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THIRTEENTH PLENARY MEETING

Tuesday, 6 May 1969, at 3.10 p.m.

President: Mr. AGO (Italy)

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)*

New article proposed by Luxembourg (continued)

1. The PRESIDENT invited the Conference to continue its consideration of the new article proposed by Luxembourg (A/CONF.39/L.15).

2. Mr. MARESCA (Italy) said that the Luxembourg proposal raised three questions. The first was wheter the proposed article had a rightful place in the structure of a convention on the law of treaties. The convention was a body of rules of international law which considered the State as a subject of international law. Nevertheless, those rules did not ignore internal law. A number of articles referred to the Head of State or the Head of Government, thereby establishing a link with internal law, since it was for that law to define the status of such persons. Article 43 precluded the State from invoking a provision of its internal law for the purpose of avoiding the observance of the provisions of a treaty. Paragraph 2, which the Conference had rejected, of the International Law Commission's draft of article 5, had also referred to municipal law. The all-important article 23, by requiring a State to perform treaties in good faith, clearly imposed on a State the obligation to adapt its internal law for the purpose of implementing a treaty to which it was a party. The Luxembourg proposal therefore fell within the framework of the convention on the law of treaties.

3. Secondly, the Luxembourg proposal would not create any disturbance in the relationship between international law and municipal law, because it did not attempt to settle doctrinal disputes on the subject. If the doctrine were accepted that international law became an integral part of municipal law, the Luxembourg proposal would not affect the position at all; if, however, the doctrine of the primacy of municipal law were accepted, the Luxembourg proposal would be both apposite and valuable.

4. Thirdly, the proposed rule would be useful in practice. It would help Foreign Ministry officials in their task of impressing on various national authorities the need to observe existing rules of international law. From his own experience, he could state with confidence that an explicit article in the convention on the law of treaties on the lines of the new article proposed by Luxembourg would be very helpful. To give just one example, on the occasion of an incognito visit to Italy by a foreign Head of State whose retinue had attracted excessive attention from press photographers, leading to incidents, a press photographer had claimed damages from a security guard in the retinue of the visiting Head of State, and he (Mr. Maresca) had had the greatest difficulty in convincing the Italian judge that the security guard was entitled to full immunity from judicial process under the rules of customary international law. It would have been much easier if he had been able to invoke a treaty provision, such as that contained in the Luxembourg proposal, to uphold the application of the rules of international law on the internal plane.

5. Mr. KEARNEY (United States of America) said that he wished to take the opportunity offered by the discussion on the Luxembourg proposal to explain at the same time his delegation's position on article 23 *bis*. There was a hierarchy of differing legal rules in the internal legislation of most States. Generally, constitutional provisions were given primacy. Statutes, resolutions and administrative provisions, all of which might be authoritative, might have different weights. Treaty provisions, when viewed as internal law, necessarily had to be fitted into that hierarchy.

6. Each State was entitled to determine which legal formulation had greater internal authority in case of conflict among internal enactments and article 23 *bis*, as approved by the Committee of the Whole in no way abridged that right. Nor did it affect internal procedures for determining the primacy of internal law, whether by a decision based on the relationship in time between various legislative measures, or by a court decision on constitutional issues. It merely provided that no party to a treaty might justify internationally its failure to perform an international treaty obligation by invoking provisions of its internal law. His delegation believed that that rule, which was consonant with international practice in general and with United States international practices in particular, merited adoption by the Conference, and it would therefore vote for article 23 *bis*.

7. The Luxembourg proposal, on the other hand, did not appear to add anything to article 23 *bis* and might well disturb the balance between the provisions of articles 23 and 23 *bis*. His delegation could not therefore support it.

8. Mr. BINDSCHEDLER (Switzerland) said that the Luxembourg proposal codified a long standing rule of customary international law. It was not strictly necessary from the legal point of view, because its substance was already covered by the requirement, expressed in article 23, that the parties to a treaty must perform its provisions in good faith.

9. On the other hand, it would be useful because of its educational value, particularly for parliaments. It was quite common for a country to ratify a convention and for the convention to enter into force, but for the responsible authorities of the country to neglect to take the necessary measures to give effect to the convention in the internal legal order. That situation was generally not the fault of the government, which was well aware of its international obligations, but of the legislature.

10. An example of that situation was provided by the 1949 Geneva Convention relative to the Treatment of Prisoners of War,[1] by article 129 of which the States Parties undertook " to enact any legislation necessary

[1] United Nations, *Treaty Series*, vol. 75, p. 135.

to provide effective penal sanctions " to punish certain grave breaches of the Convention. The article was not self-executing and the States Parties needed to enact amending legislation in order to carry it out. Many years after the Convention's entry into force a number of States had still not enacted the necessary legislation and Switzerland itself had taken ten years to amend its penal code accordingly.

11. Another example was provided by the International Labour Conventions; those responsible for supervising the implementation of those Conventions had often noted that countries which had ratified the convention were not applying them in all respects because the necessary implementing legislation had not been enacted.

12. Consequently, although he could not regard the proposed new article as absolutely necessary from the legal point of view, he would support it.

13. Mr. CARMONA (Venezuela) said that either the rule contained in article 23 *bis* and in the Luxembourg proposal was useless or it constituted a violation of State sovereignty. If a State ratified a treaty, it was under an obligation to perform it and he failed to see what useful purpose would be served by the provisions of the proposed new article.

14. There were two systems for implementing a ratified treaty. In many English-speaking countries, special legislation was needed for the purpose, but in other countries, such as Venezuela, the ratification of a treaty had the effect of incorporating its provisions in the municipal law of the country, and those provisions thereby became effective on a par with national legislation, provided they did not violate the Venezuelan Constitution, which had primacy over all other legislation.

15. If the purpose of the Luxembourg proposal was to oblige a State to apply a treaty without parliamentary approval having first been obtained for its ratification, the proposal conflicted with the fundamental principle of State sovereignty.

16. Mr. ESCUDERO (Ecuador) said that in Ecuador, a treaty which had been ratified became part of internal law. No treaty could be ratified without prior adoption of the necessary legislation by Parliament.

17. The Luxembourg proposal was not consistent with the principle of national sovereignty and seemed to be based on a distrust of States and a fear that they would not perform their treaty obligations in good faith. It did not take the form of a mere recommendation and could not therefore be approached purely from the educational standpoint, as the Swiss representative had suggested. The terms in which it was couched were clearly imperative in character; they specified that the parties to a treaty " shall take any measures of internal law that may be necessary to ensure " that it was fully applied. Under Article 2 (7) of the Charter, the United Nations was not authorized " to intervene in matters which are essentially within the domestic jurisdiction " of a State. That basic principle of the Charter applied to the realm of treaties also, and a rule such as that proposed by Luxembourg could not therefore be incorporated in the convention on the law of treaties. The matter should remain governed by the provisions of article 23 on performance in good faith; the implementation of treaties was a matter of State sovereignty and should be left to the legal conscience of States.

18. Sir Francis VALLAT (United Kingdom) said that the Luxembourg proposal must be viewed in the context of the convention as a whole and of article 23 and the existing article 23 *bis* in particular. As had been pointed out in paragraph (1) of the International Law Commission's commentary to article 23, the *pacta sunt servanda* rule was " the fundamental principle of the law of treaties ". Nothing should be done to weaken the force of that basic principle and his delegation therefore felt bound to express some hesitations about the Luxembourg proposal.

19. It was of course desirable to stress the link between international law and internal law so far as the observance of treaties was concerned. But article 23 *bis* already focused attention on the heart of the problem, which was not so much the manner in which States ensured that their treaty obligations were fulfilled, but rather that States should not be permitted to invoke the provisions of their own internal law as a justification for failure to perform a treaty.

20. He also had some doubts as to the substance and implications of the Luxembourg proposal. The article would touch on one aspect of the method by which States gave effect to treaties. At least to some extent that was a question of internal law depending on State constitutions. But the legal position varied in different countries. In some countries, the constitution provided that a treaty, once it had been ratified, became part of the law of the land; in others, the constitution might require the enactment of a general approving law, giving legal effect to the treaty in internal law, before an instrument of ratification could be deposited; in yet others, there was a mixed régime where the nature of the treaty determined what measures of internal law had to be taken.

21. In the United Kingdom, a variety of methods was employed to ensure that treaties were fully applied; the choice of method depended in part on the nature of the treaty and its impact upon existing internal law. There were many treaties to which full effect could be given in the United Kingdom simply by administrative measures. Other treaties required for their effective implementation the amendment or modification of existing internal legislation and, in those cases, the policy was to ensure that the necessary amending legislation was enacted by Parliament before the ratification. There again, however, a variety of legislative techniques were possible and the choice among them depended partly on the nature of the treaty. Thus, where it was clearly intended that certain provisions of a treaty were to have direct internal effect as part of the internal law of each of the parties to a treaty, it was possible to ensure by act of the United Kingdom Parliament that those provisions did have that effect. Other delegations would no doubt be confronted with different problems, depending on the provisions of the constitutions of their countries or the practices which their governments had

adopted to ensure that full effect was given to treaty obligations under their internal law.

22. His delegation fully understood and respected the motives underlying the Luxembourg proposal, but would not be able to support it for the reasons of presentation and substance which he had mentioned.

23. Mr. KOULICHEV (Bulgaria) said that his delegation was not convinced that the inclusion of the new article proposed by Luxembourg was really necessary in order to guarantee the observance of the *pacta sunt servanda* principle. The essence of that principle was that States must perform in good faith their obligations under treaties which were in force and had been lawfully concluded. International law, however, generally left to the parties complete freedom, within the framework of the provisions of the treaty, regarding the choice of the means to be used to carry out their treaty obligations. It was true that treaties such as the International Labour Conventions expressly laid on States parties an obligation to bring their internal law into line with the provisions of the conventions, but in the majority of cases international treaties did not contain any provisions on the steps to be taken in the internal legal order for the purpose of carrying out treaty obligations.

24. The Luxembourg proposal would not be very useful for the purposes of strengthening the *pacta sunt servanda* principle, since that principle, by definition, already covered the adoption of the necessary internal measures to which the proposal referred. On the other hand, it could become a source of unnecessary disputes. The smallest discrepancy between the internal law of a State and the provisions of a treaty could give rise to controversy, even in the absence of any concrete subject of dispute.

25. For those reasons, his delegation would oppose the Luxembourg proposal as being unnecessary.

26. Mr. NASCIMENTO E SILVA (Brazil) said that, in his delegation's opinion, article 23 as adopted at the previous meeting adequately covered all the problems that might arise. The Brazilian Constitution, like those of most Latin American countries, required that all treaties should be approved by Parliament and that only after such approval could the Executive ratify the treaty. Thus, the new article proposed by Luxembourg could apply only after the treaty had been ratified, and the problem of sovereignty would not arise.

27. The Luxembourg delegation had doubtless had excellent reasons for introducing its proposal, particularly considering the variety of constitutional systems represented at the Conference, but the proposal now seemed superfluous.

28. Mr. WERSHOF (Canada) said that, although his delegation appreciated the intentions of the Luxembourg delegation, it could not support its proposal, for the reasons given by earlier speakers, particularly by the United Kingdom representative. It was well known that a number of treaties, some of them multilateral, contained specific provisions requiring the contracting parties to enact internal legislation. Canada was a party to some such treaties, but considered it unnecessary to include a general rule to that effect in the convention.

29. Mr. HOSTERT (Luxembourg) said he was glad that so many representatives considered that the substance of the Luxembourg amendment was already embodied in article 23; indeed, his delegation had submitted its proposal largely because it had not been absolutely sure that that was the case. Since however a number of representatives believed that the addition of the new article would cause confusion, his delegation would withdraw its proposal, on the understanding that the substance of it was already covered in article 23.

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(resumed from the previous meeting)*

30. The PRESIDENT invited the Conference to resume its consideration of the articles approved by the Committee of the Whole.

Article 23 bis [2]

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 43.

31. Mr. SAMAD (Pakistan) said that, at the first session, his delegation had introduced an amendment to article 23 (A/CONF.39/C.1/L.181), the purpose of which had been to add to the principle *pacta sunt servanda* the additional principle that no party to a treaty might invoke the provisions of its constitution or its laws as an excuse for its failure to perform the international obligation it had undertaken. A number of delegations had agreed that that was a generally recognized principle in international law, and the Committee of the Whole at its 29th meeting had approved the Pakistan amendment by 55 votes to none and referred it to the Drafting Committee, together with the International Law Commission's text of article 23. The Drafting Committee had recommended that the Committee of the Whole adopt the International Law Commission's text of article 23 without any addition, but that the Pakistan amendment should be embodied in a new article immediately following article 23. The Committee of the Whole had approved articles 23 and 23 *bis* without a formal vote at its 72nd meeting, but no title had then been given to article 23 *bis;* his delegation was glad that the Drafting Committee had proposed a title which corresponded closely to the one that it had intended to propose itself. His delegation therefore commended article 23 *bis* to the Conference.

32. Mr. CARMONA (Venezuela) said that the International Law Commission had at different times taken different views on the important question of the relationship between international and municipal law.

[2] The principle contained in an amendment by Pakistan (A/CONF.39/C.1/L.181) to article 23 was approved at the 29th meeting of the Committee of the Whole. At the 72nd meeting the Drafting Committee recommended that the admendment should be embodied in a separate article numbered 23 *bis*.

Sir Hersch Lauterpacht's view had been that municipal law took precedence over international law. A reaction had subsequently taken place, when Sir Gerald Fitzmaurice had advanced the opposite thesis, that international law prevailed over municipal law. A third position, which might be regarded as a compromise, had later emerged in the Commission, which had agreed upon the formula set out in the present article 43; under that article, international law prevailed over internal law, unless the violation of internal law invoked as a ground for invalidating consent was manifest.

33. During the discussion of article 43 at the first session, that formula had been supplemented by two amendments. One, by Peru and the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.288 and Add.1) stated that violation of a provision of internal law must be of fundamental importance and manifest. The other, submitted by the United Kingdom delegation (A/CONF.39/C.1/L.274), went even further along the same lines. An amendment by Japan and Pakistan (A/CONF.39/C.1/L.184 and Add.1), which would have restored the original thesis that international law prevailed over internal law even when a violation of the internal law was manifest, had been rejected by 56 votes to 25, with 7 abstentions. The other two amendments to which he had referred had been approved and the compromise thus reached had seemed to provide a generally satisfactory solution to the problem of the relationship between the two branches of law.

34. The delegation of Pakistan had, however, submitted its amendment (A/CONF.39/C.1/L.181) to article 23 before article 43 had been discussed. Throughout its lengthy debate on article 23 the Committee of the Whole had naturally been preoccupied by the extremely important question of the principle of *pacta sunt servanda,* so that it would not be unfair to claim that insufficient attention had been devoted to the Pakistan amendment. Moreover, although the principle contained in that amendment had been approved by 55 votes to none, there had been 30 abstentions, and when the new article 23 *bis* had been approved, its wording had been left in abeyance until a decision had been taken on article 43. The Drafting Committee had brought article 23 *bis* into line with the wording of article 43.

35. The Conference now had before it two articles which repeated each other. In the opinion of the Venezuelan delegation, article 23 *bis* was at best redundant and in fact conflicted with article 43, since it introduced the idea of the precedence of municipal law over international law. The only solution seemed to be to delete article 23 *bis* and to retain article 43, which was a clear, well-considered provision, unanimously adopted by the International Law Commission.

36. Mr. DE LA GUARDIA (Argentina) said the Argentine delegation wished to make a brief statement similar to that it had made in the Committee of the Whole during the first session on the subject of article 23 *bis.* There was a type of treaty — and Argentina was a party to a number of such treaties in force — which contained the so-called " constitutional clause ", according to which certain matters governed exclusively by the constitution of the State remained outside the scope of the provisions of the treaty, under the terms of the treaty itself. In such cases, the relevant constitutional rules might be invoked with respect to the treaty. They could not of course be invoked by the State " as justification for its failure to perform the treaty ", to use the words of article 23 *bis;* it was the treaty itself which authorized a State to invoke the rule of internal law.

37. But since that possibility did not emerge clearly from the wording of article 23 *bis,* which could be wrongly interpreted, his delegation felt obliged to make that statement for inclusion in the summary record, and would abstain from voting on the article.

38. Mr. MATINE-DAFTARY (Iran) said that the Iranian Constitution provided that all treaties must be approved by Parliament. He could not vote for article 23 *bis,* because it conflicted with article 43.

39. The PRESIDENT said he was surprised that some representatives should consider that article 23 *bis* conflicted with article 43 because their constitutions required parliamentary approval of all treaties; they should remember that article 23 *bis* referred only to treaties already in force.

40. He invited the Conference to vote on article 23 *bis.*

Article 23 bis *was adopted by 73 votes to 2, with 24 abstentions.*

Article 24 [3]

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

41. Mr. ALVAREZ TABIO (Cuba) said that at the first session his delegation had submitted an amendment (A/CONF.39/C.1/L.146) to article 24, in order to bring the text more closely into line with the International Law Commission's commentary. Its amendment had been referred to the Drafting Committee, but had not been taken into account in the text before the Conference.

42. The Cuban delegation would not insist on its amendment, since it was satisfied by the explanations given by the Chairman of the Drafting Committee. However, since the situation had changed as a result of the introduction of the new article 77,[4] Cuba wished to make clear its position concerning the intertemporal law, because there was a clear contradiction between the two articles. In article 24 the convention had established a flexible and balanced rule to solve problems relating to the intertemporal law, whereas article 77 applied to the convention the principle of absolute non-retroactivity, by completely excluding from its temporal application the principles and rules of international law codified in the convention.

[3] For the discussion of article 24 in the Committee of the Whole, see 30th and 72nd meetings.

[4] This article was approved by the Committee of the Whole at its 104th meeting.

43. In paragraph (3) of its commentary to article 24, the International Law Commission had stated: " If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date ".

44. That opinion provided a completely unambiguous solution to the problem of the intertemporal law, but it was contradicted by article 77, which precluded the application of the provisions of the convention, whatever their nature or authority, to treaties concluded before the entry into force of the convention. Thus the satisfactory rule laid down in article 24, which was in conformity with the International Law Commission's interpretation, was robbed of all its force by article 77.

45. True, article 77 included a general reservation relating to " any rules set forth in the present Convention to which treaties would be subject, in accordance with international law, independently of the Convention ", but those words indicated the real aim of the article, which was to restrict the codifying effect that all were agreed the convention should have. The effect of article 77 would be that the rules of international law laid down in the convention would have full authority in the future — which went without saying — but could only be applied to prior agreements if such agreements were subject to those rules independently of the convention. Article 77 deprived the convention of its inherent authority to govern continuing treaties, which as such was governed by the rules of international law consolidated in the convention. Furthermore, it did not settle the question whether a prior treaty was governed by those rules, when in fact the aim should be to ratify their immediate effect, since there was no doubt about their authority once the convention had entered into force.

46. The peremptory rules of the convention had full authority with respect to all treaties in force, whatever their date of entry into force, not only on purely logical grounds based on the principle of the hierarchy of rules, but also for reasons of substance directly related to the notion of what was just at a given moment for the international community, particularly with respect to the rules in articles 48, 49, 50 and 61. Any treaty conflicting with those peremptory rules was both illegal and inadmissible; it was not permissible to question whether those peremptory norms were or were not part of international law before the entry into force of the convention, from which they derived indisputable authority.

47. Article 24 itself did not fully resolve the problem of the intertemporal law; it laid down that the provisions of a treaty did not bind a party in relation to any act or fact which had taken place or any situation which had ceased to exist before the date of the entry into force of the treaty, but it said nothing about the rule to be applied to a treaty relationship which began before the entry into force of the treaty, but continued to exist after that event. Apparently it was implied, although that was not stated, that the principle of non-retroactivity was not violated by applying the provisions of the treaty to a prior situation which was not terminated. That was certainly the assumption made by the International Law Commission, as indicated by the commentary to which he had already referred. That was how the Cuban delegation interpreted the legal effect of article 24 and it would vote for it accordingly.

48. Mr. NETTEL (Austria) asked for a separate vote on the phrase " or is otherwise established " in the opening proviso of article 24.

The phrase " or is otherwise established " was adopted by 78 votes to 5, with 12 abstentions.

Article 24 was adopted by 97 votes to none, with 1 abstention.

Article 25 [5]

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 25 was adopted by 97 votes to none.

49. Mr. BILOA TANG (Cameroon) said that his delegation approved of the content of article 25, but wished to state on behalf of its Government that Cameroon reserved the right, when necessary, to interpret for itself the term " territory ", which was rather loosely used in the article, in respect of so-called " overseas territories ".

Article 26 [6]

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

[5] For the discussion of article 25 in the Committee of the Whole, see 30th, 31st and 72nd meetings.

[6] For the discussion of article 26 in the Committee of the Whole, see 31st and 91st meetings.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

50. Mr. PINTO (Ceylon) said that the terms " earlier treaty " and " later treaty " had been discussed briefly at the 85th meeting of the Committee of the Whole, when the United Kingdom representative had drawn attention to the lack of clarity in the use of those terms, and had asked which of the dates associated with the emergence of a treaty should be used to determine which was the earlier and which the later instrument. The Ceylonese delegation had concluded that the crucial date for that purpose should be the date when the text of the new treaty had been finally and formally established. The Expert Consultant had confirmed that view at the 91st meeting of the Committee of the Whole when he had explained that the relevant date should be that of the adoption of the treaty and not that of its entry into force and that the underlying notion was that, when the second treaty was adopted, a new legislative intention was formed, which should be taken as intended to prevail over the intention expressed in the earlier treaty.

51. His delegation concurred with that explanation and thought that it might have been desirable to clarify the position in the text of article 26, perhaps by adding a sentence to the effect that the date of the adoption of the text was relevant in determining which was the later treaty. That notion might be taken into account by the Drafting Committee, and later by the Conference, in considering the new article 77. His delegation would not, however, make any formal proposal to that effect.

52. Mr. KEARNEY (United States of America) said that in the Committee of the Whole his delegation had supported an amendment by Japan (A/CONF.39/C.1/L.207) to delete the words, " or that it is not to be considered as incompatible with," in paragraph 2. That was because the United States considered that, when a treaty contained a clause providing that it should be deemed not to be incompatible with another treaty, the first duty of the interpreter was to try to reconcile any conflicting provisions of the two treaties, rather than to give one precedence over the other. The United States had feared that the present wording of paragraph 2 might encourage interpreters to ignore or pass over lightly their primary duty of reconciling conflicting provisions.

53. His delegation now understood, from a discussion of the point with the Expert Consultant, that the International Law Commission had intended the text as a second line of defence, to be invoked when an interpreter had already tried, and failed, to reconcile two treaties, and was accordingly obliged to give one priority over the other. He wished to make it clear that his delegation would vote for article 26 on the understanding that that was the interpretation to be given to paragraph 2.

54. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that some of the provisions of article 26 were not sufficiently clear. For example, despite considerable discussion in the Drafting Committee and the Committee of the Whole, the term " provisions . . . compatible with those of the later treaty " in paragraph 3 was still open to different interpretations. Thus, if a bilateral agreement were concluded between two States which subsequently became parties to a general multilateral treaty relating to the same subject-matter, and the terms of the bilateral treaty were more advantageous to both States than those of the multilateral treaty, the question arose whether the provisions of the earlier treaty were compatible with those of the later one. The Soviet delegation understood the passage in question to mean that, if the earlier treaty was not terminated by the conclusion of the later treaty, the provisions of the earlier treaty, the effects of which were no less favourable than those of the later treaty, should continue to apply.

55. Furthermore, under paragraph 4 (*b*), situations might theoretically arise in which a State might assume certain obligations under one treaty and undertake conflicting obligations in concluding a treaty on the same subject with another State. The Soviet delegation's interpretation of paragraph 4 (*b*) was that nothing in that paragraph should be regarded as giving a State the right to conclude a treaty which conflicted with its obligations under an earlier treaty concluded with a State which was not a party to the later treaty.

56. In view of those imprecisions and difficulties of interpretation, his delegation would abstain in the vote on article 26.

57. Mr. BINDSCHEDLER (Switzerland) said that at the 31st meeting of the Committee of the Whole, his delegation had made a statement concerning the non-applicability of Article 103 of the United Nations Charter to non-members of the United Nations. Switzerland had no wish to dispute the importance and value of Article 103 of the Charter, but believed it was necessary to repeat, for inclusion in the summary record, that as it was not bound by the Charter, its signature of the convention being prepared would have to be made subject to a reservation concerning Article 103.

58. Mr. FUJISAKI (Japan) said he wished to refer, like the representative of the United States, to the words " or that it is not to be considered as incompatible with " in paragraph 2 and to remind the Conference that Japan had submitted an amendment (A/CONF.39/C.1/L.207) in the Committee of the Whole proposing the deletion of those words. Although the Drafting Committee had not accepted that amendment, the Japanese delegation still considered that, when treaty A specified that it was not to be considered as incompatible with treaty B, the intention of the parties was to set down a common understanding on the way in which the two treaties were to be interpreted as being compatible with each other, and that therefore the possibility of one of the treaties prevailing over the other should not, *prima facie,* arise. That was the primary meaning of the expression " not to be

considered as incompatible with " when it was employed in a treaty; it did not mean that one treaty was subject to another, as was obviously the case when the other expression in the article — " is subject to " — was used.

59. The PRESIDENT invited the Conference to vote on article 26.

Article 26 was adopted by 90 votes to none, with 14 abstentions.

Statement by the Chairman of the Drafting Committee on articles 27-29

60. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 27, 28 and 29 constituted section 3 of Part III.

61. The English title of article 29 had given rise to some difficulty. The title in the International Law Commission's draft, " Interpretation of treaties in two or more languages ", was somewhat ambiguous, since it was not clear whether the words " in two or more languages " applied to the treaties or to their interpretation. The Drafting Committee had solved the problem by inserting the word " authenticated " after the word " treaties " in the English version. Corresponding changes had been made in the French, Russian and Spanish versions.

62. With respect to the text of the articles, the Drafting Committee had noted that the Russian and Spanish versions of paragraph 1 of article 27 did not correspond exactly with the English and French versions, which brought out the meaning of the paragraph more clearly. It had therefore amended the Russian and Spanish versions accordingly.

63. The Committee had found the opening phrase of paragraph 4 of article 29 ambiguous. The words " Except in the case mentioned in paragraph 1 " could refer to either of the two possibilities mentioned in paragraph 1. The Committee had therefore amended the opening phrase to read " Except where a particular text prevails in accordance with paragraph 1 " in order to make it quite clear that the reference was to the second part, beginning with the words " unless the treaty provides . . . ".

Article 27 [1]

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(*b*) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(*a*) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

64. Mr. FLEISCHHAUER (Federal Republic of Germany) said that his delegation was basically in agreement with article 27 and would vote for it in its present form. It felt, however, that the term " agreement " as used in paragraph 2 might be open to divergent interpretations. In the view of his delegation, the term was to be interpreted as meaning written agreements approved by all the parties to the treaty in connexion with its conclusion. The bulk of the preparatory work, which, as correctly stated in article 28, was a supplementary means of interpretation, would otherwise come under the principal rules of interpretation. That would not only upset the systematic order between articles 27 and 28 but would also cause considerable uncertainty and difficulty in practice. However, the point was not one of substance, particularly since paragraph (13) of the International Law Commission's commentary to articles 27 and 28 spoke of " documents " in relation with paragraph 2, thus making it clear that the Commission had had written agreements in mind when it had adopted that paragraph. It was on that understanding that his delegation had refrained from submitting an amendment in that sense at the present stage of the Conference.

63. On the other hand, his delegation was of the opinion that subsequent agreements between the parties regarding the interpretation of a treaty, as mentioned in paragraph 3, did not have to be in written form. It was confirmed in that opinion not only by constant State practice but also by the fact that paragraph 3 treated subsequent agreements and subsequent pratice on an equal footing.

66. His delegation also considered that the " relevant rules of international law applicable in the relations between the parties " which, under paragraph 3, had to be taken into account in the interpretation of treaties, were to be understood as referring not only to the general rules of international law but also to treaty obligations existing for the various parties. Not only should treaties be interpreted, wherever possible, so as to be in conformity with international law, but that method of interpretation should be followed, wherever treaties could be interpreted so as to be consistent with the treaty obligations of parties to it, in order to avoid conflicting treaty obligations. It was in that sense that his delegation understood the reference in paragraph 3 (*c*) to any relevant rules of international law applicable in the relations between the parties.

Article 27 was adopted by 97 votes to none.

[1] For the discussion of articles 27 and 28 in the Committee of the Whole, see 31st, 32nd, 33rd and 74th meetings.

Article 28 [8]

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

67. Mr. NAHLIK (Poland) said that articles 27 and 28 were a successful combination of three possible approaches to the question of interpretation, namely the textual, the intentional and the functional approach. They thus constituted a coherent and well-balanced part of the convention. However, a useful change could perhaps be made in article 28, for the following reasons.

68. Recourse to the so-called " historical " interpretation, as suggested in the article, could certainly be made in any case in which the meaning conveyed by the text, even with the help of the other means mentioned in article 27, was either " ambiguous or obscure " or could lead to something " absurd or unreasonable ". But whenever recourse was had to such interpretation, it could not be known in advance whether or not the result would be to confirm the meaning conveyed by the application of the means indicated in article 27. In most cases it probably would, but it could not be presumed that such would be the case. At any rate, the " confirmation " of the meaning conveyed in application of article 27 and the " determination " of the meaning when it was left ambiguous or obscure, should not be considered as two different possibilities. If the meaning of the text was perfectly clear, it stood in no need of further confirmation and the work of the interpreter, in looking for such confirmation, would be juridically superfluous. It would therefore be more logical to delete the reference to "confirmation " and to amend the article to read:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to determine the meaning of the provision or provisions of that treaty when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

69. He suggested that the point be referred to the Drafting Committee for further consideration.

70. Mr. YASSEEN, Chairman of the Drafting Committee, said that great care had been taken in drafting article 28 in the formulation approved by the Drafting Committee. The conditions for recourse to preparatory work had been laid down in the International Law Commission's text, provision having been made for confirmation, in specific cases, of the meaning resulting from the application of article 27. The suggestion put forward by the representative of Poland related to a point of substance and affected the balance achieved between the various positions taken on the question of interpretation. It was therefore for the Conference itself to take a decision on it.

71. The PRESIDENT said that it would be most unfortunate if the phrase " in order to confirm the meaning resulting from the application of article 27 " were deleted. Its retention could certainly do no harm. He hoped that the representative of Poland would not press his suggestion.

72. Mr. ROSENNE (Israel) said that although he felt some sympathy for the views expressed by the representative of Poland, he thought that the conclusions he had drawn were not correct and that the Polish position might be better met by an amalgamation of articles 27 and 28. However, that possibility had already been discussed in the International Law Commission, the Committee of the Whole and the Drafting Committee. The suggestion that the Drafting Committee should consider the Polish proposal was tantamount to asking for the whole question to be reopened, and he therefore associated his delegation with the President's suggestion.

73. Mr. REDONDO-GOMEZ (Costa Rica) said he agreed with the President and the representative of Israel. Article 28 should be left in its present form, which appeared to meet with general approval.

74. Mr. NAHLIK (Poland) said that he had merely suggested a possible change, but would not press the point.

Article 28 was adopted by 101 votes to none.

Article 29 [9]

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

75. Mr. HYERA (United Republic of Tanzania) said that, perhaps because of an oversight by the Drafting Committee, the last phrase in paragraph 2 read " or the parties so agree " instead of " or the parties in some other manner so agree ". The earlier phrase

[8] See footnote 7.

[9] For the discussion of article 29 in the Committee of the Whole, see 34th and 74th meetings.

" if the treaty so provides " implied that there was already an agreement, but the parties could have agreed in some manner other than in the treaty.

76. The PRESIDENT said that the point made by the representative of Tanzania would be considered by the Drafting Committee.[10]

Articles 29 was adopted by 101 votes to none.

77. The PRESIDENT said that the Conference had successfully disposed of the most controversial and difficult subject in the whole field of the law of treaties, the question of the interpretation of treaties. The section on interpretation had been condensed into a few formulas which had been adopted unanimously by the Conference. When the section had first come before the International Law Commission, many had felt that it might be unwise for the Commission to embark on a codification of so difficult a subject. He himself had taken a more optimistic view and was most grateful to the Conference for having proved him right. He wished to pay a particular tribute to the Expert Consultant whose patience and hard work had contributed so much to the gratifying result achieved.

The meeting rose at 5.20 p.m.

[10] No change was made by the Drafting Committee.

FOURTEENTH PLENARY MEETING

Wednesday, 7 May 1969, at 10.45 a.m.

President: Mr. AGO (Italy)

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)*

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE *(continued)*

Statement by the Chairman of the Drafting Committee on articles 30-37

1. Mr. YASSEEN, Chairman of the Drafting Committee, said that articles 30 to 34 constituted Part III, section 4, of the draft convention (Treaties and third States) and articles 35 to 37 Part IV (Amendment and modification of treaties). Part IV had contained an article 38, entitled " Modification of treaties by subsequent practice ", which had been deleted by the Committee of the Whole.[1] The Drafting Committee had made only a few changes in the titles and texts of articles 30-37.

2. In the text of article 31, the Drafting Committee, in the light of an observation in the Committee of the Whole, had deleted the word " third " before the word " State ". It had also put the verb " accept " in the present tense in the concluding part of the sentence.

[1] See 38th meeting of the Committee of the Whole, para. 60.

3. The Drafting Committee had slightly altered the text of article 34, as approved by the Committee of the Whole following the adoption of the amendments submitted by Syria (A/CONF.39/C.1/L.106) and Mexico (A/CONF.39/C.1/L.226). In that text, the words " recognized as such " qualified only " a customary rule of international law ", but the Drafting Committee had found, when considering the Mexican amendment, that the intention had been to mention in article 34 the sources of law specified in Article 38 of the Statute of the International Court of Justice, and to apply the word " recognized " not only to customary rules but also to the general principles of law. The words " recognized as such " had therefore been placed at the end of the sentence. The title of the International Law Commission's text no longer fitted the wording approved by the Committee of the Whole, which referred both to international custom and to general principles of law. The Drafting Committee had therefore amended the title to read: " Rules set forth in a treaty becoming binding on third States as rules of general international law. "

4. The PRESIDENT invited the Conference to consider articles 30 to 37, as approved by the Committee of the Whole and reviewed by the Drafting Committee.

Article 30 [2]

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 30 was adopted by 97 votes to none.

Article 31 [2]

Treaties providing for obligations for third States

An obligation arises for a State from a provision of a treaty to which it is not a party if the parties intend the provision to be the means of establishing the obligation and the State expressly accepts that obligation.

5. Mr. PHAM-HUY-TY (Republic of Viet-Nam), introducing his delegation's amendment (A/CONF.39/L.25), said that the establishment of an obligation for a State which was not a party to a treaty was an important matter. Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation. The words " expressly accepts " could be understood in the widest sense as embracing acceptance by solemn declaration or any other form of oral acceptance which did not provide the necessary safeguards. It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only. His delegation regarded

[2] For the discussion of articles 30 and 31 in the Committee of the Whole, see 35th and 74th meetings.

An amendment to article 31 was submitted to the plenary Conference by the Republic of Viet-Nam (A/CONF.39/L.25).