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Summary record of the 1162nd meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
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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. Alcivar, 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.

paragraph 2. The former dealt with declarations in general and covered more than the mere question of temporary application of the treaty; the latter dealt exclusively with temporary application.

4. As far as paragraph 1 was concerned, the practice was clearly not confined to cases of new States. At least two examples could be given, namely, the formation of the United Republic of Tanzania and the formation of the United Arab Republic. In the case of the United Arab Republic, a declaration had been made to the Secretary-General of the United Nations and to others, informing them of the constitutional provisions of the newly-formed union, and of the continuance in force of the treaties formerly binding upon the separate States of Egypt and Syria which had formed the union.

5. When that declaration had been made, some reservations had been expressed by certain States which regarded the declaration as not binding upon third States. It was possible, of course, to take the view that the constitutional provisions in question merely gave expression to an existing rule of general international law providing for the *ipso jure* continuity of treaties. The position was not at all certain in that respect. It also seemed prudent to include in article 4 the reservation contained in paragraph 2 (a) to safeguard the position under general international law. The Commission need not at the present stage take a definite position on that question, to which it would have to revert when it dealt with the problems of fusion of States and of localized treaties.

6. In any case, he wished to make it clear that the use of the words "prior to independence" in paragraph 1 was not intended to restrict the provisions of that paragraph to the case of formerly dependent territories. He had used that language simply because the practice in the matter had revolved largely, but not exclusively, around the emergence of the newly-independent States.

7. As to the question whether the provisions of article 4 should cover both multilateral and bilateral treaties, although some unilateral declarations drew a distinction for other purposes between those two categories of treaty, provisional application applied to both categories. For instance, draft article 16, in his fourth report (A/CN.4/249), dealt with the possibility of continuing the application of a multilateral treaty on a purely reciprocal basis; in that case, bilateral relations were established under a multilateral treaty.

8. Another question, relating to the arrangement of the subject-matter of article 4, had been raised by Mr. Ushakov, who had suggested that it should be combined with the provisions on notification. He could not accept that suggestion, because any attempt to combine the two sets of provisions would lead to considerable difficulties of substance. The declarations covered by article 4 were declarations of policy and did not constitute an acceptance of all the treaties mentioned in the declaration. The position was altogether different with regard to notifications; a notification of succession had an effect comparable to ratification and served to express the consent of the successor State to be bound by the treaty.

9. With regard to the use of the terms "communication", "declaration" and "notification", he thought it was too

early to take a decision on the final terminology. While he would bear in mind the Chairman's comments on that point, he should point out that article 78 of the Vienna Convention on the Law of Treaties was entitled "Notifications and communications", and that both those terms were used in the text of that article.²

10. There had been some discussion on the provisions of paragraph 2 (b), on incompatibility with the object and purpose of the treaty. Those provisions were necessary because the treaty might well have no relevance in the new situation. It was true that the wording was somewhat general in character but it had been accepted at the United Nations Conference on the Law of Treaties for inclusion in the Vienna Convention and it constituted an objective notion; he did not believe it would be possible to find a more precise formula to express the intended purpose.

11. The reservation in paragraph 3 (d) was also necessary, because the actual termination of the treaty, or alternatively the agreement of the parties concerned to bring it into force, would necessarily bring to an end the temporary application of the treaty.

12. Mr. Reuter had pointed out that it was not the treaty itself which was maintained temporarily in force, but the rights and obligations embodied in the treaty. That proposition was no doubt correct from a strictly logical point of view, but the language of States differed from the language of lawyers. States usually referred to the continuance in force of a treaty, and it would be better not to enter into legal subtleties on that point since the result might well be to make it necessary to go through the process of parliamentary approval all over again.

13. As for the three months' time-limit laid down in paragraph 2 (c), he agreed that it might be unduly short. It should be remembered, however, that the States which were called upon to reply were not generally the new States, but the other parties to the treaties, which were often old States with well staffed legal departments in their foreign offices. Besides, the States concerned were not called upon to look into every treaty mentioned in the declaration; it was only a matter of deciding in a general way whether they were prepared to maintain those treaties temporarily in force.

14. It was, of course, possible to specify no time-limit whatsoever, but then the situation would remain undefined for a long period.

15. In conclusion, he agreed that the provisions of article 4 would need some rearrangement. Consideration would have to be given to the possibility of separating the provisions dealing with provisional application from those relating to unilateral declarations independently of provisional application. It would also be necessary to consider whether to separate the temporary application of multilateral treaties from that of bilateral treaties.

16. Mr. AGO said that, if article 4 referred to new States, the Special Rapporteur might consider placing it in Part II.

² See *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. 300.

17. Sir Humphrey WALDOCK (Special Rapporteur) said that if it was desired to leave such cases as that of fusion outside the scope of article 4, the provision could be conveniently placed in Part II. Together with articles 5 and 6, which were general articles on new States and which applied to both multilateral and bilateral treaties, it could form an introductory section to Part II.

18. He did not think, however, that the question of fusion could be left altogether outside article 4 in its present form, because there were, in fact, declarations which dealt with much more than the temporary application of treaties.

19. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 4 to the Drafting Committee for consideration in the light of discussion.

*It was so agreed.*³

ARTICLE 5

20.

Article 5 *Treaties providing for the participation* *of new States*

1. A new State becomes a party to a treaty in its own name if:
(a) The treaty provides expressly for its right to do so upon the occurrence of a succession; and

(b) It establishes its consent to be bound in conformity with the provisions of the treaty and of the Vienna Convention.

2. When a treaty provides that, on the occurrence of a succession, the successor State shall be or shall be deemed to be a party, a new State become a party to the treaty in its own name only if it expressly assents in writing to be so considered.⁴

21. The CHAIRMAN invited the Special Rapporteur to introduce article 5 (A/CN.4/224). He suggested that the time had perhaps come for the Commission to discuss, in connexion with article 5, and the following articles sub-paragraphs (d), (e) and (f) of article 1 (Use of terms).⁵

22. Sir Humphrey WALDOCK (Special Rapporteur) said that there had been considerable discussion already on the term "new State". For the purposes of article 5, it would be preferable not to enter into a discussion on the use of terms, but to leave the final formulation until the relevant substantive questions had been settled.

23. The purpose of the various articles in Part II was to state the rules applicable in cases of independence. Clearly, the Commission could not discuss every possible question in connexion with each of the articles; it would have to confine its discussion to the subject-matter of each article.

24. Mr. AGO said that the provisions of article 5 obviously applied to all new States, whether they derived from the attainment of independence by a former dependent territory or by part of the metropolitan territory of an existing State, from a merger of States, or from a dismemberment. The only case to which those provisions

would not apply was that of succession arising from the transfer of a piece of territory from one State to another.

25. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 5, said that the article was a general provision and dealt with the case in which a special clause was included in a treaty in contemplation of the emergence of a new State.

26. The practice showed that the form of those clauses varied considerably from one treaty to another. For example, the General Agreement on Tariffs and Trade made provision for a territory to become a party to it on attaining independence, but on the basis of sponsorship by a Contracting Party to the General Agreement.⁶ Other treaties gave an actual right to the new State upon its becoming independent.

27. A somewhat different case was that of the Geneva Agreement of 1966 between the United Kingdom and Venezuela, mentioned in paragraph (10) of the commentary to article 5. That agreement expressly provided for the participation of a new State which was in the process of becoming independent. It specified clearly that it was for the new State to take action under the treaty.

28. He had thought that, where a treaty specifically stated that the new State would become a party to the treaty, it would still be necessary for the new State to assent expressly to the treaty after attaining independence. In order to become a party in its own name, the new State would have to give some indication of its consent to be bound by the treaty.

29. Mr. REUTER said he found article 5 acceptable, but would like the Special Rapporteur to specify how far he accepted the principle of continuity in the application of treaties. That question was prompted not only by article 5, paragraph 2, but also by article 4, paragraph 2 (c) and the whole of article 7.

30. Under article 5, paragraph 2, a new State became a party to a treaty only when it expressed its assent. It therefore appeared that it was not bound previously, though it would be possible to specify that its assent took effect retroactively to the date on which it had become independent.

31. Under article 4, paragraph 2 (c), did the treaty apply provisionally so long as the third State had not expressed its objection, or did it not?

32. Article 7 was also based on the notion of the continuity of treaties and it would be important to know precisely what its effects were in that respect.

33. Mr. AGO said that article 5 would not be applied very often since a State seldom foresaw, when negotiating a treaty, that some part of its territory might become an independent State or that it might itself merge with another State. Such an eventuality was usually provided for in a treaty only when the process of separation or fusion had already begun at the time of the negotiations. The case of Guyana, mentioned by the Special Rapporteur, was an example of that situation.

34. Without the help of the commentary to article 5, it was hard to see the difference between the cases referred

³ For resumption of the discussion see 1181st meeting, para. 49.

⁴ For commentary see *Yearbook of the International Law Commission, 1970, vol. II, pp. 29 et seq.*

⁵ *Ibid.*, p. 28.

⁶ United Nations, *Treaty Series*, vol. 278, p. 204, para. 5 (c).

to in the two paragraphs. Paragraph 1 applied where the treaty gave the new State merely the right to become a party, while paragraph 2 concerned treaties which stipulated that the new State should automatically be deemed to be a party to the treaty unless it signified a contrary intention. In the latter case, the new State might even be deemed to be an original party, thereby acquiring considerable privileges.

35. Although the case dealt with in paragraph 1 was the commoner, the case referred to in paragraph 2 entailed a certain obligation for the new State, and it might perhaps be wise to transpose the two paragraphs. With those reservations, he found article 5 acceptable and he agreed with the Special Rapporteur that it should be placed, together with other articles, in a general section devoted to all new States, however formed.

36. Mr. USHAKOV said that in spite of its apparent simplicity article 5 raised a basic problem with regard to its scope. The article obviously concerned multilateral treaties more than bilateral treaties, since a bilateral treaty very seldom provided for the accession of a new State.

37. There was some contradiction between article 5, which was primarily applicable to multilateral treaties, and article 7. Under article 5 a new State could not become a party to a multilateral treaty unless the treaty provided expressly for its right to do so on the occurrence of a succession. Article 7, on the other hand, provided that a new State was entitled to accede to a multilateral treaty even if that possibility had not been reserved for it. Since article 7 was more general, he doubted the utility of article 5.

38. Mr. BARTOŠ said that article 5 was reasonable and did not establish a new practice. In the nineteenth century the Treaty of Berlin,⁷ for example, had laid down the conditions for the independence of certain States and, for the Treaty to apply to them, the new States had only had to ratify the article concerning the creation of new States, not the whole Treaty. A similar practice had been followed in some of the treaties concluded after the First World War.

39. It might be asked whether that practice was in conformity with the system of decolonization, which recognized that new States were created by the right of their nations under the United Nations Charter and not, as in traditional international law, by the effect of the will of the States occupying the territory. Thus, the Latin American States had never recognized the United Kingdom's right to dispose of British Guyana. The article drafted by the Special Rapporteur put an end to an international disagreement in a manner favourable to new States, the creation of which would no longer depend on the acceptance or non-acceptance of a treaty. The Special Rapporteur was to be commended for having devised such a felicitous solution.

40. Mr. ROSSIDES said that article 5 was unobjectionable in every respect. It was for the new State to decide whether it wished to become a party to the treaty or not. Today, when multilateral treaties of general application

were becoming increasingly important for the development of international law and the world legal order, States should undoubtedly be encouraged to accede to such treaties.

41. He agreed with Mr. Reuter, however, that it would be desirable to know what happened during the period before a new State assented in writing to be considered a party to a treaty. As the Special Rapporteur had pointed out in his commentary, the Contracting Parties to the General Agreement on Tariffs and Trade had, in 1957, provided for "a reasonable period" for the *de facto* application of the Agreement, which had subsequently been extended to a period of two years. Even that period had then been found unsatisfactory and finally a recommendation of 11 November 1967 had provided for *de facto* application on a reciprocal basis without any specific time-limit.

42. He suggested that article 5 should contain a clause providing for the provisional application of a treaty until the successor State had expressly dissented in writing.

43. Mr. YASSEEN said that article 5 was useful, but not essential. Paragraph 1, in particular sub-paragraph (a), did not provide for anything other than strict application of the general rules of the law of treaties.

44. Paragraph 2 was useful in that it might obviate misunderstandings by stressing that a new State, since it became a party to the treaty in its own name only if it expressly assented in writing, retained full freedom with respect to the treaty which declared it a party. The treaty provision stipulating that the successor State "shall be or shall be deemed to be" a party to the treaty might therefore be regarded as an offer, not an obligation to become a party.

45. If the Commission decided to retain the whole of article 5, he would raise no objection, but he thought it would be preferable only to retain paragraph 2.

46. Mr. USHAKOV drew attention to the possible consequences, in cases of merger or separation, of the principle embodied in article 5, according to which a new State was born free of all treaty obligations. If two States which were parties to a tripartite agreement merged, was the new State thus formed released from its obligations to the other State? Or could it be said that the two States formed by the separation of a State which had been a party to a bilateral agreement were no longer bound by that agreement? The Special Rapporteur and the Drafting Committee should consider those questions.

47. Mr. AGO said that the general criterion to be applied in every case was the newness of the State, regardless of how it had been formed. The essential point was that it must be a subject of international law different from the one which had preceded it. In cases of partition, where there were really two or more new States, the rule applied, but if only one State was really new and the other was a continuation of the previous State, the rule did not apply to the continuing State.

48. The same applied to cases of merger. If, as in the case of the United States of America, the Federal State was an entirely new State in relation to the States which had been merged and if the latter had ceased to exist in their own name, there was a new State which was not

⁷ *British and Foreign State Papers*, vol. LXIX, p. 749.

bound by obligations contracted by one of the merged States. But if there was a dominant State which had combined other States in its own international personality, as Sardinia had done in bringing Italy into existence, the basic principle was that the international legal obligations of that State subsisted after the merger. Thus the criterion was certainly whether the State in question was a new State or not.

49. Mr. USTOR said that the main problem concerning article 5 was whether it was to be construed as relating only to new States resulting from the process of decolonization or whether it was to be taken as relating to all other possible cases of the emergence of new States.

50. He himself would prefer the first alternative, since that would simplify matters, for the time being at least, and the Special Rapporteur could always make alterations at a later stage.

51. In his opinion, article 5 was not of a general character and should be included among the exceptional cases dealt with in a later part of Part I. In particular, he thought that the two situations provided for in paragraphs 1 and 2 did not differ too greatly and that the article might be simplified by combining the two paragraphs in a new draft.

52. The CHAIRMAN, speaking as a member of the Commission, said he could agree with the Special Rapporteur that article 5 was a relatively innocent article of general application. It was designed to meet a special type of case: that of a specific treaty clause to take care of a future change in conditions. To take a hypothetical case, if his own country and the States forming the European Economic Community should conclude a treaty on scientific collaboration, that treaty might conceivably include a clause to the effect that, if the members of the ECE decided to merge into a single State, the treaty would continue to apply in respect of that State *vis-à-vis* the United States of America. That would be a case of fusion, but there should be no difficulty in applying the clause.

53. There could be no possible confusion between articles 5 and 7, since article 5 applied only to the special case of a specific treaty clause and the limitations in article 7, particularly that expressed in sub-paragraph (a), could not possibly apply to a situation in which the treaty in question clearly contemplated continuity.

The meeting rose at 11.10 a.m.

1163rd MEETING

Tuesday, 23 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

later: Mr. Endre USTOR

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda,

Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, 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 5 (Treaties providing for the participation of new States)
(continued)¹

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 5 (A/CN.4/224).
2. Sir Humphrey WALDOCK (Special Rapporteur) said that article 5 had been included because it was necessary to deal with the case of participation by a new State in a treaty by virtue of the provisions of the treaty itself, as distinct from the case in which the right of participation arose from the law of succession. It was true, as Mr. Yasseen had pointed out, that the rule set out in paragraph 1 belonged to the general law of treaties, but it still needed to be stated in the present draft. A distinction had to be drawn—in the case of multilateral treaties, for example—between that rule and the one stated in article 7, in which the legal nexus arose not from the treaty itself but from the fact that, prior to the succession, the treaty had applied to the territory of the new State.
3. The rule stated in article 5 applied to all treaties. It was true that the bulk of the practice related to multilateral treaties, but in paragraph (10) of his commentary² he had given at least one example of its application to a bilateral treaty—that of Guyana and the Geneva Agreement of 1966 between the United Kingdom and Venezuela—and other examples could no doubt be found. The rule was an appropriate one for both types of treaty and there was every advantage in stating it in general terms.
4. The question had also been raised whether article 5 applied only to “new States”. Certainly all the practice that had come to his notice related to newly-independent States. As the title indicated, he had accordingly framed the provisions of article 5 with an eye to the “new States”. That term was of course used with the meaning attached to it in sub-paragraph (e) of draft article 1 (Use of terms) and therefore excluded cases of fusion. Later, as the Commission proceeded with its work, it would finally decide whether to abide by the arrangement of dealing first with new States in a set of general rules and then stating the special rules relating to particular categories of succession.
5. Some members had raised the question of continuity in regard to the operation of article 5. Under paragraph 1 (b) of the article, the new State became a party to the party in its own name when it established its consent

¹ For text see previous meeting, para. 20.

² See *Yearbook of the International Law Commission, 1970, vol. II, p. 31.*