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Eighth plenary meeting

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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

in many international treaties since that time. The provisions of paragraph 2 were in keeping with those developments and would be useful in the future.

9. The wording of paragraph 2 was the outcome of prolonged and careful work and reflected a measure of compromise. At the first session, certain delegations had experienced difficulties regarding the use of the expression " States members of a federal union ". In order to avoid those difficulties, the text as approved by the Committee of the Whole now referred to " members of a federal union ", without using the term " State ".

10. Paragraph 2 made it clear that the essential prerequisite of the capacity to conclude treaties was, for a member of a federal union, that such capacity should be admitted by the federal constitution. It did not derive from international factors; it was the result of a process within the federal union itself. It was for the constitutional law of the federal union to determine whether the treaty-making capacity existed, and, if so, to define the limits of that capacity. Also, as had been pointed out by the Brazilian representative, the provisions of the constitutional law, or of the fundamental or organic law of the federal union which recognized that capacity, could only be interpreted by the competent bodies of the federal union. There was thus no reason for the concern which had been expressed during the discussion. Constitutions or constitutional acts existed in the various federal unions, such as the United States of America, the Federal Republic of Germany, Argentina, Brazil and others. He fully understood and appreciated the position of the Canadian delegation, which had pointed out that in its country certain constitutional practices were also important. The carefully drafted and flexible wording of paragraph 2 should cover all the various situations which could arise. As a result of Lenin's enlightened policy on the question of nationalities, the constitution and the laws of the USSR made provision for the right of all Union Socialist Republics to conclude treaties. The question of the treaty-making capacity of those members of the Union was determined by the laws of the USSR and would not result from the convention on the law of treaties. Since paragraph 2 would thus serve to avoid any misunderstandings in the matter and to solve practical difficulties, his delegation strongly favoured its retention in article 5.

11. The fears which had been expressed by some delegations on the question of international responsibility were totally unfounded. The convention on the law of treaties would not affect in any way the rules on the subject of the international responsibility of States under article 69. There was no attempt to prejudice that issue, which would remain unaffected by the adoption of article 5.

12. Mr. KRISHNA RAO (India) said that his delegation would vote against paragraph 2 of article 5 for the reasons it had stated at the eleventh meeting of the Committee of the Whole.

13. The statement that a member of a federal union might possess the capacity to conclude treaties was correct, since some component units of federal States did in fact conclude treaties with sovereign States. The convention on the law of treaties, however, was not exhaustive; in accordance with article 1, it did not cover a treaty concluded between international organizations, or between an international organization and a State. Nor did it deal comprehensively with the issues arising from treaties concluded between sovereign States and the members of a federal union. Since, therefore, it concentrated only on treaties concluded between States, it ought not to attempt to deal with the question of treaties concluded between States and members of a federal union. If it did, it would have to deal not only with the capacity of members of a federal union to conclude treaties, but with a number of other consequential questions.

14. Article 5 did not cover all aspects of treaties between members of a federal union and States. It did not say who would issue full powers; it did not say how the consent of the members of a federal union would be expressed; it made no provision for the settlement problem of the responsibility of members of a federal union in terms of article 62; and it left aside the problem of the responsability of members of a federal union for breach of a treaty obligation. The whole area was one in which it would be unwise to formulate any rule of international law because it was essentially a matter regulated exclusively by the internal law of each federation. Paragraph 2 might give the impression that a State could claim the authority of international law in seeking to interpret the constitution of another State, a development which could amount to intervention of the most serious kind.

15. Any attempt to deal with such matters would involve entering into the question of the relations between the members of the federal union and the federal government, relations which were governed essentially by internal law. The International Law Commission had not examined those matters and the Conference did not have the time to go into them.

16. For those reasons, paragraph 2 should be dropped. The treaty-making capacity of members of a federal union would continue to be determined by the constitution of the federal union. That capacity could then be recognized by any sovereign State which decided to conclude a treaty with it. Without in any way affecting the treaty-making capacity of members of a federal union, the deletion of paragraph 2 would serve to avoid the difficulties in international law to which he had referred.

17. His delegation's position was not based on internal considerations. India was a Federal Republic and treaty-making was exclusively a matter for the Federal Government. Under the Constitution of the Federal Republic, the component units did not possess any treaty-making capacity, but India could conclude a treaty with a member of a federal union, if the constitution of that union permitted. His delegation would like that matter to be regulated in each case on a bilateral and practical basis, rather than on the basis of international law.

18. His delegation was therefore opposed to paragraph 2, but supported the principle embodied in

paragraph 1, which recognized and declared the capacity or every State to conclude treaties.

19. Mr. BINDSCHEDLER (Switzerland) said that Switzerland was a State with a federal Constitution. At the first session, his delegation had supported paragraph 2, but after re-examining the whole question it had now arrived at the conclusion that it would be preferable not only to drop that paragraph but to delete article 5 altogether, for reasons which he would explain.

20. It had never been intended that the convention on the law of treaties should lay down rules on the position and capacity of subjects of international law. But article 5 attempted to deal with one small aspect of that broad and difficult question. Article 5 could very well be left unsaid. To omit it would not in any way affect the capacity of States to conclude treaties, or the similar capacity of a member of a federal union, where such capacity was recognized by the federal constitution.

21. Whether or not a component unit of a federal union constituted a State was a much debated question in legal theory. If it was not considered to be a State, its capacity to conclude treaties would be fully safeguarded by article 3, which expressly declared that none of the provisions of the convention on the law of treaties would affect the legal force of an international agreement concluded between a State and another subject of international law, or between such other subjects of international law. Since, moreover, the convention did not include any provisions on the subject of the treaties of international organizations, there was no reason to refer to the treaties of members of federal unions either. It would be illogical to deal with one type of subject of international law, other than States, and not with another.

22. Again, to omit article 5 would not affect the present position in international law, which was that international law referred the matter to municipal law. It was for the constitution of a State to determine whether one of its component units had the capacity to conclude treaties. Should any clarification be needed in that respect, it was exclusively for the central authorities of the federal State to interpret the constitution of the State. On that point, the wording of paragraph 2 could give rise to misunderstandings, as had already been pointed out by the Canadian representative. Constitutional law comprised not only the letter of the constitution but also the practice of the federal authorities in its application and interpretation, and constitutional practice could, and often did, depart from the letter of the written constitution. The reference in paragraph 2 of article 5 to " the federal constitution " could therefore give rise to ambiguity.

23. In Switzerland, in accordance with the Federal Constitution, the Cantons had certain very restricted powers with regard to the conclusion of international agreements. Those powers referred in the first place to matters which were within the competence of the Cantons by virtue of the Federal Constitution. In the second place, they related to certain agreements for co-operation with neighbouring subordinate territorial entities of countries having a frontier with Switzerland; in that case, the Canton concerned dealt exclusively with the subordinate local authorities and not with the Government of the neighbouring country. In both categories of cases there was a very strict control by the Swiss federal authorities. In the first case, it was the Federal Government itself which conducted the negotiations on behalf of the Canton concerned; in the second, the Canton conducted the negotiations with the foreign local authority, but subject to confirmation by the Federal authorities. There were numerous instances of agreements by Swiss Cantons with foreign countries which had been declared void by the Swiss federal authorities. Naturally, the adoption of article 5 would not change that legal situation in any way, but his delegation would prefer that the article should be dropped.

24. Finally, there was a practical reason for dropping the whole article and not just paragraph 2. If paragraph 2 only were deleted, and paragraph 1 were retained, it might later be argued *a contrario* that the Conference had thereby meant to deny the capacity of a member of a federal union to conclude treaties. And although there was no such intention, a mistaken conclusion of that kind might perhaps be reached by the process of interpretation.

25. Mr. BELYAEV (Byelorussian Soviet Socialist Republic) said that article 5, paragraph 2, reflected the realities of international life and such norms of contemporary international law as the inalienable right of peoples and nations to self-determination and sovereign equality. Its inclusion in the draft convention would have a favourable effect on the development of treaty practice. He could not agree with those who had expressed the fear that the inclusion of the paragraph might lead to interference in the internal affairs of federal States, since paragraph 2 merely stated the right of members of federal unions to conclude treaties if that capacity was conferred upon them by the federal constitution.

26. The Byelorussian SSR, like the other republics of the Soviet Union, was a sovereign State which had voluntarily united with the other republics to form the Union of Soviet Socialist Republics. It had its own Constitution, its own territory, the frontiers of which could not be altered without its consent, its own population and its own supreme legislative executive and judicial organs. In virtue of that sovereign status, the Byelorussian SSR was a subject of international law and counted among its sovereign rights that of concluding and participating in international treaties on a basis of absolute equality with other subjects of international law. Thus, it was a founder Member of the United Nations, a member of many specialized agencies, and a party to over one hundred bilateral and multilateral treaties. His delegation therefore fully supported article 5 in the form in which it had been approved by the Committee of the Whole.

27. Mr. BAYONA-ORTIZ (Colombia) said that at

the first session of the Conference his delegation had opposed the deletion of article 5, paragraph 2, in the belief that the paragraph was in the interests of members of federal unions. It had now become clear, however, that the majority of delegations representing such unions, for both legal and political reasons, considered paragraph 2 neither necessary nor desirable. It was even maintained that paragraph 1 was redundant because its provisions followed directly from article 1. Consequently to delete the entire article would in no way affect the convention and would help to avoid problems which might arise from a mistaken interpretation of paragraph 2. For those reasons, and particularly in view of the statements just made by the representatives of Switzerland and India, as well as for the reasons previously put forward by the delegations of Canada, the United States, the Federal Republic of Germany and Mexico, his delegation would vote against the retention of article 5. If that proposal were rejected, it would support the request by Canada for a separate vote on paragraph 2 and would vote against that paragraph.

28. Mr. ALVAREZ TABIO (Cuba) said it was a matter of history that there were certain federal unions which authorized their member states to conclude international treaties within the limits permitted by their constitutions. Also, there was no rule of international law which prevented member states of a federal union from being given the capacity to conclude treaties with third States. The fact that, under article 1, the provisions of the convention would apply to treaties between States did not prevent the convention from establishing an exception to that general rule, in order to satisfy the demands of existing situations recognized by the United Nations.

29. The rule in paragraph 2 had been carefully drafted and respected the sovereign will of multi-national States by leaving the decision regarding capacity to the provisions of their federal constitutions. Consequently, his delegation could see no reason for not including article 5 in the convention and would vote for it.

30. Mr. ALVAREZ (Uruguay) said he had been particularly impressed by the points made by the Canadian representative in regard to paragraph 2.

31. At the first session of the Conference, his delegation had opposed paragraph 2 and it would now vote against it for two main reasons. First, not only was it an unjustified intervention in the domestic affairs of States, but it implied that international law surrendered to internal federal law one of its most important functions, that of determining the subjects of international law having capacity to conclude treaties. In reality, the *jus contrahendi* of a member of a federal State was not determined just by the constitution of that State; it depended also on whether other States would consent to conclude treaties with it.

32. Secondly, it would be dangerous to adopt paragraph 2 because then everything would depend on the provisions of the constitution of the federal State. A federal State would have a considerable advantage over a non-federal State since, by creating political subdivisions under cover of that provision, it could bring a large additional number of subjects of international law into conferences and multilateral treaties, thereby seriously upsetting, in its own favour, the balance of votes and parties. His delegation therefore supported the Canadian proposal for a separate vote on paragraph 2 so that it could vote against that paragraph.

33. Mr. BRAZIL (Australia) said that as a federal State, Australia had a direct interest in paragraph 2, and was one of a number of federal States which had supported the deletion of paragraph 2 at the first session.

34. His delegation did not deny that some members of federal States possessed the capacity to conclude treaties in certain instances. It did maintain, however, that the retention of paragraph 2 could create difficulties for some other federal States, whereas it had not been demonstrated that its deletion would occasion any real problems.

35. Some speakers had claimed that, since it would be for the internal authorities of a State to interpret the constitution, there was no need for concern, but that point was not clearly stated in paragraph 2. Moreover, there were other problems latent in paragraph 2, such as that just mentioned by the Uruguayan representative, namely, that of the role that international law should play in the determination of the treaty-making capacity of a member of a federal State.

36. Consideration of one aspect of the paragraph was likely to expose in a clearer light other problems which had not been apparent at first sight. Thus, at the first session, the Committee of the Whole had adopted an amendment to delete the phrase " States members of a federal union ". and substitute for it the phrase " Members of a federal union ". That amendment had taken account of the fact that members of federal unions were normally not States for purposes of international law, but at the same time it had merely served to underline the inconsistency between article 5 and article 1.

37. Although the problems raised by article 5 were real and complex, their solution was simple: to delete paragraph 2. That would expedite the task of the Conference, which was to draw up a convention dealing with treaties between States. The International Law Commission had truncated the original article 5, but it had not gone far enough; the Conference should complete what the International Law Commission had begun and delete paragraph 2. He supported the Canadian proposal for a separate vote on paragraph 2.

38. Mr. PHAM-HUY-TY (Republic of Viet-Nam) said that in principle, internal sub-divisions, whatever their title, did not possess international personality and therefore did not possess the capacity to conclude treaties. If the federal constitution granted such capacity to members of a federal union, such members might conclude treaties but only within the limits laid down by the constitution, so that their capacity was a capacity under internal law, not under inter-

national law. The limits of the capacity of a state member of a federal union could be interpreted only in accordance with internal law. His delegation therefore considered that paragraph 2 constituted an implicit attack on internal law, on the constitutional autonomy of States and thus on the sovereignty of States.

39. Again, paragraph 2 might open the door to the interpretation of the constitution of a federal union by a foreign State anxious to enter into treaty relations with a member state of the union. To speak in the convention of the capacity of a member state of a federal union to conclude treaties would constitute a serious risk, since it might encourage such member states to try to acquire that capacity to the detriment of national unity. It would therefore be more prudent to make no mention in the convention of any capacity of member states of federal unions to conclude treaties, it being understood that any federal union had the right to confer that capacity on its member states.

40. His delegation supported the request for a separate vote on paragraph 2.

41. Mr. GALINDO-POHL (El Salvador) said that paragraph 2 of article 5 stated that the members of a federal union possessed capacity to conclude treaties when such capacity was admitted by the federal constitution " and within the limits there laid down ". Both unitary and federal States acted in the international sphere within constitutional limits and yet no reference was made to those limits in paragraph 1 of article 5.

42. The text of article 43, as approved by the Committee of the Whole at the first session, limited the defect of consent which might be invoked by reason of the violation of a provision of internal law regarding competence to conclude treaties, to cases in which " that violation was manifest and concerned a rule of its internal law of fundamental importance ". The same article stipulated that a violation was manifest " if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith ". It was his delegation's understanding that article 43 applied equally to members of a federal union and to unitary States. Although article 5, paragraph 2, used the words " members of a federal union " instead of the term proposed by the International Law Commission, namely, " States members of a federal union ", the title of article 5, which covered both paragraphs, was " Capacity of States to conclude treaties", and article 1 said " The present convention applies to treaties between States ". Article 5 was concerned with capacity, and article 43 with competence, to conclude treaties. Both referred to internal law, but approached it in a different way. Whereas article 43 was couched in measured terms, it was obvious that paragraph 2 of article 5 was much less cautious.

43. International law admitted that members of a federal union possessed capacity to conclude international treaties if such capacity was established by the federal constitution. The international legal capacity of members of a federal union was the result of two factors: the permissive rule of international law and the corresponding rule of internal law which authorized a member of a federal union to conclude international agreements. The unconstitutional consequences of the exercise of that authorization were regulated, on the international plane, as far as competence was concerned, by article 43, and any other mention of limits as to capacity laid down by internal law would involve an inequality between the treatment of members of federal unions and that of other States.

44. Limits established by federal constitutions did of course exist, but to mention them expressly would lead to a lack of balance if they were not also mentioned in relation to other States for which they also existed. And if express reference were made to constitutional limits as defining the international legal capacity of members of federal unions, that could mean turning internal constitutional problems into a subject for international debate. Before the adoption of the compromise solution for article 43, the International Law Commission had stated in paragraph 8 of its commentary to that article that " any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs ". Article 43 sought to prevent international obligations from being affected by the complex problems of internal law; but that wise attitude was not maintained in article 5, paragraph 2, which amounted more to an invitation to examine and discuss on the international plane regulations and problems of internal law.

45. Legal doctrine, under the generic term " international legal capacity ", distinguished between " capacity " in the strict meaning of the term, which was the capacity recognized by international law of specific entities, not exclusively sovereign States, to enter into treaty obligations, and " authority ", which related to the recognition of that capacity by internal law. According to that terminology article 5, paragraph 2, as far as international legal capacity was concerned, referred rather to the authorization received by members of a federal union from the federal constitution to enter into international obligations. Paragraph 2 might then read: " Members of a federal union may conclude treaties when they are so authorized by the federal constitution ". But if it were desired to retain the wording used in the draft convention, paragraph 2 could be shortened to read: " Members of a federal union may possess capacity to conclude treaties if such capacity is admitted by the federal constitution ". Since the purpose of article 5 was to determine the capacity of States to conclude treaties, it must be strictly limited to that objective, and that could be achieved by the wording he had suggested, which entailed the deletion of the last part of paragraph 2 of article 5.

46. His delegation could not support the present wording of paragraph 2 and, unless it were amended, preferred to see it deleted, as the Canadian representative had proposed.

47. Mr. STREZOV (Bulgaria) said that article 5 raised

two distinct problems. Paragraph 1 laid down the capacity of every State to conclude treaties, which was an undeniable right, based on the sovereignty of States. Very few delegations had cast doubts on the need to include paragraph 1. Paragraph 2, on the other hand, created a problem which should be dealt with within the framework of the convention, for treaties concluded between members of federal unions and other States were a reality of contemporary international life, and the convention on the law of treaties should therefore apply to such instruments. The objection that paragraph 2 would open the door to interference in the domestic affairs of federal States was unfounded, since references to municipal law were often found in international law, without thereby providing a means of interference. The Bulgarian delegation therefore supported article 5 as a whole.

48. Mr. JACOVIDES (Cyprus) said that Cyprus neither was nor was likely to become a federal State, so that the issue raised in article 5, paragraph 2, did not affect it directly. Nevertheless, it was convinced that the adoption of such a provision might enable States to assume the right to interpret the constitution of a federal State for themselves, and that would constitute interference in the domestic affairs of the federal State. Moreover, it regarded as untenable the proposition that a federal constitution, which represented the domestic law of a federal State, could in itself determine matters relating to international law.

49. For those reasons, and because of the practical problems that might arise if such a provision were included in the convention, Cyprus would vote for the deletion of paragraph 2, as it had done during the first session, although it would support paragraph 1, which was based on the principle of the sovereign equality of States.

50. The PRESIDENT invited the Conference to vote first on paragraph 2 of article 5.

At the request of the representative of Brazil, the vote was taken by roll-call.

Malta, having been drawn by lot by the President, was called upon to vote first.

In favour: Monaco, Mongolia, Morocco, Nepal, Poland, Romania, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, Yugoslavia, Afghanistan, Algeria, Bulgaria, Byelorussian Soviet Socialist Republic, Central African Republic, Cuba, Czechoslovakia, Ecuador, France, Gabon, Hungary, Indonesia, Iraq, Ivory Coast, Kuwait, Madagascar.

Against: Malta, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Republic of Korea, Republic of Viet-Nam, San Marino, Singapore, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela, Zambia, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Brazil, Burma, Cameroon, Canada, Ceylon, Chile, China, Colombia, Congo (Democratic Republic of), Costa Rica, Cyprus, Denmark, Dominican Republic, El Salvador, Ethiopia, Federal Republic of Germany, Ghana, Greece, Guatemala, Guyana, Holy See, Honduras, India, Iran, Ireland, Israel, Italy, Jamaica, Japan, Liberia, Liechtenstein, Luxembourg, Malaysia.

Abstaining: Saudi Arabia, Senegal, Sierre Leone, Sudan, Thailand, Tunisia, United Republic of Tanzania, Cambodia, Congo (Brazzaville), Finland, Kenya, Lebanon, Libya.

Article 5, paragraph 2, was rejected by 66 votes to 28, with 13 abstentions.

51. The PRESIDENT invited the Conference to vote on article 5, as thus amended.

Article 5, as thus amended, was adopted by 88 votes to 5, with 10 abstentions.

52. Mr. MERON (Israel), explaining his delegation's vote, said that article 5 dealt with two entirely distinct matters. Paragraph 1 contained a general declaratory statement on the capacity of States to conclude treaties, which was indisputable and obvious. Indeed, that proposition followed logically from article 1 of the draft.

53. Paragraph 2, on the other hand, dealt with the complex and delicate matter of the capacity of members of a federal union to conclude treaties with foreign States. The paragraph laid down a single criterion for such treaty-making capacity, that of the provisions of the federal constitution. Arguments could be advanced for and against the advisability of dealing with the subject in the convention; his delegation, however, had shared the doubts expressed by the International Law Commission concerning the paragraph and the need for a provision of that kind. In particular, it was concerned at the inadequacy of the sole criterion proposed by the Commission, for although the text of the constitution of a federal State was extremely important, it represented only a part of that State's internal law and could not be considered in isolation from such other important factors as the constitutional practice, the jurisprudence of the constitutional courts, and the over-all framework of legal relations and administrative arrangements between the federal State and its constituent members. For those reasons, and in view of the many serious objections advanced by the delegations of federal States, Israel had voted against paragraph 2, although it had supported paragraph 1.

54. Mr. HAYTA (Turkey) said that his delegation's vote in favour of paragraph 2 should not be interpreted as a wish to allow interference in the domestic affairs of federal States. It wished to place on record its assumption that the fact that the majority of the Conference had decided against the inclusion of paragraph 2 did not affect the capacity of any member of a federal union to conclude treaties, if that capacity was admitted by the federal constitution and within the limits there laid down.

55. Mr. BILOA TANG (Cameroon) said he wished to explain his delegation's vote on paragraph 2. Cameroon was a federal State which, in drawing up its constitution only some ten years previously, had carefully

delimited the rights and duties of members of the federal union and those of the federal State itself. The right of members of the federal union to conclude treaties was not admitted in the constitution, and all negotiations had to be conducted through the federal Ministry of Foreign Affairs. Those considerations had led his delegation to doubt the advisability of including paragraph 2, because it might open the door to interpretations of his country's constitution by foreign States or international organizations. His delegation had therefore voted against paragraph 2.

Article 6 [1]

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(*a*) He produces appropriate full powers; or

(*b*) It appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispenses with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(*b*) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(*c*) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ.

56. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had accepted the Ghanaian amendment (A/CONF.39/L.7) to paragraph 1(*b*) of article 6, in the belief that it clarified the text.

57. The PRESIDENT invited the Conference to vote on article 6.

Article 6 was adopted by 101 votes to none, with 3 abstentions.

Article 7 [2]

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

[1] For the discussion of article 6 in the Committee of the Whole, see 13th and 34th meetings.

An amendment was submitted to the plenary Conference by Ghana (A/CONF. 39/L.7).

[2] For the discussion of article 7 in the Committee of the Whole, see 14th and 34th meetings.

An amendment was submitted to the plenary Conference by Romania (A/CONF.39/L.10).

58. Mr. YASSEEN, Chairman of the Drafting Committee, said that since it was clear from sub-paragraphs 1(*b*) and 2(*a*), (*b*) and (*c*) of article 6 that full powers need not be produced by a person before he could be considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty, the Drafting Committee had considered that the use of the word " *pouvoirs* " in the French text and " *poderes* " in the Spanish text might lead to confusion, and had therefore replaced them by the words " *autorisation* " and " *autorización* " respectively. The Drafting Committee hal also replaced the words " as representing his State " by the words " as authorized to represent a State ". That was because in some cases a State might be represented by a person who was not a national of that State. A corresponding change had been made in the other language versions of the text. The Drafting Committee wished to make it clear that the word " confirmed " in the last part of article 7 applied equally to express confirmation and to tacit confirmation.

59. The PRESIDENT asked the Chairman of the Drafting Committee whether his Committee had considered the amendment proposed by Romania (A/CONF.39/L.10), to insert the words " the competent authority of " between the words " confirmed by " and the words " that State ".

60. Mr. YASSEEN, Chairman of the Drafting Committee, said that the effect of the Romanian amendment would be to restore the original wording of the International Law Commission. The Drafting Committee had found that only the State could determine which was the competent authority in such a matter, and that competent authority differed in different States. Consequently, the Drafting Committee considered that it was sufficient to refer to confirmation by the State, instead of by the competent authority of the State.

61. Mr. SECARIN (Romania) said that his delegation wished to maintain its amendment (A/CONF.39/L.10), in order to restore the wording of article 7 as drafted by the International Law Commission and already accepted by the Committee of the Whole. His delegation considered that it was important to make clear that only the competent authority could complete the act in question when it had been performed by a person not competent to do so under the terms of article 6. The Drafting Committee's text was not as clear as the International Law Commission's text. Since sub-paragraph 1(*c*) of article 2 made it clear that the competent authority had power to conclude treaties, it must therefore be the competent authority of a State only that had the power to confirm an act performed without the required authorization, in order to give it legal effect. The International Law Commission's text was more closely in accordance with the provisions of articles 2 and 6, and with other relevant articles of the convention. Moreover, the Committee of the Whole had adopted that text by 87 votes to 2, with one abstention. The Romanian

delegation proposed that that text be retained as the final version of article 7, and hoped the Drafting Committee would agree to reconsider the question.

62. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee had not intended to make any change in the substance of article 7. It had considered that the change in wording was a purely formal change, which lightened the text and removed unnecessary wording. It was the State itself that determined the authority competent to perform a certain act. To say that confirmation must be by a State was the same as saying that it must be by the authority that the State considered competent for that purpose, but there was no necessity to specify that in the text.

63. The PRESIDENT asked the Chairman of the Drafting Committee if the Drafting Committee was willing to reconsider the text.

64. Mr. YASSEEN, Chairman of the Drafting Committee, said that the Drafting Committee would reconsider the text if the Conference so wished.

65. The PRESIDENT suggested that the Conference vote on article 7 and that the Drafting Committee subsequently consider the two versions of the text and decide which was to be preferred. It was his own understanding that the meaning was exactly the same in both cases.

66. Mr. SECARIN (Romania) said he had no objection to that procedure.[3]

Article 7 was adopted by 103 votes to none, with two abstentions.

Article 8 [4]

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

67. Mr. YASSEEN, Chairman of the Drafting Committee, said that the only change that the Drafting Committee had made to the text of article 8 was a change of wording affecting the French and Spanish texts only. As in paragraph 1(*a*) of article 2, the French word " *rédaction* " had been replaced by the word " *élaboration* ", and a corresponding change had been made in the Spanish text.

68. The Drafting Committee had asked him to emphasize that it was for the Conference to decide whether or not it wished the adoption of the text of a treaty at an international conference to be by a majority of two-thirds of the States participating in the Conference, as provided by the present text of article 8, or by a majority of two-thirds of the States present and voting. The difference was important, because the first-mentioned rule permitted those absent or abstaining from the voting to prevent the adoption of a text. That was a substantive question which must be decided by the Conference and not by the Drafting Committee.

69. Mr. PINTO (Ceylon) said that in the Committee of the Whole his delegation had introduced an amendment to article 8 (A/CONF.39/C.1/L.43) to add the following new paragraph: " 3. The adoption of the text of a treaty by an international organization takes place by action of a competent organ of such organization according to its rules. "

70. His delegation considered that since article 8 appeared to offer an exhaustive enumeration of methods of adopting a treaty, it might be desirable to include a reference to the new but increasingly used technique of the adoption of a treaty by action of the competent organ of an international organization. It was not clear whether article 4, which stated that the application of the convention to a treaty adopted within an international organization would be " without prejudice to any relevant rules of the organization " applied also to the process of adoption of treaties within an organisation, since article 4 might have been intended to apply to such treaties only after they had come into existence, instead of to their formulation within the organization concerned. It should be made clear whether the prior process of adoption was also subject to the proviso in article 4 regarding the relevant rules of the organization.

71. At the 99th meeting of the Committee of the Whole, the Chairman of the Drafting Committee had said that the amendment by Ceylon was not necessary because the adoption of a treaty within an organization was already covered by article 4 in the sense he had already explained. On the understanding that that interpretation of the scope of article 4 was correct, the delegation of Ceylon would vote for article 8 as it stood, without any specific reference to the adoption of treaties within international organizations.

72. Mr. GONZALEZ GALVEZ (Mexico) said that, with regard to the question of the two-thirds majority raised by the Chairman of the Drafting Committee in relation to paragraph 2 of article 8, the Mexican delegation considered that the words " participating in the Conference " should be replaced by the words " present and voting ". In accordance with United Nations practice, the majority should be the majority of those present and voting; absentees and abstentions should not be taken into account. He supported the view expressed by the representative of the Secretary-General at the 84th meeting of the Committee of the Whole. The question was certainly a matter of substance on which the Drafting Committee was not competent to take a decision.

[3] The Drafting Committee considered it unnecessary to make any change in article 7. See 29th plenary meeting.

[4] For the discussion of article 8 in the Committee of the Whole, see 15th, 84th, 85th, 91st and 99th meetings.

An amendment was submitted to the plenary Conference by Mexico and the United Kingdom of Great Britain and Northern Ireland (A/CONF.39/L.12).

73. Sir Francis VALLAT (United Kingdom) said he agreed with the view expressed by the representative of Mexico. The Chairman of the Drafting Committee had called attention to a point of some importance; the question was one of substance, and the Drafting Committee had been correct in treating it as such. Paragraph 2 as at present drafted could lead to difficulties in the adoption of the text of a convention at some future conference. He believed that the requirement of a majority of two-thirds of the States participating in a conference for the adoption of the text of the resulting convention was too restrictive, since it might be difficult even to get a majority of two-thirds of those present and voting. The conference might then come to nothing, unless the same high majority of States participating decided to apply a different rule. It was questionable whether the difficulty could be avoided by means of rules of procedure drawn up in advance of the conference. In his view the result might be to tie the hands of conveners of future conferences unduly.

74. He therefore supported the Mexican representative's view that it was better to refer to the two-thirds majority of those present and voting instead of those participating in the conference.

75. Sir Humphrey WALDOCK (Expert Consultant) said he had understood the representative of the Secretary-General to have stated that he would interpret the article, as proposed, to mean that under United Nations practice it would still be possible to apply the rule that abstentions would not count in calculating a two-thirds majority. That was a question of substance. The article as drafted by the International Law Commission had been intended to give some protection to minority elements in a conference, particularly at the opening stages, before the adoption of the rules of procedure. A two-thirds majority of the States participating in the conference could, if it so wished, decide that abstentions would not be included in calculating a two-thirds majority. Not to include all the States concerned in calculating the vote for the rules of procedure would water down the protection given by the clause. The question was a matter of substance for Governments to decide, in consultation with those with experience of the working of international conferences. In deciding, they would wish to bear in mind that the idea behind the provision was the protection of minority elements.

76. The PRESIDENT said the problem was a serious difficulty of substance; the Conference must decide whether it preferred the restrictive rule that would result from the text proposed, or a more flexible rule. At the present Conference a substantial number of States, though participants in the Conference, were absent, and their absence had the effect of changing the figure for the majority of two-thirds required for the adoption of each article. The second part of paragraph 2 provided a safeguard permitting a conference to decide on some other majority if it so wished. However, even with that safeguard, if the rule laid down in the existing text were adopted, every conference must take two steps. First, it must decide in advance whether or not it wished the text to be adopted by a majority of two-thirds of those present and voting; otherwise the rule requiring the majority of two-thirds of all of the participants would apply. Secondly, in order to change the rule, it would be necessary to obtain at least once a two-thirds majority of the participating States. The question was one of great importance for future conferences convened to adopt treaties.

77. Mr. RUEGGER (Switzerland) agreed that the question was one of the greatest importance for the practice of international conferences convened either under the auspices of the United Nations or by other authorities. One major example of conferences convened under other auspices was that which had resulted in the adoption of the four Geneva Conventions of 12 August 1949. Since matters of such universal importance might be affected, the conference should be cautious of binding all future international conferences by strict rules. The Conference should take more time to reflect on the matter, and seek to find a more flexible and less restrictive formula.

78. Mr. YASSEEN (Iraq) said that his delegation supported a text that would reflect the practice of the United Nations. It was the practice of conferences convened by the United Nations to adopt texts by a majority of two-thirds of those present and voting. To require a majority of two-thirds of all the participants would make it very difficult to adopt a text. Furthermore, if a majority of two-thirds of all participants was required in order to change the rule in special circumstances, that would make it very difficult to make such a change if it were necesary for any reason. Consequently, Iraq would support a text reflecting United Nations practice.

79. Mr. ESCUDERO (Ecuador) said he supported the view expressed by the representative of Mexico, and endorsed by the representative of the United Kingdom, that the text should reflect the practice of the United Nations. In any case, the expression " participating in the conference " was not altogether clear. It was not sufficient to specify that the majority should be two-thirds of those present and voting at the conference, since a large number of votes would be involved; the text should make it clear that the rule applied to those present and voting when the vote in question was taken at the conference.

80. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the text of article 8 was the result of much hard work by the International Law Commission, and represented a general consensus. The principle of unanimity had many advantages and had been applied with considerable success. However, when the text of article 8 had been drafted, it had been pointed out that in many international organizations, particularly those within the United Nations system, a two-thirds majority rule was applied. The text as it now stood reflected the two elements that unanimity was desirable if possible, and that in practice

it might be necessary to require a two-thirds majority. It had already been approved by the Committee of the Whole, and any re-examination of the text would require a two-thirds majority of the present Conference.

81. He did not believe that the text of paragraph 2 of article 8 could have the effect of harming the activities of other organizations; the problem of agreements drafted within international organizations was adequately covered by article 4.

The meeting rose at 6.15 p.m.

NINTH PLENARY MEETING

Tuesday, 29 April 1969, at 10.35 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)*

Article 8 (Adoption of the text) *(continued)*

1. Mr. ESCHAUZIER (Netherlands) said that article 8, paragraph 2 did not in any way affect the established practice in the organizations in the United Nations system or the current voting procedures in those organizations or in conferences held under the auspices of the United Nations or its subsidiary bodies.

2. Article 8 did not deal with treaties drawn up within an international organization. Such treaties were covered by the general provision in article 4 of the conventions, as the International Law Commission had stated in paragraph (6) of its commentary to article 8.

3. Article 8, paragraph 2 dealt with conferences convened outside existing bodies. The participants in such conferences would not necessarily have rules of procedure from the beginning. In the initial phase of their work the participants would therefore have to agree on certain principles, including a voting procedure for the adoption of the text of the treaty. It would thus appear that stringent provisions with regard to the required majority were warranted. The participants were of course free to depart from the provision in article 8, paragraph 2 and adopt more flexible rules of procedure, but it was in the interests of the participants in the conference to adhere to the rule stated in article 8, paragraph 2, unless the participating States decided by a two-thirds majority to apply different rules. The participants in a conference might also wish to adopt the standing rules of procedure applicable to most United Nations conferences, but there was no inherent link between article 8, paragraph 2, and what was known as United Nations practice.

4. It would therefore be wrong and harmful to replace the expression " participating in the conference " in paragraph 2 by the words " present and voting " and to interpret it in the sense of rule 37 of the rules of procedure of the Conference on the Law of Treaties, which provided that " representatives who abstain from voting shall be considered as not voting ".

5. The Netherlands delegation would therefore vote for the existing wording of article 8, paragraph 2.

6. Mr. GONZALEZ GALVEZ (Mexico), introducing the amendment by Mexico and the United Kingdom (A/CONF.39/L.12), said that certain representatives, in particular those of India and Iraq, had said they were in favour of replacing the word " participating " by the words " present and voting ".

7. A number of States were regarded as participating in the Conference, though their delegations were absent or did not participate in the voting. The rule stated in the amendment was based upon the practice of the United Nations and the specialized agencies, which was a standing practice save in such exceptional cases as the election of members of the International Court of Justice, where at the time of the vote account was taken of the number of States participating.

8. The representative of Ecuador had asked at the previous meeting that an addition should be made to the amendment by Mexico and the United Kingdom to the effect that it meant present and voting " when the vote in question was taken at the conference ". That was implied in the text of the amendment, but the Drafting Committee might consider the point in order to make the wording of the new text clearer, should the amendment be adopted.

9. Mr. ALVAREZ (Uruguay) said that the Conference had the choice between two formulas, that of " States participating in the conference " and that of " States present and voting ". On mature reflection, the Uruguayan delegation was in favour of the latter.

10. The International Law Commission had stated in paragraph (5) of its commentary to article 8 that the formula " participating in the conference " took account of the interests of minorities, which might be quite a substantial group. He himself believed that a formulation of that kind had three drawbacks. First, it was too rigid. Secondly, it was at variance with the provisions of the United Nations Charter, with the general practice followed within the United Nations, and in particular at all codification conferences, and with the rule laid down in rule 36 of the rules of procedure of the present Conference concerning decisions on matters of substance. Article 18 of the Charter provided that decisions of the General Assembly on important questions should be made by a two-thirds majority of the members present and voting, and United Nations practice and the rules of procedure of codification conferences had adhered to that rule. Thirdly, it presented the inevitable danger that as a result of absenteeism, deliberate or not, States might frustrate every effort to achieve practical results.

11. The " States present and voting " formula proposed by Mexico and the United Kingdom (A/CONF.39/