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Summary reocrd of the 1161st meeting

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75. In paragraph 2 (*a*), he had used the words "the treaty comes into force automatically" on the assumption that the treaty would be governed by the rules of general international law. Mr. Ushakov might think the "clean-slate" principle should apply in all cases of decolonization, but many new States, such as Tanganyika, had considered some treaties as binding on them under general international law. He had therefore felt bound to include such a provision until the Commission might decide otherwise.

76. With regard to paragraph 2 (*b*), in some cases the application of a treaty in relation to the successor State might indeed be incompatible with its object and purpose. For example, the United Kingdom had extended the European Convention on Human Rights to many of its dependent territories prior to their independence. Some of those territories had expressed their wish to continue to be bound by that Convention after attaining independence, but that had not been possible because the Convention was limited to members of the Council of Europe.

77. Lastly, with regard to paragraph 3, it had seemed to him necessary to list all the different situations in which the provisional application of a treaty would be terminated. It was possible, however, that the list might be reduced at a later stage.

78. Mr. THIAM said he agreed with the Special Rapporteur on the substance of the article. It was quite certain that a new State could only be committed by its own will and that if it wished to be bound by a treaty it had to express that will. The principle of article 4 was therefore acceptable.

79. It was well to state the rule of provisional application in paragraph 2. In most cases new States needed time for reflection before deciding whether to regard themselves as bound by a treaty or to withdraw from it.

80. With regard to the exception provided for in paragraph 2 (*a*), it should be stated clearly which rules of general international law could prevent the provisional application of a treaty; if those rules were valid, it was difficult to see how a treaty could stand against them.

81. The presumption on which paragraph 3 (*d*) was based was too broad, and difficult to apply in practice. It would be better either to amend that provision or to delete it.

82. Lastly, even if the scope of the draft was to be extended to cover new States other than newly independent States, the fact remained that the interests of States springing from decolonization should predominate, in accordance with the Special Rapporteur's first intention.

83. Mr. REUTER said he could accept article 4 provisionally, but noted that it raised serious problems. The first was that of its scope. The article was included among the general provisions, but even if the words "prior to independence" were deleted it was open to question whether, as it stood, it could be applied to a merger of States. He was not expressing an opinion, but a doubt.

84. The article would be clearer and more correct if the title were "Provisional application of the rules of a treaty". For although it certainly dealt with a problem of provisional application, it was not the original treaty, but its rules that were provisionally applied. From the viewpoint adopted by the Commission there was no application of the original treaty; what was applied was an entirely new agreement, a collateral agreement, resulting from an offer and its acceptance.

85. That being so, some substantial drafting changes were inevitable. It was impossible to speak of maintaining the treaty in the proper sense of the term; it was its substantive rules, and perhaps some others, that it was decided to continue to apply provisionally. The successor State did not become provisionally a party to the treaty, but to a new agreement, and that raised all sorts of problems, such as whether to retain or to delete paragraph 3 (*e*). Indeed, in that instance, it was not stated that the rule on the termination of the original treaty would be among those which were provisionally maintained.

86. It was often forgotten that the Vienna Convention on the Law of Treaties opened up the prospect of collateral agreements, as the Special Rapporteur had very clearly explained at the time, in connexion with the effects of treaties for third parties. The Commission would perhaps see later that, in the case of multilateral treaties between States, international organizations could, without becoming parties to the treaty, decide by a collateral agreement concluded between themselves and the parties, to apply certain substantive rules contained in the treaty.

87. He reserved his opinion on the drafting of the article, which would have to be reconsidered when the Commission took up article 7, on the right of a new State to notify its succession in respect of multilateral treaties.

88. The question of rights and obligations, which Mr. Bedjaoui and Mr. Ago had raised in connexion with article 3, was extremely complex. There was on the one hand the treaty, that was to say the complete mechanism, to which there was never any succession, and on the other hand the substantive rules, which might be the subject of other agreements. Was not that the same idea as the rights and obligations referred to by Mr. Bedjaoui and Mr. Ago? In their view, there was the treaty, which gave rise to rights and obligations, which in turn gave rise to situations. That was a very serious fundamental problem, which was bound to lead to much controversy.

The meeting rose at 1.5 p.m.

1161st MEETING

Thursday, 18 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(continued)

ARTICLE 4 (Unilateral declaration by a successor State) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 4 (A/CN.4/214/Add.2).

2. Mr. NAGENDRA SINGH said that, in view of the doubts expressed by Mr. Ushakov and Mr. Reuter about the advisability of including a clause on provisional unilateral declaration on treaties, he doubted whether article 4 was really necessary. The Commission would have to deal with non-provisional declaration as well, and, if it did so, provisional declaration could be referred to in the substantive formulation and a separate article on the provisional aspect could be avoided. It was true that there was State practice of provisional declaration, but that was not a permanent feature requiring a separate article in the Commission's codification. The Special Rapporteur might like to examine that matter.

3. Mr. BEDJAOUI said that article 4 fitted in logically with the preceding articles, especially article 3, first, from the point of view of finding rules applicable to cases of decolonization and, secondly, because its purpose was to regulate the effects of a succession for third States.

4. As to the question raised by Mr. Ushakov at the previous meeting, he thought it was indeed the subsequent articles of the draft, not the subsequent paragraphs of the article, which were referred to at the end of paragraph 1. It would be incomprehensible for paragraph 1, which dealt with the maintenance in force of treaties, to refer to the subsequent paragraphs, which dealt with their provisional application or termination.

5. The Special Rapporteur had in fact approached the whole question from the standpoint of the problems of succession raised by decolonization. But there were grounds for hoping that, after the necessary drafting amendments, article 4 could cover, as it should, other succession situations, such as mergers. The Commission should consider that question.

6. With regard to effects for third parties, the Commission should go further and ask what happened to treaty relations between the successor State and the predecessor State, for that was not self-evident, but would be seen in other articles of the draft. Article 4 dealt with two cases: that of a unilateral declaration by the successor State, added to a devolution agreement, and that of a declaration independent of any devolution agreement, the question about which was whether it could affect the predecessor State and finally settle the situation between the predecessor State and the successor State. In the former case, there might be sub-groups, such as a declaration concerning a treaty not covered by the devolution agreement.

7. The next question was what was a third State. A state could be a third State in relation to a treaty, but then it would be article 3, on devolution, that would be concerned. Where there was no devolution agreement, but only a unilateral declaration, it was hard to see what "third State" meant. It would be better to drop the word "third", so that the use of the word "State" alone would include the predecessor State.

8. To judge from the drafting, at least, article 4 appeared to exclude two things: first, all multilateral treaties, since it provided that the successor State communicated its declaration to a third State and not to a State or an international organization which was the depositary of a multilateral treaty; and secondly, unilateral declarations not communicated to a third State because of their general character, such as those made on accession to independence.

9. Like Mr. Ushakov, he had been struck by the apparent contradiction in paragraph 2 (*b*), but his doubts had been partly dispelled by the Special Rapporteur's explanations.

10. It should be remembered that treaties were not always applied automatically to all dependent territories. Some of them contained colonial clauses which did not solve all the problems; some underwent subsequent amendment by means of protocols which might or might not take the colonial clauses into account. Hence it was often difficult to know whether a treaty was in fact applied to a particular territory, so that lists of treaties for which a unilateral declaration would be appropriate had been drawn up. A declaration made unilaterally by a successor State expressed its consent to be bound by the instrument in questions, but was also the prelude to the novation of the agreement, which, legally speaking, was slightly different from the previous one.

11. He was in favour of keeping to the general line chosen by the Special Rapporteur and approved of article 4 provisionally.

12. The CHAIRMAN said it might help if the Special Rapporteur would clarify the point just raised by Mr. Bedjaoui about the application of article 4 to multilateral treaties.

13. Sir Humphrey WALDOCK (Special Rapporteur) said that the application of article 4 to multilateral treaties raised the question whether the article should cover more thoroughly unilateral declarations which were not of a provisional nature. The cases which the article primarily covered at present were those in which a successor State offered to continue to apply a multilateral treaty provisionally on a basis of reciprocity. Although in such cases the unilateral declaration was formally communicated to the Secretary-General, it was, in effect, only an offer to continue to apply certain treaties as a temporary expedient.

14. Newly independent States seemed, indeed, to have recognized that it would not be possible for them to participate in a multilateral treaty, as such, on a provisional basis. Multilateral treaties did not normally contemplate participation otherwise than on a definitive basis, and provisional participation would therefore require the consent of every party to the treaty. At any

[1] For text see previous meeting, para. 64.

rate, the multilateral declarations of new States found in practice did not claim or offer provisional participation in multilateral treaties as such. They offered merely to apply multilateral treaties provisionally on a basis of reciprocity vis-à-vis any individual party willing to do so. Even if a multilateral declaration were couched in terms expressing the will of the State to be considered as a party to its predecessor's multilateral treaties, it was doubtful whether the declaration should be regarded as a notification of succession to all those treaties. As in the case of a devolution agreement, a depositary would be likely to require a specific indication of the State's will with respect to the particular treaty in question.

15. Mr. YASSEEN said he approved of the philosophy underlying article 4, which was intended to bring out the preponderant part played by the will of the successor State in determining its future with respect to treaties.

16. Devolution agreements were not always essential, since a successor State could itself express its intentions without the assistance of the predecessor State. Such agreements were useful in matters other than treaties, where there was a bilateral relationship, but for treaties, where other States were involved, the method of unilateral declaration was more appropriate. A devolution agreement might make the future of the successor State depend on the will of the predecessor State, whereas a unilateral declaration was an act of the successor State alone.

17. Its provisional nature also added to the importance of a unilateral declaration. The first concern must be to ensure the continuity of international life, but that ought to be *sub beneficio inventarii* for the successor State. The time allowed for reflection enabled the successor State, first, to become truly independent and, secondly, to consider which treaties it wished to maintain or to reject. The new State thus remained master of the situation.

18. He would not go into the very thorny question whether the renewed instrument was the former treaty or a new and slightly different instrument. That distinction depended on the will of the parties.

19. Multilateral treaties differed considerably from bilateral treaties, in that they concerned the international community and were intended to serve the general international interest. He was in favour of making participation in multilateral treaties easier and therefore thought that questions of succession to such treaties should be dealt with in another article.

20. Subject to drafting changes, he supported article 4.

21. Mr. QUENTIN-BAXTER said that article 4 seemed to contain two different ideas: that of ensuring that a unilateral declaration should not disturb the normal operation of the rules in the draft articles and that of dealing with the provisional application of treaties. He himself was inclined to agree with those who considered that the article should be confined to the provisional application of treaties.

22. He agreed with Mr. Yasseen that the purpose and value of article 4 was to emphasize the role of the intention of the successor State. At the same time, however, the thought the unilateral declaration, like the devolution agreement, had its less attractive side, since it had begun as a rather hasty expedient resorted to by a new State which did not wish either to lose any possible benefit to which it might be entitled under old treaties, or to diminish its sovereignty in any way. The provisional application of treaties was essentially a crutch designed to help new States faced with that dilemma. The Commission would have to decide whether that device should be improved or whether it could be done away with altogether.

23. One problem was that of reconciling the concepts of novation and transmissibility. That problem—not easily explained to the laymen governing new States, who would probably be confronted with many more practical problems—could be avoided by the simple rule that the treaties of the predecessor State were voidable at the option of the successor State.

24. Another problem in depending upon a provisional application procedure was its sheer unreliability. It could be assumed that in general the predecessor State would do its best to inform the successor State about what treaties were in force at the time, but there was no guarantee that the list would be complete, and the new State would have to decide, with a false sense of urgency, which treaties it would adopt and which it would reject.

25. When Western Samoa had gained its independence from New Zealand, there had been a devolution agreement, because that had been the fashion of the time. The purpose, however, had been not so much to bind the parties as to put Western Samoa on notice of the treaties to which it could claim succession. The Government of Western Samoa had slowly made a selection of those treaties which it wished to remain in force, and there had been no instance in which another State had questioned its wishes.

26. He agreed with the Special Rapporteur that the Secretary General received unilateral declarations not in his capacity as a depositary, but simply as an intermediary for disseminating information. He saw no reason why that practice should not continue, since, as Mr. Yasseen had pointed out, there were many cases in which a new State would wish to inform the world that it regarded an old treaty as still provisionally in force, though it had not yet decided whether to accept it permanently. He did not, however, think that the third State should be compelled to respond to the notification within a specific time-limit.

27. To sum up, while agreeing that new States should be able to declare their intentions if they so desired, he believed that article 4, if strictly applied in its present form, could give rise to grave difficulties of both a doctrinal and a practical kind.

28. Mr. TAMMES said that while article 3 was mainly designed to protect the interests of third States, article 4 placed greater emphasis on those of new States, and on the general concern of the international community about the continuity of treaty law. The two articles were therefore complementary and helped to restore the balance of the general provisions of the draft.

29. He fully approved of the progressive and open spirit in which article 4 was drafted and hoped that it would

retain the general nature which justified its place in Part I. It should be remembered that there had been cases of the emergence of new States in other ways than by the process of decolonization, as was evidenced by the merger of two new States in the United Republic of Tanzania.

30. He also agreed with the approach adopted by the Special Rapporteur in paragraph 2, which was an adaptation of article 25 of the Vienna Convention on the Law of Treaties.[2]

31. As Mr. Quentin-Baxter had pointed out, recent practice showed that new States needed a reasonable period for reflection before definitely undertaking to acknowledge an existing treaty. The time-limit provided for in paragraph 2 (*c*) was justified by the reasons given by the Special Rapporteur in paragraph (23) of his commentary.[3]

32. The Special Rapporteur had invited the Commission to express its views on the contents of paragraph 2 (*a*): "The treaty comes into force automatically as between the States concerned under general international law independently of the declaration". He (Mr. Tammes) thought that the more work the Commission did in codifying international law in treaty form, the less there would remain for it to do under general international law independently of treaties. The following passage from the judgment of the International Court of Justice in the North Sea Continental Shelf cases illustrated his point:

> "In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way".[4]

33. What would finally become automatically binding in an ideal world would be certain general rules of logic and certain moral rules, but it was impossible to separate such rules from the practical, administrative and organizational rules contained in conventions, which were not of a kind that could come into force automatically. The Special Rapporteur had himself given, with reference to paragraph 2 (*b*), the example of the European Convention on Human Rights.

34. Mr. HAMBRO said he agreed with Mr. Yasseen about the general philosophy behind article 4. Those ideas had been clearly and constructively brought out by the Special Rapporteur, and if the Commission proposed to codify the rules on succession of States in respect of treaties, it would undoubtedly be wrong to ignore the widespread practice of unilateral declarations.

35. On the question whether article 4 related only to cases of decolonization or covered all kinds of succession, it was clear to him that the latter interpretation was the correct one and that it would be a mistake to concentrate too narrowly on decolonization. Decolonization, in fact, had now become almost a part of history and in the future there would undoubtedly be many other ways in which new States might be formed.

36. Mr. Quentin-Baxter had commented on the difficulty of explaining the underlying conception of succession in article 4; he himself thought it was not the Commission's task to explain all the subtleties which might arise, but to produce a draft that would be sufficiently simple to be understood by those who would have to apply it. There was always a danger that international law might become too esoteric, but it was a danger, he was pleased to note, that the Special Rapporteur had been highly successful in avoiding.

37. Mr. USHAKOV, referring to the question of multilateral treaties, said he thought that article 4 related only to cases of succession to bilateral treaties. Succession to universal or general multilateral treaties was decided by notification, which was the subject of another article.

38. Moreover, article 4 was applicable only to formerly dependent States, for it was based on the "clean slate" principle, which did not apply either to mergers or to cases of separation.

39. Mr. AGO said that the present wording of article 4 would suggest that it did not cover all cases of State succession; the drafting would have to be amended if its scope was to be made general.

40. The problems of substance raised by the article were more difficult. The rule it proposed applied perfectly to the situation of new States, whether they were former dependent territories or former parts of the territory of a particular State, but it was doubtful whether it covered cases of merger. In the case of a new State born of decolonization, separation of dismemberment, the only question was whether an existing treaty applied to the new State or not. But in a case of merger, did the problem arise only for the State with respect to which the treaty had been in force and which had merged with others, or for the entire territory of the State created by the merger? That was a complex question, on which the Commission would have to reflect. The problem also arose in a different form where a cession or transfer of territory occurred, and special provisions would probably have to be included for each of those cases.

41. With regard to restricted multilateral treaties—special provisions would have to be included for general multilateral treaties—the problem differed very little from that raised by bilateral treaties. It was, indeed, mainly in their case that a declaration expressing consent to provisional application could be envisaged.

42. He would not go into the drafting problems raised by paragraph 1. It might be questioned whether the introductory clause of paragraph 2 reflected existing international practice; in other words, whether it was a rule *de lege lata* or *de lege ferenda*. In any case, the clause was very appropriate. Its purpose was to make it possible to maintain provisionally in force, in accordance with the

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[2] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.10.V.5), p. 292.

[3] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 67.

[4] *I.C.J. Reports 1969*, p. 25.

will of the successor State, a treaty whose suspension might be harmful, the consent of the third State being temporarily assumed. The successor State would not normally take such a step if it had any reason not to expect the third State's consent. The spirit of the clause was in conformity with the principle of the stability of international treaty relations affirmed by the Vienna Convention on the Law of Treaties. And the Vienna Convention contained a provision specifying that a treaty might be applied provisionally before ratification, if that was desirable.[5]

43. Sub-paragraph (*a*) of paragraph 2 should be retained provisionally; it could be deleted later if necessary, depending on what the Commission decided about localized treaties.

44. Sub-paragraphs (*a*) and (*e*) of paragraph 3 caused him more serious doubts. Since paragraph 3 dealt with the provisional application of a treaty, and there was not a really existing treaty but a kind of expectation of a new treaty, it was doubtful whether one could speak of a requirement of notice, since that requirement derived from rules concerning treaties in force. Similarly, with regard to sub-paragraph (*e*), a treaty might terminate in conformity with its own provisions between the States between which it was effectively in force; but when it was applied only provisionally and there was a possibility of prolongation, perhaps it would be better not to bring the provision in sub-paragraph (*e*) into play.

45. Mr. TABIBI said that, while he shared many of the doubts expressed by Mr. Reuter and Mr. Ushakov regarding the structure of article 4, he favoured the inclusion of an article of that kind in the draft. The provisions of article 4 were not open to the same objections as those of the previous article. A devolution agreement could represent the price of independence, whereas the practice of unilateral declarations left every new State free to take its own decision on the continued application of treaties to its territory. Moreover, it was a practice that played a useful role in ensuring the stability and continuity treaties.

46. The practice of unilateral declarations had developed satisfactorily in connexion with multilateral treaties. With regard to bilateral treaties, however, care should be taken not to give a sort of blank cheque and suggest that a unilateral declaration was always useful and necessary. A unilateral declaration could give the successor State an opportunity to put forward its own unilateral interpretation of a treaty in which other States were concerned and to which it did not intend to become a party. There was the case of a new State which had declared, on attaining independence, that within a specified period it would inform the Secretary-General of the United Nations of the treaties of its predecessor State which it considered to be valid, thus suggesting that it treated as invalid those treaties which it did not wish to continue to apply to its territory.

47. The safeguards provided in article 4 seemed inadequate, whereas those of article 25 of the Vienna Convention on the Law of Treaties were clear and precise. The Drafting Committee should improve the language of article 4 in that respect.

48. Mr. REUTER said he agreed that the "clean slate" rule was perfectly applicable to cases of decolonization and to all forms of separation of a territory to constitute a new State. He doubted, however, whether it was applicable to a case not covered by article 4, namely, the case of a merger of States. For the legal personality of a State could not be invoked as a ground for allowing two or three States to default on their treaty obligations on the pretext that they had merged to form a single State. Or course, it was always open to third States not to recognize a merger and to consider that the States in question retained their separate existence, but that was rather a simplistic idea. When the Commission came to examine the problem of mergers, which would arise more and more frequently in the future, it would have to review its position on the "clean slate" rule.

49. Paragraphs 1 and 2 of article 4 concerned the provisional application of treaties, whereas paragraph 3 seemed already to envisage the institution of a definitive régime. Those two stages should be kept separate, in accordance with the practice which appeared to be followed in the United Nations. For open multilateral treaties, members of the Commission would certainly be prepared to make substantial concessions to the "clean slate" rule; it might perhaps be simpler to provide that all open multilateral treaties could be automatically applied provisionally until their maintenance in force was terminated by a declaration. That solution, which was in conformity with ILO practice, would solve the discontinuity problem resulting from article 4. It would therefore be advisable to redraft the article and, if necessary, the provisions relating to bilateral and multilateral treaties.

50. Mr. BILGE said he approved of the solution proposed by the Special Rapporteur in article 4, which, although not concerned with succession in the strict sense of the term, met a definitive need.

51. In paragraph 1, the expression "maintenance in force" suggested an idea of continuation which was not appropriate in the circumstances, since the parties concerned had changed. A more suitable expression would have to be found, taking into account the terminology used in the subsequent articles.

52. Although it was wise to provide in paragraph 2 (*c*) that a third State could oppose the provisional application of the treaty, it might be asked whether three months was not too short a period. In his commentary, the Special Rapporteur had explained that a longer period might diminish the value of provisional application. But from his own experience he knew that many internal decisions often had to be taken, particularly in the case of treaties relating to technical or financial matters. If too short a period were allowed, it might cause States to give a negative reply merely through lack of time. He wondered, too, whether sub-paragraph (*c*) was not perhaps a true condition, which should be placed in the introductory part of paragraph 2.

53. Mr. TSURUOKA said he could accept article 4 on the understanding that it related solely to bilateral treaties,

[5] Article 25.

not to multilateral or restricted multilateral treaties, whose maintenance in force could be dealt with in separate articles.

54. The procedure proposed in article 4 provided for the maintenance in force of the existing treaty régime in the interests of the new State and the international community. It was with that consideration in mind that the Special Rapporteur had set the consent of the third State against the unilateral declaration of the successor State, thus attenuating the unilateral character of that declaration. It should also be noted that the article could never have more than a limited practical scope, since it dealt with provisional application.

55. In order to ensure a parallelism between the successor State and the third State, the period during which the new State could make a unilateral declaration might be limited, since a time-limit for objection by the third State was laid down in paragraph 2 (*c*).

56. Lastly, the Special Rapporteur and the Drafting Committee should make it clear whether or not they were adopting the "clean slate" principle. If they were, the reservations accompanying a treaty would not be maintained in force.

57. Mr. BARTOŠ said that theoretically he supported the "clean slate" rule. In cases of decolonization it was clear that there was no continuity as between the colonial Power and the newly independent State and that the latter was not automatically bound by the treaties previously concluded by the colonial Power. And that was the approach chosen by the Special Rapporteur.

58. Nevertheless, that conception raised certain difficulties. In the first place, it involved some inequality of treatment between the new State and the third State, the former being free to accept the rights and obligations deriving from the treaties of the predecessor State, while the third State had to await the unilateral declaration of the successor State before it could take a position.

59. Furthermore, the maintenance in force of treaties often depended not only on the will of the States concerned, but on political and economic circumstances. Every new State was necessarily bound by pre-existing contractual relations with respect to its territory. Theoretically, it could refuse to accept those relations, but to do so could often mean condemning itself to isolation. That would be the case, for example, in the field of telecommunications, if a State refused membership in the International Telecommunication Union.

60. Similarly, on achieving independence certain African colonies of the British Crown would have lost their traditional cocoa markets if they had not opted for the maintenance in force of the arrangements concluded by the United Kingdom with other British colonies or consumer States. Those arrangements, which had been of a quasi-international character, had become true international treaties when the former colonies had acceded to them. The situation of the French colonies has been similar.

61. The period of three months prescribed in paragraph 2 (*c*) should be increased to six or eight months, or there should be no time-limit at all. In his experience, a period of three months would be definitely insufficient in some circumstances. On the other hand, too long a period would certainly be detrimental to the security of international relations.

62. Paragraph 2 (*b*) referred to the case in which the application of the treaty in relation to the successor State would be incompatible with its object and purpose. Since that notion of incompatibility had given rise to many international disputes, the meaning of the provision should be clarified.

63. Mr. USTOR said that the provisions of article 4 had been intended by the Special Rapporteur to be of general application. The concluding words of paragraph 1, "are governed by the subsequent articles of the present draft", clearly referred to all the draft articles that would follow and not merely to those in Part II, which dealt specifically with new States.

64. It was useful to have in the draft an article on the effects of a unilateral declaration in all cases of successor States, including cases of merger. A provision such as that in paragraph 2 (*a*) would apply, for example, to the case of the merger of two pre-existing States. It laid down an exception to provisional application and, in the case in question, its effect would be that, if the two pre-existing States were parties to the same general multilateral treaty, that treaty would become automatically applicable to the combined State.

65. There were a few drafting points he would like to raise. The title of article 4 used the word "declaration", but the text of the article used the word "communicates", while article 7 (A/CN.4/224) spoke of the "notifying" succession. The Drafting Committee should endeavour to unify those expressions.

66. If, as proposed, article 4 was retained in the form of a general rule, it would be appropriate to include in it some of the provisions at present in Part II, which were general in character. Two examples of such provisions were those of article 11, on the procedure for notifying succession in respect of a multilateral treaty, and those of sub-paragraph (*b*) of article 7, which made an exception for the constituent instruments of international organizations; they applied not only to the case of a new State, but to other cases of succession as well. If those provisions of a general character were moved to draft article 4, Part II would contain only provisions relating exclusively to new States.

67. Mr. USHAKOV, referring to Mr. Ago's remarks concerning multilateral treaties, said that article 4 related solely to bilateral treaties: it required the consent of only one third State. If it were applicable to a tripartite treaty, it would require the consent of two third States. In the case of a tripartite treaty, however, only one of the two third States might give its consent, and that would lead to the provisional application of a multilateral treaty, but binding on only two parties.

68. The Special Rapporteur should also consider the difficulties involved in drawing a distinction between cases of separation and cases of partition of one State into two new States.

69. Mr. ROSSIDES said that, taken as a whole, the provisions of article 4 were satisfactory; they were based on the experience gained with newly independent States in the recent past.

70. The provisions of the article were obviously intended to apply exclusively to new States. The subject of merger of States should be dealt with elsewhere in the draft.

71. It was not desirable to place undue emphasis on the question of separation, since that would seem to endorse the idea of partition of States. That idea had been worth stressing during the period when the application of the principle of self-determination had required the breaking up of large empires; at the present time, however, separations were an exceptional phenomenon and should not receive undue attention in the draft. The emphasis should rather be placed on mergers and unions of States, which were bound to have great importance in the future.

72. With regard to the text of the article, he agreed that the period of three months laid down in paragraph 2 (*c*) might well prove too short. Consideration should be given to the idea of proposing no time-limit at all; when a successor State made the declaration mentioned in paragraph 2, provisional application of the treaty would begin, and it would continue either until such time as the third State informed the successor State of its objection to provisional application, or until the treaty came fully into force between those two States.

73. The CHAIRMAN, speaking as a member of the Commission, said that he supported the philosophy of article 4 with respect to multilateral treaties. The article was not intended to put a multilateral treaty into effect as such between all the parties concerned.

74. One point which had to be borne in mind was that many multilateral treaties contained provisions for machinery; a treaty of that kind could not very well be applied provisionally without at the same time bringing the machinery into operation. A similar problem could also arise in connexion with bilateral treaties, many of which contained provisions for the functioning of an arbitration body or a river or boundary commission. Such treaties clearly could not be provisionally applied without setting up the machinery they provided for. Those considerations suggested that the real problem was not so much succession to treaties as succession to rights and obligations resulting from treaties.

75. On the question of terminology, he found the term "communicates" unduly broad, since it might be taken to cover, for example, a broadcast announcement. Narrower wording should be sought.

76. The Drafting Committee should also endeavour to clarify the relationship between the provisions of paragraph 2 (*b*) and those of paragraph 2 (*c*). It should be made clear that, if the third State did not notify its objection to the sending State within three months in accordance with paragraph 2 (*c*), it was not thereby precluded from objecting under paragraph 2 (*b*) to the application of the treaty in relation to the successor State as being incompatible with the object and purpose of the treaty.

Yearbook of the International Law Commission

(resumed from the 1157th meeting)

77. The CHAIRMAN said he had received the following cable, dated 17 May 1972, from the Legal Counsel of the United Nations in reply to the letter of 12 May 1972 sent in pursuance of the Commission's decision: [6]

PUBLICATIONS BOARD APPROVED TODAY RECOMMENDATIONS CONTAINED IN YOUR LETTER OF 12 MAY AND EXPRESSED ITS APPRECIATION TO ILC ENLARGED BUREAU FOR HAVING THUS OVERCOME EXISTING FINANCIAL DIFFICULTIES REGARDING PUBLICATION OF VOLUME II OF 1971 ILC YEARBOOK.

78. If there were no comments, he would take it that the Commission approved the recommendations of the enlarged Bureau.

It was so agreed.

The meeting rose at 1.5 p.m.

[6] See 1157th meeting, paras. 43 and 44.

1162nd MEETING

Friday, 19 May 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(resumed from the previous meeting)

ARTICLE 4 (Unilateral declaration by a successor State) *(continued)* [1]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 4 (A/CN.4/214/Add.2).

2. Sir Humphrey WALDOCK (Special Rapporteur) said that several members had raised the question of the scope of article 4. They had done so from two points of view: the first related to the question whether the article should cover every case of succession or only that of the new State; the second related to the question whether the article should cover both multilateral and bilateral treaties.

3. On the first question, a distinction should be made between the provisions of paragraph 1 and those of

[1] For text see 1160th meeting, para .64.