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Summary record of the 1166th meeting

Topic:
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notification was to be regarded as bound was generally decided on a pragmatic basis. When a new State indicated its clear intention to be considered as continuing to be a party to a treaty, the depositary was generally content to take that intention as operative. A few new States, however, had expressed an apparent intention to be bound by a predecessor's treaty as far back as its first application in colonial times, while others had indicated an intention that it should take effect only from the date of notification.

88. The difficulty was to distinguish between cases of succession and cases of accession, if the Commission were to accept that a State might notify its succession from the date of the notification rather than from the date of its independence. To do that would, however, give flexibility to the process of succession and thus promote maximum participation in multilateral treaties. In proposing that solution he had based himself on State practice and the depositary practice of the Secretary-General; and members of the Commission seemed ready to endorse it.

89. At the present time, many new States became Members of the United Nations rather quickly, and many of them might already be members of certain specialized agencies. There were, however, also cases in which they attempted to notify their succession in respect of multilateral treaties before they had become Members of the United Nations. In such cases the Secretary-General would inform them that they could not accede to those treaties, although they could submit a notification of their succession. That was a right arising from the law of succession which was additional to the law of treaties, and which provided a means by which a State could accede to a treaty independently of its final clauses.

90. Article 11 of the Vienna Convention, it was to be noted, had been expanded to provide that the consent of a State to be bound by a treaty could be expressed not only by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, but also "by any other means if so agreed". That clause provided a link between the law of treaties and the procedure of notifying succession to multilateral treaties, which was a new feature in international law.

The meeting rose at 1.5 p.m.

1166th MEETING

Friday, 26 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. 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, 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 7 (Right of a new State to notify its succession in respect of multilateral treaties) *(continued)* [1]

1. The CHAIRMAN invited the Special Rapporteur to conclude his summing up of the discussion on article 7 (A/CN.4/224).

2. Sir Humphrey WALDOCK (Special Rapporteur) said that there was a certain difference between the notification of succession and that of accession. In the discussion on the question of retroactivity, it had been brought out that the important date was that on which the notification became effective; that was a point which would have to be considered carefully in connexion with articles 11 and 12.

3. He thought that in most cases the differences between succession and accession would not greatly alter the position of the new State in substance. But clearly there might be some differences; for example, a treaty might contain a clause providing than an accession would not bring the treaty into force until after a period of delay. When notification of succession was given to the depositary it was clear, under current practice, that the treaty was considered as applying at once from the moment of succession. In the last analysis, the differences between succession and accession, while primarily of a technical nature, were not unimportant, as would become evident in connexion with the subject of reservations.

4. On the question of time-limits, three or four speakers, including the Chairman, had expressed the view that they were unnecessary. He personally was inclined to that view, but the Commission would be in a better position to take a decision on the point when it had examined articles 11 and 12.

5. One or two members, including the Chairman, had suggested that sub-paragraphs (*a*) and (*b*) might possibly give rise to difficulties of interpretation and that it might therefore be necessary to provide for some machinery for the settlement of disputes. He agreed that that was a question which deserved further consideration at the final stage of the Commission's work on the topic.

6. Mr. Bedjaoui had suggested that an explicit reference should be made to "all or part" of the new State's territory. That was a point which had also been raised by Mr. Ago and which he (the Special Rapporteur) proposed to deal with in a special excursus which would follow his article on unions of States.

7. Lastly, with regard to Mr. Ustor's suggestion that article 7 should be divided into two paragraphs, he thought that would very likely be the proper solution if it was finally decided to preface the draft articles with a general reservation regarding constituent instruments of international organizations.

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[1] For text see 1164th meeting, para. 42.

8. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 7 to the Drafting Committee.

It was so agreed.[2]

ARTICLE 8

9. *Article 8*
Multilateral treaties not yet in force

1. A new State may on its own behalf establish its consent to be bound by a multilateral treaty which was not in force at the date when the succession occurred if, in respect of the territory to which the succession relates, the predecessor State had before that date:

(*a*) Established its consent to be bound by the treaty; or

(*b*) Signed the treaty subject to ratification, acceptance or approval.

2. When a treaty provides that a specified number of parties shal be necessary for its entry into force, a new State which establishes its consent to be bound by the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.[3]

10. The CHAIRMAN invited the Special Rapporteur to introduce article 8.

11. Sir Humphrey WALDOCK (Special Rapporteur) said that article 8 was closely related to article 7 and, in fact, assumed acceptance of the general principle stated in article 7.

12. Multilateral treaties frequently contained a delaying provision which required a certain number of ratifications or accessions to have taken place before the treaty would enter into force. If the predecessor State had already established its consent to be a party to the treaty, the question was whether a new State could rely on that act to establish its own consent to be bound by the treaty by the process of transmitting a notification of its succession. To that question practice gave a clear affirmative answer.

13. There was also the secondary problem of whether a notification of succession should be counted as equivalent to an instrument of ratification, accession, acceptance or approval, although no mention of it had been made in the final clauses of the treaty. In such a case the successor State had established its consent to be bound by the treaty and it was therefore legitimate to ask whether it should not be included among the number of consenting States required by the final clause of the treaty.

14. The inclusion of a successor State among the required number might conceivably be argued to be an unauthorized departure from the final clauses of the treaty, but it was the practice of the Secretary-General of the United Nations to accept such expressions of consent as equivalent to an accession to the treaty. The Commission, of course, was not bound by the practice of the Secretary-General, but he himself thought that that practice should be supported whenever possible, unless there were strong reasons to the contrary, since the Secretary-General was the depositary of so many multilateral treaties. Moreover, in the present instance the Secretary-General's practice was in full accord with the spirit and intent of the clauses in question. Paragraph 2 therefore endorsed the rule acted on by the Secretary-General.

15. Paragraph 1 raised a further minor question as to what the position would be if the predecessor State had not actually established its consent to be bound by a multilateral treaty, but had merely signed it subject to ratification, acceptance or approval. Would that constitute a sufficient nexus between the treaty and the territory which had now become independent to allow the successor State to treat the signature as its own? The practice left that question open.

16. In the interests of encouraging the largest possible participation in multilateral treaties, it would seem that the rule proposed in paragraph 1 should be acceptable. The Commission was free to take whatever decision it thought fit, but the recent practice of the Secretary-General tended to recognize signature by the predecessor State as a sufficient title for a new State to proceed to ratification.

17. The CHAIRMAN asked whether the Special Rapporteur considered that article 8 should be subject to the restrictions stated in sub-paragraphs (*a*), (*b*) and (*c*) of article 7.

18. Sir Humphrey WALDOCK (Special Rapporteur) said that that was a valid point; in his opinion, the same exceptions should be made in article 8.

19. Mr. YASSEEN said that the exceptions in article 7 should apply *a fortiori* to article 8.

20. He could see no reason why the right conferred on a new State by article 7 should not be extended to multilateral treaties not yet in force, if the predecessor State had clearly established its consent to be bound by the treaty. What mattered was not so much the material link between the territory and the treaty, in other words, the effective application of the treaty in the territory, as its applicability. In that context there was very little difference between, on the one hand, a treaty which had entered into force but had not been effectively applied, or a treaty which had not entered into force but in respect of which the predecessor State had clearly established its consent to be bound as soon as the conditions laid down in the treaty for entry into force were fulfilled, and, on the other hand, a treaty which was already in force and being effectively applied.

21. With regard to paragraph 2, it seemed obvious that the consent established by the new State should be taken into account when numbering the parties to a treaty for the purpose of its entry into force.

22. He could not accept the position adopted by the International Law Association's Committee on the Succession of States, as described in paragraph (2) of the commentary to article 8. To consider that a new State did not succeed to the rights and obligations deriving, for the predecessor State, from a treaty which was not yet in force entailed discrimination against new States and was contrary to the principle of the sovereign equality of States.

23. Paragraph 1 (*b*) involved choosing between a solution which would encourage new States to become parties to multilateral treaties, and a strictly legal solution. In

[2] For resumption of the discussion see 1181st meeting, para. 71.

[3] For commentary see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 44 *et seq.*

his opinion, a new State should not be able to establish its consent to be bound by a multilateral treaty which had merely been signed by its predecessor, unless the signature constituted the predecessor's consent to be bound; for a State which merely signed a treaty retained full freedom to ratify or not to ratify it. It would be strange if a new State were thus to acquire, by reason of a succession which was not a succession, more rights and obligations than the predecessor State had possessed.

24. There was, in fact, a difference in kind, not in degree, between the cases dealt with in sub-paragraphs (*a*) and (*b*). Where a State had ratified a treaty which was not yet in force, the situation was almost the same as if the treaty was already applicable: entry into force depended solely on a certain number of accessions. On the other hand, where a State had merely signed the treaty, it would never enter into force automatically in relation to that State. It was on the basis of that distinction that he rejected paragraph 1 (*b*).

25. As to the wording of the article, it seemed to him that if the Commission intended to base its approach on succession, it should, as far as possible, use the same terms as in article 7. As at present worded, article 8 might suggest that a new State's consent must be expressed in a manner different from that provided for in article 7.

26. The CHAIRMAN said that, in order to clear up the point raised by Mr. Yasseen, he would ask the Special Rapporteur to clarify the difference between the terminology used with respect to notification and that used with respect to the establishment of consent. Would article 8 require consent to be established as provided in the Vienna Convention on the Law of Treaties? [4]

27. Sir Humphrey WALDOCK (Special Rapporteur) said that article 7 should be amended to show that the notification in question was one which established consent. The two articles must obviously be brought into line.

28. Mr. USTOR said that paragraph 1 (*a*) of article 8 seemed to provide for a mere notification, but he was not quite sure what was involved in paragraph 1 (*b*).

29. Sir Humphrey WALDOCK (Special Rapporteur) said that sub-paragraph (*b*) was covered by the words "establish its consent to be bound by a multilateral treaty" in paragraph 1. He agreed, however, that the two sub-paragraphs should be brought into line to show that there was an establishment of consent in both.

30. Mr. USHAKOV pointed out that article 7 differed not only from article 8, but also from articles 9 and 10. Whereas article 7 related to all multilateral treaties, including restricted treaties, articles 8, 9 and 10 concerned only general multilateral treaties.

31. With regard to general multilateral treaties, article 7 appeared to be applicable to all cases in which a new State was created, though questions might arise in the case of a merger. For although the new State would clearly succeed to treaties that had bound both of the two States which had merged, it was questionable whether notification of consent was also possible where only one of the two States had been a party to the treaties in question.

32. In order to avoid difficulties of interpretation in the case of restricted multilateral treaties, separate articles should perhaps be drafted for that class of treaty.

33. With regard to paragraph 1 (*b*), he agreed with Mr. Yasseen that it was difficult to accept the idea of a succession based on the mere signature of a treaty. He would be in favour of dropping that provision.

34. As to the language of articles 7, 8 and 9, he noted that different terms had been used to express the right of the new State to establish its consent. The Drafting Committee should try to find a single form of words, based if possible on that used in article 9.

35. Mr. HAMBRO said that on the whole he could accept the Special Rapporteur's draft for article 8; he did not share the difficulties expressed by Mr. Yasseen and Mr. Ushakov with regard to paragraph 1 (*b*).

36. In his opinion it was still mainly a question of succession. The successor State acquired the same right as its predecessor, namely, the right to ratify the treaty, so that paragraph 1 (*b*) was only an extension of the principle of nexus which had been embodied in article 18 of the Vienna Convention and confirmed by the International Court of Justice in its advisory opinion on *Reservations to the Convention on Genocide*.[5] That might represent a rather long step in the progressive development of international law, but he saw no danger in it, since everything possible should be done to strengthen the legal position of new States.

37. He was glad to know that the limitations contained in article 7, referred to by the Chairman, also applied to article 8.

38. He was somewhat puzzled by the wide difference between articles 7 and 8 concerning what actually was the right of the new State. Article 7 said that a new State "is entitled to notify the parties that it considers itself a party to the treaty", whereas article 8 said that a new State "may on its own behalf establish its consent to be bound by a multilateral treaty...". In the latter case, it would seem that the new State actually acquired no right but merely gave its consent to be bound by the treaty.

39. Lastly, he agreed with the Special Rapporteur that, while the Commission should not feel itself bound by the practice of the Secretary-General, it would be in the interests of the cohesion of international law to accept his practice whenever there were no strong reasons to the contrary.

40. Sir Humphrey WALDOCK (Special Rapporteur) replying to Mr. Hambro, said that at the United Nations Conference on the Law of Treaties, representatives had been troubled by the problem of the different relationships between States and treaties. In article 2 (Use of terms) of the Vienna Convention, therefore, specific definitions had been given of the terms "negotiating

[4] 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. 290, article 11.

[5] *I.C.J. Reports 1951*, p. 15.

State", "contracting State", and "party". Paragraph 1 (*g*) of that article defined a "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force". Consequently, the term "party" could not be used in article 8, since the treaty was not yet in force, and the most that could be done was to establish the consent of the new State. Under article 7, a new State could only notify its will, but that language should undoubtedly be replaced by some such wording as "establish its consent", which was already hallowed by the Vienna Convention.

41. Mr. TSURUOKA said he could accept article 8 subject to a few drafting changes.

42. It might be asked whether the cases covered by the article did not belong rather to the Vienna Convention on the Law of Treaties. In the interests of the practical application of the draft articles, however, it might be considered useful for the Commission to settle related questions of that kind.

43. Despite the doubts expressed by Mr. Yasseen about the legal basis of paragraph 1 (*b*) and although that provision was not backed by a large body of practice, he found it acceptable in the interests of the continuity of multilateral treaties. To take the extreme case of a multilateral treaty open for signature for a specified period, once that period had elapsed, a new State could neither sign the treaty nor accede to it, but it would be able to become a party under paragraph 1 (*b*).

44. Mr. AGO said there was clearly a close link between articles 7 and 8. The two provisions referred only to general multilateral treaties; perhaps that point should be made clear.

45. Another feature of articles 7 and 8 was that they both laid down a kind of exception to the normal rules of the law of treaties on the possibility of a State's becoming a party to a treaty. That exception was based on the notion of succession. Although he doubted whether that approach was entirely justified, he was prepared to accept it in the case of article 7, which concerned a true succession to a treaty in force.

46. At a pinch, the same approach might be applied to the case in article 8, paragraph 1 (*a*), although it referred to a treaty not yet in force and the predecessor State had become bound by that treaty only under a suspensive condition. On the other hand, one could certainly not speak of succession and of an exception to the normal rule if the predecessor State had not established its consent to be bound by the treaty. Like Mr. Yasseen, he thought that the provision in paragraph 1 (*b*) had no place in the draft.

47. If only the case mentioned in paragraph 1 (*a*) were retained, article 8 could be modelled on article 7. In both cases, the new State could notify the parties that it considered itself a party to the treaty; there was no need to introduce the idea of consent, as in paragraph 1 (*b*).

48. The provision in paragraph 2 seemed so self-evident as to be almost unnecessary. Moreover, it belonged not so much to succession of States as to the law of Treaties.

49. Mr. RUDA said that both in article 7 and in article 8, paragraph 1 (*a*), there was a definite consent by the predecessor State, whereas in article 8, paragraph 1 (*b*) the consent of the predecessor State was only provisional or did not even exist. The problem in article 8, paragraph 1 (*b*) was to determine what the new State succeeded to if the treaty was subject to ratification, acceptance or approval. He shared the view of the Special Rapporteur that the successor State would inherit the right to become a party to the treaty and to express its consent thereto. Apart from purely legal considerations, there were also reasons of convenience which militated in favour of that view, since it appeared to be the most favourable solution for successor States and for the encouragement of multilateral treaties in general.

50. There were, however, two other problems in regard to article 8. First, it contained no indication of the procedure by which the successor State would express its consent, as it did not include the word "notification". Since articles 7 and 8 were basically procedural in nature, some indication of the procedure to be followed, in addition to those provided for in article 11 of the Vienna Convention on the Law of Treaties, should be given.

51. Secondly, another important point not covered in paragraph 1 (*b*), although it possibly was covered in article 12, was the extent to which a new State's consent to be bound by a multilateral treaty concluded by its predecessor might be affected by article 18 of the Vienna Convention, concerning the obligation not to defeat the object and purpose of a treaty prior to its entry into force.

52. Mr. RAMANGASOAVINA said that articles 7 and 8 were closely linked. Article 8 was acceptable; its purpose was to give the new State its full capacity as a subject of law. It accorded that capacity not only where the predecessor State had clearly established its consent to be bound by a treaty, but also where the consent had been expressed conditionally by a signature. In the latter case, ratification might merely have been delayed by the requirements of the national constitutional law.

53. Paragraph 1 (*b*) did not confer any greater right on the successor State than paragraph 1 (*a*). Signature of a treaty was an incomplete expression of will which the successor State might very well wish to complete.

54. The same applied to paragraph 2, which dealt with the case in which a minimum number of States had to express their consent to be bound before the treaty could enter into force. Counting the consent expressed by the new State also meant recognizing its full capacity as a subject of law.

55. Article 8 was thus entirely acceptable; it reflected the progressive development of international law and enabled new States easily to express their consent to be bound by multilateral treaties with immediate effect.

56. Mr. REUTER said that as its work progressed, the Commission was becoming increasingly aware of the pertinence of a comment made by Mr. Ushakov early in the session, to the effect that cases of decolonization should be treated separately from other cases of succession.[6]

[6] See 1154th meeting, para. 30.

57. Most of the United Nations precedents which had been invoked were cases of decolonization and the discussions had centred on newly independent States. In that sphere, he was prepared to accept very bold solutions which would confer a maximum of rights and a minimum of obligations on the successor State. He would even go so far as to attenuate the distinction between general multilateral treaties and other treaties, for decolonization had been the source of injustices which could not be disregarded when considering the succession of States.

58. In cases other than those of decolonization, no doubt a different line of reasoning should be followed: sentiment should give place to strictness. The "clean slate" doctrine, which was well suited to decolonization, was less justified in other cases. Articles 7 and 8 seemed to be based on the desire to mitigate certain consequences of that doctrine, which had been accepted for the treaties referred to in the preceding articles. He could accept such mitigation in articles 7 and 8 where they referred to cases of decolonization, but on their consequences in other cases of succession, he must reserve his position until the end of the Commission's work.

59. In the light of the explanations given by the Special Rapporteur, he wondered how far the concept of succession applied to treaties might lead. If a new State could succeed its predecessor despite the restrictive clauses of a treaty, might it not, by way of succession, also become a party to a treaty in which it could not participate under the general law of treaties?

60. Paragraph 2 of article 8, which derived both from the law of treaties and from article 7, raised no difficulty.

61. Paragraph 1 (*b*) seemed unacceptable. Not only was it contrary to logic, but it did not conform to the jurisprudence of the International Court of Justice, which, apart from its advisory opinion on *Reservations to the Convention on Genocide* had ruled, in the *North Sea Continental Shelf Cases*, that the signature of a State did not bind it.[7] That ruling should be taken into account, even if it was not favourable to the expansion of multilateral treaties.

62. If article 8 had been drafted for cases of decolonization, then, out of consideration for the new States created by decolonization, their will should not be treated as being dependent on that of their predecessor or complementing it, since the predecessor State had sometimes been the oppressor.

63. If the article was intended to apply more generally, it was difficult to see why, in cases other than those of decolonization, account should not be taken of treaty clauses stipulating a period of notice for accession to become effective. Such a period would offer a safeguard for third States.

64. He had serious reservations on paragraph 1 (*b*), but could accept the rest of article 8 subject to the reservations expressed by other speakers with regard to the drafting and to the views he had stated on article 7.

65. Mr. ROSSIDES said there appeared to be unanimous agreement regarding the right accorded to a new State under paragraph 1 (*a*) of article 8. Although, where a multilateral treaty was not yet in force, no legal nexus existed between the treaty and the territory, the fact remained that the predecessor State had done all it could to bind itself and thus the territory.

66. The position was different, however, in the case envisaged in paragraph 1 (*b*), where the predecessor State had merely signed the treaty subject to ratification, acceptance or approval. In that case, it might perhaps seem logical to say that the successor State inherited the rights and obligations of the predecessor State and could therefore proceed to ratify the treaty, even if the predecessor State did not do so; the successor State would then become a party to the treaty while the predecessor State remained outside it.

67. He would have been prepared to accept that proposition if the right of the new State to notify succession under article 7 had been expressed in terms of a presumption of continuity, in accordance with the formula adopted by the International Law Association at its Buenos Aires Conference in 1968.[8] Under that formula, a successor State was bound by a multilateral treaty unless and until it made a declaration to the contrary.

68. The overwhelming majority of the Commission, however, had supported the formula in article 7, which in effect embodied the clean slate rule and specified that the new State would be bound by the treaty only on its notifying its consent. Under that formula, there could be a more or less long interval during which the treaty was not applicable to the new State. In the circumstances, he could not accept paragraph 1 (*b*) of article 8.

69. He fully agreed with the provisions of paragraph 2.

70. He also agreed with the idea put forward by Mr. Reuter of separating cases of decolonization from other cases, though he realized the difficulties that would involve.

71. Mr. AGO said he would like to reply to an observation by Mr. Ruda. Articles 7 and 8 dealt with a rather exceptional and marginal situation. It was the case of a State that wished to become a party to a treaty, but could not or did not wish to do so by the normal procedures of the law of treaties; it was now proposed to give that State the faculty to become a party on the basis of a right of succession deriving from the fact either that a treaty was already in force in respect of its territory at the date of its succession, as in article 7, or that, if the treaty was not yet in force, everything was ready for it to enter into force, as in article 8.

72. But that was not the case dealt with in paragraph 1 (*b*) and Mr. Ruda maintained that it would be possible to conceive of a right of succession linked not to the maintenance in force of a treaty in respect of the territory, but to a sort of succession by the new State to the predecessor State in the right to accede to a given treaty. If that were so, it might well be asked why the

[7] *I.C.J. Reports 1969*, pp. 25-27.

[8] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 48.

right should be limited to cases in which the treaty had been signed. For if a State had the right to accede to a treaty and the new State was to inherit that right from the predecessor State, it mattered little whether the treaty had been signed or not; the right of accession to the treaty was transmitted. But that was going too far: the right of accession could not be accorded to the successor State even when it was not recognized by the rules of the law of treaties.

73. Mr. QUENTIN-BAXTER said that in the course of the discussion two different meanings had been attached to paragraph 1 (*b*). The first was that the new State could become a party to a multilateral treaty simply by depositing a declaration of succession; that interpretation would impose an intolerable strain on the law of succession. The second interpretation, which was much more plausible, was that a notification of succession placed the successor State in exactly the same position as the predecessor State; it established the successor State's right to ratify the multilateral treaty.

74. With that second interpretation, the provision in paragraph 1 (*b*) was satisfactory and coincided with the existing practice. Its practical applications were likely to be few, but he could cite at least one example. The Hague Conventions establishing the Permanent Court of Arbitration were open to accession only by the States which had participated in the Hague Conferences and those which had been invited to participate in those conferences; accession to one of those Conventions by any other State required the consent of all the parties to the Convention. The provisions of paragraph 1 (*b*) of the present draft article 8 would facilitate accession to such a convention by a new State.

75. Mr. USHAKOV said that it was not so much a question of the inheritance of a right of ratification as of notification of succession.

76. The CHAIRMAN, speaking as a member of the Commission, said that for the same reasons as Mr. Quentin-Baxter, he supported paragraph 1 (*b*). That provision would require some elaboration, however, to make it clear that the basic right of the successor State was the right to ratify the multilateral treaty.

77. Sir Humphrey WALDOCK (Special Rapporteur) summing up the discussion on article 8, said that the members who had taken part in the discussion appeared to be almost evenly divided on the subject of paragraph 1 (*b*); perhaps that was because there appeared to be some misunderstanding about its meaning. The intention of paragraph 1 (*b*) was to recognize the succession of the new State to the right to perform the act of ratification, acceptance or approval, that would serve to complete the act of signature already performed by the predecessor State. Unlike some of the critics of that provision, he felt that the proposition was juridically perfectly defensible. The predecessor State had performed an act with regard to the treaty in respect of a territory, and the successor State inherited the right to avail itself of the consequences of that act.

78. With regard to the application to the new State of the provisions of article 18 sub-paragraph (*a*) of the Vienna Convention on the Law of Treaties (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), he would certainly not favour including in the draft any rule which would have the effect of making the new State automatically bound by those provisions without its consent; some notification by the new State should be required. Of course, the problem would not arise if the Commission were to decide to delete paragraph 1 (*b*).

79. But although paragraph 1 (*b*) was juridically defensible, it could be argued that its inclusion was not absolutely necessary. Action had now been taken to make the multilateral treaties concluded under the auspices of the League of Nations open to accession by new States without recourse to the principles of succession. One major category of multilateral treaties had thus been disposed of; moreover, in the case of other multilateral treaties, most new States were covered by the final clauses. There remained, however, a few cases such as those mentioned by Mr. Quentin-Baxter in which the provisions of paragraph 1 (*b*) might be useful in practice. The best course would be to leave it to the Drafting Committee to explore the question and reformulate paragraph 1 (*b*) in the light of the discussion.

80. He agreed that article 8, like article 7, did not apply to restricted multilateral treaties and that the language of both articles would have to be adjusted so as to make that point clear. Furthermore, a separate set of provisions on the subject of restricted multilateral treaties would have to be formulated.

81. Mention had been made during the discussion of a possible distinction between "general" multilateral treaties and other multilateral treaties. In its work on the Law of Treaties, the Commission had endeavoured to define the concept of a "general multilateral treaty", but without success. A further unsuccessful attempt had been made at the United Nations Conference on the Law of Treaties. As finally adopted, the Vienna Convention did not refer to that proposed category of treaties; it did, however, draw a distinction between multilateral treaties in general and a certain type of restricted multilateral treaty. His own suggestion in draft article 8 was that the Commission should adhere to that distinction for the purposes of the present draft.

82. Mr. Ago had referred to the application of the multilateral treaty to the territory. Personally he preferred to speak of the applicability, or the potential applicability, of the treaty to the territory. In many countries, like his own, municipal legislation had to be enacted in order to apply a treaty. The question, therefore, was not whether the treaty was actually applied to the territory, but whether it was applicable to it.

83. The CHAIRMAN suggested that article 8 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[9]

[9] For resumption of the discussion see 1181st meeting, para 71.

ARTICLE 9

84. *Article 9*

Succession in respect of reservations to multilateral treaties

1. When the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession, it shall be considered as maintaining any reservations applicable in respect of the territory in question at the date of the succession unless:

(*a*) The State, in notifying its succession to the treaty, expressed a contrary intention or formulated reservations different from those applicable at the date of succession; or

(*b*) The particular reservation, by reason of its object and purpose, must be considered as appropriate only in relation to the predecessor State.

2. In such cases, if the new State formulates reservations different from those applicable in respect of the territory at the date of succession:

(*a*) Any reservation formulated by its predecessor which differs from its own reservations shall be considered as withdrawn;

(*b*) Any provisions regarding reservations which may be contained in the treaty shall, together with articles 19 to 23 of the Vienna Convention, apply to the successor State as from the date of its notification of its succession to the treaty.

3. (*a*) The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations.

(*b*) However, in the case of a treaty falling under article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty.[10]

85. Sir Humphrey WALDOCK (Special Rapporteur) introducing article 9, said that the article dealt with the important problem of reservations to multilateral treaties. It took into account the relevant provisions of the Vienna Convention on the Law of Treaties and the varied practice in the matter, especially the practice of the Secretary-General as depositary.

86. As could be seen from the commentary, most of the evidence of practice on which the provisions of article 9 were based had been derived from the Secretariat publication "Multilateral treaties in respect of which the Secretary-General performs depositary functions".[11] There was little information in legal literature on the subject of succession to reservations to multilateral treaties.

87. The first point to be settled was whether, as proposed in the opening sentence of article 9, a notification of succession by a new State implied that it maintained the reservations formulated by the predecessor State. There was some practice in support of the provision contained in that sentence.

88. On the question of the freedom of the new State to formulate further reservations, dealt with in paragraph 2, the solutions adopted in practice had, on the whole, been pragmatic. Little distinction had been made between ratification and notification of succession. On such a notification being made, the practice of the Secretary-General allowed the new State not only to withdraw any of the earlier reservations formulated by the predecessor State, but even to vary those reservations.

89. The possibility of withdrawal of reservations did not give rise to any difficulty, because the Vienna Convention allowed the withdrawal of a reservation at any time. As for the right to vary reservations, it could be considered consistent with the proposition that notification of succession constituted a form of establishing consent to be bound by a treaty, although it might not be entirely consonant with the notion of inheritance from the predecessor State. The possibility of attaching reservations to a notification of succession could, on that basis, be admitted.

90. In paragraph 3 (*a*), he had made allowance for the right which the Vienna Convention granted to the other parties to the treaty to make objection to a reservation. He had used the expression "*mutatis mutandis*", but he had drafted the provision well before that expression had come under criticism in the Commission. The Drafting Committee would deal with that point.

91. Another drafting question was that of legislation by reference to the Vienna Convention on the Law of Treaties. Personally, he shrank from reproducing all its relevant rules; he preferred to refer in each case, as he had done in paragraph 3 (*b*), to the relevant provision or provisions of the Vienna Convention—the only version of the law of reservations at present in existence which had any authority.

92. Mr. USHAKOV said that, in general, he supported the principle stated in article 9. However, instead of considering the silence of the successor State as acceptance of the reservations made by the predecessor State, it would be preferable to provide that the new State must declare its intentions with regard to those reservations explicitly. It would be sufficient to amend the wording of the introductory phrase of paragraph 1 to provide that, when the consent of a new State to be bound by a multilateral treaty was established by means of a notification of succession, it must at the same time state its position with regard to the reservations formulated by the predecessor State or formulate its own reservations.

93. In his opinion, it would be preferable to state the relevant provisions of the Vienna Convention in full instead of just referring to them.

94. He could not agree that the new State should be bound by its predecessor's consent to reservations accepted by the other parties to the treaty, as provided in paragraph 3 (*b*). If the new State had the right to make its own reservations, it should also be able to make objections to reservations by other parties. Perhaps the Special Rapporteur would explain the justification for the principle stated in paragraph 3 (*b*).

95. Sir Humphrey WALDOCK (Special Rapporteur) said that paragraph 3 (*b*) related to a special category of treaties of a restricted kind. If the new State were to be allowed to object to a reservation which had already been accepted by all the parties to the treaty, it would have the

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[10] For commentary see *Yearbook of International Law Commission, 1970*, vol. II, pp. 47 *et seq.*

[11] ST/LEG/SER.D/5 (United Nations publication, Sales No. E.72.V.7).

power to remove the character of a party to the restricted multilateral treaty from a State which had already become a party by virtue of its acceptance of the reservation.

96. Mr. USHAKOV said that the ambiguity would be removed if general multilateral treaties and restricted multilateral treaties were dealt with in two separate articles.

97. Mr. REUTER said he quite understood that paragraph 3 (*b*) referred to restricted multilateral treaties, but under the terms of article 7 there was no succession by notification in the case of those treaties.

98. Sir Humphrey WALDOCK (Special Rapporteur) said that the point raised by Mr. Reuter could be covered when special provisions were drafted to deal with the subject of restricted multilateral treaties.

Organization of work

99. The CHAIRMAN said that the Commission was about to complete its fourth week of work; considering that the last week of the session was needed for the discussion and adoption of the annual report, it had only five weeks left in which to discuss the two topics of succession of States in respect of treaties, item 1 (*a*) of its agenda, and the protection of diplomatic agents and assimilated persons, item 5.

100. The Commission would be hard pressed and, to speed up its work, it would be necessary for both the Drafting Committee and the Working Group on item 5 to meet on two afternoons each week. The Chairmen of those two bodies had agreed to that arrangement.

101. The next two weeks would be devoted to the completion of the draft articles on succession of States in respect of treaties. The Commission would then return to item 5, on which it should by then have some material from the Working Group. That would give the Special Rapporteur on succession of States in respect of treaties an opportunity of working on redrafting of the articles and formulation of the commentaries.

102. If there were no objections, he would assume that the Commission accepted those arrangements.

It was so agreed.

The meeting rose at 1 p.m.

1167th MEETING

Monday, 29 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

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, 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 9 (Succession in respect of reservations to multilateral treaties) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 9 (A/CN.4/224).

2. Mr. HAMBRO said there were three points on which he had serious misgivings about the article.

3. The first was that not enough attention had been paid to the important general consideration that reservations to multilateral treaties should be discouraged as much as possible, because reservations could greatly detract from the value of such treaties.

4. The logical basis for the rule allowing new reservations by a successor State was that the case was not simply one of succession to the rights of the predecessor State: the successor State benefited from a new rule which was outside the strict application of the principle of succession. The Special Rapporteur had very properly kept in mind the need to facilitate the widest possible participation by successor States in multilateral treaties, but he had been rather too liberal in suggesting that those States should be presumed to have maintained the reservations of their predecessors.

5. Personally, he thought that article 9 unduly enlarged the rights of the successor State. He therefore suggested, for the consideration of the Special Rapporteur, the adoption of a formula which would require a successor State to make a notification if it wished to maintain the reservations of the predecessor State; failing such notification, it would be presumed that it did not maintain them.

6. His second point related to the method of legislation by reference to the Vienna Convention on the Law of Treaties, as in paragraphs 2 (*b*) and 3 (*b*). He realized that it would be awkward to repeat in the draft all the relevant provisions of the Vienna Convention, but it should be remembered that the parties to the future instrument on succession in respect of treaties would in all probability not be the same as the parties to the Vienna Convention. It was therefore desirable that the present draft should be complete and self-contained.

7. His third point related to the use of the formula "*mutatis mutandis*", which would have the effect of leaving it to individual States and their legal advisers to decide to what extent the provisions on reservations would apply to objections. It was the duty of the Commission to specify the extent of the application. The Drafting Committee should reword paragraph 3 (*a*) so as to avoid using that undesirable expression.

8. Mr. TSURUOKA said that, like Mr. Hambro, he would prefer to see the presumption in paragraph 1 reversed: the silence of a successor State concerning reservations applicable in respect of its territory should

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[1] For text see previous meeting, para. 84.