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States" instead of the expression proposed in its amendment. He hoped that the Committee would agree to the amendment being treated as a drafting change.

59. In paragraph 5, it was not clear whether the phrase "such notification of succession" related back to the notification referred to in paragraphs 1, 2 and 3 or only to paragraph 4, where notification of succession was coupled with the phrase "or any communication". In the context, the latter reading seemed more likely, since notifications to parties or contracting States, as provided for in paragraph 3, subparagraph (*a*) were not relevant to paragraph 5. He suggested that the Drafting Committee should be asked to clarify that point.

60. Sir Francis VALLAT (Expert Consultant) said that in his view the point raised by the Australian amendment was one for the Drafting Committee. He agreed that the phrase "such notifcation of succession" in paragraph 5 of article 21 might be ambiguous.

61. The use of the terms "the parties or the contracting States" in paragraph 3, subparagraphs (*a*) and (*b*) had been a deliberate choice by the International Law Commission. Article 78 of the Vienna Convention on the Law of Treaties was a general provision, which dealt in its subparagraph (*a*) with cases in which there was no depository. The context was different from that of draft article 21.

62. It had been found useful in drafting provisions on the transmission of notification to specify "parties" and "contracting States" as separate classes, and those terms were used in draft article 21 to pick up the definitions given in draft article 2, paragraph 1, subparagraphs (*k*) and (*l*). Both definitions contained the common element of consent to be bound, but a "contracting State" was one that consented to be bound whether or not the treaty had entered into force, whereas a "party" was one that had consented to be bound and for which the treaty had entered into force. The question was whether the two classes of States should be kept distinct.

63. Mr. MARESCA (Italy) said that, although he did not intend to make a formal proposal on the matter, he would advise the deletion from article 21, paragraph 2 of the provision that the representative of the State communicating the notification of succession might, in specific cases, be called upon to produce full powers. The wording of that paragraph was modelled on article 67, paragraph 2 of the Vienna Convention on the Law of Treaties, which referred to instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. Article 7, paragraph 2, subparagraphs (*b*) and (*c*) of the Vienna Convention, which explicitly did not require representatives to produce full powers, was more relevant to draft article 21, in that it dealt with the expression of consent to be bound. Experience had shown that insistence on a representative producing full powers was an unnecessary complication, which was open to misinterpretation.

64. The CHAIRMAN said that, if there was no objection, he would take it that the Committee of the Whole provisionally adopted draft article 21 and referred it to the Drafting Committee for consideration, together with the Australian amendment thereto (A/CONF.80/C.1/L.29).

It was so decided.[10]

The meeting rose at 1 p.m.

[10] For resumption of the discussion of article 21, see 35th meeting, paras. 37-40.

29th MEETING

Tuesday, 26 April 1977, at 4 p.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976 [Agenda item 11] (*continued*)

ARTICLE 22 (Effects of a notification of succession)[1]

1. Mr. LANG (Austria) said that the amendment to article 22 (A/CONF.80/C.1/L.26) proposed by his delegation was intended to clarify paragraph 2 of the International Law Commission's draft and to make it more consistent with the Vienna Convention on the Law of Treaties, although his delegation was entirely in agreement with the substance of the article drafted by the Commission.

2. The amendment sought first of all to indicate clearly the moment from which suspension of the operation of the treaty took effect. In paragraphs (6) and (11) of its commentary on the article (A/CONF.80/4, pp. 74-75), the International Law Commission had established that the decisive date was that of accession to independence, whereby it coincided with the date of succession. Nevertheless, his delegation felt that paragraph 2 of the article could specify more clearly when the suspension began.

3. In paragraph (13) of its commentary (*ibid.*, p. 76), the International Law Commission had itself admit-

[1] The following amendment was submitted: Austria, A/CONF.80/C.1/L.26.

ted that article 22 might not strictly comply with all the provisions of the Vienna Convention but it would be in accord with the spirit of article 28 and article 57, which provided for the suspension of the operation of the treaty by consent of the parties. The Commission had not sufficiently stressed the element of consent as a prerequisite for suspension. Although the two texts would achieve the same result, in order to align draft article 22 with article 57 of the Vienna Convention, the quasi-automatic suspension envisaged in the International Law Commission's text should be replaced by a presumption of consent. Greater emphasis on this idea would also indicate greater respect for the sovereign rights of the States concerned as well as their freedom of choice.

4. As its amendment concerned more the form than the substance of the International Law Commission's text, the Austrian delegation would certainly agree to its being referred to the Drafting Committee for possible inclusion in the final version of the draft convention.

5. Mr. RANJEVA (Madagascar) said that the explanations given by the Austrian representative in connexion with his amendment to paragraph 2 of article 22 were not sufficiently clear. Reference to a presumption of consent could give rise to many problems of interpretation and to practical complications, especially as it was very difficult to establish intent. The great advantage of the International Law Commission's text was that there was presumption, not with regard to an intention, but with regard to a direct legal result. In order to eliminate any ambiguity in paragraph 2, the Drafting Committee could for instance use the words "notification of succession takes effect"; they took better account of the distinction between the intrinsic validity of a treaty and its operation.

6. Mr. MBACKÉ (Senegal) expressed doubts about the words "from the date of succession" in the Austrian amendment. He asked whether its sponsor had deliberately avoided providing for the case where a treaty would enter into force after the date of a succession of States, which would not then coincide with the beginning of the suspension of the operation of the treaty.

7. Mr. LANG (Austria) said he was unaware that any particular practical difficulties—such as those referred to by the representative of Madagascar—could arise in connexion with the amendment proposed by his delegation.

8. On the other hand, the Senegalese representative's statement regarding the beginning of the suspension of the operation of the treaty was entirely relevant. It was clear that if the date of entry into force of the treaty was subsequent to the date of the succession, the former date would mark the beginning of the suspension of the operation of the treaty.

9. The CHAIRMAN said that, if there was no objection, he would take it that the Committee of the Whole wished to refer the Austrian amendment to article 22 (A/CONF.80/C.1/L.26) to the Drafting Committee, and to adopt provisionally the text of article 22 and also refer it to the Drafting Committee.

It was so decided.[2]

PROPOSED NEW ARTICLE 22 *bis* (Notification by a depositary)[3]

10. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic), introducing on behalf of his delegation and those of Czechoslovakia and Poland draft article 22 *bis* (A/CONF.80/C.1/L.28), observed that the proposal required no comment. "All other particulars relating to the treaty" mentioned in paragraph 1 meant information as to whether the treaty was applicable to the territory and such other information as might be communicated by the depositary. During the Committee's discussion of article 16 of the draft convention, some delegations had raised the point that in some cases a newly independent State might not know which treaties extended to it. The notification provided for in the proposed new article 22 *bis* would enable a successor State to take stock and decide what position to adopt towards such treaties. The new article could therefore be regarded as providing for the depositary's good offices vis-à-vis the successor State.

11. The proposal was consistent with current practice, particularly that of the Secretary-General of the United Nations, as the International Law Commission had noted in paragraph (3) of its commentary on article 16. The proposed new article 22 *bis* was of course linked to article 16 *bis*, proposed by the Union of Soviet Socialist Republics, but not adopted by the Committee. The reference to article 16 *bis* in paragraph 1 of article 22 *bis* should therefore be deleted. The delegation of the Ukrainian SSR hoped that the new article would be favourably received.

12. Mr. MEISSNER (German Democratic Republic) said that his delegation approved of the new article 22 *bis* introduced by the Ukrainian SSR; its provisions should greatly facilitate application of the future convention. In accordance with articles 76 and 77 of the Vienna Convention on the Law of Treaties, the new article filled a gap in the draft articles prepared by the International Law Commission. His delegation was well aware of the fact that the applicability of the future convention to succession in respect of multilateral treaties largely depended on how

[2] For resumption of the discussion of article 22, see 35th meeting, paras. 41-44.

[3] Czechoslovakia, Poland and the Ukrainian SSR submitted a proposal (A/CONF.80/C.1/L.28) for the insertion of a new article 22 *bis*; subsequently Czechoslovakia, Poland, Singapore and the Ukrainian SSR submitted a revised version of that text (A/CONF.80/C.1/L.28/Rev.1).

depositaries discharged their duties. The new article was consistent with the aim of the future convention and would facilitate the entry of newly independent States into treaty relations.

13. Mrs. SAPIEJA-ZYDZIK (Poland) said that many delegations had already referred to the difficulties commonly encountered by newly independant States in connexion with notification of treaties extending to them at the time of succession. As relevant information available on the date of succession was often incomplete, there were delays in the notification of succession. In some cases notification had come 20 or even 27 years after the accession of certain States to independence.

14. The Polish delegation felt that all opportunities for assisting newly independent States in that sphere deserved consideration, and it therefore supported the proposed new article 22 *bis*. The option offered by the article, moreover, corresponded to the procedure followed by the Polish Government as depositary of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929)[4] and the 1955 Hague Protocol to that Convention.[5] The Polish Government had informed all the newly independent States concerned that the Warsaw Convention extended to their territory and requested them to make known their position on the Convention. Thirty-one newly independent States had notified their succession to that treaty. The Secretary-General of the United Nations and the Swiss Government followed a similar procedure. Because it felt that the practice should be provided for in the draft convention, Poland had become one of the co-sponsors of the proposed new article.

15. Mr. STUTTERHEIM (Netherlands) said that the idea underlying the proposed new article 22 *bis* was sound. The Netherlands Government had already notified newly independent States in connexion with treaties in force. However, it was not clear how the provisions of new article 22 *bis* could be applied in the context of article 18 of the draft convention, as it was not usually known if the signature had been affixed for the territory concerned. It was not the function of the depositary State to ask the signatory State about the scope of such treaties. The words relating to communication "of all other particulars relating to the treaty" in paragraph 1 of the proposed new article also raised the question of the obligation imposed by the amendment. The sometimes limited ability of the depositary to carry out the notification provided for in the article should also be taken into account.

16. Mr. MUDHO (Kenya) expressed satisfaction that the Committee of the Whole had taken up the draft article, inasmuch as several delegations including his own had already, during discussions on previous articles, mentioned the difficulties encountered by newly independent States in determining which treaties were applicable to them. The practice of the Secretary-General of the United Nations, whereby newly independent States were notified, had not been enshrined in any convention. The intention underlying the proposed new article 22 *bis* was consequently a praiseworthy one.

17. Nevertheless, the wording of paragraph 1 of the proposed new article was ambiguous and could be interpreted in at least three ways. It might be taken to mean that the depositary would simply inform a newly independent State of the treaties whose application had been extended to its territory, leaving it the option of deciding whether or not to accede to them; or that it would inform newly independent States of treaties whose application had been extended to their territory and which remained in force; or finally that it would inform the newly independent State, once the latter had established its status pursuant to articles 16, 17 and 18 of the draft convention, of the treaties that would thenceforth apply to its territory. Kenya approved the first interpretation, which was also that of the sponsors of the proposed new article, and hoped that the article could be recast accordingly.

18. The Kenyan delegation was puzzled by the somewhat peremptory wording of paragraph 1 of the new article, which stipulated that the depositary "shall notify" a newly independent State that the treaty had been extended to the territory to which the succession of States realted. The question arose as to whether the Conference was legally competent to impose such an obligation on depositaries of multilateral treaties.

19. Despite those reservations, the Kenyan delegation would support the proposed new article 22 *bis*, although it hoped it would be redrafted with a view to facilitating interpretation.

20. Mr. SEPÚLVEDA (Mexico) said that his delegation was prepared to accept the draft articles submitted by the International Law Commission as a whole, subject to a few deletions and additions. Since that text was practically inviolable, any amendments proposed were bound to raise difficulties. Although his delegation appreciated the work of the International Law Commission, it could not help noting that the draft convention, in dealing with information, did not provide for the obligation to inform newly independent States of the particular features of the treaties concerning them. That was indeed a gap which the proposed new article was intended to fill.

21. Nevertheless, the proposed new article 22 *bis* gave rise to certain difficulties. In particular, the Kenyan representative had raised the question of imposing the obligation provided for in the article on a depositary who was not a party to the convention or

[4] League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

[5] United Nations, *Treaty Series*, vol. 428, p. 371.

on the Secretary-General of an international or regional organization. The Netherlands representative had also drawn attention to certain other difficulties. The Mexican delegation was, however, prepared to support the proposed new article.

22. Mr. CHEW (Malaysia) said that his delegation found it difficult to accept the proposed new article 22 *bis*, for two reasons. It was not in accordance with the principles of law to impose such an obligation on the depositaries of multilateral treaties. The depositary, who would not necessarily be a party to the convention, could not be bound by the obligations laid down in that convention. Secondly, all questions relating to notification were normally the subject of a separate treaty and it was therefore unnecessary to include a provision to that effect in the draft convention. His delegation thus found it very difficult to support the proposed new article 22 *bis*.

23. Mr. RANJEVA (Madagascar) said that his delegation had already drawn attention to certain practical problems in connexion with notification during the discussion of article 16 of the draft convention and had pointed out that the functions of a depositary should not be confined merely to keeping archives.[6] That idea was incorporated in the proposed new article 22 *bis*, which represented an innovation in assigning to the depositary the new task of informing and assisting the newly independent State. Moreover, the process of notification sometimes gave rise to practical problems. Thus, when Madagascar had attained independence and had requested France to provide it with a list of the treaties by which France was bound, that country had had difficulty in giving a reply. Article 22 *bis* should therefore promote international co-operation in the matter, but the depositaries would be given a greater incentive to carry out their functions if a provision to that effect was included in conventions other than those relating to treaties.

24. The Kenyan representative had rightly drawn attention to the problems of interpretation to which paragraph 1 of the proposed article gave rise. Since the intention of the sponsors was to entrust the depositary with a material task, it might be better to replace the phrase "shall notify the newly independent State", which was legally too specific, by "shall bring to the knowledge of the newly independent State" or "shall inform the newly independent State".

25. Mr. KRISHNADASAN (Swaziland) said that he was in favour of a provision drafted along the lines of article 22 *bis*, because that text was based on the practice followed by the Secretary-General of the United Nations in his capacity as depositary of multilateral treaties, as described in paragraph (3) of the International Law Commission's commentary on article 16 (A/CONF.80/4, p. 56). The article under discussion was a useful supplement to the draft; nevertheless, as the representative of Madagascar had pointed out, the term "notification" might give rise to difficulties and should be replaced by a more appropriate one.

26. For the sake of clarity, he suggested that the word "previously" be inserted before the word "extended". In the light of the wording of article 77, paragraph 1, subparagraph (*e*), of the Vienna Convention and also with a view to clarification, the words "and that it is entitled to become a party to the treaty" might be inserted before the last phrase of paragraph 1 of article 22 *bis*.

27. Mr. BUBEN (Byelorussian Soviet Socialist Republic) said that his delegation was in favour of the proposed new article for several reasons. In the first place, during the debate on part II of the draft, a number of delegations had stated that newly independent States often found it very difficult to determine which multilateral treaties of the predecessor State had been applicable to their territory before their accession to independence. Indeed, shortly after attaining independence, a new State was usually not in a position to determine which those treaties were, for lack of archives and experts in that kind of research. Moreover, the article under discussion took into account the practice generally followed by the depositaries of multilateral treaties. When the Secretary-General of the United Nations was the depositary of multilateral treaties which had been applicable to a territory before its independence, he informed the newly independent State accordingly and asked it to indicate whether it considered itself bound by those treaties. The International Law Commission's commentary on article 16 showed that other depositaries of international treaties followed the same practice. Not only was article 22 *bis* in conformity with the general practice, but it would benefit newly independent States by enabling them to determine more easily which international treaties had been applicable to them before their independence.

28. Mr. STEEL (United Kingdom) said he sympathized with the objective of article 22 *bis*, which was to reaffirm the practice followed by the Secretary-General of the United Nations and certain other depositaries of international treaties. Nevertheless, he doubted whether it was possible or necessary to give an obligatory character to that practice. In that connexion, he drew particular attention to article 77, paragraph 1, subparagraph (*e*) of the Vienna Convention on the Law of Treaties, under which one of the functions of a depositary was "informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty".[7] Since newly independent States were States entitled to become parties to multilateral treaties, the problem dealt with in article 22 *bis* was al-

[6] See above, 25th meeting, para. 19.

[7] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

ready covered by that provision of the 1969 Vienna Convention. Moreover, the International Law Commission had indicated that at least the Secretary-General of the United Nations, as a depositary of international treaties, complied with that provision.

29. Several delegations had drawn attention to some very real difficulties connected with determining the treaties previously applicable to a territory which had become independent. The inclusion in the draft of a provision along the lines of the proposed article would raise further difficulties. The provision would impose on the depositary the obligation of sending certain communications to newly independent States as soon as possible after the succession of States. It should be borne in mind that the emergence of a newly independent State was sometimes disputed and that it would not be correct to oblige the Secretary-General, for example, to take a position on that issue.

30. Under the proposed article, the depositary would also have to notify the newly independent State that the treaty "has been extended to the territory to which the succession of States relates". That was another point on which the depositary should not be obliged to take a position, especially since in modern State practice, it was no longer usual for treaties to include territorial application clauses.

31. Certain delegations had pointed out that the predecessor State was sometimes unable to give a complete list of the treaties which had been applicable to the territory attaining independence. However regrettable that situation might be, the fact remained that it would be even more difficult for a depositary to provide such a list. In any case, article 22 *bis* seemed to impose on depositaries a function defined in terms which made it doubtful whether the task could be performed.

32. It was also questionable whether an obligation could be imposed on depositaries who might not be parties to the future convention and whose authority in any event derived not from that convention but from the treaties for which they would be the depositaries. The content of the proposed new article should be expressed in a declaratory form, like the corresponding provision of the Vienna Convention on the Law of Treaties.

33. For all those reasons, he did not think it was possible or desirable to adopt article 22 *bis*.

34. Mr. MARESCA (Italy) said that he had wondered at first whether article 22 *bis* had not come after its time. Indeed, newly independent States had so far not been fully aware of their rights with regard to succession in respect of treaties and had needed to be informed. That was the reason for the practice followed by the Secretary-General of the United Nations and other depositaries. It might seem that such information would no longer be necessary when those States had a convention clearly showing them what they could and could not do. On reflection, however, he had decided that the article under discussion had some practical advantages. The treaty service of the Ministry of Foreign Affairs of any State and more particularly that of a newly independent State would be glad to be reminded of certain important facts concerning treaties. From that point of view, the depositaries of international treaties certainly had a duty to assist newly independent States.

35. The article under consideration had given rise to serious doubts. Some delegations feared that an unduly heavy burden might be imposed on the Secretary-General of the United Nations. Yet the functions of a depositary under article 77, paragraph 1, subparagraph (*e*) of the Vienna Convention on the Law of Treaties lay precisely in informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty. It was only logical for the Committee to base itself on that provision in drawing up a similar rule with regard to the succession of States.

36. In connexion with the form of article 22 *bis*, a distinction must be made between the diplomatic procedure of notification and the concept of information. Moreover, the phrase "that the said treaty has been extended to the territory to which the succession of States relates" might give the impression that the treaty in question was a new one, not a treaty which had applied to the territory before its independence. Finally, he considered that it would be going too far to require depositaries to inform the newly independent State of "all other particulars relating to the treaty". Every treaty had its own history and the depositaries could not be given such a multifarious duty of information. It would be better to limit that duty to any information that might be useful for the purposes of articles 16, 17 and 18.

37. Mr. BRECKENRIDGE (Sri Lanka) said that his delegation approved of the proposed new article, in view of its sponsors' wish to promote application of the continuity principle. That application could only be furthered if a newly independent State had a better knowledge of the situation. An equitable balance should, however, be established between that principle and the "clean slate" principle, which might be said to rest on ignorance of the situation.

38. Newly independent States would benefit by the concept of assistance provided to them in the area covered by article 22 *bis* if that provision were the subject of a declaration or resolution. In its existing form, however, the article imposed on depositaries a kind of system which would disturb the balance between the "clean slate" principle and that of continuity.

39. Mr. YANEZ-BARNUEVO (Spain) stressed the positive aspect of article 22 *bis*. His delegation had some doubts, however, not so much on the sub-

stance as on the form of the text. Article 22 *bis* was manifestly in line with the position adopted by the International Law Commission, which consisted in respecting the freedom of the newly independent State as enshrined in the "clean slate" principle, while attempting nevertheless to encourage continuity of treaty relations within the framework of succession. The depositary of multilateral treaties was in the best position to supply a newly independent State with information on treaties which had been applicable to that territory before independence. It should be borne in mind, however, that the letter which the Secretary-General of the United Nations customarily sent to newly independent States did not constitute a notification; it was a communication accompanied by a request for a reply. In that connexion, he agreed with those delegations which had suggested that the word "notification" should be replaced by "communication" or "information", or any other term wit a less clear-cut legal connotation.

40. Attached to the letter which the Secretary-General of the United Nations sent to newly independent States was a list of multilateral treaties of which the Secretary-General was the depositary and which, whether or not they had been in force, had been applicable to the territory before independence. Instruments setting up international organizations and treaties made invalid or replaced by other treaties, for example, and also treaties signed but not ratified by the predecessor State, were not listed. He presumed that article 22 *bis* would extend to the communication of information, for example, on the identity of other States parties to the treaty or on reservations, as was implied by the words "all other particulars relating to the treaty". From that standpoint, the proposed new article went too far.

41. Those who opposed the idea that the practice followed by the Secretary-General of the United Nations and other depositaries should be formally laid down in the future convention claimed that the information function of depositaries had already been established in article 77, paragraph 1, subparagraph (*e*) of the Vienna Convention on the Law of Treaties. In his delegation's view, it was perhaps not entirely redundant to spell out that function in the future convention, since it was directly related to the treaty's objective. In that connexion, he remarked that the relevant article of the Vienna Convention contained the words "unless otherwise provided in the treaty", which clearly demonstrated the primacy of the Law of Treaties. That aspect of the problem might also be indicated in the article under consideration.

42. As far as the form of article 22 *bis* was concerned, in the Spanish version at least, the phrase "shall notify the newly independent State that the said treaty has been extended to the territory" was not clear. Coming straight after article 22, it might be understood to mean that such notification could be subsequent to the notification made by the newly independent State in accordance with article 21. In fact, it was preliminary information intended to enable the newly independent State to make a notification of succession. If the Committee decided to include article 22 *bis* in the draft, it would be preferable to insert it before the provisions relating to notification of succession. In conclusion, he observed that the two paragraphs of article 22 *bis* could easily be combined in a single provision.

Mr. Ritter (Switzerland), Vice-Chairman, took the Chair.

43. Mr. EUSTATHIADES (Greece) said he viewed with sympathy the proposed new article 22 *bis*, whose purpose was to help newly independent States in their succession to multilateral treaties applicable to their territory. If the Conference adopted the idea set forth in the article, it might envisage adopting it not only for newly independent States, but possibly for other cases of succession of States as well.

44. In some respects, the proposed new article 22 *bis* did not go far enough. He wondered why it dealt only with cases referred to in articles 16, 16 *bis*, 17 and 18 of the draft and did not also deal with those referred to in articles 19 (Formulation of reservations) and 20 (Acceptance of and objection to reservations) of the Vienna Convention. It could doubtless be argued that the reason why articles 19 and 20 were not mentioned was that they were covered by the words "all other particulars relating to the treaty". He did not, however, care for that expression and considered that the sponsors of the amendment should rather have been guided by article 77, paragraph 1, subparagraph (*e*) of the Vienna Convention on the Law of Treaties. He also thought that the word "notify" was unsuitable and should be replaced, as the representative of Madagascar had suggested, by another term such as "inform" or "bring to the attention of".

45. In other respects, however, the proposed new article 22 *bis* went too far. Article 77 of the Vienna Convention listed the functions of a depositary, but that list was not exhaustive. Besides, article 77 contained the reservation "unless otherwise provided in the treaty or agreed by the contracting States". That rider applied in the case under consideration, since the depositaries' functions were to be modified by another convention. There would, accordingly, be two categories of contracting States: States parties to the 1969 Vienna Convention on the Law of Treaties and States parties to the new convention on succession of States in respect of treaties, which would confer extended powers on depositaries. While the Secretary-General of the United Nations followed his own practice, which would remain unchanged, there were other depositaries, who might be States. Article 7 of the draft convention provided that the present articles "apply only in respect of a succession of States which has occurred after the entry into force of these articles except as may be otherwise agreed". However, the present convention would cover depositaries

of treaties which had come into effect long before the entry into force of the convention, and States which became independent after the entry into force of the convention would receive notification from depositaries of very long standing. A depositary should not therefore be blamed if the information he supplied to the successor State was incomplete.

46. Mr. SAHRAOUI (Algeria) welcomed article 22 *bis*, which filled a legal gap by making *de jure* what was practically a *de facto* situation. Even if the functions of the depositary were already laid down in the Vienna Convention on the Law of Treaties, it was not a bad thing to restate a fact which had hitherto proved most useful. Article 22 *bis* not only filled a legal gap but also proposed a new and dynamic view of the depositary's role, a proposal which deserved support.

47. However, he agreed with the representatives of Madagascar and Italy that the word "notify" was out of place in the proposed new article and that the words "all other particulars relating to the treaty" should be replaced by "all useful information relating to the treaty".

48. Mr. WYSE (Sierra Leone) asked why the sponsors of article 22 *bis* had deemed it necessary to introduce the new article into the draft convention when the functions of the depositary were already clearly defined in article 77 of the Vienna Convention on the Law of Treaties.

49. Mr. ROSENSTOCK (United States of America), observing that a large majority of the Committee's members agreed on the usefulness of the proposed provision in article 22 *bis*, said that the Conference should adopt a provision to that effect. In his view, however, it was for the Drafting Committee to decide whether that provision should take the form of a separate article, a paragraph added to another article, or a simple resolution. The sponsors of article 22 *bis* should accordingly leave the Drafting Committee to decide upon the form to be given to their proposal.

50. Mr. SATTAR (Pakistan) associated himself with those delegations which had supported the substance of the proposed new article 22 *bis* and had proposed that it should be referred to the Drafting Committee.

51. Mr. MUSEUX (France) considered the proposed new article 22 *bis* to be most useful, but noted that it gave rise to a certain number of problems of both a theoretical and a practical nature. As the representative of Malaysia had observed, the word "depositary" had a very general meaning; the depositary could be a State or an international organization. Mention had frequently been made of the practice followed by the Secretary-General of the United Nations in his capacity as the depositary of multilateral treaties. But the convention could not be binding upon the Secretary-General of an international organization because international organizations were not entitled to become parties to the convention. The scope of article 22 *bis* should therefore be restricted to depositary States. It was true that article 77 of the Vienna Convention relating to the functions of depositaries was applicable not only to States but indirectly also to international organizations; but it imposed direct obligations only on States. Under article 78 of the Vienna Convention, notifications and communications to be made by a State did not directly impose obligations on international organizations. It was obvious that international organizations had to continue to discharge their obligations as depositaries of multilateral treaties, but not because those obligations were imposed upon them by the Convention. It would therefore be preferable not to include international organizations among the depositaries referred to in article 22 *bis*, the more so as article 6 raised theoretical problems which might place the Secretary-General of the United Nations in an awkward position.

52. He believed, moreover, that only States parties to the convention should be depositary States, and proposed accordingly that the term "the depositary [...] of a treaty" should be replaced by the words "the State Party to the present Convention which is the depositary [...] of the treaty".

53. The proposed new article 22 *bis* also gave rise to problems of a practical kind. As the representative of Madagascar had said, on being asked to name the treaties applicable to Madagascar after its independence the French Government had had great difficulty in giving a precise answer, since constitutional rules relating to the application of treaties had varied in France according to the régime. If the predecessor State itself was not always able to reply with precision to the successor State's questions concerning the application of a treaty, how could the depositary State reply? A depositary State could not, therefore, be asked to inform the successor State of all the particulars relating to a treaty. The most that it could be asked to do was to supply the fullest possible information on the treaty.

54. He was consequently not opposed in principle to the idea contained in the proposed new article 22 *bis*, but felt, like the representative of Greece, that that idea should be expressed more loosely. It was not possible, in his view, to impose a strict obligation upon the depositary State, because the latter could not obtain precise information from the predecessor State. The depositary State should therefore be invited to supply the successor State with the fullest possible information, without, however, making a rigid legal rule to that effect which would involve the depositary State's responsibility. In that connexion, he agreed with the representatives of Madagascar and Algeria that the word "notify" which had a legal meaning that was too precise, should be replaced by a more general expression. Accordingly, he proposed

that article 22 *bis* should be replaced by the following text:

1. A State Party to the present Convention, when designated as the depositary of a treaty referred to in article 16, 16 *bis*, 17 and 18, shall endeavour to inform the newly independent State that the said treaty has been extended to the territory to which the succession of States relates and of all other particulars relating to the treaty.

2. The information referred to in paragraph 1 shall be communicated in writing as soon as possible.

55. Mrs. SLAMOVA (Czechoslovakia) said that, as some delegations had pointed out in connexion with article 16, the newly independent State might find itself in a dangerous situation if it was not provided with information on the multilateral treaties applicable to its territory. The proposed new article 22 *bis* therefore filled a lacuna by entrusting the depositary of multilateral treaties with a new task, consisting in informing the competent organs of a newly independent State of the fact that a treaty applied to the territory of that State and in providing them with all the necessary information on the subject of the treaty. Such information, relating in particular to the entry into force of the treaty and its signature or ratification by the predecessor State, was intended to help the newly independent State succeed to the multilateral treaties applicable to its territory.

56. The representative of Kenya had asked whether the Conference had the right to impose a new task on the depositary. In the Vienna Convention on the Law of Treaties, the list of functions of a depositary was not exhaustive. Article 77 stated that "the functions of a depositary [...] comprise in particular". The depositary could therefore have other functions besides those mentioned in article 77.

57. The representatives of the United Kingdom and Sierra Leone had said that the question dealt with in article 22 *bis* was already covered by the Vienna Convention. Nevertheless, the Vienna Convention did not discuss the matter in the context of the succession of States in respect of treaties. It even excluded cases of State succession. Article 73 stated that the provisions of the Convention "shall not prejudge any question that may arise in regard to a treaty from a succession of States".[8]

58. She was not opposed to the suggestions of the representatives of Italy, Spain, Greece and Algeria, which appeared extremely interesting. She was prepared to agree that article 22 *bis* should be sent to the Drafting Committee to be revised in the light of the ideas formulated in the course of the discussion.

59. The CHAIRMAN asked the Expert Consultant to indicate what was, in the present state of international law, the source of the obligations of the depositary State: was it the Convention of which the State was the depositary—but in that case the obligations of the depositary began before the entry into force of the Convention—or was it international customs? What indeed would be the relationship between a provision such as that proposed in article 22 *bis* and the existing sources of obligation of the depositary? Would the provision override the existing sources in the case of old treaties and in the case of new treaties?

60. Sir Francis VALLAT (Expert Consultant) said that he could not pretend it was easy to answer the questions put to him by the Chairman and recalled that, during the United Nations Conference on the Law of Treaties (1969), the United Kingdom delegation included among its members an expert in depositary practice, such was the complexity of the subject. With regard to the first of the two questions, it would be easy to say that the functions of the depositaries derived at the same time from international law, the conventions of which the States were depositaries and custom. Traditionally, the functions had developed with the practice of depositaries, and it was thus that formerly the United States of America and the United Kingdom in particular, and more recently the Secretary-General of the United Nations, had played a major part in the development of depositary functions. He drew attention to articles 76 and 77 of the Vienna Convention on the Law of Treaties, where the wording was very different from that of the other articles, since the provisions described facts instead of stating rules of an obligatory character, as was shown by the phrase "the functions of a depositary [...] comprise in particular", in paragraph 1 of article 77.

61. In that context he stressed the fundamental rule that it was necessary in the first place to look in the text of the treaty of which a State was a depositary in order to discover what functions the State was required to exercise. It might therefore be asked how far the convention could impose on a depositary of a treaty functions which were not expressly stipulated in the said treaty. On the other hand, provisions like paragraph 1 of article 77 of the Vienna Convention contributed towards the development of the rules of customary international law, as had been recognized by the International Court of Justice. It might be considered that the depositary functions described in article 77 were close to those which were incumbent on a depositary by virtue of customary law, in the absence of treaty provisions to that effect, but he found it difficult to give a firm reply on the subject.

62. Turning to the second question asked by the Chairman, which touched more closely on the proposal before the Committee, and recalling that the representative of Greece had asked how far the article under discussion would govern the depositary function of old treaties, he said that in his opinion it would be wrong to suppose that it only affected new treaties.

[8] *Ibid.*

63. He hoped that those general observations would facilitate the work of the Committee and put the problem in its proper perspective.

64. Mr. RAHHALI (Morocco) supported the idea of informing the successor State about the treaties which were in force in respect of its territory; but in order to obtain the desired result, it was necessary to take as a model the framework of the Vienna Convention on the Law of Treaties (1969) within which the depositary exercised his functions, and in particular subparagraph (*e*) of paragraph 1 of article 77 of that Convention. That suggestion might perhaps be sent to the Drafting Committee.

65. Mr. STUTTERHEIM (Netherlands) said he was in favour of the principle that a depositary must do everything possible to inform the newly independent State of all the facts concerning treaties which might be applicable to its territory, but that the discussion on article 22 *bis* had confirmed his impression that article 77 of the Vienna Convention on the Law of Treaties was a sufficiently clear statement of the obligations of the depositary. Moreover, the expression "all other particulars" in the proposed supplementary article was too broad and his delegation preferred the wording used in article 77, paragraph 1, subparagraphs (*a*) to (*f*) of the Vienna Convention. He did not share the opinion of the Czechoslovak delegation on the subject of article 18 and thought that that article and the proposed new article referred to different questions, since in the first case it was the depositary State which had to examine whether a particular treaty had been signed, for example, and in the second case it was the successor State which established whether a treaty which concerned it had been signed.

66. Mr. KOH (Singapore) thought that the idea on which the new article was based was good, but that it was difficult to draft a provision embodying that idea. For that reason, in order to lighten the burden on the depositary, he suggested the following wording:

> The depositary, if any, of a treaty to which articles 16, 17 and 18 apply, shall, as far as may be practicable, inform the newly independent State that the said treaty has been previously extended to the territory to which the succession of States relates, as well as of all other relevant particulars relating to the treaty.

67. Mr. MBACKÉ (Senegal) considered that the French amendment had the merit of correcting certain defects in the proposed new article 22 *bis*, notably by making it clear that only States parties to the Convention which were depositaries of treaties were affected by the article. On the other hand, substituting the expression "endeavour to inform" for the word "notify" was tantamount to replacing one evil by another, an obligation of result by an obligation of means, when it should be left to the State party to the treaty to judge what type of obligation was incumbent on it. If, however, the provision was transferred to the preamble, the word "endeavour" would not involve such consequences and would carry even more weight. The convention would be expressing a wish instead of stipulating an equivocal obligation.

68. Mr. SAKO (Ivory Coast) supported the proposed new article 22 *bis* but thought that the Drafting Committee should be asked to revise the wording. His delegation would not be able to support a text which did not contain a minimum obligation for the depositary State.

69. Mr. ROSENSTOCK (United States of America) recalled that he had already suggested that the question should be sent to the Drafting Committee, to which the text of any proposal of an editorial nature could be submitted in writing. He formally moved the closure of the debate.

70. The CHAIRMAN read rule 24 of the rules of procedure (A/CONF.80/8), under the terms of which "permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall be immediately put to the vote".

71. Mr. MARESCA (Italy) regretted having to oppose the motion of closure of the debate, but thought that the procedure was over-hasty and that members of the Committee should be allowed time to develop their ideas.

The motion of closure of the debate was adopted by 31 votes to 6, with 34 abstentions.

72. The CHAIRMAN pointed out that the Committee had to take a decision on the oral amendment presented by the French delegation, since, although the Drafting Committee could study amendments to article 22 *bis* of an editorial nature, it could not be required to examine an amendment which, as the author himself had recognized, concerned the substance of the proposed new article.

73. Mr. ROSENSTOCK (United States of America) considered it preferable to send all the amendments to article 22 *bis* to the Drafting Committee, which the Committee might exceptionally allow fairly wide room for manœuvre. In that way, it might consider whether the provision in question should be placed in the preamble, in the main body of the convention or in a separate resolution.

74. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that, as a sponsor of article 22 *bis*, he had no objection to referring all the amendments, including the French amendment, to the Drafting Committee so that it could draw up a generally acceptable text.

75. Mr. RANJEVA (Madagascar) said that it would be sufficient for the Committee to decide on the nature of the obligations of the depositary, obligations of result or obligations of means, in order to solve

the problem. The Committee could then send all the amendments to the Drafting Committee.

76. Mr. ROSENSTOCK (United States of America) again drew the attention of Committee members to his proposal that all amendments to article 22 *bis* should be sent to the Drafting Committee.

77. Mr. MARESCA (Italy) said that however improvised it had been, the French amendment did not affect only the legal nature of the obligation imposed on the depositary, since it considerably limited the scope of the article by making clear that it only applied to depositary States which were parties to the convention. In the view of his delegation, the Committee could not confine itself to merely communicating the amendment to the Drafting Committee.

78. Mr. KATEKA (United Republic of Tanzania) pointed out that the debate had been closed and that the members of the Committee could therefore no longer express opinions concerning the substance of the French amendment.

79. Mr. YAÑEZ-BARNUEVO (Spain) considered that Singapore's amendment was valuable since it seemed to give more accurate expression to the ideas put forward in the course of the debate on the French amendment. Perhaps the Committee could look upon it as a compromise solution in view of the fact that it went some way towards bridging the gap between the obligation of result and the obligation of means which had been referred to.

80. Mr. SNEGIREV (Union of Soviet Socialist Republics) recalled that the authors of article 22 *bis* had agreed that all the amendments to their proposals should be sent to the Drafting Committee.

81. Mr. MUSEUX (France) said that, if he had understood correctly, the sponsors of article 22 *bis* had agreed that the amendment he had proposed be sent to the Drafting Committee. The best solution would therefore be not to vote on the amendment, although it was not entirely of an editorial nature. In order to get out of the difficulty, he proposed that the sponsors of the supplementary article and those of the amendments should consult with a view to drawing up a common text. If the Committee decided to put the matter to the vote, his delegation would withdraw its amendment in favour of Singapore's amendment. His amendment had been based on the unrevised version of article 22 *bis* and if the Committee put the amendment to the vote, it would be taking a decision on an inaccurate text.

82. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to ask the sponsors of article 22 *bis* and the amendments to that article to consult with a view to submitting a common text, which would be put to the vote on Thursday, 28 April.

It was so decided.[9]

ARTICLE 23 (Conditions under which a treaty is considered as being in force in the case of a succession of States) *and*

ARTICLE 24 (The position as between the predecessor State and the newly independent State)[10]

83. Mr. TORRES-BERNARDEZ (Secretary of the Committee) drew attention to a printing error in the English text of article 23 (A/CONF.80/WP.1), in which the words "was in force in respect of the territory to which the succession of States" appeared twice.

84. The CHAIRMAN invited the delegation of Finland to introduce its amendments to articles 23 and 24 (A/CONF.80/C.1/L.30) and the delegation of Australia its amendment to article 23 (A/CONF.80/C.1/L.33).

85. Mr. FREY (Finland) said that his delegation's amendment to article 23 combined the provisions of articles 23 and 24 of the International Law Commission's text; under the amendment, draft article 24 would become paragraph 3 of article 23, and the words "under article 23" in the Commission's text for article 24 had accordingly been replaced by the words "under this article". That change was of a purely technical nature and would not affect the actual contents of the proposal made by the International Law Commission.

86. The Finnish proposal concerning paragraph 1, subparagraph (*b*) of article 23 involved a minor substantive amendment, namely the addition of the words "by applying the treaty or otherwise" before "by reason of their conduct they are to be considered as having so agreed". While the International Law Commission's formulation for that subparagraph could be considered implicitly to include the application of a treaty, his delegation believed more explicit wording to be preferable to an implication that might in certain circumstances raise difficulties of interpretation. The application of a treaty was the primary, although by no means the only, form of conduct from which a bilateral treaty could be inferred to be in force. The word "otherwise" might cover a partial observation of the terms of a bilateral treaty by the successor State, as well as several other measures taken by that State. In his delegation's view, there was sufficient reason to mention the actual application of a treaty as a vital, although not exclusive, factor in defining the attitude of the successor State.

[9] For resumption of the discussion of article 22 *bis*, see 31st meeting, paras. 43-54.

[10] The following amendments were submitted: Finland (to articles 23 and 24), A/CONF.80/C.1/L.30, and Australia (to article 23), A/CONF.80/C.1/L.33.

87. Mr. GILCHRIST (Australia) said that his delegation wished to withdraw its amendment to article 23, but would nevertheless like to explain why it had put that proposal forward. The amendment had been drafted in the light of Australia's experience as a successor State to the United Kingdom and as a predecessor State in respect of the territories now constituting the newly independent States of Nauru and Papua New Guinea, experience which his delegation had considered to be of general relevance to succession problems; it had had in mind, in particular, the administrative convenience for a newly independent State of not having to take formal steps to confirm its status and the utility of providing relief, where practicable, from administrative burdens in the solution of its treaty succession problems.

88. It had, however, become apparent that a rule such as that proposed in the Australian amendment would run counter to the body of opinion which appeared disinclined to tamper with the International Law Commission's formulation of the "clean slate" principle. Moreover, it was possible that Austrialia's experience in that regard had already become anachronistic. Finally, upon further reflection, his delegation had wondered whether its amendment was in fact fully consistent with some other articles, such as article 10.

89. Mr. MANGAL (Afghanistan) said that his delegation was of the opinion that a bilateral treaty validly concluded between sovereign and fully independent States which was in force in respect of the territory to which a succession of States related could be considered as being in force between a newly independent State and the other State party only if that other party expressly so agreed and only if that party had not questioned the validity of the treaty, and hence its continuance in force, prior to the date of succession.

90. The basic principle underlying article 23 was that the newly independent State should begin its international life free of any general obligation to maintain in force treaties concluded by its predecessor. The legal nexus which, in the case of multilateral treaties, generated an actual right for newly independent States to establish themselves as parties thereto did not exist in the case of bilateral treaties, where the respective rights and obligations of the parties were fully identified and no succession could take place in the absence of mutual agreement. His delegation believed that there was no generally accepted rule of continuity regarding bilateral treaties concluded by a predecessor State. The key element in article 23 was the statement that a bilateral treaty was considered as being in force between a newly independent State and the other State party when they expressly so agreed.

91. His delegation had certain misgivings concerning article 1, subparagraph (*b*) of the International Law Commission's draft, which was vague and lacking in clarity and might lead to problems of interpretation and application. His delegation would prefer that provision to be deleted. Since, however, article 23 dealt only with lawful bilateral treaties, in accordance with draft articles 6 and 13, and was based on agreement between the parties and recognized succession on the basis of the provisions of treaties, it would not insist on that suggestion.

92. As his delegation understood it, article 24 did not cover cases in which a treaty contained clear provisions for its termination by either party. Such treaties would be considered as having lapsed if a contracting party, in accordance with such provisions and with other applicable principles concerning the validity of treaties, had declared the treaty to be terminated. No bilateral treaty already considered as terminated by one party could be considered as being in force in relations between a predecessor State and a newly independent State.

93. Mr. RANJEVA (Madagascar) said that he had some misgivings concerning article 23, paragraph 1, subparagraph (*b*). It was advisable to exercise even greater caution in matters relating to succession of States than in the case of treaties in general. Consequently, when referring to the question of "conduct", it might be advisable, in the light of the "clean slate" principle, to leave no room for any possible doubt concerning the desire of a successor State to maintain in force bilateral treaties concluded by its predecessor. In his opinion, subparagraph (*b*) was redundant and even dangerous. If, nevertheless, the Committee wished to retain the International Law Commission's text basically in its present form, he would like the notion of "conduct" to be clarified by the addition of a qualifying adjective such as "unequivocal" or "implicit".

94. Mr. TREVIRANUS (Federal Republic of Germany) said that, in the view of his delegation, article 23 was highly commendable, based as it was on the principle of consent underlying the whole law of treaties and especially the law relating to succession of States. Under the International Law Commission's text, the newly independent State and the other State party to a bilateral treaty could either agree to maintain that treaty in force, with or without modification, or refuse to do so. That freedom of choice reflected the personal relations between the parties to a bilateral treaty, the object of which was to recognize the mutual rights and obligations of the parties by reference to their individual relationship. The International Law Commission had been wise to lay down that rule, notwithstanding the fact that, in the practice of States, there was marked tendency towards continuity in regard to many categories of bilateral treaties. The recognition of the essentially voluntary nature of succession in respect of bilateral treaties also had implications for other parts of the draft convention and for the other State party to a bilateral treaty.

95. He felt that the expression "is considered as being in force" in the title and text of article 23 left room for improvement. First, if, under paragraph 1, subparagraph (*a*) of that article, two States expressly agreed to the continuance in force of a bilateral treaty, then the treaty *was* in force rather than considered as being in force. Moreover, that formula did not adequately reflect the legal character of succession in regard to bilateral treaties. Furthermore, it might be inferred that, instead of an existing treaty being maintained in force a new bilateral agreement was required; it would then probably be necessary for one or both parties to go through the process of ratification.

96. In conclusion, he believed that the drafting of articles 23 and 24 could also be improved by the adoption of the Finnish amendments.

97. Mr. MBACKÉ (Senegal) said that his delegation had a number of reservations concerning paragraph 1, subparagraph (*b*) of article 23. First, it should not be forgotten that the successor State had been subject to the application of the bilateral treaty prior to the date of its independence and might well continue to be influenced by ingrained habits for some time after that date. Secondly, there was a potential constitutional problem in that the *de jure* constitutional authorities of the newly independent State found themselves confronted with a bilateral treaty which was already, *de facto,* in force but on which they had not pronounced themselves. Lastly, who was to determine whether the conduct of a State was such as to constitute agreement to the continuance in force of a treaty? That matter could clearly not be left to the other contracting party, which would then be acting as both judge and jury.

98. Mr. YAÑEZ-BARNUEVO (Spain) said that article 23 was based on the fundamental principle underlying the draft of the International Law Commission—namely, the "clean slate" principle. Under that provision, a bilateral treaty which, at the date of a succession of States, was in force in respect of the territory to which that succession related, would be maintained in force only by agreement between the newly independent State and the other State party. The principle of voluntary consent was, in his view, reflected in both subparagraph (*a*) and subparagraph (*b*) of paragraph 1 of article 23. In effect, those provisions were two different forms of requiring the consent of both parties for a treaty to be maintained in force. While recognizing that subparagraph (*b*) might give rise to doubt in the minds of some delegations, he felt that the substantive element in subparagraph (*b*) was not so much "conduct" as agreement. Of course, such agreement could be inferred only from certain types of conduct having specific legal characteristics, including a common will to agree on the continuity of a treaty relationship. His delegation had no objection to the International Law Commission's text, although it would not be against the addition to subparagraph (*b*) proposed in the Finnish amendment in order to make it clear that the "conduct" concerned related fundamentally to the application of the treaty. It might also be pointed out that the International Law Commission, in paragraph (14) of its commentary to article 23 (A/CONF.80/4, p. 79), had itself recognized that difficulty might arise in the not infrequent case where there was no express agreement. On the other hand, his delegation was not in favour of deleting article 24 as such, since that article referred to a situation which was legally quite distinct from that covered by article 23. Article 24 should therefore be maintained as a separate provision in the draft convention.

99. His delegation was somewhat perplexed by the use of the words "in conformity with provisions of the treaty" in article 23, paragraph 1. That phrase had not been explained in the Commission's commentary, and had indeed been omitted from the summarized form of article 23, paragraph 1, given in paragraph (19) of the commentary (*ibid.* p. 80). The expression would appear to be unnecessary. Another drafting point which he wished to raise was the use of the present tense in the English text of article 23; instead of saying "is considered" and "applies", it would be preferable to use the future tense, as was done in the Spanish text of article 23 and, incidentally, in the English text of article 22.

100. Mr. SCOTLAND (Guyana) said it appeared to his delegation that article 23 of the International Law Commission's draft captured in reasonable measure the situation in bilateral treaty relations between the successor State and the other State party. Subparagraph (*a*) of paragraph 1 acknowledged the principle of the consent of the newly independent State to become a party to the bilateral treaty, a principle which must be seen as fundamental to the continuation and indeed the very existence of any bilateral treaty relationship.

101. Apart from the references in the International Law Commission's commentary on that article to the practice of newly independent States in continuing certain bilateral treaty relationships formerly created by a predecessor State with the other State party, there was no other form of State practice related by the commentary from which the consent of the State to the continuance of the treaty could be clearly inferred. Accordingly, subparagraph (*b*) of article 1 was acceptable to his delegation, subject to the incorporation of certain drafting amendments for the sake of greater clarity. Conduct by the newly independent State within the ambit of the treaty which ensured the continuance of that treaty offered unmistakable evidence of that State's desire for the treaty relationship to continue. Such conduct was exact, clear and certain and in no way left room for doubt. In the light of those considerations, the Finnish proposal to insert the words "by applying the treaty or otherwise" at the start of subparagraph (*b*) did not seem to his delegation to pay due regard to the cardinal principle of consent. He had hoped to receive from

the representative of Finland some illustration of the type of conduct from which consent to the continuance of a bilateral treaty could be imputed, other than that referred to in the provisions of the Commission's draft. That representative had referred to the possibility of partial observation of the terms of the treaty by the successor State and possible additional measures taken by that State. He would submit that a partial application of a bilateral treaty was still an application of that treaty, however limited, while the Finnish representative's second point was too vague for comment. Therefore, the Finnish amendment was not acceptable to his delegation.

102. He had no objection to the Finnish proposal to incorporate article 24 in article 23 in the form of a new paragraph 3, for article 23 related to the conditions under which a treaty was considered as being in force in the case of a succession of States. However, the text spoke of three possible parties, the newly independent State, the other State party and the predecessor State, but the relations between the predecessor State and the newly independent State had not yet been determined by the terms of the text itself. Again, the wording gave the impression that the treaty in question was a multilateral treaty, whereas it was evident from paragraph (3) of the International Law Commission's commentary on article 23 (*ibid.*, p. 77) that two separate bilateral relationships were involved, namely, between the successor State and the other State party, and between the predecessor State and the other State party. Hence, retention of the provision in its present form, whether as a new paragraph in article 23 or as a separate article, might suggest that it had been misplaced in a section of the draft which dealt with bilateral treaties. Nevertheless, the matter could, in his opinion, be dealt with by the Drafting Committee.

103. Mr. YASSEEN (United Arab Emirates) said that his delegation fully agreed with the text of article 23 as prepared by the International Law Commission. Consent could be expressed other than by specific agreement and, hence, paragraph 1, subparagraph (*b*) spoke of conduct, which did not signify an isolated act on the part of the newly independent State or the other State party but a series of acts carried out with full knowledge of the facts. Such conduct had to establish the consent of the two parties. In his view, paragraph 1, subparagraph (*b*) was carefully worded in order to safeguard the interests of newly independent States, for it dealt expressly with conduct that must reflect the State's agreement to continue to be bound by the treaty in question. The principle of national sovereignty enabled a State to express consent in a simplified manner, in other words, by its conduct, which was a reflection of its will.

104. The Finnish proposal was of a drafting nature, but was not perhaps sufficiently precise. The words "by applying the treaty or otherwise by reason of their conduct" meant that application of the treaty was not considered as conduct. However, in his opinion, the best evidence of a State's conduct was its application of the treaty—again, as a series of applications and not merely application in one particular instance. The Finnish amendment could be more clearly worded to read: "by reason of their conduct and particularly by applying the treaty", but that matter might well be referred to the Drafting Committee.

105. Similarly, the Drafting Committee could discuss the question of whether or not it would be preferable to retain articles 23 and 24 separately or to incorporate article 24 in article 23 in the form of a new paragraph.

106. Mr. MARESCA (Italy) said that the purpose of the Finnish proposal concerning article 23, paragraph 1, subparagraph (*b*) was to provide greater opportunity for ascertaining the intentions of a State with regard to a bilateral treaty, in other words, to determine whether or not the State in question consented to continued application of the treaty. International procedures were sometimes based on a State's actions and obviously its conduct could afford evidence of its consent—for example, when a State enacted a domestic law that took into account the provisions of an international treaty to which the State in question was a party. Consequently, his delegation experienced no great difficulties in merging the phrase contained in the International Law Commission's text: "By reason of their conduct" with the phrase employed in the Finnish amendment: "by applying the treaty".

107. While it was true that article 24 related essentially to article 23, it was none the less imperative to distinguish between relations with the predecessor State and relations with States other than the predecessor State. Therefore, it would be preferable to retain article 24 as a separate provision, in the form proposed by the International Law Commission.

108. Mr. MIRCEA (Romania) accepted article 23 in principle but thought that, compared with the other articles, the words "is considered as being in force" in paragraph 1 established a very strict rule, even for bilateral treaties. The Drafting Committee should bring the wording into alignment with the general scheme of the draft convention.

109. As to paragraph 1, subparagraph (*b*), it was difficult to determine whether a State's conduct reflected consent to provisional application of the treaty and, if it did, for what duration. While he could accept the idea that a State's conduct might validly indicate consent over a certain period, in other words, for the purposes of provisional application of the treaty, it was nevertheless essential to secure specific collateral agreement between the States if the treaty was to continue to apply. The Drafting Committee should therefore examine the wording of paragraph 1, subparagraph (*b*) and also of paragraph 2, which dealt

primarily with situations regarding collateral agreement by reason of conduct.

110. It might well be useful to establish a wider criterion than conduct alone. In the case of multilateral treaties, notification of succession, a process of signature and ratification, was required, whereas the conduct of a newly independent State was regarded as the equivalent of such notification for the purposes of bilateral treaties. He wished to reiterate that such an approach was acceptable for a certain period but, thereafter, written evidence of the newly independent State's agreement should be stipulated.

111. Miss WILMSHURST (United Kingdom) questioned the meaning of the words "in conformity with the provisions of the treaty" in article 23, paragraph 1, a matter that had been raised by her Government as far back as 1972. In its commentary the International Law Commission indicated that those words indicated that the treaty was in force definitively, as opposed to provisionally. If that was so, the wording was satisfactory, but it was not fully apparent from the phrase that the intention was to distinguish between definitive application and provisional application. Provisional application was in any case dealt with in part III, section 4. Indeed, she wondered whether the phrase was necessary, but would not press for its deletion. The best course would be for the Drafting Committee to consider whether article 23 was drafted in such a way as to indicate that it dealt with definitive application of a bilateral treaty.

112. Mr. KRISHNADASAN (Swaziland) approved article 23 as prepared by the International Law Commission and, like the representative of the United Arab Emirates, considered that paragraph 1, subparagraph (*b*) fully covered the questions of consent and manifestation of consent from the point of view of international law.

113. It appeared from the comments of Governments (A/CONF.80/5) and from the Committee's discussions that his delegation was the only one to take the view that article 24 was self-evident and unnecessary. The words "is not by reason only of that fact to be considered as in force also in the relations between the predecessor State and the newly independent State" seemed to imply that there was some other manner in which a bilateral treaty could be applicable between the predecessor State and the successor State. However, his delegation would not insist that the article should be deleted.

114. Mr. EUSTATHIADES (Greece) noted that the concept of consent or tacit agreement was already clearly embodied in paragraph 1, subparagraph (*b*) of article 23. The Finnish amendment used the words "by applying the treaty", an idea that was immediately eclipsed by the words "or otherwise by reason of their conduct". It was true that the idea could be clarified in the form of words suggested by the representative of the United Arab Emirates, but there was a large range of situations in which it would be very difficult to infer whether or not a State's conduct demonstrated its will to maintain the treaty in force. Hence he preferred the Commission's text but thought that, if it was to be retained, the Drafting Committee might well consider the possibility of using in the French version the word *"conduite"*, employed in article 45 of the Vienna Convention on the Law of Treaties, instead of the word *"comportement"*.

115. Mr. FREY (Finland) said that the form of words suggested by the representative of the United Arab Emirates was entirely acceptable, for it was wholly in keeping with his own delegation's purpose in submitting the amendment to paragraph 1, subparagraph (*b*).

116. The CHAIRMAN said that votes, if any, on articles 23 and 24 would be taken on the understanding that the Drafting Committee would consider the questions of the wording of article 23, paragraph 1, subparagraph (*b*) and the incorporation of article 24 in article 23.

At the request of the representative of Madagascar, a separate vote was taken on article 23, paragraph 1, subparagraph (b).

Article 23, paragraph 1, subparagraph (b) was adopted by 56 votes to 6, with 12 abstentions.

At the request of the representative of France, a vote was taken on article 24.

Article 24 was adopted by 57 votes to 8, with 7 abstentions.

117. Mr. MUSEUX (France) said that his delegation had voted against the adoption of article 24 not on grounds of substance but because the article seemed self-evident and pointless. Moreover, it had been necessary to draw the attention of the Committee to the fact that article 24 dealt with situations that did not exist, whereas the draft should deal with realities, in other words, the situation regarding predecessor States and third States.

118. Mr. MUDHO (Kenya) said that article 24 was a statement of the obvious, but his delegation which had abstained, had not experienced sufficient objections to warrant a vote against adoption of the text.

119. Mr. HELLNERS (Sweden) said that his delegation had voted against the adoption of article 24 for the same reasons as those explained by the representative of France.

The meeting rose at 9 p.m.