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Summary record of the 1170th meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
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it would seem to him only reasonable to give some indication of the period of time during which they would be under that obligation.

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*¹³

The meeting rose at 12.55 p.m.

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

1170th MEETING

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

Chairman: Mr. Richard D. KEARNEY

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

Succession of States in respect of treaties

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

[Item 1 (a) of the agenda]

(continued)

ARTICLE 13

1.

Article 13

Consent to consider a bilateral treaty as continuing in force

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

(a) They expressly so agree; or

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

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

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

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

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

State to consider a bilateral treaty as continuing in force was a very complex one because often that consent was not evidenced by any express statement. In some cases, of course, there were documents; indeed there was a well-developed practice of an exchange of notes between the parties regarding continuance of a treaty, which constituted an express agreement. However, in the numerous cases in which nothing was said to clarify the situation, it was necessary to determine what the rule should be.

4. There was a fundamental difference between multilateral and bilateral treaties. In the case of the latter, the new State had no right simply to notify its will to succeed to the treaty, since the relation was a bilateral one and the attitudes taken up by both parties were of equal importance.

5. As he had pointed out in his commentary, practice showed that there was a large measure of continuity in some types of treaties but not in others. The approach taken by the International Law Association was that the new State had to "contract out" of a treaty rather than "contract in"; in other words, there was a presumption that the treaty continued in force unless the new State gave some indication to the contrary. However, he himself had not felt that evidence of such a rule was to be found in the practice, while a rule based on "contracting in" was more consonant with the principle of self-determination.

6. He had also considered the possibility of approaching the question on the basis of provisional application of the treaty, on the lines contemplated in the unilateral declarations by Tanganyika and other States. But those declarations were themselves based on the view that the new State should "contract in" rather than "contract out" of the treaty; the approach which he had taken for the present draft, therefore, was that it must be established that the new State and the other State party had agreed expressly or impliedly to continue the treaty in force.

7. He had not attempted to produce any detailed rule about the inferences to be drawn from the conduct of the parties. There were undoubtedly some types of treaties in regard to which the tacit consent of the parties might readily be inferred, but it would be difficult to enumerate all the circumstances from which a conclusion of tacit consent must be drawn and it would be better to leave the question as one of interpretation.

8. He had rejected the notion of the provisional application of the treaty, but that notion still had to be taken into account, since even if there was evidence of tacit consent, that might indicate only a provisional application and not a continuance of the treaty. He had tried to cover that aspect of the matter in article 14 rather than in article 13, but the two questions had to be linked together to that extent.

9. It was necessary to bear in mind article 4, concerning a unilateral declaration by a successor State, as well as article 3, on an agreement for the devolution of treaty obligations, as a background to the operation of article 13. In his opinion, the values of devolution agreements lay in the general indication of the new State's attitude towards the continuance in force of its predecessor's treaties.

10. Mr. TAMMES said he supported the fundamental rule with respect to bilateral treaties stated in article 13, since the continuance in force of a treaty after a new State had attained independence was obviously a matter for agreement, whether expressed or tacit, between the successor State and the other party.

11. He endorsed the explanation given by the Special Rapporteur in paragraph (20) of his commentary of why it was practically impossible to give any precise indication of how and when a tacit agreement came into existence. On the basis of the admirable series of studies made by the Secretariat, it was only possible to conclude that there was an endless variety of informal ways of reaching agreement.

12. Concerning the relationship between article 13 and article 4, he noted that the latter, which applied to bilateral as well as to multilateral treaties, contained rather detailed provisions about the continuance of a treaty. However, practice described in the Secretariat studies indicated so many ingenious methods of extending agreements without any express statement to that effect that he wondered whether the application of the provisions of article 4 should not be restricted to multilateral treaties; bilateral situations could then be dealt with exclusively in article 13.

13. Mr. HAMBRO said he agreed with the overall approach taken by the Special Rapporteur; it was a good idea to try to ensure the continuance of even bilateral treaties, if that could be done.

14. With regard to paragraph 1(b), however, the Commission should be careful not to establish a presumption which might be dangerous to the successor State. The latter should be able to agree to the provisional application of a treaty without running the risk that such an agreement might be interpreted as a binding consent.

15. He would like to know whether the Special Rapporteur intended to make a fuller statement on the question of time-limits in connexion with article 13.

16. Sir Humphrey WALDOCK (Special Rapporteur) said he had included a note on the question of placing a time-limit on the exercise of the right to notify succession in his commentary to article 12.² He would be in a better position to deal with that question when the Commission had completed its review of all the main articles, including those on bilateral treaties.

17. Mr. REUTER said the Special Rapporteur had explained that article 13 should be read together with articles 14 and 4. It seemed to him, however, that there was a need for yet another provision.

18. For multilateral treaties, special rules had been set forth in article 12 concerning the legal effects of a notification of succession. For bilateral treaties, there was no need for such notification, their maintenance in force derived from the general rules of succession of States. To consider that the application of a bilateral treaty depended solely on the consent of the new State and of the other State party to the treaty meant considering the

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

position from the standpoint, not of State succession, but of the general rules of the law of treaties. But the maintenance in force of a bilateral treaty depended on the succession of States in so far as the consent of the States concerned had different effects from those which would result from the application of the general law of treaties. That was why the legal effects of the succession of States on bilateral treaties should perhaps be stated expressly in a separate provision. Some of those effects were set out in article 17, but in purely negative form.

19. On the question of the provisional application of bilateral treaties, he had now been convinced that new States, and not only those which had achieved independence, should be specially protected. Often their governments lacked experience, their administrative machinery was inadequate and they found themselves maintaining treaties in force *de facto*. Sometimes such treaties had required domestic legislation which could not be repealed at short notice and continued to be applied provisionally. It was not unusual for such a situation to continue for several years.

20. Like the Special Rapporteur, therefore, he thought that new States should be enabled to apply their bilateral treaties provisionally without finally committing themselves thereby. The fact that the new State and the other State continued to apply a treaty would merely be evidence of their common desire to maintain it in force provisionally, rather than of tacit assent to its definitive entry into force between them. It was quite possible that, after a period, one of the States might realize that it was not to its advantage to be bound by the treaty.

21. Everything should be done to encourage the immediate application of treaties, but only on a provisional basis. Article 13 should be redrafted, so as to present provisional application as the normal case.

22. Sir Humphrey WALDOCK (Special Rapporteur) said he agreed that it would be necessary to include an article near the end of the draft which would deal with the legal effects of succession.

23. He also had in mind the registration of an agreement to continue a treaty in force, on which there was a pertinent opinion given by the Secretariat and published in the United Nations Juridical Yearbook.³

24. Mr. RUDA said that, in the case of bilateral treaties, it was obviously necessary to take into account not only the wishes of the successor State but also those of the other party to the treaty. In addition to the transfer of rights which might have been derived by the new State from the treaty at the time of its succession, it was necessary to have the express or tacit consent of the other party if the treaty was to be made applicable between them.

25. It seemed to him that the Special Rapporteur had been correct in stating, in paragraph (19) of his commentary (A/CN.4/249), that "both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination appear... to indicate that the conduct of

the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties, rather than the general fact that a considerable measure of continuity is found in the practice of many States". In other words, continuity should obviously depend on the agreement and consent of both parties.

26. Mr. Reuter had made the point that article 13 was based on the consent of both parties; that meant that by adopting that article the Commission would be acting in the field of the general law of treaties and not in that of the law of succession.

27. If, as provided for in paragraph 2, the treaty was considered as having become binding on the date of the succession unless some different intention appeared, it would seem that there was a presumption that the treaty came into force not at the moment of the conclusion of an agreement between the two parties, but rather at the moment of the succession of the new State.

28. Mr. USHAKOV said that he approved the rule in article 13, which derived from the law of treaties; two States might agree that a bilateral treaty, whatever its nature, should bind them in the future. The article, however, raised a number of questions regarding the rights and obligations of the States concerned by such novation.

29. Cases of fusion would be covered by separate provision, but what would be the situation in cases of decolonization or dismemberment of States? He was thinking of the case where a State which had concluded a commercial treaty, or technical or commercial assistance treaty, with a third State, split up into two States. The division would raise the question of the rights and obligations of the third State on the one hand and of the two new States on the other. Was the third State bound in relation to the two new States, as it had been in relation to the predecessor State, and did the two new States succeed the predecessor State in its obligations towards the third State?

30. Paragraph 2 raised a problem which was mainly one of drafting. Under its terms, the silence of the new State and of the other State was interpreted as having retroactive effect to the date of succession. That proposition was quite acceptable in the case of a multilateral treaty, but in the case of a bilateral treaty it was difficult to imagine States keeping silent regarding the date at which they intended to give effect to the treaty. It might be conceivable in the case covered by paragraph 1 (b), where the continuance of the treaty was assumed from the conduct of the States, but it was improbable in the case covered by paragraph 1 (a), where the States had expressly agreed to maintain the treaty in force. It would therefore be desirable to amend the wording of article 13 accordingly.

31. Mr. RAMANGASOAVINA said that the purpose of article 13 was to ensure the continued application of a bilateral treaty in the event of a succession of States. The case covered by paragraph 1 (a) did not raise any difficulties, since both the successor State and the other State party to the treaty had expressly stated their will to be bound by the treaty.

32. In paragraph 1 (b) the Special Rapporteur proposed that, where the two States had shown by their conduct

³ United Nations Juridical Yearbook 1967 (United Nations publication, Sales No. E.69.V.2), p. 332.

that they regarded the treaty as applicable in their relations with each other, continuance of the treaty should be presumed. That presumption raised certain problems. Conduct could be reflected by acts or omissions. In the latter case, a new State might pay no attention to the treaty merely because it was not yet sufficiently organized. During the period of presumption, some action might be taken by the other State or time-limits might expire without the new State being aware of the unfavourable consequences which might result for it. He would therefore like to see the scope of the presumption in paragraph 1 (b) limited so as to provide only for provisional application. The new State and the other State would then always be free to terminate the treaty.

33. Paragraph 2 presented no difficulties apart from the points raised by Mr. Ushakov.

34. Mr. SETTE CÂMARA said that he supported the approach taken by the Special Rapporteur in article 13. His text emphasized the essentially voluntary character of succession to bilateral treaties, the continuance of which should be a matter for agreement, whether express or tacit, between the two parties.

35. In his opinion, the Special Rapporteur had been correct in departing from the approach taken by the International Law Association and in abandoning the idea of establishing any presumption of continuity. The view taken by the International Law Association had been based particularly on practice in the field of air transport agreements, where continuity appeared to be a common feature.

36. The Special Rapporteur had also acted wisely in not trying to spell out the exact circumstances in which the conduct of the parties might be considered as signifying their consent to continue to be bound by the treaty. Circumstances could vary greatly and it would be very risky to embark on an enumeration of possible cases.

37. Mr. BILGE said that article 13 was very well drafted and filled a definite need. Since the law of treaties did not solve all the problems dealt with in that provision, the Special Rapporteur had had to take the practice into account. He had recommended rules which were entirely fair to the new State.

38. Some members of the Commission feared that the provisional application of a treaty under articles 13 and 14 might bind the States concerned definitively. But it should be noted that the articles in no way prevented the States concerned from recovering their freedom. Moreover, many treaties which were tacitly applied in cases of succession were of limited duration or contained an article enabling them to be amended and adapted to circumstances.

39. He was therefore in favour of article 13, which encouraged the continuance of bilateral treaties, while providing that the successor State should only be bound by its own express or tacit consent.

40. Mr. REUTER said that the Special Rapporteur had rightly provided for the possibility that, by their conduct, the two States might have agreed only to provisional application of the treaty; that was provided in

article 14. But the crucial question was, if a new State emerged to independence by separation and the two States then continued to apply the treaty *de facto*, without saying anything, would the fact that they had continued to apply the treaty have the same force as a succession agreement? According to article 14, the intention had to be "established", a strong term; it had to be proved. He felt some reluctance to accept that, where there had been a *de facto* application of the treaty by both parties, it should be the new State on which fell the burden of having to prove that, although it had in fact applied the treaty, it had not done so with any intention that it should thereby become definitively bound by the treaty. Perhaps the Special Rapporteur would make his position on that situation quite clear.

41. Mr. USTOR said that the point raised by Mr. Ushakov led him to wonder whether it would not be better to expand the titles of sections 1 and 2 to refer to the position of new States and the position of other States in regard to multilateral or bilateral treaties in the event of State succession.

42. Article 13 stated that a bilateral treaty could be renewed by the successor State through its express or tacit agreement; that meant that in the absence of such express or tacit agreement there would be no succession to the treaty. He wondered, therefore, to what extent the successor State and the other party would be free *not* to conclude such an express or tacit agreement.

43. Two principles were involved. On the one hand, there was the principle of self-determination, which had been referred to by the Special Rapporteur in his commentary; that principle might be supported with particular tenacity by a new State which had emerged through the process of decolonization. On the other hand, there was the principle that all States had the duty to co-operate with each other in accordance with the United Nations Charter.

44. The question to what extent the parties would be free to conclude express or tacit agreements to be bound would seem to depend on the balance of forces between those two principles. He suggested, therefore, that the draft should include some reference to the idea that the other party to the treaty had a duty to co-operate with the new State which would take precedence over the principle of express or tacit agreement.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ustor's suggestion would seem to equate bilateral treaties with multilateral treaties by asserting that a new State had a right to consent to a treaty, while at the same time implying that the consent of the other party was irrelevant.

46. Mr. USTOR said that a new State could become a party to a multilateral treaty independently of the will of the other party, whereas the latter's consent was necessary in the case of bilateral treaties. He merely wondered whether the other party was always free to consent or not to the continuance of the bilateral treaty as it saw fit, or whether there was some obligation on it to give its consent.

47. Sir Humphrey WALDOCK (Special Rapporteur), said that if a State had no right to withhold its consent,

it could hardly be regarded as consent in the ordinary meaning of the word.

48. Mr. USTOR said that, in his opinion, a new State which had emerged through the process of decolonization had a right to say that it did not wish to continue to be bound by a treaty. On the other hand, if it did wish to apply the treaty, the other State might not be completely free to refuse its consent. In other words, the question was whether both States would be equally free to consent or not, or whether there might perhaps be a greater burden on the other State to give its consent.

49. Mr. TSURUOKA said that he wished to raise a question concerning the general economy of the draft. The dominant principle of the succession of States in respect of treaties was that of the full freedom of the new State as a sovereign State. Succession to treaties applicable in the territory of the new State was merely a special case; it involved the application either of a rule of the general law of treaties or of a different or opposite rule.

50. In any legislative provision, the general principle was usually stated before the exceptions. But that was not the case with a number of the articles of the draft. Thus, if article 13 was regarded as a special application of article 6, the introductory phrase might be redrafted to read: "A bilateral treaty shall not be considered as in force between the new State and the other State party to the treaty unless...:", to be followed by sub-paragraphs (a), (b).

51. It might, of course, be argued that more prominence should be given to special cases, since the articles dealt specifically with cases of succession. Then they should be drafted so that the special features were stated first and thereafter corrected or limited by the general principle. However, the opposite method would in a great many cases make the articles more readily comprehensible.

52. Mr. CASTAÑEDA said that he agreed with the formulation of article 13, as well as with the reasons which the Special Rapporteur had given in support of it in his commentary.

53. He also agreed that the general rule stated in article 7 would not be applicable in the case of bilateral treaties, for the reasons given by the Special Rapporteur. In the case of a multilateral treaty, the new State acceded to a normative situation, but in the case of a bilateral treaty, the relationship was more personal for each of the parties and was regulated, as the Special Rapporteur had said, "by reference essentially to their own particular relations and interests". (A/CN.4/249, Commentary to article 13, para. (3).)

54. He could not, therefore, agree with Mr. Ustor that the other party was under any special obligation; the latter merely found itself in the normal situation of having to decide whether it wished to establish a treaty link with the new State or not.

55. He agreed that the Special Rapporteur had taken the right approach in not following the suggestion of the International Law Association with respect to a presumption in favour of continuity. There was, to be sure, an impressive amount of practice in favour of that presumption, but upon closer analysis the treaties in question seemed to be of a rather special kind, such as those relat-

ing to air transport, trade agreements or technical assistance. In those cases, continuity would almost automatically confer certain benefits on the successor State, but it was obviously impossible to distinguish between those cases where it would benefit the successor State and those where it would not.

56. Mr. USHAKOV said that, although in theory there was no objection to the principle embodied in article 13, which set forth a fundamental rule of the law of treaties, its application might come up against difficulties of a practical nature. For example, if a State undertook, by means of an agreement, to build a dam in Tanzania and the two States which had merged to form Tanzania separated again, the State which had signed the agreement with Tanzania would be released from its obligation to build the dam, just as the two new States formed by the division would be released from their obligation to repay the cost of the project. The same would apply in a case of decolonization, if the dam was to be built in the territory of the former dependent State. Perhaps the question came under the topic of succession in matters other than treaties, but it also arose with respect to treaties. In any case, the legal point should be dealt with somewhere, perhaps in the commentary.

57. Mr. YASSEEN said that, although it was in the general interest of the international community to promote the participation of all States, especially new States, in multilateral treaties, it had always been accepted, in the case of bilateral treaties, that any State must be free to choose its partners. No State could be forced to maintain a treaty relationship with another. Article 13, as submitted by the Special Rapporteur, was consistent with that principle: it provided that the other State could not be bound to the new State without its consent; in other words, the other State party could not be forced to maintain a bilateral relationship with the new State. That was a just solution of the kind sought by the Commission.

58. As at present worded, the article clearly inclined towards continuity on the basis of mutual consent and was therefore acceptable.

59. Mr. AGO said he agreed that, as far as bilateral treaties were concerned, the principle of freedom of consent must be respected by both sides. Article 13 was therefore acceptable as it stood.

60. Perhaps, however, the presumption in favour of the continuance of the treaty, as laid down in paragraph 1(b), was a bit too broad and should be limited by a reference to the object and purpose of the treaty. To take the example given by Mr. Ushakov, the agreement concluded by the predecessor State with a third State for the construction of a dam would no longer be of any interest to that one of the new States resulting from the division in whose territory the dam was not situated. So that there it was not a question of the conduct of States but of the object and purpose of the treaty. Moreover, continuance of the agreement might prove impossible in practice if, for example, the third State had undertaken to build the dam in that part of the territory corresponding to one of the two States born of the division in exchange for minerals situated in that part of the

territory corresponding to the other of the two States. Or, to take a decolonization example, if, under an agreement between a metropolitan State and a third State, a dam was to be built in a colonial territory in exchange for products from the metropolitan State, and if then the territory concerned became independent, it would seem materially impossible to continue to apply the agreement.

61. The principle stated in article 13 was therefore perfectly valid in theory, but in practice there could be a series of circumstances which could make continued application of the treaty impossible. Perhaps the wording of paragraphs 1 (a) and (b) leaned rather too much towards continuance of the treaty. The principle of freedom of consent should be established clearly and unambiguously.

62. Mr. QUENTIN-BAXTER said that he had already referred to the general issue of inheritance and continuity, both during the general discussion and during the discussion on articles 3 and 4. He had then stressed the importance, in many cases, of the right of a new State to continue to be bound by a treaty concluded by its predecessor. It was precisely in the area of bilateral treaties governed by article 13 that there existed a large body of evidence in favour of the notion of continuity.

63. For general multilateral treaties, the permissive rule embodied in article 7 was appropriate, since it was a matter of encouraging the extension of membership of those treaties to the new States. For bilateral treaties, however, the position was different and the State practice described at length in the commentaries to the various articles showed a definite belief on the part of the new States in the notion of continuity. Again and again, the unilateral declarations made by new States used language which implied a belief on their part that they had certain rights and obligations with respect to bilateral treaties concluded by their predecessors. Of course, those rights and obligations were regarded as requiring review but the idea of continuity was nonetheless present and could not be explained simply by reference to dispositive treaties, for a number of the new States concerned were island countries without boundary problems or other worries of a dispositive nature.

64. Admittedly there was an element of arbitrariness in State practice and the choice between accession and succession was sometimes accidental. One thing, however, was clear: if just a single rule were to be laid down in the matter, it was bound to do less than complete justice to the wide divergence of practice, and if that rule were to be based exclusively on the principle of consent, it would do some injustice to the whole spirit of succession.

65. He could not agree with Mr. Tammes regarding the relationship between articles 4 and 13. With article 13 in its present form, it was absolutely vital that the provisions of paragraphs 2 and 3 of article 4, on provisional application, should be maintained and should apply to bilateral treaties.

66. The Commission should also bear in mind the wider implications of its findings in relation to article 13. It was in the recent practice of the era of decolonization that the strongest evidence of a policy of continuity was to be found. If that policy had no reflection in law, where

was the authority to be found for a rule of continuity in cases not arising from decolonization? Was the concept simply that of tracing the personality of the predecessor State, and applying a rule of State continuity rather than of State succession?

67. Article 13 was framed as a logical sequel to the general articles of the draft, on which he had expressed certain reservations. He found some comfort, however, in the fact that paragraph 2 emphasized the notion of succession and continuity rather than the principles of the law of treaties. He also relied on the provisions of paragraphs 2 and 3 of article 4, on provisional application, to provide some balance for article 13.

68. Mr. EL-ERIAN said that he agreed with the formulation of article 13 and accepted the underlying reasons for its contents, as given by the Special Rapporteur in paragraph (3) of his commentary (A/CN.4/249), namely, the more dominant role played in bilateral treaty relations by the identity of the other contracting party and the consequences that followed from that basic difference between multilateral and bilateral treaties.

69. In paragraph (9) of his commentary (A/CN.4/249), the Special Rapporteur had stated that the rule in article 13 did not apply to treaties of a "territorial" or "localized" character and had added that the question would be examined separately in the commentary to article 18. He approved of that exception but felt that it should be stated in article 13, or at the very least in the Commission's own commentary to the article.

70. The CHAIRMAN, speaking as a member of the Commission, said that some of the remarks which had been made during the discussion were directed more at the experience of the past than at the prospects for the future. In the future, new States were likely to have a much clearer idea of their rights and duties, especially if the present draft became an international instrument. They were also much more likely to know which treaties they wished to keep in force.

71. The treaties involved were likely to be neutral in character, such as extradition treaties and navigation treaties. A new State would naturally not consider continuing an unbalanced or an unequal treaty that might have applied to its territory in a colonial past. As far as the United States was concerned, the practice was extremely liberal towards new States. Every effort was made to accommodate their wishes with regard to the continuation or otherwise of such treaties as consular conventions.

72. He did not foresee any difficulty in the operation of the provisions of paragraph 1 (b) of article 13. The wording was perhaps somewhat unduly restrictive; it was taken from article 45 of the 1969 Vienna Convention,⁴ which related to a question of estoppel of claims of invalidity of treaties. A claim of that nature naturally required strong proof. In view of the circumstances to which article 13 would apply, however, he suggested that

⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 295.

a formula used elsewhere in the Vienna Convention, in particular in its article 14, would be more appropriate, namely the wording "or is otherwise established".

73. Dispositive treaties constituted an exception to the application of the rule in paragraph 1 of article 13 and he supported the suggestion that that exception should be stated in the text of the article.

74. Lastly, he suggested, for the consideration of the Drafting Committee, that in the opening sentence of paragraph 1, the words "shall be considered as in force" be replaced by the words "shall be considered as remaining in force", so as to place greater emphasis on the element of continuity.

75. Sir Humphrey WALDOCK (Special Rapporteur), summing up the discussion, said that article 13 had met with general approval.

76. Mr. Reuter, as he understood him, thought that in a case of application based simply on *de facto* conduct, it would be right to have a limiting rule saying that the inference to be shown from that conduct should be an inference only of provisional, not of definitive application.⁵ That suggestion should be considered by the Drafting Committee. He himself had avoided introducing that idea into article 13 because the provisions of article 14, on notice, seemed too stringent for cases of provisional application. If, in the interests of both parties to the treaty, it was desirable to require some notice of the termination of a treaty, twelve months seemed rather long for a treaty applied on a provisional basis. Certainly any rule on the question must take into account the fact that the matter was of interest to both States concerned and that there must be complete reciprocity on the point between the two parties.

77. Mr. Ushakov had raised an interesting point.⁶ It was the problem in a way of what some people referred to as unjust enrichment, in cases where, for instance, assistance had been given towards the construction of a dam in the territory subsequently taken over by the new States; the problem was touched on in paragraph (11) of his commentary (A/CN.4/249). The Commission would have to decide whether to treat cases of that type as exceptions to the rule in article 13 on bilateral treaties, or as cases to be governed by reference to principles outside the scope of the present topic and belonging perhaps to the topic of succession of States in respect of matters other than treaties. In practice, the new State generally still had some need for the continued co-operation of the other State party and the problems were settled by agreement between the two parties. The Commission would have to keep the question in mind but it would be difficult to deal with it in the context of article 13.

78. With regard to the point raised by Mr. Ustor,⁷ it was difficult to admit that the consent of the other State could somehow be dispensed with in the case of a bilateral treaty. Moreover, the introduction of an ele-

ment of compulsion on that other State would be in flat contradiction with existing State practice.

79. With reference to Mr. Quentin-Baxter's remarks,⁸ he felt it was essential to consider State practice as a whole. No doubt a desire for continuity did exist where rights were concerned, but at the same time States were reluctant to have obligations imposed upon them in the name of continuity. For example, whereas the United Kingdom had always favoured the idea of continuity for its dependent territories, when it had been confronted by a claim for continuity in its treaty obligations by a former French colony, it had answered that the continuance of the treaty must be a matter of agreement. His own belief was that the general philosophy of article 13 was certainly correct.

80. On the question whether the rules set out in article 13 applied equally in cases of fusion and separation, he would keep an open mind until he had completed his study of those categories of succession. The Commission would have to decide whether in those cases there was a basis for laying down a rule of *ipso jure* continuity.

81. He had been reminded by Mr. Quentin-Baxter's remarks that nineteenth century writers, such as Hall, had urged that the key to the whole matter was to be sought in the personality of the State. If the personality of the State could be traced back, continuity of treaty relations existed; if the personality was different, no such continuity existed. In the light of contemporary practice, however, he felt that the problems which arose with regard to fusion and dismemberment of States were too complex to be solved simply by a single formula. Cases of division of States were even more complex.

82. The Commission had now before it the first addendum to his fifth report (A/CN.4/256/Add.1), containing article 19 on the formation of unions of States. In that same addendum, he had included an additional article for insertion at the end of part II, provisionally termed "Excursus A" and entitled "States, other than unions of States, which are formed from two or more territories". That article was intended to deal with a composite State which was not a union formed of pre-existing States but had been formed from two or more territories that had not previously been States.

83. He had submitted different provisions to deal with those two separate situations because practice did not seem to support the approach adopted by the International Law Association of covering all composite States by means of a single formula.

84. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 13 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁹

The meeting rose at 12.55 p.m.

⁵ See para. 40 above.

⁶ See para. 29 above.

⁷ See paras. 42-44 above.

⁸ See paras. 63 and 64 above.

⁹ For resumption of the discussion, see 1196th meeting, para. 7.