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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.

right to participate in a multilateral treaty which codified or progressively developed norms of general international law or the object and purpose of which were of interest to the international community of States as a whole, his delegation held a clear and definite position: it would like all States to participate in such treaties in accordance with the principle of their sovereign equality, since those were the treaties which nowadays increasingly opened the way to the general settlement of the most important international problems. It was through general multilateral treaties of that kind for example, that the vital question whether a nuclear war might or might not occur was currently being settled at the international level. All States should therefore be drawn in to participate in such treaties, which should be binding on them, so that no country would be prevented from playing its part in achieving the universal aim of promoting world peace. It would be manifestly illogical to prevent any State whatsoever from participating in a treaty on disarmament, or a treaty on the prohibition and liquidation of nuclear weapons.

2. All States were sovereign and therefore had equal rights. No one was entitled to deprive a State of its inalienable right to participate in general multilateral treaties. The Byelorussian SSR, which celebrated on 1 January 1969 the fiftieth anniversary of its existence as a sovereign socialist State created as a result of the wise national policy of the great Lenin, had always respected the principle of the equality and sovereignty of all States.

3. There were, unfortunately, certain Powers which were unwilling to acknowledge either the interests of mankind or the sovereign equality of States. The opponents of the principle of universality advanced " theories " which could only be harmful. Thus, the American jurist Jessup, in his work entitled *The Use of International Law,* advocated producing a law of the " selective community " of States and went so far as to classify States as he thought fit. In Western Germany, Leibholz in his work entitled *Zur gegenwärtigen Lage des Völkerrechts* said that before it was possible to speak of an " international legal community " there must be a " minimum consensus of ideology, which did not exist at the present time". That was an attempt to carry over into inter-State relations the ideological struggle current in the world. There could be no compromise on questions of ideology, but the existence and development of norms of international law were in no way governed by differences in ideologies but by the need to live in peace and to co-operate in accordance with the principles of the United Nations Charter.

4. That was the need which should govern the Cenference in working out the convention on the law of treaties; in other words there should be mutual agreement to recognize the rules for the establishment of normal relationships between States with different political, economic and social systems and for the strengthening of peace between them in the interests of the whole of mankind.

5. The Western Powers, however, were violating the recognized principles of international law one after another. They were violating the right of peoples to share in the development of the norms of international law. By their attempts to keep certain socialist countries out of international conferences they were violating the principle that general multilaetral treaties must be drawn up in the full light of day. The Conference should ignore such selfish attempts and was in duty bound to take as its basis the aims of the United Nations Charter in order to make the consolidation of peace the fundamental principle of all international relationships.

6. Article 5 *bis* would give expression to the principle of universality and was thus a proper and a feasible response to that need. Any discriminatory formulation would be an artificial structure which could never become a norm of international law. The Byelorussian Soviet Socialist Republic was firmly opposed to all discrimination, and that was the principle which would dictate its attitude towards the convention on the law of treaties. Universality was a fundamental necessity of the development of international law, including the law of treaties. Many treaties, such as the 1963 Moscow Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, and the Agreement on the Rescue of Astronauts were based on the principle of universality. Similarly, many resolutions of the United Nations General Assembly were appeals to all States, such as the resolution condemning South Africa and Portugal for their policy of *apartheid* and racial discrimination adopted at the twenty-third session of the General Assembly.[2] Similarly, on 8 October 1968, the Netherlands, in connexion with the draft Declaration on social development, had stated [3] that in principle the proposed declaration should be of a universal nature and be acceptable by and applicable to all countries.

7. Certain representatives, including those of the Federal Republic of Germany and the United Kingdom, had advocated the adoption of what was called the " Vienna formula ", by which general multilateral treaties were open to all States Members of the United Nations, members of the specialized agencies or of the International Atomic Energy Agency, States Parties to the Statute of the International Court of Justice, and any other States invited by the General Assembly of the United Nations to become a party. That was a discriminatory formula, and hence a harmful one; for if a State achieved independence in Africa, Asia or Latin America, and, owing to lack of time, it was not yet a member of the United Nations, it would have to wait until the General Assembly of the United Nations met in order to participate, if the case arose, in a conference drawing up an important multilateral treaty to which it might have wished to be a party. That would be tantamount to violating the sovereign rights of the new State, and that was a situation which the Byelorussian Soviet Socialist Republic could not accept. Only the acceptance of the principle of univer-

[2] Resolution 2446 (XXIII).

[3] A/7235/Add.1.

sality would make it possible fully to respect the sovereign equality of States and to strengthen equity and legitimacy in international relationships. Consequently, the Byelorussian Soviet Socialist Republic unreservedly supported the new article 5 *bis*.

8. Mr. WARIOBA (United Republic of Tanzania), speaking as one of the sponsors of draft article 5 *bis* in its revised version (A/CONF.39/C.1/L.388 and Add.1), said he had followed the discussions with keen interest and had noted that the objections voiced had been directed not at the principle of universality but at the difficulties to which it gave rise. The main problem was therefore to try and find a way out of those difficulties.

9. He appreciated the differences that existed between States or groups of States, but it was unfortunate that those differences should be given more importance than the principle now under consideration. It was particularly unfortunate that the arguments both for and against the principle of universal participation in treaties — a principle which vitally affected mankind as a whole — should have been dictated to such an extent by the interests of political blocs.

10. In international relations, there were certain matters which should override all individual or group interests, and participation in general multilateral treaties was one of them. In the interests of security and of international co-operation, it was necessary for every State to conform to certain rules of international law; it was therefore unfair to expect a State to fulfil its obligations in that respect if, at the same time, it was denied certain essential rights such as the right to participate in general multilateral treaties.

11. He did not wish to enter into a detailed examination of the objections raised against article 5 *bis*, since they had already been adequately dealt with by a number of representatives, particularly the Polish representative; but he would like to refer to one or two points.

12. Some representatives considered that it was so difficult to define the term " general multilateral treaty " that it would be better not to include in the draft convention an article on the universal right to participate in such treaties. The United Republic of Tanzania was one of the sponsors of an amendment to article 2 (A/CONF.39/C.1/L.19/Rev.1) which sought to define the term " general multilateral treaty ". He was convinced that a satisfactory definition was feasible and he was quite prepared to co-operate in any attempt to formulate it. For that reason he had joined the sponsors of the proposed new article 5 *bis* which contained all the elements essential to a treaty that should be open to universal participation.

13. It had also been said that the term " State " was ambiguous and that it might allow any entity to become a party to a treaty. That was a strange argument to put forward in connexion with article 5 *bis*, because the term " State " had been used throughout the draft articles and had not raised any difficulty so far. His delegation understood the term " State " to mean nothing but a sovereign State. However, if certain delegations found genuine difficulties with that concept, he was sure that it would not be beyond the ability of the Committee to clarify it further.

14. The view had also been expressed that participation in the same treaty could amount to recognition. That argument too was a fallacy, but the advocates of article 5 *bis* were quite prepared to adopt a flexible attitude; the Committee had faced a similar problem in connexion with article 60, and in a spirit of goodwill it had approved article 69 *bis*. Perhaps it would be possible, with regard to article 5 *bis*, to work out a compromise on the pattern of article 69 *bis*.

15. The opponents of article 5 *bis* had put forward an argument which they regarded as even stronger, namely that article 5 *bis* would deprive States of their right to choose their treaty partners. In fact, that argument was the weakest of all. No State could of course be forced to have a contractual relationship with another if it did not wish to, but that did not justify preventing the latter State from participating in a treaty which vitally affected it and mankind as a whole. There already existed examples of treaties which established that type of relationship. It had been claimed by some that those were special treaties. In fact, they were special precisely because they dealt with matters of vital importance to the whole international community.

16. Moreover, if the argument of the right to choose treaty partners was carried to its logical conclusion, an absurd situation arose: under the so-called Vienna formula, States Members of the United Nations and the specialized agencies and States Parties to the Statute of the International Court of Justice would participate automatically in the treaties in question. Could it really be said that every one of the States represented or entitled to be represented at the present Conference would be ready to have all the other States represented at the Conference as treaty partners? They would certainly not do so as a result of free choice, but simply because all the States represented at the Conference subscribed to the ideals of the United Nations Charter.

17. In any case, the draft articles provided sufficient flexibility to enable two or more States to participate in the same treaty without that treaty necessarily creating a contractual relationship between them, since under the provisions dealing with reservations, two or more States could participate in the same treaty even if one or more of them strongly objected to a reservation formulated by another State.

18. The opponents of article 5 *bis* also invoked the Charter of the United Nations against the principle of universality, arguing that Article 4 laid down conditions for membership of the United Nations and that the General Assembly had the right to invite non-members of the United Nations specially to participate in treaties. But, in Article 2(6), the Charter gave pride of place to international peace and co-operation, and general multilateral treaties were necessarily concerned with matters vital to the maintenance of international peace and co-operation. The question of admission to the United Nations had nothing to do with participation in treaties.

19. The attitude of the United Republic of Tanzania on the whole question was both firm and flexible: firm

in the belief that the principle of universal participation should find a place in the convention on the law of treaties, and flexible in that it was ready to accept a formulation of that principle in a manner calculated to remove the misgivings voiced by a number of representatives, provided the principle itself was left unimpaired.

20. Mr. SAMAD (Pakistan) said that it had always been the policy of the Government of Pakistan to maintain friendly relations with all States of the world community regardless of their political, social or economic structure. His delegation therefore took the view that participation in general multilateral treaties which dealt with matters of general interest to the international community should be open to all States in accordance with the principles of sovereign equality, universality and non-discrimination.

21. In his view, mere participation by an otherwise unrecognized State in a general multilateral treaty could not in any way be taken to mean or imply its recognition. Recognition in international law was a deliberate formal act from which certain juridical consequences flowed. Thus on that point, the misgivings expressed by certain representatives — misgivings which were in fact based largely on political considerations — had no basis in law.

22. The International Law Commission, in article 8 of its 1962 draft,[4] had made provision for the participation of all States in general multilateral treaties; but the provision had later been dropped for a number of reasons in favour of the so-called Vienna formula. The discussions that had taken place had not convinced him, however, that it would be inadvisable to make provision in the convention on the law of treaties for the participation of all States and he was in favour of the new article 5 *bis* now before the Committee (A/CONF.39/C.1/L.388 and Add.1).

23. The new text obviated the need to define " general multilateral treaty " in article 2 as proposed in the Syrian amendment (A/CONF.39/C.1/L.385).

24. The principle of universality could be proclaimed either in the convention itself, in article 5 *bis,* or in a separate declaration, as had been done in connexion with article 49. On that point, his delegation had an open mind, but it hoped that the Committee would be inspired solely by legal considerations and would decide in favour of the principle of universality.

25. Mr. TSURUOKA (Japan) said that although his delegation understood the good intentions and sincerity of some of those States which favoured the insertion of article 5 *bis* in the convention, it found the proposal untenable in theory and unworkable in practice. Some speakers had given the impression that the essential element in the proposed article was the principle of universality, and that those who subscribed to that principle should support article 5 *bis.* In actual fact, it was not a question of the principle of universality but of how to secure the participation of the maximum number of States when, in the view of the parties to the treaty, its nature and its object and purpose made it appropriate to do so. Surely the right answer to the question could not be to give a third State the right to participate in a treaty which it claimed to be one of universal application. It was the will and intention of the parties which should prevail. Since a treaty was an international agreement concluded between States, it was the will of the States involved which should play a decisive role in determining the extent to which a treaty should be open to accession by third States. If the negotiating States wished to open a particular treaty to all States, they were always free to do so.

26. The Japanese delegation found that the constant practice of States had always been to leave the question of the participation of States to be decided by the parties. When those drafting a treaty had thought it appropriate to open it to the entire international community because of its nature and object, that had been done. There was no reason to depart from established practice which had proved satisfactory, by making, in effect, each third State a judge on the point whether a treaty was of the kind that should be open to all States, as was proposed in documents A/CONF.39/C.1/L.74 and Add.1 and 2, and A/CONF.39/C.1/L.388 and Add.1.

27. Where the negotiating States had agreed that a particular treaty should be universally applied, it would then be asked what formula should be adopted to secure its universal application. On that point, his delegation considered that what was known as the Vienna formula adequately met the purpose. It had been said that that formula was unduly restrictive, but that was not necessarily the case; it provided that a convention should be open for signature or accession by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency, States Parties to the Statute of the International Court of Justice, and any other State invited by the General Assembly of the United Nations to become a party to the convention. The effect of the formula was thus not only to open the convention to all States formally recognized by the international community but also to entitle every State to become a party if the General Assembly of the United Nations found by objective judgement based on a majority decision that it should be invited to do so. The Vienna formula was therefore perfectly compatible with the principle of universality and overcame all technical difficulties. On the other hand, the United Nations Secretariat had admitted that the formula proposed in article 5 *bis,* would tend to raise a whole series of technical difficulties. That formula would create problems rather than solve them. His delegation therefore considered it preferable that the proposal to include article 5 *bis* in the convention had better be dispensed with.

28. Mr. YRJÖLÄ (Finland) said that his delegation had carefully studied the proposed new article 5 *bis,* the effect of which, according to the explanations given by its sponsors, would be to enlarge the field of application of international treaties of major importance. The

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

Finnish delegation was well aware of the importance of the principle of universality and thought that the field of application of multilateral treaties regulating questions of concern to all or a large majority of States should be widened as much as possible. It had doubts, however, about whether the right to participate in some multilateral treaties in the manner proposed might not upset the stability of international treaty relations between States.

29. The Finnish delegation's attitude was based on the generally accepted principle that the right to participate in a treaty rose from the principle of State sovereignty, under which States should be free to decide whether or not they wished to conclude a treaty with other States. In other words, a State should, in principle, be entitled to express its opinion about participation when negotiating or concluding a treaty or when another State wished to become a party to it subsequently. If the convention were to contain a clause stipulating that the contracting parties were bound to allow any State to participate in a treaty, it would be an exception to the international law of treaties and to the fundamental right of States to choose their partners in treaty relations.

30. There was also a lack of precision in the notion of a multilateral treaty. It would be impossible to avoid varying interpretations of the scope of that category of treaties, thus creating uncertainties which would be a source of conflict between States. Furthermore, when there was no international body able to decide finally which treaties were to be regarded as multilateral treaties of the special kind referred to, the decision was left in each case to individual States. In other words, the proposed procedure enabled a State to become a party to a treaty simply by stating that it regarded it as a multilateral treaty of that special character. The principle of such a unilateral decision was unacceptable. It was also obvious that the adoption of the proposed procedure would lead to practical difficulties which would be a source of undesirable disputes between States. In that connexion, a very difficult position might arise for a depositary which had to decide whether the entity regarding itself as a State and attempting to deposit an instrument of accession to a treaty was really a State.

31. Difficulties might also arise in applying the proposed article 5 *bis* to treaties concluded under the auspices of certain international organizations, for example, those concluded on the initiative of the International Labour Organisation, where the operation of the treaty was to some extent supervised by that organization. How could such supervision be extended to States which were not members of the ILO and became parties to those treaties on the ground that they were multilateral treaties belonging to the special category in question?

32. It was therefore obvious that the adoption of the proposed amendment would tend to create problems rather than solve them. Consequently, his delegation could not support the proposal for a new article 5 *bis*.

33. Mr. KEARNEY (United States of America) said the new text of article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) was identical in substance with the old text and solved none of the difficulties which had been alluded to by many speakers. As the proposed article purported to create new rights and obligations, the Conference should know what those rights were and who was to exercise them. The text said " Every State has the right... ". Whenever it had been asked what States were included in that category, the reply had been that those were technical questions; but that did not solve the practical problems. Three Secretaries-General of the United Nations had stated that they would be unable to apply an " all-States " formula. An examination of the list of States parties to treaties published in the United Nations *Treaty Series* would show that it included many political entities which were unlikely to be considered States in the international sense. His delegation considered that the expression " every State " was too vague to be adopted as a binding legal norm for the future.

34. It was not surprising that the Secretary-General had refused to make the political decision as to what political entities were to be regarded as States. What was surprising, however, was that those very States which, in all other contexts, wished to restrict the Secretary-General's freedom of action wished in that instance to force him to make political decisions. Article 5 *bis* seemed nothing more than an effort to use the convention to solve certain political and security problems in Europe.

35. From the technical point of view it was not clear what class of treaties was referred to. What was a treaty " of interest to the international community... as a whole "? The United Nations Charter was of interest to the international community as a whole and created norms of international law; yet Article 4 limited the admission of possible members. Were the constituent treaties of the Organization of American States and the Organization of African Unity to be covered by the new version of article 5 *bis*? They fitted the definitions and descriptions which had been submitted. There was a reference in those definitions to treaties which were of general interest to the international community or of interest to the international community as a whole, and in the new version there was also a reference to treaties which codified or progressively developed norms of general international law. The phrase " general international law " was of no help, because it was hard to see what difference there was between general international law and plain international law. It was not a sufficient answer to those objections to say that such problems were mere technicalities. The Conference should not adopt a rule which would not work. The International Law Commission had tried to solve the same problems and failed. To pretend that they did not exist was not an acceptable solution.

36. In short, no one knew to whom or in what cases article 5 *bis* was to apply. But it might also be asked whether it was desirable to lay down a rule of that character in all cases. Treaties for the unification of private international law were certainly of general interest to States and progressively developed norms of international law; but it would be noted that they were not treaties open to all States. Article 31 of the 1954

Hague Convention relating to Civil Procedure [5] contained a typical formula. Participation was open to States which had participated in the seventh session of the Conference which had drawn up the Convention; other States might accede, provided that none of the parties objected. A State which undertook to give legal effect in its territory to foreign legal documents or judgements must have the right to refuse to recognize such documents or judgements if they were likely to impair the rights and interests of its nationals. Was it advisable to determine once and for all that all treaties of interest to the international community as a whole must be open to participation by every State? The United Nations Charter indicated that the answer must be no. Article 4(2) of the Charter was the mechanism for deciding who should become parties. It was a mechanism properly adjusted to the nature and needs of the Organization in question. Future multilateral treaties, whether constituent instruments of international organizations or not, must be drafted in the light of the needs of the treaty, not on the basis of an abstract formula.

37. It had been urged that those obstacles should be ignored in order to follow a principle of universality. Was the adoption of article 5 *bis* the only way of inviting all States to become parties to a convention or participants in a conference of plenipotentiaries? Despite the formula in resolution 2166 (XXI), no one had suggested the name of a State at the twenty-first or twenty-second sessions of the General Assembly; yet the General Assembly was the primary political organ in the world. Why should the Conference be asked to take decisions which had not been submitted to that body? Those who raised the cry of discrimination would have been heard with better grace if they had attempted to employ the remedies the General Assembly provided.

38. In reality, those who were seeking to have article 5 *bis* adopted had a political aim in view. For that reason, and without any prejudice to the notion of universality, the United States delegation would vote against the proposed article 5 *bis*.

39. The question arising out of article 5 *bis* was not new. Governments had had a full year to decide what position they wished to take. The time had therefore come for the Committee to vote. That was the only logical way of determining what the sentiment of the Conference really was, and it was, after all, the really democratic procedure.

40. Mr. JAGOTA (India) said that, since the Committee had approved article 5, paragraph 1, which provided that " every State " possessed capacity to conclude treaties, it would be illogical and paradoxical to deny to " every State " the capacity to participate in general multilateral treaties. That would be an act of discrimination contrary to the principle of the sovereign equality of States. On the other hand, if article 5 *bis* was adopted, it would promote universality and eliminate discrimination. It would enhance the legislative value of general multilateral treaties and reflect the interests of the international community as a whole.

41. It was unnecessary to define the terms " State ", " participation " or " general multilateral treaty ". The term " State " had already been used in article 5 and other provisions of the convention without being defined. Moreover, if an entity or régime not generally regarded as a State tried to take advantage of the principle of universality in order to participate in an international conference or to transmit an instrument of accession to the depositary of a treaty, there was no doubt that the conference or depositary would be able to take the appropriate decision. The possibility of such an abuse should not deter the Conference from embodying the principle of universality in the convention. The term " participation " could signify participation in the conclusion of a treaty as well as participation in the benefits and burdens of a treaty. The expression " general multilateral treaty " was explained by the new proposal (A/CONF.39/C.1/L.388 and Add.1): it was a 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 ". That wording should suffice to identify a general multilateral treaty.

42. On the question of recognition, the Indian delegation considered that participation by a State in a general multilateral treaty did not imply recognition of that State by the participating States, and that it was unnecessary for them to enter express reservations on the question of recognition. His delegation urged the Committee to adopt the proposed article 5 *bis*. In addition, it took the view that the convention on the law of treaties should itself be open to all States, so that the Conference would not only be prescribing universality for participation in general multilateral treaties but would also apply that principle to the basic convention on the subject.

43. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he thought that the new wording proposed for article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) took account of the arguments put forward in the discussion on the subject and was more precise than the first version (A/CONF.39/C.1/L.74 and Add.1 and 2).

44. The Soviet Union delegation considered that the principle of universality was clearly established in international law. It was derived from the United Nations Charter and reflected the present trend in international law. The international law of the past confined itself to regulating relations between what were called the civilized States, in other words the European States. Since then, the situation had changed considerably. Many countries had become independent and had participated in drawing up rules of international law. That law had thus become universal, and was based on the principle of the sovereign equality of all States, without distinction as to their social and political systems.

45. That political and legal development had followed the economic, scientific and technological development of contemporary society. Moreover, a number of inter-

[5] United Nations, *Treaty Series*, vol. 286, p. 283.

national organizations of a technical and political nature had been set up.

46. The principle of universality was derived from the principle of international co-operation, which was one of the basic principles of the United Nations Charter. The General Assembly of the United Nations had adopted a number of resolutions calling upon all States to collaborate in the implementation of various measures, particularly in the sphere of disarmament, or to help to bring about progress in that direction.

47. The Conferences of Heads of State of the Non-aligned Countries held at Cairo in 1964 and 1967 had adopted declarations inviting all States to collaborate in accelerating world economic development.

48. Some recently concluded treaties, such as the Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, also embodied the principle of universality.

49. He categorically rejected the argument of the United States representative that the Hague Conventions on private international law, which dealt with matters of interest to the international community as a whole, were not open to all States. In fact, the United Nations Commission on International Trade Law, at its first session in 1968, had pointed out that those Conventions were only in the interest of the developed countries and had requested all States to provide information on the changes to be made in them in order that they should be in the interests of all Staties and open to every State.

50. The principle of universality was based on the idea that no State or group of States was entitled to prevent another State from sharing in the solution to a problem which affected the joint interests of all States. The existence of that principle was undeniable. Since the task of the Conference was to codify the law of treaties, the principle should be established in the text of the draft convention.

51. The United Kingdom representative had claimed that the inclusion in the convention of a provision expressing the principle of universality would conflict with the freedom of parties to select their treaty partners. But that principle could not be regarded unilaterally, nor did it entitle one State to prevent others from being parties to a treaty. The right of every State to participate in a general multilateral treaty was absolute. States which wished to reserve the right not to have relations with certain other States could find ways of making their position known: for example, they could make a declaration to that effect, as the United States had done in the case of the 1926 International Sanitary Convention and the 1929 International Convention for the Safety of Life at Sea.

52. In order to meet the objections of some delegations, it should be possible to include in the convention a provision similar to that in article 9, paragraph 4, of the International Law Commission's 1962 draft, which stipulated that " when a State is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more States, an objecting State may, if it thinks fit, notify the State in question that the treaty shall not come into force between the two States ".[6]

53. The objection that the accession of all States to general multilateral treaties could raise difficulties concerning the question of the recognition of certain States was groundless, since various States which had not recognized each other had nevertheless been parties to a number of treaties, notably the Briand-Kellogg Pact of 1928, the Geneva Conventions of 1949 for the protection of war victims, the Geneva Agreements of 1954 on Indo-China and of 1962 on Laos, and the Moscow Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, and others. The United States, when signing the 1926 International Sanitary Convention, had made a declaration stating that its accession in no way signified that it recognized certain other States which were parties to the Convention.

54. Some representatives had argued that the inclusion of the principle of universality in the convention would raise serious practical difficulties for depositaries, in particular for the Secretary-General of the United Nations. But it would be perfectly possible to make provision for the designation of depositaries and for a clause specifying who would be the initial depositaries responsible for transmitting instruments of accession to the final depositary, who might be the Secretary-General of the United Nations.

55. The United States representative had asked what States would enjoy the right to become parties to multilateral treaties. It would be easy to adopt a resolution mentioning the States that would have that right for the purposes of article 5 *bis*.

56. He was not convinced by the argument that it was not possible to include a provision on general multilateral treaties in the convention because there was no precise definition of the term. Article 38, paragraph 1 (*a*) of the Statute of the International Court of Justice referred to general international conventions. Furthermore, in an advisory opinion of 28 May 1951 on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had made it clear that that Convention was of a general character. It should be noted, too, that a number of important terms in the United Nations Charter, such as " armed attack ", " force " and so on had not been defined. If the authors of the Charter had tried to give definitions of all the terms it contained, there would not yet have been any Charter.

57. But the absence of generally recognized definitions of principles or concepts of international law was not evidence that those principles and concepts did not exist. As the representative of Iraq had rightly pointed out, " the application of a legal rule did not depend on the definition of the terms it contained ".[7]

58. The principles of international law existed independently of their generally recognized definitions. The

[6] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 168.

[7] See 76th meeting, para. 76.

principle of universality was one of them. It was a principle that nobody denied. If it was desired to define it, it would be quite possible to do so. That such a thing was possible was demonstrated by the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. That Committee had already formulated such principles as the sovereign equality of States, *pacta sunt servanda,* and the peaceful settlement of international disputes. There was no reason why it should not be possible to define the term " general multilateral treaty ".

59. It had also been said that participation by all States in general multilateral treaties would upset political relations among States and give rise to serious difficulties. That argument was unsound, since that practice had been followed in the Moscow Treaty of 1963 and in many other treaties and had not led to political complications. The United States representative had stated that if a wording were adopted providing that all States might be parties to general multilateral treaties, certain States might advance their participation in such treaties as an argument for demanding admission to international organizations. That assertion was illogical, since article 5 *bis* covered only participation in general multilateral treaties, not in international organizations.

60. The representative of the Federal Republic of Germany had maintained that an article 5 *bis* would not be needed in the convention since, in practice, some treaties provided for participation by all States. That argument was unconvincing, since the Conference's task was to draw up a convention embodying all the elements of State practice.

61. Those who were against including a provision on the principle of universality were upholders not of law, but of illegality. The efforts by certain States to prevent the adoption of that principle were calculated to establish a discriminatory practice in the convention.

62. The Conference's duty was to lay down norms of international law in order to contribute to the development of co-operation among all States in the interests of the international community.

63. The USSR delegation therefore supported the new draft article 5 *bis* (A/CONF.39/C.1/L.388 and Add.1) and was ready to collaborate with other delegations in finding a solution to the problem.

64. Mr. KHASHBAT (Mongolia) said that all States, as members of the international community, had the right to become parties to general multilateral treaties. That right had been recognized in international practice, particularly in connexion with disarmament and outer space. Some States no doubt applied a discriminatory policy with regard to other States for political or social reasons, but that did not alter the fact that any attempt to restrict the principle of universality was contrary to the United Nations Charter and that the convention on the law of treaties would not be complete if the principle of universality was not clearly stated in it.

65. The earlier draft of article 5 *bis* had been amended so that the new version (A/CONF.39/C.1/L.388 and Add.1) should be acceptable to all delegations.

The meeting rose at 12.50 p.m.

NINETY-FIRST MEETING

Wednesday, 16 April 1969, at 3.30 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) *(continued)* [1]

1. Mr. FATTAL (Lebanon) said that the time had come to speak plainly about the real problem represented by the proposed article 5 *bis.* It was the problem of the political divisions and opposing régimes in China, Germany, Viet-Nam and Korea. It was a problem that both the Eastern and the Western Powers had failed to solve by political and diplomatic means over a period of twenty years, and that the Eastern States were now attempting to solve by presenting it to the Conference in the respectable guise of a problem of the progressive development of international law.

2. The universality of general multilateral treaties was already ensured in fact by United Nations practice, since nearly all States were Members either of the United Nations itself, or of one or more of its specialized agencies, or were parties to the Statute of the International Court of Justice. The four exceptions were the People's Republic of China, the German Democratic Republic, North Viet-Nam, and North Korea.

3. The whole purpose of article 5 *bis* was to embroil the Conference in the problem of the four divided countries. But however important that problem might be, there was no justification for attempting to transfer it from the sphere of politics to the sphere of law. It was essentially a problem for the United Nations. And in any case it was most unlikely that the present Conference would be more successful in dealing with it than the United Nations had so far been.

4. It had been claimed that the principle of the sovereign equality of States required that all States should be able to participate in the international legislative process. By nature, legislation was valid *erga omnes,* but of how many treaties was that true? It did not even apply to the United Nations Charter, with the exception of the principles set forth in Article 2. The principle of universality could not be severed from the principle of validity *erga omnes.* It would be convenient, but hardly logical, if a State were free to insist on being

[1] For the new text (A/CONF.39/C.1/L.388 and Add.1), see 89th meeting, footnote 3.