Document:-

A/CN.4/SR.1167

Summary record of the 1167th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

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.

be interpreted as a withdrawal of those reservations. If the emphasis was on the idea of succession, the presumption in paragraph 1 was justifiable; but if the interests of the international community as a whole were placed first, the presumption was reversed, since a reservation was an exception to the general rule, which was the application of the treaty in its entirety.

9. Unless the presumption were reversed, it could lead to situations like that in which certain African countries, on acceding to independence, had been considered as having accepted the reservation previously made by the United Kingdom, France and Belgium in respect of Japan, under article 35 of the General Agreement on Tariffs and Trade, because they had not clearly expressed their intention in that regard. As a result, there were no contractual relations between Japan and those countries, which paradoxically, regarded themselves as champions of non-discrimination, although the United Kingdom, France and Belgium had since withdrawn their reservation, of which the African countries in question nevertheless remained the inheritors. In order to prevent such situations from arising it would therefore be advisable to reverse the presumption in paragraph 1.

10. Mr. YASSEEN said he found the philosophy of article 9 quite understandable. Any State could notify its succession and, in principle, succeed a predecessor State under the same conditions with regard to reservations and objections. Such a rule was logical and acceptable.

11. The question arose, however, whether a successor State must declare its intentions expressly. As it was difficult to ask a State to make a clear statement of its position, it would be sufficient to choose a presumption whereby its silence could be interpreted either as an acceptance or as a refusal. Like the Special Rapporteur, he thought that the presumption of acceptance was in the interests of the successor State. To presume that a State withdrew its reservations might, indeed, lead to an irrevocable situation, since the State would be unable to re-establish them later, whereas it could always withdraw its reservations subsequently if it saw fit. Hence it was preferable that the presumption should be in favour of the maintenance of reservations.

12. Some members of the Commission thought that the successor State could not formulate reservations if the time-limit laid down for them in the treaty had expired. In his view, that attitude was not consistent with the concept of succession; the faculty of making reservations should be accorded to the successor State on the basis of a rule of law to be established in the light of consistent practice. On the other hand, he did not think that reservations formulated by the successor State, if different from the existing reservations, should be regarded as annulling the latter. New reservations were not necessarily incompatible with earlier ones; the fact that they were different did not *ipso facto* entail abandonment of the earlier reservations, as would be the case if the article had spoken of "reservations incompatible with those applicable at the date of the succession".

13. The use, in paragraph 3 (*a*), of the expression "*mutatis mutandis*", which the Commission had always tried to avoid, did not affect the substance. The Commission could leave it to the Drafting Committee to see whether some other form of words could be found.

14. Paragraph 3 (*b*) offered a hard, but reasonable solution, which, as between the general interests of the parties and the interests of the successor State, rightly chose the interests of the parties. It was therefore acceptable.

15. Mr. USTOR said that, during the discussion on article 8,[2] he had not taken a position on paragraph 1 (*b*), on which opinions had been sharply divided. On reflection, he was now inclined to favour the retention of that provision, which regarded signature by the predecessor State as establishing a connexion between the treaty and the territory. Mere adoption of the treaty would, of course, not suffice for that purpose; a rule in that sense could not be substantiated by practice.

16. If paragraph 1 (*b*) of article 8 were retained, however, it would be necessary to redraft the opening clause of paragraph 1 of article 9; the language at present used would only be suitable if paragraph 1 (*b*) of article 8 were dropped. Paragraph 1 of article 9 began with the words "When the consent of a new State to be bound by a multilateral treaty is established by means of a notification of succession...". But if paragraph 1 (*b*) of article 8 were retained, such a notification would not be the only way in which the new State could establish its consent to be bound; it could achieve the same result by means of ratification, acceptance or approval when the predecessor State had signed the treaty subject to ratification, acceptance of approval.

17. In view of the complexity of the subject-matter of article 9, its provisions should be as brief as possible. The main principle involved was that the new State generally had complete freedom to maintain or to abandon the reservations or objections expressed by the predecessor State; he would have preferred a clear statement of the complete freedom of the new State, subject to the exception specified in paragraph 1 (*b*).

18. He agreed with the proposition that the new State should be allowed to make new reservations to the treaty on its notification of succession, independently of the relevant clauses of the treaty.

19. With regard to the difficult question of the presumption to be written into the article for the case in which the new State was silent as to whether it wished to maintain or abandon the reservations or objections of the predecessor State, he thought the Special Rapporteur had made a convincing case in favour of his draft with the arguments set out in his commentary to the article,[3] in particular in paragraph (12). And apart from those arguments, it should be remembered that a reservation was by its very nature a restriction of the obligation of the reserving State; it therefore followed that, in the event of the silence of the successor State, it could not be lightly presumed that it intended to shoulder any more onerous obligations than those which rested on its predecessor.

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[2] For text see previous meeting, para. 9.

[3] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 47 *et seq.*

20. The provisions of paragraph 2 (*a*) should be interpreted as applying to reservations made by the new State and relating to the same subject-matter as the reservation formulated by its predecessor. Clearly, if the predecessor had made a reservation on one article of the treaty and the new State made a reservation on another article, it should be presumed that the intention was that both reservations should apply.

21. Sir Humphrey WALDOCK (Special Rapporteur) said it would be possible for the Drafting Committee to reword paragraph 2 (*a*) so as to give it the meaning attached to it by Mr. Ustor. The provision as now drafted was based on the basis that, since the new State had evidently addressed its mind to the old reservations before making new ones that were different, it should be presumed to want only its own reservations to stand, to the exclusion of the old ones.

22. Mr. TAMMES said he agreed with the provision in paragraph 1 to the effect that reservations expressed by the predecessor State were maintained unless the new State rejected them. A case could, of course, be made for the reverse and more natural presumption that, unless the reservations were confirmed, the treaty would become binding as originally signed, but he found the arguments given in paragraph (12) of the commentary quite convincing.

23. He could also accept the provisions of paragraph 1 (*b*), on reservations, which spoke for itself, as did its counterpart, paragraph 3, on objections to reservations. As far as the drafting was concerned, he thought that legislation by reference, to which so many speakers had objected, could be avoided in the present instance. Perhaps it was just a symptom of international legal systems coming of age, since all mature legal systems used that technique.

24. He had no difficulty with the provisions of paragraph 2, which followed from the basic philosophy of Part II of the draft. The previous provisions of section 1 enabled a new State freely to decide not to inherit a treaty signed by its predecessors; they also allowed a new State complete freedom to decide to inherit such a treaty if the treaty had been in force in respect of its territory at the date of succession. Article 8 allowed a new State freely to ratify a treaty which had only been signed by the predecessor State. Finally, by virtue of the principle embodied in articles 9 and 10, the new State was allowed freely to change the scope of application of the treaty.

25. The net result of all those provisions was to bring the new State very close to the legal position which it would have had if it had been in existence at the time when the treaty had been concluded. That result could be explained on the basis of the idea of justice and the principle of redress, wherever such redress was practically possible. He preferred that approach to basing the rules on the legal nexus between the treaty and the territory, a principle which had been useful to explain the traditional practice, but was of little help when framing new rules in response to new needs.

26. He supported the provisions of articles 8, 9 and 10, including paragraphs 1 (*b*) of article 8. He had not expressed his views on that last provision before, because he had preferred to do so in the context of the whole group of articles in which it belonged.

27. Mr. RUDA said that the adoption at the United Nations Conference on the Law of Treaties of the "maximum Pan-American rule", in the form in which it appeared in article 20, paragraph 4 (*b*) of the 1969 Vienna Convention,[4] had clearly shown that the international community preferred the most flexible possible system for reservations. He therefore fully supported the provisions of article 9, which took the same broad view of the matter.

28. There were two main considerations to be borne in mind. The first was that of ensuring the widest possible participation by new States in multilateral treaties. The second was that of protecting the rights already vested in the other States parties to those treaties.

29. He agreed with the presumption, in paragraph 1 of the article, that a reservation expressed by the predecessor State was deemed to be maintained by the new State if that State remained silent on the point. That was a matter of considerable importance. The treaty should continue to be applied in the territory in question on the same terms as before, unless the new State expressed a different intention.

30. If the presumption was reversed, and it was assumed that the silence of the new State meant that the reservations were withdrawn, the effect would be to apply to the territory certain provisions of the treaty which had previously not been applicable to it because of the reservations by the predecessor State. It seemed to him perfectly clear that such a result could not follow without a clear expression of intention to that effect by the new State. Consequently, he fully supported paragraph 1 as it stood.

31. He also fully agreed with the provisions in paragraph 2. Paragraph 2 (*a*) reversed the previous rule that the silence of the new State was taken to imply acceptance. Personally, he thought the position would depend on the nature of the new reservations expressed by the successor State. If those reservations were totally unrelated to the ones made by the predecessor State, the two sets of reservations should stand. It was only if the old reservations were incompatible with the new ones that they should be considered as withdrawn. That idea of complete incompatibility was not made clear by the words "which differs" and some more precise wording should be found.

32. In paragraph 3, he supported the provision in sub-paragraph (*a*), on objections, which paralleled the provisions of paragraph 2, on reservations. He also found sub-paragraph (*b*) acceptable.

33. Mr. RAMANGASOAVINA said that on the whole article 9 well expressed the faculty of every new State to exercise its freedom of choice with respect to a treaty to which it succeded, by accepting, modifying or rejecting the reservations attached to the treaty, according to what suited its territory.

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[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. 291.

34. The presumption in paragraph 1 was right. It was natural that a new State which simply notified its consent to be bound by a treaty should be presumed to succeed to that treaty in its entirety. It was also natural that a State which succeeded another State should not be under an obligation to accept its predecessor's position unconditionally, but should have the faculty to maintain it or to adapt it to the country's needs. If the presumption were reversed, as some members wished, it might lead to inextricable situations.

35. Paragraph 2 made it clear that any new State could formulate different reservations and thereby express its will to withdraw the former reservations. The wording might perhaps be changed, but the basic idea, which followed logically from paragraph 1, should be retained.

36. Paragraph 3 also followed logically from what preceded it. Any new State which did not withdraw a reservation was presumed also to accept the objections to that reservation. He could see no reason to change the expression "*mutatis mutandis*", the meaning of which was quite clear.

37. Mr. ROSSIDES said that, since the Commission had not accepted his suggestion that the International Law Association's formula should be incorporated in the previous articles,[5] he saw no justification for introducing into paragraph 1 of article 9 the presumption that the predecessor State's reservations were maintained. Such a presumption would have been logical if there had been at the same time a presumption of continuity of application of the treaty unless a notification to the contrary was made by the new State within a reasonable time, as had been suggested by the International Law Association.

38. The primary consideration should be the protection of the interests of the international community and of the parties to multilateral treaties, and that required that there should be maximum continuity in the application of such treaties.

39. He would suggest that the reference in paragraph 2 (*b*) to the articles of the Vienna Convention on the Law of Treaties should also be included in paragraph 1. In particular, the provisions of article 23 of the Vienna Convention, requiring that all reservations made on signature be formally confirmed at the time of ratification, should be made specifically applicable to the situations covered by paragraph 1. It should be remembered that under paragraph 1 (*b*) of article 8 a new State could succeed to an unratified treaty. It was therefore essential to make it clear that in such a case the new State, when it ratified the treaty, must confirm expressly any reservations made by its predecessor at the time of signature.

40. Mr. AGO said that article 9 dealt mainly with a marginal and exceptional case: that of a new State which was not authorized by the provisions of a treaty to become a party to the treaty. The article would enable that State to become a party on the basis of a right of succession. In such a case, the presumption adopted by the Special Rapporteur with respect to reservations was not only desirable, it was logically inevitable. For the case was one of succession; and in matters of succession, as a general rule it was the predecessor's exact situation that was inherited. It was difficult to accept the idea that the successor State could avail itself of the special faculty granted it to become a party to a treaty in order to formulate fresh reservations. That would tend to be contrary to the logic of the system.

41. He therefore supported those members of the Commission who approved of the Special Rapporteur's approach. Article 9 clearly referred to the case covered by article 8, paragraph 1 (*a*), since it referred to reservations made at the time of ratification, not of signature. Consequently the wording of article 9, paragraph 1, should be brought into line with that of article 8, paragraph 1, especially if the latter provision was amended.

42. Mr. BEDJAOUI said that the general approach in article 9 was acceptable. The presumption in paragraph 1 should be a presumption in favour of the maintenance of reservations, since otherwise rights and obligations which had never been assumed by the territory in question would be conferred upon the successor State against the express will of the predecessor State and without the expressly established will of the successor State. It would be wrong to reverse the presumption; to retain it did not mean limiting the sovereignty of the successor State, but interpreting its silence as being in favour of continuity.

43. With regard to paragraph 2, he was reluctant to accept the presumption of a withdrawal of earlier reservations merely because the new reservations were different. It was difficult to see the logic of that provision. He also had doubts about the words "or formulated reservations different from..." in paragraph 1 (*a*). The wording relating to the presumption of withdrawal in paragraphs 1 (*a*) and 2 (*a*) should be redrafted.

44. He supported paragraph 3, including sub-paragraph (*b*), since the reservation in question had been accepted by all the other parties.

45. Mr. NAGENDRA SINGH said that, for the reasons given by other speakers, he accepted the provisions of articles 8 and 9, including paragraph 1 (*b*) of article 8.

46. With regard to paragraph 2 (*a*) of article 9, there were three possibilities. The first, which would give rise to no difficulty, was that the new reservations made by the successor State were in full agreement with the earlier reservations made by its predecessor. The second was that the two sets of reservations were absolutely incompatible, in which case the provisions of paragraph 2 (*a*) would apply. The third possibility was that the new reservations partly agreed with the old ones and partly differed from them. His own view that in such a case the notification by the new State should make it clear whether the new reservations were intended to supplement the old ones, in which case both sets of reservations would apply. The Drafting Committee could perhaps reword paragraph 2 (*a*) so as to make it clear that the new State might take such action.

47. Mr. REUTER said he thought that paragraph 3 (*b*) was incompatible with article 7, sub-paragraph (*c*).

48. Mr. EL-ERIAN said that he supported article 9 and considered it a useful addition to the draft, particularly because, as the Special Rapporteur had noted in para-

[5] See 1163rd meeting, para. 32 and 1166th meeting, para. 67.

graph (4) of his commentary, "The material transmitted by Governments ... does not appear appear to throw any light on the practice in regard to reservations".

49. On the question of a presumption in favour of the maintenance of reservations, he shared the views of Mr. Bedjaoui and Mr. Ruda.

50. He also agreed that, for the reasons stated by the Special Rapporteur, if the reservations were accepted by all the parties the successor State should not be allowed to make any objections.

51. Mr. BILGE said he wondered whether the presumption in paragraph 1 applied only when a reservation had been made in the interests of the territory of the successor State. If that was not the case, he could not accept the presumption that a reservation in favour of the predecessor State was maintained. The silence of the successor State could mean that the reservation was to its advantage, but it could also mean mere indifference. In such a case, it could not be presumed that a reservation which had not been made in the interests of the successor State was maintained. Such a presumption would be all the less justifiable because in other articles the Commission had required that the successor State must establish its consent in order to succeed to certain rights.

52. Instead of maintaining or reversing the presumption in paragraph 1, it might be preferable to require the successor State to express its will.

53. The CHAIRMAN, speaking as a member of the Commission, said that he was inclined to agree with Mr. Bilge; the whole problem, however, was one which could perhaps be best summed up by the saying of the late Supreme Court Justice of the United States of America, Oliver Wendell Holmes: "The life of the law is not logic, but experience".

54. With regard to paragraph 3 (*a*), he would like to know whether it covered both objections made by the predecessor State to reservations by other States and objections made by other States to the predecessor State's reservations. As it stood, paragraph 3 (*a*) would appear to apply only to the former, since it referred to the rules in paragraphs 1 and 2, and unless the Commission laid down rules on both situations it might create a considerable amount of work which would be unnecessary if it required to submit fresh objections to the reservations which new States had inherited or acquired in some other way. The point was one which required further clarification.

55. Sir Humphrey WALDOCK (Special Rapporteur) said that the Chairman was right in saying that article 9 was not entirely logical, but he had already pointed that out in his commentary. Article 9, he wished it to be clear, reflected not his own construction of the law, but what appeared to be the prevailing practice.

56. The question of reservations and objections to them was not of merely academic interest, but arose frequently in connexion with notification of succession. There had been a long discussion on reservations in the Commission and at the Vienna Conference, and the rules which had ultimately emerged had been designed neither to encourage nor to discourage reservations. Those rules had been adopted deliberately because of the importance in international relations to-day of multilateral treaties and the need to facilitate the maximum participation in them.

57. In his opinion, since that flexible system of rules had been adopted at Vienna for reservations, it was essential to conform to it in the present connexion. On the other hand the Commission did not have to go out of its way, in paragraph 3 (*a*), to underline a successor State's complete freedom to formulate reservations, which from a psychological point of view was inadvisable. He therefore preferred the present wording, subject to any drafting amendments which might be found desirable.

58. On the question of the presumption to be made, he agreed with Mr. Ago that to presume succession to reservations was logically correct. He also agreed with the additional consideration adduced by Mr. Ustor, that a new State should not be presumed to accept greater obligations in its territory than those which had been in force at the time of its succession.

59. As to the presumption to be made in paragraph 2 in cases where a new State had made reservations different from those of its predecessor, a rather different view of the new State's intention could be taken from that of some members of the Commission. By making new reservations without referring to its predecessor's reservations, a new State could be argued to have shown that it was abandoning the reservations made by its predecessor.

60. He could not agree that it might be enough simply to provide that a new State must declare its position regarding reservations at the time of notifying its succession. No doubt, it was desirable that the new State should do so, but in fact new States often made reservations without stating what they intended should happen to the reservations made by their predecessors. He was not sure whether he had correctly interpreted the practice, but it was his impression that the Secretary-General assumed that where a statement of reservations was made by a new State without any reference to reservations made by its predecessor, the latter reservations were to be regarded as abandoned. The matter could be further explored in the Drafting Committee.

61. Mr. Rossides's point regarding the confirmation of reservations in cases of ratification was one which admittedly might arise if the possibility dealt with in article 8, paragraph 1 (*b*) was admitted, and might then require further consideration.

62. With regard to paragraph 3 (*a*), his intention had been to protect the position of third States, which should be entitled to make objections when new reservations were made. He did not think that any rule need be formulated in regard to objections to a new State's continuance of reservations; certainly such a rule would not be easy to draft.

63. Reference had been made during the discussion to legislation by reference, but the only alternative to repeating large portions of the provisions on reservations in the Vienna Convention on the Law of Treaties would seem to be to include some such phrase as "the relevant rules of general international law".

64. Lastly, he could see no really serious objection to the expression *mutatis mutandis* in paragraph 3 (*a*), but he recognized that the Commission had shown a certain

aversion to that phrase at its recent sessions and that it would therefore require to be changed.

65. Mr. YASSEEN said that it would be better to refer to the Vienna Convention, which was considered to state all the rules of the law of treaties. To refer to the general rules of international law would be a retrograde step in relation to the work of codification already accomplished.

66. The Commission should settle once and for all the question of references to general conventions, since it would no doubt often arise in the future, especially in connexion with instruments of such wide scope as the Vienna Convention.

67. Mr. ALCÍVAR said he fully agreed with Mr. Yasseen. The Commission should refer expressly to the Vienna Convention, not to the general rules of international law.

68. Mr. REUTER said he must repeat his reservations on the general conception of the draft. Under cover of the law of succession, a new right of accession for the successor State had been introduced in article 9. It was true that the practice of the Secretary-General, which the Special Rapporteur had taken as a basis, was not very clear; it related mainly to decolonization and was difficult to apply to other cases of state succession. At the present stage of its work, however, the Commission could only continue on the same course.

69. He wished to ask the Special Rapporteur whether article 9, as at present worded, and particularly the reference to the Vienna Convention in paragraph 3 (*b*), authorized a new State which had become a party by the special means of succession, to formulate an objection to a reservation made by an original party. If that was the case, the Commission would be moving even further from the concept of succession as it followed from paragraph 1.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Reuter was right in his suggestion that paragraph 3, when taken in conjunction with the rule in article 7, did imply the right to formulate objections. Paragraph 3 (*a*), in fact, might go further than he had intended, and perhaps further consideration should be given to the element of mutuality of rights to which the Chairman had referred. One right which the successor State undoubtedly possessed was that of notifying its succession.

71. Mr. USHAKOV said he was categorically opposed to legislation by reference. It was obvious that if a convention contained a reference to an earlier convention to which a State was not a party, that was an insurmountable obstacle to its becoming a party to the later convention. If the State was not bound by the earlier convention it could not possibly be asked to be bound by any of its articles, even indirectly.

72. Paragraph 3 (*b*) contained a reference to article 20, paragraph 2, of the Vienna Convention on the Law of Treaties. By that reference the Special Rapporteur had intended to define restricted multilateral treaties. In reality, however, the provision referred to did not define that category of treaties, it related to the acceptance by all the parties of a reservation to a treaty formulated under a twofold condition, namely: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty...".

73. Paragraph 3 (*b*) of article 9 should therefore be specially worded to apply to restricted multilateral treaties and should not refer to a provision which also mentioned the object and purpose of the treaty.

74. Sir Humphrey WALDOCK (Special Rapporteur) said that the wording of the Vienna Convention had been very carefully chosen; it clearly defined the category of treaties which was excepted from the general rule. In the present draft there were three or four articles which might call for a similar exception based on the distinction between multilateral treaties of a restricted character and other multilateral treaties.

75. There were many kinds of multilateral treaty which were open to many States, but which he would hesitate to call normative or general multilateral treaties. The ones referred to in the present case were narrowly based and required the consent of each State. The best course, as Mr. Ushakov had suggested, might well be to include a definition, although some care would have to be exercized in formulating it.

76. The CHAIRMAN, speaking as a member of the Commission, said that he could not agree with Mr. Ushakov that it was impossible to include a reference to the Vienna Convention in article 9. References to the Vienna Convention in treaties were, in fact, common; he need only mention the American Convention of Human Rights, which included a specific reference to articles 19-23 of the Vienna Convention.[6]

77. What the Commission was attempting to do in the present set of draft articles was merely to add another chapter to the law of treaties, and, as Mr. Yasseen had said, it seemed only reasonable to refer to what had already been done. He fully supported the idea of incorporation by reference.

78. Mr. AGO said it was necessary to settle once and for all the question of legislation by reference. Unlike Mr. Ushakov, he did not consider that reference, in a convention, to an earlier convention had the effect of making the latter binding on States parties to the later convention. The synthetic method of drafting by reference avoided a lot of repetition, but it did not mean that the rules borrowed applied in cases other than those for which they had been introduced by analogy.

79. If the Commission considered it undesirable to draft by reference, it was important that it should reproduce the existing provisions literally, in order to avoid any contradiction with the rules it had formulated in other contexts.

80. It would be inadvisable for the Commission to refer, in the case in point, to the rules of international law, because that would give the impression that the Vienna Convention was not a complete codification of

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[6] See *The American Journal of International Law*, vol. 65 (1971), p. 679 and at p. 699, article 75.

all the general rules of the law of treaties. And that impression would be contrary not only to the opinion of the Commission, but also to that of the International Court of Justice, which had ruled that the articles of the Vienna Convention which had been adopted unanimously represented general international law.[7]

81. Mr. BARTOŠ said that there was a big difference between repetition of provisions already in force, and reference to such provisions. In the first case, the provisions could be given another interpretation according to the position they occupied and the meaning they bore in the convention into which they were introduced, even if they were reproduced literally. In the second case, where the provisions were merely referred to, they had to be interpreted according to their meaning in the convention from which they were taken. Sometimes it was necessary to modify rules borrowed in that way, because the law was constantly developing.

82. In the case in point, the Special Rapporteur's intention had been to refer to certain articles of the Vienna Convention, without making any change in them. He approved of that method for the purposes of article 9, but it was important that the Commission should take a decision on the general question of legislation by reference.

83. Sir Humphrey WALDOCK (Special Rapporteur) said it was only by accident that the topic of the succession of States in respect of treaties had not been dealt with as a part of the law of treaties. He himself had always thought that it belonged in the law of treaties, but owing to lack of time he had been unable to include it in his draft and a reservation had accordingly been made with respect to it at the Vienna Conference.

84. He suggested that article 9 be referred to the Drafting Committee, which should also consider the question of the general articles that would ultimately form Part I of the draft, concerning which he would shortly submit a paper.

It was so agreed.[8]

The meeting rose at 6 p.m.

[7] *I.C.J. Reports* 1971, p. 47.

[8] For resumption of the discussion see 1187th meeting, para. 26.

1168th MEETING

Tuesday, 30 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Bilge, 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 10

1. *Article 10*

Succession in respect of an election to be bound by part of a multilateral treaty or of a choice between differing provisions

1. Except as provided in paragraphs 2 and 3, 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 its predecessor's:

(*a*) Election, in conformity with the treaty, to be bound only by a part of its provisions; or

(*b*) Choice, in conformity with the treaty, between differing provisions.

2. The new State, when notifying its succession, may declare its own election in respect of parts of the treaty or its own choice between differing provisions under the conditions laid down in the treaty for making any such election or choice.

3. After having notified its succession to the treaty, the new State may exercise, under the same conditions as the other parties, any right provided for in the treaty to withdraw or modify any such election or choice.[1]

2. The CHAIRMAN invited the Special Rapporteur to introduce article 10 (A/CN.4/224).

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the questions raised by article 10 were similar to those relating to article 9. The practice in the matter, which had been illustrated in his commentary by references to, *inter alia*, the 1949 Convention on Road Traffic, the 1951 Convention relating to the Status of Refugees and, the General Agreement on Tariffs and Trade, was quite widespread; it was largely the practice of the Secretary-General of the United Nations and some other depositaries.

4. It seemed essential to have some such rule as the one he proposed. The presumption in article 10, which was analogous to that in article 9, was inherent in the very notion of succession. It was only logical, therefore, to preserve the choice which had been made by the predecessor State unless its successor stated something to the contrary.

5. At the same time, it was desirable to give the new State an opportunity to review the situation and to make a choice or an election if it so desired. Once its choice had been made, however, the new State, having committed itself, should be considered as being in the same position as the other parties with respect to any right provided for in the treaty to withdraw or modify its election or choice.

6. Mr. BEDJAOUI said he accepted paragraph 1 of article 10, but had some doubts about paragraphs 2 and 3. As the Special Rapporteur had said, article 10 was based on the same principle as article 9, namely, the

[1] For commentary see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 52 *et seq.*