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A/CN.4/SR.1165

Summary record of the 1165th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

Examples could be given of a new State expressing the intention to become a party either before or after that date. In one case, a new State had even stated its intention to consider itself a party to a treaty as from the date on which the treaty had been ratified by the predecessor State. In a number of cases, on the other hand, new States had declared that they considered themselves parties only from the date of notification.

Question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

(A/CN.4/253 and Add.1 to 3; A/CN.4/L.182)

[Item 5 of the agenda]

(resumed from the 1153rd meeting)

75. The CHAIRMAN said that it was necessary to revert briefly to item 5 of the agenda in order to enable the Secretariat to begin its preparatory work on the Commission's report.

76. Members had received the observations of governments which had been circulated as documents A/CN.4/253 and Add.1 to 3. If there were no objections he would assume that, in conformity with past practice, the Commission agreed that those observations should be annexed to its report on the work of the present session.

It was so agreed.[11]

The meeting rose at 1.5 p.m.

[11] For resumption of the discussion see 1182nd meeting.

1165th MEETING

Thursday, 25 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

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

(resumed from the previous meeting)

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

1. The CHAIRMAN invited the Commission to continue consideration of article 7 of the Special Rapporteur's draft (A/CN.4/224).

[1] For text, see previous meeting, para. 42.

2. Mr. TSURUOKA said he could accept article 7 as interpreted by the Special Rapporteur when introducing it, and in view of the fact that the term "new State" was provisional. He wished, however, to raise two questions.

3. The first was whether the right of a new State to become a party to a multilateral treaty was accompanied by an obligation of the other parties to that treaty to recognize the effect of the notification. In other words, had the other parties no right to object or to make reservations?

4. The second question was whether it would not be advisable to set a reasonably long time-limit within which the new State must notify its intentions.

5. He approved of the three exceptions specified in the article. With regard to sub-paragraph (*a*), however, the question arose what would happen if the parties to a treaty were not unanimous in considering that its object and purpose were incompatible with the new State's participation. Similarly, with regard to sub-paragraph (*c*), the parties to a treaty might differ as to whether it did or did not fall within the category of treaties covered by the exception. Those questions would no doubt be settled later, but the Commission should bear them in mind and it would be helpful if the Special Rapporteur would give his opinion on them.

6. Mr. BEDJAOUI said he did not agree with those who believed that article 7 was of little use. An article of that kind was not merely useful, it was necessary as a complement to article 6 and should therefore be retained. There were four questions he would like to examine: the nature and origin of the right accorded to the successor State; the field of application of that right; the nature of the instruments to which it was applicable; and the effects of recognition of that right.

7. The right provided for in article 7 was derived from the law of State succession, not from the law of treaties. It was not available to any and every new State. To take the example given by Mr. Reuter at the previous meeting, a State which had emerged from a fusion could not be permitted to notify its accession to a multilateral treaty unless the two previous States, or one of them, had been a party to it.

8. The previous application of a treaty to the territory of a new State was thus a prerequisite for the creation of that State's right to notify its succession to the treaty. Moreover, article 7 used the expressions "notify its succession" and "any multilateral treaty in force in respect of its territory". The previous application of a treaty to a particular territory conferred on the sovereign which took it over as the result of a succession an open right to maintain that treaty.

9. That right was justifiable, since the new State was not entirely alien to the sphere of territorial application of the treaty, which might have left its mark on the territory in question. The right was also welcome because it made possible, with due respect for and in harmony with the sovereignty of the new State, the continuity of application of multilateral treaties which all members desired, as had become clear while article 6 was being considered. Article 7 should therefore be read in close conjunction with article 6, to which it was the comple-

ment. That was, indeed, the only way to combine respect for sovereignty, as formulated in article 6, which entailed the denial of any obligation, with concern for international co-operation and the continuity of useful treaties, which entailed the right to notify succession, as provided for in article 7. It was clear, therefore, that article 7 came within the province of State succession and contributed in some degree to the progressive development of international law.

10. With regard to the field of application of the right provided for in article 7, it could not be doubted, as in the case of the preceding articles, that it applied to every possible type of succession of States, whether resulting from decolonization, partition, dismemberment, fusion or absorption.

11. In the last-named situation, two possible cases had to be considered: that of two or more merged States, all of which had previously been parties to the treaty —there would then be an obligation rather than a right— and that in which one or more, but not all, of the merged States had been parties to the treaty—in which case it was only natural that the right to notify should be accorded to the successor State. In that connexion, he suggested that, in order to cover all possible cases of succession, the phrase "in respect of its territory" in the introductory sentence should be replaced by the phrase "in respect of all or part of its territory".

12. The nature of the instruments to which the right stated in article 7 was applicable was determined by the title of the article. Those instruments were multilateral treaties. But it would be well for the Special Rapporteur to give his opinion concerning bilateral treaties in cases of secession or dismemberment, where the actual nature of the treaty was changed and it became multilateral, since in addition to the predecessor State and the other original party, there might be one or more successor States. The question which arose was whether that problem should be taken up in connexion with article 7 or whether it belonged entirely to the section of the draft—articles 13 to 17—concerned with the position of new States in regard to bilateral treaties.

13. The question of the effects of recognition of the right stated in article 7 arose, first, with regard to States parties other than the predecessor State, and, secondly, with regard to the date of application—in other words, the problem of retroactivity. Article 7, even in its present form, safeguarded the rights of States other than the predecessor State.

14. In the case of general multilateral treaties—technical, humanitarian and law-making treaties—the successor State had such an incontrovertible right to notify its succession as almost to amount to a duty, quite apart from the fact that the machinery of multilateral treaties allowed other States to make any reservations they saw fit. Consequently, for general multilateral treaties notification satisfactorily fulfilled its function, which was to ensure the participation of the new State. It was true that there were special cases: for example, instruments which made acceptance of the notification conditional on the prior agreement of all the other States parties; that was the case of the Hague Convention of 1899 establishing the Permanent Court of Arbitration. But such very special cases need not be considered in article 7.

15. There remained the case of restricted multilateral treaties. The exception provided for in sub-paragraph (*c*) of article 7, which went so far as to require the consent of all the parties, amply sufficed to safeguard the rights of the other States. The problem did arise, however, of the effects of the notification for States, other than the predecessor State, which were parties to other multilateral conventions dealing with the same subject.

16. That applied, for example, to humanitarian conventions such as the Geneva Conventions of 1906, 1929 and 1949. Most of the new States had acceded only to the 1949 Convention, passing over or neglecting the others, and the question had arisen whether older States which had become parties only to the 1906 and 1929 Conventions should consider themselves bound in relation to the new States on the basis of the 1949 Convention. From the strictly legal standpoint, of course, the conventions to which they were not parties had no binding force for either group of States, even if they were considered to be bound because the conventions were humanitarian conventions. It was not, however, for the new States as such that the problem arose, but for any State which happened to ratify only one of the Conventions. So far as article 7 was concerned, that case should be disregarded.

17. The date of application, which some members would make retroactive in order to avoid any break in continuity in the application of the treaty to the territory of the new State, raised the problem of the rights of the other parties. He was not in favour of retroactivity. In order to safeguard the rights of the parties other than the predecessor State and the essential principle of article 6, and in order to eliminate the idea of retroactivity of a treaty, which was technically difficult to put into practice, it would be better to consider that the new State was bound only from the date of notification. Retroactivity could also give rise to difficulties because notification was often made only after a very long time. The principle of retroactivity had been applied in the case of humanitarian conventions, but the practice varied widely and was very uncertain. It would therefore be better to keep to the date of notification as the date of the treaty's effective entry into force.

18. Mr. TAMMES said that article 7 could make a significant contribution to the widest possible participation in multilateral treaties. Combined with the more general provisions of article 4, on the right to make a unilateral declaration, the new rule embodied in article 7 would serve both the interests of individual successor States and those of the international community as a whole.

19. The proposed new rule was sufficiently well established by depositary practice for its acceptance not to be as revolutionary as it would have seemed twenty-five years ago. It had the important effect of conferring a right on the successor State independently of the consent of the other parties to a multilateral treaty. It was on that assumption that depositaries had consistently acted, as was shown by the abundant material in the commentary to the article.

20. He had no difficulties with matters of detail. The legal effects of the rule were set out adequately by the provisions of article 12 (A/CN.4/224/Add.1); the exceptions were satisfactorily dealt with in sub-paragraphs (*a*), (*b*) and (*c*). In particular, the provisions of sub-paragraph (*b*) were ingeniously formulated so as to avoid any confusion between a loose association of States and an international organization established by a constituent instrument and having rules for the admission of members.

21. The question of a possible time-limit for the exercise of the right to notify succession had been dealt with by the Special Rapporteur in a note at the end of his third report. In the concluding paragraph of that note, the Special Rapporteur had suggested that for the time being no provision concerning a time-limit should be included in the draft and that the question should be reviewed at a later stage "as part of a general consideration of the problem of the loss of the right to invoke the status of a successor State as a means of becoming a party to a treaty".[2]

22. At first sight, the provisions of article 7, combined with those of article 8 (multilateral treaties not yet in force), might seem surprising in one respect. They would have the effect of enabling a new State, immediately after attaining independence, to notify its succession to a multilateral treaty on the basis of an act of the predecessor State, even if that act was only a signature subject to ratification, acceptance or approval. As a result, the new State would be entitled to become a party to the treaty by means of its notification of succession, regardless of the contents of the final clauses of the treaty. Those final clauses could, and often did, contain certain limitations or conditions with regard to accession, so that not all existing States had the right to accede. The new State would thus have a right to become a party by notification of succession while some older States were precluded from becoming parties by accession.

23. On reflection, however, it should be agreed that there was nothing illogical in that solution, because the legal nexus on which the right of participation was based did not derive from the final clauses of the treaty; it derived from the acts of the predecessor State with regard to the territory in question.

24. Article 7 was to be welcomed as a contribution to the cause of expanded participation in multilateral treaties of general interest.

25. Mr. ROSSIDES said that the provisions of article 7 were closely connected with those of articles 5 and 6; the article related to new States and was well placed in Part II of the draft.

26. The Special Rapporteur had acted wisely in leaving questions of fusion and separation for later consideration. Nevertheless, when those questions came to be considered, it would be essential to deal quite separately with the two types of situation. In the case of separation, a distinction should be drawn between a separation by agreement, such as that of Syria and Egypt in 1961 and secession resulting from internal or external pressures.

27. The provisions of article 7 did not in themselves provide any right of participation; that was really based on the provisions of article 5, which set out the requirement of the consent of the new State for it to be bound by a treaty. The importance of the provisions of article 7 lay in the fact that they accorded a procedural right having implications of substance. Notification of succession was a distinct procedure based on the law of succession and was quite separate from accession and the other methods or expressing consent to be bound by a treaty recognized by the general law of treaties.

28. As to the question of a possible time-limit, he realized that it would be in the interests of new States not to set any time-limit at all, but he had some doubts about the desirability of such an extreme solution. The question of a time-limit was very relevant to the question of continuity. Under the formula adopted at its Buenos Aires Conference by the International Law Association,[3] continuity would be assumed unless and until the newly independent State had declared "within a reasonable time after the attaining of independence" that the treaty was not in force with respect to it. The formula proposed in article 7, however, gave no such assurance of continuity, unless the new State declared that its notification was intended to have retroactive effect.

29. If the new State made a notification under article 7, but made it effective only from the date of notification, there would be a break in the continuity of application of the treaty. It seemed rather excessive, in that case, to allow the new State an indefinite period in which to exercise a virtual right of accession. For the new State would thus be permitted to disclaim all obligations under a multilateral treaty for as long as it wished, without losing its right to become a party to the treaty.

30. Mr. BILGE said that the rule stated in article 7 reflected international practice and had its place in the draft. He approved of the exceptions set out in sub-paragraphs (*a*), (*b*) and (*c*). The exception in sub-paragraph (*a*), however, was almost general, and he wondered whether it was appropriate to mention it in an article which was intended to give new States a relatively restricted right, since it applied only to general multilateral treaties.

31. It was stated at three places in the commentary [4] that the article dealt with general multilateral treaties concluded by the predecessor State. The rule stated in the article was based on the idea that a legal nexus had been established between such treaties and the right of the new State. If that was so, a nexus already existed between the territory of the new State and the general multilateral treaties.

32. He doubted whether any incompatibility between participation by the new State and the object and purpose of the treaty was conceivable, particularly since there was no obligation, but a right, which the new State might or might not exercise.

33. At the previous meeting the Special Rapporteur, had when asked whether the date at which notification

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

[3] Op. cit., *1969*, vol. II, p. 48.

[4] Op. cit., *1970*, vol. II, pp. 37 *et seq.*

produced its effect should not be specified in article 7, had said that the matter was dealt with in article 12.[5] Perhaps it would none the less be better to make that clear in article 7, which, unlike article 12, dealt only with multilateral treaties in force. Such a statement would also be useful as an answer to the question Mr. Reuter had raised at the previous meeting[6] and would make the article easier to understand for the governments which would have to interpret it.

34. Article 7 mentioned only notification of "the parties", whereas article 11, which dealt with the procedure for notifying succession in respect of a multilateral treaty, also mentioned notification of the depositary. It would therefore be better in article 7 either to replace the words "notify the parties" by "notify in accordance with article 11" or to keep the same wording, but specify in addition the date on which the notification produced its effects.

35. Mr. RUDA said that the basic principle underlying not only article 7, but other articles in Part II, such as articles 5 and 6, was that a new State could not become a party to a treaty without expressing its consent. The Special Rapporteur had wisely rejected the formula adopted in 1968, at the Buenos Aires Conference of the International Law Association, which was based on a presumption that the new State consented to be bound by a treaty formerly binding on its predecessor. The formula embodied in article 7 was much clearer and was better calculated to protect the right of a new State to become a party to a treaty only after having clearly given its consent.

36. The most important feature of the provisions of article 7 was that the new State became a party to a multilateral treaty independently of the consent of the other parties to the treaty. Its right of participation was derived not from the general law of treaties, but from the general law of succession.

37. The provisions of article 7 established notification of succesSsion as a means of expressing consent to be bound by a treaty; that represented an addition to the various means of expressing consent set out in article 11 of the 1969 Vienna Convention on the Law of Treaties.[7] As he saw it, the fact that consent to be bound was established by means of machinery based on the law of succession and not by means of accession or one of the other forms specified in the law of treaties, did not make any material difference.

38. He was not at all concerned at the fact that no "reasonable" time-limit was specified in article 7. Where a treaty was open to accession, a State could accede to it at any time and become a party to it as from that time. The position would be similar under the rule in article 7.

39. On the question whether the notification took effect from the date of independence or from the date of the notification, the provisions of article 12 were quite clear. The essential point was to safeguard the right of the new State to be bound only with its consent, so as to avoid having a treaty imposed on it.

40. Mr. SETTE CÂMARA said he fully supported article 7, which was a useful provision and satisfied the needs and interests of international co-operation.

41. The rule stated in the opening sentence, however, was in a sense a departure from the basic rule in article 6. For the first in the present draft it was recognized that the new State inherited a right. As to the nature of that right, it should be remembered that the right did not arise from the treaty itself, since a new State was not bound by the treaties of its predecessor and could therefore enjoy no rights by virtue of those treaties. The inheritance related to the legal link between the predecessor State and the treaty. The position was made clearer by the fact that, as stated in article 8, even if a multilateral treaty was not yet in force, the successor State still inherited the right to notify succession to the treaty.

42. He agreed with Mr. Ruda that notification of succession was a new form of expressing consent to be bound by a treaty. There was abundant material in the commentary to show that a considerable State practice in that sense existed.

43. He had no objection to the exceptions stated in sub-paragraphs (*a*), (*b*) and (*c*). The first of those exceptions was a normal consequence of the general law of treaties. The second was a perfectly valid exception; even if the constituent instrument of an international organization did not lay down any special prerequisites for admission to membership, certain formalities were still necessary. The case was not merely one of succession; a new State would have to deposit an instrument of acceptance of the obligations of membership of the organization.

44. Mr. AGO said he had no fault to find with the substance of article 7. The provision it set out applied only to general multilateral treaties and the exception provided for in sub-paragraph (*c*) should dispel the fears of those members of the Commission who had doubts about the application of the article to restricted multilateral treaties.

45. With regard to the wording, the French expression *a le droit* was not a satisfactory rendering of the English "is entitled to"; a better translation should be found.

46. He would be glad, however, if the Special Rapporteur would explain how the provision in article 7 operated in relation to the "Vienna clause". Of course, the article only applied to new States. But to dispose of the problem it was not enough to say that the treaties in question had already been in force for the territory of the successor State, any more than it was enough to say that the faculty in question derived from the law of succession and not from the law of treaties. If the law of treaties included a rule like that which had been proposed by several delegations at the Vienna Conference, namely, that every State had the right to accede to a multilateral treaty, there would be no problem. But that rule had not secured a majority at the Vienna Conference and it was the Vienna

[5] See previous meeting, paras. 72 and 73.

[6] *Ibid.*, para. 56.

[7] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 290.

formula that had been adopted.[8] The question which accordingly arose was whether it could be assumed that there would never again be any recurrence of the situation created by the partition of certain territories, which had given rise to the difficulties mentioned. The Commission would be wrong to shelve the problem, because in that case the diplomatic Conference would certainly take it up.

47. Mr. ALCÍVAR said he could not agree with those who suggested that article 7 was not absolutely necessary. Its provisions were essential as a complement to those of article 6, the last sentence of which stated expressly that a new State was not "under any obligation to become a party" to a treaty concluded by its predecessor. Article 7 served to state the rule that the new State nevertheless had a right to become a party to a general multilateral treaty concluded by its predecessor; that right applied mostly to multilateral treaties.

48. The right of participation enjoyed by a new State derived from the law of succession and not from the law of treaties. Mr. Ago had referred to the final clauses of the Vienna Convention on the Law of Treaties, but it should be remembered that the restrictive formula embodied in those clauses was based on purely political considerations and had no legal basis whatsoever. Those clauses were, of course, part of the Vienna Convention, and he could only express regret at their inclusion.

49. Article 7, however, related to a case in which the right of participation of the new State was not derived from the final clauses of the treaty itself. For that reason, the legal effects of a notification of succession were not the same as those of an accession. An accession took effect only from its own date, a notification of succession, on the other hand, took effect from the moment when the new State had attained its independence, as rightly expressed in the Special Rapporteur's draft.

50. He supported the three exceptions set out in sub-paragraphs (*a*), (*b*) and (*c*).

51. He hoped that the Special Rapporteur would give careful consideration to the drafting change suggested by Mr. Bedjaoui.

52. Mr. EL-ERIAN said he supported the Special Rapporteur's formulation of the right stated in article 7; his analysis of the practice, as depositaries, not only of the Secretary-General, but also of the Swiss and United States Governments made a convincing case in favour of that formulation.

53. He also accepted the Special Rapporteur's analysis, in paragraph (4) of his commentary, of the resolution adopted by the International Law Association at its Buenos Aires Conference, in which he said that "recognition of a right to contract out of a multilateral treaty would seem clearly to imply, *a fortiori*, recognition of a right to contract into it; and it is the latter right which seems to the Special Rapporteur to be more consonant both with modern practice and the general law of treaties".

54. The safeguards embodied in article 7 were adequate, the main one being the criterion that the treaty must have been in force in respect of the new State's territory at the date of its succession.

55. He had some doubts, however, about the advisability of including the provision in sub-paragraph (*b*) on succession to membership of international organizations. In a footnote to paragraph (9) of his commentary, the Special Rapporteur had rightly drawn attention to the Commission's decision at its nineteenth session to leave aside for the time being the "third aspect" of the topic of succession, namely, "succession in respect of membership of international organizations". It would be consonant with that important decision of the Commission to reserve the question, rather than attempt to regulate it as was done in sub-paragraph (*b*). He would urge the Special Rapporteur either to drop sub-paragraph (*b*) altogether, or at least to amend it so that it merely reserved the question of membership in international organizations.

56. Apart from that question of method, there were also considerations of substance involved. The example, of Pakistan's admission to the United Nations in 1947, given in paragraph (10) of the commentary, was not convincing. Many writers had expressed serious doubts regarding the necessity of an application by Pakistan. Certainly, no such application had been required from Syria after it had separated from the United Arab Republic on 28 September 1961; the President of the General Assembly had simply made a statement to the effect that, if no objections were received by 14 November 1961, he would invite Syria to join the Assembly as a member. Of course, it could be argued that there was a special feature in that case; for Syria had been a member of the United Nations before merging with Egypt on 22 February 1958 to form the United Arab Republic, so that it had, in a sense, merely recovered its separate membership. The fact remained, however, that the formula adopted for Pakistan in 1947 constituted a doubtful precedent.

57. He hesitated to criticize the rich and scholarly commentary prepared by the Special Rapporteur, but he felt bound to place on record his disagreement with the interpretation of the Suez Canal Convention of 1888 given in paragraph (22). The example of the Conference of Users of the Canal, convened in London in 1956, was not a valid one. The convening of that Conference had been a political move made entirely outside the United Nations, and the Government which had convened it had had no status to do so under the 1888 Convention. Moreover, the criterion adopted for inviting certain States rather than others to participate in the conference had been entirely political. Even thinking purely in terms of users of the Suez Canal, the list of invited States had been selective, not to say arbitrary. Leaving aside the question whether the provisions of the 1888 Convention were to be regarded as the expression of rules of general international law on waterways of international concern, it should be noted that the history of that Convention showed that no State had acceded to it since 1888 or applied to accede to it.

58. Lastly, he wished to draw attention to the declaration to the United Nations made by Egypt on 24 April 1957 and registered by the Secretary-General, whereby

[8] *Ibid.*, p. 300, article 81.

Egypt accepted the compulsory jurisdiction of the International Court of Justice with regard to any question of interpretation or application of the provisions of the 1888 Convention that might arise between Egypt and any of the other parties to that Convention.[9] No State had raised any objections to the Egyptian position on that matter.

59. Mr. QUENTIN-BAXTER said he had listened with great interest to Mr. El-Erian's remarks, but it was his understanding that article 7 was intended to exclude cases of membership in international organizations. In his opinion, the Special Rapporteur, in dealing with that article, had produced a formula which ensured that result.

60. The Commission's aim should be to codify practice in areas for which treaties ordinarily made no special provision. But at the same time it should endeavour not only to preserve the freedom to contract, but also to prevent any disturbance of established State practice in any particular treaty. It was an open question whether practice had established the absolute right of succession of a new State to a multilateral treaty concluded by its predecessor, but that right was usually conceded and, indeed, encouraged by the international community.

61. With regard to the notion of retroactivity, that seemed to him to be another phrase, like the "clean slate" rule or the doctrine of "novation", which might well lead to confusion. In his opinion, what the Commission was considering was not so much retroactivity as retrospection; the new State did not enter international life with a clean slate, but it had an option between expunging and retaining such parts of the contents of the slate as it saw fit. It was true that it might be a long time before the new State's final decision was known, but that would not constitute retroactivity in any sinister sense of the word.

62. He agreed with Mr. Rufa that there was no need to set a time-limit for notifying succession, since from a practical point of view that might entail grave disadvantages. In particular, in the case of normative treaties which involved no reciprocal obligations, all States had an interest in their continuity and the international community should be delighted if a new State, even years after its succession, informed it that it was claiming continuity in respect of such a treaty.

63. In the case of such conventions as those of the Berne Union, however, it was of importance to the new State itself to maintain continuity, since otherwise there would be a gap in the protection afforded to the works of its nationals. In that case, the depositary might well be pleased to see that the new State was applying the convention provisionally, but at the same time it might point out to that State that until it had definitely decided to be a party to the convention, it would not, for example, be entitled to participate in a conference for its revision.

64. Mr. Bedjaoui had suggested that if a new State's recognition of the continuity of a treaty was to be understood as relating backwards indefinitely in time, it might subject that State to unreasonable obligations. In such a case, however, the new State would usually have the option of acceding to the treaty rather than merely declaring that it recognized its continuity.

65. As he had already said in connexion with article 4, he was apprehensive about all articles containing time-limits and considered it important to exclude them. If, under article 4, a new State should make a declaration expressing its consent to the provisional application of the Berne copyright Convention, for example, that would merely serve as a warning to other States that for the time being it intended to apply that Convention, but without committing itself definitely to accepting the Convention or allowing the inference to be drawn that it considered itself a party. Once a time-limit was set, however, some of the other States parties might feel that if they did not react, they would be bound by their very failure to react, with the result that the depositary might be faced with a highly confused situation.

66. In his opinion, article 7, as drafted, was in accordance with State practice and should serve the purpose for which it was intended.

67. Mr. NAGENDRA SINGH said there could be no doubt that article 7, as drafted by the Special Rapporteur, was a clear and precise statement of the law on the subject and was in conformity with State practice.

68. He himself believed that the line of approach taken by the Special Rapporteur was the correct one. He could, of course, have proceeded along the lines of an analogy with municipal law, under which an individual who succeeded as a party to a contract was bound by all the acts of his predecessor, but that would have placed the developing countries, in particular, in a very difficult position. There were many treaties concluded by their predecessors to which new States might not wish to be parties, for that reason, and the requirement of notification and the expression of consent by the new State was a welcome feature of the Special Rapporteur's text.

69. In his opinion, the question when a succession became binding was clarified by article 12, which should be read together with article 7. As article 12 indicated, once notification had been given, the consent of the new State to be bound by a treaty would take effect as from that date unless the treaty provided otherwise. If there was a break in the continuity of succession, the only way to correct it was to give the new State, and in particular a new developing State, the right to notify the date on which it wished to be bound.

70. As Mr. El-Erian had said, international organizations constituted a separate subject; they would, indeed, seem to be excluded from the application of article 7 by sub-paragraph (*b*).

71. With regard to sub-paragraph (*a*), he wondered why a new State should be debarred from becoming a party to a multilateral treaty merely on the grounds that its accession would be incompatible with the object and purpose of the particular treaty. If the territory of the new State had been covered by the treaty in question it would seem that the new State should be entitled to become a party to it, although there might very well be some treaties, such as regional military pacts, by which

[9] United Nations, *Treaty Series*, vol. 265, p. 300 and vol. 272, p. 226.

the new State would not wish to be bound. On the whole, therefore, he was inclined to support the Special Rapporteur's formulation, despite the limitation which it might appear to impose.

72. When the Commission came to consider article 12, he hoped it would recognize that it should be left to the new State to specify whether it wished to be bound from the date of its succession or the date of its notification.

73. Mr. BARTOŠ said he approved of the contents of article 7, which, like the preceding article, was based on respect for the sovereign will of the new State. Under that provision, a new State had to notify the parties to a multilateral treaty expressly that it considered itself a party to the treaty; its notification was therefore of a constituent character.

74. As Mr. Quentin-Baxter had pointed out, the principle of continuity should be safeguarded as far as possible, but is was essential to leave new States free to accept or refuse succession. It was not sufficient, however, for a new State to express its desire to be a party to a treaty; it must also fulfil the conditions for accession laid down in the treaty.

75. That comment, which he had already made at the previous meeting in connexion with article 6, might perhaps be illustrated by a twofold example. Both the International Union for the Protection of Literary and Artistic Works and the International Union for the Protection of Industrial Property required their member States to enact legislation laying down certain minimum provisions for protection in their respective fields. Several States created by decolonization had completely broken with everything they regarded as the vestiges of the colonialist régime and had modelled their internal legal system on their own customary law. As a result, their internal laws sometimes did not provide sufficient guarantees for the purposes of one or other of the Unions or of some other organization, such as the Intergovernmental Maritime Consultative Organization. Some time might have to elaspe before a new State fulfilled the conditions for accession. A distinction should therefore be made between the time when a new State expressed its desire to become a party to a treaty and the time when it was authorized to accede to the treaty.

76. The CHAIRMAN, speaking as a member of the Commission, said that he had only a few minor comments to make on article 7, which had already been thoroughly discussed.

77. He wondered why article 5, paragraph 1, referred to a new State as becoming "a party to a treaty in its own name", while article 7 used the words "a party to the party in its own right".

78. On the question whether there should be some time-limit to the right of notification, he agreed with Mr. Ruda that it made no difference provided that the new State really had a right to accede to the treaty. The question would only be important in a situation where a new State had the right to notify its succession, but not the right to accede to the treaty.

79. He was somewhat concerned about the relationship between sub-paragraphs (*a*) and (*c*). Sub-paragraph (*c*) referred to participation in the treaty as "requiring the consent of all the parties", but the question arose under sub-paragraph (*a*) whether the objection of one party would be sufficient to bar the new State. It appeared necessary, therefore, to make clear what the effect of such an objection would be. It might also be necessary to consider whether, in the event of a dispute, some machinery to resolve the dispute should be established.

80. Lastly, although not entirely sure of the exact philosophy behind article 7, he agreed that the article was necessary.

81. Mr. EL-ERIAN suggsted that the Drafting Committee be asked to consider dividing article 7 into two paragraphs, of which the first would state the general rule and the two exceptions given in sub-paragraphs (*a*) and (*c*), while the second would consist of sub-paragraph (*b*) as a saving clause. The second paragraph might read: "The provisions of paragraph 1 are without prejudice to the rules applicable in an international organization in the case of a treaty which is the constituent instrument of that organization".

82. Mr. USTOR said he agreed with Mr. Reuter that the draft articles might begin with a general reservation along the lines of that drafted by the Special Rapporteur in article 3 of his first report, concerning the relevant rules of international organizations.[10] That solution might help to satisfy Mr. El-Erian.

83. He too believed that article 7 should consist of two paragraphs: the first would contain the general rule that a new State became a party to a multilateral treaty independently of the consent of the other parties, and the second would provide for exceptions in the case of those multilateral treaties which required different treatment because of their object and purpose and the limited number of parties to them.

84. With reference to the conventions on the projection of artistic and literary rights and on the protection of industrial property, he suggested that a new State might wish to become a party to a different text from that which had been acceded to by its predecessor.

85. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 7.

86. Sir Humphrey WALDOCK (Special Rapporteur) referring to the question of membership in international organizations, said it had been his original intention to include a general reservation of the kind contained in the Vienna Convention on the Law of Treaties,[11] but that at an earlier session the Commission had appeared not to favour it. He had more than once urged the need for such a general reservation, and thought the Commission should consider whether the phraseology of the Vienna Convention might be sufficient to cover the present situation. If such a general reservation was enventually included, it might be possible to delete sub-paragraph (*b*) of article 7.

87. On the problem of retroactivity, he thought that the question of the date from which the State making the

[10] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 92.

[11] Article 5 of that Convention.

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

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

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

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

The meeting rose at 1.5 p.m.

1166th MEETING

Friday, 26 May 1972, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

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

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

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

(continued)

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

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

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

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

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

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

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

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

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