Department of External Affairs

CLASSIFIED

File No. 20-3-1-6

Subject: POLITICAL AFFAIRS
TREATIES AND AGREEMENTS
TREATY MAKING POWERS
LAW OF TREATIES
ILC CODIFICATION PROJECT

Vol. 11
From APR 10/68
To MAY 20/68

References to Related Files

Docs | Subject

20-3-1-6 File No.

PUBLIC RECORDS ORDER
P.C. 1946 - 1749 - AUTHORITY
PUBLIC ARCHIVES APPROVALS
NOS 60/001 & 69/063

RETENTION PERIOD AND DISPOSITION
10 yrs. 2A-8D
AND... THEN TRANSFER TO P.A.C.
FOR SELECTIVE RETENTION

CONFIDENTIAL

CANADA

DATED FROM Apr. 16/69 FILE No. 20-3-1-6

TO May 20/69 VOLUME No. 11

CLOSED VOLUME

DO NOT PLACE ANY CORRESPONDENCE ON THIS FILE

FOR SUBSEQUENT CORRESPONDENCE SEE:

FILE No. 20-3-1-6 VOLUME No. 12

PLEASE KEEP ATTACHED TO TOP OF FILE

7540-21-562-8210

Legal Div./J.A. Beesley/bp

file
div. diary
diary
O/SSEA
O/USSEA
PARL.SEC.
PRESS OFC.

cc:European
U.N.

OTTAWA, May 20, 1969

MEMORANDUM FOR THE MINISTER

20-3-1-6
371

U.N. Draft Convention on Law of Treaties:
Settlement of Disputes

As you will recall from previous memoranda requesting instructions on the positions to be taken by the Canadian delegation to the Vienna Law of Treaties Conference, we have been particularly concerned to ensure that effective procedures are agreed to for the compulsory settlement of disputes by means of third party adjudication. Because of the opposition by the Eastern European and a substantial number of Africans and Asians to compulsory settlement procedures, it has not thus far been possible to achieve the necessary 2/3 agreement on a settlement formula. The Afro-Asian group has, however, now proposed a compromise formula, and our delegation has telephone late this afternoon for instructions by tomorrow morning on the proposal.

The elements of the proposal combine the three major political issues raised by the conference, namely: (a) the peaceful settlement problem; (b) the right to terminate or suspend treaties on the basis of provisions contained in Part V of the treaty; and (c) the all-states problem; (essentially the East German question, in the context of the Law of Treaties conference). In brief, the proposal is as follows: (1) provide for compulsory adjudication by the International Court of Justice disputes concerning the application of Articles 50 and 61 of the Convention, which together provide that a treaty is void if th conflicts with peremptory norms of general international law; (2) provides for compulsory conciliation of disputes arising out of the other Part V provisions, (such as lack of authority to express state consent, error in a treaty, fraud, corruption of a representative, cohortion of a representative, cohortion of a state by the threat or use of force, supervening possibility of performance, and fundamental change of circumstances), leaving states, ultimately, in a position to decide their own rights in the event of failure of conciliating proceedings; (3) the passage by the Conference of a resolution in declaration form drawing to the attention of the General Assembly the provision embodied in the final accession clause of the draft convention (already agreed to) of the possibility of inviting states other than members of the U.N. and of the specialized agencies to accede to the Law of Treaties Convention; and (4) the whole of the provisions of the convention to be applicable to future treaties but not to have retro-active application. (This element is not stated as part of the package, but since a decision has already been reached on this question, it is, in effect, part of the package.)

The Western group is apparently somewhat divided on the desirability or otherwise of accepting the package. Both the U.S. and the U.K., however, are prepared to vote for the compromise and, assuming it is successful, to vote in favour of the Convention as a whole, instead of abstaining on it, as has been their intention (and Canada's), as they would do if no solution is reached on the peaceful settlement problem. The major concern of the Western group is that the convention contains so many new or contentious provisions whereby a state could opt out of its treaty commitments, it becomes essential for the future stability of treaty relations (and, hence, international law itself, which is so much based on multilateral treaties) to make adequate provision for third party adjudication of disputes concerning the termination, suspension or interpretation of treaties on the basis of these new or contentious provisions. The provisions with the least legal content, however, and hence the most potentially subjective in their application are Articles 50 and 61, referred to above. Given the fact that the provisions of the treaty will not have retroactive effect, the U.S.A. and the U.K. have concluded that they can live with the Convention so long as it provides for compulsory adjudication by the International Court of Justice of disputes concerning Articles 50 and 61, and compulsory conciliation, (the results of which are not binding on the disputants) in the case of disputes arising out of other articles of the convention. It is not yet known whether the majority of the Western group will take the same position as the U.S.A. and the U.K. The French, in particular, have attached considerable importance to the two key provisions in question, and it seems likely that they should adopt a position similar to that of the U.S.A. and the U.K.

With respect to the "all states" provision, it does not present any special difficulty to the Western group. West Germany, while not prepared to vote for the proposed declaration will not oppose it, but will abstain. Presumably the rest of the Western group will either vote for it like the U.S. and U.K., or abstain on it, like the West Germans.

The Eastern Europeans evidently consider that the proposed "package" contains little for them, and they are therefore not only prepared to vote against the package but are actively opposing it, and, in the words of Mr. Wershof "attempting to wreck it". The Africans and Asians are not unanimously behind the proposal, but evidently a sufficient number of them are willing to support it that it seems likely to succeed if theWest agrees to it. (It is of interest that the proposal has been put forward by Elias of Nigeria, who is the chairman of the Committee of theWhole, and by Khrishna Rao, the Indian Legal Adviser).

.../3

In my view, the proposed compromise, while by no means wholly satisfactory, is one we can live with, the moreso because the alternative is a Convention with no compulsory settlement provisions, with the result that Canada and a large number of western states might have to refuse to ratify or accede to this important Convention. The question arises, however, whether the Canadian delegation should vote for the package (and the convention as a whole, when the question arises) or abstain or vote in favour of the package proposal, and abstain on the convention as a whole on the grounds that the package is inadequate. I consider that given the long and contentious history of the peaceful settlement problem, the "all states" question, and the Part V provisions, it might be misconstrued if Canada and other Western statesobtain the necessary support of the conference to the passage of the compromise proposal by supporting it and then do not support the convention as a whole. In these circumstances I consider that we should not only support the package proposal but, assuming that bither the U.S. or the U.K. is prepared to do likewise, vote for the the convention as a whole (bearing in mind, of course, that such a vote does not commit Canada to ratification of the convention if, on reflection, for any reason we do not consider ratification desirable.) I

I am attaching for your signature, if you agree a telegram to our delegation in Vienna instructing along the lines set out above.

M. CADIEUX

M.C.

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY20	20-3-1-6	CONFD

FM/DE EXT OTT

NO	PRECEDENCE
L-625	FLASH

TO/A VIENNA

INFO Copy X

REF WERSHOF-BEESLEY TELECON MAY20

SUB/SUJ PROPOSED PACKAGE: PEACEFUL SETTLEMENT; PART V PROVISIONS; AND ALL STATES ISSUE.

FOLLOWING FOR WERSHOF

THIS WILL CONFIRM THAT YOU SHOULD VOTE IN FAVOUR OF PROPOSED COMPROMISE CONSISTING OF: (A) COMPULSORY REFERENCE TO INTERNATIONAL COURT OF JUSTICE OF DISPUTES ARISING OUT OF ARTS 50 AND 61; (B) COMPULSORY CONCILIATION OF DISPUTES ARISING OUT OF OTHER ARTICLES IN PART V; (C) CONFERENCE RESIN (PRESUMABLY IN DECLARATION FORM) CALLING ATTENTION OF GENERAL ASSEMBLY TO PROVISIONS IN VIENNA SIGNATURE FORMULA (ALREADY ACCEPTED) AUTHORIZING GENERAL ASSEMBLY TO INVITE STATES OTHER THAN MEMBERS OF UN, SPECIALIZED AGENCIES AND IAEA TO SIGN CONVENTION AND INVITING GENERAL ASSEMBLY TO CONSIDER MATTER OF ISSUING SUCH AN INVITATION.

2. FOREGOING AUTHORITY IS GIVEN ON UNDERSTANDING: (A) THAT PROVISIONS OF CONVENTION WILL NOT BE RETROACTIVE IN THEIR APPLICATION; AND (B) THAT EITHER USA AND UK WILL VOTE IN FAVOUR OF PROPOSED PACKAGE.

3. THIS WILL CONFIRM ALSO YOUR AUTHORITY TO VOTE IN FAVOUR OF CONVENTION AS WHOLE, ASSUMING COMPROMISE PACKAGE IS ACCEPTABLE AND THAT

...2

DISTRIBUTION
LOCAL/LOCALE

NO STD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A.BEESLEY/JS	LEGAL	2-2728	SIG MITCHELL SHARP

EITHER USA OR UK IS LIKEWISE PREPARED TO VOTE IN FAVOUR OF CONVENTION AS WHOLE. SHARP

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY20	20-3-1-6	CONFD
	37	

FM/DE EXT OTT

TO/A	NO	PRECEDENCE
VIENNA	L-623	FLASH
INFO		

REF WERSHOF-BEESLEY TELECON MAY20

SUB/SUJ PROPOSED PACKAGE: PEACEFUL SETTLEMENT; PART V PROVISIONS; AND ALL STATES ISSUE

FOLLOWING FOR WERSHOF

THIS WILL CONFIRM THAT YOU SHOULD VOTE IN FAVOUR OF PROPOSED COMPROMISE CONSISTING OF: (A) COMPULSORY REFERENCE TO INTERNATIONAL COURT OF JUSTICE OF DISPUTES ARISING OUT OF ARTS 50 AND 61; (B) COMPULSORY CONCILIATION OF DISPUTES ARISING OUT OF OTHER ARTICLES IN PART V; (C) CONFERENCE RESIN (PRESUMABLY IN DECLARATION FORM) CALLING ATTENTION OF GENERAL ASSEMBLY TO PROVISIONS IN VIENNA SIGNATURE FORMULA (ALREADY ACCEPTED) AUTHORIZING GENERAL ASSEMBLY TO INVITE STATES OTHER THAN MEMBERS OF UN, SPECIALIZED AGENCIES AND IAEA TO SIGN CONVENTION AND INVITING GENERAL ASSEMBLY TO CONSIDER MATTER OF ISSUING SUCH AN INVITATION.

2. FOREGOING AUTHORITY IS GIVEN ON UNDERSTANDING: (A) THAT PROVISIONS OF CONVENTION WILL NOT BE RETROACTIVE IN THEIR APPLICATION; AND (B) THAT EITHER USA AND UK WILL VOTE IN FAVOUR OF PROPOSED PACKAGE.

3. THIS WILL CONFIRM ALSO YOUR AUTHORITY TO VOTE IN FAVOUR OF CONVENTION AS WHOLE, ASSUMING COMPROMISE PACKAGE IS ACCEPTABLE AND THAT

...2

DISTRIBUTION
LOCAL/LOCALE

NO STD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A. BEESLEY/JS	LEGAL	2-2728	SIG A.S. Mitchell for MITCHELL SHARP

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

EITHER USA OR UK IS LIKEWISE PREPARED TO VOTE IN FAVOUR OF CONVENTION AS WHOLE. SHARP

ACTION REQUEST
FICHE DE SERVICE

J. A. BEESLEY

TO — À
Legal Division

DATE
May 21, 1969

LOCATION — ENDROIT

FROM — DE
O/SSEA/ASMcGill/fl

- ☐ ACTION / DONNER SUITE
- ☐ APPROVAL / APPROBATION
- ☐ COMMENTS / COMMENTAIRES
- ☐ DRAFT REPLY / PROJET DE RÉPONSE
- ☐ MAKE / FAIRE.....COPIES
- ☐ NOTE AND FILE / NOTER ET CLASSER
- ☐ NOTE & RETURN/OR FORWARD / NOTER ET RETOURNER/OU FAIRE SUIVRE
- ☐ P. A. ON FILE / CLASSER
- ☐ REPLY / RÉPONSE
- ☐ SEE ME / ME VOIR
- ☐ SIGNATURE
- ☐ TRANSLATION / TRADUCTION
- ☐ YOUR REQUEST / À VOTRE DEMANDE
- ☐ _____

Tels approved by SSEA (in Cabinet) last night and copy of tel was used for despatch.

003754

20-3-1-6

OTTAWA, May 20, 1969

CONFIDENTIAL

MEMORANDUM FOR THE MINISTER

U.N. Draft Convention on Law of Treaties:
Settlement of Disputes

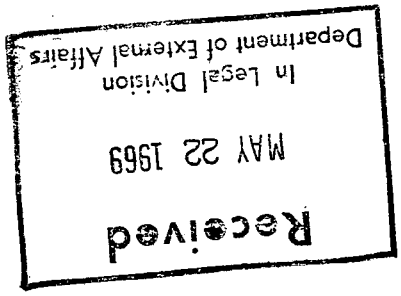
As you will recall from previous memoranda requesting instructions on the positions to be taken by the Canadian delegation to the Vienna Law of Treaties Conference, we have been particularly concerned to ensure that effective procedures are agreed to for the compulsory settlement of disputes by means of third party adjudication. Because of the opposition by the Eastern European and a substantial number of Africans and Asians to compulsory settlement procedures, it has not thus far been possible to achieve the necessary 2/3 agreement on a settlement formula. The Afro-Asian group has, however, now proposed a compromise formula, and our delegation has telephoned late this afternoon for instructions by tomorrow morning on the proposal.

The elements of the proposal combine the three major political issues raised by the conference, namely: (a) the peaceful settlement problem; (b) the right to terminate or suspend treaties on the basis of provisions contained in Part V of the treaty; and (c) the all-states problem; (essentially the East German question, in the context of the Law of Treaties conference). In brief, the proposal is as follows: (1) provides for compulsory adjudication by the International Court of Justice disputes concerning the application of Articles 50 and 61 of the Convention, which together provide that a treaty is void if it conflicts with peremptory norms of general international law; (2) provides for compulsory conciliation of disputes arising out of the other Part V provisions, (such as lack of authority to express state consent, error in a treaty, fraud, corruption of a representative, coercion of a representative, coercion of a state by the threat or use of force, supervening impossibility of performance, and fundamental change of circumstances), leaving states, ultimately, in a position to decide their own rights in the event of failure of conciliation proceedings; (3) the passage by the Conference of a resolution in declaration form drawing to the attention of the General Assembly the provision embodied in the final accession clause of the draft convention (already agreed to) of the possibility of inviting states other than members of the U.N. and of the specialized agencies to accede to the Law of Treaties Convention; and (4) the whole of the provisions of the convention to be applicable to future treaties but not to have retro-active application. (This element is not stated as part of the package, but since a decision has already been reached on this question, it is, in effect, part of the package.)

003755

20.5.7 (US) ASM

.../2



The Western group is apparently somewhat divided on the desirability or otherwise of accepting the package. Both the U.S. and the U.K., however, are prepared to vote for the compromise and, assuming it is successful, to vote in favour of the Convention as a whole, instead of abstaining on it, as has been their intention (and Canada's), as they would do if no solution is reached on the peaceful settlement problem. The major concern of the Western group is that the convention contains so many new or contentious provisions whereby a state could opt out of its treaty commitments, it becomes essential for the future stability of treaty relations (and, hence, international law itself, which is so much based on multilateral treaties) to make adequate provision for third party adjudication of disputes concerning the termination, suspension or interpretation of treaties on the basis of these new or contentious provisions. The provisions with the least legal content, however, and hence the most potentially subjective in their application are Articles 50 and 61, referred to above. Given the fact that the provisions of the treaty will not have retroactive effect, the U.S.A. and the U.K. have concluded that they can live with the Convention so long as it provides for compulsory adjudication by the International Court of Justice of disputes concerning Articles 50 and 61, and compulsory conciliation, (the results of which are not binding on the disputants) in the case of disputes arising out of other articles of the convention. It is not yet known whether the majority of the Western group will take the same position as the U.S.A. and the U.K. The French, in particular, have attached considerable importance to the two key provisions in question, and it seems likely that they should adopt a position similar to that of the U.S.A. and the U.K.

With respect to the "all states" provision, it does not present any special difficulty to the Western group. West Germany, while not prepared to vote for the proposed declaration will not oppose it, but will abstain. Presumably the rest of the Western group will either vote for it like the U.S. and U.K., or abstain on it, like the West Germans.

The Eastern Europeans evidently consider that the proposed "package" contains little for them, and they are therefore not only prepared to vote against the package but are actively opposing it, and, in the words of Mr. Wershof "attempting to wreck it". The Africans and Asians are not unanimously behind the proposal, but evidently a sufficient number of them are willing to support it that it seems likely to succeed if theWest agrees to it. (It is of interest that the proposal has been put forward by Elias of Nigeria, who is the chairman of the Committee of theWhole, and by Khrishna Rao, the Indian Legal Adviser).

.../3

In my view, the proposed compromise, while by no means wholly satisfactory, is one we can live with, the moreso because the alternative is a Convention with no compulsory settlement provisions, with the result that Canada and a large number of western states might have to refuse to ratify or accede to this important Convention. The question arises, however, whether the Canadian delegation should vote for the package (and the convention as a whole, when the question arises) or abstain or vote in favour of the package proposal, and abstain on the convention as a whole on the grounds that the package is inadequate. I consider that given the long and contentious history of the peaceful settlement problem, the "all states" question, and the Part V provisions, it might be misconstrued if Canada and other Western states obtain the necessary support of the conference to the passage of the compromise proposal by supporting it and then do not support the convention as a whole. In these circumstances I consider that we should not only support the package proposal but, assuming that either the U.S. or the U.K. is prepared to do likewise, vote for the the convention as a whole (bearing in mind, of course, that such a vote does not commit Canada to ratification of the convention if, on reflection, for any reason we do not consider ratification desirable.)

I am attaching for your signature, if you agree a telegram to our delegation in Vienna instructing along the lines set out above.

M.C.

File

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY20	20-3-1-C	UNCLAS
	37	

FM/DE EXT OTT

NO	PRECEDENCE
L-624	FLASH

TO/A VIENNA

INFO

REF

SUB/SUJ LAW OF TREATIES CONFERENCE

OUR IMMEDIATELY SUCCEEDING TELEGRAM SHOULD BE DECYPHERED BY 8 AM WED MAY 21 AND CONTENTS TELEPHONED IMMEDIATELY TO WERSHOF AT HOTEL BRISTOL.

DISTRIBUTION
LOCAL/LOCALE

NO STD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A.BEESLEY/JS	LEGAL	2-2728	SIG A. S. McGILL

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003759

File
Commcentre
diary
div.

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 19 1969	20-3-1-6	CONFID
	37	

FM/DE EXT OTT

TO/A	NO	PRECEDENCE
VIENNA (CDN DEL LAW OF TREATIES CONF)		Flash IMMEDIATE
INFO		

REF YOURTEL 431 MAY19

SUB/SUJ LAW OF TREATIES - PART V AND QUESTION OF VOTING APPROVAL OF CONVENTION AS A WHOLE.

1. ON ASSUMPTION NO/NO SATISFACTORY COMPROMISE REACHED RE THIRD PARTY SETTLEMENT CLAUSE, AGREE WITH GREEK SUGGESTION PARA 8 THAT WE SHOULD ABSTAIN ON VOTE ON CONVENTION AS A WHOLE.

~~DISCONNECTED~~

DISTRIBUTION NO STD. 5 c.c. LEGAL DIV. - not done
LOCAL/LOCALE

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. B. MAWHINNEY/ma	LEGAL DIV.		SIG. P.A. BISSONNETTE P.A. BISSONNETTE

003760

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

OTT085

ACTION COPY

PAR091

GVA046VNA19/19

RR OTT

DE VNA

R 191318Z

U N C L A S S I F I E D

FM VIENN MAY19/69 NO/NO STANDARD

TO EXTEROTT 439

REF OURTEL 408 MAY12

LAW OF TREATIES CONFERENCE-SECOND SESSION-SIXTH WEEKLY SUMMARY MAY 12-16

PLENARY HELD TEN MTGS(19TH TO 28TH INCL)THIS WEEK, CONSIDERING ARTS 49(AND RELATED DECLARATION AND RESLN)TO 75, ART 2 AND REVISED DRAFTING CTTEE(DC)VERSIONS OF ARTS 31 AND 32.

ART 49(COERCION OF A STATE)AND RELATED DECLARATION AND RESLN: OURTEL 412 MAY14 CONTAINS DETAILED ACCOUNT OF PLENARY CONSIDERATION OF ART 49 AND RELATED MATERIAL. FOR SAKE OF COMPLETENESS OF THESE SUMMARIES, WE REPEAT FOLLOWING VOTING RESULTS. TEXT OF ART 49 IN CONF.39/13/ADD. 10 WAS ADOPTED ON ROLL CALL VOTE 98(CDA, USA, FRANCE)-0-5(UK). DECLARATION RECOMMENDED BY CTTEE OF WHOLE(CW)IN RAPPORTEURS REPORT(A/CONF. 39/C.1/L.370/REV.1/VOL II AT P254)WAS ADOPTED 102(CDA, USA, UK)-6-4(FRANCE). AFGHAN RESLN IN A/CONF.39/L.32/REV.1, WITH PARA1 ORALLY AMENDED AS INDICATED IN OURTEL 412, WAS ADOPTED 99(USA, UK)-0-4(CDA, FRANCE). CDA MADE STATEMENT IN EXPLANATION OF VOTE AS INDICATED IN OURTEL 412.

ART 50(JUS COGENS)TEXT IN A/CONF.39/13/ADD.10 WAS ADOPTED 87(CDA, USA)-8(FRANCE)-12(UK).

ART 51(TERMINATION BY CONSENT)TEXT IN A/CONF.39/13/ADD.11 WAS ADOPTED 105-0-0.

ART 52(REDUCTION IN NUMBER OF PARTIES)TEXT IN A/CONF.39/13/ADD.11 WAS ADOPTED 105-0-0.

...2

6.20.5

ART 53(DENUNCIATION OF TREATIES WITH NO/NO DENUNCIATION PROVISION) IRAN AMENDMENT TO PARA1(B)IN A/CONF.39/L.35 FAILED (31-23(CDA, USA,UK,FRANCE)-43)TO OBTAIN NECASSARY TWO THIRDS MAJORITY.AUSTRALIAN REQUEST FOR SSPARATE VOTE ON PARA 1(B)WAS OBJECTED TO BY CUBA AND WITHDRAWN.TEXT OF ART IN A/CONF.39/13ADD.11 WAS ADOPTED 95(CDA,USA, UK)-Ø-6(FRANCE).

ART 54(SUSPENSION BY CONSENT)HUNGARIAN AMENDMENT A/CONF.39/L.33 DESIGNED TO BRING ART 54 INTO HARMONY WITH ART 51 WAS ADOPTED 66(CDA USA,FRANCE)-4(UKLAWOATEXT OF ART IN A/CONF.39/13/ADD.11 AS THUS AMEN-DED WAS ADOPTED 131-Ø-3.

ART 55(SUSPENSION BETWEEN CERTAIN PARTIES ONLY)TEXT IN A/CONF.39/ 13/ADD.11 WAS ADOPTED 102-Ø-Ø.

ART 56(TERMINATION OR SUSPENSION IMPLIED FROM LATER TREATY)TEXT IN A/CONF.39/13/ADD.11 WAS ADOPTED 104-Ø-3.

ART 57(TERMINATION OR SUSPENSION AS A CONSEQUENCE OF BREACH)UK AMENDMENT IN A/CONF.39/L.29 WAS VOTED UPON IN THREE PARTS.PROPOSAL IN PARA1 OF AMENDMENT,TO ADD TO PARA 2(A)OF ART FORMULA QUOTE IN WHOLE OR IN PART UNQUOTE WAS ADOPTED 56(CDA,USA,UK,FRANCE)-Ø-33.PROPOSAL IN PARA 1 OF AMENDMENT TO ADD TO PARA 2(A)FORMULA QUOTE INVOKE THE BREACH AS A GROUND UNQUOTE FAILED 42(CDA,UK,FRANCE)-24(USA)-32 TO OBTAIN NECESSARY MAJORITY.PARA 2 OF UK AMENDMENT,WHICH AFFECTS PARA 2(C) OF ART,WAS ADOPTED 45(CDA,USA,UK,FRANCE)-17-34.PRINCIPLE IN SWISS AMENDMENT IN A/CONF.39/L.31 WAS ADOPTED 87(CDA,USA,UK,FRANCE)-Ø-9. ART 57 AS THUS AMENDED WAS ADOPTED 38(CDA,USA,FRANCE)-6-7(UK)AND

...3

REFERRED BACK TO DC.

ART 58(SUPERVENING IMPOSSIBILITY)TEXT IN A/CONF.39/13/ADD.11 WAS ADOPTED 99-0-0.

ART 59(FUNDAMENTAL CHANGE OF CIRCUMSTANCES)TEXT IN A/CONF.39/13/ADD.12 WAS ADOPTED 93(CDA,USA,FRANCE)-3-9(UK).

ART 60(SEVERENCE OF DIPLO OR CONSULAR RELATIONS)TEXT IN A/CONF.39/13/ADD.12 WAS ADOPTED 103-0-0.

ART 61(NEW RULE OF JUS COGENS)CHILEAN AMENDMENT IN A/CONF.39/L.34/CORR.1 WAS WITHDRAWN. ON ROLL CALL VOTE TEXT IN A/CONF.39/13/ADD.12 WAS ADOPTED 84(CDA,USA)-8-16(UK).

ART 62 AND 62 BIS(SETTLEMENT OF DISPUTES)DETAILED REPORT ON CONSIDERATION OF THESE ARTICLES APPEARS IN OURTEL 429 MAY16. TEXT OF ART 62 APPEARING IN A/CONF.39/13/ADD.13 WAS ADOPTED 106-0-2. ART 62 BIS FAILED 62-37-10 TO OBTAIN NECESSARY MAJORITY.

ART 63(INSTRUMENTS DECLARING INVALIDITY,ETC)VERSION OF ART 63 APPEARING IN FRG AMENDMENT A/CONF.39/L.39 WAS ADOPTED 68(CDA)-1-29(USA,UK,FRANCE).

ART 64(REVOCATION OF NOTIFICATIONS)TEXT IN A/CONF.39/13 ADD.13 WAS ADOPTED 94-0-8(CDA,USA,UK,FRANCE).

ART 65(CONSEQUENCES OF INVALIDITY)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 95-1-1.

ART 66(CONSEQUENCES OF TERMINATION)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 101-0-0.

ART 67(CONSEQUENCES OF INVALIDITY-JUS COGENS)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 87(CDA,USA)-5(FRANCE)-12(UK).

ART 68(CONSEQUENCES OF SUSPENSION)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 102-1-1.

ART 69(STATE SUCCESSION,STATE RESPONSIBILITY,HOSTILITIES)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 100-0-3.

ART 69 BIS (DIPLO AND CONSULAR RELATIONS)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 88(CDA,USA,UK,FRANCE).-2-10.

ART 70(AGRESSOR STATE)TEXT IN A/CONF.39/13/ADD.14 WAS ADOPTED 100-0-4.

ART 71(DEPOSITARIES)TEXT IN A/CONF.39/13/ADD.15 WAS ADOPTED 105-0-0

ART 72(FUNCTIONS OF DEPOSITARIES)TEXT IN A/CONF.39/13/ADD.15 WAS ADOPTED 99-0-0. WE MADE BRIEF EXPLANATION OF VOTE REFERING TO QUESTION PUT BY CDN DEL AT 77TH MTG OF CW(OFFICIAL RECORD OF FIRST SESSION, P 460,PARA 26),TO REPLY GIVEN BY EXPERT CONSULTANT(SIR HUMPHREY WALDOCK)AT 78TH MTG (OFFICIAL RECORDS,P 467,PARA 56) AND TO STATEMENT BY REP OF UN SECGEN(STAVROPOULOS)AT 83RD MTG(OFFICIAL RECORD,PP 492-3 PARAS55-56)AS BASIS UPON WHICH WE SUPPORTED ART 72.

ART 73(NOTIFICATIONS AND COMMUNICATIONS)TEXT IN A/CONF.39/13/ADD.15 WAS ADOPTED 104-0-0.

ART 74(CORRECTION OF ERRORS)TEXT IN A/CONF.39/13/ADD.15 WAS ADOPTED 105-0-0.

ART 75(REGISTRATION AND PUBLICATION)TEXT IN A/CONF.39/13/ADD.15 WAS ADOPTED 105-0-0.

ART 2(USE OF TERMS)OURTEL 374 MAY5 REFERS. BELGIAN AMENDMENT IN A/CONF.39/L.8,WHICH HAD BEEN REFERRED TO DC WITHOUT VOTE,WAS NOT/NOT

...5

ADOPTED BY D. TEXT IN A/CONF.39/13 WAS ADOPTED 94-Ø-3.

RECONSIDERATION OF ARTS REFERRED BY PLENARY TO DC: TEXTS OF ARTS 31 AND 32(OURTEL 4Ø8 MAY12 REFERS) APPEARING IN A/CONF.39/17 WERE ADOPTED WITHOUT VOTE.

WERSHOF

NNNNVVVVV

ACTION COPY

20-3-1-6
327 26

done May 19/69 a.m.

COMMCENTRE OTT BRING FOLLOWING TEL TO IMMED ATTN OF DUTY OFFICER''

Reply sent signed by Bissonnette 19/5/69

C O N F I D E N T I A L

FM VIENN MAY19/69 NO/NO STANDARD

TO EXTEROTT 431 IMMED

REF OURTEL 429 MAY16

LAW OF TREATIES-PART V AND QUESTION OF VOTING APPROVAL OF CONVENTION AS A WHOLE

(FOR ACTION IN LEGAL DIV TODAY, MON)

ALTHOUGH SOME COMPROMISE SOLUTIONS TO DISPUTES SETTLEMENT PROBLEM ARE BEING DISCUSSED IT IS LIKELY THAT NOTHING WILL EMERGE. WE WILL THEN BE FACED EITHER TOMORROW OR WED LATEST WITH VOTE ON APPROVAL OF CONVENTION AS A WHOLE.

2. ASSUMING NO/NO ACCEPTABLE COMPROMISE, UK DEL HAS ASKED LDN FOR AUTHORITY EITHER TO ABSTAIN OR POSSIBLY VOTE AGAINST CONVENTION AS WHOLE USA DEL THINKS IT WILL ABSTAIN. OTHER WEO DELS ARE LIKELY TO SPLIT ON THIS BUT WE WILL NOT/NOT KNOW FOR A WHILE. KEARNEY(USA) SAYS SOME UNIDENTIFIED WEO DELS ARE EVEN TALKING OF TRYING TO DEFEAT ADOPTION OF CONVENTION AS A WHOLE BY GATHERING A BLOCKING THIRD OF NEGATIVE VOTES. I THINK THIS WOULD BE VERY FOOLISH AND KEARNEY DOES NOT/NOT FAVOUR IT.

3. IN VIEW OF CDN STATEMENT LAST YEAR AND THIS SESSION THAT PART V NOT/NOT SATISFACTORY WITHOUT THIRD-PARTY SETTLEMENT CLAUSE(AND ASSUMING NO/NO ACCEPTABLE COMPROMISE EMERGES) WE RECOMMEND CDA ABSTAIN ON THIS VOTE AND EXPLAIN BRIEFLY(INDICATING INTER ALIA THAT ABSTENTION IS WITHOUT PREJUDICE TO LATER CDN GOVT DECISION ON WHETHER TO SIGN CONVENTION). IF VOTE COMES BEFORE YOUR REPLY RECEIVED WE WILL ACT

...2

Vague (But we should put it to Cabinet)

003766

8120-5

ACCORDINGLY IF AT LEAST USA AND UK ABSTAIN(OR VOTE AGAINST).

4. WE PLAN TO SIGN FINAL ACT WHICH IS MERELY THE FORMAL RECORD OF WHAT CONFERENCE DECIDED.

WERSHOF

.....

Commcentre
diary
[redacted]v.

MESSAGE

EXT OTT

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 19 1969	20-3-1-6	CONFID
	37	

FM/DE

NO	PRECEDENCE
	Flash ~~IMMEDIATE~~

TO/A VIENNA (CDN DEL LAW OF TREATIES CONF)

INFO

REF YOURTEL 431 MAY19

SUB/SUJ LAW OF TREATIES - PART V AND QUESTION OF VOTING APPROVAL OF CONVENTION AS A WHOLE.

1. ON ASSUMPTION NO/NO SATISFACTORY COMPROMISE REACHED RE THIRD PARTY SETTLEMENT CLAUSE, AGREE (with your suggestion para 3) THAT WE SHOULD ABSTAIN ON VOTE ON CONVENTION AS A WHOLE.

~~BISSONNETTE~~

DISTRIBUTION NO STD. 5 c.c. LEGAL DIV. - not done
LOCAL/LOCALE

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B. MAWHINNEY/ma	LEGAL DIV.		SIG P.A. BISSONNETTE

003768

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

INFO ONLY

C O N F I D E N T I A L

FM DELHI MAY16/69 NO/NO STD

TO TT VIENN(ROBERTSON)1604 PRIORITY DE LDN

INFO EXTER(BESSLEY)PRIORITY

LAW OF TREATIES CONFERENCE: KRISHNA RAOS RELATIVE GOPAL APPLIED IN NORMAL WAY FOR IMMIG VISA LAST YEAR AND FAILED TO MEET NECESSARY CRITERIA. KRISHNA RAO THEN RAISED SUBJ WITH US AND WE CHECKED WITH OUR IMMIG OFFICE AND INFORMED RAO OF POSITION. (WE MIGHT MENTION THAT RAO ORIGINALLY TOLD US THAT GOPAL HAD NEVER AN ANSWER TO HIS APPLICATION WHICH WAS UNTRUE). RAO RAISED POSSIBILITY OF GOPAL GOING TO UNIVERSITY IN CDA AND WE THEREFORE PROVIDED GOPAL WITH INFO ABOUT CDN UNIVERSITIES. GOPAL TOLD US RECENTLY THAT HE HAD APPLIED FOR ENTRY INTO CALGARY UNIVERSITY. IF HE OBTAINS ENTRY AND CAN MEET FINANCIAL REQUIREMENTS, WHICH HE SAYS HE CAN, HE CAN OBTAIN STUDENT VISA BUT THIS WILL NOT/NOT PERMIT HIM TO REMAIN IN CDA AS IMMIG. GOPAL ALSO RAISED RECENTLY POSSIBILITY OF HIS IMMIG APPLICATION BEING RECONSIDERED ON BASIS OF LETS FROM CDN FIRMS INDICATING THAT THEY MIGHT EMPLOY HIM IF HE SOUGHT JOB AFTER ARRIVAL IN CDA.

2. WE APPRECIATE RAOS IMPORTANCE AT CONFERENCE BUT WE WERE SOMEWHAT SURPRISED WHEN HE BROADLY HINTED TO US BEFORE CONFERENCE THAT WE SHOULD OPEN IMMIG DOORS TO HIS RELATIVE BECAUSE INDIANS WERE(FOR REASONS UNCONNECTED WITH GOPAL)GOING TO VOTE AS WE WISHED ON ARTICLE5(2)AS THEY HAD PROMISED TO DO LONG BEFORE. WE ARE TAKING ALL THE APPROPRIATE STEPS TO SEE THAT RAOS NEPHEW GETS FULL INFO AND FAIR CHANCE TO GET TO CDA. NATURALLY WE CANNOT/NOT DO MORE THAN THAT.

...2

20-3-1-6

003769

3. WE SUGGEST THAT YOU TELL KRISHNA RAO THAT GOPAL HAS BEEN IN TOUCH WITH US AGAIN AND THAT HIS APPLICATION FOR STUDENT VISA WILL BE GIVEN PROMPT ATTENTION AS SOON AS RECEIVED. YOU COULD ADD THAT WE RECENTLY ASKED HIM TO CONTACT SENIOR IMMIG ATTACHE ABOUT POSSIBILITY OF EMIGRANT VISA BEING RECONSIDERED. SINCE HE HAD FAILED TO DO SO WE SPOKE TO GOPAL AGAIN TODAY AND SENIOR IMMIG ATTACHE HAS JUST SEEN HIM. AFTER EXAM LETS FROM POSSIBLE EMPLOYERS IMMIG ATTACHE FOUND NOTHING TO JUSTIFY REVIEWING EARLIER DECISION. YOU MAY TELL KRISHNA RAO THIS AND EMPHASIZE THAT WE HAVE GIVEN AND ARE GIVING HIS RELATIVE FULL CONSIDERATION AND FAIR TREATMENT IN ACCORDANCE WITH OUR OWN IMMIG REGS.

ACTION COPY

RESTRICTED

FM VIENN MAY16/69 NO/NO STANDARD

TO EXTEROTT 429 IMMED

REF OURTEL 385 MAY7

20-3-1-6

LAW OF TREATIES-SETTLEMENT OF DISPUTES UNDER PART V

CONSULTATIONS SEEKING GENERAL ACCEPTABLE COMPROMISE HAVING FAILED, DEBATE IN PLENARY ON ARTS 62 AND 62 BIS BEGAN MAY15. ART62 WAS ADOPTED 106(CDA)-0-2 AFTER MANY WESTERN DELS MADE CLEAR THAT FAVOURABLE VOTE WAS CONDITIONAL ON WHAT WOULD HAPPEN TO 62 BIS. LENGTHY AND AT TIMES ANGRY DEBATE ON 62 BIS ENSUED BUT WAS NOT/NOT COMPLETED. OVERNIGHT ONE OF MANY COMPROMISE IDEAS WAS REVIVED BY STAVROPOULOS AND WAS CONSIDERED BY REGIONAL GROUPS FRI MORNING; IT WAS THAT FOLLOWING PARA BE ADDED TO 62 BIS QUOTE A PARTY TO THIS CONVENTION MAY MAKE A RESERVATION TO THIS ARTICLE BUT SUCH A PARTY SHALL NOT/NOT BE ENTITLED TO INVOKE THE PROVISIONS OF PART V OF THIS CONVENTION AGAINST A PARTY THAT HAS NOT/NOT MADE SUCH A RESERVATION UNLESS THEY HAVE OTHERWISE EXPRESSLY PROVIDED IN A SUBSEQUENT TREATY UNQUOTE. MOST BUT NOT/NOT ALL WEO WERE WILLING TO ACCEPT THIS(WITH VARYING DEGREES OF RELUCTANCE). HOWEVER AFRO-ASIAN GROUP SPLIT AND ACCORDINGLY THIS COMPROMISE WAS NOT/NOT PUT FORWARD IN PLENARY.

2. DEBATE RESUMED IN PLENARY LATER FRI MORNING. ART 62 BIS INCLUDING ITS ANNEX WAS PUT TO ROLL-CALL VOTE AND FAILED TO GET NECESSARY TWO-THIRDS MAJORITY. VOTE WAS 62-37-10.

3. AT TIME OF WRITING THIS NOON FRI WE DO NOT/NOT KNOW WHETHER ANY NEW ATTEMPTS TO ACHIEVE GENERALLY ACCEPTABLE SETTLEMENT PROCEDURE

...2

003771

13165

WILL BE MADE. IF NOT/NOT NEXT QUESTION FOR WEO WILL BE HOW TO VOTE BEGINNING OF NEXT WEEK ON CONVENTION AS A WHOLE. WE WILL CONSULT YOU URGENTLY AS SOON AS WE KNOW VIEWS OF OUR PRINCIPAL FRIENDS.

WERSHOF

R E S T R I C T E D

FM VIENN MAY15/69 NO/NO STANDARD

TO TT EXTEROTT 416 PRIORITY DE PARIS

INFO TT DELHI DE LDN

LAW OF TREATIES CONFERENCE:REQUEST FOR FAVOUR FROM KRISHNA RAO

FOLLOWING FOR BEESLEY FROM ROBERTSON

APPARENTLY KRISHNA RAO(INDIA)APPROACHED YOU BEFORE YOUR RETURN OTT TO ASK FOR ASSISTANCE FROM CDN HIGHCOMM IN DELHI CONCERNING WISH OF A RELATIVE(MR AV GOPAL)TO GO TO CDA AND BEESLEY HAD AGREED TO BRING MATTER TO ATTN OF REESE OR GEORGE IN DELHI.

2. RAO APPROACHED US AGAIN MAY14 TO ASK WHETHER IT HAD BEEN POSSIBLE TO DO ANYTHING IN THIS REGARD.

3. GIVEN IMPORTANCE RAOS ROLE AT CONFERENCE(AND POSSIBILITY OF HIS GOING ON ILC IN FUTURE)AND HIS HELP TO CDA AT CONFERENCE,GRATEFUL FOR ANY INFO WE CAN PASS ON TO HIM SOONEST.

PAR044

cc Mr Bissonnette done

Mr Beesley

Mr McKinney

GVE 27

VNA7/15

RR OTT RR NYK

DE VNA

ACTION COPY

R 150954Z

U N C L A S S I F I E D

FM VIENN MAY15/69 NO/NO STANDARD

TO EXTEROTT 417

INFO PRMISNY

REF YOURTEL L592 MAY13

LAW OF TREATIES CONFERENCE

CONFERENCE SCHEDULED TO END SAT MAY24 UNLESS UNEXPECTED DEVELOPMENTS. STANFORD HAD MADE EARLIEST FEASIBLE BOOKING LEAVING SUN MAY25 AND SHOULD BE AT HIS DESK MON MORNING.

WERSHOF

1515

Have we enough copies ?

Cher M. Beesley,

Merci encore une fois!

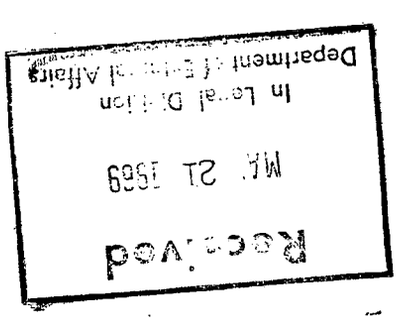
Voici, ci-joint, copies pour vous, M. Marcel Cadieux, M. C. Roquet et M. April. Also Mr. Wershof & Mr. Robertson (Rennis, N.Y.)

Mes amitiés,

André Laudrecault
"Le Soleil"

15/5/69

Copies sent 5/28/69 D.P.



VU D'OTTAWA

(1)

13/5/69

Décision de l'ONU à Vienne sur le droit des traités

par Amédée GAUDREAULT

OTTAWA — Un événement d'une très grande portée internationale (particulièrement pour le Canada dont le "cas", dû aux attentions du général de Gaulle, a d'ailleurs joué un rôle prépondérant dans un net revirement de l'opinion mondiale) s'est produit à Vienne le 28 avril dernier, jour même où l'ancien président de la France quittait son poste incidemment.

Ce jour-là, dans la capitale autrichienne, au sein de la commission du droit international de l'ONU qui se penche depuis des années, des décennies même, sur la question de la conclusion des traités, on a éliminé, par un vote de 66 contre 28 et 13 abstentions, le 2e paragraphe de l'article 5 d'un projet de document portant sur "la capacité des Etats de conclure des traités".

L'article 5 disait ceci:

1—Tout Etat a la capacité de conclure des traités.

2—Les Etats membres d'une union fédérale peuvent avoir la capacité de conclure des traités si cette capacité est admise par la constitution fédérale et dans les limites indiquées dans la dite constitution.

Pourtant, ce paragraphe 2 avait été endossé l'an dernier à deux reprises par le même organisme international, soit par des votes de 45 contre 38 et 10 abstentions, puis 46 contre 39 et 8 abstentions.

Mais entre-temps, était survenu à Paris l'incident de la signature d'un document dont on ne sait trop s'il s'agit d'un accord ou d'un traité avec le Québec pour l'utilisation (ou peut-être ... l'étude pouvant mener à l'utilisation, puisque MM. Bertrand et Dozois ont soutenu qu'aucune dépense n'avait été autorisée) de satellites. En outre, un grand nombre de pays étaient sous l'impression qu'à part le fameux cri "séparatiste" du général de Gaulle en juillet 1967 à Montréal, le président français s'était tenu à l'écart des affaires canadiennes et maints diplomates n'ont que tout récemment appris comment le gouvernement de Gaulle a pu manipuler, depuis deux ans, certaines ficelles pour créer les ennuis que l'on sait au gouvernement canadien lors de la conférence des ministres de l'Education de la francophonie tenue à Libreville, au Gabon, l'an dernier, et plus récemment à la conférence de Niamey, au Niger. Pour que des "invitations" soient adressées directement au Québec dans ces deux cas, il fallut, en somme, que de l'étranger (de Niamey et Libreville, mais en réalité de l'Elysée, grâce surtout aux bons soins de MM. de Gaulle, maintenant parti, Foccart, homme ... d'oeuvres déjà limogé par M. Poher, Rossillon, Dorin, Desfosses et compagnie, sans oublier les exécutants officiels dévoués, Debré, de Lipkosky et de Murville) on interprétât la constitution canadienne. Ce qu'on essaya de faire aussi quand on tendit la plume, à Paris, à M. Jean-Guy Cardinal.

Car c'est là qu'est le hic. Si l'on lit bien le paragraphe 2 de l'article 5 du projet soumis à la Commission du Droit International sur la question des traités à Vienne, on constate que ce texte ne dit pas spécifiquement qui, lorsque ceci n'est pas indiqué dans une constitution, peut décider si un Etat membre d'une union fédérale peut conclure un traité avec un pays étranger. Pareil texte peut donc entraîner le risque "grave et inadmissible", ont affirmé plusieurs pays, de voir une capitale étrangère interpréter la constitution d'une union fédérale.

En somme, c'est ce qui a été tenté par la France avec le Québec, ce qu'Ottawa a refusé d'accepter, faisant même parvenir une note de "regrets" au gouvernement de Paris.

A Vienne, le mois dernier, les seuls pays qui ont épousé la thèse de Paris ont été ses anciennes colonies "libres" (pas toutes, certaines ont osé s'abstenir de voter), notamment le Gabon, la Côte-d'Ivoire (forcée de refuser du blé canadien gratuit il n'y a pas si longtemps), de même que les pays arabes, ce qui n'est pas... un mystère, dirait-on à Tel-Aviv. Les pays communistes étaient aussi de la même ... fournée mais pour une raison qui est du plus haut comique: Moscou voulait épauler la présence de deux "Etats" de l'URSS, l'Ukraine et la Biélorussie, aux Nations-Unies à titre d'Etats indépendants. On sait cependant ce que pareille indépendance vaut en pratique au sein d'une fédération du genre de l'URSS quand un pays voisin et "allié" comme la Tchécoslovaquie n'est même pas capable de modifier sa formule économique sans se faire amicalement envahir. Si les Ukrainiens apprennent un jour qu'ils ont le droit de conclure seuls des traités, ça va sûrement leur faire un velours historique sur l'épine dorsale.

Contre la thèse française (du moins celle qui prévalait jusqu'au 28 avril) et celle de Moscou, on assista à Vienne au rassemblement de toutes les grandes unions fédérales du monde: Etats-Unis, Grande-Bretagne, Inde, Canada, Mexique, Australie, Suisse, Brésil, Allemagne Fédérale, etc., tiens, pourquoi ne pas donner au complet cet éloquent alignement:

Pour le maintien du deuxième paragraphe de l'article 5: Afghanistan, Algérie, Bulgarie, Biélorussie, Afrique Centrale, Cuba, Tchécoslovaquie, Equateur, France, Gabon, Hongrie, Indonésie, Iraq, Côte-d'Ivoire, Kuwait, Madagascar, Monaco, Mongolie, Maroc, Népal, Pologne, Roumanie, Syrie, Turquie, Ukraine, URSS, République Arabe Unie et Yougoslavie.

Contre, Argentine, Autriche, Australie, Barbade, Belgique, Bolivie, Brésil, Birmanie, Cameroun, Canada, Ceylan, Chili, Chine (Formose), Colombie, Congo, Costa Rica, Chypre, Danemark, République Dominicaine, El Salvador, Ethiopie, République Fédérale Allemande, Ghana, Grèce, Guatemala, Guinée, Honduras, Inde, Iran, Irlande, Israël, Italie, Jamaique, Japon, Libéria, Liechtenstein, Luxembourg, Malaysia, Malte, Mauritanie, Mexique, Hollande, Nouvelle-Zélande, Nigeria, Norvège, Pakistan, Panama, Pérou, Philippines, Portugal, Corée, Vietnam, San Marino, Singapour, Afrique-du-Sud, Espagne, Suède, Suisse, Trinidad et Tobago, Grande-Bretagne, Etats-Unis, Uruguay, Venezuela et Zambie.

Pareil vote constitue donc un désaveu d'une interprétation du droit international que tentait de mousser la France, ceci par la quasi-totalité des pays du monde libre et d'ailleurs, on se demande si de Gaulle parti, la France voudra continuer son petit jeu.

Ceci démontre également que la diplomatie canadienne a su éveiller l'opinion mondiale et bien plaider une cause qui n'intéressait que peu de pays il y a un an encore, comme par exemple la Suisse, qui a soudain saisi toutes les implications de la situation.

Le récent vote de Vienne ne cause aucun préjudice à des Etats membres d'unions fédérales qui auraient déjà, en vertu de constitutions existantes ou encore de "traités parapluies" comme Ottawa en a déjà conclu un avec Paris il y a quelques années dans les domaines de la culture et de l'éducation, la permission de signer certaines ententes. Incidemment, à Vienne, de nombreux pays ayant un système fédéral ont appris l'existence de l'accord-cadre signé par Paris et Ottawa il y a trois ans et se proposent de recourir à un tel mécanisme si l'occasion s'en présente, chez eux. Parmi les pays qui s'opposaient le plus au maintien de 2e paragraphe de l'article 5 se trouvaient des nouvelles unions fédérales qui redoutaient que l'on essaie, en recourant à des trucs du genre de ceux du général de Gaulle, de diviser et même de détruire un jour leurs fédérations.

Dans les discours qui ont précédé le vote, l'on s'en est tenu, à Vienne, à discuter strictement les points de droit international en cause, le Canada s'abstenant par exemple de donner des exemples précis d'interprétation "étrangère" d'une constitution et n'allant pas plus loin que de dire: ça peut arriver. Le chef de la délégation italienne, sans vouloir faire de l'humour a-t-on assuré, a noté que le seul (autre, sans doute...) précédent historique d'intervention connu remontait à quelque 400 ans, alors qu'une principauté italienne avait voulu signer un traité avec la France.

Le Canada, pour sa part, ne s'est pas opposé, à Vienne, au paragraphe 1 de l'article 5, signalant qu'il a déjà démontré, au moyen d'accords-cadres, qu'il est prêt à permettre la signature de certaines ententes entre ses provinces et d'autres pays, mais Ottawa a qualifié le paragraphe 2 de "dangereusement incomplet", surtout pour un pays comme le nôtre où "une bonne partie de la constitution n'est pas écrite" et où il y a un "danger réel" que tel paragraphe "mène à la pratique totalement inacceptable d'un pays étranger essayant de s'arroger le droit d'interpréter notre constitution", un "document qui ne peut s'interpréter qu'à l'intérieur du pays concerné". Les pays qui ont favorisé le maintien du paragraphe 2 ont commodément "oublié" cet argument de l'interprétation d'une constitution par des "étrangers".

(2)

L'Australie (comme le Canada) a indiqué que le texte proposé ne disait pas qui devrait être tenu responsable de toute violation d'un traité (l'Etat ou l'union fédérale) ou à qui on pourrait se plaindre en cas de litige. (Entre nous, supposons que M. Cardinal ait signé un vrai traité à Paris et qu'un jour, la France réclame vainement quelques dizaines de millions de dollars pour un programme de satellites, où devrait-on s'adresser, en dernier ressort?). Pour l'Inde, un membre d'une union fédérale peut signer des traités, mais sous la responsabilité fédérale car il s'agit d'une "question qui relève uniquement des lois internes de chaque fédération": Il serait donc "peu sage de codifier aussi prématurément (qu'on veut le faire avec le paragraphe 2) le droit international avec un texte qui peut permettre à un tiers pays d'interpréter la constitution d'une union fédérale, ce qui pourrait ouvrir la voie à des interventions très graves". L'Uruguay: "Il est impensable pour un pays de laisser à un autre le droit d'interpréter sa constitution."

Les Etats-Unis ont abondé dans le même sens, affirmant qu'on n'a "apporté aucun argument de valeur indiquant que le paragraphe 2 évitera des difficultés, mais qu'au "contraire on a démontré que cet article pourrait en créer à plusieurs pays dans sa forme actuelle" quand des tiers pays voudront interpréter une constitution, qui "est un document interne dont l'interprétation doit tomber exclusivement sous la juridiction des tribunaux des Etats fédéraux". La République Fédérale Allemande ne veut pas elle non plus d'intervention étrangère et n'accepterait le droit de signer des traités pour un membre d'une union fédérale que si la constitution de cette union le stipule ou si le pouvoir central y consent.

Pour revenir au Canada, celui-ci a soutenu que le paragraphe 2 assume "fort incorrectement" que la constitution de chaque pays parle par elle-même et que cela suffit à trancher la question. Il y a des cas où les constitutions sont amendées à la suite de décisions rendues par des tribunaux. Ailleurs, comme au Canada, une bonne partie de la constitution n'est pas écrite. La tradition constitutionnelle est alors aussi importante que les textes. Et "notre expérience confirme que dans un pays comme le Canada, qui a accédé à son indépendance au cours d'une évolution graduelle de sa tradition constitutionnelle, dont une partie n'est pas écrite, la possibilité qu'un autre pays puisse interpréter sa constitution comporte un réel danger."

Le vote du 28 avril à Vienne et les interventions dont j'ai donné ci-haut quelques résumés indiquent que le fameux paragraphe 2 de l'article 5 d'un projet de l'ONU sur les traités internationaux, qui est disparu, peut-être symboliquement, le jour où le général de Gaulle abandonnait la présidence française, n'est pas près de revenir à la surface.

Mais si MM. Debré et de Murville n'avaient été (sait-on jamais?...) que des opportunistes bientôt prêts à en suivre servilement "un autre" dans une direction totalement opposée, abandonnant, ses "claques" (à tapis rouge) à la main, notre sémillant M. Jean-Guy Cardinal, que devrait faire celui-ci ? Il pourrait toujours s'adresser à Cuba, au Gabon ou encore à l'Ukraine, en toute indépendance...

(30)

DEPARTMENT OF EXTERNAL AFFAIRS

Subject FRANCE-CANADA RELATIONS

Date 14 May 1969 Publication Toronto Daily Star

Copies to: SSEA
C. Roquet
A. Bissonnette
Beasley, Legal

Stansfield, Coordination
Ivan Head, O/SSEA
Marc Lalonde, O/SSEA
Romeo Leblanc, O/SSEA

20-3-1-6
37

Canada got UN snub for de Gaulle

By FRANK JONES
Star staff writer

OTTAWA — On the day that French President Charles de Gaulle resigned last month, Canada persuaded a large majority of the members of the United Nations to say in effect that de Gaulle was wrong to interfere in Canadian affairs.

The world snub for de Gaulle happened at a little-publicized UN conference in Vienna on international law.

Although the external affairs department will not admit it, the snub came after Canada contacted countries around the world to detail for them how de Gaulle was trying to drive a wedge between Canada and the federal government.

The vote came on a clause in an internationsl agreement on treaties which has been 20 years in the making and which is expected to be concluded by the end of the conference on May 21.

FRANCE BOUND

At this stage it seems likely all member nations will ratify the agreement. This means that if France interferes in Canadian affairs in future Ottawa will have a powerful new argument that UN members have rejected de Gaulle-type interference, and that France is bound by the international agreement.

The important clause in the agreement dealt with the right of states to conclude treaties and said two things:

"Every state possesses the capacity to conclude treaties.

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

Canadian delegates argued that the clause left the door open for one state to interpret another state's constitution as it sees fit and to move right in and conclude treaties with component parts of the other state.

PRIVATE TALKS

They pointed out in private talks with other delegations that this is exactly what de Gaulle tried to do in the case of Canada.

As a result of Canada's campaign the conference voted April 28, within hours of de Gaulle's resignation, to strike the clause from the agreement by a vote of 66 to 28 with 13 abstentions.

Significantly a large number of the vote to retain the clause were cast by France, its former colonies and the Arab countries (which are grateful to France for its recent stand against Israel).

The rest of the vote to retain the clause came from the Russian block which had campaigned for its retention on the grounds that it meets the needs of Russia's constitution.

20-3-1-6

DEPARTMENT OF EXTERNAL AFFAIRS

20-3-1-6

Subject FRANCE-CANADA RELATIONS

Date 14 May 1969 *Publication* Toronto Daily Star

Copies to: SSEA
C. Roquet
A. Bissonnette
Beasley, Legal

Stansfield, Coordination
Ivan Head, O/SSEA
Marc Lalonde, O/SSEA
Romeo Leblanc, O/SSEA

Canada got UN snub for de Gaulle

By FRANK JONES
Star staff writer

OTTAWA — On the day that French President Charles de Gaulle resigned last month, Canada persuaded a large majority of the members of the United Nations to say in effect that de Gaulle was wrong to interfere in Canadian affairs.

The world snub for de Gaulle happened at a little-publicized UN conference in Vienna on international law.

Although the external affairs department will not admit it, the snub came after Canada contacted countries around the world to detail for them how de Gaulle was trying to drive a wedge between Canada and the federal government.

The vote came on a clause in an internationsl agreement on treaties which has been 20 years in the making and which is expected to be concluded by the end of the conference on May 21.

FRANCE BOUND

At this stage it seems likely all member nations will ratify the agreement. This means that if France interferes in Canadian affairs in future Ottawa will have a powerful new argument that UN members have rejected de Gaulle-type interference, and that France is bound by the international agreement.

The important clause in the agreement dealt with the right of states to conclude treaties and said two things:

"Every state possesses the capacity to conclude treaties.

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

Canadian delegates argued that the clause left the door open for one state to interpret another state's constitution as it sees fit and to move right in and conclude treaties with component parts of the other state.

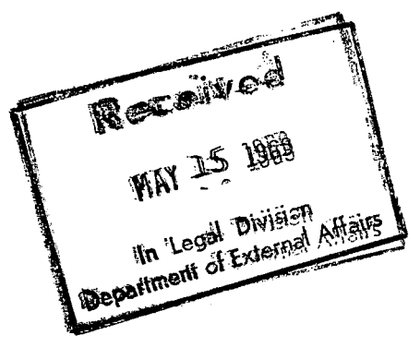
PRIVATE TALKS

They pointed out in private talks with other delegations that this is exactly what de Gaulle tried to do in the case of Canada.

As a result of Canada's campaign the conference voted April 28, within hours of de Gaulle's resignation, to strike the clause from the agreement by a vote of 66 to 28 with 13 abstentions.

Significantly a large number of the vote to retain the clause were cast by France, its former colonies and the Arab countries (which are grateful to France for its recent stand against Israel).

The rest of the vote to retain the clause came from the Russian block which had campaigned for its retention on the grounds that it meets the needs of Russia's constitution.



J. A. BEESLEY

ACTION COPY

Feb 20-3-1-68

C O N F I D E N T I A L

FM VIENN MAY14/69 NO/NO STANDARD

TO EXTEROTT 412

REF YOURTEL L583 MAY8

LAW OF TREATIES: ARTICLE 49

FORTUNATELY CHILE AND PERU CHANGED THEIR MINDS AT LAST MOMENT AND DID NOT/NOT ASK FOR SEPARATE VOTE ON PHRASE IN QUESTION. WE THEREFORE DID NOT/NOT HAVE TO OFFEND EITHER SIDE.

2. DEBATE CENTRED INSTEAD ON SAME ISSUE WHICH HAD PREOCCUPIED CONFERENCE DURING DISCUSSION OF ART 49 AT CTTEE OF WHOLE(CW) STAGE IN FIRST SESSION, NAMELY WHETHER WORD QUOTE FORCE UNQUOTE IN ART 49 EXTENDED BEYOND MILITARY FORCE TO INCLUDE POLITICAL AND ECONOMIC PRESSURE. YOU WILL RECALL ISSUE WAS RESOLVED IN CW BY ADOPTION OF TEXT OF ART 49, WHICH DID NOT/NOT REFER TO POLITICAL OR ECONOMIC PRESSURE, TOGETHER WITH DRAFT DECLARATION CONDEMNING QUOTE THREAT OR USE OF PRESSURE IN ANY FORM, MILITARY, POLITICAL OR ECONOMIC UNQUOTE TO PROCURE CONCLUSION OF TREATY. (TEXT OF ART AND DRAFT DECLARATION APPEAR IN RAPPORTEURS REPORT A/CONF. 39/C. 1/L. 370/REV. 1/VOL II AT P. 254).

3. AT CONCLUSION OF DEBATE ON ART 49, TOWARDS END OF PLENARY SESSION FRI AFTERNOON MAY9, AFGHANISTAN(WHICH HAD BEEN ONE OF PRINCIPAL SPONSORS OF AMENDMENT C. 1/L. 67/REV. 1 IN CW SEEKING TO INTRODUCE REF TO POLITICAL AND ECONOMIC PRESSURE IN ART 49) ASKED FOR POSTPONEMENT OF VOTING ON ART 49 AND DECLARATION SO THAT IT MIGHT HAVE TIME TO PRESENT WHAT AFGHAN REP DESCRIBED AS AMENDMENT TO DECLARATION TO MAKE CERTAIN DRAFTING AND PROCEDURAL ALTERATIONS. IN COMPLIANCE WITH AFGHAN

...2 8/14/5

REQUEST, PLENARY ADJOURNED FRI WITHOUT VOTING ON ART 49 OR DECLARATION

4. NEW PROPOSAL BY AFGHANISTAN (CONF. 39/L. 32) (TEXT BY BAG), WHICH WAS NOT/NOT AN AMENDMENT TO CW DECLARATION BUT A NEW AND ADDITIONAL RESLN BECAME AVAILABLE EARLY FRI EVENING AND WAS SUBJ OF CONSIDERABLE DISCUSSION DURING WEEKEND. TWO PRINCIPAL FACTORS BECAME EVIDENT FROM DISCUSSION. FIRST WAS WIDE-SPREAD VIEW IN WESTERN GROUP THAT PREAMBULAR PARAS, WHICH CONTAINED ESSENCE OF NEW PROPOSAL, WENT TOO FAR IN SEEKING TO ESTABLISH PRINCIPLE THAT POLITICAL AND ECONOMIC PRESSURE CONSTITUTED USE OF FORCE IN VIOLATION OF INNATL LAW (IN PARTICULAR UN CHARTER AND ART 49). SECOND FACTOR WAS ABSENCE OF SOLID AFRO-ASIAN SUPPORT FOR AFGHAN PROPOSAL. WE UNDERSTAND MANY AFRICAN STATES IN PARTICULAR WERE ANNOYED THAT AFGHANS HAD WITHOUT PRIOR CONSULTATION WITH AFRICANS REOPENED, AN ISSUE ON WHICH COMPROMISE SETTLEMENT HAD BEEN REACHED LAST YEAR.

5. RESULT OF WEEKEND DISCUSSIONS WAS THAT AFGHAN INTRODUCED REVISION (CONF. 39/L. 32/REV. 1) OF ITS PROPOSAL, ENTIRELY OMITTING CONTROVERSIAL PREAMBLE PARAS AND CONTAINING TWO OPERATIVE PARAS CALLING UPON UN SECGEN AND ALL STATES PARTIES TO DISSEMINATE DECLARATION RECOMMENDED BY CW.

6. FIRST ITEM OF BUSINESS AT PLENARY SESSION MAY12 WAS VOTE ON ART 49. ONROLL CALL VOTE CW TEXT APPEARING IN CONF. 39/13/ADD. 10 WAS ADOPTED 98 (CDA, USA, FRANCE)-0-5 (UK). AT AFTERNOON SESSION MAY12 PLENARY ADOPTED CW DECLARATION 102 (CDA, USA, UK)-0-4 (FRANCE). AFGHAN RESLN IN CONF. 39/L. 32/REV. 1 WAS ORALLY AMENDED BY AFGHANISTAN TO ALTER OPERATIVE

...3

PARA1 TO READ QUOTE INVITES THE SECGEN OF THE UN TO BRING DECLARATION TO ATTN OF ALL MEMBER STATES OF UN AS WELL AS THOSE PARTICIPATING IN THIS CONFERENCE AND PRINCIPAL ORGANS OF UN UNQUOTE. RESLN THUS AMENDED WAS ADOPTED BY PLENARY BY 99(USA, UK)-Ø-4(CDA, FRANCE). WE ABSTAINED ON AFGHAN RESLN BECAUSE WE CONSIDER INAPPROPRIATE THE REQUIREMENT FOR DISSEMINATION BY INDIVIDUAL MEMBER STATES(IN ADDITTION TO DISSEMINATION BY UN SECGEN).

7. FOLLOWING VOTES ON DECLARATION AND RESLN WE MADE BRIEF STATEMENT IN EXPLANATION OF VOTE ON DECLARATION. IN DEBATE SEVERAL AFRO-ASIAN DELS HAD EXPRESSED VIEW THAT DECLARATION MEANT AND ESTABLISHED THAT QUOTE FORCE UNQUOTE IN ART 2 OF UN CHARTER AND IN ART 49 OF CONVENTION INCLUDED POLITICAL AND ECONOMIC PRESSURE. WE STATED THAT WHILE CDN GOVT AGREED ENTIRELY WITH CONDEMNATION, AS EXPRESSED IN DECLARATION, OF USE OF MILITARY, POLITICAL OR ECONOMIC PRESSURE TO SECURE CONCLUSION OF TREATY, IT REMAINED CDN VIEW THAT QUOTE FORCE UNQUOTE IN CHARTER AND ART 49 WAS CONFINED TO MILITARY FORCE. FRENCH REP SPOKE TO ASSOCIATE HIS DEL WITH OUR VIEWS.

8. SOVIET BLOC REPS TOOK LITTLE PART IN DEBATES ON ART 49 AND DECLARATION AND RESLN AND THERE WAS NO/NO ALLUSION TO CZECHO

WERSHOF

FOR ACTION
POUR CONSIDÉRATION
IMMÉDIATE

DATE

May 22, 1969

TO – A

Legal Division

☐ SIGNATURE
☐ SEE ME
ME VOIR
☐ DRAFT REPLY
PROJET DE RÉPONSE
☐ COMMENTS
COMMENTAIRES

Press Office.

003785

SIGNATURE

EXT 574/BIL EXTERNAL AFFAIRS – AFFAIRES EXTÉRIEURES

J. A. BEESLEY

DEPARTMENT OF EXTERNAL AFFAIRS

20-3-1-6

Subject: UN General

MAY 13 1969

Date .... Publication: LE SOLEIL

VU D'OTTAWA

Décision de l'ONU à Vienne sur le droit des traités

par Amédée GAUDREAULT

OTTAWA — Un événement d'une très grande portée internationale (particulièrement pour le Canada dont le "cas", dû aux attentions du gén[illegible]al de Gaulle, a d'ailleurs joué un rôle prépondérant dans un [illegible] revirement de l'opinion mondiale) s'est produit à Vien[illegible] le 28 avril dernier, jour même où l'ancien président de la F[illegible]nce quittait son poste incidemment.

Ce jour-là [illegible] la capitale autrichienne, au sein de la commission du droit international de l'ONU qui se penche depuis des années, des décennies même, sur la question de la conclusion des traités, on a éliminé, par un vote de 66 contre 28, et 13 abstentions, le 2e paragraphe de l'article 5 d'un projet de document portant sur "la capacité des Etats de conclure des traités".

L'article 5 disait ceci:

1—Tout Etat a la capacité de conclure des traités.

2—Les Etats membres d'une union fédérale peuvent avoir la capacité de conclure des traités si cette capacité est admise par la constitution fédérale et dans les limites indiquées dans la dite constitution.

Pourtant, ce paragraphe 2 avait été endossé l'an dernier à deux reprises par le même organisme international, soit par des votes de 45 contre 38 et 10 abstentions, puis 46 contre 39 et 8 abstentions.

Mais entre-temps, était survenu à Paris l'incident de la signature d'un document dont on ne sait trop s'il s'agit d'un accord ou d'un traité avec le Québec pour l'utilisation (ou peut-être ... l'étude pouvant mener à l'utilisation, puisque MM. Bertrand et Dozois ont soutenu qu'aucune dépense n'avait été autorisée) de satellites. En outre, un grand nombre de pays étaient sous l'impression qu'à part le fameux cri "séparatiste" du général de Gaulle en juillet 1967 à Montréal, le président français s'était tenu à l'écart des affaires canadiennes et maints diplomates n'ont que tout récemment appris comment le gouvernement de Gaulle a pu manipuler [illegible] deux ans, certaines ficelles pour créer les ennuis que [illegible] gouvernement canadien lors de la conférence [illegible] Education de la francophonie tenue à Libreville [illegible] l'an dernier, et plus récemment à la conférence [illegible] au Niger. Pour que des "invitations" soient adres[illegible]ment au Québec dans ces deux cas, il fallut, en [illegible] de l'étranger (de Niamey et Libreville, mais en réa[illegible], grâce surtout aux bons soins de MM. de Gaulle, [illegible], Foccart, homme ... d'oeuvres déjà limogé par M [illegible] Rossillon, Dorin, Desfosses et compagnie, sans oublier les exécutants officiels dévoués, Debré, de Lipkosky et de Murville[illegible] on interprétât la constitution canadienne. Ce qu'on essaya de faire aussi quand on tendit la plume, à Paris, à M. Jean-Guy Cardinal.

Car c'est là qu'est le hic. Si l'on lit bien le paragraphe 2 de l'article 5 du projet soumis à la Commission du Droit International sur la question des traités à Vienne, on constate que ce texte ne dit pas spécifiquement qui, lorsque ceci n'est pas indiqué dans une constitution, peut décider si un Etat membre d'une union fédérale peut conclure un traité avec un pays étranger. Pareil texte peut donc entraîner le risque "grave et inadmissible", ont affirmé plusieurs pays, de voir une capitale étrangère interpréter la constitution d'une union fédérale.

En somme, c'est ce qui a été tenté par la France avec le Québec, ce qu'Ottawa a refusé d'accepter, faisant même parvenir une note de "regrets" au gouvernement de Paris.

A Vienne, [illegible] mois dernier, les seuls pays qui ont épousé la thèse de Pa[illegible] ont été ses anciennes colonies "libres" (pas toutes, certa[illegible] ont osé s'abstenir de voter), notamment le Gabon, la Cô[illegible]d'Ivoire (forcée de refuser du blé canadien gratuit il n'y a pas [illegible] longtemps), de même que les pays arabes, ce qui n'est pas... un mystère, dirait-on à Tel-Aviv. Les pays communistes étaient aussi de la même ... fournée mais pour une raison qui est du plus haut comique: Moscou voulait épauler la présence de d[illegible] U[illegible] pa[illegible] du genre de l'URSS quand un pays voisin [illegible] comme la Tchécoslovaquie n'est même pas capable de modifier sa formule économique sans se faire amicalement envahir. Si les Ukrainiens apprennent un jour qu'ils ont le droit de conclure seuls des traités, ça va sûrement leur faire un velours historique sur l'épine dorsale.

Contre la thèse française (du moins celle qui prévalait jusqu'au 28 avril) et celle de Moscou, on assista à Vienne au rassemblement de toutes les grandes unions fédérales du monde: Etats-Unis, Grande-Bretagne, Inde, Canada, Mexique, Australie, Suisse, Brésil, Allemagne Fédérale, etc., tiens, pourquoi ne pas donner au complet cet éloquent alignement:

Pour le maintien du deuxième paragraphe de l'article 5: Afghanistan, Algérie, Bulgarie, Biélorussie, Afrique Centrale, Cuba, Tchécoslovaquie, Equateur, France, Gabon, Hongrie, Indonésie, Iraq, Côte-d'Ivoire, Kuwait, Madagascar, Monaco, Mongolie, Maroc, Népal, Pologne, Roumanie, Syrie, Turquie, Ukraine, URSS, République Arabe Unie et Yougoslavie.

Contre, Argentine, Autriche, Australie, Barbade, Belgique, Bolivie, Brésil, Birmanie, Cameroun, Canada, Ceylan, Chili, Chine (Formose), Colombie, Congo, Costa Rica, Chypre, Danemark, République Dominicaine, El Salvador, Ethiopie, République Fédérale Allemande, Ghana, Grèce, Guatemala, Guinée, Honduras, Inde, Iran, Irlande, Israël, Italie, Jamaïque, Japon, Libéria, Liechtenstein, Luxembourg, Malaysia, Malte, Mauritanie, Mexique, Hollande, Nouvelle-Zélande, Nigeria, Norvège, Pakistan, Panama, Pérou, Philippines, Portugal, Corée, Vietnam, San Marino, Singapour, Afrique-du-Sud, Espagne, Suède, Suisse, Trinidad et Tobago, Grande-Bretagne, Etats-Unis, Uruguay, Venezuela et Zambie.

Pareil vote constitue donc un désaveu d'une interprétation du droit international que tentait de mousser la France, ceci par la quasi-totalité des pays du monde libre et d'ailleurs, on se demande si de Gaulle parti, la France voudra continuer son petit jeu.

Ceci démontre également que la diplomatie canadienne a su éveiller l'opinion mondiale et bien plaider une cause qui n'intéressait que peu de pays il y a un an encore, comme par exemple la Suisse, qui a soudain saisi toutes les implications de la situation.

Le récent vote de Vienne ne cause aucun préjudice à des Etats membres d'unions fédérales qui auraient déjà, en vertu de constitutions existantes ou encore de "traités parapluies" comme Ottawa en a déjà conclu un avec Paris il y a quelques années dans les domaines de la culture et de l'éducation, la permission de signer certaines ententes. Incidemment, à Vienne, de nombreux pays ayant un système fédéral ont appris l'existence de l'accord-cadre signé par Paris et Ottawa il y a trois ans et se proposent de recourir à un tel mécanisme si l'occasion s'en présente, chez eux. Parmi les pays qui s'opposaient le plus au maintien du 2e paragraphe de l'article 5 se trouvaient des nouvelles unions fédérales qui redoutaient que l'on essaie, en recourant à des trucs du genre de ceux du général de Gaulle, de diviser et même de détruire un jour leurs fédérations.

Dans les discours qui ont précédé le vote, l'on s'en est tenu, à Vienne, à discuter strictement les points de droit international en cause, le Canada s'abstenant par exemple de donner des exemples précis d'interprétation "étrangère" d'une constitution et n'allant pas plus loin que de dire: ça peut arriver. Le chef de la délégation italienne, sans vouloir faire de l'humour a-t-on assuré, a noté que le seul (autre, sans doute...) précédent historique d'intervention connu remontait à quelque 400 ans, alors qu'une principauté italienne avait voulu signer un traité avec la France.

Le Canada, pour sa part, ne s'est pas opposé, à Vienne, au paragraphe 1 de l'article 5, signalant qu'il a déjà démontré, au moyen d'accords-cadres, qu'il est prêt à permettre la signature de certaines ententes entre ses provinces et d'autres pays, mais Ottawa a qualifié le paragraphe 2 de "dangereusement incomplet", surtout pour un pays comme le nôtre où "une bonne partie de la constitution n'est pas écrite" et où il y a un "danger réel" que tel paragraphe "mène à la pratique totalement inacceptable d'un pays étranger essayant de s'arroger le droit d'interpréter notre constitution", un "document qui ne peut s'interpréter qu'à l'intérieur du pays concerné". Les pays qui ont favorisé le maintien du paragraphe 2 ont commodément "oublié" cet argument de l'interprétation d'une constitution par des "étrangers".

L'Australie (comme le Canada) a indiqué que le texte proposé ne disait pas qui devrait être tenu responsable de toute violation d'un traité (l'Etat ou l'union fédérale) ou à qui on pourrait se plaindre en cas de litige. (Entre nous, supposons que M. Cardinal ait signé un vrai traité à Paris et qu'un jour, la France réclame vainement quelques dizaines de millions de dollars pour un programme de satellites, où devrait-on s'adresser, en dernier ressort?). Pour l'Inde, un membre d'une union fédérale peut signer des traités, mais sous la responsabilité fédérale car il s'agit d'une "question qui relève uniquement des lois internes de chaque fédération": Il serait donc "peu sage de codifier aussi prématurément (qu'on veut le faire avec le paragraphe 2) le droit international avec un texte qui peut permettre à un tiers pays d'interpréter la constitution d'une union fédérale, ce qui pourrait ouvrir la voie à des interventions très graves". L'Uruguay: "Il est impensable pour un pays de laisser à un autre le droit d'interpréter sa constitution."

Les Etats-Unis ont abondé dans le même sens, affirmant qu'on n'a "apporté aucun argument de valeur indiquant que le paragraphe 2 évitera des difficultés, mais qu'au "contraire on a démontré que cet article pourrait en créer à plusieurs pays dans sa forme actuelle" quand des tiers pays [illegible] interpréter une constitution qui "est un [illegible] ation [illegible] des [illegible] pas elle non plus d'intervention étrangère et n'accepte [illegible] de signer des traités pour un membre d'une union fédérale que si la constitution de cette union le stipule ou si le pouvoir central y consent.

Pour revenir au Canada, celui-ci a soutenu que le paragraphe 2 assume "fort incorrectement" que la constitution de chaque pays parle par elle-même et que cela suffit à trancher la question. Il y a des cas où les constitutions sont amendées à la suite de décisions rendues par des tribunaux. Ailleurs, comme au Canada, une bonne partie de la constitution n'est pas écrite. La tradition constitutionnelle est alors aussi importante que les textes. Et "notre expérience confirme que dans un pays comme le Canada, qui a accédé à son indépendance au cours d'une évolution graduelle de sa tradition constitutionnelle, dont une partie n'est pas écrite, la possibilité qu'un autre pays puisse interpréter sa constitution comporte un réel danger."

Le vote du 28 avril à Vienne et les interventions dont j'ai donné ci-haut quelques résumés indiquent que le fameux paragraphe 2 de l'article 5 d'un projet de l'ONU sur les traités internationaux, qui est disparu, peut-être symboliquement, le jour où le général de Gaulle abandonnait la présidence française, n'est pas près de revenir à la surface.

Mais si MM. Debré et de Murville n'avaient été (sait-on jamais?...) que des opportunistes bientôt prêts à en suivre servilement "un autre" dans une direction totalement opposée, abandonnant ses "claques" (à tapis rouge) à la main, notre sémillant M. Jean-Guy Cardinal, que devrait faire celui-ci ? Il pourrait toujours s'adresser à Cuba, au Gabon ou encore à l'Ukraine, toute indépendance...

003786

J. A. BEESLEY

OFFICE OF THE PRIME MINISTER • CABINET DU PREMIER MINISTRE

MEMORANDUM

CLASSIFICATION

TO / A: MR. ALLAN S. MCGILL
SENIOR DEPARTMENTAL ASSISTANT
SSEA

YOUR FILE NO. / Votre dossier: 20-3-1-6

OUR FILE NO. / Notre dossier: 37

FROM / De: MARY E. MACDONALD

DATE: May 13/69

FOLD

SUBJECT / Sujet: U.N. CONFERENCE ON THE LAW OF TREATIES -- ARTICLE 5

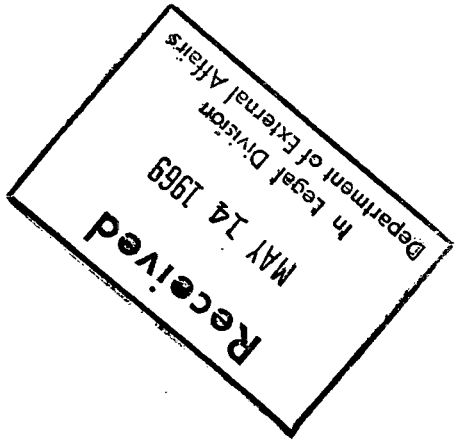
Your Minister's Memo of April 30th to the Prime Minister

The Prime Minister has commented as follows:

"Good work. Congratulations to our U.N. delegation".

Mary E. Macdonald

13/14/5



Thank you for your congratulations to our U.N. delegation

SEEN BY PRIME MINISTER 12.5.69

CONFIDENTIAL

April 30, 1969.

MEMORANDUM FOR THE PRIME MINISTER

U.N. Conference on the Law of Treaties--Article 5

The Head of our Delegation to the Law of Treaties Conference at Vienna has advised that delegates at the plenary session yesterday voted 66 to 28 with 13 abstentions to delete Paragraph 2 of Article 5 of the draft Convention on the Law of Treaties, the federal states clause. You may recall that Article 5(2) provided as follows:

> "States members of a federal union may possess the capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits therein laid down."

As stated in an earlier Memorandum to you in connection with the visit of Prime Minister Gorton, it was the Canadian concern that such a paragraph if adopted could have produced two highly undesirable results:

> first, it could lead to the practice of outside states purporting to interpret for themselves the constitutions of federal states. This would be an unacceptable interference in the internal affairs of the federal state; and
>
> second, it could lead to the fragmentation of the international personality of federal states, with each member of the federation pursuing a separate course in international affairs.

At the First Session of the Law of Treaties Conference in the spring of 1968 the Canadian Delegation supported proposals to delete Paragraph 2 in order to avoid recognition in the convention, as finally adopted, of the principle that component members of a

.... 2

cc Hm Head 38-4

003789

29.4.59(US)

federal state may under certain circumstances enjoy a treaty making capacity. In the event, however, Article 5(2) was retained by a simple majority, due largely to the efforts of the U.S.S.R. and its allies, who were concerned about the continued international personality of Byelorussia and the Ukraine, and to the fact that France was able to align the countries of the French Community in support of the Article.

In an effort to reverse this decision at the second session of the Law of Treaties Conference, discrete approaches beginning in August were made in friendly countries to seek support for our position on Article 5(2). These initiatives had as their objectives (a) to assure that those governments whose representatives opposed Article 5(2) at the First Session maintained their opposition at the Second Session, thereby depriving Paragraph 2 of the 2/3 majority it required for adoption, and (b) to assure a simple majority in favour of a procedural motion for a separate vote on Paragraph 2 of Article 5 as was done at the First Session. (Without a successful vote on this procedural question we could secure the rejection of Article 5(2) only through a rejection of Article 5 as a whole, and this we had good reason to believe would be virtually impossible.) Representations were made to over 74 governments on this question before the convening of the second session of the Conference. In addition, during the first three weeks of the Conference prior to the formal vote, our Delegation reported that they conducted a systematic campaign of personal discussions with members of approximately 80 delegations and co-ordinated the lobbying efforts of the Federal States Group consisting of primarily Australia, Malaysia, Mexico and to a lesser extent, India. In the meantime, the U.S.S.R. and French delegates were making a concerted effort to shore-up the support their position had enjoyed at the previous session of the Conference.

As it turned out no procedural vote was required on whether Paragraph 2 was to be considered as a separate item and the Paragraph itself failed even to obtain a simple majority. The substantial shift in voting on this item compared to the first session constitutes an impressive and gratifying outcome to the many months of concerted diplomatic effort to develop wider support for the Canadian position.

The deletion of Article 5(2), by reaffirming the principle that only the central government of a federal state has exclusive treaty making capacity, has significantly advanced the position of the Federal Government in its constitutional discussions with the provinces on the question of provincial powers in external affairs. If Paragraph 2 had been retained in the final text of the Convention on the Law of Treaties, it would have been open to foreign states, if they so choose, to decide whether or not a federal states constitution permits direct

.... 3

treaty relations with a unit of a federal state. This would have provided proponents of an independent treaty making capacity for the Canadian provinces with an exceedingly valuable weapon in their constitutional negotiations with the Federal Government when they turn to the role of the provinces in international affairs. In this context it is of interest that in its Working Paper On Foreign Relations presented at last February's Constitutional Conference, the Quebec Government relied solely on Article 5(2) in support of the international law aspects of its position. Deprived of this international legal argument as a result of the above vote at the Law of Treaties Conference the case put forward in the Quebec paper is appreciably weakened.

M.S.

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 13/69	20-3-1-6	SANS

FM/DE EXTERNAL OTT

NO	PRECEDENCE
L-592	ROUTINE

TO/A VIENNA (CDN DEL LAW OF TREATIES)

INFO

REF

SUB/SUJ LAW OF TREATIES CONFERENCE

ADVISE WHEN CONFERENCE LIKELY TO END AND ANTICIPATED RETURN DATE OF STANFORD.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY-itl	LEGAL	2-9553	SIG J.A.BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003792

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 13/69	20-3-1-6	SANS
	37	

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
VIENNA (CDN DEL LAW OF TREATIES)	L-592	ROUTINE
INFO		

REF

SUB/SUJ LAW OF TREATIES CONFERENCE

ADVISE WHEN CONFERENCE LIKELY TO END AND ANTICIPATED RETURN DATE OF STANFORD.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY-itl	LEGAL	2-9553	SIG J.A.BEESLEY J.A.BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003793

Diary
Div. Diary
File

Cwith/M.Q. Dench/jr

The Under-Secretary of State
for External Affairs and Addressees Listed Below

RESTRICTED

May 12, 1969

Commonwealth Division

Visit to Ottawa of Mr. Arnold Smith, Commonwealth Secretary-General

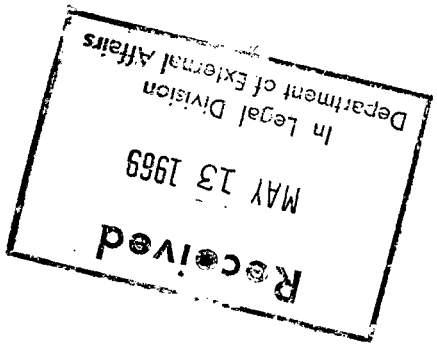
1

Mr. Robinson
Mr. Collins
Mr. Starnes
Mr. Bissonnette
Mr. McGill
Legal
Cultural Affairs
Aid & Development
Commercial Policy
Information
Francophone
Consular

You will see from the attached telegram 1976 of May 9 from London that Mr. Arnold Smith plans to be in Ottawa from May 29 to June 11. Given the length of his visit, the number of people he wishes to see and the number of subjects he wishes to discuss, we do not propose to attempt drawing up a firm timetable at this stage. However, we should be grateful if all divisions and officers concerned would keep his wishes in mind and be prepared to meet with him or to draft briefs as occasion requires.

2. In the meantime we are consulting the Prime Minister's Office, the O/SSEA and other Parliamentarians' offices concerning appointments. When some of these appointments firm up, it may be possible to work towards a tentative timetable. We will inform you as plans develop.

Commonwealth Division



R E S T R I C T E D

FM LDN MAY9/69

TO EXTER 1976 IMMED

INFO CIDAOTT DE OTT

REF OURTEL 1975 MAY9

VISIT TO OTT:COMWEL SECGEN

ON COMPLETION OF HIS VISIT TO VNCVR ON MAY28,ARNOLD SMITH HAS ADVISED ME THAT HE PROPOSES TO SPEND A FEW DAYS IN OTT FROM MAY29 POSSIBLY UNTIL HIS ENGAGEMENTS IN TORONTO ON JUN12.

2.THERE ARE A NUMBER OF THINGS SECGEN WOULD LIKE TO DISCUSS IN OTT AND DURING HIS STAY HE WOULD LIKE TO SEE THE PM,SSEA,MR CADIEUX AND OTHER OFFICERS IN THE DEPT.

3.SINCE COMWEL SECRETARIAT IS AT PRESENT MAKING ARRANGEMENTS FOR THE ANNUAL MTG OF COMWEL FINANCE MINISTERS IN BARBADOS IN SEP, HE WOULD ALSO WELCOME MTG WITH FINANCE MINISTER.

4.HE IS ALSO SEEKING APPOINTMENTS WITH THE SECY OF STATE AND JULES LEGER AND WITH MINISTER OF IMMIG AND LOU COUILLARD.

5.SECGEN HAS ALREADY ARRANGED AN APPOINTMENT WITH MAURICE STRONG ON THE MORNING OF FRI MAY30 AND WILL LUNCH WITH STRONG THAT DAY.IN CIDA HE WOULD ALSO LIKE TO SEE DENYS HUDON AND GEO KIDD.

6.IN ADDITION TO FOREGOING COMWEL SECGEN WOULD LIKE TO PAY COURTESY CALLS ON THE GOVGEN IF POSSIBLE AND ON THE LEADER OF THE OPPOSITION.HE WOULD ALSO LIKE TO SEE GORDON ROBERTSON.COMWEL SECGEN WILL BE ACCOMPANIED BY GORDON GOUNDREY,DIRECTOR PLANNING ANDATECHNCCAL DIV COMWEL SECRETARIAT,AND BY ENEKA ANYAOKU,HIS

...2

ACTING SPECIAL ASST.

7.FOLLOWING ARE SUBJS COMWEL SECGEN WOULD LIKE TO DISCUSS:

(A)COMWEL CARIBBEAN-AS YOU ARE AWARE IMMEDLY BEFORE TRIP TO CDA SMITH WILL BE VISITING A NUMBER OF COMWEL CARIBBEAN COUNTRIES, INCLUDING SOME OF THE ASSOCIATED STATES, AND THE HQS OF THEIR REGIONAL SECRETARIAT AND THE ASSOCIATED STATES SECRETARIAT. HE IS UNDERTAKING THIS CARIBBEAN VISIT AT URGING OF ERIC WILLIAMS AND OTHER CARIBBEAN LEADERS.

(B)FRANCOPHONE COOPERATION.

(C)PROBLEMS OF YOUTH IN THE COMWEL-THIS IS FOLLOW UP OF PMS MTG WHICH ASKED SECRETARIAT TO LOOK INTO POSSIBILITIES OF SOME STUDIES ON THIS QUESTION.

(D)PROBLEMS OF SHORT-TERM AND LONG-TERM MIGRATION.

(E)COMWEL ACTIVITIES IN THE INFO FIELD-AGAIN A FOLLOW UP OF PMS MTG.

(F)ESTABLISHMENT OF LEGAL SECTION IN SECRETARIAT. IN THIS CONNECTION SMITH WOULD LIKE TO MAKE CONTACT WITH THE NEW COMWEL LEGAL BUREAU SECY RONALD C MERRIAM, CDN BAR ASSOC, 90 SPARKS ST, OTT.

(G)COMWEL COOPERATION IN BOOK DEVELOPMENT AND EDUCATIONAL FIELDS. HE WOULD LIKE TO DISCUSS THIS SUBJ IN THE DEPT AND IF APPROPRIATE IN OTHER DEPTS.

(H)COMWEL SEMINAR ON INATL RELATIONS. SECRETARIAT IS CONSIDERING POSSIBILITY OF SEMINAR ON SOME ASPECTS OF THIS SUBJ OR ADMIN ARRANGEMENTS IN THIS FIELD. DISCUSSION ON THIS SUBJ WOULD

...3

BE A FOLLOW UP ON CONTACTS WE HAVE ALREADY HAD WITH INATL AFFAIRS DIV OF SECRETARIAT.

(I)COMWEL PROGRAM ON TECHNICAL COOPERATION-SMITH WOULD LIKE TO DISCUSS REVIEW OF THIS SCHEME(IE NAIROBI SCHEME)WHICH SECRETARIAT HAS SUGGESTED MIGHT TAKE PLACE THIS AUTUMN POSSIBLY IN LDN OR ELSEWHERE BEFORE MTG OF COMWEL FINANCE MINISTERS IN BARBADOS.

(J)COMWEL COOPERATION IN SCIENTIFIC FIELD-DR GLEN, SECRETARIAT SCIENTIFIC ADVISER, HAS SOME SUGGESTIONS ON THIS SUBJ.

8. I UNDERSTAND COMWEL SECGEN WILL ATTEND OPENING PERFORMANCE AT NEW NATL CENTRE FOR PERFORMING ARTS AND HAS BOOKINGS FOR JUN2,3 AND 4.

9. YOU WILL NOTE FROM ITINERARY IN REFTEL THAT SECGEN LEAVES HERE TOMORROW. YOU COULD CONVEY YOUR REACTION TO ABOVE REQUEST TO HIM ENROUTE AND ADVISE US ACCORDINGLY ALSO.

CANADIAN STATEMENT IN EXPLANATION OF VOTE

ON DRAFT DECLARATION CONCERNING USE OF FORCE

20th Plenary meeting, May 12, 1969

The Canadian Delegate, Mr. Wershof, spoke in Plenary in explanation of vote after the votes on Article 49, on the draft declaration adopted at the First Session by the Committee of the Whole (A/CONF.39/14/VOL. II Para 459) and on the draft resolution concerning broad dissemination proposed by Afghanistan (A/CONF.39/L.32/Rev.1).

Mr. Wershof stated that although Canada had voted in favour of the draft declaration, he wanted to make clear that in the view of the Canadian Government, a view which had been maintained for many years and had been stated in the General Assembly and at many conferences of a legal nature, the word "force" appearing in Article 2.4 of the United Nations Charter, and as well the same word as employed in Article 49 of the draft convention, referred only to military (armed) force. It did not, in the view of the Canadian Government, have the wider connotations of a political and economic nature which other delegations had suggested. The Canadian Government agreed wholeheartedly with other delegations supporting the declaration that the use of any kind of force against a state, not only military but also political and economic, to coerce it to perform any act relating to the conclusion of a treaty, was thoroughly reprehensible. This attitude, however, was quite independent of the Canadian opinion concerning the meaning of "force" as it appears in Article 2.4 of the Charter.

Thus, while the Canadian Delegation fully respected the views of other states which had expressed a contrary opinion, it was unable to share their views and its support for the declaration should be construed in that light.

OTT086

V

PAR080

GVA049

VNA7/12

RR OTT

DE VNA

R 121409Z

U N C L A S S I F I E D

FM VIENN MAY12/69 NO/NO STANDARD

TO EXTEROTT 408

REF OURTEL 374 MAY5

LAW OF TREATIES CONFERENCE:2ND SESSION:5TH WEEKLY SUMMARY: MAY6-9 PLENARY HELD 7 MTGS(12TH TO 18TH INCLUSIVE)THIS WEEK. IT CONSIDERED ARTICLES 23-49 AND COMPLETED 23-48. AT OPENING OF 12TH MTG, MAY6, THERE FIRST WERE TRIBUTES TO MEMORY OF PRESIDENT OF INDIA. CDA SPOKE. ART 23(PACTA SUNT SERVANDA): YUGOSLAVIA INTRODUCED AMENDMENT L.21 TO TEXT(CONF.39/13/ADD.5)ADOPTED BY CTTEE OF WHOLE(CW) TO ADD FOLLOWING QUOTE IN FORCE UNQUOTE WORDS QUOTE AND A TREATY PARTLY OR IN WHOLE PROVISIONALLY APPLIED UNQUOTE AFTER COLOMBIA HAD SUBMITTED A SOMEWHAT SIMILAR ORAL AMENDMENT TO ADD FOLLOWING QUOTE IN FORCE UNQUOTE WORDS QUOTE OR BEING APPLIED PROVISIONALLY UNQUOTE. L.21 WAS LATER WITHDRAWN ON UNDERSTANDING IT WOULD BE CONSIDERED(ALONG WITH COLOMBIAN PROPOSAL) BY DRAFTING CTTEE(DC) AS POSSIBLE BASIS FOR AN ADDITIONAL ARTICLE. ARTICLE 23 WAS THEN ADOPTED 96-0-0.

ART 23 BIS(INTERNAL LAW) LUXEMBOURG INTRODUCED AMENDMENT L.15 TO ADD TO 23 BIS ADOPTED BY CW(CONF.39/13/ADD.5) A NEW 2ND PARA TO READ QUOTE THE PARTIES SHALL TAKE ANY MEASURES OF INTERNAL LAW THAT MAY BE NECESSARY TO ENSURE THAT TREATIES ARE FULLY APPLIED UNQUOTE. AFTER VMANY STATES SPOKE AGAINST THIS FORMULATION IT WAS WITHDRAWN AND ART 23 BIS WAS ADOPTED 73(CDA, UK, USA)-2(CAMEROON AND VENEZUELA)-WRM

ART 24(NON-RETROACTIVITY).(CONF.39/13/ADD.5) AUSTRIA REQUESTED SEPARATE VOTE ON WORDS QUOTE OR IS OTHERWISE ESTABLISHED UNQUOTE WHICH

...2

WERE RETAINED 78(USA,UK,FRANCE)-5(AUSTRIA,CDA,TURKEY)-12. ART 24 WAS THEN ADOPTED 97-Ø-2(TURKEY AND SWITZERLAND).

ART 25(TERRITORIAL SCOPE).(CONF.39/13/ADD.5). ADOPTED 97-Ø-Ø.

ART 26(SUCCESSIVE TREATIES).(CONF.39/13/ADD.5)ADOPTED 9Ø-Ø-8(EASTERN EUROPEANS)AFTER DEBATE SUGGESTING GENERAL AGREEMENT THAT QUESTION WHICH TREATIES WERE EARLIER OR LATER SHOULD DEPEND UPON DATE OF ADOPTION OF TEXTS RATHER THAN OF ENTRY INTO FORCE.

ART 27(GENERAL RULE OF INTERPRETATION).(CONF/39/13/ADD.6). ADOPTED 97-Ø-Ø.

ART 28(SUPPLEMENTARY INTERPRETATION.(CONF.39/13/ADD.6). ADDOPTED 1Ø1-Ø-Ø.

ART 29(INTERPRETATION OF MULTILINGUAL TREATIES).(CONF.39/13/ADD.6) ADOPTED 1Ø1-Ø-Ø.

ART 3Ø(THIRD STATES).(CONF.39/13/ADD.7). ADOPTED 97-Ø-Ø.

ART 31(OBLIGATIONS FOR THIRD STATES).(CONF.39/13/ADD.7)VIETNAM INTRODUCED AMENDMENT(L.25)TO ENSURE ACCEPTANCE OF OBLIGATION BY THIRD STATE BE IN WRITING. THIS WAS ADOPTED 44(CDA,FRANCE)-19(UK)-31(USA) ART31 AS AMENDED WAS ADOPTED 99-Ø-1.

ART 32(RIGHTS FOR THIRD STATES).(CONF.39/13/ADD.7)HUNGARY AND USSR INTRODUCED AN AMENDMENT(L.22)CONCERNING MOST FAVOURED NATION TREATMENT WHICH WAS EVENTUALLY WITHDRAWN AFTER DEBATE(OURTEL 399 MAY9 REFERS) ART 32 THEN ADOPTED 1ØØ-Ø-Ø.

ART 33(REVOCATION OR MODIFICATION OF RIGHTS OF THIRD STATES).(CONF. 39/13/ADDMULM ADOPTED 1ØØ-Ø-Ø.

...3

ART 34(THIRD STATES AND JUS COGENS).(CONF.39/13/ADD.7)AMENDMENTS WERE INTRODUCED BY MONGOLIA(L.20),TO ADD QUOTE INNATL UNQUOTE AFTER QUOTE GENERAL PRINCIPLE OF UNQUOTE;BY UK(L.23),TO REDRAFT TEXT ADOPTED BY CW;AND BY NEPAL (L.27),TO DELETE ALL WORDS AFTER QUOTE RULE OF INNATL LAW UNQUOTE.UK WITHDREW L.23 AND NEPAL CHANGED PROPOSAL IN L.27 TO A REQUEST FOR SEPARATE VOTE ON WORDS IN QUESTION.VOTE WAS 27(CDA)-50(UK,7-,FRANCE)-19 AND WORDS WERE THEREFORE DELETED. MONGOLIAN AMENDMENT L.20 WAS THEREFORE NO/NO LONGER RELEVANT.ART 34 AS AMENDED WAS THEN ADOPTED 83(CDA,UK,USA,FRANCE)-13-7.

ART 35(AMENDMENT).(CONF.39/13/ADD.8).ADOPTED 86-0-0.

ART 36(AMENDMENT OF MULTILATERALS).(CONF.39/13/ADD.8).ADOPTED 91-0-0.

ART 37(AMENDMENT BETWEEN ONLY CERTAIN OF PARTIES).(CONF.39/13/ADD.8)ADOPTED 91-0-0

ART 38.THERE IS NO/NO LONGER AN ART 38 IN PRESENT DRAFT AS IT WAS DELETED AT FIRST SESSION.

ART 39(VALIDITY AND CONTINUANCE IN FORCE).(CONF.39/13/ADD.9). ADOPTED 90-1(TURKEY)-0.

ART 40(OBLIGATIONS UNDER GENERAL INNATL LAW).(CONF.39/13/ADD.9) ADOPTED 99-0-1(TURKEY).USA MADE GENERAL STATEMENT EXPRESSING ITS SUPPORT FOR CERTAIN ARTS IN PART V AS BEING CONDITIONAL UPON INCLUSION IN CONVENTION OF A SATISFACTORY SETTLEMENT OF DISPUTES PROCEDURE (SUCH AS 62 BIS).

ART 41(SEPARABILITY).(CONF.39/13/ADD.9).FINLAND REQUESTED A SEPARATE VOTE ON WORDS QUOTE AND 50 UNQUOTE IN PARA5(WHICH IF SUCCESSFUL

IN DELETING WORDS WOULD HAVE RESULTED IN INCLUSION OF TREATIES VIOLATING A RULE OF JUS COGENS AMONG THOSE THAT ARE SEPARABLE). VOTE ON WORDS WAS 63-33(CDA, FRANCE, UK, USA AND MOST WESTERN NATIONS)-6. THUS WORDS SHOULD HAVE BEEN DELETED HAVING FAILED TO WIN TWO-THIRDS MAJORITY. HOWEVER A PROLONGED PROCEDURAL WRANGLE(LED BY INDIA AND TANZANIA) FOLLOWED AND EVENTUALLY UK AND VFINLAND(AFTER AN ADJOURNMENT FOR CONSULTATIONS) AGREED TO HAVE A SECOND VOTE. THIS TIME ROLL CALL VOTE ON WORDS WAS 66-30(CDA, UK, FRANCE, USA, ET AL)-9 AND THEREFORE WORDS WERE RETAINED WITH TWO-THIRDS VOTE. ART 41 WAS THEN ADOPTED 96-0-8.

ART 42(PRESCRIPTION). (CONF. 39/13/ADD. 9) VENEZUELA SOUGHT A SEPARATE VOTE ON PARA(B) WHICH WAS OPPOSED BY SWITZERLAND AND GUYANA(OURTEL 398 MAY9). MOTION FOR DIV WAS REJECTED ON A ROLL CALL VOTE 21(VENEZUELA AND MOST LATIN AMERICANS)-47(UK, USA, FRANCE, SWITZERLAND, GUYANA AND MOST AFRO-ASIANS)-37(CDA, ISRAEL, EASTERN EUROPEANS). ART 42 WAS THEN ADOPTED 84(CDA, FRANCE, UK, USA, CHILE)-17(MOST LATIN AMERICANS)-6.

ART 43(INTERNAL LAW RE COMPETENCE). (CONF. 39/13/ADD. 10). CAMEROON ASKED FOR A SEPARATE VOTE ON FINAL WORDS OF PARA1 BEGINNING QUOTE AND CONCERNED... UNQUOTE. MOTION WAS REJECTED 7(CDA, AUSTRIA, SOUTH AFRICA)-43(USA, FRANCE, USSR)-47(UK). ART 43WAS THEN ADOPTED 94(CDA, FRANCE, UK, USA, USSR)-0-3CAMEROON). IN DEBATE CDA SPOKE TO POINT OUT THAT OUR VOTES IN FAVOUR OF CERTAIN OF ARTS IN SECTIONS 2 AND 3 OF PART V WERE CONDITIONAL UPON ADOPTION BY PLENARY OF A SATISFACTORY SETTLEMENT OF DISPUTES CLAUSE.

ART44(SPECIFIC RESTRICTIONS ON AUTHORITY TO EXPRESS CONSENT).

...5

(CONF.39/13/ADD.10)SPAIN HAD TABLED AN AMENDMENT(L.26)WHICH IT CONSIDERED ESSENTIALLY OF A DRAFTING NATURE AND WHICH WAS REFERRED TO DC WITHOUT VOTE. ARTICLE ADOPTED 101-0-0.

ART 45(ERROR).(CONF.39/13/ADD.10).UK HAD TABLED AN AMENDMENT(.19) TO ADD AFTER QUOTE AN ERROR IN UNQUOTE WORDS QUOTE OR CONCERNING UNQUOTE. IT ANNOUNCED,HOWEVER THAT IT WAS BEING WITHDRAWN. ADOPTED 95(CDA,USA)-0-5(UK,FRANCE).

ART 46(FRAUD).(CONF.39/13/ADD.10). ADOPTED 92-0-7(UK,FRANCE).

ART 47(CORRUPTION OF A REH).(CONF.39/13/ADD.10)ADOPTED 84(USA)-2(MXICO)-14(CDA,UK,FRANCE).

ART 48(COERCION).(CONF.39/13/ADD.10)AUSTRIA REQUESTED SEPARATE VOTE ON WORD QUOTE PERSONALLY UNQUOTE. VOTING WAS 16(JPN,AUSTRALIA,UK, FINLAND)-46(CDA,AUSTRIA,USA)-35(FRANCE,FRG,USSR). WORD WAS HEREFORE DELETED. VOTING ON ART 48 AS AMENDED WAS 93-0-4(UK,FRANCE).

ART 49(USE OF FORCE TO COERCE).(CONF.39/13/ADD.10)ALTHOUGH MANY HAD EXPECTED TO VOTE ON THIS ART AT 18TH MTG,AFGHANISTAN ANNOUNCED IT WAS TABLING A NEW DRAFT RESLN(L.32)TO SUPPLEMENT RESLN THAT HAD BEEN ADOPTED AT 1ST SESSION BY CW AND WAS TO BE ADOPTED BY PLENARY. AS TEXT HAD NOT/NOT BEEN DISTRIBUTED IT ASKED UNDER RULE 27 THAT MTG ADJORUN. MOTION WAS ADOPTED 58(CDA,UK,FRANCE)-11(USA)-29 AUSTRIA, AUSTRALIA). DISCUSSION OF ART 49 WILL RESUME MAY12.

WERSHOF

J. A. BEESLEY

feb 20-3-1-6

ACTION COPY

20-3-1-6
25 | 13

C O N F I D E N T I A L

FM VIENN MAY9/69 NO/NO STANDARD

TO EXTEROTT 398

REF YOURTEL L552 MAY2

LAW OF TREATIES-ART42-GUYANA

FOLLOWING RECEIPT OF REFTEL WE TALKED WITH HEAD OF GUYANA DEL AND EXPLAINED OUR PROBLEM. AT THAT TIME HE WAS NOT/NOT SURE THAT HE WOULD OBJECT TO VENEZUELA REQUEST FOR SEPARATE VOTE ON PARA(B);HE THOUGHT HE MIGHT RELY ON GETTING TWO-THIRDS VOTE TO RETAIN THAT PARA. YESTERDAY MORNING HOWEVER(JUST PRIOR TO OPENING OF DEBATE ON ART 42) HE TOLD US THAT HE HAD DECIDED TO OBJECT TO SEPARATE VOTE AND STRONGLY URGED US TO ABSTAIN ON PROCEDURAL VOTE RATHER THAN VOTE IN FAVOUR OF PERMITTING SEPARATE VOTE. IN VIEW OF REFTEL AND FEELINGS OF GUYANA WE AGREED TO ABSTAIN.

2. AN EMOTINAL DEBATE ENSUED WITH MOST LATIN AMRICANS SUPPORTING VENEZUELA BOTH ON PROCEDURE AND SUBSTANCE. LATTERS REQUEST FOR SEPARATE VOTE WAS REJECTED 21-47(USA,UK,FRANCE)-37(CDA). ART 42 WAS THEN ADOPTED 84(CDA)-17-6.

3. VENEZUELA AND HER SUPPORTERS RESENTED PARTICULARLY THE REFUSAL OF REQUEST FOR SEPARATE VOTE. AS IT TURNED OUT OUR ABSTENTION DID NOT/NOT AFFECT RESULTS.

WERSHOF

19/9/½

May 9 - Mr. Wershof, Canada

STATEMENT ON ARTICLE 43

The Canadian Delegation wishes to make a general statement applicable to many of the articles in Sections 2 and 3 of Part V of the draft Convention.

Quite apart from our doubts about the substance of some of the articles in these sections, the Canadian Delegation considers that certain of these articles would be inacceptable to the Canadian Government in the absence of a satisfactory settlement of disputes clause such as Article 62 bis as recommended recently by the Committee of the Whole.

Therefore, if the Canadian Delegation votes in favour of all or most articles in Sections 2 and 3 of Part V, we do so on the assumption that this Conference will adopt a satisfactory settlement of disputes clause.

If that assumption proves to be incorrect, the Canadian Delegation reserves the right to reconsider its position on the question of the adoption of the Convention as a whole. Similar declarations were made by the Canadian Delegation at the 1st Session in Committee of the Whole during the examination of Part V of the Convention.

fol 20-3-1-6 ACTION COPY Mr Beesley Mr Hawkesworth

20-3-1-6
M 13

R E S T R I C T E D

FM VIENN MAY9/69 NO/NO STANDARD

TO EXTEROTT 399

INFO TT INDTCOTT FINANCEOTT DE OTT

LAW OF TREATIES:ART 32:MOST FAVOURED NATION TREATMENT

ART 32(TREATIES PROVIDING FOR RIGHTS FOR THIRD STATES)DEALS(PARTICULARLY IN PARA1)WITH MATTER OF RIGHTS ARISING FOR THIRD STATES NOT/NOT PARTIES TO GIVEN TREATY IF PARTIES SO INTEND AND IF THIRD STATES CONCERNED ASSENT THERETO.WHEN ARTICLE CAME BEFORE PLENARY MAY7 HUNGARY AND USSR INTRODUCED AMENDMENT(L.22)TO PROVIDE IN A NEW PARA THAT QUOTE THE PROVISIONS OF PARA1 SHALL NOT/NOT AFFECT THE RIGHTS OF STATES WHICH ENJOY MOST FAVOURED NATION TREATMENT UNQUOTE.

2.ALTHOUGH ON ITS FACE(LOOKED AT FROM STRICTLY LEGAL VIEWPOINT)THIS AMENDMENT MIGHT APPEAR ONLY TO CONSTITUTE EXPLICITLY LOGICAL EXTENSION OF WHAT IS IMPLICIT IN PARA1 IT WAS CONSIDERED BY MANY EUROPEAN AND LATIN AMERICAN STATES IN FACT TO BE YET ANOTHER EFFORT BY SOVIET UNION AND OTHER MEMBERS OF COMECON TO SECURE FOR THEMSELVES CERTAIN ECONOMIC BENEFITS FROM OTHER STATES WITHOUT HAVING TO GIVE ANYTHING IN RETURN.

3.WE UNDERSTAND THAT THERE STILL EXIST CERTAIN EARLY TREATIES CONCLUDED BY USSR(AND PERHAPS OTHER COMMUNIST COUNTRIES)WITH OTHER STATES WHICH CONTAIN VARIOUS MFN CLAUSES.IN MEANWHILE GATT,EFTA,THE COMMON MARKET AND CERTAIN LATIN AMRICAN INTERSTATE AGREEMENTS HAVE BEEN VELABORATED,LEGAL NATURES OF WHICH ARE NOT/NOT CLEARLY DEFINED BUT ARE GENERALLY REGARDED AS LYING SOMEWHERE BETWEEN THAT OF FREE TRADE

...2

21/9/5

ZONES AND THAT OF CUSTOMS UNIONS(TO WHICH MFN CLAUSES DO NOT/NOT APPLY).IN RECENT YEARS SOVIETS(BASING THEMSELVES ON MFN PROVISIONS OF SUCH EARLY TREATIES)HAVE,WE ARE TOLD,ATTEMPTED TO OBTAIN FOR THEMSELVES SIMILAR TARIFF TREATMENT AS OTHER PARTIES TO THOSE EARLY TREATIES NOW EXTEND TO THEIR PARTNERS IN THE VARIOUS FREE TRADE ZONE AGREEMENTS TO WHICH THEY ARE ALSO PARTIES.

4.MAJORITY OF EUROPEANS AND LATIN AMERICANS WERE THEREFORE FIRMLY OPPOSED TO L.22.AFTER AN ADJOURNMENT FOR PRIVATE DISCUSSION USSR (APPARENTLY REALIZING THAT IT WOULD NOT/NOT HAVE ENOUGH VOTES TO CARRY ITS PROPOSED AMENDMENT)WITHDREW L.22 AFTER PRESIDENT HAD MADE STATEMENT TO EFFECT THAT IT WAS GENERAL UNDERSTANDING OF PLENARY THAT NOTHING IN ART 32 WAS INTENDED TO PREJUDICE POSITION OF STATES ENJOYING MOST FAVOURED NATION TREATMENT BY VIRTUE OF TREATIES TO WHICH THEY WERE PARTIES.ART 32 WAS THEN ADOPTED 100-0-0.

WERSHOF

J. A. BEESLEY

Mr. Mawhinney

OTT

PAR113

GVE 58

Feb 20-3-1-6

Copy has already gone to Mawhinney

ACTION COPY

20-3-1-6

VNAS/9

PP OTT

DE VNA

.P Ø91149Z

U N C L A S S I F I E D

FM VIENN MAY9/69 NO/,9 STANDARD

TO EXTEROTT 4ØØ PRIORITY

REF OURTEL 393 MAY8

LAW OF TREATIES: STATEMENTS ON ARTICLE 5(2)

FOLLOWING ARE EXTRACTS FROM STATEMENTS BY AMERICANS AND BY WEST GERMANS. IN FURTHER DISCUSSION WITH SWISS THEY RECOMMEND SUMMARY RECORD OF THEIR STATEMENT AS ADEQUATELY COVERING IT. REGRET REF TO UK STATEMENT IN PARA 2 REFTEL WAS IN ERROR AS THEY DID NOT/NOT SPEAK TO 5(2).

2. STATEMENT BY WEST GERMANY: QUOTE... SI NOUS SOMMES, NEANMOINS, OPPOSE A CE PARAGRAPH, CEST POUR DES RAISONE DUN ORDRE PLUS FONDAMENTAL, SURTOUT DANS LE CONTEXTE DE LA PRESENTE CONVENTION. NOS RAISONS SONT PRINCIPALEMENT LES SUIVANTES:

PREMIEREMENT: SELON LARTICLE L DU PROJET DE CONVENTION DEVANT NOUS, LA CONVENTION DOIT ETRE LIMITEE AUX ETATS. OR, LES MEMBRES DUNE FEDERATION, MEME SIL LEUR EST ACCORDE UNE CERTAINE CAPACITE DAGIR SUR LE PLAN INNATL ET DANS LE DOMAINE DU DROIT INNATL, NE PEUVENT PAS ETRE ASSIMILEES DUNE FACON GENERALE AUX ETATS. CECI VAUT POUR LE DOMAINE DU VDROIT DES TRAITES COMME POUR DAUTRES DOMAINES DU DROIT INTERNATIONAL ET POUR LEQUEL LARTICLE 5 PARA2 PREVOIT UNE ASSIMILATION SANS DISTINCTION DES MEMBRES DUNE FEDERATION AUS ETATS. JE ME BORNERAI A METTRE EN RELIEF, A TITRE DEXEMPLE, QUE SI UN MEMBRE DUNE FEDERATION AGIT EN MATIERE DE TRAITES INTERNATIONAUX EN DEHORS DES LIMITES QUI LUI SONT IMPOSES PAR LA CONSTITUTION FEDERALE, LES DISPOSITIONS DES ARTICLES 7 ET 43 SONT GUERE CAPABLE DE COUVRIR LA SITUATION. ET

...2

24/9/5

CECI EN RAISON DU FAIT QUIL NE SAGIT PAS DUNE SIMPLE VIOLATION DUNE DISPOSITION CONSTITUTIONNELLE, MAIS DUN ACTE RELEVANTE DU DROIT INTERNATIONAL CREE PAR UNE ENTITE JURIDIQUE QUI NE POSSEDAIT PAS LA PERSONNALITE JURIDIQUE POUR LE FAIRE. LACTE EST DONC NUL ET NE PEUT PAS ETRE GUERI DANS LA MANIERE PREVUE AUX ARTICLES 7 ET 43....

DEUXIEMEMENT; SI UN MEMBRE DUNE FEDERATION POSSEDE LA COMPETENCE DAGIR SUR LE PLAN INTERNATIONAL, IL Y A TOUJOURS LE DANGER DUN DIFFERENT SUR LINTERPRETATION DE LA CONSTITUTION FEDERALE, DONT RELEVE LA COMPETENCE EN MATIERES INTERNATIONALES DU MEMBRE DE LA FEDERATION EN QUESTION. DANS DE OAS PAREILS, IL Y A TOUJOURS LA POSSIBILITE QUE LA CONSTITUTION DUN ETAT SOIT INTERPRETEE FINALEMENT PAR UN AUTRE ETAT OU PAR UNE INSTANCE INTERNATIONALE. LADOPTION DE LARTICLE 5 PARA 2 ENTRAINERAIT SANS DOUTE UNE MULTIPLICATION DU RISQUE DE LINCIDENCE DE TELLES SITUATIONS QUI SONT HAUTEMENT INDESIRABLE....

AVANT DE CONCLURE, JE TIENS CEPENDANT A SOULIGNER CECI: SI MA DELEGATION EST OPPOSEE A LINCLUSION DE LARTICLE 5 PARA2 DANS LA CONVENTION, ELLE NE CONTESTE TOUTEFOIS NULLEMENT LA POSSIBILITE DES MEBRES DUNE FEDERATION DAGIR DANS LE CHAMPS DU DROIT INTERNATIONAL DANS LA MESURE ET DANS LA FORME PRESCRITES PAR LA CONSTITUTION DE LA FEDERATION A LAQUELLE ILS APPARTIENNENT. ET JE VOUDRAIS AJOUTER, QUE LE REJET EVENTUEL DU PARA2 NE PORTE EN RIEN PREJUDICE A LA FACULTE DES MEMBRES. DUNE FEDERATION DAGIR-DANS LA MESURE OU LE LEUR EST CONSTITUTIONNELLEMENT PERMIS-DANS LE DOMAINE DU DROIT INTERNATIONAL. UNQUOTE

...3

3. STATEMENT BY AMERICANS: QUOTE...PARA2, HOWEVER, RAISES PROBLEMS OF A DIFFERENT ORDER. IT PROVIDES THAT THE TREATY-MAKING CAPACITY OF A MEMBER OF A FEDERAL STATE IS TO BE DETERMINED BY REF TO THE FEDERAL CONSTITUTION. FEDERAL CONSTITUTIONS ARE INTERNAL LAW. THEIR INTERPRETATION FALLS WITHIN THE EXCLUSIVE JURISDICTION OF MUNICIPAL TRIBUNALS OF FEDERAL STATES. IF PARA2 OF ARTICLE 5 IS ADOPTED BY THE CTTEE OF THE WHOLE THERE IS 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.

A NUMBER OF FEDERAL STATES REPRESENTED AT THIS CONFERENCE HAVE ESTABLISHED THAT THE RETENTION OF PARA 2 WOULD CAUSE THEM SUBSTANTIAL DIFFICULTIES. AS A FEDERAL STATE, WE FULLY UNDERSTAND THESE PROBLEMS. ON THE OTHER HAND, NO/NO STATE HAS PRESENTED ANY SUSTAINABLE ARGUMENT THAT PARA 2 IS NECESSARY TO AVOID DIFFICULTIES.

MOREOVER, PARA 2 LEAVES UNANSWERED FAR TOO MANY QUESTIONS. OWING TO THE CONSTITUTIONAL DIFFERENCES BETWEEN FEDERAL STATES IT WILL NOT/NOT ALWAYS BE CLEAR WHEN PARA2 APPLIES. MY DEL BELIEVES THAT PARA2 WOULD, IF ADOPTED, 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. IN 1965, AFTER REVIEWING THE COMMENTS OF GOVTS ON THIS ARTICLE, SIR HUMPHREY WALDOCK, THE RAPPORTEUR AND OUR EXPERT CONSULTANT, PROPOSED DELETION OF THE RULE. WE BELIEVE THAT THIS PROPOSAL TO DELETE IS SOUND....UNQUOTE.

J. A. BEESLEY

ACTION COPY

20-3-1-6

VN[redacted]/8

PP OTT

DE VNA

P 081426Z

U N C L A S S I F I E D

FM VIENN MAY8/69 NO/NO STANDARD

TO EXTEROTT 393 PRIORITY

REF YOURTEL L577

LAW OF TREATIES: STATEMENTS ON ART5(2)

WE HAVE ALREADY AIRMAILED SUMMARY RECORDS OF 7TH AND 8TUITGS OF PLENARY OF APR28, DISCUSSING ART5(2) BUT UNDERSTAND THAT DUE TO STRIKE THEY MAY NOT/NOT YET HAVE REACHED YOU.

2. FACT THAT MOST OF DELS WHO SPOKE TO 5(2) AND FROM WHOM WE REQUESTED COPIES OF SPEECHES WERE NOT/NOT USING PREPARED STATEMENTS AND INSTEAD HAVE HAD TO PREPARE TYPED SCRIPTS FOR US HAS MEANT THAT WE HAVE TO DATE RECEIVED COPIES OF STATEMENTS ONLY FROM AUSTRALIA, CYPRUS, INDIA AND URUGUY (IN SPANISH). IN ADDITION ARGENTINA, FGR, UK AND USA HAVE PROMISED US TEXTS. NONE WILL BE FORTHCOMING FROM BRAZIL OR SWITZERLAND (WHICH SPOKE FROM RUDIMENTARY NOTES ONLY).

3. FOLLOWING ARE SIGNIFICANT EXCERPTS FROM TEXTS ALREADY AVAILABLE, WITH WHOLE OF URUGUAYAN STATEMENT SINCE IT WAS SO SHORT. AS SOON AS OTHER STATEMENTS ARE RECEIVED WE WILL CABLE FURTHER EXTRACTS. COPIES OF STATEMENTS ALREADY RECEIVED, PLUS SUMMARY RECORDS OF APR28 PLENARY MTGS ALSO BY AIRMAIL.

4. STATEMENT OF URUGUAY: QUOTE MI DELEGACION QUIERE REFERIRSE MUY BREVEMENTE AL PUNTO PLANTEADO POR EL SENOR DELEGADO DEL CDA EN RELACION CON EL PARRAFO 2 DEL ART5.

EN OPORTUNIDAD DE LA INTERVENCION QUE LE CUPO EN EL TRANSCURSO DE LAS SESIONES DE LA COMISION PLENARIA EN EL PRIMER PERIODO DE SESIONES

...2

13/8/s'

DE LA CONFERENCIA MI DELEGACION SE MANIFESTO EN CONTRA DEL REFERIDO PARRAFO Y DE SU INSERCION EN LA CONVENCION

DOS RAZONES FUNDAMENTAN A JUICIO DE ME DELEGACION TAL CRITERRIO: LA PRIMERA, QUE EL PARRAFO EN COMENTARIO MAS QUE UNA INJERENCIA INDEBIDA EN LOS ASUNTOS INTERNOS DEL ESTADO SUPONE QUE EL DERECHO INTERNACIONAL CEDE SU PRIORIDAD EN FAVOR DEL DERECH FEDERAL INTERNO EN UNA DE SUS FUNCIONES MAS IMPORTANTES: LA DE DETERMINAR LOS SUJETOS DE DERECHO INTERNACIONAL FACULTADOS PARA ACTUAR EN ESA ESFERA. EN REALIDAD, EL "JUS CONTRAENDI" DE UN ESTADO FEDERADO ESTA DETERMINADO NO SOLO POR LA CONSTITUNCION DEL ESTADO FEDERAL SINO QUE DEPENDE TAMBIEN DE QUE OTROS ESTADOS ACEPTEN CELEBRAR TRATADOS CON DICHO ESTADO.

LA SEGUNDA, QUE SERIA PELIGROSO ADOPTAR EL TEXTO DEL PARRAFO 2 DEL ART5 PORQUE EN TAL CASO TADO DEPENDERIA DE LAS DISPOSICIONES DE LA CONSTITUCION DEL ESTADO FEDERAL. DICHO ESTADO TENDRIA ENTONCES UNA VENTAJA CONSIDERABLE SOBRE EL ESTADO UNITARIO YA QUE PODRIA SO PRETEXTO DE TAL DISPOSICION INTRODUCIR EN LAS CONFERENCIAS Y EN LOS TRATADOS MULTILATERALES UN GRAN NUMERO DE SUJETOS DE DERECHO, DE SUBDIVISIONES POLITICAS QUE DECIDIERA CREAR. DE TAL SUERTE, LOS ESTADOS FEDERALES PODRIAN DESEQUILIBRAR GRAVEMENTE EN SU FAVOR EL NUMERO DE PARTES Y EL NUMERO DE VOTOS.

POR LO EXPUESTO, MI DELEGACION APOYA LA PROPUESTA DE VOTACION SEPARADA DEL PARRAFO 2 DEL ART5 FORMULADA POR EL SENOR DELEGADO DE MUCHAS GRACIAS, SENOR PRESIDENTE. UNQUOTE.

5. STATEMENT OF CYPRUS: QUOTE... THE REPUBLIC OF CYPRUS NEITHER IS NOR IS IT LIKELY TO BECOME A FEDERAL STATE AND THERFORE THE ISSUE IN ARTICLE 5(2) DOES NOT/NOT AFFECT US DIRECTLY.

NEVERTHELESS, ON THE BASIS OF GENERAL CONSIDERATIONS, WE ARE CONVINCED THAT THE ADOPTION OF A PROVISION OF THE KIND SET OUT IN ARTICLE 5(2) MIGHT LEAD TO THE PRACTICE OF OTHER STATES ASSUMING THE RIGHT TO INTERPRET FOR THEMSELVES THE CONSTITUTIONS OF FEDERAL STATES AND THIS, IN OUR VIEW, WOULD CONSTITUTE A CASE OF INTERFERENCE BY OUTSIDE STATES IN THE INTERNAL AFFAIRS OF A FEDERAL STATE. MOREOVER, IT IS AN UNTENABLE PROPOSITION THAT A FEDERAL CONSTITUTION, WHICH IS INTERNAL LAW OF THE FEDERAL STATE, CAN BY ITSELF DETERMINE MATTERS ON INNATL LAW.

IT IS FOR THESE REASONS, AND FOR THE PRACTICAL PROBLEMS THAT ARE BOUND TO ARISE IF SUCH PROVISION IS MADE PART OF THE CONVENTION MR PRESIDENT, THAT MY DEL WILL VOTE FOR THE DELETION OF ARTICLE 5(2) ... UNQUOTE.

6. STATEMENT OF AUSTRALIA. QUOTE... THE RETENTION OF PARA2 OF ARTICLE 5 COULD CREATE POTENTIAL DIFFICULTIES FOR SOME OTHER FEDERAL SOATES, WHEREAS NO/NO CASE HAS BEEN DEMONSTRATED THAT ITS RETENTION IS NECESSARY OR THAT ITS DELETION WOULD OCCASION ANY REAL DIFFICULTIES. I SAY THIS WITH THE GREATEST RESPECT TO PREVIOUS SPEAKERS IN THIS DEBATE THAT HAVE SPOKEN IN THE CONTRARY SENSE.

THESE LATTER REPS HAVE, EG POINTED OUT THAT IT WILL BE FOR THE INTERNAL AUTHORITIES OF A STATE TO INTERPRET THE CONSTITUTION AND

...4

THAT THE FEARS IN THIS REGARD ARE NOT/NOT WELL BASED. ONE COMMENT I WOULD MAKE IS THAT PARA2 DOES NOT/NOT SPELL THIS OUT AND THERE IS A REAL RISK OF MISUNDERSTANDING ON THE MATTER. FURTHER I WOULD SUBMIT THAT BESIDES THIS PROBLEM THERE ARE OTHER PROBLEMS LATENT IN PARA2, SUCH AS THE PROPER ROLE THAT INNATL LAW PLAYS IN THE RECOGNITION OF THE TREATY-MAKING CAPACITY OF A MEMBER OF A FEDERAL STATE...

THE PROBLEMS ARE COMPLEX AND REAL. THE SOLUTION, HOWEVER, IS A SIMPLE ONE AND THAT IS TO DELETE PARA2. THIS STEP WILL BE WITHOUT PREJUDICE TO ANY DEL AND WILL ENABLE THE CONFERENCE TO GET ON WITH WHAT IS OUR ESSENTIAL TASK, WHICH IS TO DRAW UP A CONVENTION DEALING WITH TREATIES BETWEEN STATESJM

MR PRESIDENT, THE HISTORY OF ARTICLE 5 HAS ALREADY BEEN DESCRIBED TO US. ITS ORIGINS GO BACK TO A TIME WHEN THE DRAFT ARTICLES WERE INTENDED TO COVSR ALL KINDS OF TREATIES AND WHEN AN ELABORATE PROVISION ON TREAY-MAKING CAPACITY WAS THEREFORE WARRANTED. FINALLY A DIFFERENT COURSE HAS BEEN TAKEN AND THAT HAS BEEN TO LIMIT THE CONVENTION TO TREATIES BETWEEN STATES, AND AS A RESULT THE ILC TRUNCATED THE ORIGINAL ARTICLE 5. BUT IT DID NOT/NOT GO FAR ENOUGH. OUR HOPE IS THAT THIS PLENARY SESSION WILL COMPLETE WHAT THE ILC DID NOT/NOT QUITE FINISH, AND DELETE PARA2 OF ARTICLE 5.... UNQUOTE

7. STATEMENT OF INDIA: QUOTE... WE DO RECOGNIZE THAT A MEMBER OF A FEDERAL UNION MAY POSSESS CAPACITY TO CONCLUDE TREATIES. THIS IS A STATEMENT OF FACT SINCE SOME CONSTITUENT UNITS OF FEDERAL STATES DO CONCLUDE TREATIES WITH SOVEREIGN STATES. THIS POSITION ONLY REFLECTS

THEIR TREATY-MAKING CAPACITY. BUT MR PRESIDENT OUR DRAFT CONVENTION IS NOT/NOT EXHAUSTIVE. AS IS QUITE CLEAR FROM THE TEXT OF ARTICLE 1 OF THE CONVENTION, ADOPTED BY THE CONFERENCE UNANIMOUSLY THIS MORNING, OUR CONVENTION DOES NOT/NOT INCLUDE TREATIES CONCLUDED BETWEEN STATES AND INNATL ORGANIZATIONS, NOR BETWEEN INNATL ORGANIZATIONS INTER SE. NOR DOES IT DEAL COMPREHENSIVELY WITH THE ISSUES ARISING FROM TREATIES CONCLUDED BETWEEN SOVEREIGN STATES AND THE MEMBERS OF A FEDERAL UNION. SINCE OUR CONVENTION CONCENTRATES ONLY ON TREATIES CONCLUDED BETWEEN STATES, THE PROPER COURSE WOULD BE, NOT/NOT TO DEAL WITH THE QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND MEMBERS OF A FEDERAL UNION. IN THE ALTERNATIVE, THERE MUST ALSO BE INCLUDED IN THE CONVENTION, A COMPREHENSIVE SECTION DEALING NOT/NOT ONLY WITH THE CAPACITY OF MEMBERS OF A FEDERAL UNION TO CONCLUDE TREATIES BUT ALSO ALL OTHER CONSEQUENTIAL QUESTIONS. ALL ASPECTS OF TREATIES BETWEEN MEMBERS OF A FEDERAL UNION AND STATES ARE NOT/NOT COVERED IN ARTICLE 5- SUCH AS: EG(1) WHO WILL ISSUE FULL POWERS?(2) HOW WILL CONSENT OF THE MEMBERS OF A FEDERAL UNION TO BE BOUND BY THE TREATY BE EXPRESSED?(3) HOW WILL DISPUTES BETWEEN STATES AND MEMBERS OF A FEDERAL UNION BE SETTLED IN TERMS OF ARTICLE 62?(4) WHAT WILL BE THE RESPONSIBILITY OF MEMBERS OF A FEDERAL UNION FOR BREACH OF TREATY OBLIGATIONS? MR PRESIDENT, THIS IS AN AREA IN WHICH IT WOULD BE EXCEEDINGLY UNWISE TO ENUNCIATE OR CODIFY ANY RULES OF INNATL LAW; FOR IT IS, IN ESSENCE, A MATTER SOLELY REGULATED BY THE INTERNAL LAW OF EACH FEDERATION. WE SHOULD NOT/NOT RUSH IN, WHERE ANGELS FEAR TO TREAD. THE

OF PRESENT ARTICLE 5(2), MIGHT GIVE THE IMPRESSION THAT A STATE CAN CLAIM THE AUTHORITY OF INNATL LAW IN SEEKING TO INTERPRET THE CONSTITUTION OR CONSTITUTIONAL PRACTICE OF ANOTHER STATE IN THIS CONTEXT, WHICH MAY WELL CONSTITUTE INTERVENTION OF THE MOST SERIOUS KIND...

MR PRESIDENT, IT CAN IMMEDLY BE REALIZED THAT IF WE WENT INTO THESE QUESTIONS, WE WOULD NECESSARILY HAVE TO ENTER INTO THE QUESTION OF RELATIONS BETWEEN THE MEMBERS OF A FEDERAL UNION AND THE FEDERAL GO-GOVT-RELATIONS WHICH ARE GOVERNED ESSENTIALLY BY MUNICIPAL LAW. THE ILC HAS NOT/NOT GONE INTO THESE QUESTIONS...MY DEL IS OF THE VIEW THAT THE BEST COURSE OPEN TO THE CONFERENCE IS NOT/NOT TO RETAIN PARA2. THE RESULT OF THIS COURSE WOULD BE THAT THE TREATY-MAKING CAPACITY OF A MEMBER OF A FEDERAL UNION, WILL CONTINUE TO BE DETERMINED BY THE CONSTITUTION OF THAT FEDERAL UNION, WHICH WOULD ALSO SET FORTH THE PROCEDURES OF TREATY-MAKING BY ITS MEMBERS AS WELL AS THE LIMITATIONS OF THEIR POWERS. THIS CAPACITY COULD CONTINUE TO BE RECOGNIZED BY THOSE SOVEREIGN STATES WHO DECIDE TO CONCLUDE TREATIES WITH THEM. IN OTHER WORDS, THE DELETION OF PARA2 WILL NOT/NOT IN ANY MANNER AFFECT THE TREATY-MAKING CAPACITY OF MEMBERS OF A FEDERAL UNION; IT WILL ONLY AVOID DIFFICULTIES, FROM THE INNATL LAW VIEWPOINT ...UNQUOTE.

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 8/69	20-3-1-6	CONFD
	37	

FM/DE EXTERNAL OTT

	NO	PRECEDENCE
TO/A VIENNA (CDN DEL LAW OF TREATIES) (FOR WERSHOF)	L-581	PRIORITY
INFO		

REF YOURTEL 385 MAY 7/69

SUB/SUJ LAW OF TREATIES: PART V AND SETTLEMENT OF DISPUTES

WE AGREE WITH PROCEDURE PROPOSED IN PARAGRAPH 3 OF REFTEL.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY/itl	LEGAL	2-9553	SIG J.A.BEESLEY

EXT 18/BIL (REV. 5/64)
(COMMUNICATIONS DIV)

003818

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 8/69	20-3-1-6	
	37	CONFD

FM/DE EXTERNAL OTT

	NO	PRECEDENCE
TO/A VIENNA (CDN DEL LAW OF TREATIES) (FOR WERSHOF)	L-583	IMMED
INFO		

REF YOURTEL 384 MAY 7/69

SUB/SUJ LAW OF TREATIES—ARTICLE 49

RE PARA 5 REFTEL AGREE YOU SHOULD SUPPORT SEPARATE VOTE ON PHRASE IN QUESTION. HOWEVER ^SINCE WE ARE ALSO INDEBTED TO BOLIVIA FOR ITS SUPPORT ON ARTICLE 5(2) AND IN LIGHT OF VOTE IN CW ^THERE IS GOOD POSSIBILITY THAT NON-RETROACTIVE CLAUSE WILL BE ADOPTED ~~IN LIGHT OF VOTE IN CW~~ WE RECOMMEND ABSTENTION ON QUESTION OF SUBSTANCE.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG R.MAWHINNEY/itl	LEGAL	2-9553	SIG T.A.BEESLEY J.A.BEESLEY

EXT 18/8IL (REV 6/64)
(COMMUNICATIONS DIV)

003819

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 7/69	20-3-1-6	SANS

FM/DE EXTERNAL OTT

	NO	PRECEDENCE
TO/A VIENNA (CDN DEL LAW OF TREATIES) (FOR WERSHOF)	L-577	PRIORITY
INFO		

REF

SUB/SUJ LAW OF TREATIES CONFERENCE

HAVE GIVEN INTERVIEW TO ONE NEWS CORRESPONDENT CONCERNING VOTE ON ARTICLE 5(2) AND ANTICIPATE GIVING FURTHER BRIEFINGS TO MEMBERS OF PRESS. FOR THIS PURPOSE WE WOULD FIND HIGHLY USEFUL COPIES or relevant extracts OF STATEMENTS DELIVERED BY OTHER DELS DURING DISCUSSION OF THIS ITEM PRIOR TO VOTE IN PLENARY. ~~IF AVAILABLE GRATEFUL YOU FORWARD ONE COPY EACH TEXT BY AIR MAIL.~~ soonest

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY/ttl	LEGAL	2-9553	SIG T.A. BEESLEY J.A.BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003820

file 20-3-1-6 pt 2

ACTION COPY

return to DM

C O N F I D E N T I A L

FM VIENN MAY7/69 NO/NO STANDARD

TO EXTEROTT 385 PRIORITY

LAW OF TREATIES: PART V AND SETTLEMENT OF DISPUTES

PLENARY SHOULD BEGIN CONSIDERATION OF PART V(INVALIDITY TERMINATION AND SUSPENSION)SOMETIME LATER THIS WEEK. WHEN IT DOES SO IT SEEMS LIKELY THAT SUBSTANTIVE ARTICLES WILL BE TAKEN UP BEFORE WE HAVE CONSIDERED SETTLEMENT OF DISPUTES PROCEDURES(AND IN PARTICULAR ART 62 BIS).

2. THUS IT IS NOW TIMELY FOR US TO DETERMINE HOW WE SHOULD VOTE ON INDIVIDUAL ARTICLES IN PART V OF PARTICULAR CONCERN TO US AND FOR WHICH OUR EVENTUAL SUPPORT WILL DEPEND ON THERE BEING INCLUDED IN CONVENTION SATISFACTORY SETTLEMENT OF DISPUTES PROVISIONS. THIS SUBJ IS ONE WHICH WE HAVE DISCUSSED WITH BOTH OUR AMERICAN AND OUR BRIT COLLEAGUES(WHOSE OWN THINKING IS NOT/NOT YET PARTICULARLY ADVANCED). IT WILL ALSO UNDOUBTEDLY SOON BE DISCUSSED IN WESTERN GROUP.

3. OUR OWN INCLINATION IS TO VOTE IN FAVOUR OF ARTICLES IN PART V WHEN THEY COME BEFORE PLENARY BUT TO MAKE IT CLEAR IN A STATEMENT WE COULD DELIVER EARLY THAT OUR SUPPORT IS STILL ONLY CONDITIONAL AND THAT QUESTION WHETHER OR NOT/NOT WE COULD EVENTUALLY VOTE IN FAVOUR OF TEXT AS A WHOLE WILL DEPEND ON EVENTUAL RESLN OF QUESTION OF SETTLEMENT OF DISPUTES.

4. WE WILL IN A FEW DAYS RAISE WITH YOU SEPARATE AND MORE IMPORTANT QUESTION OF HOW TO VOTE ON TEXT OF CONVENTION AS A WHOLE IF PRESENT

...2

3,815

L-583

file 20-3-1-6

20-3-1-6
1
2

ACTION COPY

X

C O N F I D E N T I A L

FM VIENN MAY7/69 NO/NO STANDARD

TO EXTEROTT 384IMMED

LAW OF TREATIES-ARTICLE 49

TEXT OF ART 49 ADOPTED BY ILC PROVIDED THAT A TREATY IS VOID IF PROCURED BY THREAT OR USE OF FORCE IN VIOLATION OF QUOTE THE PRINCIPLES OF THE CHARTER OF THE UN UNQUOTE. AS A RESULT OF ADOPTION OF AMENDMENT A/CONF.39/C.1/L.289 PROPOSED BY BULGARIA ET AL AT FIRST SESSION PASSAGE QUOTED WAS EXPANDED TO READ QUOTE THE PRINCIPLES OF INNATL LAW EMBODIED IN THE CHARTER OF THE UN UNQUOTE. TEXT OF AMENDMENT AND RECORD OF VOTING APPEAR IN RAPPORTEURS REPORT(A/CONF.39/C.1/-L.370/REV.1/VOL II)AT PAGES 251 AND 253 RESPECTIVELY. YOU WILL NOTE CDA, USA AND FRANCE ABSTAINED ON AMENDMENT AND UK VOTED AGAINST. OUR ABSTENTION WAS PRESUMABLY BASED ON VIEW THAT AMENDMENT ADDED NOTHING SIGNIFICANT TO SUBSTANCE OF ART.

2. VARGAS OF CHILEAN DEL APPROACHED US YESTERDAY SEEKING OUR SUPPORT FOR EFFORTS BY CHILE AND OTHERS TO DELETE FROM TEXT ADOPTED BY CTTEE OF THE WHOLE(CW)WORDS QUOTE INNATL LAW EMBODIED IN UNQUOTE. IMPORTANCE OF ART FOR CHILE ARISES FROM POSSIBLE INVOCATION OF ART 49 BY BOLIVIA IN RESPECT OF PEACE TREATY BETWEEN CHILE AND BOLIVIA CONCLUDED APROX 100 YEARS AGO WHICH ESTABLISHED NATL BOUNDARIES BETWEEN BOLIVIA AND CHILE IN A MANNER FAVOURABLE TO CHILE. PERU, WHICH SUPPORTS CHILEAN EFFORT TO DELETE PHRASE IN QUESTION, IS IN SIMILAR SITUATION VIS-A-VIS ECUADOR.

3. SIGNIFICANCE ATTACHED TO PHRASE IN QUESTION BY CHILE IS ESSENT-

...2

2.8.5

C O N F I D E N T I A L

PAGE TWO 385 NO/NO STANDARD

62BIS FAILS IN PLENARY AND IF NO/NO OTHER SATISFACTORY SETTLEMENT OF DISPUTES CLAUSE IS ADOPTED.

WERSHOF

C O N F I D E N T I A L

IALLY TEMPORAL. CHILEAN DEL CONSIDERS ILC TEXT SPEAKS ONLY FROM ADOPTION OF CHARTER IN 1945 WHEREAS CW TEXT MAY BE INTERPRETED AS REFERRING TO PRINCIPLES AND THEREFORE APPLYING TO TREATIES WHICH ANTEDATE CHARTER. IF FINAL CLAUSE ON NON-RETROACTIVITY OF PRESENT CONVENTION SIMILAR TO THAT ADOPTED IN CW IS ALSO ADOPTED IN PLENARY POSSIBILITY OF INVOKING CONVENTION IN RESPECT OF 19 CENTURY PEACE TREATIES WILL, OF COURSE, BE GREATLY REDUCED. AT TIME OF DEBATE ON ART 49, HOWEVER, IT WILL NOT/NOT BE KNOWN WHETHER PLENARY WILL ADOPT EXISTING FINAL CLAUSE ON NON-RETROACTIVITY. HENCE CHILEAN EFFORT TO DELETE PHRASE IN QUESTION.

4. MXICAN DEL (PRINCIPAL LATINAMERICAN CO-SPONSOR OF AMENDMENT L.289) HAS INFORMED US THAT, WHILE IT CONSIDERS CW FORMULATION LEGALLY PREFERABLE TO THAT OF ILC, IT HAS NO/NO POLITICAL INTEREST IN ADOPTION OF CW TEXT.

5. WE FAVOUR ACCEDING TO CHILEAN REQUEST FOR CDN SUPPORT BOTH ON REQUEST FOR SEPARATE VOTE ON PHRASE IN QUESTION (WHICH WE CAN SUPPORT CONSISTENT WITH OUR POSITION ON ART 5(2)) AND ON SUBSTANTIVE ISSUE CONCERNED, IE, FOR DELETION OF PHRASE. OUR VIEW ON SUBSTANCE IS BASED UPON TWO CONSIDERATIONS, FIRST THAT CHILE SUPPORTED US ON ART 5, AND SECOND THAT ANY TEXT WHICH MIGHT CREATE IMPRESSION THAT PRESENT CONVENTION APPLIES TO PRE-EXISTING TREATIES, ESPECIALLY PEACE TREATIES, SHOULD BE AVOIDED.

6. ART 49 MAY COME BEFORE PLENARY ON FRI MAY9. IF WE HAVE NOT/NOT

...3

C O N F I D E N T I A L

HEARD FROM YOU TO CONTRARY BEFORE THEN WE SHALL VOTE AS INDICATED IN PRECEDING PARA PROVIDED WE ARE IN RESPECTABLE COMPANY

WERSHOF...

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 6/69	20-3-1-6 37	UNCLAS

FM/DE EXTERNALOTT

NO	PRECEDENCE
L-573	ROUTINE

TO/A VIENNA (ROBERTSON)

INFO

REF

SUB/SUJ PEACEKEEPING.

WHILE IN VIENNA BEESLEY WAS SHOWN INTERESTING PAPER ON PEACEKEEPING BY AUTHOR JACOVIDES(CYPRUS). ~~GRATEFUL IF YOU WOULD~~ ARRANGE WITH JACOVIDES FOR US TO RECEIVE COPY BY AIRMAIL.

DISTRIBUTION
LOCAL/LOCALE UN, DISARMAMENT,PEACEKEEPING & MILITARY ASSISTANCE DIVS.(DONE IN DIV.O

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG D.M.MILLER/sm	L E G A L	2-2104	SIG Beesley

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003826

Legal/D.M. Miller/jf

file

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: United Nations Division
Att: Mr. Sterling

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: IUOTO Conference: All States Formula

SECURITY / Sécurité: RESTRICTED

DATE: May 5, 1969

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	37

ENCLOSURES / Annexes

DISTRIBUTION

European

In response to your request, we offer the following background information on the "all states formula" for possible use by the Canadian delegation to the forthcoming IUOTO Conference.

2. Some version or other of a formula which would permit "all states" to attend conferences of the U.N. or its specialized agencies or accede to multilateral treaties have been introduced by the Eastern Europeans with regularity over the years. In nearly every case the west has been able to defeat these proposals. On certain occasions it has been considered necessary or desirable to work out a compromise because of the importance of the subject matter of a problem or because of the desirability of having wide accession to a resultant treaty. For example, a formula was devised for the Outer Space and Nuclear Test Ban Treaties which provided for multiple depositories, and which have had the effect of permitting East Germany to deposit instruments of accession in Moscow. In all other cases, however, the west has been successful thus far in maintaining the formula used in the Vienna Conventions on Diplomatic and Consular Relations, namely: "... all States members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention ...".

3. Most recently, the question has arisen in connection with the Law of Treaties Conference. The basis of the conference is a Convention drafted by the International Law Commission, laying down the fundamental principles of the law of treaties. It is of interest that the U.S.S.R. representative on the Commission was successful in having a version of the "all states" formula included in the convention, but it was deleted by the Commission as a result of the determined efforts of a number of western jurists on the Commission, principally the USSEA, who led the fight as Canadian member of the Commission.

4. Subsequently, in 1966, when the Sixth Committee of the General Assembly was discussing the proposal to hold an international conference of plenipotentiaries on the Law of Treaties, the Eastern Europeans proposed that the resolution "invites all states to send delegations

..2

Ext. 407D/Bil.
[redacted]
(Admin. Services Div.)

to participate in the work of the conference". After considerable lobbying, the Western Group was able to defeat this proposal (33-53-19) and obtain approval for a modification of the "Vienna formula"; "invited States members of the United Nations, States members of the specialized agencies, States parties to the statute of the International Court of Justice, and States that the General Assembly decides specially to invite, to participate in the conference".

5. The main reasons for the West's success in defeating the traditional "all states formula" was that the Secretary-General made it clear that he could not implement such a formula. At the plenary session on November 18, 1963, he said in effect that he could not decide whether certain controversial entities are states and that, if an all states formula were given to him, he would have to ask the General Assembly to provide him with a list of the states within the formula, other than those which are members of the UN.

6. In the debate the USSR tried but failed to get a non-aligned state to propose that "States party to any treaty that had been registered with the UN" should be invited to the conference. And when it was discovered that Southern Rhodesia, for instance, was among those countries that would then have had to be invited, the Eastern Europeans dropped this idea.

7. At the current Law of Treaties Conference, the all states issue arises mainly in connection with the final clause on accession, although it also enters into articles dealing with multilateral treaties of general interest for the international community and the right of "all states" to participate in and become parties to such general treaties.

8. Last month, during the second session of the Law of Treaties Conference, Brazil and the UK proposed the Vienna formula in opposition to an Eastern European introduction of the all states formula. The non-aligned sought a compromise by suggesting that Parties to the Nuclear Test Ban Treaty and the Outer Space Treaty should automatically be eligible to become parties to the Law of Treaties Convention. Our delegation has reported that in the voting in Committee of the Whole, the Conference resoundly defeated the all states formula (32-56(Canada)-17) and the non-aligned proposal (32-40(Canada)-25) and adopted the Vienna Formula (60(Canada)-26-19). /Procedures for the conference require articles to obtain a two-thirds majority in plenary./ It may be that the issue will be raised again at the Conference as a result of the desire of a number of states to achieve a compromise solution. (A number of western delegations would not be averse to the acceptance of an accession formula similar to that used in the Nuclear Test Ban and Outer Space Treaties. The West Germans may block such a move).

9. Experience so far concerning the all states formula, particularly that at the second Law of Treaties Conference, suggests, therefore, that the formula has little chance of being adopted at any international conference under UN aegis. This is not to say, however, that the Eastern Europeans will not continue to advance it on every occasion in order, inter alia to attempt to win recognition for East Germany. In the event, that you consider this issue could arise at the IUOTO Conference, we recommend the delegation be instructed to refer to Ottawa for guidance, not so much on how to respond but on what specifically to say.

J. A. BEESLEY

Legal Division

tel file
diary
div.diary
f i l e

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 5/69	20-3-1-6	UNCLAS
	37	

FM/DE [illegible]

NO	PRECEDENCE
L-573	ROUTINE

TO/A VIENNA (ROBERTSON)

INFO

REF

SUB/SUJ PEACEKEEPING.

UNDER SU VIENNA DESPATCH WAS SECOND INSTANCE PAPER ON PEACEKEEPING BY AUTHOR JACOVIDES(CYPRUS). GRATEFUL IF YOU COULD ARRANGE WITH J/COVIDES FOR US TO RECEIVE COPY BY AIRMAIL.

DISTRIBUTION
LOCAL/LOCALE [illegible]

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. D.M. MILLER/mc	L E G A L	2-2104	SIG. J.A. BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

TRANSMITTAL SLIP

RESTRICTED

TO: UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA

FROM: CANADIAN EMBASSY, BERN, SWITZERLAND

Security: RESTRICTED

Date: May 5, 1969

Air or Surface:

No. of enclosures: 1

The documents described below are for your information.

Despatching Authority: J.A.ROBERTS/gm

20-3-1-6

Copies	Description	Also referred to:
1	Copy of our letter of May 5, 1969 to the Secretary General of the Swiss Political Department ref: Mr. Wershof's cable from Vienna of April 29 sub.: Law of Treaties - Article 5 - Switzerland	TO: M Stanford FROM REGISTRY MAY 12 1969 FILE CHARGED OUT TO:

INSTRUCTIONS

1. This form may be used in sending material for informational purposes from the Department to posts abroad and vice versa.

2. This form should *NOT* be used to cover documents requiring action.

3. The name of the person responsible for authorizing the despatch of the material should be shown opposite the words "Despatching Authority". This may be done by signature, name stamp or by any other suitable means.

4. The form should bear the security classification of the material it covers.

5. The column for "Copies" should indicate the number of copies of each document transmitted. The space for "No. of Enclosures" should show the total number of copies of all documents covered by the transmittal slip. This will facilitate checking on despatch and receipt of mail.

J.M.WELD/G.MOREAU/gm

Berne, le 5 mai 1969

Monsieur le Secrétaire Général,

Je viens d'apprendre, par voie d'un télégramme de notre représentant à la Conférence de la Commission du Droit International à Vienne que le représentant suisse, le Dr. Bindschedler, a voté contre le paragraphe 2 de l'article 5 du projet de Convention sur le droit des traités et qu'il a en outre, dans son discours, appuyé plusieurs des arguments canadiens.

Comme vous le savez par les représentations que notre Chargé d'affaires a faites auprès de vous l'an dernier, le Canada tient beaucoup à ce que ce paragraphe soit exclu de la Convention. Conscients comme nous le sommes que l'article 5 est conforme à la pratique suisse et que son inclusion ou exclusion dans le corps de la Convention ne touchait pas les intérêts directs de votre pays, nous sommes d'autant plus reconnaissants à la Suisse de nous avoir donné son appui particulièrement précieux.

Je vous remercie vivement de votre intérêt personnel dans cette affaire et de cette preuve de solidarité entre pays fédéraux.

Je vous prie d'agréer, Monsieur le Secrétaire Général, l'assurance de ma très haute considération.

Original Signed by
JAMES A. ROBERTS

James A. Roberts
Ambassadeur

Monsieur l'Ambassadeur Pierre Micheli
Secrétaire Général
Département Politique Fédéral
Berne

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 5/69	20-3-1-6	SANS

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
VIENNA (CND DEL LAW OF TREATIES CONFERENCE)	L-570	ROUTINE
INFO		

REF YOURTEL 375 MAY 5

SUB/SUJ LAW OF TREATIES

~~THANK YOU FOR INFO IN REFTEL~~. DELAY IN ARRIVAL OF STATEMENT ~~WHICH IS~~ (NOT YET RECEIVED) PROBABLY DUE TO AIR CANADA STRIKE. YOU ~~WILL~~ may WISH TO BEAR THIS TIME LAG IN MIND WHEN DISPATCHING FURTHER CCN REFERENCE MATERIALS.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG D.MAHHINNEY/ill	LEGAL	2-9553	SIG J.A. BEESLEY J.A. BEESLEY

EXT 18/BIL (REV 8/64)
(COMMUNICATIONS DIV)

OTT072

J. A. BEESLEY

PA 93

20-3-1-6

ACTION COPY

20-3-1-6
MT 1 13

GVE 56

VNA6/5

RR OTT

DE VNA

R 051000Z

U N C L A S S I F I E D

FM VIENN MAY5/69 NO/NO STANDARD

TO EXTEROTT 374

REF OURTEL 343 APR28

LAW OF TREATIES CONFERENCE-SECOND SESSION-FOURTH WEEKLY SUMMARY-
APR28-30

CONFERANCE BEGAN MTG IN PLENARY MON MORNING APR28, AND WITH ONLY A FEW EXCEPTIONS, HAS BEEN MOVING QUICKLY THROUGH EARLY ARTICLES WITH FOLLOWING RESULTS: ARTICLE 1(SCOPE OF THE PRESENT CONVENTION). TEXT OF ARTICLE 1 APPEARING IN A/CONF 39/13 WAS ADOPTED 98-0-0. IT WILL BE NOTED THAT DRAFTING CTTEE(DC), IN SUBMITTING TEXTS TO PLENARY, IS INCLUDING TITLES OF ARTICLES. TITLES WERE NOT/NOT INCLUDED IN TEXTS ADOPTED BY CTTEE OF WHOLE(CW).

ARTICLE 2(USE OF TERMS). TEXT OF ARTICLE 2 APPEARING IN 39/13 WAS DISCUSSED IN PLENARY IMMEDLY FOLLOWING DISCUSSION OF ARTICLE 1. AS NO/NO FINAL DECISION ON DEFINITIONS CAN BE TAKEN, HOWEVER, UNTIL CONTENTS OF CONVENTION ARE KNOWN, VOTE ON THIS ARTICLE WAS DEFERRED UNTIL CONSIDERATION OF OTHER ARTICLES IS COMPLETED.

ARTICLE 3(INNATL AGREEMENTS NOT/NOT WITHIN THE SCOPE OF PRESENT CONVENTION). TEXT OF ARTICLE 3 APPEARING IN 39/13 WAS ADOPTED 102-0-0.

ARTICLE 4(TREATIES CONSTITUTING INNATL ORGANIZATIONS AND TREATIES ADOPTED WITHIN AN INNATL ORGANIZATION). TEXT OF ARTICLE 4 APPEARING IN 39/13 WAS ADOPTED 102-0-0. DC WAS ASKED TO CONSIDER ROMANIAN AMENDMENT IN CONF 39/L.9. IN REPLY TO OUR REQUEST IN CONNECTION WITH A LATER ARTICLE, PRESIDENT STATED THAT WHEN DC WAS ASKED TO REVIEW AN

...2

GMMM W

16/5/4

ARTICLE ADOPTED BY PLENARY, THE ARTICLE WOULD BE REFERRED BACK TO PLENARY IF DC DECIDED TO RECOMMEND ANY ALTERATIONS IN TEXT ADOPTED BY PLENARY.

ARTICLE 5(CAPACITY OF STATES TO CONCLUDE TREATIES). WE HAVE ALREADY REPORTED IN DETAIL(OURTEL 344 APR28 AND SUCCEEDING TELS) ON RESULTS OF DEBATE AND VOTE ON THIS ARTICLE. WE SHALL THEREFORE RECORD HERE, FOR SAKE OF COMPLETENESS OF THESE SUMMARIES, ONLY THAT ON SEPARATE VOTE PARA2 OF ARTICLE 5 WAS DEFEATED 28-66-13. REMAINDER OF ARTICLE AS SET OUT IN 39/13 CONSISTING ONLY OF PARA 1, WAS ADOPTED 88-5-10.

ARTICLE 6(FULL POWERS). CHAIRMAN OF DC IN INTRODUCING TEXT OF ARTICLE 6 IN 39/13, STATED THAT GHANAIN AMENDMENT(CONF 39/L.7) TO PARA1 HAD BEEN ACCEPTED BY DC. TEXT OF ARTICLE 6 APPEARING IN 39/13, AMENDED BY GHANAIN L.7, WAS ADOPTED 101-0-3.

ARTICLE 7(SUBSEQUENT CONFIRMATION OF AN ACT PERFORMED WITHOUT AUTHORIZATION). TEXT OF ARTICLE 7 APPEARING IN 39/13/ADD 1 WAS ADOPTED 103-0-2 SUBJ TO FURTHER CONSIDERATION BY DC OF ROMANIAN AMENDMENT IN CONF 39/L.10.

ARTICLE 8(ADOPTION OF THE TEXT). TEXT OF ARTICLE 8 APPEARING IN 39/13/ADD1 WAS INTRODUCED BY CHAIRMAN OF BC. TANZANIA SUBMITTED ORALLY AMENDMENT BASED ON AMENDMENT IT SUBMITTED AT FIRST SESSION(C.1/L.103). THIS WAS DEFEATED 11-62(CDA)-23. UK-MXICO SUBMITTED AMENDMENT IN CONF 39/L.12, AND ACCEPTED ORAL SUB-AMENDMENT BY EL SALVADOR TO DELETE WORDS QUOTE IN THE CONFERENCE UNQUOTE. THIS AMENKMENT WAS ADOPTEB 91(CDA)-1-7.

...3

ARTICLE 9(AUTHENTICATION OF TEXT).VTANZANIAN AMENDMENT CONF 39/L.11 WAS REJECTED 20-47(CDA)-30.TEXT OF ARTICLE 9 APPEARING IN 39/13 WAS ADOPTED 98-0-3.ARTICLE 9 BIS(MEANS OF EXPRESSING CONSENT TO BE BOUND BY A TREATY).BELGIAN AMENDMENT CONF 39/L.13 WAS WITHDRAWN. TEXT OF ARTICLE 9 BIS APPEARING IN 39/13/ADD 2 WAD ADOPTED 100-0-3.

ARTICLE 10(CONSENT TO BE BOUND BY A TREATY EXPRESSED BY SIGNATURE). NETHERLANDS REQUESTED SEPARATE VOTE ON LAST SIX WORDS OF PARA1(C) OF TEXT APPEARING IN 39/13/ADD 2.THESE WORDS WERE RETAINED 54-26-19(CDA).SWITZERLAND REQUESTED SEPARATE VOTE ON PARA2(A).THIS WAS RETAINED BY 74-15(CDA)-12.TEXT OF ARTICLE 10 APPEARING IN 39/13/ ADD 2 WAS THEN ADOPTED 95(CDA)-1-5.ARTICLE 10 BIS(CONSENT TO BE BOUND BY A TREATY EXPRESSED BY AN EXCHANGE OF INSTRUMENTS CONSTITUTING A TREATY).TEXT OF ARTICLE 10 BIS APPEARING IN 39/13/ADD2 WAS ADOPTED 91-0-0 SUBJ TO CONSIDERATION BY DC OF BELGIAN AMENDMENT CONF 39/L.14.

ARTICLE 11(CONSENT TO BE BOUND BY A TREATY EXPRESSED BY RATIFICATION, ACCEPTANCE OR APPROVAL).TEXT OF ARTICLE11 APPEARING IN 39/13/ADD 2 WAS ADOPTED 94-0-0.

ARTICLE 12(CONSENT TO BE BOUND BY A TREATY EXPRESSED BY ACCESSION). FOLLOWING A BRIEF DISCUSSION IN WHICH THE QUOTE ALL STATES UNQUOTE ISSUE WAS ALLUDED TO,TEXT OF ARTICLE 12 APPEARING IN 39/13/ADD 2 WAS ADOPTED 73(CDA,USA,UK,FRANCE)14-8.

ARTICLE 13(EXCHANGE OR DEPOSIT OF INSTRUMENTS OF RATIFICATION,ACCEPTANCE,APPROVAL OR ACCESSION).TEXT OF ARTICLE 13 APPEARING IN 39/13/ ADD 2 WAS ADOPTED 99-0-1.

...4

ARTICLE 14(CONSENT TO BE BOUND BY PART OF A TREATY AND CHOICE OF DIFFERING PROVISIONS. TEXT OF ARTICLE 14 APPEARING IN 39/13/ADD 3 WAS ADOPTED 99-Ø-Ø.

ARTICLE 15(OBLIGATION NOT/NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY PRIOR TO ITS ENTRY INTO FORCE). POSISH AMENDMENT IN CONF 39/L.16 WAS ADOPTED 65(CDA, UK)-Ø-36(USA, FRANCE). TEXT OF ARTICLE 15 APPEARING IN 39/13/ADD3 AS AMENDED BY POLISH L.16 WAS ADOPTED 102-Ø-Ø.

ARTICLE 16(FORMULATION OF RESERVATIONS). TEXT OF ARTICLE 16 APPEARING IN 39/13/ADD 3 WAS ADOPTED 92(CDA, USA, UK, FRANCE)-4-7.

ARTICEL 17(ACCEPTANCE OF AND OBJECTION TO RESERVATIONS). DURING 1968 SESSION CW ADOPTED A FORMULATION OF PARA4(B) OF ARTICLE 17 WHICH RAISED A PRESUMPTION THAT TREATY DID NOT/NOT ENTER INTO FORCE BETWEEN OBJECTING AND RESERVING STATES. USSR SUBMITTED AMENDMENT CONF 39/L.3 TO REVERSE THIS PRESUMPTION. AMENDMENT WAS ADOPTED AFTER CONSIDERABLE DISCUSSION BY 49-21(CDA, USA)-3Ø(UK). NEW FORMULATION REQUIRES OBJECTING STATE TO SAY THAT IT DOES NOT/NOT WANT TREATY IN FORCE BETWEEN ITSELF AND RESERVING STATE. AUSTRIA REQUESTED SEPARATE VOTE ON WORDS QUOTE THE LTD NUMBER OF THE NEGOTIATING STATES AND UNQUOTE IN PARA2. THESE WORDS WERE RETAIND 75(CDA, UK, FRANCE)-6(USA)-18. USSR REQUESTED SEPARATE VOTE ON PARA3. THIS PARA WAS RETAINED 61(CDA, USA, 7()-2Ø-18. TEXT OF ARTICLE 17 APPEARING IN 39/13/ADD3, AS AMENDED BY USSR AMENDMENT IN L.3, WAS ADOPTED 83(USA, FRANCE)-Ø-17(CDA, UK).

ARTICLE 18(PROCEDURE REGARDING RESERVATIONS). TEXT OF ARTICLE 18 APPEARING IN 39/13/ADD 3 AND CORR 1 WAS ADOPTED 9Ø-Ø-Ø.

...5

ARTICLE 19(LEGAL EFFECTS OF RESERVATIONS).TEXT OF ARTICLE 19 APPEARING IN 39/13/ADD 4(WHICH INCLUDED MODIFICATION OF PARA3 AS ADOPTED EARLIER IN CW TO TAKE ACCOUNT OF ADOPTION OF SOVIET AMENDMENT TO 17(4)(B)) WAS ADOPTED 94-Ø-Ø,SUBJ TO FURTHER REVIEW BY DC.

ARTICLE2Ø(WITHDRAWAL OF RESERVATIONS).HUNGARIAN AMENDMENT IN CONF 39/L.17 WAS ADOPTED 92(CDA,USA,UK,FRANCE)-Ø-3.HUNGARIAN AMENDMENT CONF 39/L.18 WAS ADOPTED 93(USA,UK)-Ø-3(CDA).WE INTERVENED IN DEBATE TO POINT OUT THAT HUNGARIAN AMENDMENT L.18 WAS BASED UPON TEXT ADOPTED BY CW AND DID NOT/NOT TAKE INTO ACCOUNT DCS IMPROVEMENTS IN TEXT OF PARA2 AS IT WAS SUBMITTED TO PLENARY IN 39/13/ADD4.TEXT OF ARTICLE 2Ø APPEARING IN 39/13/ADD 4,AS AMENDED BY HUNGARIAN AMENDMENT L.17 AND L.18 WAS ADOPTED 98-Ø-Ø SUBJ TO FURTHER REVIEW BY DC IN THE LIGHT OF CDN OBSERVATIONS ON DRAFTING OF HUNGARIAN L.18.

ARTICLE 21(ENTRY INTO FORCE).TEXT OF ARTICLE 21 APPEARING IN 39/13/ADD 5 WAS ADOPTED 99-Ø-Ø.

ARTICLE 22(PROVISIONAL APPLICATION)THIS ARTICLE WAS THE SUBJ OF A LENGTHY AND AT TIMES CONFUSED DEBATE.A NUMBER OF DELS,LED BY IRAN, APPEARED TO QUESTION CONCEPT IN PARA2 REGARDING TERMINATION OF PROVISIONAL APPLICATION.IN LIGHT OF OUR INSTRUCTIONS ON ARTICLES 22 AND 51 WE INTERVENED,FOLLOWED BY A FEW OTHER DELS,TO SUPPORT PARA2.

TEXT OF ARTICLE APPEARING IN 39/13/ADD 5 WAS ADOPTED 87(CDA,USA, UK,FRANCE)-1-13 SUBJT TO FURTHER REVIEW BY DC IN LIGHT OF DISCUSSION.

PRESIDENT ALSO REFERRED DIRECT TO DC THE POLISH SUGGESTION FOR 6 MONTH PERIOD BETWEEN TIME OF NOTICE OF TERMINATION OF PROVISIONAL

...6

PAGE SIX 374 NO/NO STANDARD

APPLICATION AND DATE UPON WHICH TERMINATION BECOMES EFFECTIVE.

CONFERENCE DID NOT/NOT MEET THURS AND FRI MAY1-2 AND WILL RESUME

TUE MAY6.

WERSHOF

NN

OTT041

PAR035

GVE 20

file 20-3-1-6

ACTION COPY

20-3-1-6
23 | 13

VNA4/5

OO OTT

DE VNA

O 051000Z

U N C L A S S I F I E D

FM VIENN MAY5/69 NO/NO STANDARD

TO EXTEROTT 375 IMMED

BEESLEY(LEGAL DIV)DE WERSHOF

REF YOURTEL L555 MAY1

LAW OF TREATIES

SPEECH AS DELIVERED WAS COMMERCIALLY AIRMAILED MON NIGHT, APR28 TO MAWHINNEY. CANNOT/NOT UNDERSTAND FAILURE TO RECEIVE IT PRIOR TO DESPATCH OF REFTEL. FOLLOWING IS TEXT OF IMPORTANT PASSAGES AS DELIVERED. BEGINS; QUITE APART FROM THE QUESTION WHETHER PARA2 FALLS OUTSIDE THE SCOPE OF THIS CONVENTION, THE QUESTION ARISES WHETHER PARA2 FORMULATES A DESIRABLE LEGAL PRINCIPLE WHICH OUGHT TO BE ADOPTED IN THE INTEREST OF ORDERLY TREATY RELATIONS. I WISH TO MAKE CLEAR THAT MY DEL IS NOT/NOT QUESTIONING THE RELEVANCE OF THE PROVISIONS OF THE FEDERAL CONSTITUION TO THE PRACTICE WHEREBY CERTAIN FEDERAL STATES PERMIT, WHITHIN THE LIMITS OF THEIR CONSTITUTIONS AND SUBJ TO VARIOUS FORMS OF FEDERAL CONTROL, COMPONENT PARTS OF THE FEDERATION TO CONCLUDE AGREEMENTS WITH SOVEREIGN STATES. WE ARE CONCERNED HOWEVER, THAT THIS FORMULATION, AS EXPRESSED IN PARA2, IS DANGEROUSLY INCOMPLETE. THERE ARE CLEARLY AT LEAST TWO PREREQUISITES, BOTH OF WHICH MUST EXIST TOGETHER, IF A COMPONENT UNIT OF A FEDERAL STATE IS TO HAVE EFFECTIVE TREATY-MAKING CAPACITY. ONE IS THE CONFERRING ON IT OF SUCH CAPACITY BY THE FEDERAL STATE, THE OTHER IS THE RECOGNITION BY OTHER SOVEREIGN STATES OF THE CAPACITY SO CONFERRED. WITH RESPECT TO THE FIRST ELEMENT, THE PARA ASSUMES, QUITE INCORRECTLY, THAT THE CONSTITUTION SPEAKS FOR ITSELF AND IS ALONE DETERMINATIVE. IT IGNORES THE

...2

11/5/

STATE PRACTICE OF FEDERAL STATES BOTH ON THE MUNICIPAL AND INNATL PLANE, IN PARTICULAR, THE PROCESS WHEREBY THE CONSTITUTION IS CONTINUOUSLY AMENDED IN CERTAIN STATES BY MEANS OF JUDICIAL DECISION. A FURTHER PROBLEM IS THAT THE PROPOSED FORMULATION SAYS NOTHING ABOUT WHO IS TO BE RESPONSIBLE FOR ANY BREACH BY A MEMBER OF A FEDERAL STATEOF ITS TREATY OBLIGATIONS. ONE MAY ANSWER THAT THE PRESENT CONVENTION EXPRESSLY EXCLUDES FROM ITS AMBIT ALL QUESTIONS OF STATE RESPONSIBILITY. THERE NEVERTHELESS EXISTS, INDEPENDENT OF THE PRESENT CONVENTION, A BODY OF INNATL LAW GOVERNING THE RESPONSIBILITY OF SOVEREIGN STATES FOR THE BREACH OF THEIR TREATY OBLIGATIONS. NO/NO SIMILAR RULES EXIST, HOWEVER, IN RESPECT OF TREATIES CONCLUDED BY MEMBERS OF A FEDERAL STATE. A REVIEW OF THE DISCUSSION OF THIS ISSUE IN THE ILC QUICKLY REVEALS THE ABSENCE OF ANY CONSENSUS AMONG JURISTS ON THIS ISSUE. THERE IS A FURTHER CONSIDERATION, MR PRESIDENT, OF CONSIDERABLE PRACTICAL SIGNIFICANCE, WHICH SERVES TO UNDERLINE THE INADEQUACY OF PARA2 AS A FORMULATION OF THE RULE OF INNATL LAW RELATING TO THE TREATY-MAKING CAPACITY OF MEMBERS OF A FEDERAL STATE. THE PARA PROPOSES THAT SUCH A CAPACITY MAY EXIST IF IT IS ADMITTED BY THE FEDERAL CONSTITUTION AND WITHIN THE LIMITS THERE LAID DOWN. AS DISTINGUISHED REPS WILL READILY REALIZE, THE CONSTITUTION FORMS PART OF THE MUNICIPAL LAW OF THE FEDERAL STATE AND ITS INTERPRETATION FALLS EXCLUSIVELY WITHIN THE INTERNAL JURISDICTION OF THAT STATE. THIS IS PARTICULARLY OBVIOUS WHEN ONE CONSIDERS THAT THE CONSTITUTION OF A STATE IS AN ORGANIC STATUTE INTERPRETED AND DEVELOPED BY THE APPROPRIATE INT-

...3

ERNAL ORGANS OF THE STATE. PARA2 CONTAINS NO/NO PROVISION, HOWEVER, RECOGNIZING THAT ONLY THE FEDERAL STATE ITSELF MAY INTERPRET ITS OWN CONSTITUTION. THUS THE PARA MAY LEAD TO THE TOTALLY UNACCEPTABLE PRACTICE OF ONE MEMBER STATE OF THE UN PRESUMING TO INTERPRET THE CONSTITUTION OF ANOTHER MEMBER STATE WHICH HAPPENS TO BE A FEDERAL STATE. IN FEDERATIONS WHERE THE CONSTITUTION IS ENTIRELY WRITTEN AND DEALS EXPRESSLY WITH TREATY-MAKING, THERE MAY BE RELATIVELY LITTLE DANGER OF THIS PRACTICE ARISING. THE PARA SEEMS TO IGNORE, HOWEVER, SITUATIONS LIKE THAT OF CDA WHERE THE CONSTITUTION IS IN LARGE PART UNWRITTEN. CONSTITUTIONAL PRACTICE, IN SUCH CASES, IS AS IMPORTANT AS THE WRITTEN DOCUS. BUT OUR EXPERIENCE CONFIRMS THAT, IN A COUNTRY LIKE CDA, WHICH GAINED ITS INDEPENDENCE THROUGH THE RADUAL EVOLUTION OF CONSTITUTIONAL PRACTICE, NOT/NOT ALL OF WHICH WAS REDUCED TO WRITTEN FORM, THE POSSIBILITY OF ONE STATE PURPORTING TO INTERPRET THE CONSTITUTION OF ANOTHER FEDRAL STATE IS ALL TOO REAL. THE FAILURE OF PARA2 TO DEAL WITH THIS PROBLEM IS PROBABLY ITS MOST IMPORTANT DEFECT.

IN DISCUSSING THE QUESTION WHETHER A PROVISION SUCH AS PARA2 SHOULD BE INCLUDED IN THE PRESENT CONVENTION, THE OBSERVATION IS OCCASIONALLY MADE THAT THE PRACTICE OF TREATY-MAKING BY MEMBERS OF CERTAIN FEDERAL STATES EXISTS AND SHOULD THEREFORE BE MENTIONED. AN EXAM OF STATE PRACTICE CONFIRMS THAT CERTAIN FEDERAL STATES DO PERMIT, WITHIN THE LIMITS OF THEIR CONSTITUTIONS AND SUBJ TO VARIOUS FORMS OF FEDERAL CONTROL, THE CONCLUSION OF CERTAIN TYPES OF INNATL AGREEMENTS BY THEIR MEMBER UNITS. THESE PRACTICES HAVE BEEN GOING ON FOR YEARS,

...4

THEY HAVE LONG SINCE BEEN ACCEPTED UNDER INNATL LAW AND THEIR CONTINUANCE IS NOT/NOT DEPENDENT UPON THE ADOPTION OF PARA2 OF ARTICLE 5. I SHOULD LIKE TO MAKE CLEAR, MR PRESIDENT, THAT THE CDN DEL DOES NOT/NOT QUESTION EITHER THE LEGALITY OR THE DESIRABILITY OF THESE PRACTICES. INDEED CDA, WHOSE CONSTITUTION DOES NOT/NOT PROVIDE FOR SUCH ACTION BY ITS PROVINCES. HAS NONETHELESS AUTHORIZED, BY MEANS OF UMBRELLA AGREEMENTS BETWEEN CDA AND OTHER SOVEREIGN STATES, THE CONCLUSION OF VARIOUS AGREEMENTS BETWEEN ITS PROVINCES AND SUCH STATES. WE DO NOT/NOT BELIEVE, HOWEVER, THAT STATE PRACTICE SUPPORTS THE PARTICULAR AND DEFECTIVE FORMULATION OF THE RELEVANT RULE OF LAW AS PROPOSED IN PARA2, LEAVING IT OPEN TO OTHER STATES TO INTERPRET THE CONSTITUTIONS OF FEDERAL STATES. END OF QUOATION.

file 20-3-1-6

Stanford O.R.

P.O. Box 114
4, Aurangzeb Road
New Delhi-11

J-70

May 2, 1969

Dear Shri Kaul:

I have heard from Mr. Wershof, the Canadian Delegate at the Law of Treaties Conference in Vienna last month, that the cooperation between the Indian and Canadian Delegations to the Conference was excellent. In particular, Mr. Wershof greatly appreciated the splendid support publicly and privately given by Dr. K. Krishna Rao in our joint campaign to delete paragraph 2 of Article 5 of the draft Treaty. I knew as Federal States India and Canada had similar interests at this Conference, but I wanted you to be aware that the efforts of Dr. K. Krishna Rao and your delegation to the Conference were greatly appreciated by our delegation and our government.

With many thanks,

Yours sincerely,

James George,
High Commissioner.

Shri T.N. Kaul,
Foreign Secretary,
Ministry of External Affairs,
New Delhi.

cc: Dr. K. Krishna Rao

Department of External Affairs

Canadian Embassy, Copenhagen

23,145

RETURN

MESSAGE

div

diary-Mawhinney
diary - Beesley
file ✓

DATE	FILE/DOSSIER	SECURITY SECURITE
	20-3-1-6	
EXT2	37	

FM/DE EXT OTT

NO	PRECEDENCE
[illegible]552	PRIORITY

TO/A [illegible]

INFO

REF

SUB/SUJ YOURTEL 358 APR29

LAW OF TREATIES CONFERENCE - ART 42

WE ARE HOPEFUL GUYANESE WILL NOT OPPOSE SEPARATE VOTE IF THERE IS LITTLE LIKELIHOOD OF SUCCESSFUL OPPOSITION. SHOULD ISSUE ARISE, THEN CONSISTENT WITH POSITION BE ADOPTED ON ART 5(2) YOU SHOULD SUPPORT SEPARATE VOTE ON ART 42(B). IF, HOWEVER, YOU CONSIDER GUYANESE WOULD MISUNDERSTAND OUR ADOPTING SUCH A POSITION YOU MAY ABSTAIN.

DISTRIBUTION
LOCAL/LOCALE

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG [illegible]	EXTRA	2-9555	SIG J.A. BEESLEY
			J.A.BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

MESSAGE

file BM

DATE	FILE/DOSSIER	SECURITY SECURITE
APR 30/69	20-3-1-6	CONFD

FM/DE EXTERNAL OTT

	NO	PRECEDENCE
TO/A VIENNA	L-552	PRIORITY
INFO		

REF YOURTEL 358 APR 29

SUB/SUJ LAW OF TREATIES CONFERENCE - ARTICLE 42

WE ARE HOPEFUL GUYANESE WILL NOT OPPOSE SEPARATE VOTE IF THERE IS LITTLE LIKLIHOOD OF SUCCESSFUL OPPOSITION. CONSISTENT WITH POSITION WE ADOPTED ON ARTICLE 5(2) YOU SHOULD ISSUE ARISE, THEN SHOULD SUPPORT SEPARATE VOTE ON ARTICLE 42(B). IF, HOWEVER, YOU CONSIDER GUYANESE WOULD ~~NOT~~ MISUNDERSTAND OUR ADOPTING SUCH A POSITION YOU MAY ~~DISSONNETTE~~ ABSTAIN.

not sent
revised
place on file

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY/itl	LEGAL	2-9553	SIG P.A.BISSONNETTE

EXT 18/BIL (REV 6/64)
(COMMUNICATIONS DIV) 30.4.40(us)

003847

J. A. BEESLEY

ACTION COPY

RESTRICTED

FM KNGTN MAY2/69 NO/NO STANDARD

TO EXTER 346 PRIORITY

INFO TT PERMISGNEVA VIENA DE OTT CIDAOTT DE OTT

REF YOURTEL L338 MAR1

LAW OF TREATIES ARTICLE 5

TO ANYONE WHO HAS NEVER BEEN POSTED TO CARIB COUNTRIES IT MAY SEEM PERFECTLY REASONABLE TO ASK WHAT ARE JAMAICAN VIEWS ON SUBJS SUCH AS LDC PREFERENCE PROPOSALS OR PARA2 ARTICLE 5 OF LAW OF TREATIES AND WHAT INSTRUCTIONS HAVE BEEN GIVEN TO DELEGATIONS. FACT IS THAT ON MANY SUBJS SUCH AS TWO MENTIONED JAMAICANS HAVE NO/NO SERIOUS VIEWS AND DELEGATIONS HAVE NO/NO INSTRUCTIONS. THEY LEAVE FOR CONFERENCES WAITING TO SEE WHAT WILL DEVELOP AND HOW VOTE WILL GO AND ASK FOR INSTRUCTIONS IF NECESSARY WHILE CONFERENCE IS IN PROCESS. WHILE WE MAY TRY TO INFLUENCE INDIVIDUAL DELS BEFORE SOME QUESTION REACHES CONF TABLE, FREQUENTLY WE MAY DRAW A BLANK BECAUSE THERE ARE NOT/NOT ENOUGH GOOD PEOPLE IN CIVIL SERVICE TO GIVE THOUGHT TO ALL PROBLEMS AND REACH FIXED POLICY DECISIONS. SUCH IS CASE WITH JAMAICAN DELS FRANCIS AND DR RATTRAY AT LAW OF TREATIES CONF ALTHOUGH THEY HAVE ASSURED US PERSONALLY THAT THEY WILL PROBABLY SUPPORT OUR POSITION. DODD ASST UNDERSEC EXTER TOLD US THEY HAD NO/NO INSTRUCTIONS AND WE CAN WELL BELIEVE HIM.

1/5/5

003848

File ✓
Diary
Div. Diary

Legal Division/B. Mawhinney/jtl

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Multiple letter to posts listed on attached sheet

FROM / De: Under-Secretary of State for External Affairs OTTAWA

REFERENCE / Référence: Our Multiple Letter L-737 (M) - September 10, 1968

SUBJECT / Sujet: Law of Treaties Conference--Article 5

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 2, 1969

NUMBER / Numéro: L-(M)-559

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	

ENCLOSURES / Annexes: 2

DISTRIBUTION

We are pleased to inform you that the Law of Treaties Conference at Vienna, at the plenary session on April 28, voted to delete Paragraph 2 of Article 5 of the draft convention on the Law of Treaties which provided that "Members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down." Although only a blocking third was needed for deletion, sixty-six delegates voted against the paragraph, twenty-eight in favour and thirteen abstained, (i.e. two-thirds of the Conference voted against the article). These results represent a considerable diplomatic achievement for Canada, as appears from the enclosed copies of Vienna telegrams 352 and 353 of April 29, in which our delegation outlines the notable features of the debate on this item and the breakdown of the vote.

2. As you are well aware, the outcome of the vote on this question has been of particular concern to Canada. If Paragraph 2 had been retained in the final text it could have led to the practice of outside states purporting to interpret for themselves the constitution of federal states. This would constitute an unacceptable interference in the internal affairs of the federal state.

3. At the first session of the Law of Treaties Conference Article 5(2) was approved by a simple majority. It was in an effort to reverse this decision at the second session of the Law of Treaties Conference that our Minister issued instructions that discreet approaches should be made in friendly countries to enlist their support for our position on Article 5(2). You will recall that the Multiple Letter under reference sought your assistance in making a high level approach to the appropriate authorities of the government or governments to which you are accredited in order to outline Canada's position on Article 5(2) and solicit their support on this item at the Conference. These approaches were extremely useful, as you will note from the voting breakdown.

.... 2

003849

Ext. 407D/Bil.
(Admin. Services Div.)

4. Our delegation has noted that no procedural vote was required on the issue of whether Paragraph 2 was to be considered as a separate item and the paragraph itself was defeated by an overwhelming (more than two-thirds) majority. The substantial shift in voting on this item compared to the first session constitutes an impressive and gratifying outcome to the many months of concerted diplomatic effort, in which you played an invaluable role, to develop wider support for the Canadian position. In the view of our delegation the outcome of the vote "represents . . . a significant success for Canadian diplomacy resulting from the efforts of the Department, both in Ottawa and abroad, plus general goodwill toward Canada in most states. Representations in capitals made by our posts during the past several months facilitated the work of the delegation lobbying in Vienna." We wish to add our own words of commendation to Mr. Wershof's for your very effective co-operation and assistance. The representations that you made over the past months have contributed greatly to the successful result.

5. We would be grateful if as soon as possible you could convey to the appropriate officials of the government or governments to which you are accredited the formal thanks and appreciation of the Canadian Government for their support on the vote of the Article 5(2) item in the plenary.

6. (For posts in following countries only: Italy, U.S.A., Mexico, Germany, Brazil, Argentina, India, Switzerland, Columbia, Uruguay, Australia, Vietnam and Cyprus.) In particular you may wish to express our gratitude for the very forceful and persuasive speech on this question delivered by their representative at the plenary session.

M. CADIEUX

Under-Secretary of State
for External Affairs.

File ✓
Diary
Div. Diary

Legal Division/B.Mawhinney/itl

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: The Under-Secretary
(through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties Conference—Article 5

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 2, 1969

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	37

ENCLOSURES / Annexes

Several

DISTRIBUTION

— Attached for your signature if you agree is a multiple numbered letter with enclosures advising posts of the outcome of the vote on Article 5(2) of the draft Convention on the Law of Treaties.

— 2. Also attached is a list of the posts to which the numbered letter is to be sent. You will recall that it was to these same posts that a multiple letter signed by you was sent last September asking them to make approaches to the governments to which they were accredited to enlist support for Canada's position on the above Article. As you are aware, at the plenary most of the governments concerned voted in favour of deleting Paragraph 2 of Article 5.

J. A. BEESLEY
Legal Division.

Ext. 407D/Bil.
(Admin. Services Div.)

003851

CONFIDENTIAL

LIST OF POSTS FOR MULTIPLE NUMBERED LETTER L-(M)-559 of May 1, 1969

Ottawa File: 20-3-1-6

Buenos Aires
Canberra
Vienna
Port of Spain (incl. Barbados)
Brussels
Lima (incl. Bolivia)
Rio de Janeiro
Kuala Lumpur (incl. Burma)
Colombo
Santiago
Bogota
Kinshasa
San José (incl. El Salvador,
Panama, Honduras)
Nicosia
Copenhagen
Santo Domingo
Addis Ababa
Bonn
Accra
Athens
Guatemala City
Georgetown
Delhi
Tehran
Dublin
Tel Aviv
Rome
Kingston
Tokyo
Permis NY (Liberia)
Mexico
Hague
Wellington
Lagos
Oslo
Islamabad
Lima
Manila
Lisbon
Saigon
Singapore
Pretoria
Madrid
London
Washington
Montevideo
Caracas
Dar es Salaam
Stockholm
Berne
Nairobi

Legal Division/B.Mawhinney/ltl

File 5/5/69

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: The Under-Secretary (through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties Conference--Article 5

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 2, 1969

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	37

ENCLOSURES / Annexes: Several

DISTRIBUTION

-- Attached for your signature if you agree is a multiple numbered letter with enclosures advising posts of the outcome of the vote on Article 5(2) of the draft Convention on the Law of Treaties.

-- 2. Also attached is a list of the posts to which the numbered letter is to be sent. You will recall that it was to these same posts that a multiple letter signed by you was sent last September asking them to make approaches to the governments to which they were accredited to enlist support for Canada's position on the above Article. As you are aware, at the plenary most of the governments concerned voted in favour of deleting Paragraph 2 of Article 5.

Ian Beesley
Legal Division.

Ext. 407A/Bil.
(Admin. Services Div.)

5.5.15/05

003853

File

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
MAY 1	20-3-1-6	
	37	

FM/DE EXT OTT

NO	PRECEDENCE

TO/A VIENNA (FOR HEESHOP FM BEESLEY)

INFO

REF

SUB/SUJ

AMENDED CDN STATEMENT IN PLENARY UNFORTUNATELY NOT AMONGST MY PAPERS. MEMO ALREADY SENT TO PARIS BASED ON EARLIER VERSION RATHER THAN THAT ACTUALLY DELIVERED. GRATEFUL TO RECEIVE TEXT OF SUBSTANTIALLY AMENDED PASSAGES BY TEL SOONEST.

* (FOR EXAMPLE MEMO READS IN PART QUOTE THE DELETION OF ART 5(2), BY REAFFIRMING THE PRINCIPLE THAT ONLY THE CENTRAL GOVT OF A FEDERAL STATE HAS EXCLUSIVE TREATY MAKING CAPACITY, HAS SIGNIFICANTLY ADVANCED THE POSITION OF THE FEDERAL GOVT IN ITS CONSTITUTIONAL DISCUSSIONS WITH THE PROVINCES ON THE QUESTION OF PROVINCIAL POWERS IN EXTERNAL AFFAIRS UNQUOTE.)

DISTRIBUTION
LOCAL/LOCALE

NO STD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A.BEESLEY/JS	LEGAL	2-2728	SIG J.A. BEESLEY

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003854

cc: R. McKinnon PCO ✓
Mr. A E Gotlieb ✓
D/m Dept of Communications

Apr. 30/69

ACTION COPY

Mr. Tremblay
Suggest you give this evaluation – i.e. by say to other missions which lobbied for us etc.
Apr 30/69

C O N F I D E N T I A L

FM VIENNA APR29/69

TO EXTEROTT 353

INFO TT OPI(L/LEGAL) PCO(FE PROV SECT) DE OTT

REF OURTEL 352 APR29

LAW OF TREATIES-ARTICLE 5

FOLLOWING ARE SOME OF THE MORE NOTABLE FEATURES OF DEBATE AND VOTING ON ARTICLE 5 WHICH TOOK PLACE YESTERDAY APR28. MORE DETAILED REPORT WILL, OF COURSE, BE INCLUDED IN CDN DEL REPORT ON SECOND SESSION.

2. PERHAPS MOST UNEXPECTED DEVELOPMENT WAS DECISION OF SUPPORTERS OF PARA2 NOT/NOT TO OBJECT TO OUR REQUEST FOR SEPARATE VOTE ON PARA2. BOTH PROCEDURAL AND SUBSTANTIVE ISSUES HAVE BEEN SUBJ OF CONSIDERABLE DISCUSSION AMONG DELS FOR PAST TWO WEEKS. ON EVE OF VOTE, OUR ASSESSMENT OF VOTING ON REQUEST FOR SEPARATE VOTE WAS 71 IN FAVOUR, 24 OPPOSED, 3 ABSTENTIONS 10 UNDECIDED, WELL OVER REQUIRED SIMPLE MAJORITY. PRESUMABLY SOUNDINGS BY RUSSIANS AND FRENCH REVEALED TO THEM THAT THEY COULD NOT/NOT SUCCESSFULLY OPPOSE REQUEST FOR SEPARATE VOTE AND, SINCE OPPOSITION TO SEPARATE VOTE WOULD HAVE BEEN UNPOPULAR IN PRINCIPLE, THEY DECIDED NOT/NOT TO RAISE ISSUE.

3. OF 22 SPEECHES ON ARTICLE 5, ONLY FIVE SUPPORTED PARA2. ALL OF THESE WERE BY SOVIET BLOC STATES, INCLUDING CUBA BUT NOT/NOT INCLUDING ROMANIA CZECHO OR YUGOSLAVIA. SOVIET BLOC SPEECHES WERE IN LOW KEY AND ONE CAN ONLY ASSUME THAT BEING AWARE THAT PARA2 WOULD BE DEFEATED, SOVIET GROUP WISHED NOT/NOT TO APPEAR TO STAKE TOO MUCH ON PARA. INFORMAL APPROACH ON APR22 BY KHLESTOV, HEAD OF USSR DEL, SUGGEST-

...2

11/30/4

003855

IMC POSSIBILITY OF AMENDMENT IN TERMS QUITE UNACCEPTABLE TO US, CONSTITUTED ONLY SOVIET EFFORT TO SEEK COMPROMISE. THERE IS NO/NO INDICATION THAT EITHER USSR OR FRANCE LOBBIED EXTENSIVELY OUTSIDE SOVIET BLOC AND FRENCH COMMUNAUTE STATES RESPECTIVELY, EXCEPT AMONG ARAB GROUP. NEITHER FRANCE OR ANY OF ITS ASSOCIATES SPOKE ON BEHALF OF PARA2, AND, AS YOU WILL NOTE FROM VOTING DETAILS IN REFTEL, FRENCH AFRICAN STATES WERE NOT/NOT UNANIMOUS IN SUPPORT OF FRENCH POSITION ON THIS ISSUE. INACTIVITY OF FRENCH DEL ON THIS AS WELL AS OTHER MATTERS IS NOTICEABLE AND MAY BE ATTRIBUTABLE TO FACT THAT HUDENTCA FOR ER MFA LEGAL ADVISER CALLED OUT OF RETIREMENT TO HEAD FRENCH DEL AT SECOND SESSION) IS CONSIDERABLY LESS DYNAMIC THAN DE BRESSON WHO HEADED FRENCH DEL AT FIRST SESSION.

4. CDA SPOKE FIRST IN DEBATE. TEXT OF SPEECH HAS BEEN SENT TO YOU BY AIRMAIL. COMMON THEME OF OTHER SPEECHES AGAINST PARA2 WAS ISSUE OF NON-INTERVENTION, WITH SOME DELS MAKING MORE DIRECT REF TO CDA-FRANCE SITUATION (THOUGH NO/NO NAMES WERE MENTIONED) THAN WE DID IN OUR SPEECH. RESULT WAS THAT FRENCH WERE PLACED IN DIFFICULT POSITION OF BEING UNABLE TO INTERVENE IN DEBATE WITHOUT IN EFFECT ADMITTING THAT COMMENTS CONCERNING INTERVENTION WERE DIRECTED AT THEM. DEBATE ON THIS PARA CONSTITUTES CLEAR ENDORSEMENT OF FEDERAL CDN THESIS ON MATTER OF INTERVENTION IN AFFAIRS OF FEDERAL STATE. WE ARE NOW SEEKING TO OBTAIN FULL TEXTS OF STATEMENTS MADE AGAINST PARA2 WHICH BEESLEY BELIEVES WILL BE USEFUL WITHIN CDA.

5. REVERSAL OF VOTE FROM A SIMPLE MAJORITY IN FAVOUR OF PARA 2 AT

...3

FIRST SESSION TO AN OVERWHELMING (MORE THAN TWO-THIRDS) MAJORITY AGAINST THE PARA IN PLENARY, INVOLVING AS IT DID COMPLETE PUBLIC REVERSAL OF POSITION BY MANY STATES, (INCLUDING MOST NOTABLY SWITZERLAND AND NIGERIA) REPRESENTS IN OUR VIEW SIGNIFICANT SUCCESS FOR CDN DIPLOMACY, RESULTING FROM EFFORTS OF DEPT, BOTH IN OTT AND ABROAD, PLUS GENERAL GOODWILL TOWARD CDA IN MOST STATES. REPRESENTATIONS IN CAPITALS MADE BY OUR POSTS DURING PAST SEVERAL MONTHS FACILITATED WORK OF DEL LOBBYING IN VIENNA. SUCCESS OF CDN EFFORT HAS BEEN THE SUBJ OF MUCH FAVOURABLE COMMENT BY OTHER REPS SINCE VOTE WAS TAKEN YESTERDAY.

6. IN ANY EVENT, WHATEVER STATUS PARA2 MAY HAVE ENJOYED BY VIRTUE OF ITS ADOPTION BY ILC HAS BEEN COMPLETELY NULLIFIED. OVERWHELMING VOTE AGAINST PARA YESTERDAY CONSTITUTES FIRM AND UNAMBIGUOUS REPUDIATION OF THAT PARA AS A STATEMENT OF INTNATL LAW RELATING TO TREATY-MAKING (OR ANY OTHER INTNATL ACT, FOR THAT MATTER) BY MEMBERS OF A FEDERAL STATE.

WERSHOF

.....

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: Multiple letter to posts listed on attached sheet

FROM / De: Under-Secretary of State for External Affairs OTTAWA

REFERENCE / Référence: Our Multiple Letter L-737 (M) - September 10, 1968

SUBJECT / Sujet: Law of Treaties Conference--Article 5

SECURITY / Sécurité: CONFIDENTIAL

DATE: May 2, 1969

NUMBER / Numéro: L-(M)-559

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	

ENCLOSURES / Annexes: 2

DISTRIBUTION

We are pleased to inform you that the Law of Treaties Conference at Vienna, at the plenary session on April 28, voted to delete Paragraph 2 of Article 5 of the draft convention on the Law of Treaties which provided that "Members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down." Although only a blocking third was needed for deletion, sixty-six delegates voted against the paragraph, twenty-eight in favour and thirteen abstained, (i.e. two-thirds of the Conference voted against the article). These results represent a considerable diplomatic achievement for Canada, as appears from the enclosed copies of Vienna telegrams 352 and 353 of April 29, in which our delegation outlines the notable features of the debate on this item and the breakdown of the vote.

2. As you are well aware, the outcome of the vote on this question has been of particular concern to Canada. If Paragraph 2 had been retained in the final text it could have led to the practice of outside states purporting to interpret for themselves the constitution of federal states. This would constitute an unacceptable interference in the internal affairs of the federal state.

3. At the first session of the Law of Treaties Conference Article 5(2) was approved by a simple majority. It was in an effort to reverse this decision at the second session of the Law of Treaties Conference that our Minister issued instructions that discreet approaches should be made in friendly countries to enlist their support for our position on Article 5(2). You will recall that the Multiple Letter under reference sought your assistance in making a high level approach to the appropriate authorities of the government or governments to which you are accredited in order to outline Canada's position on Article 5(2) and solicit their support on this item at the Conference. These approaches were extremely useful, as you will note from the voting breakdown.

.... 2

CONFIDENTIAL

4. Our delegation has noted that no procedural vote was required on the issue of whether Paragraph 2 was to be considered as a separate item and the paragraph itself was defeated by an overwhelming (more than two-thirds) majority. The substantial shift in voting on this item compared to the first session constitutes an impressive and gratifying outcome to the many months of concerted diplomatic effort, in which you played an invaluable role, to develop wider support for the Canadian position. In the view of our delegation the outcome of the vote "represents . . . a significant success for Canadian diplomacy resulting from the efforts of the Department, both in Ottawa and abroad, plus general goodwill toward Canada in most states. Representations in capitals made by our posts during the past several months facilitated the work of the delegation lobbying in Vienna." We wish to add our own words of commendation to Mr. Wershof's for your very effective co-operation and assistance. The representations that you made over the past months have contributed greatly to the successful result.

5. We would be grateful if as soon as possible you could convey to the appropriate officials of the government or governments to which you are accredited the formal thanks and appreciation of the Canadian Government for their support on the vote of the Article 5(2) item in the plenary.

6. (For posts in following countries only: Italy, U.S.A., Mexico, Germany, Brazil, Argentina, India, Switzerland, Columbia, Uruguay, Australia, Vietnam and Cyprus.) In particular you may wish to express our gratitude for the very forceful and persuasive speech on this question delivered by their representative at the plenary session.

Under-Secretary of State
for External Affairs.

CONFIDENTIAL

LIST OF POSTS FOR MULTIPLE NUMBERED LETTER L-(M)-559 of May 1, 1969

Ottawa File: 20-3-1-6

20-3-1-6

Buenos Aires
Canberra
Vienna
Port of Spain (incl. Barbados)
Brussels
Lima (incl. Bolivia)
Rio de Janeiro
Kuala Lumpur (incl. Burma)
Colombo
Santiago
Bogota
Kinshasa
San José (incl. El Salvador,
Panama, Honduras)
Nicosia
Copenhagen
Santo Domingo
Addis Ababa
Bonn
Accra
Athens
Guatemala City
Georgetown
Delhi
Tehran
Dublin
Tel Aviv
Rome
Kingston
Tokyo
Permis NY (Liberia)
Mexico
Hague
Wellington
Lagos
Oslo
Islamabad
Lima
Manila
Lisbon
Saigon
Singapore
Pretoria
Madrid
London
Washington
Montevideo
Caracas
Dar es Salaam
Stockholm
Berne
Nairobi

AUSTRALIAN EMBASSY
CONCORDIAPLATZ 2/3
VIENNA I

CONFERENCE ON THE LAW OF TREATIES

Attached is a copy of the statement by the Australian delegation in Plenary on Article 5, paragraph 2, proposed by the Committee of the Whole.

The position within the Australian Federation on capacity to make treaties was dealt with in the statement by the Australian delegation at the 11th meeting of the Committee of the Whole on the 3rd April, 1968, as follows:-

> "Under the Constitution of the Australian Federation, the six constituted states, with a small "s", have no international standing and the making of treaties was a function of the Federal Executive alone".

Australian Delegation
30th April, 1969.

Statement by Australian Representative in Plenary on Article 5(2) - 28th April, 1969

Mr. President,

The best kind of contribution my delegation can make to the discussion at this stage is to be very brief. However, as a federal State there are a few points that we would like to stress.

Mr. President, the first point is to recall that Australia was one of a number of federal States that supported the deletion of paragraph 2 of article 5 at the first session. The Australian delegation does not contest the statement that members of certain federal unions possess a capacity to conclude treaties. All acknowledge the existence of this capacity in certain instances. However, as stressed both at the first session and again today, the retention of paragraph 2 of article 5 could create potential difficulties for some other federal States, whereas no case has been demonstrated that its retention is necessary or that its deletion would occasion any real difficulties. I say this with the greatest respect to previous speakers in this debate that have spoken in the contrary sense.

These latter representatives have, e.g. pointed out that it will be for the internal authorities of a State to interpret the Constitution and that the fears in this regard are not well based. One comment I would make is that paragraph 2 does not spell this out and there is a real risk of misunderstanding on the matter. Further I would submit that besides this problem there are other problems latent in paragraph 2, such as the proper role that international law plays in the recognition of the treaty-making capacity of a member of a federal State. This particular aspect has just been referred to by the distinguished Representative of Uruguay.

The paradox of the situation is , Mr. President, that attention to one aspect of the paragraph is likely only to expose in fuller light other problems which on a surface reading may not seem to be present. Thus the

amendment made last year in the Committee of the Whole deleted the awkward phrase "State member of a federal union" and substituted instead simply, "member of a federal union". This in itself was a useful amendment, as it took account of the well-known fact that members of federal unions are usually not States for purposes of international law. In the end, however, the amendment has only served to underline the inconsistency with article 1 of our Convention, which is to the effect that our Convention deals only with treaties between States.

The problems are complex and real. The solution, however, is a simple one and that is to delete paragraph 2. This step will be without prejudice to any delegation and will enable the Conference to get on with what is our essential task, which is to draw up a Convention dealing with treaties between States.

Mr. President, the history of article 5 has already been described to us. Its origins go back to a time when the draft articles were intended to cover all kinds of treaties and when an elaborate provision on treaty-making capacity was therefore warranted. Finally a different course has been taken and that has been to limit the Convention to treaties between States, and as a result the I.L.C. truncated the original article 5. But it did not go far enough. Our hope is that this Plenary session will complete what the I.L.C. did not quite finish, and delete paragraph 2 of article 5.

The delegation of Canada has asked for a separate vote on paragraph 2 of article 5. This is a proper and reasonable request, as paragraph 2 raises quite distinct issues from those of paragraph 1 of article 5. The Australian delegation has no objection to paragraph 1. On the separate vote my delegation will be voting against the retention of paragraph 2, i.e. it will re-voting no.

Apr.30 McKinnon ✓ Cathcart ✓

ACTION COPY

Maloney

file 20-3-1-6

CONFIDENTIAL

FM VIENN APR30/69 NO/NO STANDARD

TO TT EXTEROTT 362 DE PARIS

INFO TT ROME DE PARIS

LAW OF TREATIES-ARTICLE 5(2)-ITALY

MARESCA OF ITALIAN FOREIGN MINISTRY WAS VERY HELPFUL TO US.HE LOBBIED AND MADE A SPEECH AND OF COURSE VOTED TO DELETE PARA2.HE ALSO WEN TO GREAT TROUBLE TO GET SAN MARINOS USUALLY VACANT SEAT FILLED WHEN ARTICLE 5 WAS DEBATED APR28.MARESCA WAS REALLY ACTING ON HIS OWN AS HIS CHIEF OF DEL(AGO)DID NOT/NOT AGREE WITH CDN SUBSTANTIVE ARGUMENTS;AGO HAD SUPPORTED PARA2 IN ILC AND WAS IMPERVIOUS TO IDEA THAT ILC(HIMSELF INCLUDED)HAD MADE MISTAKE.FORTUNATELY AGO AS PRESIDENT OF CONFERENCE KEPT OUT OF THE DEBATE.

2.WHEN MARESCA RETURNS TO ROME LATE MAY I SUGGEST OUR AMBASSADOR MIGHT WISH TO THANK HIM(AND IN MEANTIME THANK FOREIGN MINISTRY).

FOR ROME-PARA2 WAS DELETED BY SUBSTANTIAL VOTE IN PLENARY.

WERSHOF

....

4/30/4

ACTION REQUEST
FICHE DE SERVICE

FILE NO. — DOSSIER NO.

TO — À

Le[redacted] Division

DATE

April 30

LOCATION — ENDROIT

FROM — DE O/SSEA/JMRobinson/fl

- ☐ ACTION / DONNER SUITE
- ☐ APPROVAL / APPROBATION
- ☐ COMMENTS / COMMENTAIRES
- ☐ DRAFT REPLY / PROJET DE RÉPONSE
- ☐ MAKE / FAIRE.....COPIES
- ☐ NOTE AND FILE / NOTER ET CLASSER
- ☐ NOTE & RETURN/OR FORWARD / NOTER ET RETOURNER/OU FAIRE SUIVRE
- ☐ P. A. ON FILE / CLASSER
- ☐ REPLY / RÉPONSE
- ☐ SEE ME / ME VOIR
- ☐ SIGNATURE
- ☐ TRANSLATION / TRADUCTION
- ☐ YOUR REQUEST / À VOTRE DEMANDE
- ☐ _____

Memo to PM signed and sent to O/PM

003865

FOR ACTION
POUR CONSIDÉRATION
IMMÉDIATE

SECURITY – SÉCURITÉ
CONFIDENTIAL

DATE
April 28, 1969

TO – À
The Minister

☐ SIGNATURE
☐ SEE ME / ME VOIR
☐ DRAFT REPLY / PROJET DE RÉPONSE
☐ COMMENTS / COMMENTAIRES

For your initials, if you approve.

This is a significant victory achieved for the country by the diplomats

SIGNATURE

003866

EXT 574/BIL EXTERNAL AFFAIRS – AFFAIRES EXTÉRIEURES

O/PM
O/SSEA
O/USSEA
Parl. Sec.
Press Office
Diary
Div. Diary
File ✓

Legal Division/B.Mawhinney/ltl

20-3-1-6

Copy 37

CONFIDENTIAL

April 30, 1969.

MEMORANDUM FOR THE PRIME MINISTER

U.N. Conference on the Law of Treaties--Article 5

The Head of our Delegation to the Law of Treaties Conference at Vienna has advised that delegates at the plenary session yesterday voted 66 to 28 with 13 abstentions to delete Paragraph 2 of Article 5 of the draft Convention on the Law of Treaties, the federal states clause. You may recall that Article 5(2) provided as follows:

> "States members of a federal union may possess the capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits therein laid down."

As stated in an earlier Memorandum to you in connection with the visit of Prime Minister Gorton, it was the Canadian concern that such a paragraph if adopted could have produced two highly undesirable results:

> first, it could lead to the practice of outside states purporting to interpret for themselves the constitutions of federal states. This would be an unacceptable interference in the internal affairs of the federal state; and
>
> second, it could lead to the fragmentation of the international personality of federal states, with each member of the federation pursuing a separate course in international affairs.

At the First Session of the Law of Treaties Conference in the spring of 1968 the Canadian Delegation supported proposals to delete Paragraph 2 in order to avoid recognition in the convention, as finally adopted, of the principle that component members of a

.... 2

Original signed and sent to O/PM - 30.4.69

federal state may under certain circumstances enjoy a treaty making capacity. In the event, however, Article 5(2) was retained by a simple majority, due largely to the efforts of the U.S.S.R. and its allies, who were concerned about the continued international personality of Byelorussia and the Ukraine, and to the fact that France was able to align the countries of the French Community in support of the Article.

In an effort to reverse this decision at the second session of the Law of Treaties Conference, discrete approaches beginning in August were made in friendly countries to seek support for our position on Article 5(2). These initiatives had as their objectives (a) to assure that those governments whose representatives opposed Article 5(2) at the First Session maintained their opposition at the Second Session, thereby depriving Paragraph 2 of the 2/3 majority it required for adoption, and (b) to assure a simple majority in favour of a procedural motion for a separate vote on Paragraph 2 of Article 5 as was done at the First Session. (Without a successful vote on this procedural question we could secure the rejection of Article 5(2) only through a rejection of Article 5 as a whole, and this we had good reason to believe would be virtually impossible.) Representations were made to over 74 governments on this question before the convening of the second session of the Conference. In addition, during the first three weeks of the Conference prior to the formal vote, our Delegation reported that they conducted a systematic campaign of personal discussions with members of approximately 80 delegations and co-ordinated the lobbying efforts of the Federal States Group consisting of primarily Australia, Malaysia, Mexico and to a lesser extent, India. In the meantime, the U.S.S.R. and French delegates were making a concerted effort to shore-up the support their position had enjoyed at the previous session of the Conference.

As it turned out no procedural vote was required on whether Paragraph 2 was to be considered as a separate item and the Paragraph itself failed even to obtain a simple majority. The substantial shift in voting on this item compared to the first session constitutes an impressive and gratifying outcome to the many months of concerted diplomatic effort to develop wider support for the Canadian position.

The deletion of Article 5(2), by reaffirming the principle that only the central government of a federal state has exclusive treaty making capacity, has significantly advanced the position of the Federal Government in its constitutional discussions with the provinces on the question of provincial powers in external affairs. If Paragraph 2 had been retained in the final text of the Convention on the Law of Treaties, it would have been open to foreign states, if they so choose, to decide whether or not a federal states constitution permits direct

.... 3

 CONFIDENTIAL

treaty relations with a unit of a federal state. This would have provided proponents of an independent treaty making capacity for the Canadian provinces with an exceedingly valuable weapon in their constitutional negotiations with the Federal Government when they turn to the role of the provinces in international affairs. In this context it is of interest that in its Working Paper On Foreign Relations presented at last February's Constitutional Conference, the Quebec Government relied solely on Article 5(2) in support of the international law aspects of its position. Deprived of this international legal argument as a result of the above vote at the Law of Treaties Conference the case put forward in the Quebec paper is appreciably weakened.

ORIGINAL SIGNED BY
MITCHELL SHARP

M.S.

27

D. M. MILLER

RETURN TO LEGAL DIV. DCO

ACTION COPY

file 20-3-1-6

20-3-1-6 | 25 | 3

CONFIDENTIAL

FM VIENN APR29/69 NO/NO STANDARD

TO EXTEROTT 358 PRIORITY

BAG CRCAS GRGTN DE OTT

LAW OF TREATIES CONFERENCE-ARTICLE 42-GUYANA AND VENEZUELA

ARTICLE 42(B) OF DRAFT CONVENTION ON LAW OF TREATIES PROVIDES THAT A STATE MAY NOT/NOT INVOKE CERTAIN GROUNDS FOR INVALIDATING A TREATY IF, AFTER BECOMING AWARE OF THE FACTS QUOTE IT MUST BY REASON OF ITS CONDUCT BE CONSIDERED AS HAVING ACQUIESCED, AS THE CASE MAY BE, IN THE VALIDITY OF THE TREATY OR IN ITS MAINTENANCE IN FORCE OR IN OPERATION UNQUOTE.

2. VENEZUELA SEEKS TO DELETE THIS PARA. GUYANA, CONVINCED DESPITE VENEZUELAN DENIALS THAT VENEZUELAN EFFORT IS RELATED TO GUYANA-VENEZUELA TERRITORIAL DISPUTE, ATTACHESGREAT IMPORTANCE TO RETENTION OF PARA(B). THE SUBSTANCE OF THE PARA, WHICH EMBODIES THE LEGAL PRINCIPLE OF ESTOPPEL, PRESENTS NO/NO PROBLEM AND WE WOULD PROPOSE TO SUPPORT IT IN ACCORDANCE WITH INSTRUCTIONS PREPARED FOR FIRST SESSION OF CONFERENCE.

3. DIFFICULT QUESTION HAS ARISEN, HOWEVER, IN MATTER OF PROCEDURE. VENEZUELA WILL REQUEST SEPARATE VOTE ON PARA(B). RESULT OF SEPARATE VOTE ON PARA(B) AT FIRST SESSION, WHEN THERE WERE MANY ABSTENTIONS MAKES IT UNCERTAIN THAT PARA(B) IF VOTED UPON SEPARATELY, WOULD OBTAIN TWO-THIRDS MAJORITY IN PLENARY. CONSEQUENTLY GUYANA OPPOSES REQUEST FOR SEPARATE VOTE AND HAS ASKED US TO JOIN IN OPPOSITION TO SEPARATE VOTE. VENEZUELA, ON THE OTHER HAND, YESTERDAY ASKED US TO SUPPORT ITS

...2

15/29/4

003871

REQUEST FOR SEPARATE VOTE.

3. FACTORS RELEVANT TO CDN POSITION ON SEPARATE VOTE APPEAR TO BE FOLLOWING: ON THE ONE HAND CDA SUPPORTS GUYANA IN DISPUTE WITH VENEZUELA BOTH BECAUSE WE ARE CONVINCED OF MERITS OF GUYANESE CASE AND BECAUSE GUYANA IS A COMMONWEALTH COUNTRY. IN ADDITION, IN EARLY STAGES OF OUR LOBBYING ON ARTICLE 5, SHRI RAMPHAL, GUYANESE ATTORNEY GENERAL, PUT QUESTION TO US HE WAS GIVEN TO UNDERSTAND THAT CDA WOULD SUPPORT GUYANAS OBJECTION TO SEPARATE VOTE. ON THE OTHER HAND, WE HAVE, DURING THE COURSE OF OUR OWN CAMPAIGN FOR SEPARATE VOTE ON PARA 2 OF ARTICLE 5, BEEN PREACHING VIEW THAT, WHATEVER MAY BE A DELS VIEW ON THE SUBSTANCE OF AN ISSUE, A SEPARATE VOTE SHOULD BE ALLOWED ON ANY PORTION OF AN ARTICLE WHICH IS CLEARLY SEPARABLE FROM REMAINDER OF ARTICLE. LATTER CERTAINLY APPEARS TO BE THE CASE IN RESPECT OF 42(B). THUS A CDN VOTE OPPOSING SEPARATE VOTE ON 42(B) WOULD PLACE CDA IN INVIDIOUS POSITION OF ABANDONING IN RESPECT OF 42(B) POSITION OF PRINCIPLE WHICH WE URGED FORCEFULLY AND SUCCESSFULLY RE ARTICLE 5(2).

4. GRATEFUL FOR YOUR INSTRUCTIONS ON POSITION TO BE TAKEN BY CDN DEL SHOULD ISSUE OF SPEARATE VOTE ON ARTICLE 42(B) BE PUT TO SEPARATE PROCEDURAL VOTE. BEESLEY CAN SUPPLEMENT THIS ON HIS RETURN TO OTT THIS WEEK

WERSHOF

ORIGINAL NOT CLEAR

Miller/Macartney

ACTION COPY

file 20-3-1-6

L

R E S T R I C T E D

F VIENNAPRESS/SS NOW TO STANDARD

TO EXTEROTT 334

REF OUTTEL 332 APRES

LAW OF TREATIES-ARTICLE 2(2)-SUGGESTED COMMUNICATIONS TO COUNTRIES

WHICH SUPPORTED CDA

UNFICL LISTS COUNTRIES WHICH VOTED TO DELETE PARA. OUT OF THESE HAD

BEEN OFFICIALLY APPROACHED BY CDN DIPLOMATS WITH A REQUEST FOR SUCH

HELP. AS CDA DOES NOT/NOT OFTEN CARRY OUT EXTENSIVE DIPLO CAMPAIGN

ON A SUBSTANTIVE MATTER OF DIRECT CONCERN TO CDA, I SUGGEST THAT MULTIPLE LET BE SENT TO POSTS CONCERNED ASKING THEM TO THANK RESPECTIVE GOVTS. THE LET MIGHT ALSO ASK POSTS IN FOLLOWING COUNTRIES, WHICH DELS MADE HELPFUL SPEECHES ON THIS ITEM, TO ADD THANKS FOR THEIR SPEECHES:

ITALY USA MEXICO GERMANY BRAZIL ARGENTINA INDIA SWITZERLAND COLOMBIA URUGUAY AUSTRALIA VIETNAM CYPRUS.

2. MALAYSIA WAS HELPFUL IN LOBBYING ALTHOUGH THEY DID NOT/NOT MAKE A SPEECH.

3. OUR MISSIONS MIGHT BE TOLD THAT THEIR REPRESENTATIONS WERE VERY USEFUL AND CERTAINLY CONTRIBUTED GREATLY TO THE SUCCESSFUL RESULT.

WERSHOF

3/30/4

ORIGINAL NOT CLEAR

McKinnon / Apr. 30 / Gotlieb / JL

Miller / McKinnon

Vol 20-3-6 L
25 | 13

M

R E S T R I C T E D

FM VIENN APR29/69 NO/NO STANDARD

TO TT EXTEROTT 357 DE PARIS

INFO TT BERN DE PARIS

REF OURTEL 320 APR22

LAW OF TREATIES-ARTICLE 5-SWITZERLAND

WHEN VOTE ON PARA2 WAS TAKEN YESTERDAY SWISS AGREEABLY SURPRISED US BY VOTING AGAINST PARA2. IN ADDITION BINDSCHEDLER MADE HELPFUL SPEECH IN WHICH HE ACCEPTED SEVERAL CDN ARGUMENTS WHILE MAKING IT CLEAR THAT DELETION OF PARA2 WOULD NOT/NOT AFFECT LAW AND PRACTICE OF SWISS CONSTITUTION. I HAVE THANKED HIM.

WERSHOF

.....

5/30/4

McKinnon / PCO / apr30
Gagliek

ACTION COPY

Feb 20-3-1-6
3/13

C O N F I D E N T I A L

FM VIENN APR29/69 NO/NO STANDARD

TO TT EXTEROTT 355 DE PARIS

INFO TT DELHI DE LDN

LAW OF TREATIES-ARTICLE5-INDIA

INDIAN DEL AND ESPECIALLY KRISHNA RAO WERE VERY HELPFUL TO US IN SUCCESSFUL CAMPAIGN TO DELETE PARA2 OF ARTICLE 5. IN ADDITION TO VOTING FOR DELETION AS THEY DID LAST YEAR, RAO MADE SPLENDID SPEECH AGAINST PARA2 AND ALSO USED HIS INFLUENCE PRIVATELY.

2. IT IS A RARE EXPERIENCE FOR ME TO FIND INDIA(AND RAO)FORCEFULLY ON OUR SIDE IN AN ISSUE IN WHICH SOVIETS ARE OPPOSED. ALTHOUGH INDIAS OWN INTERESTS AS A FEDERAL STATE MAY HAVE BEEN MAIN REASON FOR THEIR ATTITUDE, FRIENDSHIP FOR CDA MUST HAVE PLAYED A PART. I HAVE OF COURSE THANKED RAO AND CDN HIGHCOMM MAY WISH TO DO THE SAME AND ALSO THANK MINISTER OF EXTERNAL AFFAIRS.

WERSHOF

7/30/4

McKinnon PCO / Apr. 30
Gotlieb

Miller Maule

file 20-3-1-6

ACTION COPY

L

R E S T R I C T E D

FM VIENN APR29/69 NO/NO STANDARD

TO TT EXTEROTT 356 DE PARIS

INFO TT LAGOS DE LDN

REF OURTEL 256 APR9

LAW OF TREATIES-ARTICLE 5-NIGERIA

WHEN VOTE ON PARA2 WAS TAKEN YESTERDAY NIGERIA AGREEABLY SURPRISED US BY VOTING AGAINST PARA 2 INSTEAD OF ABSTAINING.

2. ALSO WE UNDERSTAND THEY DID QUIET LOBBYING IN AFRO-ASIAN GROUP.

I HAVE THANKED DR ELIAS.

WERSHOF

6/30/4

Copies to Mr. McKinnon, PCO
Mr. A. E. Gotlieb
April 30/69
itl

OTT088

PAR101

GVA47.

VNA7/29

RR OTT

DE VNA

R 291417Z

U N C L A S S I F I E D

FM VIENN APR29/69

TO EXTEROTT 352

INFO TT OPM(LALONDE)PCO(FED PROV SECT) DE OTT

REF OURTEL 344 APR28

LAW OF TREATIES-ARTICLE 5

FOLLOWING ARE DETAILS OF ROLL CALL VOTE ON PARA2 OF ARTICLE 5 HELD IN PLENARY IN PM APR28.

2. VOTING TO RETAIN PARA2: AFGHANISTAN, ALGERIA, BULGARIA, BYELORUSSIAN S.S.R. CENTRAL ARRICAN REPUBLIC, CUBA, CZECHO, ECUADOR, FRANCE, GABON, HUNGARY, INDONESIA, IRAQ, IVORYCOAST, KUWAIT, MADAGASCAR, MONACO, MONGOLIA, MOROCCO, NEPAL, POLAND, ROMANIA, SYRIA, TURK, UKRAINIAN SSR, USSR, UAR, YUGOSLAVIA, TOTAL 28.

3. VOTING TO DELETE PARA2: ARGENTINA, AUSTRALIA, AUSTRIA, BARBADOS, BELGIUM, BOLIVIA, BRAZIL, BURMA, CAMEROON, CDA, CEYLON, CHILE, CHINA, COLOMBIA, CONGO(KIN), COSTA RICA, CYPRUS, DENMARK, DOMINICAN REPULBIC, EL SALVADOR, ETHOPIA, FR GERMANY, GHANA, GREECE, GUATEMALA, GUYANA, HOLY SEE, HONDURAS, INDIA, IRAN, IRELAND, ISRAEL, ITALY, JAMAICA, JPN, LIBERIA, LIECHTENSTEIN, LUXEMBOURG, MALAYSIA, MALTA, MAURITIUS, MEXICO, NETHERLANDS, NEW ZEALAND, NIGERIA, NORWAY, PAK, PANAMA, PERU, PHILIPPINES, PORTUGAL, REP OF KOREA, REP OF VIETNAM, SAN MARINO, SINGAPORE, SOUTH AFRICA, SPAIN, SWEDEN, SWITZERLAND, TRINIDAD, AND TOBAGO, UGANDA, UK, USA, URUGUAY, VENEZUELA, ZAMBIA. TOTAL 66.

4. ABSTENTIONS: CAMBODIA, CONGO(BRAZZ), FINLAND, KENYA, LEBANON, LIBYA, SAUDI ARABIA, SENEGAL, SIERRA LEONE, SUDAN, THAILAND, TUNISIA, UNITED REP OF TANZANIA. TOTAL 13

WERSHOF

9.29.4

CANADIAN EMBASSY AMBASSADE DU CANADA

WITH THE COMPLIMENTS

OF THE CANADIAN EMBASSY

DE LA PART DE

L'AMBASSADE DU CANADA

From: Canadian Delegation to
Law of Treaties Conference
Vienna

28 de abril de 1969 (sesión de la tarde)

ALVARO ALVAREZ (URUGUAY)

" Mi Delegación quiere referirse muy brevemente al punto planteado por el señor delegado del Canadá en relación con el párrafo 2 del art.5.

En oportunidad de la intervención que le cupo en el transcurso de las sesiones de la Comisión Plenaria en el primer período de sesiones de la Conferencia mi Delegación se manifestó en contra del referido párrafo y de su inserción en la Convención.

Dos razones fundamentan a juicio de mi Delegación tal criterio:

La primera,que el párrafo en comentario más que una injerencia indebida en los asuntos internos del Estado supone que el derecho internacional cede su prioridad en favor del derecho federal interno en una de sus funciones más importantes:la de determinar los sujetos de derecho internacional facultados para actuar en esa esfera.En realidad,el "jus contraendi" de un Estado federado está determinado no sólo por la Constitución del Estado federal sino que depende también de que otros Estados acepten celebrar tratados con dicho Estado.

La segunda,que sería peligroso adoptar el texto del párrafo 2 del art.5 porque en tal caso todo dependería de las disposiciones de la Constitución del Estado federal.Dicho Estado tendría entonces una ventaja considerable sobre el Estado unitario ya que podría so pretexto de tal disposición introducir en las conferencias y en los tratados multilaterales un gran número de sujetos de derecho,de subdivisiones políticas que decidiera crear. De tal suerte,los Estados federales podrían desequilibrar gravemente en su favor el número de partes y el número de votos.

Por lo expuesto,mi Delegación apoya la propuesta de votación separada del párrafo 2 del art 5 formulada por el señor Delegado de Canadá a fin de votar en contra del párrafo en sí.
Muchas gracias,señor Presidente."

Statement By Dr. Krishna Rao, Leading the Indian Delegation, on April 28, 1968, on Article 5(2) of the draft Convention on Law of Treaties (Treaty Making Power of Federal Units)

Mr. President,

The Indian delegation will vote against the retention of Para 2 of Article 5. Our reasons for doing so were elaborated in our statement at the 11th meeting of the committee of the whole which is reported at page 63 of the printed report. We do recognize that a member of a Federal Union may possess capacity to conclude treaties. This is a statement of fact since some constituent Units of Federal States do conclude treaties with Sovereign States. This position only reflects the treaty-making capacity. But Mr. President our draft Convention is not exhaustive. As is quite clear from the text of Article 1 of the Convention, adopted by the Conference unanimously this morning, our Convention does not include treaties concluded between States and International Organizations, nor between International Organizations inter se. Nor does it deal comprehensively with the issues arising from treaties concluded between Sovereign States and the Members of a Federal Union. Since our Convention concentrates only on treaties concluded between States, the proper course would be, not to deal with the question of treaties concluded between States and Members of a Federal Union. In the alternative, there must also be included in the convention, a comprehensive section dealing not only with the capacity of Members of a Federal Union, to conclude treaties but also all other consequential questions. All aspects of treaties between Members of a Federal Union and State

are not covered in Article 5 - such as:

eg (1) who will issue Full Powers?

(2) how will consent of the Members of a Federal Union to be bound by the treaty be expressed?

(3) how will diputes between States and Members of a Federal Union be settled in terms of Article 62 ? what are the

(4) ~~how about~~ responsibility of Members of a Federal Union for breach of treaty abligations?

Mr. President, this is an area in which it would be exceedingly unwise to enunciate or codify any rules of International Law; for it is, in essence, a matter solely regulated by the internal law of each Federation. We should not rush in, where angels fear to tread. The adoption of present Article 5 (2), might give the impression, that a State can claim the authority of International Law, in seeking to interpret the constitution or constitutional practice of another State in this context, which may well constitute intervention of the most serious kind in some cases.

Mr. President, it can immediately be realized that if we went into these questions, we would necessarily have to enter into the question of relations, between the Members of a Federal Union and the Federal Government - relations which are governed essentially by Municipal Law. The ILC has not gone into these questions. Nor have we the time to deliberate upon these questions at the present conference. In view of the above, my delegation is of the view that the best course open to the conference is not to retain Paragraph 2. The result of this course

would be that the treaty-making capacity of a Member of a Federal Union, will continue to be determined by the constitution of that Federal Union, which would also set forth, the procedures of treaty-making by its Members as well as the limitations of their powers. This capacity could continue to be recognized by those Sovereign States who decide to conclude treaties with them. In other words, the deletion of Paragraph 2 will not in any manner affect the treaty-making capacity of Members of a Federal Union; it will only avoid difficulties, from the International Law viewpoint, which I have referred to above and which, for want of time, this conference cannot go into, at the present session.

I should also like to make it clear that our views on this question are not motivated by any internal considerations. India is a Federal Republic. Under its Constitution, the component units do not possess any treaty-making capacity. Treaty-making is exclusively a central subject. However India may conclude treaties with the Members of a Federal Union, if their Constitution so permits it. We would like this matter to be regulated on a bilateral and practical basis, rather than on the basis of International Law.

It is for these reasons, Mr. President, that we would oppose the retention of Paragraph 2 of Article 5. We will, however, support the principle embodied in Paragraph 1 of Article 5, which recognizes and declares the capacity of every State to conclude treaties.

Thank you, Mr. President.

Statement by Australian Representative in Plenary on Article 5(2) - 28th April, 1969

Mr. President,

The best kind of contribution my delegation can make to the discussion at this stage is to be very brief. However, as a federal State there are a few points that we would like to stress.

Mr. President, the first point is to recall that Australia was one of a number of federal States that supported the deletion of paragraph 2 of article 5 at the first session. The Australian delegation does not contest the statement that members of certain federal unions possess a capacity to conclude treaties. All acknowledge the existence of this capacity in certain instances. However, as stressed both at the first session and again today, the retention of paragraph 2 of article 5 could create potential difficulties for some other federal States, whereas no case has been demonstrated that its retention is necessary or that its deletion would occasion any real difficulties. I say this with the greatest respect to previous speakers in this debate that have spoken in the contrary sense.

These latter representatives have, e.g. pointed out that it will be for the internal authorities of a State to interpret the Constitution and that the fears in this regard are not well based. One comment I would make is that paragraph 2 does not spell this out and there is a real risk of misunderstanding on the matter. Further I would submit that besides this problem there are other problems latent in paragraph 2, such as the proper role that international law plays in the recognition of the treaty-making capacity of a member of a federal State. This particular aspect has just been referred to by the distinguished Representative of Uruguay.

The paradox of the situation is , Mr. President, that attention to one aspect of the paragraph is likely only to expose in fuller light other problems which on a surface reading may not seem to be present. Thus the

amendment made last year in the Committee of the Whole deleted the awkward phrase "State member of a federal union" and substituted instead simply, "member of a federal union". This in itself was a useful amendment, as it took account of the well-known fact that members of federal unions are usually not States for purposes of international law. In the end, however, the amendment has only served to underline the inconsistency with article 1 of our Convention, which is to the effect that our Convention deals only with treaties between States.

The problems are complex and real. The solution, however, is a simple one and that is to delete paragraph 2. This step will be without prejudice to any delegation and will enable the Conference to get on with what is our essential task, which is to draw up a Convention dealing with treaties between States.

Mr. President, the history of article 5 has already been described to us. Its origins go back to a time when the draft articles were intended to cover all kinds of treaties and when an elaborate provision on treaty-making capacity was therefore warranted. Finally a different course has been taken and that has been to limit the Convention to treaties between States, and as a result the I.L.C. truncated the original article 5. But it did not go far enough. Our hope is that this Plenary session will complete what the I.L.C. did not quite finish, and delete paragraph 2 of article 5.

The delegation of Canada has asked for a separate vote on paragraph 2 of article 5. This is a proper and reasonable request, as paragraph 2 raises quite distinct issues from those of paragraph 1 of article 5. The Australian delegation has no objection to paragraph 1. On the separate vote my delegation will be voting against the retention of paragraph 2, i.e. it will re-voting no.

Statement by Cyprus Delegate, A.J. Jacovides
on Article 5(2)
28 April 1969

Mr. President,

Allow me, Sir, to say how gratified we are at seeing you occupy your well-deserved post and to express the conviction that, under your presidency, the work of the Conference will be brought to the successful conclusion which so many of us desire.

I would like, very briefly, to explain the vote of my delegation on the question of Article 5.

The Republic of Cyprus neither is nor is it likely to become a federal state and therefore the issue in Article 5(2) does not affect us directly.

Nevertheless, on the basis of general considerations, we are convinced that the adoption of a provision of the kind set out in Article 5(2) might lead to the practice of other states assuming the right to interpret for themselves the constitutions of federal states and this, in our view, would constitute a case of interference by outside states in the internal affairs of a federal state. Moreover, it is an untenable proposition that a federal constitution, which is internal law of the federal state, can by itself determine matters of international law.

It is for these reasons, and for the practical problems that are bound to arise if such provision is made part of the Convention Mr. President, that my delegation will vote for the deletion of Article 5(2), just as we did at last year's Committee vote on the same issue. At the same time we will support the retention of operative paragraph 1 which highlights the principle of the sovereign equality of states.

Erklärung zu Artikel 5 Abs. 2 (Bundesstaatsklausel)

Monsieur le Président,

Je vous prie d'excuser que je prenne la parole pour une deuxième fois, mais mon pays a une longue tradition fédérale, et c'est pour cette raison que l'article 5 par. 2 revêt, pour ma délégation, un intérêt particulier. Je me permets donc de vous exposer à ce stade de la Conférence encore une fois la position de ma délégation, bien que ma délégation se soit prononcée sur l'article 5 paragraph 2 déjà lors de la discussion de cette disposition au sein de la Commission plénière le 3 avril 1968.

Monsieur le Président, ma délégation [s]est [prononcée à cette occasion] contre l'inclusion de l'article 5 paragraph 2 dans le projet de Convention et elle y est toujours opposée. Cette attitude n'est pas motivée par des raisons relevant de notre Constitution. Au contraire, l'article 32 paragraph 3 de la Loi fondamentale de la République Fédérale d'Allemagne accorde aux pays membres de la fédération, aux "länder", une capacité limitée de conclure des traités internationaux. Du point de vue strictement constitutionnel nous pourrions donc vivre avec l'article 5 paragraph 2 tel qu'il est prévu dans le projet de Convention que nous avons sous les yeux. Si nous sommes, néanmoins, opposé à ce paragraph, c'est pour des raisons d'un ordre plus fondamental, surtout dans le contexte de la présente Convention. Nos raisons sont principalement les suivantes:

<u>Premièrement:</u> Selon l'article 1 du projet de Convention devant nous, la Convention doit être <u>limitée aux Etats.</u> Or, les membres d'une fédération, même s'il leur est accordé une certaine capacité d'agir sur le plan international et dans le domaine du droit international, ne peuvent pas être assimilées d'une façon générale aux Etats. Ceci vaut pour le domaine du droit des traités comme pour d'autres domaines du droit international et pour lesquels l'article 5 paragraph 2 prévoit une assimilation sans distinction des membres d'une fédération aux Etats. Je me bornerai à mettre en relief, à titre d'exemple, que si un membre d'une fédération agit en matière de traités

internationaux en dehors des limites qui lui sont imposés par la Constitution fédérale, les dispositions des articles 7 et 45 sont guère capable de couvrir la situation. Et ceci en raison du fait qu'il ne s'agit pas d'une simple violation d'une disposition constitutionnelle, mais d'un acte relevant du droit international créé par une entité juridique qui ne possédait pas la personnalité juridique pour le faire. L'acte est donc nul et ne peut pas être guéri dans la manière prévue aux articles 7 et 45. Cette question a, d'ailleurs, été discuté plus amplement dans la publication de Helmut Steinberger, "Constitutional subdivisions of States or Unions and their Capacity to conclude Treaties, Comments on art. 5 par. 2 of the ILC draft on the Law of Treaties", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1967, page 425. Je l'évoque afin de souligner que l'article 5 par. 2 du projet devant nous est en contradiction avec l'article 1.

Deuxièmement: si un membre d'une fédération possède la compétence d'agir sur le plan international, il y a toujours le danger d'un différent sur l'interprétation de la constitution fédérale, dont relève la compétence en matières internationales du membre de la Fédération en question. Dans de cas pareils, il y a toujours la possibilité que la Constitution d'un Etat soit interprétée finalement par un autre Etat ou par une instance internationale. L'adoption de l'article 5 paragraph 2 entraînerait sans doute une multiplication du risque de l'incidence de telles situations qui sont hautement indésirables et qui peuvent avoir des conséquences politiques bien au delà de la sphère de compétence du membre en question de la Fédération.

Troisièmement: Il semble à ma délégation, Monsieur le Président, que l'article 5 paragraph 2, tel qu'il a été adopté par la Commission du Droit International et tel qu'il a été adopté l'année dernière par la Commission plénière de notre Conférence, introduit avec le terme "union fédérale" une notion peu claire et difficile à interpréter, Car il n'y a, ni en droit international, ni dans le projet de

Convention devant nous, une interprétation bien établie de cette notion. A en juger d'après le commentaire de la Commission du Droit international, la Commission a employé le terme dans le sens d'Etat fédéral. Mais déjà là, il est difficile de déterminer quelles Constitutions sont vraiment fédérales et quelles constitutions ne le sont pas. Nous doutons, d'autre part, que l'emploi de la notion "Union Fédérale" dans le sens traditionnel "d'Etat Fédéral" couvre toutes les formations fédérales existantes ou qui pourraient naître.

Telles sont, très brièvement, Monsieur le Président, les raisons principales qui déterminent l'attitude négative de ma délégation à l'égard de l'article 5 paragraph 2.

Avant de conclure, je tiens cependant à souligner ceci: Si ma délégation est opposée à l'inclusion de l'article 5 paragraph 2 dans la Convention, elle ne conteste toutefois nullement la possibilité des membres d'une fédération d'agir dans le champs du droit international dans la mesure et dans la forme prescrites par la constitution de la Fédération à laquelle ils appartiennent. Et je voudrais ajouter, que le rejet éventuel du paragraph 2 ne porte en rien préjudice à la faculté des membres d'une fédération d'agir - dans la mesure ou le leur est constitutionnellement permis - dans le domaine du droit international.

Merci, Monsieur le Président.

U.S. Statement in Plenary

DRAFT - ARTICLE 5

Mr. Chairman:

My delegation has listened with great interest to the debate on this article. At the 12th meeting of the Committee of the Whole last year my delegation expressed the view that Article 5 was unnecessary.

Paragraph 1 of that Article, in our view, merely represents what is implicit in Articles 1 and 2 of the Convention.

Some representatives have indicated that they are very anxious to retain paragraph 1. In view of the strong feeling of those delegations [illegible] the United States has decided to accept the adoption of that paragraph.

Paragraph 2, however, raises problems of a different order. It provides that the treaty-making capacity of a member of a federal State is to be determined by reference to the federal constitution. Federal constitutions are internal law. Their interpretation falls within the exclusive jurisdiction of municipal tribunals of federal States. If paragraph 2 of Article 5 is adopted by the Committee of the Whole there is 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.

A number of federal States represented at this Conference have established that the retention of paragraph 2 would cause them substantial difficulties. As a federal State, we fully understand these problems. On the other hand, no State has presented any sustainable argument that paragraph 2 is necessary to avoid difficulties.

Moreover, paragraph 2 leaves unanswered far too many questions. Owing to the constitutional differences between federal States it will not always be clear when paragraph 2 applies. My delegation believes that paragraph 2 would, if adopted, 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. In 1965, after reviewing the comments of governments on this article, Sir Humphrey Waldock, the rapporteur and our expert consultant, proposed deletion of the rule. We believe that this proposal to delete is sound.

The Canadian delegation has asked, under Rule 40, that paragraph 2 be voted on separately. My delegation supports the Canadian request. If the majority of the Plenary approves the request as

we hope they will my delegation will vote against retention of paragraph 2. On the other hand, if the Canadian request for a separate vote should be defeated, then the United States would find it necessary to vote against Article 5 as a whole.

* * * * * * * * *

Statement by Cyprus Delegate, A.J. Jacovides
on Article 5(2)
28 April 1969

Mr. President,

Allow me, Sir, to say how gratified we are at seeing you occupy your well-deserved post and to express the conviction that, under your presidency, the work of the Conference will be brought to the successful conclusion which so many of us desire.

I would like, very briefly, to explain the vote of my delegation on the question of Article 5.

The Republic of Cyprus neither is nor is it likely to become a federal state and therefore the issue in Article 5(2) does not affect us directly.

Nevertheless, on the basis of general considerations, we are convinced that the adoption of a provision of the kind set out in Article 5(2) might lead to the practice of other states assuming the right to interpret for themselves the constitutions of federal states and this, in our view, would constitute a case of interference by outside states in the internal affairs of a federal state. Moreover, it is an untenable proposition that a federal constitution, which is internal law of the federal state, can by itself determine matters of international law.

It is for these reasons, and for the practical problems that are bound to arise if such provision is made part of the Convention Mr. President, that my delegation will vote for the deletion of Article 5(2), just as we did at last year's Committee vote on the same issue. At the same time we will support the retention of operative paragraph 1 which highlights the principle of the sovereign equality of states.

Statement by Mr. Wershof (Canada) on Article 5 in the Plenary Meeting of the Conference

Mr. President

The Canadian delegation has grave reservations concerning paragraph 2 of Article 5 which, in our view, deals inadequately with the treaty-making capacity of members of a federal state, both from a political and from a strictly legal viewpoint. The reasons for my delegation's concern were made known to distinguished representatives at the first session last year. Now, however, the conference must take its final decision on whether or not a provision of the kind proposed in the second paragraph of this Article is to be included in the convention we are to adopt. It is the view of my delegation that the implications and possible consequences of the adoption of this paragraph are sufficiently serious to warrant further consideration by this conference at this time. It is for this reason, Mr. President, that I propose to deal in some detail with the issues raised by this paragraph since, although these issues were discussed at the Committee stage of our deliberations, they were not resolved at that time.

It would be helpful, I believe, to review briefly the history of paragraph 2 of this Article, because such a review reveals that there has never, at any stage of the consideration of this question, been a consensus in favour of the desirability of including paragraph 2. The first draft articles (including an article on capacity to conclude treaties) were considered by the International Law Commission as early as 1950. In 1958 the then Special Rapporteur, Sir Gerald Fitzmaurice, included, in what was then proposed as a code rather than a convention, the proposition that "The component states of a federal union, not possessing any international personality apart from

...2

that of the union, do not possess treaty-making capacity". It is not until 1962 that we find, in draft Article 3 dealing with capacity generally to conclude treaties, a specific provision relating to treaty-making by members of a federal state. I should like particularly to draw the attention of distinguished representatives to the fact that this provision, which was paragraph 2 of Article 3, was formulated by the I.L.C. at a time when the Commission had not yet decided to limit the scope of its draft articles to treaties between States. Thus the proposed Article 3 also contained a paragraph on the treaty-making capacity of international organizations.

Paragraph 2 was at that time the subject of prolonged and deep controversy within the Commission, with a number of its most distinguished members expressing serious reservations about its provisions. At the 779th meeting of the Commission, the Special Rapporteur, in suggesting that the whole of the proposed article on capacity be deleted, noted that the article (and I quote now from the Summary Record) "had given rise to considerable difficulty in the Commission, which had been almost equally divided on the issues it raised; in the truncated form in which it had finally emerged, it was not very useful and the best course would probably be to drop it altogether." End of quotation.

Finally, however, after considerable redrafting and continued controversy, what is now paragraph 2 of Article 5 was adopted by a vote, in a Commission consisting of 25 members, of only 7 in favour, with three opposed and four abstentions. In other words, only 7 out of 25 members actually recorded approval of the paragraph.

Distinguished representatives will recall that when Article 5 was considered by the Committee of the Whole at the first session of this conference, paragraph 2 of the article was the subject of two votes. In both cases the paragraph was retained by only a narrow majority. The result of the first vote was 45 in favour and 38 opposed, with 10 abstentions. On the second vote 46 voted in favour, 39 against, with 8 abstentions.

...3

The conclusion to be drawn from the foregoing is that the desirability of including in this convention a provision incorporating the principle contained in the second paragraph of draft Article 5 has been the subject of serious controversy among eminent jurists and, on those occasions on which it has been voted upon, paragraph 2 has failed to attract the support of even a simple majority of the members and representatives who considered it.

I turn now, Mr. President, to the considerations which lead my delegation to believe that the proposed formulation of the rule found in paragraph 2 is unsatisfactory from a legal viewpoint and, moreover, is beyond the scope of the convention which we are now drafting.

First, I should like to reiterate that the paragraph was originally proposed when the I.L.C. draft articles were intended to cover treaty-making not only by States but also by other subjects of international law, including international organizations. Subsequently however, the Commission decided to confine the draft articles to treaties between States and, in consequence, the third paragraph dealing with treaty-making by international organizations was deleted from the article on capacity. The paragraph on treaty-making by members of a federal union was retained, however. The result was that the word "State" was used in two quite different senses in the two paragraphs of Article 5, as adopted by the I.L.C. When this article was considered last year by the Committee of the Whole and by the Drafting Committee of this conference, it was agreed that the word "States" in Article 1, on the scope of the convention, and in paragraph 1 of Article 5, meant independent sovereign States. Recognizing that members of a federal State are not themselves States in that sense, the Committee deleted the word "States" from paragraph 2 of Article 5.

....4

Thus a provision dealing with the capacity of these entities to conclude treaties is as much beyond the scope of the present convention, as defined in Article 1, as would be a provision on the treaty-making capacity of an international organization or of any other entity which is not a sovereign State.

Quite apart from the question whether paragraph 2 falls outside the scope of this convention, the question arises whether paragraph 2 formulates a desirable legal principle which ought to be adopted in the interest of orderly treaty relations. I wish to make clear that my delegation is not questioning the relevance of the provisions of the federal constitution to the practice whereby certain federal states permit, 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. We are concerned however, that this formulation, as expressed in paragraph 2, is dangerously incomplete. There are clearly at least two prerequisites, both of which must exist together, if a component unit of a federal state is to have effective treaty-making capacity. One is the conferring on it of such capacity by the federal State, the other is the recognition by other sovereign States of the capacity so conferred. With respect to the first element, the paragraph assumes, quite incorrectly, that the constitution speaks for itself and is alone determinative. It omits, for example, any recognition of the process whereby the constitution is continuously amended in certain states by means of judicial decision. The proposed formulation also says nothing about who is to be responsible for any breach by a member of a federal State of its treaty obligations. One may answer that the present convention expressly excludes from its ambit all questions of state responsibility. There nevertheless exists, independent of the present convention, a body of international law governing the responsibility of sovereign

....5

States for the breach of their treaty obligations. No similar rules exist, however, in respect of treaties concluded by members of a federal state. A review of the discussion of this issue in the I.L.C. quickly reveals the absence of any consensus among jurists on this issue.

There is a further consideration, Mr. President, of considerable practical significance, which serves to underline the inadequacy of paragraph 2 as a formulation of the rule of international law relating to the treaty-making capacity of members of a federal state. The paragraph proposes that such a capacity may exist if it is admitted by the federal constitution and within the limits there laid down. As distinguished representatives will readily realize, the constitution forms part of the municipal law of the federal state and its interpretation falls exclusively within the internal jurisdiction of that state. This is particularly obvious when one considers that the constitution of a state is an organic statute interpreted and developed by the appropriate internal organs of the state. Paragraph 2 contains no provision, however recognizing that only the federal state itself may interpret its own constitution. Thus the paragraph may lead to the totally unacceptable practice of one member state of the U.N. presuming to interpret the constitution of another member state which happens to be a federal state. In federations where the constitution is entirely written and deals expressly with treaty-making, there may be relatively little danger of this practice arising. The paragraph seems to ignore, however, situations like that of Canada where the constitution is in large part unwritten. Constitutional practice, in such cases, is as important as the written documents. But our experience confirms that, in a country like Canada, which gained its independence through the gradual evolution of constitutional practice, not all of which was reduced to written form, the possibility of one state purporting to interpret the constitution of another federal state is all too real. The failure of paragraph 2 to deal with this problem is probably its most important defect.

...6

In discussing the question whether a provision such as paragraph 2 should be included in the present convention, the observation is occasionally made that the practice of treaty-making by members of certain federal states exists and should therefore be mentioned. An examination of state practice confirms that certain federal states do permit, within the limits of their constitutions and subject to various forms of federal control, the conclusion of certain types of international agreements by their member units. These practices have been going on for years, they have long since been accepted under international law and their continuance is not dependent upon the adoption of paragraph 2 of Article 5. I should like to make clear, Mr. President, that the Canadian delegation does not question either the legality or the desirability of these practices. Indeed Canada, whose constitution does not provide for such action by its provinces, has nonetheless authorized, by means of umbrella agreements between Canada and other sovereign States, the conclusion of various agreements between its provinces and such states. We do not believe, however, that state practice supports the particular and defective formulation of the relevant rule of law as proposed in paragraph 2, omitting as it does any reference to the element of ultimate federal control over such treaty-making capacity.

My delegation considers that the only satisfactory remedy for the dangerous inadequacies of paragraph 2 is the deletion of the paragraph. We consider that the conference should take into account the fact that, at the first session, paragraph 2 was opposed by the large majority of federal states represented here. I would hope, Mr. President, that non-federal states will not seek to impose upon federal states a rule which particularly concerns federal states and to which the large majority of such states are opposed. There is no suggestion that the omission of paragraph 2 of Article 5 would in any way impair the existing rights of the members of any federal State, whereas many federal States have indicated that its inclusion is unnecessary and undesirable.

...7

Distinguished representatives will have noted that my delegation's concern relates only to paragraph 2 of Article 5. My delegation recognizes that many other delegations attach considerable importance to paragraph 1 of Article 5 and we have no desire whatever to interfere with that paragraph. Distinguished representatives will be aware that on all occasions upon which this Article has been submitted to a vote, both in the I.L.C. and twice during consideration of this article in Committee of the Whole, paragraph 2 was voted upon separately. This reflects the fact that the two paragraphs in fact stand independent of each other and deal with quite different matters. Paragraph 1 deals with the capacity of sovereign states whereas paragraph 2 deals with the capacity of entities which this conference has already determined (when it deleted "States" from paragraph 2 last year) are something other than sovereign states.

My delegation therefore requests, Mr. President, that there be a separate vote on paragraph 2 of Article 5. I assume that all distinguished representatives, even those whose substantive views on that paragraph differ from those of my delegation, will recognize that because the two paragraphs of the Article deal with quite distinct issues, it is not only important, but proper and fair, that there be a separate vote on paragraph 2 in order to determine whether that paragraph enjoys the support necessary for its inclusion in the proposed convention.

I have already stressed, Mr. President, that my delegation has no wish to interfere with paragraph 1 of Article 5. In the unlikely event, however, that a separate vote on paragraph 2 should be refused, then it would be the view of my delegation that, since the dangers of paragraph 2 greatly outweigh any advantages to be found in paragraph 1, the entire Article should then be deleted. I would hope, however, Mr. President, that this conference will agree to allow a separate vote on paragraph 2, and that paragraph 1 will not be unnecessarily jeopardized by the refusal of a separate vote.

....8

Possibility of Amendment

The suggestion has been made, Mr. President, that the proper remedy for the inadequacies of paragraph 2 is not to delete the paragraph but to amend it. I should like to remind distinguished representatives that at the first session of this conference the distinguished representative of Austria proposed an amendment which, while it would not have remedied all the defects of the paragraph, would have gone a considerable way toward meeting the legitimate objections of the majority of federal states to paragraph 2. However the proposed amendment failed to obtain the support of even a simple majority in the Committeeof the Whole. The procedure of amendment has therefore been tried Mr. President, and has not succeeded. This paragraph is not one which is at the same time so fundamental and so controversial that its retention in some form is essential to the success or integrity of the convention. The simple fact is that this is a paragraph about federal states which is unacceptable to a large majority of federal states. The conference should therefore be asked to express itself on this matter by means of a vote on the paragraph.

file 20-3-1-6

OTT[redacted]

PAR076 GVE 33

VNA8/28

RR OTT

DE VNA

R 281149Z

U N C L A S S I F I E D

FM VIENN APR28/69 NO/NO STANDARD

TO EXTEROTT 343

REF OURTEL 321 APR21

3d

LAW OF TREATIES CONFERENCE-SECOND SESSION: WEEKLY SUMMARY(APR21-25)
CTTEE OF WHOLE(CW)MET 11 TIMES DURING WEEK AND COMPLETED ALL ITS SCHEDULED BUSINESS AND, AFTER HAVING DEALT WITH THE LAST OF THE DRAFT ARTICLES, ADOPTED RAPPORTEURS REPORT(A.CONF.39/C.1/L.390 AND ADDITIONS) WHICH GOES TO PLENARY. NEW ARTICLE 62 BIS AND RELATED ARTICLES AND AMENDMENTS(SETTLEMENT OF DISPUTES UNDER PART V): AT MORNING MTG APR21 LUXEMBOURG SUBMITTED PROPOSAL(L.391 CORR.1) FOR ARTICLE 62 TER PERMITTING STATES TO EXCLUDE FROM APPLICATION OF PART V(WITHOUT PREJUDICE TO GENERAL RULES OF INNATL LAW) ANY STATE NOT/NOT ACCEPTING RECIPROCAL UNDERTAKING REGARDING COMPULSORY ARBITRATION. AT AFTERNOON MTG INDIA(ON BEHALF ALSO OF INDONESIA, TANZANIA AND YUGOSLAVIA) INTRODUCED SUB-AMENDMENT L.398(WHICH WOULD PREFACE THE 19 STATE TEXT OF 62 BIS WITH A PROVISION ENABLING PARTIES TO DECLARE WHETHER AND TO WHAT EXTENT THEY WOULD ACCEPT ITS PROVISIONS) TO THE 19 POWER TEXT OF 62 BIS(L.395/REV.3). DEBATE CONTINUED AT EVENING MTG APR21 AND CONCLUDED MORNING APR22, WITH VOTING BEING SCHEDULED FOR AFTERNOON APR22. AT OPENING OF THAT MTG HOWEVER GHANA SOUGHT TO DEFER VOTING BY PROPOSING TO ADJOURN DEBATE FOR 48 HOURS; THIS PROCEDURAL MOTION WAS DEFEATED 45(CDA USALUK)-33-7. FOLLOWING PROPOSALS WERE THEN WITHDRAWN: SPAIN L.391 ON 62 BIS AND L.392(NEW ARTICLE 76); THAILAND L.387(NEW ARTICLE 62 TER ENABLING STATED TO OPT-OUT FROM PROVIS ONS OF 62 BIS); LUXEMBOURG L.397(SEE ABOVE). VOTING ON REMAINING PROPOSALS WAS AS

...2

13/28/4

FOLLOWS: SWISS PROPOSAL L.377 WAS REJECTED 28(CDA FRANCE UK)-51-20 (USA); INDIAN SUB-AMENDMENT L.398 TO 62 BIS WAS REJECTED 37-47(CDA FRANCE UK USA)-19.19 POWER PROPOSAL FOR 62 BIS(L.352/REV 3 AND CORR 1) WAS ADOPTED 54(CDA FRANCE UK USA)-34-14. CEYLON PROPOSAL(L395)FOR A 62 TER(MAKING EXPLICIT THAT A FUTURE TREATY MIGHT STATE OR PARTIES TO A FUTURE TREATY MIGHT AGREE NOT/NOT TO APPLY 62 BIS)FAILED ON A TIE VOTE 28(CDA UK USA)-28-4. SWISS PROPOSAL FOR A NEW ARTICLE 62 QUATER(L.393 AND CORR 1)(PROVIDING THAT NOTHING IN 62 BIS SHOULD AFFECT OBLIGATIONS OF PARTIES UNDER OTHER PROVISIONS IN FORCE BETWEEN THEM RELATING TO SETTLEMENT OF DISPUTES)WAS ADOPTED 45(CDA UK USA) -21-36.

WE HAVE ACCORDINGLY NOW ADOPTED IN CW AN ARTICLE 62 BIS THAT PROVIDES FOR COMPULSORY ARBITRATION OF DISPUTES UNDER PART V; IT WILL HOWEVER HAVE TO ATTAIN 2/3MAJORITY IN PLENARY.

REPORT OF DRAFTING CTTEE(CD): ARTICLES 8,55, AND 66.

FOLLOWING CONCLUSION OF VOTING ON 62 BIS CHAIRMAN OF DC INTRODUCED TEXTS OF ARTICLES 8,55 AND 66 AS ADOPTED BY DC(C.1/16). THESE WERE ALL ADOPTED BY CW WITHOUT OBJECTION.

FINAL CLAUSES AND PROPOSED NEW ARTICLES 76 AND 77.

AT MORNING MTG APR23 BRAZIL AND UK INTRODUCED PROPOSED FINAL CLAUSES (L.386/REV.1)INCORPORATING QUOTE VIENN FORMULA UNQUOTE FOR DEFINING STATES ELIGIBLE TO SIGNOR ACCEDE TO THIS CONVENTION. HUNGARY(AND POL-AND ROMANIA USSR)INTRODUCED PROPOSED FINAL CLAUSES(L.389 AND CORR 1) INCORPORATING QUOTE ALL STATES UNQUOTE FORMULA. INDIA(AND GHANA)INT-

...3

RODUCED AMENDMENT TO L.386/REV.1(L.394)WHICH WOULD HAVE HAD SAME EFFECT AS QUOTE ALL STATES UNQUOTE FORMULA BECAUSE IT SPECIFIED THAT PARTIES TO NUCLEAR TEST BAN TREATY AND OUTER SPACE TREATY WOULD AUTOMATICALLY BE ELIGIBLE TO BECOME PARTIES TO TREATIES CONVENTION. SWISS INTRODUCED AMENDMENT L.396 TO L.386 INCREASING NUMBER OF RATIFICATIONS TO BRING CONVENTION INTO FORCE FROM 45 TO 62. VENEZUELA INTRODUCED PROPOSED NEW ARTICLE 77(L.399)TO MAKE TREATIES CONVENTION NON-RETROACTIVE. LATER SWEDEN AND OTHERS INTRODUCED NEW ARTICLE 77(L.400)ALSO TO ENSURE NON-RETROACTIVITY OF TREATIES CONVENTION. AT MORNING MTG APR24 SPAIN(L.401 AND IRAN(L.402)INTRODUCED TEXTUAL AMENDMENTS TO L.400. AT EVENING MTG APR24L.399, L.400 AND L.402 WERE WITHDRAWN AND WERE REPLACED BY REVISED PROPOSAL(L.403)INTRODUCED BY SWEDEN(ALSO ON BEHALF OF BRAZIL CHILE KENYA IRAN TUNISIA VENEZUELA). SPAIN PROPOSAL L.401 WAS CONSEQUENTLY REGARDED AS NO/NO LONGER BEFORE CW. DEBATE CONTINUED DURING EVENING MTG. MORNING MTG APR25 DEBATE CONCLUDED BUT CERTAIN PROCEDURAL DISCUSSIONS PRECEEDED VOTING. USSR REQUESTED PRIORITY FOR VOTING ON L.389. THIS WAS NOT/NOT OPPOSED. ECUADOR PROPOSED THAT VOTE ON NEW ARTICLE 77(L.403)BE DEFERRED UNTIL APR28; THIS WAS DEFEATED 17-42(UK USA)-32(CDA).

VOTING ON RELEVANT SUBSTANTIVE PROPOSALS WAS AS FOLLOWS(ALL ROLL-CALL VOTES);(A)SWISS PROPOSED ARTICLE 76(L.250)ON SETTLEMENT OF DISPUTES(PROVIDING ROLE FOR INNATL COURT OF JUSTICE)WAS DEFEATED 37(CDA UK)-38-20 USA NETHERLANDS).(B)PROPOSED ARTICLE 77(L.403)TO ENSURE

...4

NON-RETROACTIVITY WAS ADOPTED 71(CDA UK USA FRANCE)-5(ECUADOR ALGERIA CUBA)-29(USSR).(C)PROPOSAL FOR FINAL CLAUSES INCORPORATING QUOTE ALL STATES UNQUOTE FORMULA(L.389)WAS DEFEATED 32(INDIA MXICO SOUTH AFRICA EASTERN EUROPEANS ECUADOR)-56(CDA FRANCE UK USA)-17. (D)GHANA/INDIA PROPOSAL(L.394)WAS DEFEATED 32-48(CDA FRANCE UK USA) -25.(E)SWISS PROPOSAL(L.396)TO INCREASE NUMER OF RATIFICATIONS WAS THEN WITHDRAWN.(F)VOTING ON BRAZIL AND UK PROPOSAL INCORPORATING VIENN FORMULA(L.386/REV.1)WAS PRECEIDED BY A FURTHER PROLONGED PROCEDURAL WRANGLE CONCERNING NUMBER OF RATIFICATIONS THAT SHOULD BE REQUIRED TO BRING CONVENTION INTO FORCE.FINALLY CHAIRMAN RESOLVED DISPUTE BY RULING THAT RELEVANT PART OF TEXT BE LEFT BLANK TO BE RESOLVED BY PLENARY.VIENN FORMULA WAS THEN ADOPTED80(CDA FRANCE UK USA)-26(MXICO CEYLON EASTERN EUROPEANS ECUADOR)-19(SPORE SOUTHAFRICA CYPRUS AFGHANISTAN).

ARTICLE 5BIS:ARTICLE 5 BIS(L.388)PROVIDING THAT EVERY STATE HAS RIGHT TO PARTICIPATE IN MULTILATERAL TREATIES OF INTEREST TO INNATL COMMUNITY AS A WHOLE WAS DEFEATED 32(MXICO EASTERN EUROPEANS)-52(CDA FRANCE FRG UK USA)-19(NIGERIA AND SOUTH AFRICA).

ARTICLES FROM DC(2,12,62 BIS):

CHAIRMAN OF DC FROM TIME TO TIME DURING REMAINDER OF APR25 MTG INTRODUCED REMAINING ARTICLES FROM DC(2,12,62 BIS).ALL WERE ADOPTED WITHOUT OBJECTION.REFERRING TO ARTICLE 2(I)CHAIRMAN STATED THAT DC CONSIDERED BOTH GATT AND BIRPIX WERE COVERED BY DEFINITION THEREIN OF QUOTE INNATL ORGANIZATIONS UNQUOTE;CDA HAD RAISED THIS PROBLEM

.....5

LAST YEAR. CHAIRMAN FURTHER ANNOUNCED THAT DC WILL TAKE UP CONSIDERATION OF TITLES OF ARTICLES AND SECTIONS LATER AND REPORT ON THEM DIRECT TO PLENARY.

RAPPORTEURS REPORT:

VOLUMES I AND II OF RAPPORTEURS REPORT AND ADDITIONS 1-13 THEREOF WERE ALSO ADOPTED. CW AUTHORIZED SPECIAL RAPPORTEUR AND SECRETARIAT TO PREPARE REMAINING PARTS OF REPORT(ON CURRENT MTGS)FOR INCLUSION IN REPORT AS A WHOLE.

CONCLUSION OF WORK OF CW:

CW WOUND UP ITS ACTIVITIES WITH TRIBUTES TO CHAIRMAN ELIAS AND SECRETARIAT. PLENARY STARTS MON, APR28.

WERSHOF

Delivered 28/4/69

Statement by Mr. Wershof (Canada) on Article 5 in the Plenary Meeting of the Conference

Mr. President

The Canadian delegation has grave reservations concerning paragraph 2 of Article 5 which, in our view, deals inadequately with the treaty-making capacity of members of a federal state, both from a political and from a strictly legal viewpoint. The reasons for my delegation's concern were made known to distinguished representatives at the first session last year. Now, however, the conference must take its final decision on whether or not a provision of the kind proposed in the second paragraph of this Article is to be included in the convention we are to adopt. It is the view of my delegation that the implications and possible consequences of the adoption of this paragraph are sufficiently serious to warrant further consideration by this conference at this time. It is for this reason, Mr. President, that I propose to deal in some detail with the issues raised by this paragraph since, although these issues were discussed at the Committee stage of our deliberations, they were not resolved at that time.

It would be helpful, I believe, to review briefly the history of paragraph 2 of this Article, because such a review reveals that there has never, at any stage of the consideration of this question, been a consensus in favour of the desirability of including paragraph 2. The first draft articles (including an article on capacity to conclude treaties) were considered by the International Law Commission as early as 1950. In 1958 the then Special Rapporteur, Sir Gerald Fitzmaurice, included, in what was then proposed as a code rather than a convention, the proposition that "The component states of a federal union, not possessing any international personality apart from

...2

U.S. Statement in Plenary

Apr 28/69

Tab 20-3-1-6

DRAFT - ARTICLE 5

Mr. Chairman:

My delegation has listened with great interest to the debate on this article. At the 12th meeting of the Committee of the Whole last year my delegation expressed the view that Article 5 was unnecessary.

Paragraph 1 of that Article, in our view, merely represents what is implicit in Articles 1 and 2 of the Convention.

Some representatives have indicated that they are very anxious to retain paragraph 1. In view of the strong feeling of those delegations [illegible] the United States has decided to accept the adoption of that paragraph.

Paragraph 2, however, raises problems of a different order. It provides that the treaty-making capacity of a member of a federal State is to be determined by reference to the federal constitution. Federal constitutions are internal law. Their interpretation falls within the exclusive jurisdiction of municipal tribunals of federal States. If paragraph 2 of Article 5 is adopted by the Committee of the Whole there is 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.

A number of federal States represented at this Conference have established that the retention of paragraph 2 would cause them substantial difficulties. As a federal State, we fully understand these problems. On the other hand, no State has presented any sustainable argument that paragraph 2 is necessary to avoid difficulties.

Moreover, paragraph 2 leaves unanswered far too many questions. Owing to the constitutional differences between federal States it will not always be clear when paragraph 2 applies. My delegation believes that paragraph 2 would, if adopted, 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. In 1965, after reviewing the comments of governments on this article, Sir Humphrey Waldock, the rapporteur and our expert consultant, proposed deletion of the rule. We believe that this proposal to delete is sound.

The Canadian delegation has asked, under Rule 40, that paragraph 2 be voted on separately. My delegation supports the Canadian request. If the majority of the Plenary approves the request as

we hope they will my delegation will vote against retention of paragraph 2. On the other hand, if the Canadian request for a separate vote should be defeated, then the United States would find it necessary to vote against Article 5 as a whole.

* * * * * * * *

Can 28/69
fol 20-3-1-6

Erklärung zu Artikel 5 Abs. 2 (Bundesstaatsklausel)

Monsieur le Président,

Je vous prie d'excuser que je prenne la parole pour une deuxième fois, mais mon pays a une longue tradition fédérale, et c'est pour cette raison que l'article 5 par. 2 revêt, pour ma délégation, un intérêt particulier. Je me permets donc de vous exposer à ce stade de la Conférence encore une fois la position de ma délégation, bien que ma délégation se soit prononcée sur l'article 5 paragraph 2 déjà lors de la discussion de cette disposition au sein de la Commission plénière le 3 avril 1968.

Monsieur le Président, ma délégation [s]est [prononcée à cette occasion] contre l'inclusion de l'article 5 paragraph 2 dans le projet de Convention et elle y est toujours opposée. Cette attitude n'est pas motivée par des raisons relevant de notre Constitution. Au contraire, l'article 32 paragraph 3 de la Loi fondamentale de la République Fédérale d'Allemagne accorde aux pays membres de la fédération, aux "länder", une capacité limitée de conclure des traités internationaux. Du point de vue strictement constitutionnel nous pourrions donc vivre avec l'article 5 paragraph 2 tel qu'il est prévu dans le projet de Convention que nous avons sous les yeux. Si nous sommes, néanmoins, opposé à ce paragraph, c'est pour des raisons d'un ordre plus fondamental, surtout dans le contexte de la présente Convention. Nos raisons sont principalement les suivantes:

[omit]

Premièrement: Selon l'article 1 du projet de Convention devant nous, la Convention doit être limitée aux Etats. Or, les membres d'une fédération, même s'il leur est accordé une certaine capacité d'agir sur le plan international et dans le domaine du droit international, ne peuvent pas être assimilées d'une façon générale aux Etats. Ceci vaut pour le domaine du droit des traités comme pour d'autres domaines du droit international et pour lequel l'article 5 paragraph 2 prévoit une assimilation sans distinction des membres d'une fédération aux Etats. Je me bornerai à mettre en relief, à titre d'exemple, que si un membre d'une fédération agit en matière de traités

internationaux en dehors des limites qui lui sont imposées par la Constitution fédérale, les dispositions des articles 7 et 43 sont guère capable de couvrir la situation. Et ceci en raison du fait qu'il ne s'agit pas d'une simple violation d'une disposition constitutionnelle, mais d'un acte relevant du droit international créé par une entité juridique qui ne possédait pas la personnalité juridique pour le faire. L'acte est donc nul et ne peut pas être guéri dans la manière prévue aux articles 7 et 43. Cette question a, d'ailleurs, été discuté plus amplement dans la publication de Helmut Steinberger, "Constitutional subdivisions of States or Unions and their Capacity to conclude Treaties, Comments on art. 5 par. 2 of the ILC draft on the Law of Treaties", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 1967, page 425. Je l'évoque afin de souligner que l'article 5 par. 2 du projet devant nous est en contradiction avec l'article 1.

Deuxièmement: si un membre d'une fédération possède la compétence d'agir sur le plan international, il y a toujours le danger d'un différent sur l'interprétation de la constitution fédérale, dont relève la compétence en matières internationales du membre de la Fédération en question. Dans de cas pareils, il y a toujours la possibilité que la Constitution d'un Etat soit interprétée finalement par un autre Etat ou par une instance internationale. L'adoption de l'article 5 paragraph 2 entraînerait sans doute une multiplication du risque de l'incidence de telles situations qui sont hautement indésirables et qui peuvent avoir des conséquences politiques bien au delà de la sphère de compétence du membre en question de la Fédération.

Troisièmement: Il semble à ma délégation, Monsieur le Président, que l'article 5 paragraph 2, tel qu'il a été adopté par la Commission du Droit International et tel qu'il a été adopté l'année dernière par la Commission plénière de notre Conférence, introduit avec le terme "union fédérale" une notion peu claire et difficile à interpréter, Car il n'y a, ni en droit international, ni dans le projet de

Convention devant nous, une interprétation bien établie de cette notion. A en juger d'après le commentaire de la Commission du Droit international, la Commission a employé le terme dans le sens d'Etat fédéral. Mais déjà là, il est difficile de déterminer quelles Constitutions sont vraiment fédérales et quelles constitutions ne le sont pas. Nous doutons, d'autre part, que l'emploi de la notion "Union Fédérale" dans le sens traditionnel "d'Etat Fédéral" couvre toutes les formations fédérales existantes ou qui pourraient naître.

Telles sont, très brièvement, Monsieur le Président, les raisons principales qui déterminent l'attitude négative de ma délégation à l'égard de l'article 5 paragraph 2.

Avant de conclure, je tiens cependant à souligner ceci: Si ma délégation est opposée à l'inclusion de l'article 5 paragraph 2 dans la Convention, elle ne conteste toutefois nullement la possibilité des membres d'une fédération d'agir dans le champs du droit international dans la mesure et dans la forme prescrites par la constitution de la Fédération à laquelle ils appartiennent. Et je voudrais ajouter, que le rejet éventuel du paragraph 2 ne porte en rien préjudice à la faculté des membres d'une fédération d'agir - dans la mesure ou le leur est constitutionnellement permis - dans le domaine du droit international.

Merci, Monsieur le Président.

Statement By Dr. Krishna Rao, Leader of Indian Delegation, on April 28, 1968, on Article 5 (2) of the draft Convention on Law of Treaties (Treaty Making Power of Federal Units)

28/4/68

file 20-3-1-6

Mr. President,

The Indian delegation will vote against the retention of Para 2 of Article 5. Our reasons for doing so were elaborated in our statement at the 11th meeting of the committee of the whole which is reported at page 63 of the printed report. We do recognize that a member of a Federal Union may possess capacity to conclude treaties. This is a statement of fact since some constituent Units of Federal States do conclude treaties with Sovereign States. This position only reflects the treaty-making capacity. But Mr. President our draft Convention is not exhaustive. As is quite clear from the text of Article 1 of the Convention, adopted by the Conference unanimously this morning, our Convention does not include treaties concluded between States and International Organizations, nor between International Organizations inter se. Nor does it deal comprehensively with the issues arising from treaties concluded between Sovereign States and the Members of a Federal Union. Since our Convention concentrates only on treaties concluded between States, the proper course would be, not to deal with the question of treaties concluded between States and Members of a Federal Union. In the alternative, there must also be included in the convention, a comprehensive Section dealing not only with the capacity of Members of a Federal Union, to conclude treaties but also all other consequential questions. All aspects of treaties between Members of a Federal Union and States

are not covered in Article 5 - such as:

eg (1) who will issue Full Powers?

(2) how will consent of the Members of a Federal Union to be bound by the treaty be expressed?

(3) how will disputes between States and Members of a Federal Union be settled in terms of Article 62 ?

(4) ~~how about~~ what will be the responsibility of Members of a Federal Union for breach of treaty obligations?

Mr. President, this is an area in which it would be exceedingly unwise to enunciate or codify any rules of International Law; for it is, in essence, a matter solely regulated by the internal law of each Federation. We should not rush in, where angels fear to tread. The adoption of present Article 5 (2), might give the impression, that a State can claim the authority of International Law, in seeking to interpret the constitution or constitutional practice of another State in this context, which may well constitute intervention of the most serious kind in some cases.

Mr. President, it can immediately be realized that if we went into these questions, we would necessarily have to enter into the question of relations, between the Members of a Federal Union and the Federal Government - relations which are governed essentially by Municipal Law. The ILC has not gone into these questions. Nor have we the time to deliberate upon these questions at the present conference. In view of the above, my delegation is of the view that the best course open ~~for~~ to the conference is not to retain Paragraph 2. The result of this course

would be that the treaty-making capacity of a Member of a Federal Union, will continue to be determined by the constitution of that Federal Union, which ~~will~~ would also set forth, the procedures of treaty-making by its Members as well as the limitations on their powers. This capacity could continue to be recognized by those Sovereign States who decide to conclude treaties with them. In other words, the deletion of Paragraph 2 will not in any manner affect the treaty-making capacity of Members of a Federal Union; it will only avoid difficulties, from the International Law viewpoint, which I have referred to above and which, for want of time, this conference cannot go into, at the present session.

I should also like to make it clear that our views on this question are not motivated by ~~nay~~ any internal considerations. India is a Federal Republic. Under its Constitution, the component units do not possess any treaty-making capacity. Treaty-making is exclusively a central subject. However India may conclude treaties with the Members of a Federal Union, if their Constitution so permits it. We would like this matter to be regulated on a bilateral and practical basis, rather than on the basis of International Law.

It is for these reasons, Mr. President, that we would oppose the retention of Paragraph 2 of Article 5. We will, however, support the principle embodied in Paragraph 1 of Article 5, which recognizes and declares the capacity of every State to conclude treaties.

Thank you, Mr. President.

Copies of Mr. Wershof's Statement sent to the following on May 6, 1969:

USSEA
Mr. Bissonnette
Mr. Roquet
Mr. McKinnon, PCo
Mr. Gotleib, Dept. of Communications
Co-ordination Div.
European Div.
U.N. Div.
Pays Francophone

28 de abril de 1969 (sesión de la tarde)

ALVARO ALVAREZ (URUGUAY)

" Mi Delegación quiere referirse muy brevemente al punto planteado por el señor delegado del Canadá en relación con el párrafo 2 del art.5.

En oportunidad de la intervención que le cupo en el transcurso de las sesiones de la Comisión Plenaria en el primer período de sesiones de la Conferencia mi Delegación se manifestó en contra del referido párrafo y de su inserción en la Convención.

Dos razones fundamentan a juicio de mi Delegación tal criterio:

La primera,que el párrafo en comentario más que una injerencia indebida en los asuntos internos del Estado supone que el derecho internacional cede su prioridad en favor del derecho federal interno en una de sus funciones más importantes:la de determinar los sujetos de derecho internacional facultados para actuar en esa esfera.En realidad,el "jus contraendi" de un Estado federado está determinado no sólo por la Constitución del Estado federal sino que depende también de que otros Estados acepten celebrar tratados con dicho Estado.

La segunda,que sería peligroso adoptar el texto del párrafo 2 del art.5 porque en tal caso todo dependería de las disposiciones de la Constitución del Estado federal.Dicho Estado tendría entonces una ventaja considerable sobre el Estado unitario ya que podría so pretexto de tal disposición introducir en las conferencias y en los tratados multilaterales un gran número de sujetos de derecho,de subdivisiones políticas que decidiera crear. De tal suerte,los Estados federales podrían desequilibrar gravemente en su favor el número de partes y el número de votos.

Por lo expuesto,mi Delegación apoya la propuesta de votación separada del párrafo 2 del art 5 formulada por el señor Delegado de Canadá a fin de votar en contra del párrafo en sí.
Muchas gracias,señor Presidente."

---

that of the union, do not possess treaty-making capacity". It is not until 1962 that we find, in draft Article 3 dealing with capacity generally to conclude treaties, a specific provision relating to treaty-making by members of a federal state. I should like particularly to draw the attention of distinguished representatives to the fact that this provision, which was paragraph 2 of Article 3, was formulated by the I.L.C. at a time when the Commission had not yet decided to limit the scope of its draft articles to treaties between States. Thus the proposed Article 3 also contained a paragraph on the treaty-making capacity of international organizations.

Paragraph 2 was at that time the subject of prolonged and deep controversy within the Commission, with a number of its most distinguished members expressing serious reservations about its provisions. At the 779th meeting of the Commission, the Special Rapporteur, in suggesting that the whole of the proposed article on capacity be deleted, noted that the article (and I quote now from the Summary Record) "had given rise to considerable difficulty in the Commission, which had been almost equally divided on the issues it raised; in the truncated form in which it had finally emerged, it was not very useful and the best course would probably be to drop it altogether." End of quotation.

Finally, however, after considerable redrafting and continued controversy, what is now paragraph 2 of Article 5 was adopted by a vote, in a Commission consisting of 25 members, of only 7 in favour, with three opposed and four abstentions. In other words, only 7 out of 25 members actually recorded approval of the paragraph.

Distinguished representatives will recall that when Article 5 was considered by the Committee of the Whole at the first session of this conference, paragraph 2 of the article was the subject of two votes. In both cases the paragraph was retained by only a narrow majority. The result of the first vote was 45 in favour and 38 opposed, with 10 abstentions. On the second vote 46 voted in favour, 39 against, with 8 abstentions.

...3

The conclusion to be drawn from the foregoing is that the desirability of including in this convention a provision incorporating the principle contained in the second paragraph of draft Article 5 has been the subject of serious controversy among eminent jurists and, on those occasions on which it has been voted upon, paragraph 2 has failed to attract the support of even a simple majority of the members and representatives who considered it.

I turn now, Mr. President, to the considerations which lead my delegation to believe that the proposed formulation of the rule found in paragraph 2 is unsatisfactory from a legal viewpoint and, moreover, is beyond the scope of the convention which we are now drafting.

First, I should like to reiterate that the paragraph was originally proposed when the I.L.C. draft articles were intended to cover treaty-making not only by States but also by other subjects of international law, including international organizations. Subsequently however, the Commission decided to confine the draft articles to treaties between States and, in consequence, the third paragraph dealing with treaty-making by international organizations was deleted from the article on capacity. The paragraph on treaty-making by members of a federal union was retained, however. It will be recalled ~~The result was~~ that the word "State" was used in two quite different senses in the two paragraphs of Article 5, as adopted by the I.L.C. When this article was considered last year by the Committee of the Whole and by the Drafting Committee of this conference, it was ~~agreed~~ recognized that the word "States" in Article 1, on the scope of the convention, and in paragraph 1 of Article 5, meant independent sovereign States. Recognizing that members of a federal State are not themselves independent sovereign States in that sense, the Committee deletdd the word "States" from paragraph 2 of Article 5.

....4

Thus a provision dealing with the capacity of these entities to conclude treaties is as much beyond the scope of the present convention, as defined in Article 1, as would be a provision on the treaty-making capacity of an international organization or of any other entity which is not a sovereign State.

Quite apart from the question whether paragraph 2 falls outside the scope of this convention, the question arises whether paragraph 2 formulates a desirable legal principle which ought to be adopted in the interest of orderly treaty relations. I wish to make clear that my delegation is not questioning the relevance of the provisions of the federal constitution to the practice whereby certain federal states permit, 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. We are concerned however, that this formulation, as expressed in paragraph 2, is dangerously incomplete. There are clearly at least two prerequisites, both of which must exist together, if a component unit of a federal state is to have effective treaty-making capacity. One is the conferring on it of such capacity by the federal State, the other is the recognition by other sovereign States of the capacity so conferred. With respect to the first element, the paragraph assumes, quite incorrectly, that the constitution speaks for itself and is alone determinative. It [ignores the state practice of federal states both on the municipal and international plane, in particular omits, for example, ~~any recognition of~~ the process whereby the constitution is continuously amended in certain states by means of judicial decision. A further problem is that/] The proposed formulation also says nothing about who is to be responsible for any breach by a member of a federal State of its treaty obligations. One may answer that the present convention expressly excludes from its ambit all questions of state responsibility. There nevertheless exists, independent of the present convention, a body of international law governing the responsibility of sovereign

....5

States for the breach of their treaty obligations. No similar rules exist, however, in respect of treaties concluded by members of a federal state. A review of the discussion of this issue in the I.L.C. quickly reveals the absence of any consensus among jurists on this issue.

There is a further consideration, Mr. President, of considerable practical significance, which serves to underline the inadequacy of paragraph 2 as a formulation of the rule of international law relating to the treaty-making capacity of members of a federal state. The paragraph proposes that such a capacity may exist if it is admitted by the federal constitution and within the limits there laid down. As distinguished representatives will readily realize, the constitution forms part of the municipal law of the federal state and its interpretation falls exclusively within the internal jurisdiction of that state. This is particularly obvious when one considers that the constitution of a state is an organic statute interpreted and developed by the appropriate internal organs of the state. Paragraph 2 contains no provision, however recognizing that only the federal state itself may interpret its own constitution. Thus the paragraph may lead to the totally unacceptable practice of one member state of the U.N. presuming to interpret the constitution of another member state which happens to be a federal state. In federations where the constitution is entirely written and deals expressly with treaty-making, there may be relatively little danger of this practice arising. The paragraph seems to ignore, however, situations like that of Canada where the constitution is in large part unwritten. Constitutional practice, in such cases, is as important as the written documents. But our experience confirms that, in a country like Canada, which gained its independence through the gradual evolution of constitutional practice, not all of which was reduced to written form, the possibility of one state purporting to interpret the constitution of another federal state is all too real. The failure of paragraph 2 to deal with this problem is probably its most important defect.

...6

In discussing the question whether a provision such as paragraph 2 should be included in the present convention, the observation is occasionally made that the practice of treaty-making by members of certain federal states exists and should therefore be mentioned. An examination of state practice confirms that certain federal states do permit, within the limits of their constitutions and subject to various forms of federal control, the conclusion of certain types of international agreements by their member units. These practices have been going on for years, they have long since been accepted under international law and their continuance is not dependent upon the adoption of paragraph 2 of Article 5. I should like to make clear, Mr. President, that the Canadian delegation does not question either the legality or the desirability of these practices. Indeed Canada, whose constitution does not provide for such action by its provinces, has nonetheless authorized, by means of umbrella agreements between Canada and other sovereign States, the conclusion of various agreements between its provinces and such states. We do not believe, however, that state practice supports the particular and defective formulation of the relevant rule of law as proposed in paragraph 2, ~~omitting as it does any reference to the element of ultimate federal control over such treaty-making capacity~~ leaving it open to other States to interpret the constitutions of federal states.

My delegation considers that the only satisfactory remedy for the dangerous inadequacies of paragraph 2 is the deletion of the paragraph. We consider that the conference should take into account the fact that, at the first session, paragraph 2 was opposed by the large majority of federal states represented here. I would hope, Mr. President, that non-federal states will not seek to impose upon federal states a rule which particularly concerns federal states and to which the large majority of such states are opposed. There is no suggestion that the omission of paragraph 2 of Article 5 would in any way impair the existing rights of the members of any federal State, whereas many federal States have indicated that its inclusion is unnecessary and undesirable.

...7

Distinguished representatives will have noted that my delegation's concern relates only to paragraph 2 of Article 5. My delegation recognizes that many other delegations attach considerable importance to paragraph 1 of Article 5 and we have no desire whatever to interfere with that paragraph. Distinguished representatives will be aware that on all occasions upon which this Article has been submitted to a vote, both in the I.L.C. and twice during consideration of this article in Committee of the Whole, paragraph 2 was voted upon separately. This reflects the fact that the two paragraphs in fact stand independent of each other and deal with quite different matters. Paragraph 1 deals with the capacity of sovereign states whereas paragraph 2 deals with the capacity of entities which this conference has already determined (when it deleted "States" from paragraph 2 last year) are something other than sovereign states.

My delegation therefore requests, Mr. President, that there be a separate vote on paragraph 2 of Article 5. I assume that all distinguished representatives, even those whose substantive views on that paragraph differ from those of my delegation, will recognize that because the two paragraphs of the Article deal with quite distinct issues, it is not only important, but proper and fair, that there be a separate vote on paragraph 2 in order to determine whether that paragraph enjoys the support necessary for its inclusion in the proposed convention.

I have already stressed, Mr. President, that my delegation has no wish to interfere with paragraph 1 of Article 5. In the unlikely event, however, that a separate vote on paragraph 2 should be refused, then it would be the view of my delegation that, since the dangers of paragraph 2 greatly outweigh any advantages to be found in paragraph 1, the entire Article should then be deleted. I would hope, however, Mr. President, that this conference will agree to allow a separate vote on paragraph 2, and that paragraph 1 will not be unnecessarily jeopardized by the refusal of a separate vote.

NNI U

VV

ACTION COPY

OTT118

cc. M. R. McKinnon PCO

Done - Apr. 29/69

PAR152

GVA80

phoned at 2:45

VNA13/28

ZZ OTT

DE VNA

Z 281806Z

U N C L A S S I F I E D

FM VIENN APR28/69

TO EXTEROTT 344 FLASH''''

INFO TT OPM(LALONDE)PCO FLASH DE OTT

LAW OF TREATIES CONFERENCE

PARA2 ARTICLE 5 REGARDING MEMBERS OF FEDERAL STATES DELETED TODAY BY PLENARY.28 VOTED FOR PARA2,66 AGAINST AND 13 ABSTAINED.PARA2 THEREFORE FAILED TO OBTAIN EVEN SIMPLE MAJORITY.NO/NO DEL OBJECTED TO OUR REQUEST FOR SEPARATE VOTE ON PARA2 AND THEREFORE ~~THEREFORE~~ THERE WAS NO/NO PROCEDURAL VOTE.FULLER REPORT TOMORROW.

WERSHOF

17/28/4

File ✓
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
APR 28/69	20-3-1-6	SANS

FM/DE EXTERNAL OTT

NO	PRECEDENCE
L-540	IMMED

TO/A VIENNA

TO/A CDN DELEGATION LAW OF TREATIES

INFO OPM (LALONDE) PCO

REF YOURTEL 344 APRIL 28

SUB/SUJ LAW OF TREATIES CONFERENCE

FOR WERSHOF

CONGRATULATIONS AND THANKS TO YOU AND MEMBERS OF YOUR DELEGATION.

CADIEUX

DISTRIBUTION
LOCAL/LOCALE MR. BISSONNETTE, O/USSEA (DONE IN DIV.)

NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORIS
SIG B.MAWHINNEY/itl	LEGAL	2-9553	SIG M. CADIEUX

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003926

Diary
Div. Diary
File ✓

MESSAGE

DATE	FILE/DOSSIER		SECURITY SECURITE
APR 24/69	20-3-1-6		
	37		RESTRICTED

FM/DE EXTERNALL OTT

	NO	PRECEDENCE
TO/A VIENNA	L-536	PRIORITY
CDN DELEGATION LAW OF TREATIES		
INFO		

REF EMBASSY TUNIS LETTER 147 APRIL 21

SUB/SUJ LAW OF TREATIES - ARTICLE 5

FOR STANFORD

IN RESPONSE OURTEL L-377 MARCH 14 EMBASSY TUNIS INFORMS US IN REFLET THAT THEY SPOKE AGAIN WITH LEGAL COUNSEL IN TUNISIAN F.M. RE TUNISIA'S VOTING POSITION ON ARTICLE 5. IN THANKING MESSAOUDA FOR HELPFUL POSITION HE OUTLINED TO US AS REPORTED TUNIS LETTER 12 JANUARY 22 EMBASSY STRESSED THAT WE WELCOMED TUNISIA'S FORTHCOMING SUPPORT ON OUR REQUEST FOR SEPARATE VOTE OF PARA 2 IN RESPONSE MESSAOUDA STATED ONLY THAT MATTER WAS DISCUSSED WITH ABED OF THE PRESIDENCE WHO WILL ATTEND CONFERENCE.

2. EMBASSY ALSO MADE POINTS PRESENTED IN OURLET 127 OF JANUARY 20. IN REPLY LEGAL COUNSEL ONLY ASKED WHETHER WE KNEW WHY AUSTRIAN AMENDMENT WHICH WE FAVOURED HAD FAILED TO OBTAIN SIMPLE MAJORITY AT FIRST CONFERENCE. [redacted] COPY OF LET FOLLOWS BY BAG.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY/itl	LEGAL	2-9553	SIG D.M. MILLER

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
APR.23/69	20-3-1-6	UNCLA

FM/DE EXT/OTT

NO	PRECEDENCE
L-527	~~XXXXXX~~ RTN

TO/A VIENNA
CDN DELEGATION LAW OF TREATIES

INFO

REF OURTEL 487 APR. 15/69

SUB/SUJ LAW OF TREATIES

MINISTER HAS APPROVED INSTRUCTIONS TO DELEGATION CONTAINED IN MEMO OF APR. 14.

DISTRIBUTION
LOCAL/LOCALE

NO STD.

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. B. MAWHINNEY	LEGAL	2-9553	SIG. M.D. Copithorne

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

003928

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
APR.23/69	20-3-1--6	~~PROTECTED~~ CONFD

FM/DE EXT/OTT

NO	PRECEDENCE
L-519	PRIORITY

TO/A VIENNA

CDN DELEGATION - LAW OF TREATIES

INFO

REF YOUR TEL 321 OF APR 21 AND PERMISNY LET 313 OF APR 15

SUB/SUJ LAW OF TREATIES CONFERENCE-SPANISH PROPOSAL RE ARTICLE 62

HAVE RECD NOTE FROM SPANISH EMBASSY ENCLOSING NOTE VERBALE OUTLINING PROPOSAL FOR SPECIAL PROCEDURES TO GOVERN SETTLEMENTS OF DISPUTES ARISING OUT OF INTERPRETATION OR APPLICATION OF LAW OF TREATIES CONVENTION ESPECIALLY QUESTIONS RELATED TO PART V. ASSUME YOU HAVE NOW RECD TEXT OF SPANISH PROPOSAL FROM OUR PERMISNY REFLET REFERS. IF NOT PLS ADVISE AND WE WILL CABLE MAIN ELEMENTS OF SPANISH RECOMMENDATION.

DISTRIBUTION
LOCAL/LOCALE NO STD. cc: Mr. Bissonnette

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. R. MATHINEY	LEGAL	2-9553	SIG. O.D. COPITHORNE

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

ACTION COPY
M. D. COPITHORNE

P

FM VIENN APR23/69 CONFD NO/NO STANDARD

TO EXTEROTT 325 PRIORITY

REF OURTEL 287 APR16

LAW OF TREATIES ARTICLE 5-PROGRESS REPORT

WORK OF CONFERENCE MOVING MORE SLOWLY THAN EXPECTED AND VOTING ON ARTICLE 5 NOT/NOT LIKELY BEFORE NEXT MON OR TUES APR28-29.

2.SINCE ARRIVAL IN VIENN DEL HAS BEEN CONDUCTING SYSTEMATIC CAMPAIGN OF PERSONAL DISCUSSIONS WITH MEMBERS OF ABOUT 80 DELS.IN ADDITION WE HAVE BEEN ARRANGING AND COORDINATING LOBBYING EFFORTS OF FEDERAL STATES GROUP CONSISTING PRIMARILY OF AUSTRALIA,MALAYSIA,MXICO, AND,TO A LESSER EXTENT INDIA.

3.WE BEGAN OUR EFFORTS BY FIRMING UP SUPPORT OF DELS OF THOSE STATES WHOSE GOVTS HAD PROMISED COMPLETE SUPPORT FOR CDN POSITION.WE THEN APPROACHED DELS OF GOVTS WHOSE POSITION HAD BEEN GENERALLY FAVOURABLE THOUGH NOT/NOT CONFIRMED.FINALLY,WE APPROACHED DELS OF MORE DIFFICULT STATES.

4.BY APR15 WE HAD OBTAINED ASSURANCES OF SUPPORT,BOTH ON PROCEDURAL REQUEST FOR SEPARATE VOTE AND ON VOTE TO DELETE PARA2 FROM FOLLOWING DELS:ARGENTINA AUSTRALIA AUSTRIA CEYLON CYPRUS DENMARK FRG HOLY SEE IRELAND ISRAEL ITALY JAMAICA JPN MALAYSIA MXICO NZ NORWAY PORTUGAL SAN MARINO SWEDEN UK USA URUGUAY(TOTAL 23).AS A RESULT OF LOBBYING EFFORTS SINCE THAT DATE WE HAVE OBTAINED ASSURANCES OF SUPPORT IN RESPECT OF REQUEST BOTH FOR SEPARATE VOTE AND SUPPRESSION OF PARA2 FROM FOLLOWING ADDITIONAL STATES:BARBADOS BELGIUM BOLIVIA BRAZIL BURMAN CAMEROON CHINA COSTA RICA DOMINICAN REPUBLIC GHANA GREECE

...2

GUATEMALA GUYANA HONDURAS INDIA LIBERIA LUXEMBOURG MAURITIUS NETHERLANDS PANAMA PAK PERU PHILIPPINES REPUBLIC OF KOREA REPUBLIC OF VIETNAM SPORE SOUTH AFRICA SPAIN THAILAND TRINIDAD VENEZUELA ZAMBIA(TOTAL 32).ALSO WE HAVE OBTAINED UNDERTAKINGS OF SUPPORT AT LEAST IN RESPECT OF REQUEST FOR SEPARATE VOTE FROM COLOMBIA,CONGO(KNSHA)EL SALVADOR FINLAND IRAN LIECHTENSTEIN NIGERIA SWITZERLAND TANZANIA TUNISIA UGANDA(TOTAL 11).PRESENT STATE OF PLAY THEREFORE IS THAT,OF APPROX 105 STATES REPRESENTED AT CONFERENCE,67(INCLUDING CDA),WELL OVER NECESSARY SIMPLE MAJORITY,SAY THEY WILL SUPPORT REQUEST FOR SEPARATE VOTE AND 56(WELL OVER BLOCKING THIRD)SAY THEY WILL VOTE AGAINST PARA 2.CAMBODIA KENYA AND INDONESIA HAVE AGREED TO ABSTAIN ON PROCEDURAL VOTE.CHANGES IN POSITION OF SUCH KEY STATES AS CAMEROON CONGO(KNSHA) INDONESIA PAK SWITZERLAND TANZANIA AND UGANDA IS ENCOURAGING.HARD CORE OPPONENTS TOTAL ABOUT 25.WE ARE CONTINUING TO WORK ON REMAINING UNDECIDED STATES.

5.LINE-UP OF VOTES IN FAVOUR OF CDN POSITION IS BEGINNING TO LOOK FAVOURABLE,ALTHOUGH OF COURSE MANY THINGS CAN GO WRONG.WE HAVE PREVIOUSLY REFERRED TO DIFFICULTIES IN HOLDING OFF MOVES TO DEFEAT OUR POSITION BY CONFUSING THE SITUATION;MERELY MAKING SURE THAT OUR VOTES ARE PHYSICALLY PRESENT WILL BE DIFFICULT;WE WERE SHOCKED YESTERDAY TO SEE THAT MANY DELS WERE ABSENT WHEN VITAL VOTES WERE TAKEN IN CTTEE OF WHOLE ON PROPOSALS FOR OBLIGATORY SETTLEMENT OF DISPUTES MACHINERY(ART 62 BIS).IT REMAINS TO BE SEEN TO WHAT EXTENT EFFORT OF FRENCH AND/OR USSR TO RETAIN PARA2 EITHER BY SPEAKING AND LOBBYING IN

SUPPORT OF IT,OR(POSSIBLY MORE EFFECTIVE)BY PROCURING THE TABLING OF PLAUSIBLE SOUNDING(BUT FROM OUR VIEWPOINT UNACCEPTABLE)AMENDMENTS MAY ERODE OUR SUPPORT.EFFECT OF DIFFICULT DEBATES ON 5 BIS AND 62 BIS HAS BEEN TO CREATE DISPOSITION IN CONFERENCE AGAINST VOTING ON CONTROVERSIAL ARTICLES.EFFECT OF THIS MOOD ON OUR POSITION MAY DEPEND LARGELY ON HOW BIG AN ISSUE USSR AND FRANCE SEEK TO MAKE OF ARTICLE 5.

WERSHOF

.....

file 20-3-1-6

M. D. COHTHORNE

M. Mawhinney

Legal Dir.

ACTION CO

ne

G

20-3-1-6

M3 | 13

FM VIENN APR22/69 CONFD NO/NO STANDARD

TO EXTEROTT 319 PRIORITY

FOR USSEA AND BISSONNETTE FROM WERSHOF DONE

LAW OF TREATIES CONFERENCE

ALTHOUGH IT IS A LITTLE LATE WE SUGGEST ADDING TREMBLAY OF EMB HERE TO CDN DEL LIST AS HE HAS ALREADY HELPED US ON OCCASION. HE WILL NOT/ NOT BE EXPECTED TO GIVE MUCH TIME AS HE IS VERY BUSY WITH EMB WORK. MCCORDICK CONCURS. PLEASE REPLY SOONEST.''''''

14/22/4

003933

22.4.8(05)

File ✓
Diary
Div. Diary

Legal Division/L.S. Clark/gm

20-3-1-6
5T

Mr. J.S. Stanford (on return).

RESTRICTED

April 22, 1969

Mr. L.S. Clark.

Report of the International Law Commission - Draft Articles on Representatives of States to International Organizations.

The United Nations Secretary-General has invited our comments on the ILC Report on the above subject. I have examined the Report and do not see that any substantive comment on our part is required. However, you will note several references to the Law of Treaties Conferences and I believe it might be worthwhile for you to have a look at the document.

*** 2. Attached is Document A/7209 of August 27, 1968 containing the Report and a copy of the United Nations Legal Council's letter no. LE 130 (6-3-1) of October 14, 1968 soliciting our comments. I should be grateful if you would advise me whether you are of the opinion that Canada should send a substantive reply to the Secretariat through our Mission in New York or merely acknowledge receipt of the document and continuing interest in the subject matter. As indicated in the Legal Council's letter, a reply is requested not later than September 1, 1969.

L. S. CLARK

L.S. Clark.

[redacted] COPITHORNE

INFO ONLY

cc M. McKinney
PCO
April 23/69

File 20-3-1-6

FM VIENN APR22/69 RESTR NO/NO STANDARD

TO TT BERN 320 DE PARIS

INFO EXTEROTT DE PARIS

REF OTT TEL L490 APR16

LAW OF TREATIES ARTICLE 5(2)-SWITZERLAND

BINDSCHEDLER SAYS SWITZERLAND WILL VOTE FOR RPT FOR CDN PROCEDURAL REQUEST TO PERMIT SEPARATE VOTE ON PARA(2). HE STILL INTENDS TO VOTE FOR PARA(2) SUBTANTIVELY. THIS WELCOME CHANGE OF ATTITUDE ON PROCEDURE IS DOUBTLESS RESULT OF SSEA PERSONAL REPRESENTATIONS TO SWISS AMBASADDOR OTT WHICH WE FOLLOWED UP HERE.

WERSHOF

3/23/4

OTT153

TY

ACTION COPY

M. D. COPITHORNE

cc: Chr del
Law of Treaties
Conference
Vienna. April 23/69

FM PRNCE APR22/69

TO EXT OTTAWA 70

REF OURLET 280 AUG 23

IN CONNECTION PARA 2 OUR REFLET UNOFFICIAL BUT FIRM INDICATIONS ARE THAT GOH WILL NOT RPT NOT BE REPRESENTED AT CONFERENCE IN QUESTION. POTVIN.

20-3-1-6

10/23/4

NNN

M. D. COPITHORNE / Maureen

ACTION COPY

Legal Div G — Jule 20-3-1-6a

to see

2/14/69

FM VIENN APR22/69 CONFD NO/NO STANDARD

TO EXTEROTT 319 PRIORITY

DONE

FOR USSEA AND BISSONNETTE FROM WERSHOF

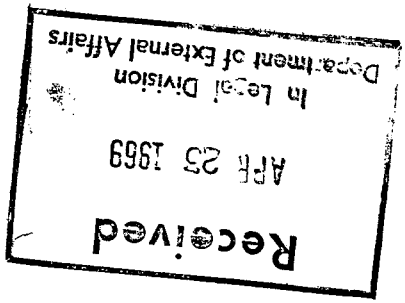
LAW OF TREATIES CONFERENCE

ALTHOUGH IT IS A LITTLE LATE WE SUGGEST ADDING TREMBLAY OF EMB HERE TO CDN DEL LIST AS HE HAS ALREADY HELPED US ON OCCASION. HE WILL NOT/ NOT BE EXPECTED TO GIVE MUCH TIME AS HE IS VERY BUSY WITH EMB WORK. MCCORDICK CONCURS. PLEASE REPLY SOONEST.....

This tel answered by tel G1389 Apr 22

6/23/4 (Legal)

22.4.8/US)



FM VIENN APR22/69 CONFD NO/NO STANDARD

TO EXTEROTT 319 PRIORITY

FOR USSEA AND BISSONNETTE FROM WERSHOF

LAW OF TREATIES CONFERENCE

ALTHOUGH IT IS A LITTLE LATE WE SUGGEST ADDING TREMBLAY OF EMB HERE TO CDN DEL LIST AS HE HAS ALREADY HELPED US ON OCCASION. HE WILL NOT/NOT BE EXPECTED TO GIVE MUCH TIME AS HE IS VERY BUSY WITH EMB WORK. MCCORDICK CONCURS. PLEASE REPLY SOONEST.

Legal Div

to file

This tel answered by tel G1389 Apr 22

4/23/4 (Legal)

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
22APR69	20-3-1-6 5	CONFD

FM/DE EXTER OTT

Apr 22 11 30 69

TO/A	NO	PRECEDENCE
VIENNA	G-139	PRIORITY
INFO		

REF REFYOURTEL 319 APR22

SUB/SUJ LAW OF TREATIES CONFERENCE

FOR WERSHOF

NO/NO OBJECTION TO ADDING TREMBLAY TO CANDEL LIST.

CADIEUX

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG P.A.Bissonnette/ll			SIG M. Cadieux

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV) 22.4.49(05)

003940

TO: Mr Stanford
FROM REGISTRY
APR 24 1969
FILE CHARGED OUT
TO:
L

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, Ottawa

FROM / De: The Canadian Embassy, Tunis

REFERENCE / Référence: Your telegram L.377 of March 14, 1969

SUBJECT / Sujet: Law of Treaties Conference - Article 5

SECURITY / Sécurité: RESTRICTED

DATE: 21 April 1969

NUMBER / Numéro: 147

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	20-1-2 CANADA

ENCLOSURES / Annexes

DISTRIBUTION

CC: Law Dept Law of Treaties Vienna
DONE-Apr 25/69 JL

This is just to inform you that, as requested in your telegram under reference, we spoke once again to the Legal Counsel in the Tunisian Foreign Ministry about Tunisia's voting position on Article 5 at the Law of Treaties Conference. We thanked Messaouda on your behalf for the helpful position which he had outlined to us on January 22 (see our letter No. 12 of January 22/69), stressing that we particularly welcomed Tunisia's forthcoming support on our request for a separate vote on paragraph 2. Messaouda did not comment other than to say that the matter had been 'discussed' with Abed of the Présidence who would be attending the conference.

2. We took this opportunity to make the points presented in your letter L.127 of January 20. Messaouda's only remarks were to ask whether we knew why the Austrian amendment which we favoured had failed to obtain a simple majority at the first conference, and to refer to a convention which is apparently in the making on the problem of state succession.

Yde Salsbery

The Embassy

Ext. 407B/Bil.

003941

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA

OUTGOING MESSAGE

file 20-3-1-6 JH 2/6

DATE	FILE		SECURITY
APR 21/69	~~20-1~~ 20-3-1-6		CONFD
FM: SJOSE	37	26	

NUMBER	PRECEDENCE	COMCENTRE USE ONLY	
136	PRIORITY		

TO: EXTERNAL OTT

INFO: EXTERNAL BY BAG ✓

Ref.: PARA 1 AND 2 OURIET 99 MAR18

J. 69.

Subject: CONFERENCE ON LAW OF TREATIES

HONDURAN AMBASSADOR ASSURED ME APR18 THAT WHEN HE HAD SHOWN LEGAL ADVISOR IN TEGUCIGALPA OUR AIDE MEMOIRE INSTRUCTIONS FOR HONDURAN DELEGATION WERE ALTERED TO SUPPORT CDN PROPOSAL. HE ADDED THAT HONDURANS WOULD ALSO BE SUPPORTING WEST GERMANS WHO WERE SEEKING, HE SAID, TO HAVE ARTICLE 5 OF DRAFT REMOVED ALTOGETHER.

MUNRO.

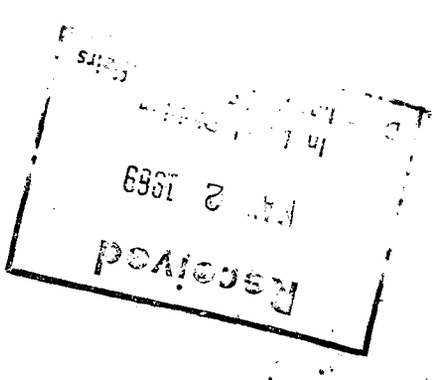
LOCAL DISTRIBUTION NO/NO STD

ORIGINATOR	DIVISION	PHONE	APPROVED BY
[redacted]			SIG D. W. MUNRO
			NAME D. W. MUNRO

003942

(Rev. 12/56)

16.2.5



- Copy sent to Canadian Delegation, Law of Treaties Conference VIENNA - April 22/69 Itl

- c.c. M. McKinnon, PCO April 23/69 itl

M. D. COPITHORNE

ACTION COPY

20-3-1-6

37 | 26

FM SJOSE APR21/69 CONFD NO/NO STANDARD

TO EXTER 136 PRIORITY

REF MYLET 99 MAR18 PARA1 AND PARA2

CONFERENCE ON LAW OF TREATY

AMBASSADOR OF HONDURAS ASSURED ME APR18 THAT WHEN HE HAD SHOWN LEGAL ADVISER IN TEGUCIGALPA OUR AIDE MEMOIRE INSTRUCTIONS FOR HONDURAS DEL WERE ALTERED TO SUPPORT CDN PROPOSAL. HE ADDED THAT HONDURAS WOULD ALSO BE SUPPORTING WESTGERMANS WHO WERE SEEKING, HE SAID, TO HAVE ARTICLE 5 OF DRAFT REMOVED ALTOGETHER

MUNRO.

15/21/4

INFO ONLY

L

Rule 20-3-(a)-6

FM VIENN APR21/59 CONFD NO/NO STANDARD

TO TT KLIPR 312 DE OTT

INFO EXTEROTT

REF YOURTEL 550 APR13

LAW OF TREATIES ARTICLE 5

NO/NO NEED TO TELEGRAPH REASONS.

MERSHOF

.....

9.21.4

MESSAGE

File

DATE	FILE/DOSSIER	SECURITY SECURITE
21APR69	20-3-1-6	CONFD

FM/DE EXTER OTT 30 APR 21 '69

TO/A	NO	PRECEDENCE
VIENN	G-137	IMMED

INFO

REF YOURTEL 285 APR16

SUB/SUJ ~~LAW OF TREATIES~~ CONFERENCE - ARTICLE 5

FOR WERSHOF FROM BISSONNETTE

I HAVE ONE SPECIFIC COMMENT ON MARCH 25 DRAFT INTERVENTION. IT IS A SUGGESTION TO DELETE STATEMENT THAT WHAT IS BEING PROPOSED IN ARTICLE 5(2) IS QUOTE THE FORMULATION OF A NEW AND AS YET UNTRIED RULE OF INTERNATIONAL LAW UNQUOTE. IN THE ENSUING PARAS I WOULD ALSO TALK ABOUT THE QUOTE PROPOSED UNQUOTE RULE OF INTERNATIONAL LAW RATHER THAN THE QUOTE NEW UNQUOTE RULE. REASON FOR THAT IS THAT WE HAVE PROPOSED IN WHITE PAPER VARIOUS INNOVATIONS IN RESPECT OF TREATY MAKING PRACTICE. IT WOULD NOT/NOT BE TO OUR ADVANTAGE TO GIVE IMPRESSION THAT WE ARE RESISTING ARTICLE 5(2) BECAUSE IT IS A NEW RULE.

2. OUR POSITION ON TREATY MAKING POWER IS WELL KNOWN AND I WOULD THINK THAT TO REITERATE IT IN SUCH UN FORUM SHOULD NOT/NOT PRODUCE HERE REACTIONS OF MAJOR SIGNIFICANCE UNLESS WE WOULD DELIBERATELY USE ~~THE~~ VIENNA CONFERENCE TO PRECLUDE POSSIBLE SOLUTIONS WHICH COULD BE REACHED IN CONTEXT OF CONSTITUTIONAL

...2

DISTRIBUTION
LOCAL/LOCALE NO STANDARD c.c. Legal Div. (done in O/USSEA)

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. P.A.Bissonnette/ll			SIG. P.A.Bissonnette

REVIEW. SINCE WE OBJECT TO 5(2) ON ~~THE~~ BASIS THAT IT IS INCOMPLETE AND ALSO INAPPROPRIATE BECAUSE RULES OF CONVENTION ARE TO BE APPLICABLE TO SOVEREIGN STATES ONLY IT CANNOT/NOT BE CONCLUDED FROM THAT POSITION THAT WE DO NOT/NOT RECOGNIZE UNDER ANY CIRCUMSTANCES ANY TREATY MAKING CAPACITY WHATSOEVER TO MEMBERS OF FEDERATIONS. THUS I WOULD THINK THAT WE ARE NOT/NOT PREJUDGING THE CONSTITUTIONAL REVIEW.

M. D. COPITHORNE

ACTION COPY

OTT145

fol 20-3-1-6

PAR165

GVAS7

20-3-1-6
25 | 13

cc: Mr R. McKinnon
Privy Council
Office
April 23/69

VNAS/22

RR OTT

DE VNA

R 221029Z

FM VIENN APR21/69

TO EXTEROTT 321

REF OURTEL 278 APR14

LAW OF TREATIES CONFERENCE-SECOND SESSION-SECOND WEEKLY SUMMARY

APR14-18

ARTICLE 2

CTTEE OF WHOLE(CW) AT ITS MORNING MTG APR14 DISCUSSED ARTICLE 2, INCLUDING ALL AMENDMENTS EXCEPT PORTION OF FRENCH AMENDMENT(L.24) RELATING TO QUOTE RESTR MULTILATERAL TREATY UNQUOTE WHICH WAS WITHDRAWN(REFTEL REFERS) AND AMENDMENTS BY CONGO(L.19/REV 1) AND SYRIA(L.385) CONCERNING DEFINITION OF QUOTE GENERAL MULTILATERAL TREATY UNQUOTE, WHICH WILL BE DISPOSED OF FOLLOWING DECISIONS ON ARTICLES 5 BIS AND 12. AMENDMENTS BY BELGIUM(L.381) HUNGARY(L.382) ECUADOR(L.25/REV.1) SWITZERLAND(L.384 AND CORR 1) AND AUSTRIA(L.383) WERE REFERRED TO DRAFTING CTTEE(DC) TO JOIN AMENDMENTS PREVIOUSLY REFERRED TO DC AT FIRST SESSION.

ARTICLE 5 BIS AND RELATED AMENDMENTS TO ARTICLES 2 AND 12.

CW DISCUSSED 5 BIS AT AFTERNOON MTG APR14, MORNING MTG APR15 AND AT BOTH MTGS APR16. ON APR14 ALGERIA ET AL AMENDMENT(L.74) PROPOSING 5 BIS WAS WITHDRAWN AND REPLACED BY REVISED PROPOSAL BY ALGERIA ET AL(L.388) INTRODUCED BY SYRIA. CZECH AMENDMENT(L.104) TO ARTICLE 12 WAS SUBSEQUENTLY WITHDRAWN. MTG OF CW AFTERNOON APR15 WAS CANCELLED TO PERMIT PRIVATE DISCUSSION OF POSSIBLE SOLUTION TO QUOTE ALL STATES UNQUOTE ISSUE. LIST OF SPEAKERS ON 5 BIS WAS CONCLUDED AT AFTERNOON MTG APR16. ON APR17 MORNING MTG OF CW WAS CONVENED AND

...2

1/23/4

IMMEDLY ADJOURNED. FOLLOWING DISCUSSIONS DURING THE MORNING AND EARLY AFTERNOON OF APR17 IT WAS AGREED, AT INSISTENCE OF USSR AND ASSOCIATES, THAT VOTING ON 5 BIS BE DEFERRED AND CW BEGIN IMMEDLY DISCUSSION OF 62 BIS. POINT IN PROCEEDINGS OF CW AT WHICH 5 BIS IS TO VOTED UPON REMAINS UNCERTAIN.

ARTICLE 8(REFTEL REFERS)

AT AFTERNOON MTG OF CW APR16 CHAIRMAN OF DC INFORMED CW THAT AMENDMENTS BY PERU(L.101 AND CORR 1), TANZANIA(L.103) AND AUSTRALIA(L.380) WHICH HAD BEEN REFERRED TO DC, INVOLVED MATTER OF SUBSTANCE REQUIRING DECISION OF CW. AMENDMENTS WERE THEN PUT TO VOTE. PORTION OF PERU AMENDMENT(L.101 AND CORR 1) WHICH RELATED TO PARA1 WAS DEFEATED 13-55-21. PORTION OF SAME AMENDMENT WHICH RELATED TO PARA2 WAS ALSO DEFEATED 11-54-29. TANZANIA AMENDMENT(L.103) WAS DEFEATED 27-51(CDA, FR, USA, UK)-16. AUSTRALIA AMENDMENT(L.380) WAS DEFEATED 24-48(CDA, FR, USA, UK)-20. ARTICLE 8 WAS THEN REFERRED BACK TO DC.

ARTICLE 26(REFTEL REFERS)

TEXT OF ARTICLE 26 REPORTED FROM DC IN C.1/15 WAS ADOPTED BY CW WITHOUT VOTE AT AFTERNOON MTG APR16.

ARTICLE 36(REFTEL REFERS)

TEXT OF ARTICLE 36 REPORTED FROM DC IN C.1/15 WAS ADOPTED BY CW WITHOUT VOTE AT AFTERNOON MTG APR16.

ARTICLE 37(REFTEL REFERS)

TEXT OF ARTICLE 37 REPORTED FROM DC IN C.1/15 WAS ADOPTED BY CW WITHOUT VOTE AT AFTERNOON MTG 1016.

...3

ARTICLES 62 BIS, 62 TER, 62 QUATER AND 76.

PACKAGE OF PROPOSALS RELATING TO PEACEFUL SETTLEMENT OF DISPUTES, ALL BEING DISCUSSED TOGETHER WITH 62 BIS NOW INCLUDE FOLLOWING: PROPOSED ARTICLE 62 BIS BY JPN(L.339), SWITZERLAND(L.377), AUSTRIA ET AL(19 POWER PROPOSAL)(L.352/REV 3 CORR 1), PROPOSED ARTICLE 62 TER BY THAILAND(L.387), CEYLON(L.395), AND LUXEMBOURG(L.397); PROPOSED ARTICLE 62 QUATER BY SWITZERLAND(L.393 CORR 1); AND PROPOSED ARTICLE 76 BY SWITZERLAND(L.250) AND SPAIN(L.392).

PURSUANT TO DECISION, REPORTED ABOVE, TO BEGIN DISCUSSION OF 62 BIS AND RELATED PROPOSALS WITHOUT VOTING ON 5 BIS, FORMER WERE DISCUSSED IN CW AT AFTERNOON MTG APR17 AND BOTH MTGS APR18. AT CONCLUSION OF AFTERNOON MTG APR18 CHAIRMAN ANNOUNCED THAT 45 SPEAKERS REMAINED TO BE HEARD. HE WAS THEREFORE SCHEDULED EVENING MTG FOR MON, APR21 IN EFFORT TO HOLD TO CW TIMETABLE REPORTED IN REFTEL PARA2. DEBATE ON 62 BIS LIKELY TO CONCLUDE TUES APR22. IT IS POSSIBLE THAT, AS WAS THE CASE WITH 5 BIS, VOTE ON 62 BIS AND RELATED PROPOSALS WILL NOT/NOT TAKE PLACE IMMEDLY FOLLOWING CONCLUSION OF DEBATE.

FINAL CLAUSES

ALTHOUGH DISCUSSION OF FINAL CLAUSES HAS NOT/NOT YET BEGUN, PROPOSALS SUBMITTED DURING PAST WEEK FOR DISCUSSION IN CW INCLUDE: (A) JOINT UK BRAZIL PROPOSAL(L.386/REV 1), REPLACING BRAZIL PROPOSAL (L.386) WITH QUOTE VIENN FORMULA UNQUOTE ACCESSION CLAUSE AND REQUIREMENT FOR 45 RATIFICATIONS AND ACCESSIONS FOR ENTRY INTO FORCE; (B) JOINT HUNGARY, POLAND, ROMANIA, USSR PROPOSAL(L.389) WITH QUOTE ALL

...4

STATES UNQUOTE ACCESSION CLAUSE AND NO/NO NUMBER OF RATIFICATIONS AND ACCESSIONS SPECIFIED FOR ENTRY INTO FORCE;(C)JOINT GHANA, INDIA AMENDMENT(L.394)TO PROPOSAL BY UK AND BRAZIL. PRINCIPAL FEATURES OF THIS AMENDMENT ARE FIRST, THAT TREATY WOULD BE OPEN FOR SIGNATURE BY ALL GROUPS OF STATES REFERRED TO IN VIENN FORMULA PLUS RPT PLUS PARTIES TO PARTIAL TEST BAN TREATY OR OUTER SPACE TREATY AND, SECOND, REDUCTION OF NUMBER OF RATIFICATIONS AND ACCESSIONS NECESSARY FOR ENTRY INTO FORCE FROM 45. 59 35. SWITZERLAND HAS TODAY PROPOSED AMENDMENT(L.396)TO UK/BRAZIL PROPOSAL TO RAISE NUMBER OF RATIFICATIONS AND ACCESSIONS NECESSARY FOR ENTRY INTO FORCE FROM 45 TO 60

WERSHOF

NNNNVVVVV

Sent to Vienna BP 1/21/4

M.D. COMMUNIQUE ACTION COPY

Fol 20-3-1-6

FM LIMA APR18/69 CONFD

TO EXTER 215 PRIORITY

REF OURTEL 176 APR2

LAW OF TREATIES CONFERENCE-BOLIVIA

JUST RECEIVED NOTE FROM BOLIVIAN MFA STATING THAT QUOTE MINISTRY OF FOREIGN RELATIONS CONSIDERS THAT THE SUGGESTIONS MADE BY GOVT OF CDA REGARDING CONSTITUTIONAL SYSTEM OF FEDERAL STATES ARE VERY INTERESTING AND THAT THEY WILL KEEP THEM IN MIND FOR THE DISCUSSIONS OF THE CONFERENCE, WITHOUT NECESSARILY ACCEPTING THAT THE CONSTITUTIONS OF STATES, BEING INSTRUMENTS OF INNATL LAW, CAN GENERATE RIGHTS AND OBLIGATIONS OF AN INNATL NATURE.

1/21/4

Committee of the Whole, April 18, 1969, 94th Meeting

Statement by Canada (Mr. Wershof) on Article 62 bis

Mr. Chairman. The views of my delegation on the principle raised by proposed Article 62 bis were made known at length at the first session of this conference. I shall not, therefore, repeat them in detail. I do wish, however, to refer briefly to some of the considerations which my delegation believes are particularly relevant to this issue.

In our view the ideal method of dealing with disputes arising in the application of Part V of the proposed convention is that found in the proposals submitted by Switzerland (L.377) and Japan (L.339). We consider it particularly appropriate that a convention as fundamental to the law of nations as that which we are now preparing should recognize the role of the International Court of Justice as the judicial organ of the United Nations family. For this reason we shall support these proposals if they are submitted to a vote.

We also consider that the Spanish proposal (L.391) has a number of features to commend it. We consider the 18 power proposal (L.352 Rev.3), however, to be the most suitable of the proposals for Article 62 bis which provide for ad hoc arbitration, as opposed to adjudication by the International Court of Justice. In the event the Swiss and Japanese proposals do not obtain acceptance by this conference, it is the intention of my delegation to support the 18 power proposal. Moreover the broadly representative group of sponsors of that proposal leads us to believe that it may enjoy the support of the conference generally.

The essential point, Mr. Chairman, which in the view of my delegation cannot be stressed too much, is that a procedure for automatically available third party adjudication is an essential companion to the provisions of Part V of the Convention establishing the grounds for the invalidity, termination and suspension of treaties.

...2

In my opinion, my Government would find some difficulty in accepting a convention which included a Part V along the lines provisionally approved by this Committee at the first session but which did not include satisfactoy procedures for its application, namely automatic independent adjudication of disputes concerning invalidity and termination. In this connection may I remind distinguished representatives that during the first session many delegations, including my own, expressly noted that their acceptance of certain articles in Part V was conditional upon the acceptance by the conference of satisfactory adjudication procedures.

May I refer to two other amendments. We think that the Swiss amendment in L.393 would be very useful, assuming that 62 bis as proposed by the 18 powers is approved. L. 393 is similar to the provision already adopted by this Committee in para. 4 of Article 62. Also we think that the Ceylon amendment in L. 395 is useful and reasonable and we will be glad to support it.

INFO ONLY

M. D. COPITHORNE

Mr. Mawhinney

file 20-3-1-6

file 20-3-1-6

FM KLMPR APR18/69 CONFD NO/NO STD

TO TT VIENN 550 PRIORITY DE OTT

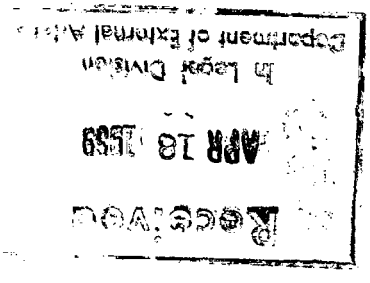
INFO EXTER

REF OURTEL 538 APR18

LAW OF TREATIES ARTICLE 5

RAMANI HAS CONFIRMED IN WRITING TODAY THAT HE HAS TELEGRAPHED MALAYSIAN DEL VIENA TO SUPPORT EFFORTS TO DELETE PARA2 QUOTE IF THAT CAN BE ACHIEVED UNQUOTE. RAMANI HAS ALSO PLACED IN WRITING HIS REASONS FOR RAISING IDEA OF AMENDMENT. WE SHALL FORWARD THESE BY BAG UNLESS YOU WISH THEM TELEGRAPHICALLY. PLEASE ADVISE.

1/18/4



M. D. COPITHORNE

ACTION COPY

FM VIENN APR18/69 RESTR NO/NO STANDARD

TO EXTEROTT 301 PRIORITY

REF YOURTEL G136 APR17

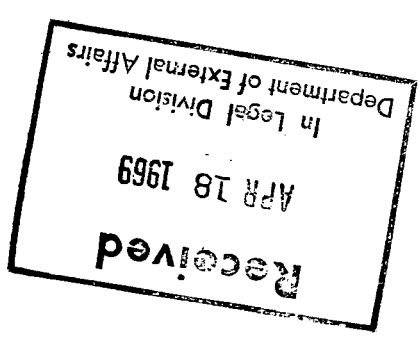
LAW OF TREATIES-ARTICLE 5

GRATEFUL FOR REPORT IN REFTEL ON FAVOURABLE INDONESIAN POSITION ON PROCEDURAL QUESTION. UNTIL VOTE ON ARTICE 5 IS HELD, PROBABLY LATE NEXT WEEK OR EARLY FOLLOWING WEEK, GRATEFUL IF YOU WOULD ENSURE THAT ANY COMMUNICATIONS (OR SUMMARIES) FROM GOVTS RELATING TO ARTICLE 5 ARE TRANSMITTED TO US PROMPTLY. ONE OF OUR PRINCIPAL DIFFICULTIES HERE IS IN ENSURING THAT REPS AT CONFERENCE HAVE BEEN INFORMED OF AND UNDERSTAND UNDERTAKINGS WHICH THEIR GOVTS HAVE GIVEN IN THEIR CAPITALS OR IN OTT. IT IS THEREFORE ESSENTIAL FOR US, IN DISCUSSIONS WITH REPS HERE TO KNOW LATEST VIEWS COMMUNICATED IN CAPITALS: EG COSTA RICAN DEL INFORMED US THIS MORNING OF LETTER TRANSMITTED IN MAR FROM COSTA RICAN FM TO OUR EMB IN SJOSE INFORMING US OF COSTA RICAN SUPPORT FOR CDN POSITION.

WERSHOF

.....

11:18:4



Ref. Tel
File ✓
Diary
Div. Diary

MESSAGE

RETURN TO LEGAL DIV. SCD

DATE	FILE/DOSSIER	SECURITY SECURITE
APR 17/69	20 - 3 - 16	CONFD

FM/DE EXTERNAL OTT

NO	PRECEDENCE
L-501	IMMED

TO/A VIENNA (CDN DEL LAW OF TREATIES)

INFO

REF YOURTEL 287 APRIL 16

SUB/SUJ LAW OF TREATIES-ARTICLE 5-GENERAL PROBLEMS

I CONCUR IN RECOMMENDATIONS CONTAINED IN PARAS 4 and 5 OF REFTEL.

CADIEUX

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG B.MAWHINNEY/ivl	LEGAL	2-9553	M. CADIEUX SIG M.CADIEUX

EXT 18/BIL (REV 6/64)
(COMMUNICATIONS DIV)

003959

T-11
1814/69

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary (Through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Law of Treaties Conference-Article 5

SECURITY / Sécurité: CONFIDENTIAL

DATE: April 17, 1969

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-16
MISSION 20-3-1-6

ENCLOSURES / Annexes: 2

DISTRIBUTION

Attached is telegram No. 287 of April 16, 1969 from Mr. Wershof in Vienna reporting on our delegation's progress in mobilizing the required simple majority for the procedural vote on whether to permit a separate vote on Paragraph 2 of Article 5 of the draft Convention on the Law of Treaties, the Federal States Clause. Mr. Wershof indicates that the delegation is reasonably optimistic about accomplishing this objective. However he is concerned that the efforts of "well-meaning friends or clever opponents" may complicate our operations either by proposing amendments to Paragraph 2 (allegedly designed in a spirit of compromise) or by proposing, when the voting stage is reached, that voting be postponed in order that opposing delegates may be encouraged to work out a compromise.

2. The Head of our Delegation is hopeful that our lobbying efforts have or will succeed in dissuading some well-meaning delegations from putting forth such compromise proposals. However if last minute proposals of this kind are put forward, on-the-spot decisions may have to be taken. Mr. Wershof seeks your instructions, to be received by Monday, April 21st at the latest, on the posture our delegation should adopt if one of the following situations develops as the voting stage approaches:

(a) In the unlikely event that the U.S.S.R. should suddenly indicate a willingness to accept the Austrian amendment, Mr. Wershof considers it necessary that we should be willing to accept it without delay. Under the Austrian amendment, which you will recall was put forward at the first session of the Law of Treaties Conference and was defeated 29 (Canada)-35-21, Paragraph 2 of Article 5 would read as follows:

> The States members of a federal union may possess the capacity to conclude treaties if such capacity is admitted by the Federal

.... 2

Ext. 407A/Bil.
(Admin. Services Div.)

17.4.34(us)

constitution and within the limits there laid down. For the purpose of concluding a Treaty the extent of such capacity has to be confirmed by an authority of the Federal Union competent under Article 6.

Mr. Wershof requests your confirmation that our delegation be permitted to support the Austrian amendment if it is introduced at the 11th hour and there is no time for further consultation with you. In view of the fact that we voted for the Austrian amendment at the first session of the Conference last year, we would see no objection to Mr. Wershof's recommendation that we again express our support for it if it should be revived under the foregoing circumstances.

(b) If President Ago or some delegation proposes a delay in the voting at the last minute in order to permit more time for consultation and compromise, Mr. Wershof notes that it would be tactically inadvisable for us to refuse to concur in such a deferral. If this situation materializes Mr. Wershof seeks your authority to participate in further discussions among delegates to reach a compromise solution, but not of course to accept any resulting compromise text other than the Austrian amendment without confirmation from you. We consider Mr. Wershof's suggestion as the only sensible way to proceed if efforts to postpone the vote gather substantial support.

3. We are enclosing for your signature if you agree, a telegram stating that you concur in Mr. Wershof's recommendations.

J. H. Taylor

for Legal Division.

ACTION COPY

L

FM VIENN APR16/69 CONFD NO/NO STANDARD

TO EXTEROTT 287 PRIORITY

(REPLY REQUESTED PLEASE BY MON APR21)

LAW OF TREATIES-ARTICLE 5-GENERAL PROBLEMS

CDN DEL HAS BEEN LOBBYING STEADILY. WHILE WE HAVE NOT/NOT YET COVERED ALL THE UNDECIDED OR CONFUSED DELS, AT MOMENT IT SEEMS THAT VOTE (ON WHETHER TO PERMIT SEPARATE VOTE ON PARA2) WILL BE CLOSE, BUT WE HAVE FAIR TO GOOD CHANCE OF MOBILIZING THE REQUIRED SIMPLE MAJORITY. DETAILED REPORT ON VOTING PROSPECTS WILL BE SENT AT LATER STAGE.

2. WHAT IS JUST AS WORRYING AS VOTING POSITION IS POSSIBILITY(EVEN PROBABILITY) THAT EITHER WELL-MEANING FRIENDS OR CLEVER OPPONENTS OR A PRESIDENT(AGO) WHO WANTS TO BE UNIVERSALLY LOVED MAY COMPLICATE OUR OPERATIONS EITHER: (1) BY PROPOSING AMENDMENTS TO PARA2(ALLEGEDLY DESIGNED IN SPIRIT OF COMPROMISE), OR(2) BY PROPOSING WHEN WE REACH TIME FOR VOTING THAT VOTING BE POSTPONED IN ORDER THAT OPPOSING DELS MAY BE ENCOURAGED TO WORK OUT COMPROMISE. THERE ARE MANY INDIVIDUALS HERE WHO MAKE A SPECIALTY OF PROPOSING COMPROMISES IN ORDER TO PRESERVE THE QUOTE SPIRIT OF CONCILIATION UNQUOTE AND PERHAPS(IF I AM NOT/NOT UNFAIR) IN ORDER TO GLORIFY THEMSELVES AS FINDERS OF HAPPY SOLUTIONS.

3. AUSTRIA DEL LAST YEAR PROPOSED AMENDMENT TO PARA2 WHICH AS YOU KNOW CDA VOTED FOR BUT IT WAS DEFEATED 29-35-21. WHEN AUSTRIANS ASKED US EARLY THIS YEAR ABOUT REVIVING THIS AMENDMENT WE DISSUADED THEM BECAUSE WE WERE AND ARE SURE THAT NO/NO AMENDMENT ACCEPTABLE TO CDA CAN WIN NECESSARY 2/3 MAJORITY IN PLENARY; AND INTRODUCTION AND

...2

27.16.4

DEFEAT OF SUCH AMENDMENT WOULD CONFUSE AND HURT OUR MAIN OPERATION. SINCE COMING HERE ONE MEMBER OF MEXICAN DEL(WHO ARE OUR SUPPORTERS) STARTED TO TALK OF AN AMENDMENT AND WE HAVE(WE THINK) DISSUADED HIM. NOW MALAYSIAN GOVT(KLMPR TEL 490 APR10) HAS DRAFTED AN AMENDMENT (WHICH WE THINK IS A BAD ONE) AND WE SHALL TRY TO DISSUADE THEIR DEL FROM PROPOSING IT. TANZANIAN DEL HAS SIMILIAR IDEAS, AND WE THINK WE HAVE TALKED HIM OUT OF IT FOR THE TIME BEING.

4. IF LAST MINUTE PROPOSALS OF THIS KIND SHOULD COME UP WE MAY HAVE TO TAKE SOME DECISIONS ON THE SPOT. APART FROM AUSTRIAN AMENDMENT WE WILL NOT/NOT OF COURSE BEGIN TO DISCUSS SERIOUSLY ANY AMENDMENT WITHOUT FIRST CONSULTING YOU. HOWEVER IN UNLIKELY EVENT THAT USSR SHOULD SUDDENLY INDICATE WILLINGNESS TO ACCEPT AUSTRIAN AMENDMENT WE THINK WE SHOULD BE READY TO ACCEPT IT WITHOUT DELAY(MUCH AS WE WOULD PREFER SIMPLE DELETION). AUSTRIAN AMENDMENT WOULD ADD TO PARA2 WORDS QUOTE FOR THE PURPOSE OF CONCLUDING A TREATY THE EXTENT OF SUCH CAPACITY HAS TO BE CONFIRMED BY AN AUTHORITY OF THE FEDERAL UNION COMPETENT UNDER ARTICLE 6 UNQUOTE. PLEASE CONFIRM SOONEST THAT WE MAY (IF FORCED TO AND IF NOV NO TIME TO CONSULT) SUPPORT AUSTRIAN AMENDMENT AS WE DID LAST YEAR.

5. WE NEED ALSO FOLLOWING AUTHORITY. IF PRESIDENT AGO OR SOME DEL AT LAST MOMENT PROPOSES DELAY IN VOTING IN ORDER TO PERMIT OPPOSING DELS TO CONSULT AND SEEK SOLUTION ETC IT WOULD BE TACTICALLY BAD TO REFUSE TO PARTICIPATE IN SUCH AN EXERCISE. GRATEFUL TO RECEIVE AUTHORITY TO PARTICIPATE(BUT NOT/NOT OF COURSE TO ACCEPT ANY RESULTING COMPROMISE

...3

TEXT OTHER THAN AUSTRIAN AMENDMENT WITHOUT CONFIRMATION FROM YOU.

6. I SHALL TALK TO AGO TO TRY TO PERSUADE HIM TO FOREGO PEACEMAKING ROLE AND TO LIMIT HIMSELF TO IMPARTIAL ENFORCEMENT OF RULES OF PROCEDURE.

7. BEESLEY AND OTHER MEMBERS OF DEL CONCUR

WERSHOF.

M. D. CORRIGAN

ACTION COPY

OTT200

WD099

CC: Vienna 4/21 BP

FROM SJOSE APR17/69 NO/NO STD

TO EXTERNAL OTT 130

REF OURLET 99 MAR18/69

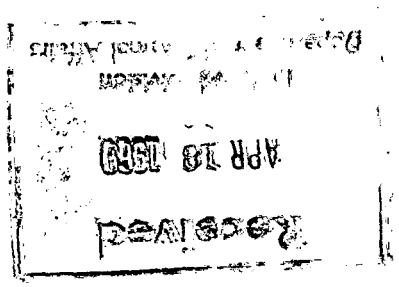
LAW OF TREATIES

COSTA RICAN DELEGATION TO CONFERENCE IN VIENNA MADE UP AS FOLLOWS:

LIC JOSE LUIS REDONDO GOMEZ: DR ERICH M ZEITINGER, COSTA RICAN CONSUL GENERAL IN SALZBURG.

4/18/4

NNNN VVVVV



MESSAGE

file

DATE	FILE/DOSSIER	SECURITY SECURITE
17APR69	26-3-1-6	CONFD
	37	

FM/DE EXT OTT

APR 17 23 09 '69

NO	PRECEDENCE
G-136	IMMEDIATE

TO/A VIENNA (CANDEL LAW OF TREATIES)

INFO

REF

SUB/SUJ LAW OF TREATIES - ARTICLE 5

INDONESIAN AMBASSADOR TELEPHONED THIS AFTERNOON TO SAY THAT HE HAD BEEN INFORMED BY HIS GOVERNMENT THAT INDONESIA WOULD HAVE NO/NO OBJECTION TO A SEPARATE VOTE ON ARTICLE 5.

DISTRIBUTION LOCAL/LOCALE NO STANDARD c.c. Legal Div. Far Eastern Div. DONE O/USSEA

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG P.A.Bissonnette/ll	O/USSEA	2-6876	SIG P.A.Bissonnette

003967

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

c.c. to M.McKinnon, P.C.O.,
April 23/69 itl

file 20-3-1-6

INFO ONLY

L

FM KLMPR APR17/69 CONFD NO/NO STD

TO TT VIENA 538 IMMED DE OTT

INFO EXTER IMMED

REF YOURTEL 286 APR16

LAW OF TREATIES: ARTICLE 5

AS INSTRUCTED I SAW RAMANI THIS MORNING AND VERBALLY MADE POINTS IN YOUR REFTEL.

2. I HAVE SENT RAMANI WRITTEN SUMMARY OF YOUR POINTS THIS AFTERNOON AND HE HAS UNDERTAKEN WHERE APPROPRIATE TO SEND ADDITIONAL INSTRUCTIONS TO MALAYSIAN DEL IN VIENA. RE POINT(A) RAMANI OF COURSE EXPECTS MALAYSIAN DEL TO CONTINUE TO COLLABORATE WITH YOU IN EXPLAINING PROBLEMS POSED BY ARTICLE 5 AS DRAFTED.

3. RAMANI WAS MOST GRATEFUL TO HAVE YOUR APPRAISAL OF TACTICSAL SITUATION NOW CONFRONTING THOSE FEDERAL STATES WHO ARE OPPOSED TO PRESENT WORDING OF ARTICLE 5. HE RPTD AGAIN THAT HE FEELS CDA SHOULD TAKE INITIATIVE ON THIS ARTICLE AND THAT MALAYSIA IS PREPARED TO SUPVORT US IN ALL PRACTICAL WAYS. HE SAID THAT AS YOU ARE CONFIDENT OF ACHIEVING NECESSARY SIMPLE MAJORITY IN FAVOUR OF HOLDING SEPARATE VOTE ON PARA2 AND HAVE VOTES FOR A BLOCKING THIRD ON SUBSEQUENT SUBSTANTIVE VOTE HE OF COURSE SUPPORTS OUR CONTINUED EFFORTS TO DELETE PARA2 AND YOUR JUDGEMENT THAT AN AMENDMENT SHOULD NOT/NOT BE INTRODUCED AT THIS TIHE. HE SAID HE WILL SO ADVISE MALAYSIAN DEL IN VIENA. IN DISCUSSING POINT MADE YOUR REFTEL ON COLLABORATION ON A FORM OF WORDS OF AMENDMENT FOR POSSIBLE USE AS FALL-BACK POSITION RAMANI EMPHASIZED AGAIN THAT HE CONSIDERS

...2

12.17.4.

THAT IF INTRODUCTION OF AMENDMENT IS NECESSARY CDA SHOULD TAKE INITIATIVE BUT IF INTRODUCTION IS NECESSARY HE WOULD LOOK FORWARD TO COLLABORATION ON THE FORM OF WORDS. IT IS QUITE CLEAR THAT IF AN AMENDMENT TO ARTICLE 5 IS INTRODUCED RAMANI WANTS IT TO BE A CDN NOT/NOT MALAYSIAN AMENDMENT.

4. IN SUM RAMANP CONCURS IN POSITION OUTLINED YOUR REFTEL AND HE LOOKS FORWARD TO DISCUSSING PROBLEMS OF ARTICLE 5 WITH YOU WHEN HE REACHES VIENA. HOWEVER HE DID NOTE WHEN WE WERE DISCUSSING POINT(C)OR PARA1 YOUR REFTEL THAT HE HAS SOME APPREHENSION ABOUT ABILITY OF USSR IF IT ACTIVELY SUPPORTS RETENTION OF PARA2 TO INFLUENCE AFRO-ASIAN BLOC. HE NOTED IN THIS CONTEXT THAT HE CONSIDERS AFRICANS PARTICULARLY AS QUOTE STILL SOMEWHAT IMMATURE UNQUOTE AND SUSCEPTIBLE TO RUSSIAN PERSUASION. HE THUS SUGGESTED BUT ONLY IN PASSING THAT IF RUSSIANS DO ACTIVELY SUPPORT RENTENTION OF PARA2 A FALL-BACK POSITION MAY STILL BE NEEDED. I UNDERTOOK TO PASS HIS COMMENT TO YOU

SHORTLIFFE

c.c. to M.McKinnon,
P.C.O.
April 23/69 itl

INFO ONLY

L

FM HAGUE APR17/69 CONFD NO/NO STANDARD

TO TT VIENN(WERSHOF)230 PRIORITY DE PARIS

INFO TT EXTER DE HAGUE

REF YOURTEL 277 APR14

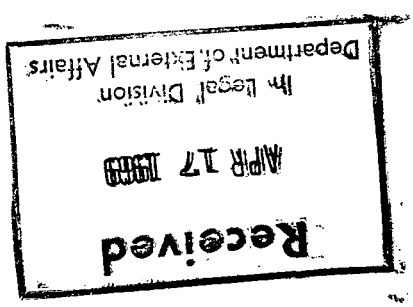
LAW OF TREATIES CONF-ARTICLE 5

IT HAS BEEN DIFFICULT TO CONTACT RIPHAGEN SINCE HE IS ON LEAVE OF ABSENCE FROM MFA OWING TO HIS APPOINTMENT AS ADHOC JUDGE OF INNATL COURT FOR BARCELONA TRACTION CASE; HOWEVER, BY EXPLANING NATURE OF PROBLEM TO HIS DEPUTY, VAN SANTEN, LATTER ARRANGED FOR US TO SEE HIM LATE YESTERDAY.

2. RIPHAGEN COMMENCED INTERVIEW BY EXPLANING THAT, DESPITE POSSIBLE IREGULARITY IN RECEIVING US, HE HAD BEEN VERY CONCERNED TO HEAR FROM VAN SANTEN THAT THERE APPEARED TO BE PROBLEM ABOUT DUTCH DELS INSTRUCTIONS ON ART5, THE MORE SO SINCE ESCHAUSIER HAD NOT/NOT COMM-UNICATED WITH HAGUE ON THIS MATTER, NOR COULD HE IMAGINE WHAT HAD GONE WORNG. WE CONVEYED INFO CONTAINED IN PARA1 OF REFTEL AND SAID WE HAD BEEN ASKED TO SEEK INTERVIEW. RIPHAGNE WAS TOTALLY MYSTIFIED BY THIS INFO AND TOLD US THAT HE HAD IN NO/NO WAY SUSPENDED OR ALTERE DUTCH DELS INSTRUCTIONS ON ART5 HE HD WITH HIM COPY OF OUR AIDEMEMOIR OF OCT4/68 AND MEMO HE HAD PREPARED FOLLOWING OUR CALL ON HIM THAT DAY. WE THEN READ OUT RECORD OF THAT CONVERSATION AS REPORTED IN PARA1 OF OURTEL 575 OCT4/68 AND RIPHAGEN SAID THAT IT WAS IDENTICAL TO HIS RECORD, AND REFLECTED WHAT HE WAS SURE WERE ESCHAUSIERS INSTRUCTIONS.

.....2

15.17.4



HE CONFIRMED THAT DISCUSSIONS WERE TAKING PLACE ON QUESTION OF ALLOWING SURINAM A MEASURE OF AUTONOMY IN NEGOTIATING LOCAL TREATIES BUT THAT UNDER EXISTING CONSTITUTIONAL ARRANGEMENTS, ONLY REALM GOVT COULD SIGN TREATIES. MOREOVER IF SURINAM WERE TO HAVE MORE LATITUDE IN THIS FIELD, DUTCH GOVT WOULD BE ALL MORE ANXIOUS TO ALIGN THEMSELVES WITH CDN POSITION ON ART 5 OF DRAFT CONVENTION.

3. RIPHAGEN READILY APPRECIATED CONCERN EXPRESSED YOURREFTEL BUT WAS SURE A MISUNDERSTANDING HAD ARISEN SOMEHOW. HE PROMISED TO SEND EXCHAUSIER A COPY OF OUR AIDEMEMOIRE AND HIS MEMO OF OCT4/68 BY BAG TO VIEN TODAY. HE SUBSEQUENTLY PHONED US AT HOME YESTERDAY EVENING TO SAY THAT MSG HAD LATER BEEN RECEIVED FROM DUTCH DEL ASKING FOR CONFIRMATION THEIR INSTRUCTIONS RE ART 5 WERE TO REMAIN UNCHANGED DESPITE POSSIBILITY OF NEW ARRANGEMENTS RE SURINAMS POWER TO NEGOTIATE TREATIES. RIPHAGEN TOLD US APPROPRIATE CONFIRMATION WOULD BE SENT AND SUGGESTED THIS MIGHT POSSIBLY EXPLAIN HOW MISUNDERSTANDING HAD ARISEN.

c.c. to M.McKinnon,
P.C.O.,
April 23/69 itl

INFO ONLY

FM VIENN APR16/69 CONFD NO/NO STANDARD

TO KLMPR 286 IMMED DE OTT

INFO EXTEROTT IMMED

REF YOURTEL 527 APR15

LAW OF TREATIES: ARTICLE 5

PLEASE MAKE FOLLOWING POINTS TO RAMANI SOONEST;

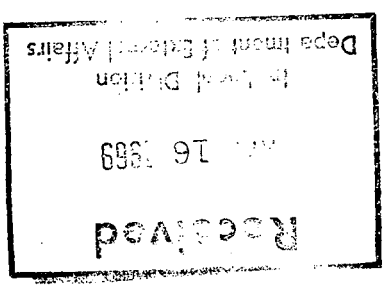
(A) WE ARE EXTREMELY GRATEFUL FOR MALAYSIAN SUPPORT FOR CDN POSITION ON ARTICLE T(2). MALAYSIAN DEL TOGETHER WITH DELS OF OTHER KEY FEDERAL STATES (INCLUDING INDIA, MXICO, AUSTRALIA IN PARTICULAR) IS BEING MOST HELPFUL IN EXPLAINING TO OTHER DELS PROBLEMS POSED BY ARTICLE AS DRAFTED. (WE ASSUME MALAYSIAN DEL CAN CONTINUE TO COLLABORATE IN THIS FASHION).

(B) OUR APPRAISAL OF TACTICAL SITUATION, SHARED BY OUR FRIENDS, IS THAT AMENDMENT OF SORT SUGGESTED BY MALAYSIA WOULD ENCOUNTER SAME PROBLEMS AS AUSTRIAN AMENDMENT LAST YEAR. FOR THIS REASON AUSTRIA, WHILE STRONGLY SUPPORTING CDN POSITION, HAS DECIDED IN CONSULTATION WITH US, NOT/NOT TO REINTRODUCE THEIR AMENDMENT. CLOSELY RELATED CONSIDERATION IS THAT CORRIDOR DISCUSSION AND EVEN MORESO PUBLIC INTRODUCTION OF AMENDMENT WOULD ALMOST CERTAINLY ERODE PRESENT SUPPORT FOR DELETION OF PARA2 OF ARTICLE 5, WHILE NOT/NOT INCREASING CHANCES OF SUCCESS OF AMENDMENT OF SORT ACCEPTABLE TO MAJORITY OF FEDERAL STATES. THUS, FROM TACTICAL POINT OF VIEW, INTRODUCTION OF AMENDMENT MIGHT, WE FEAR, CREATE TYPE OF CONFUSED SITUATION IN WHICH PRESENT UNACCEPTABLE TEXT WOULD HAVE BEST CHANCES OF SUCCESS.

(C) WE ARE REASONABLY CONFIDENT OF ACHIEVING NECESSARY SIMPLE MAJORITY

...2

24.16.4.



M. D. COPITHORNE

ACTION COPY

fub 20-3-1-6

20-3-1-6
13

FM VIENN APR16/69 CONFD NO/NO STANDARD

TO EXTEROTT 285 IMMED

LAW OF TREATIES CONFERENCE -ARTICLE 5

FOLLOWING FOR BISSONNETTE(OUSSEA)FROM WERSHOF

GRATEFUL FOR YOUR EARLY COMMENTS ON DRAFT SPEECH ON ARTICLE 5 DATED MAR25 (FORWARDED TO YOU BEFORE DEPARTURE OF BEESLEY AND STANFORD). WHILE WE WILL OF COURSE GIVE CONSIDERATION TO DESIRABILITY OF MAKING VARIOUS POINTS CONTAINED IN DRAFT SPEECH FROM POINT OF VIEW OF IMPACT ON OTHER DELS, WE SHOULD BE PARTICULARLLY INTERESTED IN RECEIVING ANY COMMENTS YOU MAY HAVE ON POSSIBE CDN DOMESTIC REACTION TO THE TEXT.

WERSHOF.....

25.16.4.

DECISION IN FAVOUR OF HOLDING SEPARATE VOTE ON PARA 2, AND WE HAVE AMPLE VOTES FOR A BLOCKING THIRD ON SUBSEQUENT SUBTANTIVE VOTE. WE HAVE SUPPORT OF OTHER FEDERAL STATES MENTIONED IN (A) ABOVE(PLUS OTHERS, SUCH AS ARGENTINA, BRAZIL, GERMANY, NIGERIA, USA). IN THESE CIRCUMSTANCES WE HAVE SUGGESTED TO MALAYSIAN DEL HERE THAT THEY KEEP THEIR AMENDMENT IN THEIR POCKET FOR TIME BEING, ON UNDERSTANDING THAT WE WIL COLLABORATE ON FORM OF WORDS OF AMENDMENT FOR POSSIBLE USE AS FALL-BACK POSITION IF DEVELOPMENTS HERE SO WARRANT. WE HOPE THAT RAMANI, WHOSE ADVICE WE VALUE, WILL BE ABLE TO CONCUR IN THIS POSITION.

2. FOR YOUR OWN INFO ONLY, WE DO NOT/NOT CONSIDER THAT MALAYSIAN AMENDMENT SOLVES PROBLEMS POSED BY PRESENT TEXT. WE WILL BE DISCUSSING THES QUESTIONS WITH MALAYSIAN DEL IN DUE COURSE.

WERSHOF

.....

File
Diary
Div. Diary

MESSAGE

DATE	FILE/DOSSIER		SECURITY SECURITE
APR 16-69	20-3-1-6		
	21		RESTR

FM/DE EXTERNAL OTT

	NO	PRECEDENCE
TO/A VIENNA	L-490	PRIORITY
INFO BERN		

REF YOURTEL 282 APRIL 15

SUB/SUJ LAW OF TREATIES-ARTICLE 5-SWITZERLAND

PLEASE PASS FOLLOWING TO STANFORD OF CANADIAN DELEGATION TO LAW OF TREATIES CONFERENCE:SWISS AMBASSADOR'S RESPONSE TO SSEAS REQUEST FOR INDICATION OF SWISS POSITION ON ARTICLE 5(2) RECEIVED APRIL 11. REGRET DELAY IN TRANSMITTING TO YOU. TEXT OF AMBASSADOR'S LETTER AS FOLLOWS:

YOUR TEMPORARY ABSENCE FROM OTTAWA UNFORTUNATELY PREVENTS ME FROM CALLING ON YOU PERSONALLY TO LET YOU KNOW OF MY GOVERNMENT'S REACTION TO YOUR REMARKS ON THE SIGNIFICANCE FOR CANADA OF ARTICLE 5(2) OF THE PROPOSED CONVENTION WHICH IS NOW BEING DISCUSSED IN VIENNA.

I HAVE BEEN INFORMED OF MY AUTHORITIES' FULL UNDERSTANDING FOR THE CANADIAN POSITION; FOR THEIR PART, THEY HOPE THAT THE PROPOSALS PUT FORWARD BY SWITZERLAND WILL RECEIVE THE ACTIVE SUPPORT OF THE CANADIAN DELEGATION (MY COUNSELLOR HAD ALREADY BEEN ASSURED OF THIS BY MR. STANFORD OF YOUR LEGAL DIVISION ON MARCH 12).

THE SWISS DELEGATION WILL CONTACT THE CANADIAN DELEGATION IN VIENNA REGARDING A MUTUALLY SATISFACTORY COURSE OF ACTION.

COMPLIMENTARY CLOSE - HANS W. GASSER

DISTRIBUTION
LOCAL/LOCALE

NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG H.MAWHINNEY/itl	LEGAL	2-9553	SIG M.D. Copithorne M.COPITHORNE

EXT 18/8IL (REV 5/64)
(COMMUNICATIONS DIV)

c.c. to M.McKinnon,PCO
April 23/69 itl

ACTION COPY

file 20-3-1-6

13

File 20-3-1-6

18/4/69

FM VIENN APR16/69 CONFD NO/NO STANDARD

TO EXTEROTT 287 PRIORITY

(REPLY REQUESTED PLEASE BY MON APR21)

LAW OF TREATIES-ARTICLE 5-GENERAL PROBLEMS

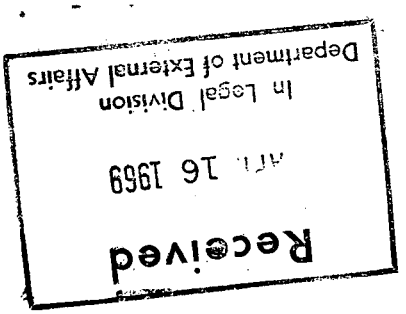
CDN DEL HAS BEEN LOBBYING STEADILY. WHILE WE HAVE NOT/NOT YET COVERED ALL THE UNDECIDED OR CONFUSED DELS, AT MOMENT IT SEEMS THAT VOTE (ON WHETHER TO PERMIT SEPARATE VOTE ON PARA2) WILL BE CLOSE, BUT WE HAVE FAIR TO GOOD CHANCE OF MOBILIZING THE REQUIRED SIMPLE MAJORITY. DETAILED REPORT ON VOTING PROSPECTS WILL BE SENT AT LATER STAGE.

2. WHAT IS JUST AS WORRYING AS VOTING POSITION IS POSSIBILITY(EVEN PROBABILITY) THAT EITHER WELL-MEANING FRIENDS OR CLEVER OPPONENTS OR A PRESIDENT(AGO) WHO WANTS TO BE UNIVERSALLY LOVED MAY COMPLICATE OUR OPERATIONS EITHER:(1) BY PROPOSING AMENDMENTS TO PARA2(ALLEGEDLY DESIGNED IN SPIRIT OF COMPROMISE), OR(2) BY PROPOSING WHEN WE REACH TIME FOR VOTING THAT VOTING BE POSTPONED IN ORDER THAT OPPOSING DELS MAY BE ENCOURAGED TO WORK OUT COMPROMISE. THERE ARE MANY INDIVIDUALS HERE WHO MAKE A SPECIALTY OF PROPOSING COMPROMISES IN ORDER TO PRESERVE THE QUOTE SPIRIT OF CONCILIATION UNQUOTE AND PERHAPS(IF I AM NOT/NOT UNFAIR) IN ORDER TO GLORIFY THEMSELVES AS FINDERS OF HAPPY SOLUTIONS.

3. AUSTRIA DEL LAST YEAR PROPOSED AMENDMENT TO PARA2 WHICH AS YOU KNOW CDA VOTED FOR BUT IT WAS DEFEATED 29-35-21. WHEN AUSTRIANS ASKED US EARLY THIS YEAR ABOUT REVIVING THIS AMENDMENT WE DISSUADED THEM BECAUSE WE WERE AND ARE SURE THAT NO/NO AMENDMENT ACCEPTABLE TO CDA CAN WIN NECESSARY 2/3 MAJORITY IN PLENARY; AND INTRODUCTION AND

...2

27.16.4



DEFEAT OF SUCH AMENDMENT WOULD CONFUSE AND HURT OUR MAIN OPERATION. SINCE COMING HERE ONE MEMBER OF MEXICAN DEL(WHO ARE OUR SUPPORTERS) STARTED TO TALK OF AN AMENDMENT AND WE HAVE(WE THINK) DISSUADED HIM. NOW MALAYSIAN GOVT(KLMPR TEL 490 APR10) HAS DRAFTED AN AMENDMENT (WHICH WE THINK IS A BAD ONE) AND WE SHALL TRY TO DISSUADE THEIR DEL FROM PROPOSING IT. TANZANIAN DEL HAS SIMILIAR IDEAS, AND WE THINK WE HAVE TALKED HIM OUT OF IT FOR THE TIME BEING.

4. IF LAST MINUTE PROPOSALS OF THIS KIND SHOULD COME UP WE MAY HAVE TO TAKE SOME DECISIONS ON THE SPOT. APART FROM AUSTRIAN AMENDMENT WE WILL NOT/NOT OF COURSE BEGIN TO DISCUSS SERIOUSLY ANY AMENDMENT WITHOUT FIRST CONSULTING YOU. HOWEVER IN UNLIKELY EVENT THAT USSR SHOULD SUDDENLY INDICATE WILLINGNESS TO ACCEPT AUSTRIAN AMENDMENT WE THINK WE SHOULD BE READY TO ACCEPT IT WITHOUT DELAY(MUCH AS WE WOULD PREFER SIMPLE DELETION). AUSTRIAN AMENDMENT WOULD ADD TO PARA2 WORDS QUOTE FOR THE PURPOSE OF CONCLUDING A TREATY THE EXTENT OF SUCH CAPACITY HAS TO BE CONFIRMED BY AN AUTHORITY OF THE FEDERAL UNION COMPETENT UNDER ARTICLE 6 UNQUOTE. PLEASE CONFIRM SOONEST THAT WE MAY (IF FORCED TO AND IF NO/NO TIME TO CONSULT) SUPPORT AUSTRIAN AMENDMENT AS WE DID LAST YEAR.

5. WE NEED ALSO FOLLOWING AUTHORITY. IF PRESIDENT AGO OR SOME DEL AT LAST MOMENT PROPOSES DELAY IN VOTING IN ORDER TO PERMIT OPPOSING DELS TO CONSULT AND SEEK SOLUTION ETC IT WOULD BE TACTICALLY BAD TO REFUSE TO PARTICIPATE IN SUCH AN EXERCISE. GRATEFUL TO RECEIVE AUTHORITY TO PARTICIPATE(BUT NOT/NOT OF COURSE TO ACCEPT ANY RESULTING COMPROMISE

...3

TEXT OTHER THAN AUSTRIAN AMENDMENT WITHOUT CONFIRMATION FROM YOU.

6. I SHALL TALK TO AGO TO TRY TO PERSUADE HIM TO FOREGO PEACEMAKING ROLE AND TO LIMIT HIMSELF TO IMPARTIAL ENFORCEMENT OF RULES OF PROCEDURE.

7. BEESLEY AND OTHER MEMBERS OF DEL CONCUR

WERSHOF.

M. B. CORITHORNE

NNNNVVVVV

Copy sent April 17/69
Vienna, Canadian
Delegation, 1
Law of Treaties Conference

il

OTT003

WD001

ACTION COPY

FROM SJOSE APR16/69

TO EXTERNAL 128 NO/ NO STD

REF OURLET 127 APR7/69

LAW OF TREATIES CONFERENCE

THE NOTE DATED MAR31 LEFT WITH PANAMANIAN MINISTER EXTERNAL RELATIONS DURING MY COURTESY CALL ON HIM MON APR14. AFTER GLANCING THROUGH NOTE QUICKLY HE MADE SIGNS OF AGREEING COMPLETELY WITH OUR STAND AND SUGGESTED CDN DELEGATION VIENNA CONTACT HEAD OF PANAMANIAN DELEGATION, NARCISO GARAY, WHO HAS BEEN LEGAL ADVISER PANAMA MINISTRY FOR MANY YEARS. HE SHOULD BE RESPONSIBE TO OUR ARGUMENTS. MUNRO

1/17/4