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Summary record of the 1270th meeting

Topic:
Succession of States with respect to treaties

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den on newly independent States because of the nature of the treaties involved, and would promote continuity and stability in treaty relations. He had then mentioned two possible objections: first, such an option would involve treaty obligations for a newly independent State before it had had an opportunity to examine their implications, and secondly, it was difficult to identify and define "law-making" multilateral treaties.

70. The Special Rapporteur's conclusion that the balance of considerations in favour of the "opting-out" approach did not justify its adoption in article 12 was a little surprising. However, the comments and arguments in the report seemed to provide a basis for solving the definition problem in a way that would enable the Commission to decide between the two approaches.

71. To overcome the technical difficulties, the Commission might first recommend that future diplomatic conferences, when preparing or revising general conventions, should indicate their nature for the purposes of succession. That could be done on the basis of the Nigerian suggestion that an exception to the clean slate principle should be made in the case of law-making treaties concluded under the auspices of the United Nations, since they had not been made by foreign Powers, but were acts of the world community intended to regulate international relations (A/CN.4/278/Add.2, para. 218). Secondly, the Commission might consider the possibility of making the "opting-out" system applicable to all multilateral treaties not falling within the scope of article 12, paragraph 3. Thirdly, the General Assembly might be invited to legislate along the lines suggested by the Netherlands Government (*ibid.*), perhaps taking the number of parties to a treaty as a criterion. At all events, it should not be beyond the capacity of the legal mind to find solutions to such technical problems in order to meet the overwhelming need for continuity and stability in treaty relations.

72. On the other aspects of article 12 he entirely agreed with the observations and proposals of the Special Rapporteur.

73. Mr. USHAKOV said he thought that if the Commission decided to provide for a time-limit, the best solution would be to stipulate a "reasonable" period and to leave it to international practice to establish what was meant by "reasonable".

74. With regard to law-making treaties, he would prefer to speak of "treaties of a universal character". Under the principle of presumed participation referred to by Mr. Tammes, the successor State would be considered to be a party to the treaty until its non-participation had been notified. A solution of that kind would ensure the treaty's continuity and at the same time safeguard the clean slate principle.

75. Mr. TSURUOKA said he was in general agreement with the comments made by the Special Rapporteur in his report and with his verbal explanations, but wished to stress the importance of establishing a time-limit within which newly independent States must exercise their right to notification of succession. It was right to protect the interests of new States, but the interests of other parties must not be injured in the process, so he

thought it would be better to lay down a precise time-limit to safeguard the rights of all concerned. For instance, a time-limit of 20 years could be prescribed, since it was obvious that after 20 years a State could no longer be regarded as "newly independent".

76. On the subject of law-making treaties, he fully agreed with Mr. Ushakov.

77. Mr. YASSEEN said that on the subject of law-making treaties, which the Commission had discussed at length two years previously, his convictions remained unchanged. He still believed that it was impossible to impose such treaties, whether they were declaratory or whether they embodied progressive development of international law. He was convinced, however, that under the United Nations system of progressive development and codification, new States would have no difficulty in acceding to those treaties.

78. As to the question of a time-limit, he understood the reasons of certain Governments and some members of the Commission who wished to avoid difficulties in bringing treaties into effect. But he thought it difficult to fix a figure, because the length of the time-limit would depend on the nature of the treaty and on practical considerations relating to the newly independent State. Some treaties needed a longer period of reflection than others. Mr. Elias had rightly emphasized the difficulty of choosing a specific period; like him, he thought that the problem could be left to the courts and international practice. To provide a basis for judicial interpretation, the article might perhaps stipulate a "reasonable" time-limit, as Mr. Ushakov had suggested.

79. The CHAIRMAN drew attention to the suggestion that a law-making or universal treaty should be presumed to be binding on a newly independent successor State until it had notified its acceptance. Did that mean that in the case of other kinds of treaty there would be a presumption of non-continuity? The Special Rapporteur might wish to consider that point.

The meeting rose at 1 p.m.

1270th MEETING

Tuesday, 4 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-4; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND
READING

ARTICLE 12 (Participation in treaties in force) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 12.

2. Mr. MARTÍNEZ MORENO said he did not agree that an exception to the clean slate principle should be made in the case of universal law-making treaties. It would be unfair to expect a newly independent State to accept rules of international law which many other States had not yet accepted. The Vienna Convention on the Law of Treaties,¹ for example, was not yet in force, because it had not been ratified by the requisite number of States. Moreover, some law-making treaties contained contractual provisions as well as general rules of international law. A provision which made such treaties automatically binding on successor States would be discriminatory. It was, of course, desirable to obtain the widest possible participation in treaties codifying principles of international law, but States might themselves set an example by ratifying those treaties. *Jus cogens* rules were mandatory *per se* for all countries and there was no need to depart from the clean slate principle to ensure their observance.

3. The concern expressed about the legal uncertainty that might result if no time-limit was fixed for notification of acceptance by the successor State was justified in some cases, and the situation was complicated by the retroactive effect of the notification. In practice that should not be a problem in the case of universal treaties, since they were open to all countries, which could accede at any time. Treaties constituting international organizations or adopted within an international organization were covered by article 4. In the case of treaties concluded by a limited number of States for geographical, economic or other reasons, the important question was whether or not the treaty could be applied to the new State, not whether that State would exercise its right to accede, although the retroactive effect of notification might create problems. Such cases could perhaps be covered by a specific provision and it might then be desirable to fix a time-limit. He would prefer a reference to a "reasonable time", as suggested by Mr. Ushakov, or, as suggested by the United States (A/CN.4/275), to a period long enough for the successor State to review possibly applicable multilateral treaties, but not so long that the rights of other parties would be seriously impaired by the retroactive effect of notification.

4. The Polish Government's concern about the interim régime (A/CN.4/275) was reasonable, and it might be wise to draft an article providing that States parties to a multilateral treaty would not be held responsible for not applying the provisions of the treaty to a newly independent State, except in regard to general rules of international law and humanitarian principles, until that State had notified its acceptance. He preferred that approach

to a presumption of continuity, as it would be more in keeping with the clean slate principle.

5. He agreed with the exceptions to the general rule stated in paragraphs 2 and 3 of article 12 and in article 4.

6. The drafting of the article could probably be improved. Paragraph 1 should state only the general principle, omitting the words "Subject to paragraphs 2 and 3", and paragraph 2 might begin with the words "Nevertheless, the provisions of paragraph 1 shall not apply to the following cases...". The term "negotiating States" in paragraph 3 should perhaps be changed to "States parties", as other States might subsequently have acceded to the treaty. For example, a recent agreement concerning the central banks of certain Central American countries, which provided for the establishment of a monetary clearing-house as part of the Central American Common Market, had been negotiated by only five States, but a number of other States had subsequently become parties to it and more were expected to accede in the future. Under paragraph 3 of the present draft article 12, Belize, on attaining independence, could be denied the right to participate in that agreement. The Drafting Committee should find more satisfactory wording.

7. Mr. TABIBI said he supported the Special Rapporteur's conclusion that the present text of article 12 should be retained. It was not only necessary as a counterbalance to article 11, but also safeguarded the interests of newly independent States and of the other parties to treaties. The provision might save a newly independent State the embarrassment of notifying its succession to a treaty whose object and purpose were incompatible with its participation.

8. He agreed that it was difficult to define law-making treaties and to draw a line of demarcation between them and other types of treaty; he was inclined to support the views expressed by the Special Rapporteur on that matter in paragraphs 221 to 229 of his report (A/CN.4/278/Add.2).

9. The question of a time-limit for notification had an important bearing on the element of continuity in international affairs and on the role of new States in the international community. A time-limit would help to eliminate uncertainty in regard to treaty rights and obligations, but it must be long enough to allow newly independent States to translate and study the texts of treaties and to decide which of the many treaties and conventions to accede to. Newly independent States needed time to familiarize themselves with the language of treaties and to reflect on their political implications. Moreover, their governments and parliaments were primarily concerned with internal political, economic and social problems. They were, however, often quick to participate in treaties that were important to them, and he therefore agreed that it would be better to refer to a "reasonable time" than to lay down a specific time-limit. Otherwise the matter might be left open for decision by the future plenipotentiary conference adopting the draft articles. Notification of acceptance by newly independent States could be speeded up if they

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p.289.

were provided with relevant information and summaries of treaties and conventions in their own languages. A fund might be established for the provision of such documentation.

10. The question of objections was adequately dealt with in the Special Rapporteur's report (A/CN.4/278/Add.2, paras. 247-253); paragraphs 2 and 3 of article 12 covered that point. The views expressed by the Governments of Australia and Spain on objections in the case of bilateral treaties were, however, quite correct. Such problems rarely arose in the case of multilateral treaties and might perhaps be considered more fully when the articles on bilateral treaties were discussed.

11. Mr. ELIAS said he was opposed to express provision for a time-limit for notification, as suggested by the Polish and United States Governments. The difficulties raised for newly independent States by devolution agreements did not seem to be appreciated. Such agreements generally took the form of an exchange of notes or letters, accompanied by a list of the treaties in question, but not by the texts of those treaties. In some cases, accession to one multilateral treaty entailed acceptance of another incorporated in it by reference. If the predecessor State, or, for that matter, the Secretary-General of the United Nations, as the depositary, were required to provide the successor State with copies of the treaties in question within a certain time, it might be reasonable to fix a time-limit for notification of acceptance by the successor State after it had received the texts. Some successor States which had been independent for many years were still trying to obtain copies of treaties in order to decide what position to adopt with regard to them.

12. Predecessor States could perhaps be called upon to request third-party States to help successor States to make their decision. For example, the Netherlands and the United States had submitted lists of multilateral treaties which they considered important to certain African countries, requesting them to state their position on those treaties; in some cases facilities had been provided for obtaining the texts of the treaties. With such assistance, successor States were able to deal with the matter more expeditiously.

13. A solution to the problem of notification could perhaps be found by simplifying some of the present provisions, or by stipulating that notification should be within a reasonable time, as suggested by Mr. Ushakov. It was nevertheless important to link any decision on the question of a time-limit with the provisions of article 18.

14. Mr. ŠAHOVIĆ said that he concluded from the Special Rapporteur's analysis and the comments by Governments that States attached special importance to multilateral treaties and recognized their usefulness as a formal source of general international law. While he appreciated the reasons for the comments made by Governments, he thought the Commission should not be too hasty in accepting them and amending the text of article 12; for in his opinion the article was well drafted and reflected a concept clearly established in the draft. Moreover, the Special Rapporteur had well understood

the nature of the comments and had only proposed a few slight changes.

15. With regard to the classification of multilateral treaties—a question much dwelt on by States—he agreed with the Special Rapporteur that it was very difficult to define law-making multilateral treaties and that the answers to the questions raised during the discussion were to be found in practice. He therefore thought it preferable not to make any such classification.

16. On the question of the period for notification, he thought the Commission had been right not to set any time-limit in the text of the article adopted on first reading. Although the arguments in favour of a time-limit put forward by certain Governments were logical and based on real situations, in view of the nature of the article and of the purpose of devolution agreements, he did not think it was necessary to refer to time-limits in the strict sense of that term. The Special Rapporteur had made it quite clear in his commentary that a distinction should be made between the law of treaties and the principle of State succession, and that the draft articles dealt with State succession. A time-limit could be justified only if there was an option to withdraw; but in fact there was a positive option to participate. It might also be indicated that the general law of treaties did not prescribe any time-limits for the acceptance of multilateral treaties. The Commission had therefore been right not to specify a time-limit in the text of article 12.

17. Mr. BILGE observed that the rule in article 12 made the clean slate rule stated in article 11 less rigorous, and thus ensured some continuity in the international legal order.

18. He was opposed to the setting of a time-limit, which would create many difficulties, not only for newly independent States, but also for old-established States. Turkey, for instance, had not yet acceded to the Vienna Convention on Diplomatic Relations, which it approved of in principle, owing to the difficulties caused by the lengthy procedure necessary for ratifying that Convention. He did not think it would be possible even to speak of a "reasonable time", since article 12 did not place an obligation on new States, but gave them an option which they were free to use or not to use, as they saw fit. He understood the difficulties referred to by Mr. Elias and considered that the legal nature of the article did not require the introduction of any notion of time limitation.

19. As to the distinction to be made between law-making and other multilateral treaties, he appreciated that the international legal order must be preserved so far as possible; but the Commission was now dealing with the problems which arose on the birth of a newly independent State, not with the obligations that State would have to assume later. Consequently, even if the definition of law-making treaties did not raise any difficulties, he would not be in favour of making an exception for those treaties.

20. Lastly, he had some reservations about paragraph 2. He did not see how the object and purpose of

the treaty could be incompatible with the participation of the successor State in that treaty when, under the terms of paragraph 1, the treaty had already been in force in respect of the territory at the date of the succession.

21. Mr. EL-ERIAN said that the successor State's option in regard to general multilateral law-making treaties should be regarded, not as a granted right, but as the inherent right of a State which had long been denied a role in the international community and in the formulation of general international law. Article 12 proclaimed that right, while providing for a few clearly-defined exceptions; little could be added to improve the draft. He accepted the conclusions of the Special Rapporteur, who, he understood, proposed to deal in the commentary with the point raised by the Polish Government. The issue might perhaps become clearer when article 18 was taken up. It was in any case a matter for the Drafting Committee and the Special Rapporteur to decide.

22. When discussing the question of a time-limit, speakers had mentioned the practical difficulties facing newly independent States; but those which had attained independence very recently were perhaps more fortunate than some others. Egypt, for example, as a vassal State in the Ottoman Empire from 1841 to 1914, had retained its international personality in so far as it was expressly allowed to conclude international agreements of a non-political character. It was therefore difficult to decide whether Egypt should be considered a party, for instance, to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. He nevertheless agreed with Mr. Elias that it was often difficult for a newly independent State lacking qualified personnel and the requisite documentary material to decide what position to adopt in regard to a multilateral treaty. Consequently, he doubted whether it would be wise to fix a time-limit, which seemed contrary to the principle of the universality of multilateral law-making treaties and might defeat their purpose.

23. Mr. BEDJAOUI said he shared the Special Rapporteur's views on article 12, which stated a rule that was generally followed in international practice. He hoped the text would be altered as little as possible, as it seemed to him to be well balanced; its three paragraphs complemented one another and covered all the possible situations.

24. The Commission had started from a firm foundation, namely, the link created between the territory and the treaty in force; and that link had led it to believe that a newly independent State had an objective right to participate in the treaty. He was afraid that if the Commission made that option subject to a time-limit, it would fail to achieve the purpose it had set itself. The States favouring a fixed time-limit had a dual objective: they wished to end uncertainty about the continued application of the treaty in the territory and to enlarge the area of international co-operation between States as far as possible. But he feared that in imposing a time-limit on newly independent States, which very often were not in a position to take an immediate decision, the Commission might be acting counter to the second

of those objectives, since such States might be prevented from participating in the treaties in question, at least by the simplified and convenient procedure of notification of succession.

25. He recognized that uncertainty about the application of certain treaties to former colonial territories was genuine and difficult to remove. For under the system of "particularity of treaties" that formed part of their internal legal order, certain former colonial Powers had not automatically extended the application of a treaty to all their colonies, but had proceeded case by case, according to the type of treaty, the varying status and development of the colony, and even according to circumstances or convenience, not to mention the cases in which the colonial Power had been silent about the applicability of the treaty to the then dependent territory. There had also been cases in which the predecessor State had not taken the trouble to specify its intentions *ne varietur*. And when it was also remembered that, for a single predecessor State, there has been wide differences in legal status between one dependent territory and another, the amount of uncertainty that could be created was readily apparent. But that uncertainty could not always be removed by communicating the texts or the list of treaties to the successor State.

26. He therefore considered that the imposition of a time-limit would run counter to the object in view and would create an obstacle for newly independent States, which might not be able to take advantage of the option open to them. As Mr. Šahović had pointed out, the Commission's intention in article 12 had not been to provide a right to "opt out", based on a presumption of continuity—which would have been contrary to the clean slate principle and could have been accompanied by a time-limit—but a right to participate. He did not see how that choice could be accompanied by a provision reflecting the anxieties—however honourable—of those States which wished to make the application of article 12 subject to a time-limit imposed on the successor State.

27. Mr. RAMANGASOAVINA said that he, too, wished to emphasize the value of article 12, which was the counterpart of the clean slate principle set out in article 11. In his view, a newly independent State must be allowed to declare, by a notification of succession, its will to be bound by a treaty. In spite of the many comments on that principle made by Governments and by their representatives in the Sixth Committee of the General Assembly, article 12 seemed to him to require very little change, for it was the result of a thorough examination of the difficulties caused by practical application of the principle of succession to multilateral treaties.

28. Some members of the Commission had rightly stressed that it was difficult to differentiate between general multilateral treaties and law-making treaties. Clearly, a State achieving sovereignty and joining the international community must be able to accede quickly to certain treaties or arrangements that were essential to international life; yet it was difficult to make distinctions between law-making treaties.

29. In that connexion the Special Rapporteur had referred to the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Treaty on the Non-Proliferation of Nuclear Weapons and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space; but those treaties were certainly not all of equal interest to newly independent States. Diplomatic and consular relations were of vital importance to them, and no newly independent State would wish to avoid the application of the Conventions regulating those relations. The same applied to the International Telecommunication Convention and the Chicago Convention on International Civil Aviation, which laid down rules that were already part of international life. On the other hand, a new State would be less interested in the limitation of weapons of mass destruction and the principles governing the exploration and use of outer space, than in international liability for damage caused by space objects or radio-active fall-out. Thus there were certain treaties which were not of immediate interest to new States and it was natural that they should be in no hurry to accede to them.

30. In some cases, however, States had to take a decision fairly quickly, so as not to embarrass the other States parties or cause confusion in international life. But since the international community had no supranational power and could not impose rules, the best that could be hoped for was a strengthening of the role of the Secretary-General, who could guide the new States directly by communicating a list of treaties of immediate interest to them.

31. He thought it would be difficult to impose a time-limit. A limit of two or four years would only be useful as a guide, since it would be impossible to declare that States which failed to announce their intentions in time were barred from doing so. It would be possible to follow Mr. Ushakov's suggestion and refer to "a reasonable time". That would not be an ultimatum, but a recommendation to young States, designed to make them understand as quickly as possible how important it was that they should participate in certain treaties. In his opinion, the Commission should not lay down a specific time-limit.

32. It was obvious that the other States parties to the treaty might have difficulties, since for an indeterminate period, being unaware of the new State's intentions, they would not know what attitude to adopt. The Special Rapporteur had considered whether those difficulties could not be overcome by establishing a right to "opt out". He (Mr. Ramangasoavina) thought that such a right would be contrary to the clean slate principle which the Commission had taken as its starting point, and would confuse matters still further. Consequently, he was in favour of keeping article 12 as it stood, subject to a few small drafting changes that could be made by the Drafting Committee.

33. Mr. QUENTIN-BAXTER said he agreed that newly independent States needed time to discover where they stood in relation to treaties. The present draft was in accordance with the spirit of State practice in such

matters and the Commission should be very cautious about trying to provide for a time-limit.

34. The principle enunciated in the article was the concomitant of the Commission's general agreement on the clean slate approach. It had been traditional practice to stress the benefits of succession rather than the duties it might impose, and to ensure that new States should not be deprived of those benefits by some arbitrary rule. It had been found possible to give new States the right to participate in general multilateral treaties. There would seldom be any reason for denying a new State the right to participate, except perhaps in the case of certain constitutive treaties, those making special provision, or those concluded by a small number of States. In the case of most treaties, it would not be a question of reciprocity so much as general international benefit from the widest possible acceptance of the rules.

35. He could not support the idea of reversing the onus by setting a new State a time-limit within which to opt out. That would be contrary to State practice and to international interests. In the case of some treaties, there might be inequalities between the parties, or it might be important for the parties to know whether the new State would accede, or the parties might not allow such accession to have retroactive effect. However, such cases might appropriately be considered in the more limited context of article 18.

36. The CHAIRMAN, speaking as a member of the Commission, said that some of the points listed in paragraph 220 of the Special Rapporteur's report (A/CN.4/278/Add.2), such as time-limits, the interim régime and objections to a notification of succession, were more closely related to articles 17 and 18 than to article 12.

37. The main issues which had arisen during the discussion were the adoption of an "opting in" system in article 12 and the making of a distinction between "law-making" treaties and other treaties. The Special Rapporteur had pointed out that since other States were not bound to become parties to law-making treaties, it would not be fair to impose such an obligation on newly independent States. That had been precisely the view of the Commission at its 1972 session, and he had the impression that its view had not changed since.

38. He drew attention to the provisions of article 5, on obligations imposed by international law independently of a treaty. A new State was bound by the rules of general international law and, in particular, by the rules of customary law generally recognized by the family of nations. With the expansion of the international community, the rules in question were no longer limited to the traditional rules recognized by European States, but covered a much wider area, including, in particular, the material now partly embodied in the great codification conventions.

39. On the question of the classification of treaties, he drew attention to the third report submitted by the Special Rapporteur on the topic of treaties concluded between States and international organizations or between two or more international organizations. A well-balanced passage in that report pointed out that the

International Law Commission, after its lengthy debates on the law of treaties, had finally avoided "any *systematic* reference to classifications, confining itself in some articles to drawing, in terms as simple and precise as possible, distinctions whose purpose is always limited to that of the article in question".² That passage was particularly relevant to the present discussion; the argument for avoiding any classification of treaties for the purposes of draft article 12 was overwhelming.

40. Reference had been made during the discussion to the need to bear in mind the interests of the other States parties to a multilateral treaty; it was important for those States to know what position the newly independent State would take with respect to the treaty. If the Commission adopted Mr. Ushakov's suggestion and stipulated for notification within "a reasonable time", the matter would be settled by diplomatic correspondence. The other States parties could draw the attention of the newly independent State to a particular treaty and request it to clarify its position within a reasonable time.

41. From his own practical experience, he could say that a notification of succession by a newly independent State was not always sufficient. When an old State like Hungary received such a notification in respect of a treaty which it had previously concluded with, say, France or the United Kingdom, as the State previously responsible for the international relations of a territory, it often found it necessary to clarify certain details later. For example, in the case of treaties on legal assistance, the newly independent State had to specify, by diplomatic correspondence, what authority would be responsible for certain functions designated in the original treaty. There again, the stipulation of "a reasonable time" would help States to obtain the necessary clarification.

42. With regard to the newly independent State's difficulty in obtaining the texts of treaties, which had been mentioned by Mr. Elias, he thought the best way to deal with that point was by a passage in the commentary drawing attention to the possibilities of technical assistance.

43. Sir Francis VALLAT (Special Rapporteur) expressed his appreciation for the encouraging statements made by members with regard to the commentary, in which he had done his best to present the issues arising in connexion with article 12. He did not propose to take a definitive view on the many interesting points which had been raised during the discussion. It would be wiser to reflect on them, particularly as several related also to article 18 and it would be appropriate to revert to them when that article was discussed.

44. On the question of a time-limit, an interesting proposal had been made by Mr. Ushakov, calling for the introduction of a flexible formula that would not specify any fixed time. That proposal deserved careful consideration.

45. The discussion had shown that there was strong opposition to making any further distinctions between

treaties, beyond that made between bilateral and multilateral treaties, subject to such exceptions as were stated in the draft—for example, in paragraph 3 of article 12.

46. The idea had also been put forward that the position of third States might be alleviated by restricting the retroactive effect of notification of succession in certain cases, so that a third State would not be held responsible for a breach. Despite the attractions of that suggestion, he did not favour it, because it would go a long way towards destroying the effect of article 18. The Commission could revert to the matter, if necessary, when discussing that article.

47. He would advise caution in regard to the suggestion that the reference to "the negotiating States", in paragraph 3, should be replaced by a reference to "States parties". The term "negotiating States" had been used because the question whether the treaty was or was not of the kind indicated had to be determined at the time when the treaty was concluded; and indeed, that was really the basis of the corresponding provision in the Vienna Convention on the Law of Treaties.³

48. He knew from his own experience the great importance attached by new States to the texts of the treaties and to other information regarding treaties. Such material was necessary to enable a newly independent State to consider its position. He did not believe, however, that it was possible to make provision for that need in the draft articles, except as an element of the proposal to introduce a "reasonable" time-limit; the question whether the newly independent State had the information it needed would be relevant in that regard. It was more a matter for the commentary than for the article itself.

49. The adoption of a reference to "a reasonable time" would not, of course, solve the problem mentioned by the United States Government, which related to the difficult technical questions that could arise in internal court proceedings. Questions of that kind could only be settled by clarification through diplomatic correspondence.

50. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 12 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

ARTICLE 13

51.

Article 13

Participation in treaties not yet in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates, if before that date the predecessor State had become a contracting State.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

² A/CN.4/279, para. (7) of the commentary to article 1.

³ Article 20, para. 2.

⁴ For resumption of the discussion see 1290th meeting, para. 46.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the contracting States, the successor State may establish its status as a contracting State to the treaty only with such consent.

4. When a treaty provides that a specified number of parties shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a party for the purpose of that provision.

52. Sir Francis VALLAT (Special Rapporteur), introducing article 13, said that the points made during the debate on article 12 should be taken into account with regard to the important questions of principle that arose in respect of both articles, especially in regard to the time factor.

53. In the light of the comments by Governments, he had proposed an amendment to paragraph 1 of article 13, introducing a reference to "a period of [3] years from the date of the succession of States", within which notification would have to be made (A/CN.4/278/Add.3, para. 263).

54. Mr. USHAKOV said that in spite of their similarities, articles 12 and 13 dealt with quite different situations: one concerned treaties in force, and the other treaties not yet in force. Whereas no time-limit was prescribed in article 12, the Special Rapporteur was proposing to introduce one in article 13. But the idea of a time-limit was implicit in article 13, because the article could only apply until the date on which a particular treaty came into force. That time-limit ran from the date of the succession of States until the date on which the treaty entered into force, and there was no need to introduce another specific time-limit into the article.

55. The other proposals for amending article 13 were largely drafting points. In paragraph 1, the phrase "a multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates" was probably clear enough, and there was no need to specify that the predecessor State must have become a contracting State "in respect of that territory".

56. Mr. HAMBRO said he could accept the amendment proposed by the Special Rapporteur to paragraph 1.

57. With regard to Mr. Ushakov's remarks, since the time lag between the conclusion of a treaty and its entry into force could be very long, would it not be just as natural to introduce a time-limit in article 13 as in article 12?

58. Mr. USHAKOV said he appreciated that a long time might elapse, especially in the case of codification treaties, before a treaty obtained the number of ratifications or accessions needed to bring it into force. In such cases, newly independent States and other States were in the same situation.

59. Mr. ELIAS suggested that the Commission should not adopt the amendment introducing a time-limit into paragraph 1. He urged that article 13 should be adopted as it stood. The period which would elapse between the date of succession and the date of entry into force of the

treaty would provide a natural time-limit to cover the situation mentioned in the Special Rapporteur's commentary.

60. The Special Rapporteur's suggestion introducing a time-limit into article 13 was in line with his similar suggestion regarding article 12. Hence the reasons for opposing a time-limit in article 12 applied with equal force to article 13. He did not think the amendment proposed by the Swedish Government (A/CN.4/275) was justified.

61. Sir Francis VALLAT (Special Rapporteur) pointed out that entry into force could take place only a short time after succession. In that case, the question arose how the situation in article 12 was to be distinguished from that in article 13.

62. Mr. USHAKOV stressed the fact that article 13 referred to status as a contracting State. Once a treaty came into force, there was no question of the newly independent State establishing its status as a contracting State and article 13 was no longer applicable. It was not possible to provide in the article for every situation that might arise in practice, such as a treaty coming into force immediately after a succession of States.

63. Sir Francis VALLAT (Special Rapporteur) said it was important to clear up the point raised by Mr. Ushakov, which affected the relationship between article 12 and article 13. Article 12 dealt with treaties in force at the date of the succession of States in respect of the territory to which the succession related. Article 13 dealt with treaties not yet in force on that date. In both articles, the position was crystallized at the date of the succession of States.

64. The CHAIRMAN, speaking as a member of the Commission, said that article 13 dealt with the case in which the newly independent State could establish its status as a contracting State; it really envisaged a situation in which the treaty was not in force at the time of the notification. If the treaty was in force at that time, the notification would be for the purpose of making the newly independent State a party to the treaty.

65. Mr. ELIAS said that the situation contemplated in article 13 would be governed by article 24 of the Vienna Convention on the Law of Treaties.

66. The CHAIRMAN, speaking as a member of the Commission, said that when a treaty was open for ratification, accession or acceptance, a newly independent State would be in the same situation as any other State. He saw no reason why there should be a time-limit for newly independent States which did not exist for other States.

67. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that there was a lacuna in the draft. There appeared to be no way in which, by a notification of succession, a new State could become a party to a treaty not yet in force at the time of the succession, if the treaty happened to enter into force before the date of the notification. In that situation, neither the provisions of article 12 nor those of article 13 would apply.

68. Mr. USHAKOV observed that notification of succession was not the only procedure by which a newly

independent State could become a party to a treaty. It could comply with the procedure for accession prescribed in the treaty itself or in the law of treaties, so it was not essential to fill any lacuna that might exist in article 13.

The meeting rose at 6.5 p.m.

1271st MEETING

Wednesday, 5 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Co-operation with other bodies

[Item 10 of the agenda]

1. The CHAIRMAN said that the next session of the European Committee on Legal Co-operation was to be held at Strasbourg, from 22 to 24 June 1974, and the Commission had been invited to send an observer. The enlarged Bureau had discussed the matter and proposed that the First Vice-Chairman, Mr. José Sette Câmara, should act as the Commission's observer. If there were no objections, he would take it that the Commission agreed to that proposal.

It was so agreed.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-4; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 13 (Participation in treaties not yet in force) *(continued)*

2. The CHAIRMAN invited the Commission to resume consideration of draft article 13.

3. Sir Francis VALLAT (Special Rapporteur) said that at the end of the previous meeting the discussion had centred on the question whether the right of a newly independent State, under paragraph 1 of article 13, to establish its status as a contracting State ceased, or did not cease, when the treaty entered into force. His own reading of article 13 was that the right continued even after the entry into force of the treaty. One argument in favour of that interpretation was the

statement in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that article 13 "parallels article 12", which presumably meant that it was parallel to article 12 in all respects. Another argument was that the term "contracting State" was defined in article 2 as meaning "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". If the term "contracting State" was understood in that sense, it really included a party to the treaty. He understood the term "contracting State" in the same way in the Vienna Convention on the Law of Treaties, which contained the same definition.

4. From the point of view of substance, there would be a lacuna in the draft if the provisions of article 13 were taken as ceasing to apply on the entry into force of a multilateral treaty; for if the treaty happened to enter into force very soon after the succession of States, the newly independent State would be totally deprived of its right to become a contracting State or a party to the treaty. It should be noted that article 14 of the draft would not cover the situation, because it dealt only with the case in which the predecessor State had signed the treaty but not ratified it.

5. If article 13 was not clear, it should be redrafted so as to state its intended meaning unequivocally.

6. Mr. USHAKOV said he was not entirely satisfied by the Special Rapporteur's explanations. It was not only newly independent States that were concerned: no State whatever could become a contracting State to a multilateral treaty once it had come into force. All States were therefore in the same position, and the Commission should not try to make it possible for a newly independent State to establish its status as a contracting State in those circumstances. For instance, when the Soviet Union had ratified the two International Covenants on Human Rights, it had acquired the status of a contracting State because the Covenants were not yet in force, the necessary number of ratifications or accessions not having been received. If the Covenants had already been in force, the Soviet Union could not have become a contracting State; it would have become a party to the Covenants, in accordance with the definition of that term given in article 2, paragraph 1 (g) of the Vienna Convention on the Law of Treaties.¹

7. Mr. CALLE Y CALLE said that articles 12 and 13 were completely parallel. Article 12 conferred upon the newly independent State a faculty in its own right to replace the predecessor State, by way of succession, in the status of party to a multilateral treaty. The treaty in question was doubly in force: it had the number of ratifications necessary for general entry into force and it was in force for the predecessor State.

8. The case contemplated in article 13 was that of a multilateral treaty which was not yet in force for any State, because it did not have the necessary number of ratifications. The right conferred upon the newly inde-

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No.: E.70.V.5), p. 289.