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Fourth Report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

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SUCCESSION OF STATES

(*a*) Succession in respect of treaties

[Agenda item 2 (*a*)]

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Fourth report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

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I. Introduction

A. The basis of the present report

1. The Special Rapporteur's first report on this topic,[1] submitted to the International Law Commission at its twentieth session, was of a preliminary character. At that session, in conjunction with Mr. Mohammed Bedjaoui's first report on succession of States in respect of matters other than treaties,[2] it was the subject of a preliminary examination by the Commission.[3] No formal decisions were taken by the Commission at that session in regard to succession in respect of treaties. A summary of views expressed on such questions as the title of the topic, the dividing line between the two topics of succession and the nature and form of the work was, however, included in the Commission's report to the General Assembly.[4]

2. A second report on succession in respect of treaties [5] was submitted by the Special Rapporteur at the twenty-first session, containing an introduction and four draft articles designed to be a first group of substantive articles setting out general rules on succession in respect of treaties. Owing to lack of time this report was not taken up by the Commission at that session.[6]

3. The Special Rapporteur's third report on the same topic [7] was submitted at the twenty-second session and took the form of a continuation of his second report. It contained certain provisions on the use of terms and eight additional draft articles with commentaries. These additional articles embraced two further general rules and a set of six rules concerning succession in respect of multilateral treaties.

4. At its twenty-second session, the Commission considered the second and third reports of the Special Rapporteur together [8] but, owing to lack of time, only in a preliminary manner. The two reports combined contained, in addition to substantial introductory explanations, twelve articles with commentaries, which covered the use of certain terms, the case of territory passing from one State to another (the so-called principle of moving treaty-frontiers), devolution agreements, unilateral declarations by successor States, and rules governing the position of "new States" [9] in regard to multilateral treaties. In presenting his two reports to the Commission, the Special Rapporteur explained the proposals which they contained and also his proposals for completing his draft on succession in respect of treaties. Having regard to the preliminary nature of the discussion, the Commission confined itself to endorsing the Special Rapporteur's general approach to the topic and did not take any formal decisions regarding the substance of the drafts.[10] The Commission did, however, include in its 1970 report to the General Assembly extensive summaries both of the Special Rapporteur's proposals and of the views expressed by members who took part in the discussion on succession in respect of treaties. Accordingly, for an account of the proceedings of the Commission on this topic at its twenty-second session, the Special Rapporteur thinks it sufficient here to refer members of the Commission to the relevant paragraphs of that report.[11]

5. The Commission's report on the work of its twenty-second session was considered by the Sixth Committee at the twenty-fifth session of the General Assembly in 1970, and a number of representatives made observations on the part concerned with succession in respect of treaties. A summary of these observations is contained in the Sixth Committee's report to the General Assembly on the work of the Commission.[12] Some of the observations relate to matters dealt with in the present report and the Special Rapporteur draws particular attention to the views expressed by representatives in the Sixth Committee on the question of so-called "dispositive", "territorial" or "localized" treaties. Certain representatives emphasized that their approval of the general rule, proposed in article 6, that new States should not be considered as automatically bound by their predecessor's treaties, did not mean that they regarded it as an absolute rule; and they urged the Commission now to give thorough consideration to these and other special categories of treaties with a view to determining the pertinent exceptions to the general rule. Certain other representatives, indeed, considered that the proposed general rule could be acceptable only if it was clearly established that the successor State was bound by certain categories of treaties. These representatives reserved their final positions on the question until the Commission had considered the nature and scope of exceptions to the general rule, particularly with regard to "dispositive", "territorial" or "localized" treaties. Some representatives, on the other hand, expressed the view that the general rule applied especially to "territorial" or "dispositive" treaties, and that the Commission should avoid giving legal endorsement to situations created by old treaties relating to colonial boundaries.

In general, the debate in the Sixth Committee, like that in the Commission at its twenty-second session, underlined the importance of the question of "dispositive", "territorial" or "localized" treaties as potential exceptions to the general rule that a new State is not under any obligation to assume the treaties of its predecessor.

B. The scheme of the draft articles

6. Under the basic scheme of the draft, as explained in the third report,[13] the articles are arranged in three parts:

[1] *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

[2] *Ibid.*, p. 94, document A/CN.4/204.

[3] *Ibid.*, pp. 216-222, document A/7209/Rev.1, paras. 44-91.

[4] *Ibid.*, pp. 221-222, paras. 82-91.

[5] *Ibid., 1969*, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

[6] *Ibid.*, p. 225, document A/7610/Rev.1, para. 33.

[7] *Ibid., 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1.

[8] *Ibid.*, vol. I, 1067th, 1068th and 1070th-1072nd meetings.

[9] An expression used as a term of art in the draft articles and defined in article 1, paragraph 1 (*e*) (*ibid.*, vol. II, p. 28, document A/CN.4/224 and Add.1).

[10] *Ibid.*, p. 303, document A/8010/Rev.1, para. 49.

[11] *Ibid.*, pp. 301-305, paras. 37-63.

[12] *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 73-97.

[13] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 27-28, document A/CN.4/224 and Add.1, paras. 7-10.

part I containing certain general rules, part II the rules applicable in the case of "new States", and part III the rules applicable in the case of particular forms of succession. (This arrangement is without prejudice to the addition of other articles designed to relate the provisions of the present draft to the general law of treaties embodied in the Vienna Convention on the Law of Treaties.) [14] The twelve draft articles presented in the Special Rapporteur's second and third reports, as already indicated in paragraph 4 above, contain the general rules to be included in part I and the rules governing the position of "new States" in regard to multilateral treaties which form the first section of part II. There remain two other important matters for inclusion in part II: (*a*) the rules governing the position of new States in regard to bilateral treaties; and (*b*) the special rules, if any, governing so-called "dispositive", "territorial" or "localized" treaties. The present report, therefore, continues part II at the point where the third report left off and begins with section 2 comprising five articles dealing with the position of new States in regard to bilateral treaties. The question of "dispositive", "territorial" or "localized" treaties will then be covered in section 3.

7. Although in the present report the text of the draft in substance begins with the articles of part II concerning succession in respect of bilateral treaties (articles 13-17), it is necessary first to explain a particular term—"other State party"—used as a term of art in those articles. Accordingly, the text of the draft articles and commentaries opens with this addition to the provisions of article 1 regarding the use of terms in the draft.

II. Text of draft articles with commentaries [15]

PART I. GENERAL PROVISIONS (*continued*)

Article 1. Use of terms

(Additional provision)

[For the purposes of the present articles:]

1. [. . .]

(*g*) "Other State party" means in relation to a successor State another party to a treaty concluded by its predecessor and in force with respect to its territory at the date of the succession.

Commentary

(1) In drafting rules regarding succession in respect of bilateral treaties there is a need for a convenient expression to designate the other parties to treaties concluded by the predecessor State and in respect of which the problem of succession arises. The expression "third State" is not available since it has already been made a technical term in the Vienna Convention on the Law of Treaties denoting "a State not a party to the treaty" (article 2, para. 1 (*h*)). Simply to speak of "the other party to the treaty" does not seem entirely satisfactory because the question of succession concerns the *triangular* position of the predecessor State, the successor State and the other State which concluded the treaty with the predecessor State. Moreover, the expression "other party" has too often to be used—and is too often used in the Vienna Convention—in its ordinary general sense for its use as a term of art in the present articles with a special meaning to be acceptable. It therefore seems necessary to find another expression to use as a term of art denoting the other parties to a predecessor State's treaties. It is suggested that the expression "other States party" may be appropriated for this purpose and defined as having that special meaning without giving rise to any drafting inconveniences. Accordingly, it is proposed to add a new provision to article 1 stating that the term "other State party" is used in the present articles with this special meaning.

(2) If this addition is accepted by the Commission, corresponding changes will be made in the drafting of articles 3 and 4, where the expression "third State" at present appears. It may also be desirable, for the sake of consistency, to use the term "other States parties", instead of "the parties" in article 7, although the latter expression does not present any difficulties in the case of multilateral treaties.

PART II. NEW STATES (*continued*)

SECTION 2. THE POSITION OF NEW STATES IN REGARD TO BILATERAL TREATIES

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 the 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.

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[14] For the text of the Convention, 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.

[15] The texts of the previous draft articles, together with the commentaries, have been published as follows:

Article 1 (para.1 (*a*), (*b*) and (*c*)) and articles 2-4: *Yearbook of the International Law Commission, 1969*, vol. II, pp. 50 *et seq.*, document A/CN.4/214 and Add.1 and 2;

Article 1 (para. 1 (*d*), (*e*) and (*f*)) and articles 5-12: *Ibid.*, vol. II, pp. 28 *et seq.*, document A/CN.4/224 and Add.1.

Commentary

(1) Article 6 of the present draft lays down as the general rule that a new State is not *ipso jure* bound by its predecessor State's treaties nor under any obligation to take steps to become a party to them; and the reasons for so stating the general rule are given in the commentary to that article. The commentary at the same time emphasizes that the question whether a successor State may have a *right* to consider itself a party in its own name to treaties in force at the date of the succession is separate and different from the question whether it is under an *obligation* to do so. Furthermore, in the commentaries to articles 7 and 8 the view is put forward that, under certain conditions and subject to some exceptions, a successor State does have the right to consider itself a party in its own name to multilateral treaties in force with respect to its territory at the date of the succession. Article 13 considers the position of a successor State in regard to bilateral treaties.

(2) The "clean slate" metaphor, as already noted in paragraph 6 of the commentary to article 6, is admissible only in so far as it expresses the basic principle that a new State begins its international life free of any general obligation to take over the treaties of its predecessor. The evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the successor State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the successor State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the successor State to establish itself as a party, this does not appear to be so in the case of bilateral treaties.

(3) The reasons are twofold. First, the personal equation—the identity of the other contracting party—although an element also in multilateral treaties, necessarily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force *between the successor State and its predecessor*, as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue in force bilaterally as between it and the other party to the treaty. But should the treaty become applicable as between that other party and the successor State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. Nor will the treaty come into force at all as between the successor and predecessor States. No doubt, the successor and predecessor States may decide to regulate the matter in question—e.g. extradition or tariffs—on a similar basis. But if so, it will be through a new treaty which is exclusive to themselves and legally unrelated to any treaty in force prior to independence. In the case of bilateral treaties, therefore, the legal elements for consideration in appreciating the rights of a successor State differ in some essential respects from those in the case of multilateral treaties.

(4) The International Law Association derives from the considerable measure of continuity found in practice a general presumption that bilateral treaties in force with respect to a territory and known to the successor State continue in force unless the contrary is declared within a reasonable time after the new State's attainment of independence.[16] Some writers even see in it a general principle of continuity implying legal rights and obligations with respect to the maintenance in force of a predecessor State's bilateral treaties. In some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity. This is, for example, the case with the air transport and trade agreements examined in the second and third Secretariat studies on "Succession of States in respect of bilateral treaties".[17]

(5) The prime cause of the frequency with which some measure of continuity is given to such treaties as air transport and trade agreements in the event of a succession seems to be the practical advantage of continuity to the interested States in present conditions. Air transport is as normal a part of international communications today as railway and sea transport; and as a practical matter it is extremely likely that both the successor State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are made. It is therefore not surprising that in 1966 the position in regard to air transport agreements should be summarized by the International Law Association's Committee on the succession of new States to the treaties and certain other obligations of their predecessors as follows:

"Usually no alteration is effected in respect of air traffic until the new State negotiates a new exchange of rights and routes. In some instances no negotiation has been requested at all; in other instances it has been requested after a period of time. No new State has immediately following independence terminated traffic".[18]

The summary of the practice in the Secretariat study also underlines the prevalence of continuity in the case of air transport agreements:

"At least fourteen new States and twenty-four parties to bilateral air transport agreements—other than predecessor States—have taken the position that for one reason or other airlines designated by the new State and the party concerned could continue, at least for a certain period, to provide services in accordance with

[16] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967) pp. xiii and 557-595, and idem, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. xiii and 589-632. See also the summary of the International Law Association's proceedings given by the Special Rapporteur in his second report on succession in respect of treaties, in *Yearbook of the International Law Commission, 1969*, vol. II, pp. 47-49, document A/CN.4/214 and Add.1 and 2, paras. 13-18.

[17] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243 and Add.1.

[18] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

agreements concluded before independence between that party and the predecessor State and involving the exercise of air traffic rights.

". . .

"Cases of formal denial of continuity which have been collected are limited. In one instance the denial was made in bilateral exchanges on the basis of the non-exercise of rights before independence (Madagascar and the United Kingdom). In another instance the position of the new State was acknowledged by the other State (the United States with regard to Israel)." [19]

(6) Again, international trade is an integral part of modern international relations; and as a practical matter both the successor State and the other interested States will find it convenient in many instances to allow existing trade arrangements to run on provisionally until new ones are negotiated. This is reflected in the practice, as appears from the following appreciation of the position by the above-mentioned Committee of the International Law Association:

"Since the operation of these agreements ordinarily affects a new State's tariff structure, and hence its pattern of trade, the tendency is to regard them as remaining in force. Many agreements, upon examination, will be found to be obsolete. Since all commercial agreements are terminable on notice, it has been found advantageous, where desired, to denounce them and give the trading community time to adjust to the change, rather than treat them as having lapsed. However, very difficult questions of interpretation have been raised, and it may be that in strict law some of these agreements may be regarded as having lapsed. Some new States feel that wholesale denunciations of commercial agreements, even when permitted by termination clauses, may be embarrassing politically because the impression may be given that commercial policy is being drastically changed." [20]

The summary of the practice given in the Secretariat study of trade agreements is certainly no less suggestive of a large measure of continuity:

"In the light of the relevant materials collected in the present study, about forty new States and thirty-four original parties, other than predecessor States, have taken a position concerning the continued force of bilateral trade agreements which were applicable to former non-metropolitan territories before independence. In most of the recorded cases continuity has been achieved or recognized at least during a certain period of time after independence.

". . .

"The recorded practice denying continuity has occurred mainly in a bilateral context (Venezuela to Australia; Canada and New Zealand; Argentina to India; Thailand to Pakistan; USSR to States formerly under French administration which became independent in 1960). In all those cases, the denial of continuity has been invoked by the interested original party to the pre-independence agreement. Only one of the forty new States referred to in paragraph 169 above seems to have taken it as a general view that pre-independence bilateral trade agreements applicable to its territory were no longer in effect after independence (Tanganyika). It is possible, however, that other new States also take this position; for instance, Algeria and Guinea have not participated in the renewal, etc., of the short-term trade agreements concluded by France.[21]

(7) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity. Thus the International Law Association's Committee commented in 1966:

Where such agreements affect the territory concerned and its economy, or where the territory derives advantages from them, the tendency is to keep them in operation. Certain administrative difficulties, mainly concerning personnel, have arisen in this connection, but there is no instance of such an agreement automatically lapsing.[22]

An example may be seen in an exchange of notes between the United States and the Democratic Republic of the Congo in 1962 concerning the continuance in force of certain United States—Belgian treaties of economic co-operation with respect to the Congo, which is reproduced in *Materials on Succession of States*.[23] In general, the view of the United States, the interested other party in the case of many such treaties, has been stated to be that an economic co-operation agreement

should be regarded as continuing in force with a newly independent State if that State continues to accept benefits under it.[24]

(8) The International Law Association's Committee also found a measure of "*de facto* continuity" in certain other categories of treaties:

Frequently action is delayed with respect to treaties which might be considered as having lapsed, such as those concerning abolition of visas, migration, or powers of consuls, and a *de facto* continuity thereby sometimes occurs for a limited period. Agreements for the avoidance of double taxation fall into an intermediate category, and there is a tendency to deal with them in a manner similar to that with respect to commercial treaties.[25]

The Committee's statement in regard to tax agreements finds some support from material contained in the United Nations publication on international tax agreements.[26] This is summarized by a recent writer as follows:

The practice collected in this volume shows that Indonesia considers that the pre-independence agreements with Canada and the United States remained in force, that Ghana considers that all nine tax agreements which were applicable to it remain binding; that Malaya considers itself bound by at least four of the five tax agreements that applied to it before independence [. . .].[27]

[19] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 177 and 182. Cf. for Senegal, J.-C. Gautron, "Sur quelques aspects de la succession d'Etats au Sénégal", *Annuaire français de droit international, 1962* (Paris, C.N.R.S.), vol. VIII, pp. 845-846.

[20] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

[21] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243/Add.1, paras. 169 and 172.

[22] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 576.

[23] United Nations publication, Sales No. E/F.68.V.5, pp. 219-220. See also an exchange of notes between the United States and the Somali Republic in 1961 (*ibid.*, pp. 216-217).

[24] Note by Ch. I. Bevans (Assistant Legal Adviser, Department of State), in *American Journal of International Law* (Washington D.C., 1965), vol. 59, No. 1 (January 1965), p. 96. Cf. the observation of I. I. Lukashuk (USSR):

"[. . .] economic agreements are also not succeeded to automatically by new States. But this must not lead to unjust enrichment and to infringement of lawful interests and rights of other States."

(International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 564).

[25] International Law Association, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 577.

[26] United Nations, *International Tax Agreements*, vol. VIII: *World Guide*.

[27] K. J. Keith, "Succession to bilateral treaties by seceding States", *American Journal of International Law* (Washington D.C., 1967), vol. 61, No. 2 (April 1967), p. 524. Keith also notes the continued operation of a number of pre-independence treaties concluded between the then dependent territory and its parent State—a somewhat different case.

This writer's further statement that "only one State, Israel, has denied succession" [28] may, however, put the continuity factor in the case of tax agreements rather too high.

(9) Continuity is also a conspicuous feature of the practice in regard to bilateral treaties of a "territorial" or "localized" character. But these categories of treaties raise special issues and will be examined separately in the commentary to article 18.

(10) If, therefore, State practice shows a tendency towards continuity in the case of certain categories of treaties,[29] it may be doubted whether the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the successor State and the other party to its predecessor's treaty). At any rate, it does not seem to support the existence of a unilateral right in a new State to consider a bilateral treaty as continuing in force with respect to its territory after independence *regardless of the wishes of the other party to the treaty*. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declaration by new States examined in the commentary to article 4 have unmistakably been based on the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. True, those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. Again, as pointed out in paragraphs 22-23 of the commentary to article 3, even when a predecessor State purports to transmit rights under its treaties to its successor State, the express or tacit concurrence of the other contracting party has still been regarded as necessary to make a bilateral treaty enforceable as between it and the successor State.

(11) Further State practice to the same effect is contained in the Secretariat publication *Materials on Succession of States*.[30] Argentina, for example, which did not accept Pakistan's claim that the Argentine—United Kingdom Extradition Treaty should be considered as continuing in force automatically with respect to Pakistan, afterwards assented to the extension of that treaty to Pakistan "by virtue *of a new agreement* signed in 1953 and formalized by an exchange of notes." [31] Similarly, correspondence between Ghana and the United States in 1957-1958 shows that the continuance of former United Kingdom treaties in respect of Ghana was regarded by them as a matter to be dealt with by the conclusion of an agreement.[32] It is true that occasionally, as in the case of a United States *Aide-Mémoire* to the Federation of Malaya in 1958, language is used which might seem to imply that a new State was considered to have effected the continuance of a treaty by its unilateral act alone.[33] But such language generally occurs in cases where the other party was evidently in agreement with the successor State as to the desirability of continuing the treaty in force, and does not seem to have been based on the recognition of an actual right in the successor State. Moreover, in the particular case mentioned the successor State, Malaya, seems in its reply to have viewed the question as one of concluding an agreement rather than of exercising a right:

> Your *Aide-Mémoire* of 15 October 1958 and this Note are to be regarded as constituting the agreement in this matter.[34]

The technique of an exchange of Notes or Letters regarding the continuance of a bilateral treaty, accompanied by an express statement that it is to be regarded as constituting an agreement, has indeed become very common—a fact which in itself indicates that, in general, the continuance of bilateral treaties is a matter not of right but of agreement. Instances of the use of the technique in connexion with such categories of bilateral treaties as air transport, technical co-operation and investment guarantee agreements, are to be found in documents supplied by the United States and published in *Materials on Succession of States*.[35] Numerous examples can also be seen in the first of the Secretariat studies on "Succession of States in respect of bilateral treaties",[36] which is devoted to extradition treaties.

(12) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,[37] has been recognized or achieved on the procedural level by several different devices, a fact which in itself suggests that continuity is a matter of the attitudes and intentions of the interested States. True, in certain categories of treaties, e.g. air-transport agreements, continuity has quite often simply occurred; and this might be interpreted as indicating recognition of a right or obligation to maintain them in force. But even in these cases the continuity seems in most instances to be rather a tacit manifestation of the will of the interested States. Some instances can certainly be found where one or other interested State sought to place the continuity on the basis of a legal rule. An example is Japan's claim as of right to the continuance of its traffic rights into Singapore which had been granted to it in the Agreement between Japan and the United Kingdom for Air Services (Tokyo, 1952). This claim was made first against Malaysia and then, after the separation of Singapore from Malaysia, against Singapore itself.[38] But the successor States, first

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[28] *Ibid.*

[29] Cf. K. Zemanek, "State succession after decolonization", in *Recueil des cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff, 1965), vol. 116, p. 243.

[30] United Nations publication, Sales No. E/F.68.V.5.

[31] *Ibid.*, p. 7.

[32] *Ibid.*, pp. 211-213.

[33] *Ibid.*, pp. 229-230.

[34] *Ibid.*, p. 230.

[35] *Ibid.*, pp. 211-224.

[36] *Yearbook of the International Law Commission, 1970*, vol. II, p. 102, document A/CN.4/229, paras. 23, 31, 33, 62-66, 68-69, 71-74, and 77-79. Agreements of this kind in the form of exchanges of Notes are in many cases registered with the Secretariat under Article 102 of the Charter (*ibid.*, p. 127, para. 135).

[37] *Ibid.*, p. 127, paras. 134-135; *ibid., 1971*, vol. II, Part Two, documents A/CN.4/243, paras. 117-187; and A/CN.4/243/Add.1, paras. 169-177.

[38] S. Tabata, "The independence of Singapore and her succession to the Agreement between Japan and Malaysia for Air Services", *The*

Malaysia and then Singapore, underlined in each case the "voluntary" character of their acceptance of the obligations of the United Kingdom under the 1952 Agreement. The position taken by those two States is supported not only by the considerations mentioned in the two preceding paragraphs but by other evidence.

(13) Individual instances of continuity have necessarily to be understood in the light of the general attitude of the States concerned in regard to succession in respect of bilateral treaties. Thus frequent reference is made by writers to the listing of treaties against the name of a successor State in the United States publication *Treaties in Force*,[39] but this procedure has to be understood against the background of the United States' general practice which was authoritatively explained in 1965 as follows:

> In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States—Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.[40]

That the United Kingdom regards the continuity of bilateral treaties as a matter of consent on both sides has already been shown in the Special Rapporteur's second report.[41] In addition to the evidence there set out, reference may be made to its reply to an inquiry in 1963 from the Norwegian Government concerning the continuance in force of the Anglo-Norwegian Double Taxation Agreement of 1951 with respect to certain newly independent States:

> The Foreign Office replied to the effect that the Inheritance Agreements concluded between the United Kingdom and those countries now independent were thought to show that the Governments of those countries would accept the position that the rights and obligations under the Double Taxation Agreement should still apply to those countries *but that the question whether the Agreement was, in fact, still in force between those countries and Norway was a matter to be resolved by the Norwegian Government and the Governments of those countries.*[42]

A recent statement of Canadian practice indicates that it is similar to that of the United States:

> [. . .] the Canadian approach has been along essentially empirical lines and has been a two stage one. Where a newly independent State has announced that it intends to be bound by all or certain categories of treaties which in the past were extended to it by the metropolitan country concerned, Canada has, as a rule, tacitly accepted such a declaration and has regarded that country as being a party to the treaties concerned. However, when a State has not made any such declaration or its declaration has appeared to Canada to be ambiguous, then, as the need arose we have normally sought information from the government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connection with which we require such information.

The writer then added the comment:

> Recent practice supports the proposition that, *subject to the acquiescence of third States*, a former colony continues after independence to enjoy and be subject to rights and obligations under international instruments formerly applicable to it, unless considerations as to the manner in which the States came into being or as to the political nature of the subject-matter render the treaty either impossible or invidious of performance by the new State.
>
> Whether this practice should be regarded as a strict succession to a legal relationship, or as a novation, may still be an open question [. . .].[43]

(14) Enough evidence has been adduced in the preceding paragraphs to establish the essentially voluntary character of succession in respect of bilateral treaties: voluntary, that is, on the part not only of the successor State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties would seem to be that their continuance in force after independence is a matter of agreement, express or tacit, between the successor State and the other interested State (the other party to the predecessor State's treaty).

(15) The difficulty remains of determining when and upon what basis (i.e. definitively or merely provisionally) a successor State and the other interested State are to be considered as having agreed to the continuance of a treaty which was in force in respect of the successor State's territory at the date of the succession. Where there is an express agreement, as in the Exchanges of Notes mentioned in paragraph (11) above, no problem arises. Whether the agreement is phrased as a confirmation that the treaty is considered as in force or as a consent to its being so considered, the agreement operates as a novation of the treaty and determines the position of the States concerned in relation to the treaty. There may be a point as to whether they intend the treaty to be in force definitively according to its terms (notably any provision regarding notice of termination) or merely provisionally, pending the conclusion of a fresh treaty. But that is a

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Japanese Annual of International Law (Tokyo, 1968), No. 12, p. 36. See also *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 122-123 and 138-143.

[39] United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington D.C., U.S. Government Printing Office).

[40] See International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens & Sons, 1965), pp. 385-386. As pointed out in the Special Rapporteur's second report, the United States practice of seeking to arrive at a common understanding with the new State in regard to the continuance in force of individual treaties appears to apply equally in cases where the new State has entered into a devolution agreement with its parent State (*Yearbook of the International Law Commission, 1969*, vol. II, pp. 60-61, document A/CN.4/214 and Add.1 and 2, para. 23 of commentary to article 3).

[41] *Yearbook of the International Law Commission, 1969*, vol. II, pp. 59-60, document A/CN.4/214 and Add.1 and 2, paras. 21-22 of commentary to article 3.

[42] United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 192. [Italics supplied by the Special Rapporteur].

[43] A. E. Gotlieb and J. A. Beesley, ed., "Canadian practice in international law during 1968 as reflected mainly in public correspondence and statements of the Department of External Affairs", in *Canadian Yearbook of International Law, 1969* (Vancouver B.C., 1969), vol. VII, p. 331 [Italics supplied by the Special Rapporteur].

question of interpretation to be resolved in accordance with the ordinary rules for the interpretation of treaties.

(16) The problem arises in the not infrequent case where there is no express agreement. The resolutions of the International Law Association provide that a bilateral treaty is to be considered as continuing in force if "the newly independent State and the other party or parties have applied the terms of the treaty *inter se*".[44] This is an obvious case, since the application of the treaty by both States necessarily implies an agreement to consider it as being in force. But unless a very broad meaning is given to the word "apply", that provision in the International Law Association's resolutions is not apt to cover a number of situations which arise in practice and constitute the real difficulty. These include situations where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force—for example by listing the treaty amongst its treaties in force—but the other State has done nothing in the matter; or where the new State has evidenced a general intention in favour of the continuance of its predecessor's treaties but has not manifested any specific intention with reference to the particular treaty; or where neither State has given any clear indication of its intentions in regard to the continuance of bilateral treaties.

(17) The International Law Association sought to cover these types of situations by a general presumption of continuity to which attention has already been drawn in the Special Rapporteur's second report.[45] In its resolutions the International Law Association proposed a general rule under which, subject to one qualification, any bilateral treaty would be considered as continuing in force after independence unless either the new State or the other interested State had declared, within a reasonable time after the date of independence, that the treaty was regarded as no longer in force between them.[46] The qualification was that this general rule would apply only to a treaty in regard to which the new State had been notified or otherwise had knowledge that the treaty had been internationally in force with respect to its territory prior to independence. Whether the proposal is viewed as laying down a general rule of continuity subject to an option for either State to contract out, or as stating a general presumption which may be negatived by evidence of a contrary intention, it makes the continuance of the treaty depend on the intentions of both States. This is emphasized by the requirement that the new State should have knowledge of the treaty's having been internationally in force with respect to its territory.

(18) The considerable measure of continuity found in modern practice and the ever-growing interdependence of States may, no doubt, provide some basis for such a general rule or presumption. But the question here in issue is the determination of the appropriate rule in a particular field of law, that of treaty relations where intention and consent play a major role. State practice, as shown in the preceding paragraphs of this commentary, contains much evidence that the continuance in force of bilateral treaties, unlike multilateral treaties, is commonly regarded by both the new State and the other interested State as a matter of mutual agreement. Accordingly the Commission does not seem called upon to deduce from the frequency with which continuity occurs any general rule or presumption that bilateral treaties continue in force unless a contrary intention is declared. Moreover, as indicated in the second report,[47] a solution based upon the principle not of "contracting out" of continuity but of "contracting in" by some more affirmative indication of the consent of the particular States concerned, may be more in harmony with the principle of self-determination. The Special Rapporteur also feels that the question of the new State's knowledge of the treaty's having been internationally in force prior to independence, which forms an integral part of the rule proposed by the International Law Association, might constitute a somewhat difficult element in the application of that rule.

(19) Accordingly, 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 the Special Rapporteur 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. It is true that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of case. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.[48]

(20) It then becomes a question whether the rule should seek to indicate particular acts or conduct which give rise to the inference that the State concerned has consented to the continuance of a bilateral treaty or whether it should merely be formulated in general terms. Among points which suggest themselves are whether any particular provisions should be inserted concerning the inferences to be drawn from a new State's conclusion of a devolution agreement, or from a unilateral declaration inviting continuance of treaties (provisionally or otherwise) or from a unilateral listing of a predecessor State's treaty as in force in relation to a new State, or from the continuance in force of a treaty in the internal law of a State, or from reliance on the provisions of the treaty by a new State or by the other State party to it in their mutual relations. It may, however, be doubted whether the insertion of any such provisions prescribing the inferences to be drawn from particular kinds of acts would be justified. In the case of devolution agreements and

[44] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 597.

[45] *Yearbook of the International Law Commission, 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, para. 22.

[46] See foot-note 44 above.

[47] See foot-note 45 above.

[48] e.g. articles 12-15 (consent to be bound), article 20 (acceptance of and objection to reservations) and article 45 of the Vienna Convention on the Law of Treaties.

unilateral declarations, much depends both on their particular terms and on the intentions of those who made them. As appears from the commentaries to articles 3 and 4, even where States may appear in such instruments to express a general intention to continue their predecessors' treaties, they frequently make the continuance of a particular treaty a matter of discussion and agreement with the other interested State. Moreover, in all cases it is not simply a question of the intention of one State but of both: of the inferences to be drawn from the act of one and the reaction—or absence of reaction—of the other. Inevitably the circumstances of any one case differ from those of another and it would hardly seem possible to lay down general presumptions without taking the risk of defeating the real intention of one or other State. Of course, one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty, in which event account has to be taken of the principle of good faith applied in article 45 of the Vienna Convention on the Law of Treaties (often referred to as estoppel or *préclusion*). But subject to the application of that principle, the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.

(21) In general, although the context may be quite different, the questions which arise under the present article appear to have affinities with those which arise under article 45 of the Vienna Convention on the Law of Treaties (loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty). This suggests that the language used to apply the principle of good faith (estoppel—*préclusion*) in that article may serve a similar purpose in the present context.

(22) Accordingly, *paragraph 1* of the present article provides that a bilateral treaty shall be considered as in force between a successor State and the other party to the treaty when (*a*) they expressly so agree or (*b*) when 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. Under the second part of this provision a new State's knowledge of a treaty's having been internationally in force in respect of its territory at the date of the succession might possibly be relevant in a particular case in determining whether it should be considered having consented to that treaty's continuance in force. But the fact that the continuance in force of each particular treaty is made dependent on establishing the consent of both the new State and the other State specifically to the continuation of that treaty greatly reduces the significance of the problem of a new State's knowledge of its predecessor State's treaties.

(23) *Paragraph 2* deals with the question of the date on which a treaty is to be considered as becoming binding between a new State and the other party to it under the provisions of paragraph 1. The very notions of "succession" and "continuity" suggest that this date should, in principle, be the date of the new State's "succession" to the territory. This is also suggested by terminology found in practice indicating that the States concerned agree to regard the predecessor's treaty as continuing in force in relation to the successor State. Accordingly, it is thought that the primary rule concerning the date of entry into force must be the date of the succession. On the other hand, the continuance of the treaty in force in relation to the successor State being a matter of agreement, there seems to be no reason why the two States should not fix another date if they so wish. Paragraph 2, therefore, admits the possibility of some other date's being agreed upon.

Article 14. Duration of a bilateral treaty considered as in force

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

(*a*) Until a specified date;

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

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

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

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

Commentary

(1) When a new State and the other State party agree expressly or tacitly to consider a bilateral treaty as in force between them, the natural result would seem to be that the duration of the treaty and any question of its denunciation or suspension should be governed by the provisions of the treaty and also of articles 54 to 72 of the Vienna Convention on the Law of Treaties. In short, if there were no other complication, it would be possible simply to leave these questions to be governed by the general law of treaties; and the Secretariat studies on succession of States in respect of bilateral treaties in fact contain a number of examples of treaties having been terminated after succession by a notice of termination given in accordance with a provision in the particular treaty.[49]

[49] *Yearbook of the International Law Commission, 1970*, vol. II, p. 128, document A/CN.4/229, para. 136, and *ibid., 1971*, vol. II, Part Two, document A/CN.4/243, para. 179, and document A/CN.4/243/Add.1, para. 171.

(2) But a complication does arise from the fact that the treaty is in force as a result of an *agreement* between the new State and the other State party; for their agreement is not infrequently on the basis merely of applying the treaty provisionally until a specified date or pending a decision by one of them to put an end to the application of the treaty or pending the conclusion of a new treaty. If so, any terms of the treaty relating to its duration or termination are necessarily subject to the specific agreement between the States concerned to apply the treaty only provisionally.

(3) Instances of such agreements are not only quite common in practice but are specifically invited in the unilateral declarations made by Tanganyika, Uganda, Kenya and a number of other States.[50] Many of these declarations specify a period—not infrequently extended by a further declaration—during which the new State makes an offer to any other State party to one of its predecessor's bilateral treaties to apply the treaty provisionally on a reciprocal basis with a view to its replacement by a new treaty or its termination at the end of the period. Then, if the other State party accepts, either expressly or tacitly, the new State's offer, an agreement for the provisional application of the treaty arises. Examples of agreements for the provisional application of bilateral treaties resulting from such unilateral declarations may be seen in the Secretariat study on succession of States in respect of extradition treaties.[51] Other examples can be found in its Studies on succession in respect of air transport agreements [52] and trade agreements.[53] Equally, such agreements may arise in practice simply from the agreement of the new State and the other State party to continue to apply a treaty pending the negotiation of new arrangements.[54]

(4) *Paragraph 1* accordingly lays down as the general rule that a treaty considered as in force between a new State and the other State party in accordance with article 13, is binding upon them until terminated in conformity with its provisions, but underlines that this is subject to the particular terms on which they agreed to consider it as in force. This it does by setting out three specific exceptions to the rule. The first is where the agreement is only to apply the treaty until a specified date, as may happen in the case of a tacit agreement based on a unilateral declaration fixing a specified period for the provisional application of the treaty. The second is where the agreement is only to apply the treaty until either State decides to terminate it. This situation may arise from a unilateral declaration if a new State agrees to apply the treaty until it reaches a decision as to the continuance of the treaty in which case it is thought that the reservation of the right to terminate must be considered as operating reciprocally. The third is where the agreement is simply to continue to apply the old treaty until a fresh treaty is concluded between the new State and the other State party. Paragraph 1 does not include any reference to the general provisions of the Vienna Convention on the Law of Treaties under which the termination or suspension of a treaty may take place. Such a reference is considered unnecessary since it is a basic assumption of the present draft articles that the rules governing succession in respect of treaties form a special part of or an appendage to the general law of treaties. A treaty considered as in force between a new State and the other State party is clearly a treaty in force for the purposes of the general law of treaties and, therefore, necessarily governed by any relevant rules of the Vienna Convention in addition to the rules governing succession of States.

(5) When the agreement is simply to apply the treaty provisionally pending a decision by either State as to its continuance, it seems desirable that some period of notice should be given of any decision to terminate the treaty. Article 56 of the Vienna Convention, which concerns treaties that contain no provision regarding their termination, admits the possibility of denunciation where such is established to have been the intention of the parties or is to be implied from the nature of the treaty. At the same time, however, it lays down that not less than twelve months notice must be given of the intention to denounce the treaty. Having regard to the kinds of treaties involved—e.g. trade, air transport, tax and extradition treaties—a similar period of notice would seem appropriate. On the other hand, if the treaty itself provides for a period of notice which is different, it would seem logical to apply the period specified in the treaty. *Paragraph 2* of the present article accordingly states the rule in these terms.

(6) When the agreement is on the basis that the treaty is to continue to be applied pending the conclusion of a new treaty, the question of the termination of the earlier treaty clearly seems to fall within the general principles set out in article 59 of the Vienna Convention. Under paragraph 1 of that article—

> "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (*a*) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (*b*) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."

In the present instance, however, the very fact that under the agreement the earlier treaty is to continue in force pending the conclusion of a new treaty would appear to establish a *prima facie* intention that the conclusion of the later treaty should terminate the earlier one. Certainly, this is normally the intention in practice. In consequence, the principle underlying article 59 of the Vienna Convention may in the present context find its true expression in a rule which provides rather that the conclusion of the later treaty is to be considered as terminating the earlier one unless a contrary intention appears from the later treaty or is otherwise established. For this reason it is thought

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[50] *Ibid.*, *1969*, vol. II, pp. 62-68, document A/CN.4/214 and Add.1 and 2, commentary to article 4.

[51] *Ibid.*, *1970*, vol. II, pp. 116 and 119, document A/CN.4/229, paras. 69, 72, 91 and 92.

[52] *Ibid.*, *1971*, vol. II, Part Two, document A/CN.4/243, para. 36.

[53] *Ibid*, document A/CN.4/243/Add.1, paras. 35 and 38.

[54] *Ibid.*, *1970*, vol. II, p. 111, document A/CN.4/229, paras. 41-42. See also *ibid.*, *1971*, vol. II, Part Two, document A/CN.4/243, paras. 28, 56 and 122, and document A/CN.4/243/Add.1, para. 57.

that the rule should be so stated in *paragraph 3* of the present article rather than leave the matter to be covered simply by article 59 of the Vienna Convention. A further reason for including a special provision on this point in the present article may be the slight difficulty which arises in article 59 from the phrase "if *all* the parties to it conclude a later treaty relating to the same subject-matter" [Italics supplied by the Special Rapporteur]. In cases of succession both the predecessor and successor States may in a sense be parties to the earlier treaty vis-à-vis the other State party, so that the reference in article 59 to "all the parties" is not entirely apt in the present context. It should perhaps be added that the expressions "conclusion of a new treaty" and "conclude the new treaty" are here used in *paragraphs 1* and *3* because this is similar to the wording employed in the Vienna Convention; indeed it is also the wording commonly used by States in making agreements of the kind dealt with in paragraphs 1 (*c*) and 3 of the present article. No doubt, the intention of the States concerned would normally be that the earlier treaty should terminate on the *entry into force* of the new treaty, rather than on the establishment of their consents to the new treaty if its entry into force were fixed for a later date; and paragraph 3 should be understood in that sense. The intention in these cases clearly is that the earlier treaty should continue to be applied until replaced in its application by a new treaty.

Article 15. The treaty not to be considered as in force also between the successor and predecessor States

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

Commentary

(1) The rule formulated in this article may be thought to go without saying, since the predecessor State is not a party to the agreement between the new State and the other State party which alone brings the treaty into force between these States. Nevertheless, it seems desirable to formulate the rule in an article, if only to remove any possibility of misconception. True, the legal nexus, which arises between a treaty and a new State's territory by reason of the fact that the treaty concluded by its predecessor was in force in respect of its territory at the date of the succession, provides a basis for the subsequent application of the treaty in the bilateral relations between the new sovereign of the territory and the other State party—by agreement between them. But it does not invest the new State with a right to become a party to the actual treaty between its predecessor and the other State party, so as to bring the treaty into force also between itself and its predecessor, as would happen in the case of a multilateral treaty.

(2) The position, as pointed out in paragraph 3 of the commentary to article 13, is rather that the agreement between the new State and the other State party gives rise to a second bilateral treaty, which exists *parallel* with the original treaty concluded between the predecessor State and the other State party. The second treaty, even though it may be in all respects the twin of the original treaty, operates between the new State and the other State party as a new and purely bilateral relation between them which is independent of the predecessor State. Furthermore, should the successor and predecessor States decide to regulate the same matter—for example, extradition, tariffs, etc.,—on a similar basis, it will be through a new treaty which is exclusive to themselves and legally unconnected with the treaty formerly concluded between the predecessor State and the other State party. Indeed, in many cases (e.g. air transport route agreements), the considerations motivating the provisions of the treaty between the predecessor State and the other State party may be quite different from those relevant in the bilateral relations between the predecessor State and the new State.

(3) The rule is so clear that it is difficult to find any but negative evidence for it in State practice. This consists in the fact that neither successor nor predecessor States have ever claimed that in these cases the treaty is to be considered as in force between them as well as between the successor State and the other State party.

(4) Accordingly, the present article simply provides that a bilateral treaty, considered as in force for a new State and the other State party in accordance with article 13, is not on that account to be considered as also in force between the new State and its predecessor.

Article 16. Consent to apply a multilateral treaty on a reciprocal basis with respect to any party thereto

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

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

Commentary

(1) The purpose of this article is to cover cases of the provisional application of multilateral treaties *on a bilateral basis* which may arise—and are indeed invited—when a new State makes a unilateral declaration on the Tanganyika or Uganda model.[55] These declarations announce the intention of the new State to review its position in regard to multilateral treaties in force prior to independence and its willingness meanwhile to apply any such treaty on a reciprocal basis with respect to any individual party to the treaty. Such a declaration therefore amounts to

[55] *Ibid.*, *1969*, vol. II, pp. 62-68, document A/CN.4/214 and Add.1 and 2, commentary to article 4.

an offer to continue the application of the provisions of any of those multilateral treaties *bilaterally* during the interim period of review with respect to any individual party to such treaty wishing to do so. It therefore seems to set up a situation analogous to that which exists in the case of bilateral treaties and which should logically be governed by the same principles. *Paragraph 1* of the present article accordingly so provides.

(2) Clearly, however, any agreement to continue the application of a multilateral treaty provisionally on a bilateral basis would terminate upon the new State's becoming an actual party, either by a notification in accordance with article 7 of the present draft or by ratification, accession etc., under the terms of the treaty itself.[56] This contingency is, therefore, provided for in *paragraph 2* of the present article.

Article 17. Effect of the termination or amendment of the original treaty

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

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

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

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

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

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

Commentary

(1) Once it is recognized that, in general, succession in respect of bilateral treaties is a matter of novation and occurs through the express or tacit agreement of the new State and the other State party, it follows that the treaty operates between these States as an independant treaty with a life of its own. The legal source of the obligations of the new State and the other State party *inter se* is their own agreement not the original treaty; and the agreement, as it were, cuts the umbilical cord between those States and the original treaty. Consequenly, there is no legal reason why the termination of the original treaty, by agreement or otherwise, in the relations between the predecessor State and the other State party should necessarily at the same time involve the termination of the treaty in the relations between the new State and the other State party. The termination of the latter treaty relation is a matter which, in principle, concerns the new State and the other State party and them alone.

(2) The expiry of the treaty simply by the force of its own terms may, of course, entail the simultaneous termination of the treaty relations (*a*) between the predecessor State and the other State party and (*b*) between the successor State and the other State party. Thus, if the treaty provides for its own termination on a specified date, it will cease to be in force on that date for the successor State and the other State party (unless they specially agree otherwise) because that provision of the treaty forms part of their own agreement. An instance of the expiry of the original treaty by the force of its own terms may be found in the Secretariat study of air transport agreements,[57] which refers to the United States having reminded, first, Trinidad and Tobago and, secondly, Jamaica that an Exchange of Notes of 1961 between the United States and United Kingdom was due to expire very soon. Another appears in the Secretariat study of trade agreements [58] where mention is made of the expiry of Franco-Italian and Franco-Greek Trade Agreements, which were applicable to Morocco and Tunis, some months after the attainment of independence by these countries.

(3) On the other hand, a termination of the treaty as between the *predecessor* State and the other State party resulting from the initiative of one of them, (e.g. a notice of termination under the treaty or as a response to a breach of the treaty) does not, *ipso jure* affect the separate treaty relations between the successor State and the other State party. This point is made the subject of a specific rule by the International Law Association in its resolution No. 3 on succession of new States, which reads:

> Termination of a treaty by notice or otherwise between two original parties does not in itself have the effect of terminating the application of the treaty vis-à-vis the successor States or as between the successor States.[59]

In proposing that rule the relevant Committee of the Association explained in a note:

> There are several instances where the original parties to a bilateral treaty have terminated the treaty but where the treaty has remained in force between the successor States of one original party and the other original party. For example, the Webster-Ashburton Treaty arrangements concerning extradition remained in force between New Zealand and the United States after the United Kingdom had negotiated a new extradition treaty with the United States.[60]

The Secretariat study of air transport agreements provides another example in the India—United States

[56] Some new States have preferred to accede to multilateral treaties rather than to notify their succession, even when entitled to do so.

[57] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, para. 54.

[58] *Ibid.*, document A/CN.4/243/Add.1, para. 71.

[59] *Ibid., 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

[60] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969) [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors], p. 601, Notes, para. 3.

Agreement of 1946.[61] After Pakistan's separation from India, she agreed with the United States in an Exchange of Notes that the 1946 Agreement should be considered as in force between Pakistan and the United States. In 1954 India gave notice of termination to the United States and in 1955 the 1946 Agreement ceased to be in force with respect to India herself. With respect to Pakistan, however, it continued in force.

(4) Similarly, the principle finds expression in cases where the other State party, desirous of terminating the treaty in respect of the successor as well as the predecessor State, has taken steps to communicate its notice of termination to the successor State as well as the predecessor. Thus, when Sweden decided in 1951 to terminate the Norway and Sweden—United Kingdom Extradition Treaty of 1873, it gave notice of termination separately to India,[62] Pakistan,[63] and Ceylon.[64] Correspondingly, it also finds expression in cases where the predecessor and successor States have each separately given notice of termination to the other State party. An example is a series of notices of termination given by Malaysia and by Singapore in May 1966 to put an end to Air Transport Agreements by Malaysia respectively with Denmark,[65] Norway,[66] France,[67] the Netherlands [68] and New Zealand.[69] Malaysia's termination of the 1946 United Kingdom-United States Air Transport Agreement does not appear to be any exception.[70] After Malaysia's attainment of independence, this Agreement was considered by it and the United States as continuing in force between them. Then in 1965, some two months before Singapore's separation from Malaysia, Malaysia gave notice of termination to the United States and this was treated by the latter as terminating the Agreement also for Singapore, although the twelve months' period of notice presented in the treaty did not expire until after Singapore had become independent. In this case Malaysia was the State responsible for Singapore's external relations at the time when the notice of termination was given, and the United States presumably felt that fact to be decisive. Whether a notice of termination, which has not yet taken effect at the date of independence, ought to be regarded as terminating the legal norms between the treaty and the new State's territory may raise a question. But it is a question which is not limited to bilateral treaties and does not affect the validity of the principle here in issue.

(5) At first sight, Canada might seem to have departed from the principle in correspondence with Ghana in 1960 concerning the United Kingdom—Canada double-tax agreement which had been applied to the Gold Coast in 1957.[71] Three years later Canada gave notice of termination to Great Britain but not to Ghana, who took the position that the agreement was still in force between itself and Canada. The latter is then reported as having objected that it had understood that Great Britain would communicate the notice of termination to any States interested by way of succession. If such was the case, Canada would not seem to have claimed that its termination of the original treaty *ipso jure* put an end also to its operation as between itself and Ghana. Canada seems rather to have maintained that its notice of termination was intended to be communicated also to Ghana and was for that reason effective against the latter. Although Ghana did not pursue the matter, it may be doubted whether, in the light of article 78 of the Vienna Convention on the Law of Treaties, a notice of termination can be effective against a successor State unless actually received by it. This is on the assumption that when the notice of termination was given by the predecessor State, the treaty was *already in force* between the new State and the other State party. A notice of termination given by the predecessor State or by the other State party *before any agreement has been reached between the successor State and the other State party* would present a situation of a rather different kind.[72]

(6) *Paragraph 1* (a) of the article accordingly provides that a treaty considered as in force for a new State and the other State party does not cease to be in force in the relations between them by reason only of the fact that it has terminated in the relations between the predecessor State and the other State party. This, of course, leaves it open to the other State party to send a notice of termination under the treaty simultaneously to both the predecessor and successor States. But it establishes the principle of the separate and independent character of the treaty relations between the two pairs of States.

(7) The same basic principle must logically govern the case of an amendment of a treaty which is considered as in force between a new State and the other State party. An amendment agreed between the predecessor State and the other State party would be effective only between themselves and would be *res inter alias acta* for the new State in its relations with the other State party. It does not, therefore *ipso jure* effect a similar alteration in the terms of the treaty as applied in the relations between the new State and the other State party. Any such alteration is a matter to be agreed between these two States, and it is hardly conceivable that the rule should be otherwise.

(8) In the case of air transport treaties, for example, it frequently happens that after the new State and the other State party have agreed, expressly or tacitly, to consider the treaty as continuing in force, the original treaty is amended to take account of the new air route situation resulting from the emergence of the new State. Such an amendment obviously cannot be reproduced in the treaty as applied between the new State and the other State

[61] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 17-19.

[62] *Ibid., 1970*, vol. II, p. 109, document A/CN.4/229, para. 25.

[63] *Ibid.*, p. 110, para. 32.

[64] *Ibid.*, p. 111, para. 38.

[65] *Ibid., 1971*, vol. II, Part Two, document A/CN.4/243, para. 131.

[66] *Ibid.*

[67] *Ibid.*, para. 135.

[68] *Ibid.*, para. 146.

[69] *Ibid.*, para. 147.

[70] *Ibid.*, paras. 125 and 151.

[71] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969) [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Annex E], p. 632.

[72] See para. 9 below.

party. Numerous instances of such amendments to the original treaty made for the purpose of changing route schedules may be seen in the Secretariat study on succession in respect of air transport agreements.[73] In these cases, although the original air transport agreement itself is considered by the new State and the other State party as in force also in the relations between them, the fact that there are really two separate and parallel treaties in force manifests itself in the different route schedules applied, on the one hand, between the original parties and, on the other, between the new State and the other State party.

(9) The principle also manifests itself in cases which recognize the need for a new State's participation in or consent to an amendment of the original treaty if the amendment is to operate equally in its relations with the other State party. There are several such cases to be found in the Secretariat study of trade agreements.[74] When in 1961 certain Franco-Swedish trade agreements were amended and extended in duration, and again in subsequent years, six new States authorized France to represent them in the negotiations, while a further six new States signed the amending instrument on their own behalf. In other cases of a similar kind[75] sometimes France expressly acted on behalf of the community; more usually, those of the new ex-French African States who desired to continue the application of the French trade agreements signed the amending instruments on their own behalf. The same Secretariat study also mentions a number of Netherlands trade agreements that provided for annual revising instruments in which Indonesia was to have the right to participate. But Indonesia not having exercised this right, its participation in the trade agreements in question ceased. Yet another illustration of the need for a new State's consent, if a revising instrument is to affect it, can be seen in the Secretariat study of extradition treaties, though this is perhaps more properly to be considered a case of termination through the conclusion of a new agreement. In 1931 the United Kingdom and United States concluded a new Extradition Treaty, which was expressed to supersede all their prior extradition treaties, save that in the case of each of the Dominions and India the prior treaties were to remain in force unless those States should accede to the 1931 Treaty or negotiate another treaty of their own.[76]

(10) *Paragraph 1* (b) of the present article, therefore, further provides that a bilateral treaty considered as in force for a new State and the other State party is not amended in the relations between them by reason only of the fact that it has been amended in the relations between the predecessor State and the other State party. This again does not exclude the possibility of an amending agreement's having a parallel effect on the treaty relation between the successor State and the other State party if the interested State—in this case the new State—so agrees.

(11) The point remains as to whether any special rule has to be stated for the case where the original treaty is terminated or amended before the new State and the other State party can be considered as having agreed upon its continuance. If the treaty has been effectively terminated before the date of the succession, there is no problem.[77] The treaty is not one which can be said to have been in force in respect of the new State's territory at the date of the succession so that, if the new State and the other State party should decide to apply the treaty in their mutual relations, it will be on the basis of an entirely new transaction between them. The problem concerns rather the possibility that the predecessor State or the other State party should terminate the treaty soon after the date of the succession and before the new State and the other State party have taken any position regarding the continuance in force of the treaty in their mutual relations. In the view of the Special Rapporteur, the necessary legal nexus is established for the purposes of the law of succession if the treaty is in force in respect of the new State's territory at the date of succession. On this basis, there does not seem to be any legal reason why that legal nexus should be affected by any act of the predecessor State after that date.

(12) Although that is thought to be the correct view of the matter, it is arguable that the point is of no great importance since, as article 13 expressly recognizes, the bringing of the treaty into force in the relations between the new State and the other State party is a matter for their mutual agreement. In consequence, it is open to them to disregard the termination or amendment of the treaty between the original parties or to treat it as conclusive as between themselves according to their wishes. On the other hand, the point might possibly have importance in determining the position in the case of an alleged agreement to continue the treaty in force to be implied simply from the conduct of the new State and the other State party—for example, from the continued application of the treaty. At any rate, the Special Rapporteur has thought it better to draft a paragraph dealing with this point for the consideration of the Commission. *Paragraph 2* of the article therefore in effect provides:

(*a*) That the termination of the treaty between the original parties after the date of the succession does not preclude the new State and the other State party from considering the treaty as in force between them in accordance with article 13; and

(*b*) That the amendment of the treaty between the original parties after that date does not amend the treaty for the purpose of the application of article 13, unless the new State and the other State party shall have so agreed.

[73] *Yearbook of the International Law Commission, 1971*, vol. II, Part Two, document A/CN.4/243, paras. 20, 26, 35, 40, 42, 58, and 66.

[74] *Ibid.*, document A/CN.4/243/Add.1, paras. 73-76, 77-80 and 97-103.

[75] In many of these cases the object of the amending instrument was essentially to prolong the existing trade agreement.

[76] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 107-108, document A/CN.4/229, para. 13.

[77] Other than the effect of a notice of termination given before that but expiring after the date of the succession.