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Summary record of the 1172nd meeting

Topic:
Succession of States with respect to treaties

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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.

State succession. It was obvious that, under the general law of treaties, States could apply a multilateral treaty on a bilateral basis. The condition of reciprocity was one of the characteristics of bilateral treaties.

8. The proposed solution allowed the new State time to consider its position with regard to the multilateral treaty as such. It was, however, merely an application of the general principle of the autonomy of the will and for that reason he doubted whether there was any need for the article. The only original feature in article 16 was reciprocity, on the basis of which bilateral relations were established between a new State and one or more States parties to a multilateral treaty.

9. Mr. HAMBRO said that to some extent he shared Mr. Yasseen's doubts regarding the need for article 16, but felt that, precisely for that reason, it was desirable to retain it *ex abundanti cautela*. Later, if States wished to eliminate it from the draft, they could do so; it was always easier to delete an article than to restore it.

10. As to the placing of the provision, he suggested that it would be better to move it to article 7, and that question of drafting led him to a point of substance.

11. He would suggest, for the consideration of the Special Rapporteur, that a right should be conferred on the new State to announce that it was provisionally bound by the multilateral treaty on a reciprocal basis in certain bilateral relations, on the lines of the right conferred upon the new State by article 7 to declare itself permanently bound.

12. Mr. USTOR said that if article 16 were retained, its proper place was following articles 13 to 15, since it related to a special type of bilateral agreement.

13. As drafted, paragraph 1 covered a bilateral agreement reached following a declaration *erga omnes* by the new State of its willingness to enter into reciprocal bilateral arrangements. He would suggest that the wording be broadened so as to cover any bilateral agreement for the reciprocal application of a multilateral treaty, even if made otherwise. Such an agreement could, for example, result from an offer made by the new State to only one party to the multilateral treaty. Clearly, articles 13 to 15 would apply to an agreement reached under those circumstances, but it was preferable to state as much in terms.

14. He noted the explanation given in the commentary that the application referred to in article 16 was a provisional one. The text of the article itself did not specify that, but he believed it was correct because the bilateral agreement might in some cases continue indefinitely.

15. Usually, when a new State entered into a bilateral arrangement as provided for in article 16, it was not the multilateral treaty itself but the contents of its substantive provisions which constituted the bilateral agreement; the final clauses, and perhaps also some institutional clauses, would not become applicable if the contents of the multilateral treaty became operative only between the two States concerned.

16. It seemed obvious that when the two States agreed to maintain the multilateral treaty in their relations between themselves, they could also agree to maintain or relinquish any reservations made on the conclusion of the multilateral treaty. It might perhaps be necessary to provide for a presumption in the matter, as was done in article 9.

17. Mr. SETTE CÂMARA said that article 16 covered a case of provisional application which was additional to that dealt with in article 4 and which, like the latter provision, was based on the decisive element of consent. It constituted a very useful device to provide a newly independent State with a full opportunity to review the whole field of multilateral treaties before reaching a final decision on each of them.

18. Since the effect of paragraph 1 was to fragment a multilateral treaty into a set of bilateral agreements, it was logical to place those provisions in the part of the draft dealing with bilateral treaties.

19. Paragraph 2 was a logical consequence of the system embodied in the previous paragraph. If a new State became a party to the multilateral treaty, that arrangement necessarily superseded the bilateral arrangement contemplated in paragraph 1.

20. On the whole he supported article 16, which could now be referred to the Drafting Committee. He felt that the article was necessary, but if the majority were opposed to it, he would not press for its retention. His own view was that it was better to state the rules stated in the article because of the variety of different situations which occurred in practice. Besides, if article 16 were dropped, there would be a danger of having to drop article 17 also.

21. Mr. REUTER said that although he was sympathetic to article 16, he also had certain reservations.

22. In article 16, the Special Rapporteur was introducing a new concept in relation to the preceding articles, the concept of the collateral agreement. The new State did not become a party to the multilateral treaty but concluded a collateral agreement. That was the concept that had been retained in the articles of the Vienna Convention concerning the effects of treaties for third States. He himself had mentioned it in his first report on treaties concluded by international organizations (A/CN.4/258, paras. 74 and 75). Article 16 was justified because it established as a right what had previously been merely a faculty to conclude collateral agreements.

23. The article did, however, raise certain difficulties, some of which had already been explained. It was questionable whether it applied only to a bilateral agreement "with respect to any party thereto". The new State might conclude a bilateral agreement either with a group of States or with all the States parties to a multilateral treaty; furthermore, not all multilateral treaties could be fragmented into bilateral agreements subject to reciprocity. That was the case, for example, with the international labour conventions, as regards the provisional application of some of their substantive articles. The formula "with respect to any party thereto" should therefore be reworded, and article 16 itself might be moved to some other part of the draft depending on whether it was more closely related to bilateral treaties or to multilateral treaties.

24. The main difficulty raised by article 16 lay elsewhere. During the discussion on the articles concerning multilateral treaties, he had wondered whether it should be

considered that a new State became a party to a treaty simply on the strength of a *de facto* application of the treaty for a certain period of time.[2] Article 16 did not provide for *de facto* application but for notification of application, without specifying whether it was provisional. If it was provisional, there was no question of the State becoming a party to the treaty; it would be considered merely a party to a collateral agreement.

25. A distinction should thus be made between various situations: first, a mere *de facto* application without legal consequences; secondly, a notification of application, by means of which the new State would become a party to a collateral agreement; and thirdly, a lasting *de facto* application, by means of which the State would perhaps become a party to the treaty. Although it would be useful to provide for all those situations, careful consideration should also be given to the consequences to be attributed to application and to the notification of application.

26. Lastly, it was not made clear whether article 16 applied to restricted as well as to general multilateral treaties. While in his view there was no doubt about the faculty to conclude an agreement collateral to a general multilateral treaty, States should not be given that right with respect to restricted multilateral treaties.

27. Mr. EL-ERIAN said that, even if article 16 was not indispensable, it would be very useful to retain it for the consideration of the Sixth Committee of the General Assembly. Moreover, situations in practice varied so much that its retention was desirable on that account also.

28. The Commission had on several occasions included articles of an expository character in its drafts. Early in its work on the law of treaties, the Commission's draft had been criticized in academic circles on the ground that it was too elaborate and more suited to a code than to a draft convention. Nevertheless, the Commission had adhered to its method of making its draft as complete as possible, even if some of the articles might not be essential for specifying legal obligations. For that reason also, he supported the retention of the article.

29. The question of the placing of the article should be left for the Drafting Committee to decide, in the light of the comments made during the discussion.

30. Mr. RAMANGASOAVINA said that the purpose of article 16 was to enable a new State to indicate what position it intended to adopt with regard to a multilateral treaty. Article 7 gave it the possibility of stating its intention to be considered as a party to such a treaty. A new State might, however, not wish to commit itself immediately. That was why the Special Rapporteur had provided for the possibility of a new State making a bilateral agreement on a basis of reciprocity. The usefulness of article 16 lay in the fact that it dealt with a specific situation.

31. Article 16 could equally well be placed after article 7, which dealt with the right of a new State to notify its succession in respect of multilateral treaties, or as a link between the articles on multilateral treaties and those on bilateral treaties.

32. Mr. USHAKOV said he supported the principle stated in article 16, which should also be applicable to restricted multilateral treaties, since two States could perfectly well establish a bilateral relationship on the basis of the text of a treaty of that kind.

33. He noted that once again the method of drafting by reference presented certain disadvantages. Although the reference to article 15 did not present any difficulties, since article 15 was of a general character, that was not the case with articles 13 and 14. In particular, the provision in paragraph 1 (*b*) of article 13 was not applicable in the case of article 16; it was concerned with a tacit agreement, whereas article 16 was based on an express notification. Similarly, paragraph 2 of article 13, which dealt with the retroactive entry into force of the treaty, was not relevant to article 16, since in the latter case the treaty was binding on the two parties from the moment the third State accepted the new State's offer.

34. The reference to article 14 was equally inappropriate. Not only was paragraph 1 (*c*), which concerned the conclusion of a new treaty, inapplicable, but also paragraph 1 (*b*), particularly the twelve months' notice it provided for. It seemed clear from the Special Rapporteur's commentary that such a period was not necessary in the case dealt with in article 16.

35. Mr. BARTOŠ said that he too doubted the desirability of referring to articles 13, 14 and 15, which were concerned with bilateral treaties, whereas article 16 was concerned with the application of a treaty with respect to any party thereto.

36. He would not comment on paragraph 2, but he supported the principles set out in paragraph 1. In particular, reciprocity should apply to all the parties to the treaty and not just to some of them; that was an essential condition and was in the interests of all the great international conventions.

37. Mr. TSURUOKA said he supported the principle expressed in article 16, though on reflection he doubted whether there was any need for the article and wondered whether it did not fall under the law of treaties, as codified in the Vienna Convention, rather than under State succession.

38. He hoped that the Drafting Committee would take account of Mr. Ushakov's comments if the article was retained.

39. Mr. QUENTIN-BAXTER said that article 16 appeared to have a useful function to perform in correlation with the system of provisional application embodied in article 4. That system provided a bridge to enable the new State to consider its position and become a party to those multilateral treaties which it ultimately decided to join.

40. As laid down in the provisions of article 16, it was the essence of that interim period that only a series of bilateral relationships were established between the new State and the various accepting parties concerned.

41. The provisions of article 16 were perhaps a little more than merely expository. They ensured that the rules

[2] See 1170th meeting, para. 40.

as to bilateral treaties would apply to bilateral agreements to apply multilateral treaties, even though such agreements were not themselves treaties within the Vienna Convention definition.

42. Without an express provision on the lines of paragraph 1 of article 16, the provisions of articles 13 to 15 on bilateral treaties would not automatically apply to an arrangement made by the new State with a party to a multilateral treaty. He realized that the application of articles 13 to 15 by reference could create difficulties but he did not believe that they would prove very great. For the time being, the Commission could well agree on the principle of article 16.

43. Mr. REUTER said he wished to clear up a point concerning the application of article 16 to restricted multilateral treaties. Say, for example, that Algeria on acceding to independence had wished to notify its intention of becoming a party to the restricted multilateral treaties establishing the Common Market, it would have been entitled to do so. If the other States had accepted its offer, the result would have been a collateral agreement under the general law of treaties. From that standpoint, he was not opposed to Mr. Ushakov's idea of extending article 16 to restricted multilateral treaties, but he must emphasize that there was nothing original in that faculty.

44. If, on the other hand, it were desired under article 16 to give a new State the right to make a unilateral declaration resulting in a collateral agreement, its application would have to be restricted to general multilateral treaties. That right would then be justified in the context of State succession in respect of treaties.

45. Juridically, the collateral agreement would result on the one hand from the notification by the new State, and on the other from the express or tacit consent of the other States. If the consent was tacit and reciprocity was not observed, it would then have to be decided whether the collateral agreement should be considered as violated or as voidable.

46. Mr. YASSEEN said he still had doubts about the need for article 16. It was true that the Commission had not always restricted itself to essential rules and had sometimes formulated dispositive rules, but the right stated in article 16 already existed under the law of treaties: any State could propose to another that they should consider the provisions of a multilateral treaty as applicable in their relations on a reciprocal basis.

47. His doubts were reinforced by a further consideration. A multilateral treaty had a well-defined status in international law; to consider it as a bilateral treaty might undermine that status. For that reason, new States should not be encouraged to make use of the faculty of applying a multilateral treaty on a bilateral basis.

48. Mr. BARTOŠ said he agreed with Mr. Yasseen. A multilateral treaty to which article 16 was applied would take on certain features of a bilateral treaty. In his view, States might conclude a bilateral treaty incorporating the text of a multilateral treaty, and then state that the treaty would be applicable between them on a bilateral basis. On the other hand, it was hard to see how a multilateral treaty could be transformed into a bilateral treaty by the application of article 16.

49. Furthermore, the Commission should not encourage a procedure like the one laid down in article 16. Its duty was to preserve the authority of multilateral treaties, whose value depended on their general character. It was essential that multilateral treaties should retain their place in the hierarchy of legal instruments. If applied generally, they were likely to become a source of international customary law as well as of treaty law. To encourage the solution proposed in article 16 would be against the interests of the development of international law.

50. The CHAIRMAN, speaking as a member of the Commission, said that although he did not think that article 16 was really essential, it might be helpful in making clear the particular aspect of the problem of succession which arose when a new State wished to put into force in a limited way a multilateral treaty which had formerly been applicable to its territory.

51. He assumed that article 16 was limited to cases of succession. If that was so, he did not think there need be too much concern about the fact that what the article was doing was making a rule that in effect converted a multilateral treaty into a bilateral treaty.

52. The problem arose from the fact that many multilateral treaties contained provisions providing for certain machinery, such as commissions, secretariats and the like, so that the application of the multilateral treaty would necessarily have to be limited to only some of their provisions, because the two States obviously could not commit the treaty machinery to the bilateral agreement. Whether that limitation required any clarification or not he did not know, but it was an obvious limitation.

53. Once it was recognized, however, he did not think that the problems of restricted multilateral treaties caused any trouble. Certainly some restricted multilateral treaties could be applied without any difficulty at all, such as some of the treaties of the Hague Conference on Private International Law, for example, which were quite restricted since they required the approval of all the parties for the admission of any new member. But he did not think there could be any objection to applying treaties of that character, such as for judicial assistance, as between one of the parties and a new State. There were also other restricted treaties, such as the European Economic Community, referred to by Mr. Reuter,[3] where the substantial amount of administrative and legislative operations constituted a real obstacle to their application on a bilateral basis.

54. With regard to the references to articles 13 to 15, there was some merit in the concern expressed by certain members about the application of article 16. Paragraph 1 of that article, in fact, might cause some difficulty because it appeared to apply *mutatis mutandis*.

55. Mr. Ushakov had expressed some concern about the application of article 13, paragraph 1 (*b*),[4] but he himself thought that in the case of article 16 there was merely an offer on the part of one State and an acceptance on the part of another. In the case of paragraph 1 (*b*),

[3] See para. 43 above.

[4] See para. 33 above.

a very high degree of proof was called for, since it stated that "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". That heavy burden of proof should not be necessary when a new State offered to apply a multilateral treaty on a reciprocal basis, since it should be possible to infer agreement from the evidence.

56. He wondered, however, whether article 15 had any real application in respect of article 16, since it would seem to him to be going beyond the farthest stretch of the imagination to conceive that a new agreement between the new State and the third State could affect relations between the new State and its predecessor.

57. Sir Humphrey WALDOCK (Special Rapporteur), said that article 16 was obviously less innocent than it had seemed to him at first. He assumed that a majority of members considered it useful to cover the point it dealt with, but the question was what precisely was that point? It had been his intention to cover the special situation of an attempt to set up temporary bilateral relations on the basis of a multilateral treaty. As Mr. Yasseen had insisted, that question was a matter of consent and properly belonged in the general law of treaties.[5]

58. The question which the Commission would have to answer was whether it was undesirable to encourage arrangements of that kind. It seemed to him that, unless they involved something which was incompatible with general practice under the law of treaties, it would be impossible to prevent States from making such arrangements if they so desired.

59. He personally did not think that there was much risk of disturbing multilateral relations, except possibly in some cases such as those involving interdependent agreements about disarmament and the like, if a new State, as a temporary arrangement, agreed to apply a multilateral treaty which had already been in force with respect to its territory. It had to be recognized, however, that it was a case of a State in respect of whose territory the treaty had formerly been in force.

60. The Commission obviously had to rearrange its thoughts about the whole question of provisional application. Article 4 (Unilateral declaration by a successor State), appeared to overlap somewhat with article 16. He thought that probably the solution would be to restrict article 4 to the main principle that a declaration did not have automatic effects for third States. The provisional application aspect might have to be brought to a later part in the draft, in which case it might be possible to make more coherent the relation between the particular problem and the question of provisional application.

61. Of course, as Mr. Ustor had pointed out,[6] that question might be a little more complicated because it should not perhaps be confined to unilateral declarations. The latter were perhaps the most obvious examples, but there might be other cases in which the basis on which the new State wished to give provisional application to the treaty would be clear from its statement. In such cases, the situation would be more difficult and article 13 would seem to apply. The Commission would have to decide whether it was necessary to broaden the terms of the present draft.

62. He did not share the Chairman's doubts about the proof required by paragraph 1 (*b*) of article 13,[7] since, in his opinion, the more strongly the provision was expressed, the easier the burden of proof would become. Article 13 should apply word for word, although article 14 contained some sub-paragraphs which might not be appropriate. On the whole, he did not think that the references to articles 13 and 15 were out of place.

63. Mr. Reuter had rightly observed that it might be necessary to include special provisions on restricted multilateral treaties.[8]

64. The Commission would also have to consider whether it needed some general provisions which would permit the provisional application of multilateral treaties which were not restricted. He wondered, however, whether it would be possible, even in the case of a treaty which was open to many parties, for a new State to notify the depositary of its intention to apply the treaty provisionally and in that way to become a temporary party to it.

65. He agreed with the Chairman and those other speakers who had suggested that article 16 did not apply to the treaty as a whole if the latter included provisions concerning some machinery for its application.[9] Additional language might be necessary to take that possibility into account.

66. Mr. Ustor had once more raised the spectre of reservations;[10] he doubted, however, whether it was necessary to go into that question again, since, if not covered by some general provision, it might prove to be too complicated.

67. Lastly, since the Commission in general seemed to wish to see another version of article 16, he suggested that it be referred to the Drafting Committee.

68. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 16 to the Drafting Committee.

It was so agreed.[11]

ARTICLE 17

69. *Article 17*

Effect of the termination or amendment of the original treaty

1. A bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13:

(*a*) Does not cease to be in force in the relations between them by reason only of the fact that it has been terminated in the relations between the predecessor State and the other State party;

[5] See para. 8 above.

[6] See para. 13 above.

[7] See para. 55 above.

[8] See para. 26 above.

[9] See para. 52 above.

[10] See para. 16 above.

[11] Article 16 was subsequently deleted but the provisions of paragraph 1 were incorporated in article 17 *(bis)*; see 1196th meeting, para. 18.

(*b*) Is not amended in the relations between them by reason only of the fact that it has been amended in the relations between the predecessor State and the other State party.

2. Similarly, when a bilateral treaty is terminated or, as the case may be, amended in the relations between the predecessor State and the other State party after the date of a succession:

(*a*) Such termination does not preclude the treaty from being considered as in force between the new State and the other State party in accordance with article 13;

(*b*) Such amendment shall not be considered as having amended the treaty also for the purposes of the application of article 13, unless the new State and the other State party shall have so agreed.[12]

70. The CHAIRMAN invited the Special Rapporteur to introduce article 17 of his draft (A/CN.4/249).

71. Sir Humphrey WALDOCK (Special Rapporteur), said that the point dealt with in paragraph 1 might seem to be an obvious one, but some jurists seemed to have thought it not free from doubt. In the case of a bilateral treaty which was considered to be in force on the basis of the principle of succession, what would happen if the original treaty should be terminated between the original parties? Would that bring about the termination of the treaty between the successor State and the other State party?

72. The rule should clearly be that there was no termination of the treaty between the successor State and the other State because a treaty relationship had been created on the basis of article 13 which constituted an entirely independent agreement between the successor State and the other State. Accordingly, anything which occurred between the predecessor State and the other State was *res inter alios acta*. The same would be true in the case of an amendment to the original treaty.

73. Paragraph 2 dealt with a similar problem where a bilateral treaty was terminated or amended between the predecessor State and the other State party, after the date of succession but before any agreement between the successor State and the other State party in regard to its continuance in force. In that case, termination did not preclude the continuance in force of the treaty between the successor State and the other State. In the case of a bilateral treaty, if the successor State had an agreement with the other State, that constituted an independent agreement and there was no reason why it should not continue in force merely because something had happened between the predecessor State and the other State, after the date of the succession. In his opinion, paragraph 1 was necessary in order to avoid any possible misunderstanding.

74. Mr. USTOR asked the Special Rapporteur whether it was a correct assumption that the rule stated in article 17 applied to the arrangements made in article 16. If so, he felt that the articles might have to be rearranged.

75. Sir Humphrey WALDOCK (Special Rapporteur), said that there was no reason in principle why it should not apply equally to the arrangements made in article 16.

76. Mr. USHAKOV said that he approved of the substance of article 17 but felt that the wording should be more precise. It was hard to see the difference between the situations which paragraphs 1 and 2 respectively were designed to cover. Since it was expressly stated that paragraph 2 dealt with a situation occurring "after the date of a succession", it might be concluded that paragraph 1 dealt with a situation occurring before the succession. If the situation envisaged occurred in both cases after the succession, what was the point of having two paragraphs?

77. Sir Humphrey WALDOCK (Special Rapporteur), said that paragraph 1 also applied to the situation which existed after succession, since it began with the words "considered in force for a new State and the other State party in accordance with article 13". That obviously applied to a situation where a treaty was already in force, and he would have thought it clear that it dealt with a case which existed after the date of the succession of a new State.

78. Mr. USHAKOV said that he still did not see what difference there was between the situations covered by the two paragraphs, since in both cases they arose after the succession.

79. Sir Humphrey WALDOCK (Special Rapporteur), said that there was an essential difference between paragraphs 1 and 2. In paragraph 1, termination or amendment took place after the new State had given notice that it wished to have the treaty considered as in force between it and the other State, and the latter had expressed its agreement thereto.

80. Paragraph 2 dealt with a different situation where, before the new State had reached an agreement with the other State, there had been a termination or amendment of the treaty between the original parties. Paragraph 2 merely stated that those facts would not preclude the treaty from being considered in force between the parties if they so desired.

81. Mr. USHAKOV, thanking the Special Rapporteur for his explanation, said he understood how article 17 would apply when there had been an express agreement, but not in the case of a tacit agreement. That, however, was more a question of drafting.

82. Mr. SETTE CÂMARA said that paragraph 1 established in clear terms the parallel and independent nature of treaties considered in force for a new State and the other State party in accordance with article 13. When consent was established, either expressly or tacitly, a new treaty relationship was born between the successor State and the other State party. Neither the termination nor the amendment of the original treaty relationship between predecessor State and the other State party would affect the new treaty.

83. In paragraph (2) of his commentary (A/CN.4/249), the Special Rapporteur had dealt with a different case. If the treaty itself, by its own terms, established a date of expiry, that would affect the new treaty because it had been part of the agreement between the new State and the other State party when they had established their consent to consider a bilateral treaty as continuing in force. Nevertheless, nothing would preclude the new State and the other State party from establishing a different date for the expiry of the treaty between themselves.

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

84. The case referred to in paragraph 2 had nothing to do with the expiry of treaties by the effect of their own provisions; it dealt with termination or amendment by agreement between the predecessor State and the other State party. In that case, the logical assumption was that the treaty between the new State and the other State party would be considered as in force.

85. He had some doubts concerning the case mentioned in paragraph (11) of the Special Rapporteur's commentary, where the predecessor State and the other State party terminated the treaty after the date of succession but before the new State and the other State party had taken any position regarding the continuance in force of the treaty. While accepting the logic of the solution offered by the Special Rapporteur, he personally thought that in the reality of international life it would be easier for the successor State and the other State party to conclude an entirely new treaty than to avail themselves of some legal nexus which had been established, so to speak, merely to resurrect a defunct treaty.

86. He was entirely in favour of the text proposed by the Special Rapporteur and it should now be referred to the Drafting Committee.

87. Mr. REUTER said he agreed with Mr. Ushakov that the wording of article 17 must be improved, but the Special Rapporteur's intention was quite clear and he approved of the substance of the article.

88. What Mr. Sette Câmara had just said was true enough, but article 13 contained only one new element as far as the general law of treaties was concerned, the presumption of retroactivity provided for in paragraph 2. If the Commission accepted that presumption, it could retain article 17, subject to drafting improvements.

The meeting rose at 6 p.m.

1173rd MEETING

Tuesday, 6 June 1972, at 10.15 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen.

Letter of appreciation to Mr. Movchan, former Secretary to the Commission

1. The CHAIRMAN suggested that the Commission might like to send a letter of appreciation to Mr. Movchan, who had served as its Secretary for five years and had recently retired from the United Nations Secretariat in order to return to the Ministry of Foreign Affairs in Moscow. All members would recall the excellent work done by Mr. Movchan, not only in the Commission itself but also at the Vienna Conference on the Law of Treaties and in the Sixth Committee of the General Assembly.

2. Mr. YASSEEN said that he warmly supported the Chairman's suggestion; Mr. Movchan's merits and qualities had been outstanding.

3. Mr. ALCÍVAR said that he heartily supported the Chairman's suggestion. As Director of the Codification Division at Headquarters, Mr. Movchan had made an important contribution to the codification of international law. His services as Secretary to both the Sixth Committee and the Commission had been extremely beneficial to the United Nations.

4. Mr. TSURUOKA said that he too fully supported the Chairman's suggestion. As Chairman of the Commission at its twenty-third session, he had had an opportunity of appreciating the objectivity, efficiency and modesty of Mr. Movchan, who had loyally served the cause of the codification and progressive development of international law.

5. Mr. BARTOŠ said that he could only endorse the Chairman's suggestion. As an expert consultant on two occasions at the General Assembly, he had been impressed by the efficiency with which Mr. Movchan carried out his task as Secretary to the Sixth Committee. Mr. Movchan's modesty was equalled only by the tact with which he succeeded in applying his skill without wounding anyone's feelings. He had always been available to members of the International Law Commission, even between sessions, and had successfully guided its work without taking any of the credit for himself. It was the Commission's duty to acknowledge its debt of gratitude to its former collaborator.

6. Mr. RAMANGASOAVINA said that he wished to join the other members of the Commission in acknowledging Mr. Movchan as a distinguished, competent and discreet jurist who had undoubtedly contributed to the progress and efficiency of the work of the Commission.

7. Sir Humphrey WALDOCK said that he was glad to support everything which had been said by his colleagues in praise of Mr. Movchan. It was only proper that the Commission should formally place on record its own indebtedness to him for his services as its Secretary. When he himself had served as Chairman, he had had particular reason to be thankful to Mr. Movchan for his able assistance as Secretary. Mr. Movchan had also done much to smooth the work of the Vienna Conference on the Law of Treaties.

8. Mr. BEDJAOUI said that he too wished to pay a warm tribute to the merits and modesty of Mr. Movchan.

9. Mr. USTOR said that he wished to subscribe to all that had been said by his colleagues in appreciation of Mr. Movchan. It should also be pointed out that it was under his aegis that the Secretariat had prepared its Survey of International Law (A/CN.4/245) which was recognized as an outstanding achievement of its kind.

10. Mr. REUTER said that he wished to associate himself with the expressions of esteem and appreciation to which they had just listened.