United Nations Conference on the Law of Treaties

Vienna, Austria
Second session
9 April – 22 May 1969

Document:-
A/CONF.39/C.1/SR.89

89th 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)*

Copyright © United Nations

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.

States. The International Law Commission had discussed the nature of the principle of universality, and had abandoned the idea that the principle was a rule of *jus cogens,* because that would mean that it would be impossible to lay down rules on restricted participation, on limited accession, and on the exclusion of members of organizations set up by general multilateral treaties.

6. Perhaps those difficulties could be overcome through article 62 *bis,* by setting up a body to which they could be submitted for solution.

7. The Commission had taken the view that the problem had been insufficiently investigated for any proposal on the subject to be included in the draft articles. The Conference should take a step forward, and do so without delay. Unfortunately, the article 5 *bis* now before the Committee was not entirely satisfactory. Nevertheless, the Conference should expressly and clearly recognize the principle of universality. In that connexion, it would be helpful to consider what had transpired at the previous session on the subject of treaties concluded between States and international organizations or between two or more international organizations: the United Nations should be asked to refer the question to the International Law Commission. In order to obtain solemn recognition of the principle of universality, consideration should also be given to the possibility that the Conference might make a declaration on the lines of that approved by the Committee of the Whole at the first session with regard to article 49, on the proposal of the Netherlands delegation.

8. Mr. GALINDO-POHL (El Salvador) said that treaties gave rise to legal consequences for the parties and in international law they were a source of obligations. They were based on the principle of mutual consent. During the discussion of article 2, the representative of Ecuador had stressed the importance of freedom of consent of the parties. The conclusion of a treaty presupposed agreement between the parties which had taken part in the negotiations. With regard to the special situation of third States, article 30 provided that a treaty did not create either obligations or rights for a third State without its consent. For the same reasons, it followed that third States could not by accession impose obligations on the States which concluded the treaty. Articles 12, 31 and 32 of the draft were based on the same doctrine of freely-expressed consent. The definition of the term " treaty " in article 2 specified that it was an agreement concluded between States and requiring their consent.

9. Thus the system of the draft was based on the principle of the consent of the parties. To say that all States could participate in general multilateral treaties in accordance with the principle of the sovereign equality of States would impair the principle of the free consent of States, since it would enable any State to accede to an agreement without the consent of the signatory parties, which would be unable to prevent that State from participating in the treaty and would have to accept obligations against their will. The reverse might even be provided for — that a duly ratified general multilateral treaty might be imposed on third States which had originally refused to accede to it.

10. Article 5 *bis* made an exception to the principle of consent in the name of the principle of universality. If those two principles were to exist side by side, an attempt would have to be made to see whether they could be reconciled. The principle of universality was a political principle of great value to the modern international community. It was a regulatory principle, not a constituent principle of the international community, and the United Nations has not succeeded in applying it. It was therefore acceptable as a desirable aim; but the question was whether it was possible to apply it without impairing the principle of the consent of the parties to international agreement. In his delegation's view, it was possible to do so without impairing the one principle for the sake of the other, by means of specific decisions, as had been the case in certain recent treaties in which all States without exception, had been invited to participate.

11. Much progress had been made by the international community in applying the political principle of universality. But, although the principle was gaining ground, it could not take precedence over the principle of freedom of consent. It was to be hoped that the principle of universality would become of general application, but its introduction into the convention on the law of treaties in the abstract, as a kind of blank cheque, would substantially modify international practice where treaty obligations were concerned. It must be recognized that the international community was not yet ready to accept the automatic application of that principle. Specific consent by the parties helped to promote its acceptance without imparing the principle of freedom of consent.

12. The automatic application of the principle of universality would raise a problem of definition. The Conference would have to find a satisfactory definition of general multilateral treaty; but the decision whether the subject-matter of a treaty was covered by the definition would rest with States, at the time of negotiating a treaty. The negotiating States would have to consider whether they were drawing up a restricted multilateral treaty or a general multilateral treaty. Later, a dispute might arise with States which claimed to have the right to accede to it. That process was not very different from inviting States to participate in each individual case.

13. His delegation considered that the question of the existence of certain States should not be raised in the discussion. Recognition was not an essential condition of the existence of States; participation by a State in multilateral treaties or international conferences did not imply recognition.

14. If it was desired to go a step further, recourse might be had to the International Law Commission's 1962 formula, which provided that every State might become a party to a general multilateral treaty " unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization ".[2] That wording upheld the principle of an obligation accepted by consent. There was no doubt

[2] See *Yearbook of the International Law Commission, 1962,* vol. II, pp. 167 and 168, article 8.

that, in the interests of the international community, it was undesirable that any State should be excluded from matters which were of genuine importance to the whole world. The principle of universality should be maintained in international relations in all cases where the interests of the international community as a whole were involved; but the best way of furthering that principle was to adopt it in each specific case, thus ensuring that contractual obligations were not imposed on any State against its will.

15. Mr. STREZOV (Bulgaria) said that the Bulgarian Government had already had occasion to state that the absence of a clause on the right of all States to become parties to general multilateral treaties would be a serious omission, and it regretted that article 8 of the 1962 draft, which settled that problem more or less satisfactorily, had been abandoned. Those misgivings were shared by many governments. The Bulgarian delegation considered it very important for the Conference to agree on a text affirming the principle of universal participation in general multilateral treaties. Such an agreement would contribute to the progressive development of international law and would open the door to the more rapid elimination of the many controversies arising from other articles of the draft. General multilateral treaties were in fact in a separate category, and the problem of participation in those treaties warranted special treatment in the light of the principle of the sovereign equality of States.

16. The existence of that category of treaties was confirmed by international practice, in which they were playing an increasingly important part, since they governed problems of general interest to the entire community of nations and were intended to be universally applied. They represented an important factor in the codification and development of international law. Participation by all States in such treaties was in the interests of the international community as a whole. Moreover, every State had a legitimate interest in becoming a party to them. The right of States to participate in them was closely linked with certain fundamental principles of international law, such as the principle of the sovereign equality of States, the duty of States to co-operate with one another and the principle of the equality and self-determination of peoples.

17. It was argued by some that the principle of universal participation in general multilateral treaties was incompatible with the freedom of States to choose the partners with which they wished to establish treaty relations. That freedom was, of course, undeniable, but that was no reason for ignoring the no less justified right of other States to participate in the solution of international problems which affected their legitimate interests. To exclude certain States would be contrary to logic and to the interests of the international community. From the legal point of view, it would be inadmissible to try to lay down rules of general international law, in other words rules of universal application, and at the same time to prevent certain States from helping to draw them up. The Bulgarian delegation was convinced that the principle of the universality of general multilateral treaties was not at variance with a reasonable interpretation of the principle of the freedom of States to determine for themselves how far they were prepared to establish treaty relations with other States.

18. It had also been said that the inclusion of the principle of the universality of general multilateral treaties in the draft convention would be contrary to existing international practice, particularly within the United Nations. It was true that a large number of the general multilateral treaties concluded under the auspices of the United Nations embodied restrictions designed to prevent certain States from participating in those instruments. That practice was motivated by considerations which had nothing to do with law or justice, but in recent years it had been abandoned in several cases in which the principle of participation by all States had been adopted. The Conference should base its action on those examples, not on a retrograde practice which established discrimination between States and hampered the development of international law.

19. The objection that the adoption of the principle of universality would create practical difficulties, not only in connexion with the participation of States not recognized by other contracting parties, but also with regard to the performance of the functions of depositaries, was unfounded.

20. As the Secretary-General had pointed out in his memorandum of 1950 on the representation of States in the United Nations,[3] the practice with regard to multilateral treaties made a clear distinction between the problem of participation in general multilateral treaties and the problem of recognition. A State's participation in a multilateral treaty in no way prejudged the recognition of that State by all the other contracting parties. The States which were opposed to the principle of universality were fully aware of that fact and it was solely for political reasons and in order to maintain a discriminatory attitude that they preferred to adhere to their erroneous position and to assert that participation was tantamount to recognition. In actual fact, those States were afraid that the participation of certain States might facilitate their recognition.

21. The objection that the adoption of the principle of universality might cause difficulties for depositaries was equally unconvincing. The difficulties arose rather from the discriminatory policy pursued by certain countries. The adoption of the principle of universality would make it possible to eliminate those difficulties, since all States could participate in conferences drawing up general multilateral treaties and could therefore all become parties to those treaties. So far, treaties open to accession by all States had not caused difficulties for the depositary.

22. The opponents of the principle of universality had asserted that if a treaty were open to accession by all States, certain States would refuse to become parties to it, on the grounds that they had not been free to choose their partners, and that that would reduce the

[3] See *Official Records of the Security Council, Fifth Year, Suppplement for 1 January through 31 May 1950*, document S/1466.

number of contracting parties. That assertion, however, was refuted by the wide participation of States in the Moscow Nuclear Test Ban Treaty and other similar instruments.

23. His delegation considéred that the principle of universality, which was so important for the progressive development of international law, for co-operation among States and for the future of the entire international community, should take its place in the draft.

24. Accordingly, the Bulgarian delegation supported the eleven-State amendment, which would certainly lead to the elimination of all discrimination in regard to the accession of States to general multilateral treaties.

25. Mr. SINCLAIR (United Kingdom) said that his delegation was opposed to the eleven-State proposal because it conflicted with the principle that States negotiating the text of a treaty were entitled to determine the scope of participation in that treaty. The negotiating States also had the right to know in advance who their potential treaty partners would be.

26. Multilateral treaties varied enormously in their nature and their purpose. The fact that the French delegation had agreed to withdraw its amendments relating to restricted multilateral treaties, because of the difficulty of formulating special rules for that category of treaties, did not mean that no such category existed. Some multilateral treaties were regional in nature and concerned only States members of such regional organizations as the Organization of American States, the Organization for African Unity, the Arab League, and the Council of Europe. Other treaties might be negotiated within a regional organization, but might be open for accession, under certain conditions, to States which were not members of that organization. Other treaties again might be negotiated within the framework of a general international organization and might be open for participation to the members of that organization or related organizations. Certain treaties were negotiated at diplomatic conferences convened at the initiative of one or several governments and outside the international organization framework, as in the case of the 1954 Geneva Agreements on Indo-China or the Antarctic Treaty.

27. The international community should have flexible techniques for dealing with matters of general interest. The right of passage through vital international waterways, which was certainly a matter of general interest to the international community, might be based on treaties to which very few States were parties, but which were clearly intended to be for the benefit of third States.

28. Moreover, the provision of the eleven-State amendment would be difficult to apply in practice. Some examples of general multilateral treaties could of course be identified, but experience had shown that it was virtually impossible to provide a precise definition of that category of multilateral treaties.

29. The essence of the problem lay in the fact that the members of the international community of States had differing views on the question of what territorial entities constituted States.

30. Many representatives who had spoken in the debate had based their views on the assumption that all entities whose status was in dispute must be considered as States if they asserted a claim to statehood. But must every claim to statehood by a territorial entity, whatever its nature, and irrespective of the means by which it might have temporarily attained sufficient *de facto* control over a piece of territory, be accepted? Certainly not. Everyone knew that beyond the area of Central Europe to which the Polish representative had drawn the Committee's attention, there were other controversial régimes seeking to thrust their way into the international community of States. Was it seriously suggesed that régimes and entities of that nature had the right to participate in general multilateral treaties?

31. A number of representatives had spoken of the alleged discriminatory nature of the customary practice whereby accession to general multilateral treaties was open to States members of the United Nations and the specialized agencies and to States which the General Assembly decided specially to invite. But the fact was that the international community lacked an independent organ which could determine objectively in a particular case whether a territorial entity whose status was in dispute had the attributes of statehood. As there was no such organ, it was reasonable that the main political organ of the United Nations should decide so difficult an issue.

32. The Conference must base itself on customary law and existing practice. There could be no doubt that State practice and the practice of international organizations was based on the principle that negotiating States had full freedom of contract and were free to determine which States or other subjects of international law were entitled to become parties to a treaty which they proposed to conclude. The principle of freedom of consent, which had been mentioned in connexion with article 2, should also apply to the choice of treaty partners.

33. The problem raised in the eleven-State amendment was not fundamentally a problem of the law of treaties. It was merely one aspect of a wider question deriving from the nature of the international community and from the means whereby territorial entities whose status was in dispute were admitted to that community. The methods devised by the international community to solve that question were not perfect, but in an imperfect world, and in the present state of international relations and of the organization of the international community, the customary formula on participation — the so-called Vienna formula — offered ample guarantees that entities which were not members of the United Nations or of the specialized agencies, but which were nevertheless recognized as States by the majority of the international community would be accorded the opportunity to participate in general multilateral treaties.

34. Mr. SHUKRI (Syria), introducing a new proposal for an article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1), said that the sponsors of the amendment, after listening to the arguments advanced during the discus-

sion, had reached the conclusion that the majority of States were in favour of the principle of universality. The main objections raised had related to points of detail, such as the desirability of drawing a distinction between general multilateral treaties and ordinary multilateral treaties, or the possibility of defining general multilateral treaties.

35. In a spirit of conciliation and in order to facilitate a general agreement on the problem, Algeria, Ceylon, Hungary, India, Mongolia, Poland, Romania, Syria, the Ukrainian Soviet Socialist Republic, the United Arab Republic, the United Republic of Tanzania, Yugoslavia and Zambia had submitted a new draft of article 5 *bis* [4] which replaced the previous proposal (A/CONF.39/C.1/L.74 and Add.1 and 2).

36. It was undeniable that every State had the right to participate in drawing up treaties which established general norms of international law, for no State could be bound by such norms without its consent. That principle was clearly stated in Article 38 of the Statute of the International Court of Justice. Again, the right of every State to participate in drawing up treaties governing problems of concern to the community as a whole could not be disputed.

37. The new proposal contained no definition or statement of abstract principles.

38. Mr. ALVAREZ TABIO (Cuba) said that the Conference was discussing what might be called the constitutional law of treaties and it was therefore logical that the future convention should be open to accession by every State which desired to accede to it, without any discrimination.

39. Any decision concerning the right of States to participate in establishing international treaty relations must be based on the principle of universality. Co-operation among States made it necessary that multilateral conventions should be open to accession by all States, and that had in fact been envisaged by the International Law Commission in the 1962 draft.

40. Absolute recognition of the principle of universality was essential for the progressive development of international law. The nature of certain conventions called for the adoption of the principle of universality, because those conventions established international relations which affected the whole of mankind, and it was illogical that, when the rights and obligations arising from such relations were being defined, all the members of the international community should not all have the right to participate, in accordance with the principle of sovereign equality contained in the United Nations Charter.

41. A characteristic of contemporary international law was its trend towards universality and it was impossible to deny the existence of certain socialist States, which were subjected to arbitrary discrimination as a result of pressure exerted by certain Powers, although they fulfilled all the necessary conditions legally entitling them to form part of the community of sovereign States.

42. It had been pointed out that the eleven-Power amendment (A/CONF.39/C.1/L.74 and Add.1 and 2) did not include any definition of a general multilateral treaty, but there were other amendments, such as the Syrian amendment (A/CONF.39/C.1/L.385), which clearly indicated all the elements which would make it possible to identify such a treaty.

43. Furthermore, the issue was not the definition of a general multilateral treaty but the absolute recognition of the principle of universality.

44. His delegation would therefore vote for the amendment (A/CONF.39/C.1/L.388 and Add.1).

45. Mr. FRANCIS (Jamaica) said that he could not yet express an opinion on the new article 5 *bis* proposed by Syria, atlhough he did not think it differed much from the text previously submitted (A/CONF.39/C.1/L.74 and Add.1 and 2).

46. In his delegation's view, there was a very clear distinction between the political desirability of securing the widest possible participation in general multilateral treaties and the establishment of a peremptory norm laying down an absolute right of participation.

47. The Czechoslovak delegation had submitted an amendment to article 12 (A/CONF.39/C.1/L.104) at the first session of the Conference. Notwithstanding that amendment, if article 5 *bis* was accepted in its existing form, there would be a lack of balance in the structure of the convention. In the first place, the proposed article conflicted with article 30, which stated " A treaty does not create either obligations or rights for a third State without its consent ". The right to participate in a general multilateral treaty should not be absolute; it should be derived from the provisions of the treaty itself or from the general wish of the parties.

48. Secondly, article 5 *bis* also seemed questionable in the light of article 15, which imposed obligations on the States concerned before the treaty had been ratified, accepted or approved and even before it had entered into force. Rights entailed obligations, and article 5 *bis,* in so far as it made no provision regarding the obligations mentioned in article 15, was very much open to question.

49. His delegation would therefore be unable to support the proposal for a new article 5 *bis*.

50. Mr. PELE (Romania) said that his delegation was one of the sponsors of the proposed new article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) and of the amendment to article 2 concerning the definition of a general multilateral treaty (A/CONF.39/C.1/L.19/Rev.1) which was still before the Committee. It therefore attached particular importance to the question of the right of every State to participate in a multilateral treaty whose object was the codification or progressive development of general international law, and in any other treaty of general application. Those treaties

[4] The proposal read:

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

' Every State has the right to participate in a multilateral treaty which codifies or progressively develops norms of general international law or the object and purpose of which are of interest to the international community of States as a whole.' "

formed a separate category of international agreements which very properly took account of the expansion of inter-State relationships in the modern world. Whether they were called general multilateral treaties, treaties of universal interest or treaties of universal application, such agreements must be open to all States, since they all contained provisions intended to ensure the rule of law and justice among nations and to satisfy the common interests of all States, and the interests of international peace, security and co-operation. That, moreover, was the spirit of the United Nations Charter, as Article 2(6) of the Charter showed; and the universality of the Charter was undoubted. The purposes and principles of the Charter were in fact the source of such treaties, the aim of which was to promote the right of peoples to self-determination, equal rights, non-interference in the internal affairs of other States, and respect for national sovereignty and independence.

51. State practice confirmed beyond all doubt the existence of such a category of treaties, open to all States. Many collective or universal conventions had been concluded towards the end of the nineteenth century and at the beginning of the twentieth, such as the 1883 Union Convention of Paris for the Protection of Industrial Property, the 1904 International Agreement for the Suppression of the White Slave Traffic, the 1907 Convention concerning the Laws and Customs of War on Land, and the 1928 General Treaty for Renunciation of War as an Instrument of National Policy. They all contained provisions allowing any non-signatory State to accede to them. Similarly, more recent conventions, such as the 1949 International Convention for the Northwest Atlantic Fisheries, the 1952 Universal Copyright Convention, the 1951 International Plant Protection Convention and others, were open to accession by all States. Those conventions, either in their preamble or in their initial articles, affirmed the universality of their objects and purposes.

52. The United Nations practice of restricting participation in treaties of universal interest seemed no longer to satisfy the principle of universality, as was shown by certain recent international agreements concluded under United Nations auspices such as the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the Outer Space Treaty and the Agreement on the Rescue of Astronauts.

53. The International Law Commission made extensive reference to general multilateral treaties as a firmly established institution of public international law. That was evident from its commentaries to the draft articles such as paragraph (12) of the commentary to articles 16 and 17, paragraph (2) (*c*) of the commentary to articles 27 and 28, paragraph (20) of the commentary to article 28, paragraph (1) of the commentary to article 29, paragraph (2) of the commentary to article 30, paragraph (4) of the commentary to article 50 and paragraph (7) of the commentary to article 57.

54. Nor had eminent publicists been slow to recognize the universal applicability of such treaties in their writings, for example, Paul Reuter in *Droit international public,* 1963, Charles Rousseau in *Droit international public,* 1965, and Max Sørensen in the *Manual of Public International Law* which appeared under his editorship in 1968. That being so, the Conference should affirm the principle of the universality of treaties, which sought to bind all States and were *par excellence* the legal instrument of universal co-operation. The Romanian delegation could not endorse the view of those who feared that what they called the " unilateral participation " of some States in multilateral treaties restricted freedom of consent to be bound by a treaty, in other words the sovereign equality of States. The universal treaties which he had cited as examples testified to the contrary, and the convention in course of preparation would contain a serious gap if it remained silent on general multilateral treaties.

55. Mr. MOLINA ORANTES (Guatemala) said that his country, which was resolutely anticolonialist, had always adopted an extremely liberal attitude towards the admission to international organizations of the new political entities born of decolonization. But Guatemala, both in the United Nations and in the Organization of America States, had always reserved its position with respect to would-be States which, with the help of Powers outside the American continent, attempted to establish themselves on territories forming an integral part of certain American republics and claimed by those republics. In the resolutions adopted by the United Nations General Assembly on the creation of new States, which were based on the application of the principle of self-determination, Guatemala had always introduced a proviso that such entities should only be allowed to benefit from the application of that principle if they did not form an integral part of American territories. Moreover, the Charter of the Organization of American States had been amended in that sense by the Protocol of Buenos Aires, 1967,[5] which provided that no new member could enter that Organization if it was the subject of a territorial claim by any country on the American continent.

56. His delegation feared that the article 5 *bis* proposed at the first session of the Conference might conflict with those General Assembly resolutions and international conventions. In order not to open the door to would-be political entities whose international status was open to dispute, his delegation would vote against article 5 *bis,* even in the form just proposed by the Syrian representative, which in no way disposed of the substantive difficulties which that article raised.

57. Mr. HUBERT (France) said he had some difficulty in coming to a decision on the new wording of article 5 *bis* submitted by the Syrian representative, but his impression was that the new text did not differ basically from the old one inasmuch as it maintained the principle of the universality of general multilateral treaties and was merely trying to define them.

58. Though the French delegation appreciated some of the arguments put forward by supporters of article 5 *bis* in the form in which it had been introduced at the first session, it concurred with the view that the

[5] Protocol of Amendment to the Charter of the Organization of American States (Washington, D.C., Pan American Union).

article was untimely. He would not go over all the arguments against the article, but he would observe that the members of the International Law Commission, highly qualified and independent persons who were entirely uninfluenced by political considerations had, after a lengthy and thorough debate, concluded that it was hard to find a satisfactory way of defining general multilateral treaties, and that it was not possible to draft a general provision for inclusion in the draft articles on the right of States to become parties to such treaties. In the French delegation's opinion the Commission's attitude carried considerable weight.

59. Another weighty argument against article 5 *bis* was the very nature of the Conference; it had been convened by the General Assembly of the United Nations and it was only right therefore that it should conform to United Nations practice. Except for a very few treaties, such as the Outer Space Treaty, it was part of the customary law of the United Nations to reproduce in technical conventions such as that which the Conference was now preparing certain clauses which had become usual since the Vienna Conference of 1961 on Diplomatic Intercourse and Immunities and the Vienna Conference of 1963 on Consular Relations. There was no need to make any change in what was known as the " Vienna clause ", by which participation in a convention was open to five classes of State, namely States Members of the United Nations, States members of the specialized agencies, States parties to the Statute of the International Court of Justice, States members of the International Atomic Energy Agency, and States invited by the General Assembly itself to become a party to the treaties in question. That was a broad, liberal and flexible formulation, inasmuch as it closed no door finally. The Conference should follow it to the letter in drawing up the final clauses of the convention and observe its spirit in the case of " general " multilateral treaties concluded in the future. It would be unfortunate to be committed in the future by an automatic universality clause which would prevent States from choosing their treaty partners freely. Conventions open to all States, of which the Romanian representative had given examples, were conventions on very specific matters, and their universality derived from their specific character. The Conference should take care to avoid signing a blank cheque which would amount to a definite infringement of State sovereignty. The French delegation would vote against article 5 *bis*.

60. Mr. SMEJKAL (Czechoslovakia) said that at the first session the Czechoslovak delegation had supported the universality rule, the principle that all States participated in the creation of international law. The international community should strive to ensure that all States became parties to treaties codifying or developing the general rules of international law. One illustration was the importance of the Covenants on Human Rights and the effect that would be produced by the possibility for all States to become parties to them.

61. He would not rehearse the arguments for and against the proposal, since the positions of principle were well known and it seemed hardly likely that the debate, which was limited to the theoretical questions of universality, would introduce any really new elements. That did not mean that the Czechoslovak delegation was not following the discussion with great attention or that it considered the discussion itself useless.

62. Indeed, one of the reasons why the discussion could not be said to be pointless was that the problem of universality presented itself to different delegations in different contexts. In the Czechoslovak delegation's view, the progress which the adoption of article 62 *bis* and article 5 *bis* would bring about would most certainly mark an important stage in the relationships between States. For, although it might not be immediately apparent, there was a relationship between article 5 *bis* and article 62 *bis,* which was generally recognized and decisive; only a real attempt at mutual understanding and agreement would make it possible to achieve the genuine progress in that respect which was the very object of the Conference. Without such an attempt, any decisions reached by voting alone would only represent a Pyrrhic victory.

63. Some delegations maintained that they could not accept any solution that might entail a modification of principle concerning the recognition of some other State. His delegation was not at all sure that article 5 *bis* would have any such effect. It held, indeed, that article 5 *bis* could not be interpreted in that sense. It supported without the least reservation the new text submitted by the Syrian representative in a spirit of compromise at that meeting. It was ready to take an active part in any attempt to find a compromise formula that would lead to the acceptance of the ideas underlying articles 5 *bis* and 62 *bis.*

64. In that spirit, and in order to meet the points raised by the Jamaican representative concerning the amendment to article 12 submitted by the Czechoslovak delegation at the first session (A/CONF.39/C.1/L.104), he would withdraw that amendment if any article on lines similar to those proposed for article 5 *bis* was adopted.

The meeting rose at 12.55 p.m.

NINETIETH MEETING

Wednesday, 16 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. KUDRYAVTSEV (Byelorussian Soviet Socialist Republic) said that on the basic question who had the

[1] For the new text (A/CONF.39/C.1/L.388 and Add.1), see 89th meeting, footnote 4.