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Summary record of the 1171st meeting

Topic:
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1171st MEETING

Friday, 2 June 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, 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)

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

(continued)

ARTICLE 14

1. *Article 14*

Duration of a bilateral treaty considered as in force

1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is binding upon them until terminated in conformity with its provisions, unless it appears from their agreement or is otherwise established that they intended the treaty to be applied only:

(*a*) Until a specified date;

(*b*) Pending a decision by either State to terminate its application;

(*c*) Pending the conclusion of a new treaty between them relating to the same subject-matter.

2. In cases falling under paragraph 1 (*b*) not less than twelve months' notice shall be given of the State's intention to terminate the application of the treaty, unless the treaty itself provides for a different period of notice in which event this period shall apply.

3. In cases falling under paragraph 1 (*c*) the application of the treaty shall be considered as terminated if the new State and the other State party conclude the new treaty, unless a contrary intention appears from the later treaty or is otherwise established.[1]

2. The CHAIRMAN invited the Special Rapporteur to introduce article 14 of his draft (A/CN.4/249).

3. Sir Humphrey WALDOCK (Special Rapporteur), said he had been working on the basis that, when a bilateral treaty was considered as being in force in accordance with the provisions of article 13, the application of the law of succession was exhausted; thereafter the general law of treaties applied in every particular. He did not therefore consider it necessary to set out in detail all the possible applications of the Vienna Convention to a bilateral treaty maintained in force in accordance with article 13.

4. The treaty was maintained in force on the basis of the consent of the two States concerned. He thought they were all agreed that it was not desirable to emphasize the point that it was really a case of a collateral agreement continuing the treaty in force. The element of novation should be played down because the case they were dealing with was a special situation involving the operation of the principles of succession, and although there was a collateral agreement, the essence of the matter was that by that consent the treaty remained in force in accordance with its terms.

5. The purpose of article 14 was to deal with a special point. Paragraph 1 stated that a bilateral treaty maintained in force in accordance with article 13 was binding until terminated in conformity with its provisions, unless the parties showed their intention to apply it provisionally either until a specified date, or pending a decision by either State to terminate its application, or else pending the conclusion of a new treaty between the two States relating to the same subject-matter.

6. Paragraph 2 dealt with the important case where the treaty was applied pending a decision by either State to terminate its application; it specified that twelve months' notice had to be given of the intention to terminate the treaty. Clearly, in a case of that kind, the requirement of notice was a necessary safeguard and he had felt that a period of twelve months was reasonable. That was the period specified in article 56, paragraph 2, of the Vienna Convention,[2] although admittedly in a somewhat different context.

7. Paragraph 3 dealt with the manner in which the rule applied to successive treaties on the same subject-matter. The exchange of notes which usually took place between the two States concerned ought to make the position clear but unfortunately that was not always the case and, when concluding a new treaty, the two States concerned did not always expressly cancel the old one. The formula in paragraph 3 represented a reversal of the presumption in paragraph 1 (*a*) of article 59 of the Vienna Convention,[3] but he felt that there were good reasons for adopting a different approach.

8. Mr. YASSEEN said he supported article 14. A treaty maintained in force between a new State and the other State party undoubtedly came under the law of treaties but, looking at the situation from the point of view of succession, certain presumptions could nevertheless be formulated concerning the intentions of the parties.

9. According to paragraph 1 of article 14, the continuance in force of a treaty in accordance with article 13 implied that all its provisions were applicable, including those relating to its duration. That rules was not, however, categorical; the intention of the parties to apply another solution might appear from a specific agreement or from circumstances. Thus, they could choose from the three solutions listed in paragraphs 1 (*a*), (*b*) and (*c*), and that list was not exhaustive.

10. Paragraph 2 came into play where the treaty was applied "pending a decision by either State to terminate its application", as provided in paragraph 1 (*b*). The twelve months' notice proposed by the Special Rapporteur was acceptable; it was taken from a similar provision

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

[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. 296.

[3] *Ibid.*, p. 297.

in the Vienna Convention and its purpose was to ensure that a State was not taken by surprise.

11. The presumption set forth by the Special Rapporteur in paragraph 3 was logical: when two States agreed to maintain the treaty provisionally in force pending the conclusion of a new treaty, they intended the provisional application to cease on the conclusion of the new treaty. That presumption was not, however, exclusive and the Special Rapporteur had reserved the possibility of a contrary intention being deduced from the new treaty or being otherwise established.

12. Mr. SETTE CÂMARA said that article 14 was in perfect conformity with articles 54 to 72 of the Vienna Convention.[4] The Special Rapporteur had stated that the problems arising with regard to the duration of a bilateral treaty considered as in force could have been left to be governed by the general law of treaties, had it not been for certain complications. The complications arose from the fact that the problem was mainly one of provisional application, which could only result from an agreement between the new State and the other State party. State practice showed that provisional application came into play in three specific situations, which represented exceptions to the general rule laid down in the opening sentence of paragraph 1.

13. The first exception, dealt with in paragraph 1 (*a*), was an obvious one, calling for no comments.

14. In stating the second exception, mentioned in paragraph 1 (*b*), the Special Rapporteur had considered it necessary to include the rule in paragraph 2, requiring not less than twelve months' notice of the intention to terminate the treaty. In paragraph (4) of his commentary (A/CN.4/249), the Special Rapporteur had stated that the reservation of the right to terminate must be considered as operating reciprocally. Twelve months was a reasonable time-limit which provided due protection for the interests of both parties, a very important consideration for bilateral treaties on such matters as trade, air transport, taxation and extradition. The parties were of course free to establish some other time-limit if they so wished.

15. The third exception, dealt with in paragraph 1 (*c*), came within the scope of article 59 of the Vienna Convention. It was a typical case in that respect, because the termination was not only determined by the hypothesis of article 59 but was the result of the agreement of the parties that the conclusion of the new treaty should have the effect of terminating the old one.

16. He would like to know why the Special Rapporteur had not included in article 14 a provision on the lines of article 59 of the Vienna Convention, to the effect that the earlier treaty would be considered as only suspended in operation if it appeared from the later treaty or was otherwise established that such was the intention of the parties. It could be argued that the case would implicitly be covered by the Vienna Convention, but since article 14 dealt extensively with the other situations falling under article 59 of the Vienna Convention, the omission might be interpreted as excluding the case in paragraph 2 of that article. On the whole, however, he supported the Special Rapporteur's text.

17. Mr. AGO said he thought article 14 was perfectly logical in both its conception and its drafting. The purpose of the article was to determine whether, at a given moment, a particular treaty was in force between the new State and the other State. If it was, the treaty was subject to the general law of treaties unless the parties decided otherwise.

18. Article 14 called nevertheless for a few minor comments. To begin with, the first sentence of paragraph 1 should be brought into line with the corresponding sentence in article 13 by replacing the word "for" by the word "between" in the phrase "in force for a new State and the other State party".

19. Also in paragraph 1, the provision "A bilateral treaty... is binding upon them until terminated in conformity with its provisions" should at least be explained in the commentary. It should be made clear that, where the parties agreed to continue the treaty in force pending a decision by one of them to terminate its application, and where that condition was not fulfilled, the treaty could still be denounced if it contained a clause to that effect. Moreover, it remained subject to the general rules of the Vienna Convention in all other respects, particularly as regards its validity. Without such explanations, which seemed to follow the Special Rapporteur's general line of thought, it might be assumed that it was intended to exclude the treaty from the application of the general principles of the law of treaties.

20. Paragraph 3, which dealt with the provisional maintenance in force of the treaty pending the conclusion of a new treaty, also needed explaining in the commentary. The rule embodied in that provision existed side by side with the different rule of the law of treaties relating to the conclusion of a new treaty. In practice, it would sometimes be difficult to determine whether the parties really intended that the treaty being provisionally applied should terminate on the conclusion of the new treaty, or whether they merely wished to conclude a new treaty. In the latter case, it might be asked whether the old treaty ought not to remain partially in force, in so far as it was not fully covered by the new treaty. The point should be clarified.

21. Mr. HAMBRO said that he could accept article 14, subject to drafting changes. The general principle it embodied was that once a bilateral treaty was accepted by the successor State, the law of treaties applied.

22. The article could be referred to the Drafting Committee, which would make any necessary changes to the wording and decide on the appropriate commentary to be attached to it.

23. Mr. REUTER said that when the Commission had prepared its draft articles on the law of treaties, it had left aside the question of collateral agreements supplementing a main treaty and had not elaborated any theory on that subject. The question would arise again when the Commission came to discuss treaties concluded between international organizations. For the time being, the Commission should simply note that the legal rights and obligations of the parties to a treaty could derive from three

[4] *Ibid.*, pp. 296-299.

sources: the general theory of treaties, succession of States and the theory of collateral agreements.

24. Referring to Mr. Ago's comments, he suggested that paragraph 1 (*c*) might be reworded to read: "pending the conclusion of a new treaty to replace it". If the present wording was to be maintained, specific mention should be made of the Vienna Convention.

25. In his view, the requirement of twelve months' notice laid down in paragraph 2 was too harsh. It should be remembered that that period, which was taken from article 56 of the Vienna Convention, related to a *de facto* provisional application. A new State frequently maintained a treaty in force without really being aware of the fact, simply because it continued to implement it by virtue of its internal law. Under the proposed rule, a new State that decided to terminate a treaty after a provisional application of two months would have to wait another year. Such a period would be acceptable only after a provisional application that had lasted long enough to imply the consent of the new State. The Commission should consider how long a period might reasonably be taken as implying consent.

26. Lastly, the expression "unless it appears from their agreement or is otherwise established", used in paragraph 1, seemed inadequate. Paragraph 1 was concerned with a bilateral treaty considered as in force in accordance with article 13, in other words, where the States had agreed, expressly or tacitly, to maintain it. Article 14 could not, therefore, speak of their "agreement" or intention otherwise established, because it referred to article 13, and article 13 was based not on a mere agreement or on something even more informal but on a genuine treaty.

27. Mr. RUDA said that the question of the duration of a bilateral treaty considered as in force for a new State and the other State party in accordance with article 13 gave rise to the application of three sets of rules: first, the rules governing the law of treaties, which were those of the 1969 Vienna Convention; secondly, the rules in the original treaty between the predecessor State and the other State party; and thirdly, the terms of the agreement between that other State and the successor State, which governed the entry into force of the treaty.

28. In paragraph (4) of his commentary (A/CN.4/249), the Special Rapporteur stated that a treaty considered as in force between a new State and the other State party, being a treaty in force for the purposes of the general law of treaties, was necessarily therefore governed by any relevant rules of the Vienna Convention, in addition to the rules governing succession of States. He fully agreed with that proposition but he did not agree that it was unnecessary to include in article 14 any reference to the general provisions of the Vienna Convention under which the termination of a treaty could take place.

29. In particular, it was necessary to include a reference to section 3 (Invalidity, termination and suspension of the operation of treaties) of part V of the Vienna Convention. It was not enough to say, as in paragraph 1 of article 14, that the bilateral treaty was binding upon the two States concerned "until terminated in accordance with its provisions". Unless a reference to the relevant provisions of the Vienna Convention were added, problems of interpretation would arise with regard to the question whether the treaty was or was not in force, bearing in mind the provisions of article 54 of the Vienna Convention. That article specified that a treaty might be terminated either in conformity with its provisions or at any time by consent of all the parties.

30. Mr. USHAKOV said he did not think the provision in paragraph 2 of article 14 was necessary where the States had expressly agreed, in accordance with paragraph 1 (*a*) of article 13, to continue the treaty in force. In that case, they were free to agree whatever they liked concerning the termination of the treaty.

31. On the other hand, if the treaty was continued in force as a result of a tacit agreement, in accordance with paragraph 1 (*b*) of article 13, the period of notice indicated in paragraph 2 of article 14 was applicable.

32. Mr. USTOR said that the Special Rapporteur had started from the premise that the general rules of the law of treaties applied to a bilateral treaty considered as in force in accordance with article 13. Some doubts could arise however, particularly in the case of an oral agreement between the new State and the other State party to continue the treaty in force. Should such an agreement be treated as a treaty in the sense of the law of treaties or not?

33. His own feeling was that a provision on the lines of article 14 was useful in the present draft, subject to the reservations expressed by certain other members of the Commission.

34. With regard to the requirement of twelve-months notice laid down in paragraph 2, it should be remembered that, by its very nature, the international instrument which would emerge from the present draft would not be binding on those States to which rules of that kind were directed, since those States would be new States and, by hypothesis, not parties to the instrument. Under those circumstances, the adoption of such a strict rule might not be desirable.

35. Mr. NAGENDRA SINGH said that he agreed with the substance of article 14 and with the principle on which it was based. The formula adopted by the Special Rapporteur contained all the necessary safeguards.

36. With regard to paragraph 2, he agreed that a time-limit was inescapable and that twelve months notice was reasonable.

37. Mr. REUTER said that Mr. Ustor's observation on the practical scope of the future convention was very pertinent. There was no doubt that the articles would never be applied on a conventional basis to new States. The Commission should realize that, though it need not be discouraged by it. It was nonetheless true that the only value of a large part of its work, even if it resulted in draft conventions, was a customary law. The same could have been said during the drafting of the articles of the Vienna Convention on the Law of Treaties concerning international organizations, since the latter could not be parties to that convention.

38. The CHAIRMAN, speaking as a member of the Commission, said that article 14 seemed to raise no basic

problems. However, it might be asked whether paragraph 1 (*c*) was really essential, in which case paragraph 3 would also be called into question.

39. If the general rules laid down in the Vienna Convention were considered in relation to article 14, it would seem that whereas paragraphs 1 (*a*) and (*b*) conferred additional privileges on new States which they would not have in the absence of those paragraphs, paragraphs 1 (*c*) and 3 would constitute a slightly revised formulation of the Vienna rule. Personally, he considered it desirable to rely on the application of the Vienna Convention so far as possible and to depart from it only when there was some real and pressing need to do so.

40. With respect to paragraph 1 (*b*), it was clear that even if the agreement between two States was a tacit one, the provision regarding termination would have to be based on some communication between the States concerned.

41. Lastly, the requirement of twelve months' notice in paragraph 2 appeared reasonable, but even if the treaty itself provided differently, due weight should be given to any suggestion by the new State concerning a period of notice for termination of the treaty other than that specified in the treaty.

42. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that the fundamental point raised by Mr. Reuter after hearing Mr. Ustor was not a new one;[5] it had already been made by the Chairman himself in connexion with the form of the draft articles. He himself had drawn attention in the Drafting Committee to the special difficulty of including in the present draft an express provision on non-retroactivity, because most cases of succession involved a new State which, *ex hypothesi*, would not have ratified the convention before it was born.

43. However, that point did not materially diminish the importance of concluding a convention on the law of State succession in respect of treaties; it merely provided a reason for not including an express provision on non-retroactivity. The real importance of any codifying convention was to consolidate those areas of the law where a certain practice existed but where there was doubt as to how far there were any generally recognized rules. Such codification provided a basis for the formation of legal opinion and a guide for new States, which at present had nothing to reply on except somewhat divergent doctrines in text-books. He hoped that no one in the Commission would have any misgivings about the value of the work it was undertaking.

44. Mr. Sette Câmara had suggested that article 14 should also cover the question of the suspension of the operation of the treaty.[6] He himself had not thought that that would be a very likely situation, but the Drafting Committee might consider also covering that possibility in the same way as in article 59 of the Vienna Convention.

45. With regard to the question of the time-limit provided for in paragraph 2, he said that it was important from a practical point of view. He had envisaged the common situation of a unilateral declaration, such as that made by Tanzania, in which there was an invitation to continue a treaty in force provisionally for a specific period of time. There might, however, be other cases in which the question of intention was simply a matter of inference from the evidence, as for example the *de facto* application of the treaty, and then it seemed necessary to have some kind of safeguard between the parties. The period of twelve months might be considered too long, but without some time-limit there was a real possibility that, as Mr. Yasseen has said, one party might be placed in an awkward situation due to the sudden denunciation of the treaty.[7] He was prepared to leave that matter to the Drafting Committee.

46. On the question whether paragraph 1 (*c*) was really necessary at all, which had been raised by the Chairman,[8] it could be said that if the case was viewed as one of the conclusion of a new treaty relating to the same subject-matter, the rule would be that the older treaty was only terminated if the application of the second treaty appeared to be incompatible with that of the first. The basic hypothesis in those cases, however, was that the parties had specifically agreed to continue the application of the treaty only until the new treaty was concluded, and that intention should be given effect. If the question was merely left to be covered by the relevant provision of the Vienna Convention, as the Chairman had suggested, he thought that that provision would not really reflect the intentions of the parties.

47. The question had also been asked whether it was necessary to safeguard the application of other provisions of the Vienna Convention, including those providing for other grounds of termination. That was a question which might require consideration in connexion with the article on legal effects, but he was not convinced that it needed to be dealt with in the present context.

48. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to refer article 14 to the Drafting Committee.

It was so agreed.[9]

ARTICLE 15

Article 15

49. *The treaty not to be considered as in force also between the successor and predecessor States*

A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is not on that account to be considered as also in force in the relations between the new State and the predecessor State which concluded the treaty with the other State party.

50. The CHAIRMAN invited the Special Rapporteur to introduce article 15 of his draft (A/CN.4/249).

[5] See para. 37 above.

[6] See para. 16 above.

[7] See para. 10 above.

[8] See para. 38 above.

[9] The provisions of article 14 were subsequently incorporated in article 17 *(quater)* (A/CN.4/L.183/Add.4); see 1196th meeting, para. 27.

51. Sir Humphrey WALDOCK (Special Rapporteur) said that article 15 dealt with the question of the relationship between the successor State and the predecessor State when a bilateral treaty was continued in force in relation to a successor state. In his view, when a treaty was continued in force, the result was that the treaty became duplicated; in other words, the position was that there were two parallel but independent treaty relationships arising out of a single treaty: the first between the predecessor State and the other State party and the second between the successor State and the other State party. But that did not mean that the treaty also came into force as between the predecessor and successor States, as happened in the case of a multilateral treaty.

52. It was possible, of course, that the predecessor State and the successor State might put something like that treaty into force between themselves, as, for example, in the case of extradition treaties, where they might use the previous treaty as a model and agree to put its provisions into force between them; the position, however, was that any such agreement was an entirely new treaty, not arising out of the succession.

53. Mr. EL-ERIAN said that the Special Rapporteur had seen fit to include article 15 in order to remove any possible ambiguity; he wondered, however, whether it was necessary to include the phrase "on that account".

54. Sir Humphrey WALDOCK (Special Rapporteur) said that it would be possible to state the rule by some such phrase as "by consequence only of that fact", but he felt that in the present case it should be stated explicitly.

55. Mr. USTOR asked the Special Rapporteur whether he felt that article 15 should have general validity or should apply only to part II, on new States.

56. Sir Humphrey WALDOCK (Special Rapporteur), said he assumed that article 15 would apply only to section 2, on the position of new States in regard to bilateral treaties.

57. Mr. USTOR asked whether it would affect questions of the fusion or federation of States.

58. Sir Humphrey WALDOCK (Special Rapporteur) said that the position of the article might have to be reviewed; it was not a rule which applied only to situations of decolonization but to any case where there was a continuance of bilateral treaties.

59. Mr. REUTER said that he had serious doubts about article 15. First of all, the principle it laid down seemed so obvious that the Special Rapporteur himself had admitted that he had drafted it as a pure formality and that it could easily be deleted.

60. Secondly, the principle was not correct. There were some bilateral treaties which, by virtue of their very object, were liable to become twofold following a succession of States: in other words, there would then be two bilateral treaties instead of one, one between the other State and the predecessor State, and one between the other State and the successor State. In that case the predecessor State and the successor State would be obliged to conclude a new agreement in order that the other treaties might be applied simultaneously.

61. For example, supposing a treaty had been concluded between State A and State B concerning freedom of navigation on a river situated entirely on the territory of State A, and State A was subsequently divided into two States, A′ and A″, with the river serving as the frontier between the two; if States A′ and A″ both maintained the treaty with State B, that meant that they would have to conclude a treaty between themselves in order to make it possible for the two bilateral treaties to continue in force.

62. Or again, to take a case where the object of the treaty was a series of operations carried out entirely on the territory of the predecessor State; the successor State and the predecessor State would have to conclude an agreement, otherwise it would be impossible for the original agreement to become a twofold agreement. In short, he felt that article 15 was neither useful nor accurate.

63. Mr. TSURUOKA said he also wondered whether there was any point in keeping article 15, since the case which it was designed to cover was so simple that it could easily be dealt with by the law of treaties as established in the Vienna Convention. However, subject to certain drafting changes, he would not object to it being retained.

64. Mr. QUENTIN-BAXTER said that he supported the retention of article 15, since it was necessary to make it clear that a bilateral treaty did not in some way become a multilateral treaty as a result of State succession. What was involved was a new agreement altogether.

65. Mr. HAMBRO said that he entirely agreed with Mr. Quentin-Baxter.

66. Mr. YASSEEN said that the purpose of article 15, which was perfectly clear, was to avoid any misunderstanding, and for that reason its inclusion in the draft was justified. He did not think that the case envisaged could give rise to a tripartite relationship, but the treaty could be continued between the predecessor State and the successor State by an agreement between them.

67. Mr. RAMANGASOAVINA said that article 15 was useful, even if a first sight it appeared superfluous. He did not think there could be any twofold application in the event of a division of the State, since it was clearly stated in the article that the bilateral treaty considered as in force for a new State and the other State, should not on that account be considered as binding on the predecessor State. That would need a new agreement because it was no longer the same State that was bound by the treaty.

68. The article was therefore perfectly clear, and even if the principle it laid down was self-evident, it was useful to restate it in order to avoid any ambiguity.

69. The CHAIRMAN, speaking as a member of the Commission, said that it was debatable whether article 15 was really necessary, but if it was to be retained, the phrase "on that account" should also be retained; otherwise the article might be too categorical and would not take into account many peculiar cases which might conceivably arise.

70. Sir Humphrey WALDOCK (Special Rapporteur) said that any doubts which he might have entertained concerning the need for article 15 had been removed

by Mr. Yasseen's observation that the article seemed necessary in order to avoid any possible misunderstanding.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 15 to the Drafting Committee.

It was so agreed.[10]

Eighth session of the Seminar on International Law

72. The CHAIRMAN invited Mr. Raton, Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

73. Mr. RATON (Secretariat) said he wished first to thank those members of the Commission, particularly Mr. Tsuruoka, who, when speaking in the Sixth Committee of the General Assembly, had stressed the value of the Seminar on International Law and described the organizational problems involved. He also wished to thank those members of the Commission who had agreed to lecture to the participants in the eighth session of the Seminar.

74. Thanks were also due to those States which were financing fellowships [11] but he must point out that, as a result of the recent monetary crisis, the Seminar had lost the equivalent of one fellowship and he hoped that an Asian country would be kind enough to finance one. There would be twenty-three participants in the eighth session of the Seminar, including thirteen fellows, who would be joined by four UNITAR fellows and, in accordance with the wish expressed by the Sixth Committee, by two young diplomats who had taken part in the work of the Sixth Committee.

75. At the suggestion of former participants, two meetings devoted to practical work in the form of discussions would be arranged, one on the future work of the Commission and the other on the draft articles on the representation of States in their relations with international organizations, which the Commission had adopted at its twenty-third session.

The meeting rose at 11.15 a.m.

[10] For resumption of the discussion, see 1196th meeting, para 11.

[11] Denmark, Federal Republic of Germany, Finland, Israel, Netherlands, Norway, Sweden and Switzerland.

1172nd MEETING

Monday, 5 June 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, 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 16

1. *Article 16*

Consent to apply a multilateral treaty on a reciprocal basis with respect to any party thereto

1. Articles 13 to 15 apply also when a new State, without notifying the parties to a multilateral treaty in accordance with article 7 that it considers itself a party, declares that it is willing to apply the treaty on a reciprocal basis with respect to any party thereto.

2. Any agreement to apply a multilateral treaty in accordance with paragraph 1 terminates if the new State notifies the parties either that it considers itself a party in accordance with article 7 or that it has become a party in conformity with the provisions of the treaty.[1]

2. The CHAIRMAN invited the Special Rapporteur to introduce article 16 of his draft (A/CN.4/249).

3. Sir Humphrey WALDOCK (Special Rapporteur), said that article 16 dealt with the comparatively limited cases in which a newly independent State made a declaration that it was prepared to apply a multilateral treaty with respect to any party thereto which was willing to do the same. State practice showed that, in certain cases, a new State, in its declaration, would divide treaties into multilateral and bilateral treaties, reserving its decision on the former but stating its willingness to apply them in its reciprocal relations with any other State willing to do the same. Where a State party to a multilateral treaty responded in the affirmative, the result was to create between it and the new State a bilateral relationship.

4. It was questionable whether article 16 was really necessary. Several declarations of the kind had undoubtedly been made, although he had not been able to ascertain whether any substantial number of bilateral arrangements had been concluded pursuant to such declarations. The purpose of a bilateral arrangement in such a case was to serve as a practical expedient to cover the interim period until a decision was made by the new State whether to become definitely a party to the multilateral treaty or not. It was on that basis that he had formulated article 16, paragraph 1 of which stated that, in principle, the rules relating to bilateral treaties, set forth in articles 13 to 15, applied to bilateral arrangements of that kind.

5. As far as the wording was concerned, the phrase in paragraph 1, "without notifying the parties to a multilateral treaty" should be corrected to read: "which has not notified the parties to a multilateral treaty".

6. Paragraph 2 stated the fairly obvious point that, if a State took steps to become an actual party to the multilateral treaty by notifying succession, by accession or otherwise, the multilateral treaty would then completely supersede the previous bilateral arrangement.

7. Mr. YASSEEN said that article 16 fell within the realm of autonomy of the will, but was also linked with

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