United Nations Conference on the Law of Treaties

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Seventh plenary meeting

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

Methods of Work and procedures of the second session of the Conference

11. The PRESIDENT said that a proposed schedule for the work of the Committee of the Whole had been submitted by the delegations of Ghana and India (A/CONF.39/L.2). If there were no objection, he would take it that the Conference agreed to adopt that proposal.

It was so agreed.

12. The PRESIDENT drew attention to the memorandum by the Secretary-General on methods of work and procedures of the second session (A/CONF.39/12) and in particular to paragraphs 13 and 14, which gave details of the working hours and working days of the Conference. If there were no objection, he would assume that the Conference approved of those arrangements.

It was so agreed.

13. The PRESIDENT said that it was also suggested in the memorandum that the drafting of the preamble should be entrusted to the Drafting Committee, which would submit the text directly to the plenary. If there were no objection, he would take it that the Conference approved of that procedure.

It was so agreed.

14. The PRESIDENT drew attention to the suggestion in the memorandum that, towards the close of the Conference, the Secretariat should submit a text of the Final Act to the Drafting Committee, which would then report on it to the plenary. If there were no objection, he would take it that the Conference approved of that procedure.

It was so agreed.

The meeting rose at 3.40 p.m.

SEVENTH PLENARY MEETING

Monday, 28 April 1969, at. 10.45 a.m.

President: Mr. AGO (Italy)

Tribute to the memory of General René Barrientos Ortuño, President of the Republic of Bolivia

On the proposal of the President, representatives observed a minute's silence in tribute to the memory of General René Barrientos Ortuño, President of the Republic of Bolivia, who had met his death in an air crash.

1. Mr. ROMERO LOZA (Bolivia) thanked the Conference for its tribute to the memory of General Barrientos Ortuño. The Bolivian Government would be informed of that gesture of sympathy without delay.

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

REPORTS OF THE COMMITTEE OF THE WHOLE

2. The PRESIDENT suggested that the Conference express by acclamation its gratitude to Mr. Elias, Chairman of the Committee of the Whole, for the firmness, flexibility and courtesy he had shown in carrying out the difficult task entrusted to him.

3. He invited the Conference to take up the various articles of the convention, with a view to producing a convention on the law of treaties which satisfied all as fully as possible. It was not a question of one group triumphing over another, but of ensuring the success of the Conference.

4. Mr. KHLESTOV (Union of Soviet Socialist Republics) referred to the way in which the work of the Committee of the Whole had ended and to the fate of several proposals submitted by certain delegations. Unfortunately, the basic views of some groups had not been taken into consideration. The Conference still had some time left in which to discuss matters and make its work as effective as possible. The Soviet Union delegation was anxious to do all it could to ensure the success of the Conference. It therefore very much hoped that the President would act boldly so as to enable the Conference, with the participation of certain groups, to use what little opportunity remained to bring the task of codification of the law of treaties to fruition. The Conference must above all achieve positive results. He therefore requested the President to attempt, with the participation of the representatives of certain groups, to secure the adoption of certain basic views which had been rejected. The Soviet Union delegation would be understanding and would strive to assist the President in his task.

5. The PRESIDENT assured the representative of the Soviet Union that he would do everything possible to guarantee the success of the Conference.

ARTICLES APPROVED BY THE COMMITTEE OF THE WHOLE

6. The PRESIDENT invited the Chairman of the Drafting Committee to introduce the texts of articles 1 to 6 approved by the Committee of the Whole, the drafting of which had been reviewed by the Drafting Committee.

Statement by the Chairman of the Drafting Committee on articles 1-6

7. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Committee of the Whole had approved the texts of a whole series of articles, but no titles, except for article 1. The Drafting Committee therefore had two tasks: with regard to the texts adopted by the Committee of the Whole, it had to co-ordinate and review their wording under rule 48 of the rules of procedure of the Conference; with regard to the titles, it had to draft them in the light of the amendments concern-

ing titles which had been referred to it by the Committee of the Whole.

8. The Drafting Committee had already considered the texts of articles 1 to 6 as approved by the Committee of the Whole, as well as the titles of those articles and the titles of Parts I and II and of Section 1 of Part II.

9. With respect to the titles, the Drafting Committee had made the following changes : in the English version of the title of article 1 it had deleted the word " the " before " scope ". In the light of an amendment submitted by Gabon (A/CONF.39/C.1/L.42), it had simplified the title of article 4. It had also shortened the title of article 6 by deleting the words " to represent the State in the conclusion of treaties " after the words " full powers "; it had found those words superfluous, since the section containing article 6 was entitled " Conclusion of treaties ".

10. With regard to the wording of the articles themselves, the Drafting Committee had made some changes. For example, in article 2, paragraph 1 (*c*), it had replaced the words " designating a person " by the words " designating a person or persons ", since in practice a State designated several persons to represent it; and in article 6, paragraph 1 (*b*), it had replaced the words " to dispense with " by " not to require representatives to produce ". The purpose of that change was to make it clear that no one could avail himself of sub-paragraph (*b*) in order to act on behalf of a State in respect of the conclusion of a treaty unless he had the status of a representative of that State.

11. The Ghanaian representative had submitted a proposal (A/CONF.39/L.7) to redraft article 6, paragraph 1 (*b*). The amendment clarified the text and the Drafting Committee had therefore accepted it.

12. The PRESIDENT invited the Conference to consider the texts of the articles approved by the Committee of the Whole.

Article 1 [1]

Scope of the present Convention

The present Convention applies to treaties between States.

13. Sir Francis VALLAT (United Kingdom) said that article 1 provided that the convention applied only to treaties between States. His delegation accepted that limitation, but wished to stress that it did not imply that treaty law did not govern treaties concluded between States and other subjects of international law or between such other subjects of international law, whatever their status or character. Article 3 of the draft convention emphasized that point.

14. Among the classes of treaties which did not fall within the scope of the present convention were agreements concluded between States and international organizations or between two or more international organizations. Agreements of that nature were however, increasing both in number and in importance. For that reason, the United Kingdom delegation welcomed whole-heartedly the text of the draft resolution presented by the Committee of the Whole which recommended the General Assembly to refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations. If that resolution was adopted [2], it would be a matter for the International Law Commission and the General Assembly to determine what priority that topic should have in the Commission's future work programme. It was to be hoped that it would be accorded a reasonable degree of priority so that the work undertaken by the Conference could be completed. Also, in studying that topic, the Commission should work in close co-operation with the international organizations themselves, since their experience and knowledge of particular problems provided an indispensable basis for its work.

Article 1 was adopted by 98 votes to none.

Article 2 [3]

Use of terms

1. For the purposes of the present Convention:

(*a*) " treaty " means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(*b*) " ratification ", " acceptance ", " approval " and " accession " mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(*c*) " full powers " means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

(*d*) " reservation " means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(*e*) " negotiating State " means a State which took part in the drawing up and adoption of the text of the treaty;

(*f*) " contracting State " means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(*g*) " party " means a State which has consented to be bound by the treaty and for which the treaty is in force;

(*h*) " third State " means a State not a party to the treaty;

(*i*) " international organization " means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

[1] For the discussion of article 1 in the Committee of the Whole, see 2nd, 3rd and 11th meetings.

[2] The resolution was adopted at the 32nd plenary meeting.

[3] For the discussion of article 2 in the Committee of the Whole, see 4th, 5th, 6th, 87th and 105th meetings.

An amendment was submitted to the plenary Conference by Belgium (A/CONF.39/L.8).

15. Mr. ESCUDERO (Ecuador) said he noted that the Drafting Committee proposed the title " Use of terms " for the article. That might give the impression that the paragraphs of the article contained definitions. The Committee should review the matter and modify the title to show clearly that it was not a question of definitions, particularly in paragraph 1 (*a*), to which the Ecuadorian delegation had proposed a substantive amendment.

16. Mr. YASSEN, Chairman of the Drafting Committee, explained that the purpose was not to give definitions valid in all cases, as was clear from the introductory phrase of paragraph 1 reading " for the purposes of the present Convention ". The article merely gave the meaning of certain terms used in the convention in order to help those who would later have to interpret it.

17. The PRESIDENT said that a similar article was to be found in all conventions codifying international law and its purpose was not to give definitions. The wording used was designed to prevent the danger to which the Ecuadorian representative had just drawn attention. It would therefore be better not to depart from the text used in other conventions. If those who later interpreted the text noted differences between the convention on the law of treaties and other conventions, they would ask themselves what had been the reasons for those differences, and that might lead to difficulties of interpretation. For example, it might be deduced that the intention in the Convention on Diplomatic Relations had been to give definitions; but that was certainly not so. The Drafting Committee might therefore look at the matter again.

18. Mr. DENIS (Belgium) introduced his delegation's amendment to article 2, paragraph 2 (A/CONF.39/L.8). It was purely a drafting amendment. The expression " are without prejudice to the use " did not seem appropriate : it would be better to employ a more neutral expression such as " do not affect the use ".

19. The PRESIDENT said he wondered whether the expression " *qui peut leur être donné* " in the same paragraph should not be in the plural. It appeared to mean the use and the meanings which might be given to the terms in question in the municipal law of a State.

20. Mr. DENIS (Belgium) said that everything depended on what idea it was intended to express. It was possible that only the meanings which might be given to the terms in the municipal law of any State had been intended.

21. The PRESIDENT said that in any event the Conference could not vote forthwith on article 2, which might be altered subsequently in the light of decisions taken by the Conference on various articles, in particular the final clauses. He suggested that the Drafting Committee should review the text of the article in the light of the comments.

It was so agreed.[4]

[4] For further discussion and adoption of article 2, see 28th plenary meeting.

Article 3 [5]

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(*a*) The legal force of such agreements;

(*b*) The application to them of any of the rules set forth in the present Convention to which they would be subject, in accordance with international law, independently of the Convention;

(*c*) The application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 3 was adopted by 102 votes to none.

Article 4 [6]

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

22. Sir Francis VALLAT (United Kingdom) said that his delegation approved the text of article 4 as adopted by the Committee of the Whole and presented by the Drafting Committee. The article dealt with the important topic of treaties which were constituent instruments of an international organization or were adopted within an international organization. It was surely right that, in seeking to crystallize the law concerning treaties between States, the Conference should preserve the particular rules which governed the adoption or framing of treaties within international organizations. The United Kingdom delegation would accordingly wish to emphasize the significance it attached to the phrase " without prejudice to any relevant rules of the organization ". At the first session of the Conference his delegation had proposed (A/CONF.39/C.1/L.39) the addition of the words " and established practices " after the word " rules " in order to make it clear that the term " rules " was not to be understood in too restrictive a sense. His delegation had not pressed that amendment to the vote because, as the Chairman of the Drafting Committee had pointed out at the 28th meeting of the Committee of the Whole, the Drafting Committee had taken the view that the term " rules " applied both to written rules and to unwritten customary rules. It was in the light of that understanding of the concluding phrase of article 4 that the United Kingdom delegation would vote in favour of the article.

[5] For the discussion of article 3 in the Committee of the Whole, see 6th, 7th and 28th meetings.

[6] For the discussion of article 4 in the Committee of the Whole, see 8th, 9th, 10th and 28th meetings.

An amendment had been submitted to the plenary Conference by Romania (A/CONF.39/L.9).

23. Mr. GROEPPER (Federal Republic of Germany) reminded the Conference that during the debate on article 4 at the 9th meeting of the Committee of the Whole his delegation had expressed certain doubts, first, as to the actual usefulness of the article and, secondly, as to the reservation it contained, which had appeared to it unduly broad. Article 4 dealt with two very different classes of treaty which did not involve the application of the same rules of the convention. The text of the article as adopted by the Committee of the Whole at the first session of the Conference made it possible for the Federal German delegation now to support the provision.

24. Speaking from a more general point of view, he observed that the draft adopted by the International Law Commission and later by the Committee of the Whole contained no provision stipulating the extent to which the convention had the character of *jus dispositivum,* in other words how far the parties to a particular treaty might derogate from it by mutual agreement. During the debate in the Committee of the Whole several speakers had asserted that the rules of international law always had the character of *jus dispositivum* unless they were peremptory norms of *jus cogens.* The convention on the law of treaties would therefore have the character of *jus dispositivum* where it did not codify *jus cogens.* He referred the Conference in particular to the statements made on article 4 by the representatives of Sweden and Switzerland at the 8th and 9th meetings of the Committee of the Whole respectively, and to the statements by the Expert Consultant and the United Kingdom representative during the discussion of article 63 at the 74th meeting of the Committee of the Whole.

25. The text of the draft convention might, however, give rise to doubts on that head. In many places it was stated that certain articles would apply to a particular treaty only if the treaty did not otherwise provide or if the parties did not otherwise agree. Moreover, there was article 4, which made a general exception for the constituent instruments of international organizations and treaties adopted within an international organization. It might be inferred that the States parties to the convention would not be free to derogate by mutual consent from any provisions of the convention which did not expressly contain a derogation clause. Actually, that kind of restriction existed only in respect of the rules in the convention codifying *jus cogens*; but the International Law Commission itself had stated in its commentary to article 50 that the majority of the general rules of international law did not have the character of *jus cogens.* It could not be asserted, therefore, that in the absence of a derogation clause, and by the very fact of its absence, a rule in the convention was a rule of *jus cogens.* On the contrary, it was recognized that any derogation was possible, even if there was no clause to that effect, unless it was established that the rule in question codified *jus cogens.*

26. In that case, it might be asked whether special restrictions or the general restriction in article 4 were in fact necessary. His delegation's answer was that they were necessary, since those clauses, though in theory not essential, would nevertheless help to clarify the convention and make it easier to apply. The Federal German delegation would therefore vote in favour of article 4 and the other derogation clauses.

27. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the wording of article 4 did not seem to be quite clear, for the proviso " without prejudice to any relevant rules of the organization " at the end of the article logically applied only to " any treaty adopted within an international organization ", not to " the constituent instrument of an international organization ", since, at the time when such a constituent instrument was drawn up, there were as yet no rules of the organization. The Drafting Committee might review the text and consider the possibility of saying, for instance, " without prejudice to any relevant rule of an international organization ".

28. In any case, his delegation assumed that, independently of the relevant rules of the international organization concerned, the provisions of Part V of the convention on the law of treaties which were of a *jus cogens* character would still be applicable.

29. The PRESIDENT said he was not sure whether the USSR representative's remarks related only to the drafting. It was true that at the time when a constituent instrument was drawn up the relevant rules of the organization concerned did not yet exist, but it was also possible that certain rules might be laid down at the actual time of the drawing up of a constituent instrument. The convention on the law of treaties related not only to the creation of treaties, but also to their life in the future. The constituent instrument of an international organization might conceivably contain rules of interpretation which were at variance with those laid down in the convention, and the last phrase of article 4 (" without prejudice to any relevant rules of the organization ") would then apply to the constituent instrument and not merely to any treaty subsequently adopted within the organization. The proposed text was therefore flexible enough to apply to all possible cases, and it might be undesirable to make it more precise.

30. Mr. KHLESTOV (Union of Soviet Socialist Republics) said he would not press his suggestions, in view of the need to retain a certain flexibility. He wished to emphasize, however, that the relevant provisions of the convention that were of a peremptory character would be applicable in all cases.

31. Mr. VOICU (Romania) said he wished to propose a purely drafting amendment, the purpose of which was to avoid repetition of the words " organization " and " international ". Article 4 would then read: " The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within such organization without prejudice to any of the relevant rules of the organization. "

32. The PRESIDENT said that the Romanian amendment would be referred to the Drafting Committee.

33. Mr. BILOA TANG (Cameroon) said he agreed with the United Kingdom's representative's remarks on

written and customary rules. The Cameroonian Government would consider itself bound by customary rules only to the extent to which they were accepted by an overwhelming majority of States, even if they were supposed to constitute peremptory norms of international law. His delegation would support article 4 subject to that reservation.

Article 4 was adopted by 102 votes to none, with 1 abstention.[7]

Article 5 [8]

Capacity of States to conclude treaties

1. Every State possesses capacity to conclude treaties.

2. Members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

34. Mr. WERSHOF (Canada) said that his delegation had very serious reservations, both from a political and from a strictly legal viewpoint, about paragraph 2 of article 5, dealing with the treaty-making capacity of members of a federal union.

35. The question had been considered by the International Law Commission as early as 1950, and from the very beginning it had given rise to prolonged controversy. At the 779th meeting of the International Law Commission, the Special Rapporteur had proposed that any provision concerning capacity to conclude treaties should be dropped altogether.[9] In the event, of the twenty-five members of the Commission, only seven had approved the provision now appearing in paragraph 2 of article 5 of the draft convention on the law of treaties.

36. At the first session of the Conference, two votes had been taken on that provision and in both cases the Committee of the Whole had retained it by only a small majority.[10]

37. It was thus evident that article 5, paragraph 2, had always given rise to divergent views among eminent jurists and had never obtained even a simple majority of votes from the jurists or delegations expressing an opinion upon it.

38. Moreover, the provision as formulated was not only unsatisfactory from the strictly legal viewpoint; it was also outside the scope of the convention which the Conference was drafting.

39. The provision had originally been included in the International Law Commission's draft articles when the draft had been intended to cover the treaty-making capacity not only of States but also of other subjects of international law, including international organizations. Subsequently, however, the Commission had decided to confine the draft articles to treaties between States, but the provision concerning the treaty-making capacity of members of a federal union had been retained. The International Law Commission had used the word " State " in two different senses in the two paragraphs of article 5. At the first session, the Conference had recognized that the word " State " in the sense in which it was used in article 1 and in article 5, paragraph 1 meant an independent sovereign State and, recognizing that members of a federal State were not States in that sense, the Committee of the Whole had deleted the word " State " from article 5, paragraph 2. Consequently a provision concerning the capacity of those entities to conclude treaties was as much beyond the scope of the convention, as defined in article 1, as would be any provision on the treaty-making capacity of an international organization or of any other entity which was not an independent sovereign State.

40. Furthermore, the question arose whether article 5, paragraph 2, formulated a desirable legal principle which was in the interest of orderly treaty relations. Without questioning the relevance of the provisions of federal constitutions whereby certain federal States permitted, within the limits of their constitutions and subject to various forms of federal control, component parts of the federation to conclude agreements with sovereign States, his delegation nevertheless thought that the corresponding provision, as formulated in article 5, paragraph 2, was dangerously incomplete. There were two prerequisites, both of which must exist together, if a component unit of a federal State was to have effective treaty-making capacity : the capacity must be conferred by the federal State, and must have been recognized by other sovereign States. With respect to the first condition, paragraph 2 of article 5 assumed, quite incorrectly, that the constitution was alone determinative. That did not take into account the practice of certain federal States, both on the municipal and the international planes, whereby the constitution was continuously amended by means of judicial decision. Furthermore, paragraph 2 of article 5 said nothing about who was to be responsible for any breach by a member of a federal State of its treaty obligations. It might be argued in reply that the convention on the law of treaties expressly excluded from its field of application all questions of State responsibility; nevertheless, there existed, independently of the convention, a series of rules of international law governing the responsibility of sovereign States for the breach of their treaty obligations, whereas no similar rules existed in respect of treaties concluded by members of a federal State. The discussion of that issue in the International Law Commission showed the absence of any consensus among jurists on the point.

41. Again, article 5, paragraph 2, was also incomplete in the sense that, although it stated that treaty-making capacity must be admitted by the federal constitution and within the limits it laid down, it did not say that only the federal State was competent to interpret its own constitution. There would therefore be a risk of introducing a completely unacceptable practice whereby one Member State of the United Nations might presume to

[7] The Drafting Committee did not propose any change in the text of article 4. See 29th plenary meeting.

[8] For the discussion of article 5 in the Committee of the Whole, see 11th, 12th and 28th meetings.

[9] See *Yearbook of the International Law Commission, 1965*, vol. I, p. 23.

[10] See 12th meeting of the Committee of the Whole, para. 47, and 28th meeting, para. 40.

interpret the constitution of another Member State which happened to be a federal State. In federations where the constitution was entirely written and dealt expressly with treaty-making, the danger might be relatively small, but it would be real and very serious in situations like that of Canada, where the constitution was largely unwritten and where constitutional practice was as important as the written documents. The failure of paragraph 2 of article 5 to deal with that problem was probably its most important defect.

42. Some representatives had said that the practice of treaty-making by certain members of federal unions existed, and should therefore be mentioned in the convention. It was true that, within the limits of their constitutions and subject in almost every case to some form of federal control, certain federal States did permit their member units to conclude some types of international agreement; that practice had long been accepted in international law and there was no need to confirm it by adopting paragraph 2 of article 5. His delegation did not query either the legality or the desirability of those practices. Indeed Canada, whose Constitution did not provide for such action by its provinces, had nevertheless authorized, by means of blanket agreements between Canada and other sovereign States, the conclusion of various agreements between its provinces and such States. But State practice did not support the particular and defective formulation of the rule as proposed in paragraph 2, which would authorize other States to interpret the constitution of a federal union.

43. The only satisfactory remedy for the dangerous inadequacies of that provision was the deletion of the paragraph. It was to be hoped that non-federal States would not seek to impose upon federal States a rule which particularly concerned the latter and to which the large majority of federal States were opposed. The deletion of article 5, paragraph 2, would in no way impair the existing rights of the members of any federal State, whereas many federal States had indicated at the first session that a provision of that nature was unnecessary and undesirable.

44. His objections related only to paragraph 2 of article 5; his delegation recognized that many delegations attached considerable importance to paragraph 1, and it did not intend to oppose that provision. Paragraph 1 related to sovereign States, whereas paragraph 2 concerned entities which the Conference, by deleting the term " State " from paragraph 2 at the first session, had already decided were not sovereign States. Paragraph 1 and paragraph 2 were thus completely independent of each other, as was evident from the fact that, both in the International Law Commission and in the Committee of the Whole, paragraph 2 had always been put to the vote separately. In those circumstances, his delegation requested, under rule 40 of the rules of procedure, that article 5, paragraph 2, should be put to the vote separately. If that request were granted, his delegation would vote against paragraph 2, and it hoped that that paragraph would not obtain the majority necessary for its inclusion in the convention. In the unlikely event of a separate vote on paragraph 2 being refused, it would then be his delegation's view that the whole article should be deleted, since the dangers of paragraph 2 greatly outweighed the advantages of paragraph 1.

45. Mr. MARESCA (Italy) pointed out, in connexion with paragraph 2, that all the rules embodied in the convention were based on the concept of legal personality and that only entities possessing legal personality had the capacity to conclude international treaties. The members of a federal union by definition were not subjects of international law, whereas the members of a confederation were.

46. The Italian delegation had some doubts as to the legal basis of paragraph 2, which it did not regard as indispensable. Admittedly, the members of certain federal unions could conclude international agreements, but the scope of those agreements was limited, for they were local or provincial in character. That capacity was not derived from rules of international law, and if paragraph 2 were deleted, the members of such federal unions could continue to conclude agreements of that kind.

47. Furthermore, the expression " if such capacity is admitted by the federal constitution " was not clear: did it mean the written constitution or the *de facto* constitution which was continually renewed? The term might give rise to serious disputes, for it was a well-known fact that States were not willing to admit any discussion with other States concerning their constitutions.

48. A dangerous legal situation might arise if a federal union opposed the conclusion of a treaty by one of its members and that member refused to accept the objection. There had been examples of such situations in diplomatic history.

49. He would be in favour of deleting paragraph 2.

50. Mr.WARIOBA (United Republic of Tanzania) said that during the first session of the Conference his delegation had supported the Austrian amendment (A/CONF.39/C.1/L.2) which clarified the text of paragraph 2 as drafted by the International Law Commission. His delegation had opposed the deletion of that paragraph, in the hope that the Drafting Committee would improve its wording; but the Drafting Committee had not changed the text, and the Tanzanian delegation had therefore abstained in the vote on the paragraph.

51. Paragraph 2 could give rise to serious difficulties. In the event of a dispute, certain States might become involved in an attempt to try to revise the constitution of a particular State, and that would be undesirable.

52. Mr. KEARNEY (United States of America) said that, at the 12th meeting of the Committee of the Whole, the United States delegation had expressed the view that article 5 was unnecessary. In the first place, paragraph 1 of the article merely stated something which was implicit in articles 1 and 2 of the convention. Nevertheless, since certain delegations had indicated that they were very anxious to retain that provision, the United States had decided not to oppose its adoption.

53. Paragraph 2 raised different problems, for it provided that the treaty-making capacity of members of a federal State was determined by reference to the federal

constitution. But federal constitutions were internal law and their interpretation fell within the exclusive jurisdiction of municipal tribunals of federal States. If the Conference adopted article 5, paragraph 2, there would be at least an implication that a State contemplating the conclusion of a treaty with a member of a federal union might assume the right to interpret for itself the constitution of the federal State.

54. A number of federal States represented at the Conference had expressed the view that the retention of paragraph 2 would cause them considerable difficulties. The United States, which was a federal State, fully understood those problems. On the other hand, no State had proved, either at the first or at the second session, that the insertion of paragraph 2 was necessary to avoid difficulties.

55. Moreover, paragraph 2 left far too many questions unanswered. In view of the constitutional differences between federal States, it would not always be clear when paragraph 2 was applicable. His delegation believed that the paragraph would sooner or later cause difficulties, not only for federal States, but also for other states seeking to enter into treaty relations with members of federal States.

56. In 1965, the International Law Commission's Special Rapporteur, who was now acting as Expert Consultant to the Conference, had proposed the deletion of the special rule concerning federal States. The proposal was sound, not only for the reasons he had stated, but also on the basis of the analysis made by the Canadian representative.

57. The Canadian representative had asked for a separate vote on paragraph 2; the United States delegation supported that request. If the majority approved the request, the United States delegation would vote against the retention of paragraph 2. If, however, the Canadian representative's request was rejected, the United States would be obliged to vote against article 5 as a whole.

58. Mr. GONZALEZ GALVEZ (Mexico) said that, from the doctrinal point of view, there was no need to include a provision on the capacity of States to conclude treaties, for that capacity was an essential attribute of international personality and was implicit in articles 1 and 2 of the convention. Moreover, it had to be recognized that the inclusion of article 5, paragraph 2, would create dangers for certain States, whereas its deletion would not affect the position of those countries which allowed their entities to conclude treaties in certain circumstances. The Mexican delegation would therefore vote for the deletion of article 5 as a whole. Nevertheless, it supported the proposal for a separate vote on the two paragraphs, since paragraph 2 appeared to be the one which had the most serious shortcomings.

59. Mr. GROEPPER (Federal Republic of Germany) said that article 5, paragraph 2 was of particular importance to Germany as a federal State, and he must therefore explain his Government's position once more, though his delegation had already expressed its opposition to the inclusion of article 5 at the first session.

60. In virtue of article 1 the convention applied solely to treaties between States. The components of a federation, even if the law conferred upon them a certain capacity to conclude international agreements — as was the case in the Federal Republic of Germany — could not be assimilated in general to States, and that applied just as much to the sphere of treaty law as to general international law.

61. To explain his opposition he would observe that if a member of a federal union acted in regard to international treaties beyond the limits admitted by the federal constitution, the provisions of articles 7 and 43 would hardly be applicable since that would not be merely the breach of a constitutional provision, but an act under international law performed by an entity not possessing the legal capacity to perform that act. The act would therefore be null and void. That example showed that article 5, paragraph 2, conflicted with article 1. His argument was supported by Helmut Steinberger's " Constitutional Subdivisions of States or Unions and their Capacity to conclude Treaties: Comments on Article 5, Paragraph 2 of the ILC'S 1966 Draft Articles on the Law of Treaties." [11]

62. Furthermore, even if a component of a federation was competent to act internationally, the interpretation of the federal constitution might lead to controversy involving the interpretation of the constitution by a third State or an international tribunal, which would be highly undesirable and might have incalculable consequences. The risk of such a situation arising would be increased by the inclusion of a general clause on federal unions of the kind laid down in article 5, paragraph 2.

63. Lastly, the text of article 5, paragraph 2, as adopted by the International Law Commission and by the Committee of the Whole at the Conference's first session, by its use of the term " federal union " introduced a notion which was vague and hard to interpret. According to its commentary, the International Law Commission had used the term in the sense of a federal State. But it was hard to determine what constitutions were truly federal. It was doubtful whether the term " federal union " in the sense of " federal State " covered all forms of federal State.

64. Although his delegation was against the inclusion of article 5, paragraph 2 in the convention, it was not in any way contesting the capacity of components of a federation in international matters within the limits and in the form laid down in the constitution of the federation to which they belonged. The rejection of paragraph 2 would in no way impair that capacity.

65. Mr. NASCIMENTO E SILVA (Brazil) said that the Federative Republic of Brazil was composed of twenty-two states, corresponding to the provinces of the former Empire. Article 5, and paragraph 2 in particular, was therefore of direct interest to Brazil. The article used the word " State " with two different meanings, namely as a subject of international law and as a member of a federal union.

[11] See *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 425.

66. At the Conference's first session the vote on paragraph 2 had not been conclusive and most of the States directly concerned, in other words the federal States, had opposed the inclusion of a paragraph of that kind. However, owing to the opposition of States which were not directly concerned by the problem, the Austrian amendment (A/CONF.39/C.1/L.2) had been rejected. The delegation of the Federal Republic of Germany had voted against paragraph 2 and had pointed out that the *Länder* possessed only very limited treaty-making capacity. At the 12th meeting the representative of the Byelorussian Soviet Socialist Republic had stated that paragraph 2 was " consonant with the legislation and practice of the Byelorussian SSR ". The Brazilian delegation was not competent to interpret the treaty-making capacity of other States, but its understanding was that when the Byelorussian SSR signed treaties it did so under paragraph 1, not under paragraph 2. It was inconceivable that a State which had signed the United Nations Charter and had participated in international conferences on an equal footing with other States could be regarded in the same way as the components of a federal union or *Länder* with very limited rights. The provinces or units of a federal union could not be members of international organizations or sign treaties such as the convention on the law of treaties.

67. The only acceptable interpretation of paragraph 2 was that national tribunals alone, normally the Supreme Court, were competent to interpret the formula " within the limits laid down " in the constitution. It was unthinkable that a foreign Government should give an opinion on matters of internal legislation, since that would represent an intervention in the domestic affairs of a State.

68. Article 41, paragraph 2, of the United Nations Convention on Diplomatic Relations [12] provided that " all official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed ". That article clearly showed that no foreign Government could conclude treaties with units of a federal union unless it first went through the Ministry for Foreign Affairs of the federal union.

69. The conditions laid down in paragraph 2 regarding the question of the capacity of members of a federal union to conclude treaties depended on the national constitution as interpreted by the national courts and were thus purely a matter of domestic law.

70. Paragraph 2 was therefore out of place and undesirable. The Brazilian delegation would request a roll-call vote on the substance and form of article 5, paragraph 2.

71. Mr. DE LA GUARDIA (Argentina) reminded the Conference that during the first session, his delegation had opposed article 5, although it raised no difficulties for Argentina as a federal State, since under its Constitution the members of the Federation were not entitled to conclude treaties.

72. His delegation considered that although paragraph 1 concerned one of the fundamental rights of a State, namely its capacity to conclude treaties, that was not a question of the law of treaties. The provision was therefore unnecessary in the convention on the law of treaties.

73. With regard to paragraph 2, he thought that although the Committee of the Whole had decided to delete the word " States ", the paragraph still dealt with a strictly constitutional matter which had no place in the convention. The provision conflicted with articles 1 and 2 (*a*) of the draft.

74. The members of some federal unions doubtless had capacity to conclude treaties under their federal constitutions, but the deletion of paragraph 2 of article 5 would in no way affect that capacity, which derived from domestic law, not from international law.

75. The Argentine delegation would therefore vote against article 5, paragraph 2, if the two paragraphs were voted on separately, but if that paragraph was adopted by the Conference, it would be forced to vote against the article as a whole.

76. Mr. MAKAREWICZ (Poland) said that the Conference, in judging the usefulness of certain provisions, must bear in mind that the convention contained many which simply restated the existing law; that was perfectly natural, since the main purpose of the convention was to codify the law of treaties. The fundamental rules must find a place in a convention of that kind, and article 5 was merely one example of such a rule. It was clear that the omission of any one of those rules was bound to leave a serious gap in the work of codification.

77. Treaty-making was one of the oldest and most typical rights of States; it was an attribute of sovereignty and it was unquestionably within the competence of States. It was therefore essential to reaffirm such a fundamental principle in article 5, paragraph 1. The argument that the provision was unnecessary because its purport could be inferred from articles 1 or 2 seemed quite unjustified. The fact that the article on the scope of the convention and the article on use of terms were not inconsistent with article 5 was no reason for questioning the usefulness of the latter article. All those articles used similar phraseology, but each dealt with a different problem.

78. Article 5, paragraph 1, was in harmony with the principles laid down in the United Nations Charter, in particular with the principle of the sovereign equality of States; it was an essential ingredient of the convention. Furthermore, his delegation believed that the fundamental principle stated in paragraph 1 should be suitably reflected in other articles of the convention, including its final clauses. Every State possessed treaty-making capacity, and should therefore be entitled to become a party to the convention on the law of treaties. His delegation hoped that some way would be found of making the convention open to all States.

79. The Polish delegation regarded paragraph 2 of article 5 as a logical corollary to paragraph 1. It reflected the well-known fact that States were not all uniform in

[12] United Nations, *Treaty Series*, vol. 500, p. 120.

structure, and that besides unitary States there were federal States whose political structures varied considerably. From the point of view of international law, some federal unions might be in the same category as unitary States by virtue of the fact that they had only one central political authority representing all the constituent parts of the union in its international relations, whereas other federal unions might allow their component states some rights in that respect. The International Law Commission had rightly refrained from going into the matter in detail and had included all States with a non-unitary structure under the single term " federal unions ". It had wisely laid down the fundamental rule that only the constitution could say whether the members of a federal union had treaty-making capacity. From the point of view of international law, that question could only be settled by the domestic law of the federal State concerned, and other States could do no more than take cognizance of that decision. It was therefore difficult to understand the apprehensions of certain delegations that article 5, paragraph 2, was " trespassing beyond the boundary between international law and domestic law ".

80. The Polish delegation favoured the retention of paragraph 2, which was an integral part of article 5, and would vote for article 5 as approved at the first session of the Conference.

The meeting rose at 1 p.m.

EIGHTH PLENARY MEETING

Monday, 28 April 1969, at 3.35 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)*

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

Article 5 (Capacity of States to conclude treaties) *(continued)*

1. Mr. KORCHAK (Ukrainian Soviet Socialist Republic) said his delegation strongly supported both paragraphs of article 5. Paragraph 1 set forth the capacity of every State to conclude treaties. Paragraph 2 recognized the capacity of members of a federal union to conclude treaties if that capacity was admitted by the federal constitution; that provision acknowledged a fact of international society and gave expression to a rule of contemporary international law.

2. The Ukrainian SSR was a member State of the Union of Soviet Socialist Republics. It was a particular feature of the USSR that it constituted a single State while at the same time comprising fifteen sovereign republics, one of which was the Ukrainian SSR. Those republics had freely formed the Union and, in so doing, had not relinquished their sovereignty. Their sovereignty was confirmed by the USSR Federal Constitution and also by the separate constitutions of the federated republics. Within the framework of the Union, each republic had all the attributes of a sovereign State and enjoyed full sovereign rights.

3. The Ukrainian SSR had 50 million inhabitants; it had its own Constitution and its own government machinery, including organs for foreign relations; it had its own laws on such matters as Ukrainian citizenship. The legislative provisions on all those subjects could not be amended without its consent. The position was, of course, the same with regard to the other fourteen federated republics.

4. The Ukrainian SSR was a party to numerous bilateral and multilateral treaties. It had ratified over one hundred major multilateral treaties, dealing with a wide variety of forms of international co-operation, and including such treaties as the Universal Postal Union and International Telecommunication Union Conventions. An important legal point was that a treaty signed by the Ukrainian SSR was valid and effective only within the territory of the Ukrainian SSR. Neither the USSR itself nor any of its fourteen other federated republics had any legal responsibility in the matter. Naturally, both the USSR authorities and those of the fourteen other federated republics had the greatest respect for commitments undertaken by the Ukrainian SSR and if the need arose, would whole heartedly co-operate in carrying out those commitments.

5. The legal capacity of federated republics to conclude treaties had thus a solid basis both in law and in fact. The federated republics had all the necessary cultural, economic and other qualifications to act as parties to treaties, to discharge their duties and to exercise their rights as parties.

6. Paragraph 2 could not, of course, affect the interpretation of the internal law of a State, including a State with a federal constitution. It was for the federal constitution in each case to determine whether a member of the federal union concerned had the capacity to conclude treaties, and to define the limits of that capacity. The purpose of paragraph 2 was to make it clear that, where a federal constitution so empowered a component member of a federal union, no objection could be made by another party to the participation in the treaty by that component member. The anxieties which had been expressed by certain delegations with regard to article 5 were therefore unfounded.

7. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that he had only a few additional comments to make on the subject of paragraph 2, since his delegation's position in support of both paragraphs of article 5 had been explained in detail in the Committee of the Whole at the first session.

8. Paragraph 2 gave expression to an international practice which had developed more particularly since the Second World War; a number of governments of component members of federal unions had participated