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Summary record of the 1169th meeting

Topic:

Succession of States with respect to treaties

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a party to that treaty; the consent of all the parties was also necessary. That was probably the case which the concluding phrase in article 12 was intended to cover. If that was so, the article concerned not only the legal effects of a notification, as its title indicated, but also the legal effects of the consent of all the parties.

84. Those members of the Commission who wished to set aside certain rules of the treaty because the draft dealt with succession should make it clear whether what they had in mind was the rules relating to the group of States which might become parties to the treaty when it took legal effect, or the rules relating to the rights of third States. For if mere notification could change the date when the treaty produced legal effects, as it would appear from the end of paragraph 3, the notification would have a certain retroactive effect which could be prejudicial to third States. Although that consequence was acceptable in certain cases, particularly cases of decolonization, it called for caution in others.

85. He hoped the Commission would make it clear whether article 12 should deal with dates or legal effects and that in all cases it would give very precise directions, without which the provision might give rise to serious difficulties.

86. Mr. ROSSIDES said that paragraphs 1 and 2 of article 12 did not give rise to any special problems. The difficulties arose with regard to the provisions of paragraph 3, taken in conjunction with those of paragraph 2 (*b*).

87. There were three important dates to be considered: the first was the date of entry into force of the treaty itself; the second was the date of the succession, or the attainment of independence by the new State; the third was the date of notification by the new State of its consent to be bound by the treaty.

88. He noted that the great majority of members of the Commission were of the opinion that the new State should be bound only by its own act of notification. It would have been logical to consider that such a notification did not have retroactive effect. Nevertheless, it was proposed, in paragraph 3, to give it such effect if the new State so wished. Personally, he would be prepared to accept that retroactive effect as stated in the first part of paragraph 3, ending with the words "or any situation which exists after the date of succession"; but he had misgivings about the concluding proviso: "unless an intention that they should be binding upon it from an earlier date appears...". Did "earlier date", in that context, mean the date of entry into force of the treaty?

89. Sir Humphrey WALDOCK (Special Rapporteur) said that in drafting the rules in article 12 he had, as usual, based himself on the existing practice. There were in fact cases of notifications of succession that had been made expressly effective as from a particular date, usually later than the date of succession. In a few cases, the new State had declared its intention to accept responsibility for the application of the treaty as from a date earlier than the date of succession. Declarations of that kind were, for example, to be found in connexion with such conventions as that for the Protection of Literary and Artistic Works, mentioned in paragraph (11) of his commentary.

90. In such situations he saw no need to set aside the clearly expressed intention of a new State on the logical argument that it had not been in existence prior to independence. The case was one of succession to obligations and rights arising from a treaty.

91. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the underlying philosophy of paragraph 3, which accorded with the Commission's general position on succession. At the same time, he realized that the provisions of that paragraph raised a number of questions with regard to the other parties to a multilateral treaty. One of them was the question of the obligations, if any, incumbent upon the depositary and the other parties to the multilateral treaty during the period which preceded a notification of succession with retroactive effect. Would the depositary be obliged to send all notifications relating to the treaty to the successor State in expectation of a possible notification of succession with retroactive effect?

92. For the other parties to a multilateral treaty, the question arose whether they were under an obligation not to take any action that might hinder the new State from becoming a party to the treaty. Were those parties under an obligation of good faith of the kind provided for in article 18 of the Vienna Convention on the Law of Treaties?

93. His own feeling was that it would be going too far to impose such obligations on the parties for an unlimited time. The new State should be given a reasonable time-limit in which to take advantage of the provisions of paragraph 3. If it made a notification of succession within, say, twelve months, it would be allowed to give the notification retroactive effect and could then invoke the rule of non-frustration against the States parties to the treaty. If, on the other hand, the new State allowed that period to elapse, it would no longer enjoy the rights set forth in article 12 and could then only make a declaration of accession of the ordinary kind; an accession by a new State would not, of course, involve all the problems that arose with regard to a declaration of succession under article 12.

The meeting rose at 1 p.m.

1169th MEETING

Wednesday, 31 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 12 (Legal effects of a notification of succession in respect of a multilateral treaty) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 12 of the Special Rapporteur's draft (A/CN.4/224/Add.1).

2. Mr. YASSEEN said he was quite satisfied with article 12, which was based on the Vienna Convention on the Law of Treaties.[2] The provisions of the article were logical with regard both to the date when the consent of the new State to be bound by the multilateral treaty was established and to the date when the treaty entered into force for the new State.

3. He had some doubts, however, about the interpretation to be given to the words "after the date of the succession" in paragraph 3. That paragraph provided that, in the absence of any contrary intention, "the provisions of the treaty bind the new State in relation to any act or fact which takes places or any situation which exists after the date of the succession". It seemed that the Special Rapporteur had wished to express the general principle of non-retroactivity, while providing for the possibility of exceptions. If that was the case, the term "succession" should not be understood as defined in article 1,[3] that was to say, as corresponding to the date of independence, but from the standpoint of succession to the treaty, that was to say, as from the date of entry into force of the treaty for the new State. The period between those two dates could be the subject of an exception to the principle of non-retroactivity.

4. That interpretation appeared to be the inescapable; it was based on the intention of the parties to derogate, in a particular case, from the principle of non-retroactivity. The precise meaning of "succession" as the term was used in paragraph 3 should therefore be clarified.

5. Mr. RUDA said that article 12 was one of the most important in the whole draft and a particularly delicate one. Paragraph 1, on the form in which consent to be bound was established, did not raise any problem; nor did the general principle stated in paragraph 2 (*a*), on the date on which consent was established.

6. Paragraph 2 (*b*) embodied a very important principle; it laid down that the treaty entered into force for the new State on the date of notification of its succession. That principle was in full accord with the principle underlying article 7, on the right of a new State to notify its succession in respect of multilateral treaties.

7. That brought him to the crucial question raised by paragraph 3, which made it possible, where the treaty entered into force on the date of notification, for the new State to make the treaty operative for itself from an earlier date. That right was granted to the new State not by virtue of the general law of treaties, but by virtue of the right of succession and the principle of continuity on which it was based. Article 28 of the Vienna Convention on the Law of Treaties laid down the principle of non-retroactivity of treaties, but that principle was appropriately set aside in the present case because the right of the new State derived from the law of succession and not from the law of treaties.

8. The Commission had reached a cross-roads. In article 7 [4] it had agreed to give the new State the right to become a party to a multilateral treaty independently of the consent of the other parties; by the same token, it should accept the rule in paragraph 3 of article 12 that the new State had the right to give its notification of succession retroactive effect so that it operated from the date of attaining independence.

9. No practical problems were involved. If the new States did not wish to be bound as from the date of its independence, it could in most cases elect to accede to the treaty instead of notifying succession. In that event, article 28 of the Vienna Convention would apply and there would be no retroactive effect, except by agreement of the parties.

10. He supported the solution embodied in paragraph 3 as being logically correct in addition to being based on a solid body of consistent practice.

11. Mr. TSURUOKA said he noted from the last clause of paragraph 3 that the intention established by the successor State was sufficient to make the treaty applicable retroactively. In view of the importance of the legal effects attaching to that establishment of intention, he thought that it should be permitted only during a certain period and suggested that the Commission set a time-limit.

12. Mr. ROSSIDES said he could not agree that the words "the date of the succession" in paragraph 3 could mean anything else than the date of independence. Only that interpretation would be consistent with the meaning attached to the term "succession" in article 1 (Use of terms).

13. During the discussion on article 7, he had stressed the need for continuity in cases of notification of succession. Unless a retroactive effect was attached to that notification so that the treaty became binding as from the date of independence, the new State would be enjoying an unlimited right of accession.[5] He therefore agreed with the views expressed by Mr. Ruda.

14. Mr. YASSEEN said that the reason why he had doubts about the meaning of the term "succession" as used in paragraph 3 was that he saw a contradiction between the rule stated in paragraph 2 (*b*), under which the treaty entered into force for the successor State on the date on which its consent to be bound was established, and the rule in the first part of paragraph 3, under which

[1] For text see previous meeting, para. 58.

[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. 289.

[3] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 50.

[4] Op. cit., *1970*, vol. II, p. 37.

[5] See 1165th meeting, para. 29.

the provisions of the treaty bound the State from the date of the succession. If the words "date of the succession" meant the date of attaining independence, that date would generally be earlier than the date referred to in paragraph 2 (*b*), namely, the date of entry into force of the treaty for the new State. There would then be retroactive application of the treaty, which was the case covered by the last clause of paragraph 3.

15. Mr. QUENTIN-BAXTER said he supported article 12 as drafted by the Special Rapporteur. He also agreed that, in adopting that article, the Commission would be acting on a principle of succession; and continuity of obligation was of the very essence of that principle.

16. Some of the difficulties which had emerged during the discussion arose from a drafting problem. In article 1 (Use of terms), sub-paragraph (*a*) specified that the term "succession" was used as meaning the simple fact of replacement of one State by another in the competence to conclude treaties with respect to a given territory. In sub-paragraph (*f*),[6] on the other hand, the terms "notifying succession" and "notification of succession" were stated to mean "any notification or communication made by a successor State" whereby it expressed its consent to be bound by the treaty"; in that paragraph, the term "succession" was thus used as implying a transfer of rights and obligations.

17. In article 12, however, he did not think there was in any sense a real conflict between the provisions of paragraphs 2 and 3 and the different points of time at which they operated. Article 7 established the right of the new State to become a party to the treaty if it so desired, and it also established that the right in question was a right of succession. It therefore followed that, as stated in article 12, a notification of succession should take effect as from the date of independence, unless the notification—and the acceptance by the other parties—proved a contrary intention. In that context, the consent of the other States concerned meant their agreement that the case was in fact one of succession.

18. It was also important to remember the relationship of the provisions of article 12 with those of article 4[7] on provisional application. In most cases, the new State would be applying the treaty on a provisional basis. If it ultimately decided that it did not wish to become a party to the treaty, it ceased to be bound by it and no serious problems arose. But if the new State made it clear that it was honouring the treaty, the other parties would be bound by it, unless they had rejected the provisional application of the treaty in the first place.

19. In that connexion, he was very sceptical of the idea of a time-limit. The international community had lived very well without a time-limit in a period during which there had been a much greater incidence of succession than was likely to occur in the future. In practice, a declaration of provisional application by a successor State under paragraph 2 of article 4 would give an indication of that State's wish ultimately to become a party. In some cases, it would not matter if the acts mentioned in article 12 did not take place for a long time. In other cases, where it did matter, the States concerned could always inquire about the intentions of the new State. Such had been the practice so far and there was every reason to encourage a similar practice in the future.

20. Mr. BEDJAOUI said it was necessary for the Commission to take a clear position on the notion of continuity in State succession. That was a decisive factor for both sets of draft articles now being prepared on the subject.

21. For his part, he thought that, in the case of treaties, continuity derived from the right which article 7 conferred on the new State. That right was manifested by a notification of succession, associated with the freedom of the new State to arrange the modalities of its conventional legal ties, particularly those taking the form of reservations or elections. There was accordingly no continuity without the exercise of that right and without the complementing consent of the other States; but the successor State was free to choose retroactivity or non-retroactivity of the treaty. It followed that the effective application of a treaty immediately after the creation of a State depended not on a customary rule, but on the expressed will of that State and of the other States parties to the treaty. Under those conditions, there could be no presumption of continuity or retroactivity.

22. In short, the continued application of a treaty to the territory of the successor State required, in additon to the consent of the other States, either an express declaration by the successor State or the establishment of its will as deduced from its acts or conduct; otherwise continuity would not be presumed.

23. Personally, he was in favour of the principle of non-retroactivity of treaties, as stated in article 28 of the Vienna Convention. Retroactivity could, of course, be presumed, as an exception to that principle, in the special case where a new State notified its succession under article 7. But uncertainty would persist until the new State had expressed its will, and it might ultimately refuse to consider itself bound by the treaty. He therefore hoped the Commission would not introduce the concept of retroactivity into the draft.

24. For the rest, article 12 was acceptable, provided that the words "after the date of the succession" meant "after the date of the notification".

25. Mr. NAGENDRA SINGH said that no problem arose with regard to paragraphs 1 and 2 (*a*) of article 12. On the question of retroactivity in the application of paragraphs 2 (*b*) and 3, he thought that those provisions conformed with the approach adopted in article 28 of the Vienna Convention. Under that article, retroactivity was not totally barred; sovereign States could give a treaty retroactive effect by clearly expressing their intention to do so; the words "or is otherwise established" made that clear.

26. Paragraph 3 needed clarification, particularly the meaning of the words "after the date of succession". In view of the overriding importance of the principle of consent, a new State should be allowed to decide the

[6] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 28.

[7] Op. cit., *1969*, vol. II, p. 62.

exact point of time at which it wished to be bound by a treaty. It should have the right to choose between three different dates: the date of independence, the date of the notification of succession, and the date of the ratification of the treaty by the predecessor State. The first and third of those possibilities were clearly covered by the terms of paragraph 3. The wording should be adjusted so as to make it clear that the new State also had the option of declaring itself bound only as from the date of notification. That might somewhat upset the concept of succession, which would call for a link with the date of independence or succession. However, succession in personal law must necessarily differ from the succession of sovereign States.

27. Mr. USHAKOV said that the presumption of retroactivity was not a subject for general discussion, because it did not apply equally to all cases of State succession. When States merged, it could be presumed that a treaty continued to apply without interruption, whereas in cases of decolonization or separation, the criterion must be the intention established by the new State. It was therefore important to deal with each type of State succession separately.

28. Mr. AGO, after explaining that he was concerned only with cases of State succession due to decolonization or secession, drew attention to the special meaning of the term "succession" in the current discussion on article 12. That article dealt with an exceptional mode of participation in a multilateral treaty, namely, "notification of succession" by a new State, which had the effect of making a certain treaty binding between the new State and the other States parties to the treaty.

29. For that effect to be retroactive, for example with respect to reservations, was inconceivable. For under article 9, the new State could withdraw the reservations made by its predecessor, and some believed that it could even make other reservations. Hence third States could not know what their position vis-à-vis the new State would be so long as the new State had not expressed its intentions.

30. Hence it was important to follow the principle that the rights and obligations of the new State and of third States came into being only from the time when their consent was established, that was to say, from the time of notification of succession.

31. Mr. YASSEEN said it was in the interests of the successor State to be bound, not from the date of its independence, but from the date of its notification of succession. He therefore suggested that in paragraph 3 the words "after the date of the succession" should be replaced by the words "after the date of the notification".

32. Sir Humphrey WALDOCK (Special Rapporteur) said it was necessary for the Commission to take a stand on the question of the temporal aspect of the legal effects of notification. That question involved, of course, a number of subsidiary problems which were not dealt with in article 12, but it was a fundamental question with regard to the provisions now under discussion.

33. When the Commission had discussed succession in respect of reservations (article 9) and in respect of an election to be bound by part of a multilateral treaty or of a choice between differing provisions (article 10), it had been agreed that when a State deliberately made a notification of succession, it was performing an act different from accession. The presumed intention of the notifying State was to maintain the position of its predecessor; it therefore stepped into the shoes of the predecessor State with regard to reservations, election or choice.

34. The position should accordingly be the same with regard to article 12. A new State often had very important reasons to prefer a notification of succession to an accession. The implications of the two acts could be very different as far as their repercussions on municipal law were concerned. Certain treaties created rights and obligations for individuals and it might be important for the new State to ensure the continuity in municipal law of those rights and obligations by making a declaration of succession.

35. The existing practice in the matter was quite consistent. The effects of a notification of succession dated back to independence unless a different intention appeared. If the rule were now to be altered so that the notification produced its effects only from its own date, the result would be to reverse the present understanding as to the applicable rule.

36. As far as the terminology was concerned, he was becoming more and more convinced that it would not be possible in the present draft to use the term "succession" by itself. Two different expressions would have to be used for the terms defined in sub-paragraphs (*a*) and (*f*) of article 1. The fact of the replacement of one State by another in the sovereignty of territory, to which the first of those sub-paragraphs referred, should perhaps be called "succession of States"; in sub-paragraph (*f*), on the other hand, the word "succession" should be replaced by words such as "succession to a treaty". That change in terminology would make it possible to keep apart the two ideas of factual replacement and transfer of treaty rights and obligations.

37. A number of subsidiary problems also arose. The first was that of a possible interim régime covering the rights and duties of other States parties to the treaty before notice of succession was given. That problem was much more difficult in the case of bilateral treaties than in that of multilateral treaties. In the case of multilateral treaties the existence of a depositary who received notifications and made communications relating to the treaty made it possible to clarify the position. In the case of a bilateral treaty, it was often uncertain whether a particular declaration or act constituted an acceptance of continuity or merely a provisional arrangement.

38. The question of a possible time-limit was, of course, particularly relevant to the present discussion. One solution would be to introduce *de lege ferenda* a rule whereby retroactivity would be allowed only if notification of succession took place within a specified period. The rule would be an entirely new one because there was nothing in contemporary State practice which evidenced such a rule.

39. As to the suggestion that the operative date should be the date of notification, he thought it would defeat the principle on which several of the draft articles were

based. The Commission could nevertheless adopt that suggestion, provided it did so clearly. The present case was one in which it was essential above all to have a clear rule one way or the other, so that States would know how to act in a particular case.

40. Mr. USHAKOV observed that the practice cited by the Special Rapporteur related solely to decolonization and applied mainly to general multilateral treaties. It was necessary to consider other cases of State succession too, particularly fusion and separation, and to deal separately with restricted multilateral treaties.

41. Sir Humphrey WALDOCK (Special Rapporteur) said that article 12, like the previous articles in Part II was based on a certain concept of the "new State", which was set out in sub-paragraph (*e*) of article 1. Those articles did not deal with other cases of succession, such as fusion. He was preparing draft articles on those cases and would submit them to the Commission, together with an account of the State practice in the matter. The Commission would then have to decide whether, in the case of fusion, the rule of continuity operated *ipso jure* or by consent. The same issue would arise with regard to cases of separation or dismemberment of States and dissolution of unions.

42. Lastly, he wished to confirm the statement he had made during the discussion of certain other articles, that it would be necessary to frame special provisions on restricted multilateral treaties. The reservation relating to that type of treaty contained in sub-paragraph (*c*) of article 7 would not be sufficient to cover the subject. A clearer distinction would have to be drawn between restricted multilateral treaties and other multilateral treaties.

43. Mr. AGO said that the new State should not be left free to declare itself bound either from the date of independence or from the date of its notification of succession. If it were, the position of third States would remain uncertain as long as the new State had not expressed its will. Subsequently, the successor State might accuse a third State of having committed an internationally wrongful act by not complying with the treaty during the period between the birth of the new State and the date of notification.

44. The practice of States, on which the Special Rapporteur had based himself, had been formed from particular cases. He hesitated to consider it definitive and thought that in all cases the position of third States should be safeguarded, so that it would not depend solely on the will of the successor State.

45. Mr. BEDJAOUI said that current practice revealed a concomitance of conduct on the part of the successor State and third States which resulted in the treaty being maintained in force. That situation should be distinguished from retroactivity deriving from notification of succession.

46. The Commission could therefore refrain from mentioning retroactivity and simply provide that notification of succession following a parallel course of conduct by the successor State and third States confirmed the practice reflected by that conduct.

47. On the other hand, to accept a general presumption of retroactivity would be to exclude the case in which a successor State refused to consider itself bound by the treaty and the case in which third States did not desire to bind themselves with the successor State. An example of the latter case was given in paragraph (12) of the commentary to article 13 (A/CN.4/249).[8] The practice certainly afforded several examples of non-application of the presumption of continuity and the rule of retroactivity.

48. Sir Humphrey WALDOCK (Special Rapporteur) said that it was really a question of determining the date on which notification took effect for the successor State as far as its obligations and rights were concerned.

49. The problem was not so much that of retroactivity as that of a deliberate choice made by the new State concerned in accordance with customary international law. It was not a question of presumption: the new State made a deliberate choice. A declaration of succession would sometimes indicate the date from which it was intended to take effect; but in the absence of any such indication, its intention was taken to be that the notification should take effect from the date of independence, not from the date on which the notification was made. That was the assumption on which the relevant entries had been made in the Secretariat publication *Multilateral treaties in respect of which the Secretary-General performs depositary functions.*[9]

50. Mr. NAGENDRA SINGH said he appreciated that the practice of States concerning the effects of a notification was to date them back to independence; in a few cases, the entry into force was moved even further back to the date of ratification of the treaty by the predecessor State. Nevertheless, it would not be fair to the new State concerned to rule out entirely the date of notification as the operative date.

51. There was not much substantive difference between a new State which emerged from decolonization and one which emerged from some other process—secession, partition, dismemberment, disintegration, fusion or even the creation of a new State on a previously uninhabited territory. In all those cases, real or hypothetical, a new member entered the international community. That being so, he saw no reason to discriminate between a formerly dependent territory and another successor State, when it came to applying the paramount principle that consent was the basis of all international obligations.

52. Sir Humphrey WALDOCK (Special Rapporteur) said that far from discriminating against the new State, his draft articles gave it the privilege of choice between succession and accession. In some cases, the existence of that choice might even place a burden on the old States.

53. Mr. ROSSIDES said that, coming from a country which was a former colony, he was in full sympathy with the ideas expressed by Mr. Nagendra Singh. Nevertheless, he must admit that a new State could not be

[8] Op. cit., *1971*, vol. II, Part One.

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

allowed to declare that it succeeded to a multilateral treaty with effect from any date it chose.

54. The new State would have to decide whether it preferred continuity, in which case it would notify succession, or discontinuity, in which case it would avail itself of the right of accession to the treaty like any other State. The desire to favour new States was understandable, but the fundamental principles of international law could not be disregarded.

55. Mr. RUDA said that, as he had already stated, the basis of all treaty obligations was consent; it was impossible to impose a treaty on a new State without its consent, and that consent should not be presumed, but should be expressed by some specific act of notification by the successor State.

56. Under the system provided for in article 7, a new State which elected to use its right to notify its succession in respect of a multilateral treaty would become a party to that treaty independently of the other parties; in that case, its right would derive from the general law of succession in respect of treaties and not from the law of treaties itself.

57. Having once chosen the path of notification, however, the new State could not fall back on the law of treaties, since it had already deliberately elected to be bound by the law of succession. In his opinion, therefore, the Special Rapporteur's solution in paragraph 3 of article 12 was correct, since it was important to take into account the interests of third States. In the event of silence on the part of the successor State, the legal effects of notification should be considered to apply retroactively to the time of its attaining independence.

58. Mr. USHAKOV said he would like to know whether it was on the strength of the tacit agreement of the other parties or of his own interpretation that the Secretary-General had adopted the practice of considering treaties as binding the parties from the date of succession.

59. Mr. SETTE CÂMARA said he would refrain from commenting on paragraphs 1 and 2 (*a*), since opinion in the Commission seemed to be in favour of those provisions.

60. On paragraph 3, he agreed with Mr. Ago. Mr. Ruda had suggested that the Commission would now have to choose between following the law of succession and the law of treaties; in his own opinion, however, that choice had already been made when the Commission had accepted the definition of "succession" in article 1, and when it had adopted the "clean-slate" rule in connexion with article 6.

61. Article 7 did not involve succession in the traditional sense in which that term was understood in private law. What was inherited was a link which the predecessor State had had with the treaty, and it provided the successor State with nothing more than a different, and perhaps exceptional, way of establishing its consent to be bound by the treaty. In that respect article 7 differed from article 15 of the Vienna Convention.

62. It was his impression that certain prejudices about concepts of succession under private law had been injected into the discussion. Members always seemed to be thinking of retroactivity as something going back to the date of independence. Perhaps that difficulty could be resolved by replacing the words "an earlier date", in paragraph 3 of article 12, by "another date", which would make it clear that the date in question resulted from the consent of the parties.

63. Sir Humphrey WALDOCK (Special Rapporteur) replying to Mr. Ushakov, said his approach reflected the practice of the Secretariat as he understood it. That practice was based on the idea that when a State gave notification of its succession, it intended to establish continuity in respect of the treaty relations which had existed at the time of the predecessor State. In other words, the notification went back to the date of independence.

64. There was nothing arbitrary in the procedure adopted. Notifications were circulated to all the other States parties to the treaty, and, as far as he knew, none of them had ever questioned such a notification. It was simply a matter of using common sense and making a proper interpretation of the notification. To provide otherwise would mean a reversal of practice and would deprive States of the possibility of maintaining continuity in their treaty relations.

65. In many cases, it was true, a new State had the right either to succeed to, or to accede to, the treaty. Indeed, there were cases in which a new State had accepted to one multilateral treaty, but notified its succession to another on the same day, and in such cases it was clear that the State deliberately intended to achieve a different result in regard to the two treaties.

66. In his opinion, if a State gave notification of succession, it must be assumed that it meant what it said. In drafting the rule in paragraph 3, however, he had provided for the alternative that a State could date the effects of a treaty from a date other than that of independence if such an intention appeared in the notification.

67. Mr. Yasseen had suggested that paragraph 3 would be easier to accept if it had not been phrased in terms of retroactivity and if the phrase "on that date", in paragraph 2 (*b*), were amended to read: "on the date of the independence of that State". On that point, the drafting could be adjusted, but it was necessary for the Commission first to decide whether it accepted the general lines of his draft.

68. There were also some other points, such as those raised by Mr. Ushakov, which should be taken into consideration. It was undoubtedly important to protect the position of other parties.

69. On the question of time-limits, he would like to know the views of the Commission.

70. If article 12 was drafted in a different form and it was accepted, as Mr. Ruda had agreed, that a new State should be able to choose the date of its notification as an alternative, agreement could probably be reached on a text. He therefore believed that the article could now be usefully referred to the Drafting Committee.

71. Mr. BARTOŠ said he agreed with Mr. Ago that the rights of third States should not be neglected. A new provision should be inserted specifying whether or not third States should consider themselves bound pending

the notification of secession, and whether the notification should have retroactive effect even though the successor State did not consider itself bound, since it had the right either to make or not to make the notification.

72. Sir Humphrey WALDOCK (Special Rapporteur) said that at least it was reassuring that no trouble of that kind seemed ever to have occurred with respect to multilateral treaties.

73. Mr. REUTER said that the Commission was not drafting a text to govern only those cases which had arisen in the practice of the Secretary-General.

74. For example, in the case of an open economic treaty, the essential question would be a question of fact: whether, on the day it had attained independence, the successor State had continued to apply the treaty in fact. If it had, the other States would also apply the treaty, and it was quite normal that in that case notification of succession should have retroactive effect.

75. But if, having attained independence, the successor State no longer applied the treaty in fact, since it was not bound, but later changed its mind, after a period during which the other parties either had or had not applied the treaty, and then notified its succession, it could be accepted that the notification took effect as from its own date, but not that it had retroactive effect on earlier situations in which third States had taken a legitimate position because the new State had not in fact considered itself bound by the treaty.

76. It seemed that the whole of the Secretary-General's practice was based on treaties designed to protect the general interests of mankind. For example, it was clear that the rights of third States could not be impaired in the case of an international labour convention since, in that case, no reciprocity was involved in the legislation. It was when reciprocity was involved that retroactivity was inadmissible. There was no need to quote specific instances, but the treaties to be covered in the future would not always be of the kind which had given rise to the present practice; there would also be far more complex and delicate instruments.

77. If article 12 was considered to apply to all multilateral treaties, including those covered by the exception in article 7 (*c*), where it was, of course, the consent of the other parties which gave effect to the notification, the title and several of the provisions of article 12 would have to be amended.

78. Sir Humphrey WALDOCK (Special Rapporteur) said he had already accepted the point with respect to restrictive treaties. There might be a type of treaty in which the question of an interim régime might be important, but no difficulty of that kind had yet come to his notice. He was speaking on the basis of the practice not only of the United Nations, but also of the Swiss and United States Governments as depositaries.

79. All members had expressed concern about the problem of third parties; something obviously should be done to protect their interests, but with treaties other than those of a restrictive kind, notification was in practice given the effect which he had stated.

80. In the case of unilateral declarations, such as that which had been made by Tanganyika, a State might agree that it would keep bilateral treaties in force on a reciprocal basis and would apply multilateral treaties once it had made up its mind to do so. However, it might be difficult to know how and when the other parties aquiesced in such a declaration, and the situation might be particularly obscure with regard to economic treaties.

81. Mr. USHAKOV said that, in recasting article 12, account should also be taken of the effect of a unilateral declaration on the provisional maintenance in force of a treaty. That was a special case which should also be covered by the article.

82. Mr. CASTAÑEDA said he wondered whether paragraph 3 of article 12 was not dependent on article 7 (*c*), which referred to treaties requiring the consent of all the parties. As Mr. Reuter had suggested, special difficulties might arise in connexion with treaties of an economic type which called for reciprocal rights and obligations and where the consent of the third parties was more important.

83. Mr. REUTER said that if the position were always as Mr. Castañeda had described it, the problem would be much simpler; but that was not the case. The 1958 Conventions on the Law of the Sea [10] for example, were broadly open treaties and so were not covered by article 7 (*c*), but they established reciprocal rights and obligations. If, on attaining independence, a State continued to apply those Conventions in fact without saying anything, as it was entitled to do, there was no objection to its declaring that its notification of succession was retroactive. But if it decided no longer to apply the Conventions in fact, as it was also entitled to do, and later changed its mind, it could then notify its succession, but without retroactive effect to the date of independence. The situation was thus more complicated than was provided for in article 7 (*c*).

84. The CHAIRMAN asked whether any member wished to comment on the Special Rapporteur's note on the question of placing a time-limit on the exercise of the right to notify succession.[11]

85. Mr. TSURUOKA said he had raised the question of a time-limit, but he thought it was for the Drafting Committee to see what could be done about it.

86. Sir Humphrey WALDOCK (Special Rapporteur) said that when the matter had first come up in debate, both the Chairman and Mr. Ruda had appeared to consider it unnecessary to go into the question of time-limits.[12] But in view of the Chairman's statement at the end of the previous meeting, he at least, seemed now to be of a different view.

87. The CHAIRMAN, speaking as a member of the Commission, said that the need for a time-limit would depend on how article 12 was ultimately drafted with respect to third parties. If some definite obligation was imposed on them to pursue a certain line of conduct,

[10] United Nations, *Treaty Series*, vol. 450, p. 82; vol. 499, p. 312; vol. 516, p. 206; vol. 559, p. 286.

[11] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 60.

[12] See 1165th meeting, paras. 38 and 78.

it would seem to him only reasonable to give some indication of the period of time during which they would be under that obligation.

88. Mr. YASSEEN said he thought it was too early to take a decision on the question. The Commission would have a clearer view when its work was further advanced.

89. Mr. USHAKOV said that everything would depend on the new wording of the article.

90. Mr. SETTE CÂMARA said he agreed with Mr. Yasseen and Mr. Ushakov. After reading the Special Rapporteur's note he thought it obvious that at the present stage it would be risky to include any provision on time-limits. The successor State had a right to establish a time-limit by its own initiative and that had been the practice in most unilateral declarations. However, for the Commission to establish a time-limit would, to his mind, be a rather arbitrary procedure. He therefore agreed with the Special Rapporteur's suggestion, in paragraph (6) of his note, that for the time being no provision concerning a time-limit should be included in the draft articles dealing with multilateral treaties.

91. Mr. USTOR said that it was not a question of setting a particular time-limit in months or years, since the legislative effects of such a provision would be open to doubt. What was needed was to guard against a situation in which a new State might unduly delay its decision with respect to a treaty and to determine whether such a State should be entitled to declare itself bound by a treaty *ab initio*. Those problems would have to be decided at a later stage.

92. Mr. REUTER said he agreed with Mr. Ushakov. It would be unnecessary to fix a time-limit if the article protected the rights of third States, since the protection of those rights was the object of the time-limit, or if the article took account of whether the treaty was being applied in fact. If a new State continued to apply the treaty in fact, under *beneficium inventarii* and if, consequently, the interests of third States were protected, the new State, which would be grappling with considerable political difficulties, should be given as much time as it needed. Everything therefore depended on the extent to which the text of the article would protect the rights of third States.

93. Mr. QUENTIN-BAXTER said that although in principle he was opposed to time-limits, he agreed that it was necessary to protect the interests of third States. He was therefore unwilling to admit the absolute right of a new State to claim continuity in respect of a treaty after a supervening interval of time.

94. The new State did have an absolute right to accede to a multilateral treaty concluded by its predecessor, but if it had behaved in a way which was inconsistent with that treaty, it no longer had the right to inform other States that it had chosen to be bound by the treaty as a successor State and that those States would have to accept it as a party to the treaty from the date which it had indicated. On that point he felt compelled to reserve his position.

95. The CHAIRMAN said that question came under the rights and duties of third States.

96. Mr. EL-ERIAN said he agreed and assumed, with Mr. Reuter, that the interests of third States would be properly protected; in view of the difficulties with which successor States were usually confronted, however, he was opposed to laying down any time-limits.

97. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer article 12, together with the additional sub-paragraph of article 1 which had been prepared by the Special Rapporteur (A/CN.4/249), to the Drafting Committee.

It was so agreed.[13]

The meeting rose at 12.55 p.m.

[13] For resumption of the discussion see 1196th meeting, para. 3.

1170th MEETING

Thursday, 1 June 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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 and Add.1)

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

(continued)

ARTICLE 13

1.

Article 13

Consent to consider a bilateral treaty as continuing in force

1. A bilateral treaty in force in respect of the territory of a new State at the date of succession shall be considered as in force between the new State and the other State party to the treaty when:

(*a*) They expressly so agree; or

(*b*) They must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. A treaty in force between a new State and the other State party to the treaty in accordance with paragraph 1 is considered as having become binding between them on the date of the succession, unless a different intention appears from their agreement or is otherwise established.[1]

2. The CHAIRMAN invited the Special Rapporteur to introduce article 13 of his draft (A/CN.4/249).

3. Sir Humphrey WALDOCK (Special Rapporteur) said that the situation with respect to the consent of a new

[1] For commentary, see document A/CN.4/249.