified in any way. The principle of international law under which the only government of a country was one which actually controlled its territory was generally recognized, and in the light of that principle it was absurd to cast doubt on the capacity of the governments of certain States to exercise authority over their territory and on the wide popular support enjoyed by those governments. Furthermore, from the point of view of international law, such a policy amounted to a violation of the principle of non-interference in the domestic affairs of other States.

24. The Conference was faced with the responsible task of confirming the principle of universality which had become evident in practice. In fulfilling that task, it would be introducing into the convention on the law of treaties a provision which would promote the progressive development of international law.

25. Mr. PINTO (Ceylon) said that his delegation had been glad to be one of the sponsors of the proposal (A/CONF.39/C.1/L.74 and Add.1 and 2) which gave effect to the principle, consistently supported by his Government, that all States had the right to participate in general multilateral treaties in accordance with the principle of sovereign equality. It was basic to the whole fabric of international law that, in the process of codifying and developing norms intended to have wide application, every State should have the opportunity to make its contribution and to participate in the final instrument.

26. That principle had its roots in the very nature of international law. Unlike domestic law, international law did not rely on a central coercive authority. It was a system which depended for its effective operation on the acceptance of States, a system which States observed because of their own desire to observe it in the interests of order within the community. The entire community was therefore concerned to secure the widest possible acceptance of general norms by throwing participation in general multilateral treaties open to all States.

27. At the same time, his Government held the view that recognition of statehood could not be implied from the fact of participation in an international conference or in the conclusion of a multilateral treaty. Participation in a general multilateral treaty to which Ceylon was a party by an entity not otherwise recognized by the Government of Ceylon could never *per se* be construed as recognition of that entity, whether or not the Government of Ceylon appended a declaration or disclaimer to that effect to its instrument of accession. That view of his Government was fully in accordance with modern international law.

28. Mr. HU (China) said that the proposed new article 5 *bis* raised a very involved question. It has a desirable aim, namely universal participation in general multilateral treaties. But there was a big difference between paving the way for universal participation and laying down a legal rule with regard to participation. There did not exist in international law any right of participation, especially in the sense of absolute or unregulated participation, and the proposal now under discussion appeared precisely to provide for such unregulated participation.

29. The new article 5 *bis*, if adopted, would conflict with the provisions of Article 4 of the United Nations Charter which laid down conditions for the admission of new members. It would also create difficulties for other international organizations in connexion with the provisions governing qualifications for membership of those organizations.

[4] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 168, para. (2) of commentary to article 9.

[5] See *Official Records of the Security Council, Fourth Year, No. 32*, 429th meeting, p. 17.

[6] For text, see *British and Foreign State Papers*, vol. 145, pp. 852-870.

30. For those reasons, his delegation was opposed to the inclusion of the proposed new article 5 *bis* in the draft convention.

31. Mr. KELLOU (Algeria) said that Algeria had always supported the principle of universality, since it considered that every State, in accordance with the principle of the equality of States, had the right to participate in general multilateral treaties that might affect its interests. The Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States had unanimously affirmed the principle of the sovereign equality of States. Article 5 of the draft convention, which laid down that every State possessed capacity to conclude treaties, was sound but insufficient, since it did not exclude the contrary principle of the restrictive clauses which prevented certain States from participating in treaties concluded in the interests of the international community as a whole. The very nature of certain general treaties was such that it was the duty of all States to accede to them.

32. His delegation regretted that the International Law Commission had abandoned the position it had originally taken in support of the principle of universality, as evidenced by article 8 of the 1962 draft.[7] Article 13 of the United Nations Charter invited States to promote international co-operation and the progressive development of international law and its codification. Unlike multilateral treaties of a purely contractual nature, general multilateral treaties established new legal rules, regulated the conduct of States and defined existing rules. That was in the interests both of relations between States and of the rights of individuals or groups of individuals. The rules confirmed, laid down or clarified by general multilateral treaties eventually came to affect third parties, and, thus strengthened by the practice of all States, became part of general international law.

33. Modern practice in international law provided examples of general multilateral treaties which, though concluded between a limited number of States were, because they contained provisions of a general nature, capable of being acceded to by other non-signatory States. The convention on the law of treaties should become a general multilateral treaty and take its place in the first rank of treaties. Algeria wished to reiterate its support for the principle of universality, which was one of the basic elements of modern international relations, since it could end discrimination between States whatever their political, economic or social systems.

34. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that the proposal for a new article 5 *bis* raised a very important question of principle because it attempted to open participation in general multilateral treaties to all States. His delegation had always supported any constructive step to guarantee the sovereign equality of States. In the matter of international co-operation, particularly with regard to treaties, it was, however, necessary to ascertain first the nature of the parties and the extent to which States actually had the right to participate in general multilateral treaties.

35. In their attempt to secure the widest participation in general multilateral treaties, the sponsors of the proposal under discussion could in fact open the door to territorial entities which regarded themselves as States but which in practice did not adhere either to the principles of the United Nations Charter or to the generally recognized practices of the international community. It was therefore important, in the interests of the security and the smooth conduct of international relations, to determine the meaning to be given to the term " State ". That matter could only be decided by an international authority and the only competent authority for that purpose was the United Nations.

36. The representative of Poland had referred to the practices of the colonial era, when a protectorate did not have the right to participate in international treaties, even if invited to do so. That deplorable situation had come to an end and multilateral treaties were now open to all Member States of the United Nations and the specialized agencies; it was also the practice to invite other States to participate in general multilateral treaties and that practice was amply sufficient to ensure universality.

37. A treaty could only concern parties which had the capacity to become bound by it and which were accepted by the other contracting parties. His delegation therefore urged that the proposal for a new article 5 *bis* be rejected and that the formula used in United Nations practice be maintained; that formula made general multilateral treaties open to the participation of all undisputed members of the international community, and provided for the possibility of inviting States whose participation was desired by the majority of the contracting parties.

38. Mr. ABDEL MEGUID (United Arab Republic) said that the right of every State to participate in general multilateral treaties on an equal footing was of vital importance to the progressive development of international law. General multilateral treaties were of concern to the international community as a whole. The draft convention on the law of treaties should therefore include a provision setting forth the right of all States to participate in general multilateral treaties in accordance with the principle of sovereign equality, which was the cornerstone of contemporary international law. The possibility of becoming parties to such treaties was particularly important for the promotion of peaceful relations and friendly co-operation among all nations.

39. His delegation had always advocated the participation of all States in conferences which prepared general multilateral treaties. The principle of universality was not confined to the question of membership of the United Nations. States which had nearly a quarter of the population of the world were at present prevented from participating in such conferences, and it would be illogical to expect them to become parties to general multilateral treaties when they had been debarred from assisting in their formulation.

40. General multilateral treaties were steadily increasing in number and importance. It was in the interests of

[7] See *Yearbook of the International Law Commission, 1962*, vol. II, pp. 167 and 168.

the world community that conferences dealing with treaties governing such matters as nuclear warfare and outer space activities should be open to the participation of all States without discrimination as long as they codified norms of general international law or contributed to the progressive development of those norms. His delegation therefore supported the proposal for an article 5 *bis*.

41. Mr. TODORIC (Yugoslavia) said that, in accordance with the attitude of his Government, which had been conveyed to the United Nations Secretary-General, his delegation believed that an article on the participation of all States in general multilateral treaties should be included in the future convention, in the interest of States and of the international community. Such a provision would be in accordance with the United Nations Charter, which stressed the importance of the principles of universality and the sovereign equality of States, and with the principle of non-discrimination between States whatever their social or political systems.

42. Mr. GROEPPER (Federal Republic of Germany) said he was opposed to the inclusion in the convention of the proposed article 5 *bis*, since it would create considerable insecurity in relations between States and cause great harm to multilateral co-operation in major treaties. The inclusion of the proposal in the convention would create a right to unilateral participation, or to participation without special invitation, for all States. But since there was no international authority to give a binding decision as to what constituted a State, the so-called " general multilateral treaties " would be automatically open to any territorial entity which described itself as a State. It was well-known that there existed a number of entities in the vague area between States and non-States, and the international emergence of territorial entities whose legal status was in dispute usually involved serious political conflicts. Adoption of the proposed new article 5 *bis* would expose the whole area of co-operation in major multilateral treaties to the damaging effects of such conflicts and thereby create obstacles to international co-operation instead of facilitating it.

43. It was also important to remember that the meaning of the term "participation " was not clear, any more than was that of the term " general multilateral treaty ".

44. The new article 5 *bis* would greatly restrict the freedom which States at present enjoyed in international law for purposes of the preparation and conclusion of treaties, since any territorial entity describing itself as a State would be able to participate in important treaties, regardless of the will of the majority of the community of States. There was no basis in existing international practice for imposing such a limitation on the comptence of the contracting States. Even the most " general " of all multilateral treaties, the Charter of the United Nations, required a vote of the General Assembly for the admission of new members.

45. The proposed new article would infringe the sovereign rights of States in another respect. Under its provisions, insurgents who had broken away unlawfully from their State of origin and who endeavoured to assert their independence in the areas under their control would be enabled to enhance their status by acceding to multilateral treaties.

46. Article 5 *bis* was not necessary for the purpose of safeguarding the principle of the sovereign equality of States. That principle had existed for a long time but treaties which provided for unrestricted unilateral accession were extremely rare. Nor was article 5 *bis* necessary for the purpose of guaranteeing the universality of major multilateral treaties. The practice of States and of international organizations, in particular that of the United Nations, showed that the universality of major multilateral treaties was assured without any provision being made for unilateral accession by any entity describing itself as a State. The standard formula used in the major treaties prepared by the United Nations made it possible for all undisputed members of the community of States to accede to such treaties, and also made it possible to invite territorial entities whose participation was desired by the majority of States.

47. In recent years, a limited number of treaties had been opened to unilateral accession by all States but only for very special and exceptional reasons. Moreover, in those few special cases, it had been found necessary to devise the multi-depositary system, which had grave disadvantages and which did not eliminate the legal, practical and political defects of unilateral participation. Those were the reasons why his delegation was opposed to the proposal to include a new article 5 *bis*.

48. Mr. CHO (Republic of Korea) said that amendments relating to general multilateral treaties had been submitted to articles 8 and 17, which had been discussed at the 84th and 85th meetings, but had been withdrawn because of the difficulty in arriving at a clear definition of the term " general multilateral treaty ". And because of the practical impossibility of arriving at a clear definition, it would be inappropriate to introduce into the draft convention the concept of general multilateral treaties.

49. On the proposed article 5 *bis*, he shared the views expressed by the representatives of the Republic of Viet-Nam and of the Federal Republic of Germany. There was no international body that could decide what political entity could be regarded as a State. For that reason, and because of the absence of a clear definition of a general multilateral treaty, the proposed article 5 *bis* should not be included in the draft convention.

50. Mr. BRAZIL (Australia) said that although most, if not all, delegates attending the Conference would agree that there were certain treaties that should be open to participation on as wide a basis as possible, that was not the question the Committee was considering, which was rather whether the principle referred to could and should be translated into a general rule of international law. That, in fact, was what the eleven-State proposal (A/CONF.39/C.1/L.74 and Add.1 and 2) amounted to.

51. Over the years the International Law Commission had considered a number of possibilities, and after lengthy discussions had decided that that general question should not be included in the draft articles. Aus-

tralia considered that decision correct, and believed that the subject was not at the present stage suitable for inclusion in the convention on the law of treaties.

52. The particular rule now proposed was unsatisfactory for a number of reasons. First, it could only be acceptable if there were a clear definition of a general multilateral treaty, but the definition proposed by eight States for inclusion in article 2 (A/CONF.39/C.1/L.19/Rev.1) did not meet that requirement; it defined the category by reference to content, in imprecise terms. The wording proposed might even apply to a treaty between a limited number of States on an important question of interest to them, but with wider implications that might make it of general interest to the international community.

53. Another objection was that the proposal cut across an essential basis of treaty relations, because it created the possibility of treaty relations with a third State even though the States concerned had expressly indicated that they wished to avoid that possibility. His delegation did not consider that the end in view, namely, the widest possible participation in certain multilateral treaties, justified the means proposed, which involved overriding the fundamental rule that treaty relations depended upon the consent of the State concerned. It could not accept that the proposed rule was required or demanded by the principle of the sovereign equality of States, and in fact considered that that principle indicated an opposite conclusion, namely, that States could not be forced into treaty relations against their own will.

54. Mr. SHUKRI (Syria) said that at the first session of the Conference his delegation had been one of the sponsors of a new article 5 *bis*. Since then many comments had been made on the meaning and scope of general multilateral treaties.

55. The Syrian delegation had now submitted an amendment to article 2 (A/CONF.39/C.1/L.385), providing a definition of " general multilateral treaty ", based on three sources: the definition previously proposed by the International Law Commission in article 1, paragraph 1(*c*) of its 1962 draft,[8] the definition submitted by eight States at the first session of the Conference (A/CONF.39/C.1/L.19/Rev.1), and the position taken by the Syrian delegation. The proposed amendment defined a general multilateral treaty as a treaty which related to general norms of international law or dealt with matters of general interest to the international community at large, and then went on to indicate the various means by which such a treaty could be prepared.

56. The present was an age of universality in international relations, and consequently it was necessary that all States should participate in treaties that affected the international community as a whole. To continue to ignore the existence of a number of States would be to undermine the principle of universality. It would be wrong to prevent, out of political considerations, the inclusion in the convention on the law of treaties of the principle of universality in relation to a general multilateral treaty.

[8] *Ibid.*, p. 161.

57. He hoped that Syria's attempt to define a general multilateral treaty would be well received.

58. Mr. USTOR (Hungary) said that Hungary had been one of the sponsors of the eight-State amendment to article 2 defining a general multilateral treaty (A/CONF.39/C.1/L.19/Rev.1), and of the eleven-State proposal to include a new article 5 *bis* (A/CONF.39/C.1/L.74 and Add.1 and 2). His delegation believed that all States had the right to participate in a general multilateral treaty, which had been clearly defined in the eight-State amendment to article 2. The best example of a general multilateral treaty was a treaty that served the purpose of codification and the progressive development of international law.

59. The right to participate in a general multilateral treaty was based on the general principles of international law, especially the principle of the sovereign equality of States. Another basic principle of international law involved was the duty of States to co-operate in accordance with the United Nations Charter; that was also one of the seven basic principles of international law dealt with by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. That principle, as drafted by the Drafting Committee of the Special Committee, imposed the duty to co-operate on all States.[9] In bilateral treaties, only two States were involved; in treaties of regional interest, all States of the region should co-operate to solve regional problems; but where problems of universal interest were concerned, such as questions of codification, they were of concern to all States, and it was unjust to exclude any State from a conference dealing with such a treaty. Exclusion in such circumstances amounted to a violation of the principle of co-operation.

60. In the world of today, with increasing and varied relations among States, rapid industrialization, development of the means of communication, and the danger of wars of annihilation, it was essential to establish rules of co-operation, which must be in the form of treaties, the main source of modern international law. Treaties relating to the codification and progressive development of international law had now become of overriding importance and should be binding on all States; consequently all States should be permitted to participate in preparing such treaties.

61. Article 31 of the draft confirmed the old rule that no State could be bound by a treaty if it had not expressly accepted the obligation arising from the treaty. It was to the interest of the international community that all States should be bound by codification treaties, but that aim could not be achieved so long as the present discriminatory practice continued. He therefore hoped that the Conference would accept the definition of a general multilateral treaty, and acknowledge the right of all States to participate in such treaties, in accordance with the principle of sovereign equality and the obligation of States to co-operate.

[9] See *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 87, document A/6799, para. 161.

62. Mr. NASCIMENTO E SILVA (Brazil) said that in principle all delegations could support the proposed amendment, but many considered that it would be difficult to translate it into a practical rule. The principle of universality was dear to Brazil and to all the Latin American states, which had defended that principle ever since Dumbarton Oaks. Those States had supported the admission of a number of African and Asian States, even though it meant the end of the privileged position of the Latin American States, with one-third of the total votes in the General Assembly.

63. The present system was satisfactory, since the principle of universality could be observed from a practical point of view in the General Assembly, where decisions were taken on the basis of the sovereign equality of all States, great and small. Brazil would be obliged to vote against article 5 *bis* because it would detract from the authority of the General Assembly, which must retain the right to decide what States not parties to the Charter might participate in general multilateral treaties.

64. Brazil had no objection in principle to the definition of a general multilateral treaty, but did not see why it should be introduced into the present convention. Article 2 was not a set of definitions, but an article on the use of terms employed in the convention, whose purpose was to avoid cumbersome repetition of the same expressions. Since the draft articles did not include any reference to general multilateral treaties, it was not necessary to define the expression in article 2.

65. Mr. YASSEEN (Iraq) said that for the reasons that had been given on many occasions by the representatives of his country and reiterated by several representatives during the discussion, the Iraqi delegation would vote for the principle of universality.

The meeting rose at 5.15 p.m.

EIGHTY-NINTH MEETING

Tuesday, 15 April 1969, at 10.55 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)*

Proposed new article 5 bis (The right of participation in treaties) *(continued)* [1]

1. Mr. DE CASTRO (Spain) said that the article 5 *bis* proposed by eleven States (A/CONF.39/C.1/L.74 and Add.1 and 2) raised a problem of the utmost importance which was familiar even to those opposed to the principle of universality. The question of the right of States to participate in general multilateral treaties was not new. As early as 1962, the International Law Commission had tried to draft a provisional text but had subsequently abandoned the idea, perhaps for fear of delaying the submission of the text of the convention. Article 5 *bis* was therefore intended to fill a gap. Unfortunately, the Committee was meeting the same difficulties as the International Law Commission, and it was particularly difficult for such a large body to reach a solution.

2. From the doctrinal point of view, the great difficulty was the apparent contradiction between two equally valid principles which, if considered separately, produced conflicting results, namely the principle of freedom of consent and the principle of universality. According to the principle of freedom of consent, every State was entitled to decide which States it wished to deal with. The principle of equal rights of peoples, laid down in Article 1(2) of the Charter, and the principle of the sovereign equality of States, laid down in Article 2(1) of the Charter, led to opposite conclusions. Contemporary internal and international law showed a clear preference for the democratic principle of equality. In international law, consideration had to be given to co-operation by all States, whatever system they represented, particularly in view of the growing importance of the law-making function of general multilateral treaties. In its most recent judgement, the International Court of Justice had in general, accepted that some rules once regarded as law in the formative stage had since become defined and consolidated in those treaties, because emerging law became crystallized by the adoption of conventions. How could a State be prevented from participating in that kind of agreement without impairing the principle of equality? Similarly, it was contrary to that principle to conclude restricted regional treaties in which the principle of social and economic co-operation laid down in Articles 1(3) and 55 of the Charter was not respected. The principle of universality should be recognized as a basic principle of the progressive development of international law, in both the general and the regional spheres.

3. The application of that principle met with serious obstacles, however. A wording had to be found which not only could secure a wide measure of agreement but also could be applied with certainty and to good effect.

4. The difficulties were numerous and had already been pointed out. What was to be understood by a general multilateral treaty? It was necessary to take into account its objective meaning, the general character of the subject-matter, and the object and purpose of the treaty. Consideration also had to be given to the quantitative element. Moreover, regional treaties, if effective with regard to an entire region, were entitled to be regarded as general multilateral treaties.

5. The relationship between the principle of universality and the recognition of States was another problem. There were in fact two distinct problems. But the Conference should not overlook the possible difficulties for co-existence that would be created within an organization which was set up by a multilateral treaty and which established close reciprocal relations between its members, by the fact that, for reasons affecting their legitimate interests, some States did not recognize other

[1] For the text, see 88th meeting, footnote 1.