Document:-
A/CN.4/SR.1293

Summary record of the 1293rd meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
1974, vol. I

members of the Commission. The visit of the observer for the European Committee, like other similar visits by representatives of regional bodies, was an occasion for informal discussions among members of the Commission on the nature and importance of its co-operation with regional legal bodies. There was general appreciation of the fact that the regional bodies were taking due note of the Commission's work and that the Commission, in its turn, was being kept informed of their work. The question arose, however, whether arrangements for the mutual exchange of information could not be improved. The Commission's documents and the records of its proceedings were, of course, available in its *Yearbooks*, but those volumes were published with some delay.

16. Apart from that question of information, he wished to draw attention to an interesting point of difference between the European Committee and the Asian-African Legal Consultative Committee. The latter body had its own Statute, which specified that one of the Committee's purposes was to study the work of the International Law Commission and possibly comment on it. The Asian-African Committee had in fact submitted comments concerning the Commission's work on the law of treaties, but the possibilities of that provision of its Statute had not yet been fully exploited. He understood that no similar provision existed in the case of the European Committee on Legal Co-operation.

17. So far as co-operation between the Commission and the European Committee was concerned, some members of the Commission considered that the present arrangements were fully satisfactory. His own view, however, was that some thought should be given to the possibility of improving the arrangements for co-operation, not only with the European Committee, but also with the other regional legal bodies.

18. The Commission could certainly learn much from the experience of the regional bodies. Since the members of the European Committee came from highly developed countries, the Committee dealt with problems such as water pollution which, in time, would be of increasing interest in other parts of the world. The Committee's experience in that field could certainly be useful to the Commission, which was considering a recommendation concerning commencement of work on the law of non-navigational uses of international watercourses, under item 8(a) of its agenda. He had been particularly interested by the observer's remarks on the idea of a *pactum de contrahendo* whereby riparian States were placed under an obligation to conclude agreements on questions of water pollution control. That obligation was clearly derived from the general principle of the duty of States to co-operate with one another in accordance with the Charter of the United Nations, a duty solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[5]

19. He hoped that the time was not far off when co-operation in the legal sphere would extend beyond the present membership of the European Committee on Legal Co-operation and include the whole of Europe. He was aware that such a development would involve some sensitive political problems, but his personal view, which did not, of course, bind the other members of the Commission, took account of the fact that a conference dealing with both security and co-operation was now in session at Geneva, attended by representatives from all European States. At the previous session, on a similar occasion, he had drawn attention to the preparations then under way for the Conference on Security and Co-operation in Europe, "the purpose of which would be to lower the barriers between the two parts of the old continent and to unite their peoples in their common interest and for the benefit of mankind".[6]

20. On behalf of the Commission he thanked the observer for his kind words about the Commission's twenty-fifth anniversary and for the sympathy he had expressed regarding the loss suffered by the Commission through the death of Mr. Bartoš. He hoped that co-operation with the European Committee would continue to develop and wished the Committee and its observer every success.

21. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said he wished to assure the Chairman that he did not feel at all discriminated against by the adoption of the new procedure, which meant that the Commission spoke with one voice through its Chairman.

22. He hoped that European jurists like the Commission's Chairman would have fruitful meetings with the Europeans on the Committee he had the honour to represent, which covered only part of Europe. He trusted that principles would be worked out to strengthen the arrangements for co-operation and mutual exchange of information between the Commission and the European Committee.

The meeting rose at 12.55 p.m.

[5] General Assembly resolution 2625 (XXV), Annex.

[6] *Yearbook ... 1973*, vol. I, p. 177, para. 56.

1293rd MEETING

Friday, 12 July 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, 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.1-6; A/CN.4/L.209/Add.2 and L.215; A/8710/Rev.1)

[Item 4 of the agenda]

(resumed from the 1290th meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider articles 15 to 18 as proposed by the Drafting Committee (A/CN.4/L.209/Add.2).

ARTICLE 15[1]

2. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 15:

Article 15

Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 12 or 13, it shall be considered as maintaining any reservation to that treaty which was applicable in respect of the territory in question at the date of the succession of States unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (*a*), (*b*) or (*c*) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 1 or 2, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

3. Article 15 dealt with the difficult matter of reservations. The 1972 text of the article[2] had been divided into three paragraphs, which he proposed to examine separately. Paragraph 1 of that text began with an introductory part laying down a general rule formulated as follows: "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States...". Sub-paragraphs (*a*) and (*b*) of paragraph 1—preceded by the word "unless" at the end of the introductory part—set out exceptions to that general rule.

4. One of the exceptions set out in sub-paragraph (*a*) was the formulation by a newly independent State of "a new reservation which relates to the same subject-matter and is incompatible with the said reservation", that was to say the reservation referred to in the introductory part of paragraph 1. The Drafting Committee had noted that the words "and is incompatible with" would necessitate the application of a difficult test which would be quite unnecessary in the present instance, since it could be assumed that the submission of a reservation on the same subject-matter as an existing reservation implied the intention to substitute the new reservation for the old. It had therefore decided that those words should be deleted.

5. Sub-paragraph (*b*) of the former paragraph 1 excepted from the rule laid down in the introductory part any reservation which "must be considered as applicable only in relation to the predecessor State". But it followed from the introductory part of paragraph 1 that the paragraph related only to a reservation which "was applicable in respect of the territory in question", and the effect of that clause was to exclude from the scope of the general rule laid down in paragraph 1 the type of reservation referred to in sub-paragraph (*b*). The Drafting Committee had decided that there was no need to exclude that type of reservation again and had deleted sub-paragraph (*b*) as an unnecessary repetition, which might be a source of perplexity.

6. The Committee had also made some drafting changes in paragraph 1. It had done away with the division into sub-paragraphs; it had inserted the words "under article 12 or 13" after the words "by notification of succession"; and it had deleted the adjective "new" in the phrase "formulates a new reservation", as being unnecessary. The adjective had presumably been used because it implied the existence of a prior reservation; that was true in the situation covered by paragraph 1, but not necessarily true in the situation covered by paragraphs 2 and 3. Having decided to delete the word "new" in the latter paragraphs, the Committee had also deleted it from paragraph 1.

7. Paragraph 2 of the 1972 text dealt with the formulation of reservations by newly independent States. It was rather long and complicated, because it reproduced the substance of several provisions appearing in the Vienna Convention on the Law of Treaties.[3] Since drafting by reference to the Vienna Convention had been found acceptable for paragraph 3, the Committee believed that it should also be accepted for paragraph 2. It was therefore submitting a new text for that paragraph which referred to the relevant provisions of the Vienna Convention without reproducing them.

8. Paragraph 3 of the 1972 text had been divided into two sub-paragraphs. Sub-paragraph (*a*) read: "When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply." As he had already said, the Committee had deleted the word "new" before the word "reservation". It had also substituted the words "in conformity with paragraph 1 or 2" for "in conformity with the preceding paragraph", since paragraph 1 also referred to the formulation of reservations by newly independent States. Finally, it had replaced the reference to article 23, paragraphs 1 and 4, of the Vienna Convention by a reference to the whole of that article.

9. Sub-paragraph (*b*) of the former paragraph 3 read: "However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the

[1] For previous discussion see 1272nd meeting, para. 2.

[2] *Ibid.*

[3] 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.

parties to the treaty". The Committee had taken the view that article 15 should be confined to the only new element introduced by the law of State succession into the whole field of reservations. That new element was the right to formulate a reservation when notifying a succession. Since sub-paragraph (*b*) dealt with a different matter, the Committee had decided that it should be deleted.

10. Mr. USHAKOV suggested that in paragraph 1 the words "applicable in respect of the territory in question" should be amended to read "applicable in respect of the territory to which the succession of States relates...", and that the word "at" in the phrase "at the date of the succession of States" should be replaced by the word "before" or "prior to".

11. Sir Francis VALLAT (Special Rapporteur) said that he accepted Mr. Ushakov's first suggestion. As to his second suggestion, however, he thought that the present wording was clearer.

12. He pointed out that in paragraph 3 of the Drafting Committee's text, the words "in conformity with paragraph 1 or 2" should be replaced by the words "in conformity with paragraphs 1 and 2".

13. Mr. AGO, referring to Mr. Ushakov's first suggestion, said that the French version of the phrase in question might be amended to read: "*il est réputé maintenir toute réserve au traité qui, à la date de la succession d'Etats, était applicable à l'égard du territoire auquel la succession d'Etats se rapporte,...*".

14. The CHAIRMAN suggested that the Commission should approve the title and text of article 15 proposed by the Drafting Committee, with the changes indicated by Sir Francis Vallat.

It was so agreed.

ARTICLE 16[4]

15. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 16:

Article 16

Consent to be bound by part of a treaty and choice between differing provisions

1. When making a notification of succession establishing its status as a party or contracting State to a multilateral treaty under article 12 or 13, a newly independent State may express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty.

2. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent or choice made by itself or made by the predecessor State in respect of the territory in question.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State it is considered as maintaining

(*a*) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory in question, by part of that treaty; or

(*b*) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory in question.

16. Article 16 dealt with the consent of a newly independent State to be bound by part of a treaty, and with the choice by that State between differing provisions of a treaty. The 1972 text[5] set out the general proposition last and the qualifications to that proposition first. The text submitted by the Drafting Committee reversed the order, in accordance with what the Committee believed to be sound legal drafting. It also contained some changes in wording. In the Drafting Committee's text the qualifying clause "in respect of the territory in question" had been added at the end of paragraph 2 (former paragraph 3) after the reference to the right of the newly independent State to withdraw or modify any consent or choice made by the predecessor State. The newly independent State was clearly not concerned with a consent or choice which did not affect the territory. The same qualifying clause was included in paragraph 3. For the sake of precision, the Committee had also inserted in paragraph 1 a cross-reference to articles 12 and 13.

17. Sir Francis VALLAT (Special Rapporteur) proposed that, in view of the Commission's decision to replace the words "territory in question" in paragraph 1 of article 15 by the words "territory to which the succession of States relates", the Drafting Committee should, in the process of final editing, consider whether to make the same change in article 16.

It was so agreed.

18. Mr. AGO said he would prefer the French version of the beginning of article 16 to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, sa qualité de partie à un traité multilatéral ou d'Etat contractant à l'égard d'un tel traité...*". The existing formulation might give the impression that the words "under article 12 or 13" related to the status of a party or contracting State.

19. Mr. REUTER suggested that the wording proposed by Mr. Ago should be simplified to read: "*Lorsqu'un Etat nouvellement indépendant établit, par une notification de succession, conformément à l'article 12 ou à l'article 13, à l'égard d'un traité multilatéral sa qualité de partie ou d'Etat contractant...*".

20. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to adopt that wording for the French version of article 16.

It was so agreed.

21. Mr. KEARNEY pointed out that the words "under the conditions laid down in the treaty" following the words "or make a choice between differing provisions" at the end of paragraph 1, differed from the original wording (former paragraph 2), which had read: "under the conditions laid down in the treaty for making any such choice". He would like to know whether there was a good reason for that change.

[4] For previous discussion see 1272nd meeting, para. 58.

[5] *Ibid.*

22. Sir Francis VALLAT (Special Rapporteur) said that Mr. Kearney's point was well taken and suggested that the words "for expressing such consent or making such choice" should be added after the words "under the conditions laid down in the treaty" at the end of paragraph 1.

23. After a brief exchange of views between Mr. REUTER and Mr. USHAKOV, the CHAIRMAN suggested that the Commission should agree to the addition suggested by the Special Rapporteur.

It was so agreed.

24. Mr. TSURUOKA suggested that, in the French version of paragraphs 2 and 3, the verb "*rétracter*" should be replaced by the verb "*retirer*", which was the one used to translate the verb "withdraw" in the Vienna Convention on the Law of Treaties, for example, in article 22.

It was so agreed.

Article 16, as amended, was approved.

ARTICLE 17[6]

25. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 17:

Article 17

Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 12 or 13 must be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(*a*) be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States;

(*b*) be considered to be made by the newly independent State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. (*a*) Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State.

(*b*) Subject to the provisions of the treaty, the notification of succession or such communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

26. The Drafting Committee had made no change in paragraph 1 of the article. In paragraph 2, it had inserted the words "of succession" after the word "notification", since article 2 defined the expression "notification of succession", not the term "notification".

27. Paragraph 3 of the 1972 text[7] reproduced, *mutatis mutandis*, the provisions of sub-paragraphs (*a*), (*b*) and (*c*) of article 78 of the Vienna Convention on the Law of Treaties. The Drafting Committee had thought, however, that some departures from that model would be appropriate.

28. Sub-paragraph (*a*) dealt with the transmission of the notification of succession by the newly independent State. The Committee had shortened the 1972 text of that sub-paragraph and had replaced the somewhat vague phrase "transmitted ... to the States for which it is intended" by the words "transmitted ... to the parties or the contracting States".

29. In the Committee's view, the purpose of sub-paragraph (*b*) was to determine the date of the notification. If there were no depositary, the notification would have to be considered as made by the newly independent State on the date on which it had been received by all the parties or, as the case might be, by all the contracting States. But if there was a depositary, by analogy with article 16 of the Vienna Convention on the Law of Treaties, the notification would have to be considered as made on the date on which it had been received by the depositary. The Committee had redrafted the sub-paragraph in order to bring out that purpose more clearly.

30. Sub-paragraph (*c*) of the former paragraph 3 concerned the transmission of the notification of succession by the depositary to the States for which it was intended or, to use the terminology proposed by the Drafting Committee, to the parties or the contracting States. The purpose of that sub-paragraph was to protect the interest of the States in question. It laid down the rule that the notification should "be considered as received by the State for which it was intended only when the latter State has been informed by the depositary". The Committee had taken the view that that rule was necessary, but that it should be broadened to cover not only notifications of succession, but also any communication made in connexion therewith by newly independent States. The broader rule should also specify that the preceding provisions of article 17 did not affect any duty the depositary might have to inform the parties. The Drafting Committee considered that, because of its subject-matter, the broader rule should constitute a separate paragraph. It had accordingly drafted the text of the present paragraph 4, which replaced the former sub-paragraph (*c*) of paragraph 3.

31. Mr. USHAKOV, referring to paragraph 4(*a*), suggested that the words "Paragraph 3 does not affect any duty" should be rendered in the French version by the words "*Le paragraph 3 n'affecte aucun des devoirs*" instead of "*Le paragraph 3 n'influe sur aucune des obligations*".

32. Mr. REUTER said he preferred the verb "*affecter*" to the verb "*influer*", which had a less precise and not necessarily legal meaning; but he preferred the term "*obligations*" to the term "*devoirs*". With regard to paragraph 3(*b*), he suggested that the French version should be brought exactly into line with the English, the words "*à la date de sa réception par toutes les parties*" being replaced by the words "*à la date à laquelle elle aura été reçue par toutes les parties*". It was not really reception by all the parties that was meant, for the date

[6] For previous discussion see 1273rd meeting, para. 1.

[7] *Ibid.*

of notification of succession was the date of receipt by the last party.

33. After a brief discussion in which Mr. SETTE CÂMARA, Mr. ELIAS, Sir Francis VALLAT and Mr. CALLE y CALLE took part, the CHAIRMAN suggested that article 17 should be approved, subject to possible changes by the Drafting Committee in the process of final editing.

It was so agreed.

ARTICLE 18[8]

34. Mr. HAMBRO (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following title and text for article 18:

Article 18

Effects of a notification of succession

1. (*a*) Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 12 or paragraph 2 of article 13 shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

(*b*) However, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as that treaty may be applied provisionally in accordance with article 22.

2. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under paragraph 1 of article 13 shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

35. Article 18 had given rise to a marked divergence of views. Some members had supported its provisions, while others had believed that there was a contradiction between paragraphs 1 and 2 of the 1972 text.[9] Paragraph 1 of that text laid down the general rule that a newly independent State which made a notification of succession should be considered a party or, as the case might be, a contracting State to the treaty on the receipt of the notification. But paragraph 2 provided that, subject to certain exceptions set out in that paragraph, when a newly independent State was considered a party to a treaty which was in force at the date of the succession of States, the treaty was considered as being in force in respect of that State from the date of the succession. How, it was asked, could a treaty which came into force in respect of a State at a certain date be considered to have been in force in respect of that State from an earlier date? It was also pointed out that the retroactive effects of paragraph 2 would place the other parties to the treaty—and possibly third States—in a most difficult situation and would create problems which might be almost insoluble.

36. The Drafting Committee had found that there was some merit in those criticisms and had redrafted article 18 on new lines. The problem was twofold. On the one hand, it was necessary, for the sake of continuity, to establish the existence of a nexus between the newly independent State and the treaty, from the date of succession or from the date of entry into force of the treaty if that was later. On the other hand, it was no less necessary to alleviate the retroactive effects following from that principle.

37. The 1972 text sought to solve the first part of the problem by providing that, while the newly independent State was a party to the treaty only from the date of the notification, the treaty was considered as being in force in respect of that State from the date of the succession. Taking a different view of the matter, the Drafting Committee had come to the conclusion that, in order to establish the nexus, the newly independent State must be considered a party to the treaty from the date of the succession or from the date of entry into force of the treaty, if that was later, and it had drafted paragraph 1(*a*) accordingly.

38. In order to alleviate the retroactive effects resulting from paragraph 1(*a*), however, the Committee had added paragraph 1(*b*), which provided that the operation of the treaty should be considered as suspended between the newly independent State and the other parties to the treaty until the date of making of the notification of succession, except so far as the treaty might be applied provisionally in accordance with article 22.

39. Paragraph 2 of the new text dealt with the case of a notification of succession made under paragraph 1 of article 13.

40. Mr. YASSEEN said he had found the previous version of article 18 unacceptable because of the difficulties its application would have raised as a result of retroactivity. The wording proposed by the Drafting Committee was satisfactory, and elegantly resolved all those difficulties.

41. Mr. USHAKOV said he had been unable to participate in the Drafting Committee's discussion of article 18 and express his disagreement with that provision. The Committee's text would make a notification of succession retroactive to the date of the succession of States or to the date of entry into force of the treaty. But that retroactivity was entirely artificial since, under paragraph 1(*b*) of the proposed article, the application of the treaty would be considered as suspended from the date of the succession until the date of the notification. It was contrary to the spirit and the letter of the Vienna Convention on the Law of Treaties that the operation of a treaty which had not entered into force should be considered as suspended.

42. The Drafting Committee had sought to eliminate the legal effects which might result from retroactivity between the date of succession and the date of notification; but it was obvious that a treaty whose application was suspended nevertheless had legal effects for all the parties to it. Although those effects might be acceptable to and even desired by the newly independent State, they would not be acceptable to the other parties to the treaty, for which the artificial suspension of the operation of the treaty could have grave legal consequences and entail international responsibility. There was no principle of international law which could justify such a

[8] For previous discussion see 1273rd meeting, para. 10.

[9] *Ibid.*

situation. He would therefore prefer article 18 to provide simply that the newly independent State should be considered a party to the treaty from the date of the succession of States.

43. As to drafting, the phrase "except so far as that treaty may be applied provisionally", in paragraph 1(*b*), was unsatisfactory, since in the case of provisional application the operation of the treaty would not be suspended between the dates of succession and notification. That sub-paragraph would suspend the operation of all treaties except those which were applied provisionally, so that they would be the only treaties not suspended. That could scarcely have been the result which the Drafting Committee had intended.

44. He asked that, if the Commission decided to approve article 18 in its present form, his dissent should be recorded in the commentary.

45. Mr. AGO said he thought the Drafting Committee had considerably improved the wording of article 18. In its previous form, the article had contained a contradiction between paragraphs 1 and 2: under paragraph 1, a multilateral treaty would have entered into force for the newly independent State at the time of notification, whereas under paragraph 2 it would have done so at the time of succession. That contradiction had been due to the conflict between the Commission's wish to safeguard the continuity of multilateral treaties and its fear of the dangers such continuity would entail. If a treaty was considered as continuing in force for a long time, and a newly independent State finally decided not to accept that situation, there might be serious consequences for third States, particularly in regard to international responsibility.

46. The new version of article 18 rested on a dual fiction: the treaty was considered to be in force from the date of the succession and at the same time its operation was considered to be suspended. That system was not entirely satisfactory, but it might be necessary to make do with it.

47. It should also be noted that article 18 was closely connected with the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215). That proposal was based on a different system, which distinguished between different kinds of treaty. In the case of some treaties there would be no retroactivity, whereas for others—treaties of a universal character—the principle of continuity would apply. It might be desirable to defer a decision on article 18 until the Commission had discussed article 12 *bis*. The Commission might opt for either system, or prefer to submit an alternative to the General Assembly.

48. The CHAIRMAN agreed that there was a connexion between the new article 12 *bis* proposed by Mr. Ushakov and article 18 and that it might be useful to discuss the two articles together. Mr. Ushakov had, however, maintained that article 18 was inherently defective, and that argument certainly deserved consideration.

49. Mr. USHAKOV observed that the two systems described by Mr. Ago differed on one point. Under his (Mr. Ushakov's) system, treaties of a universal character were considered as being in force until notice of termination was given; all the parties were aware of the legal consequences which could result from that situation. Under the system proposed by the Drafting Committee, on the other hand, the responsibility deriving from a treaty whose operation was suspended became retroactive upon notification of succession. That notion of retroactive responsibility was unacceptable.

50. Mr. AGO agreed that the idea of retroactive international responsibility was unacceptable, but maintained that no such responsibility was involved. He asked the Special Rapporteur to confirm that, under his system, third States were released from their obligation to observe the provisions of the treaty during the interim period and consequently could not be held responsible for failing to observe it.

51. Sir Francis VALLAT (Special Rapporteur) said that it was necessary to make article 18 relate to the practice recorded in the 1972 commentary to that article (A/8710/Rev.1, chapter II, section C) and, at the same time, to make it a realistic provision in the context of the draft articles. In his view, the article in its present form met both those requirements.

52. Paragraph 1 was directly based on practice, as set out in the 1972 commentary, which contained frequent references to the fact that a newly independent State which gave notification of succession was regarded as a party to a treaty from the date of independence. According to the definition in the present draft, a "party" meant a State "which has consented to be bound by the treaty and for which the treaty is in force". There was therefore no doubt that when a State was described as a party, that meant that the treaty was in force for it. From a practical standpoint, that would imply that third States had a responsibility which might be unknown for many years, but which might suddenly be made retroactive to the date of independence of a newly independent State. Such a situation appeared to be unacceptable to the majority of members of the Commission.

53. Paragraph 2 of article 18 was therefore a realistic provision, which recognized the importance of provisional application, but which ruled out the possibility of a State imposing a retroactive liability on another State. It did so by stipulating that a newly independent State should be regarded as a party from the date of independence, but that, subject to provisional application, the treaty should be regarded as suspended in operation. That provision was entirely in conformity with article 57 of the Vienna Convention, concerning the suspension of the operation of a treaty under its provisions or by consent of the parties. He agreed, however, that a fuller explanation of the juridical basis of article 18 might be needed in the commentary.

NEW ARTICLE 12 *bis*

54. The CHAIRMAN said that the discussion had shown a close connexion between draft article 18, as proposed by the Drafting Committee, and the new article 12 *bis* proposed by Mr. Ushakov (A/CN.4/L.215), which read:

Article 12 bis

Multilateral treaties of universal character

1. Any multilateral treaty of universal character which at the date of a succession of States is in force in respect of the territory to which the succession of States relates shall remain in force between a newly independent State and the other States parties to the treaty until such time as the newly independent State gives notice of termination of the said treaty for that State.

2. Reservations to a treaty and objections to reservations made by the predecessor State with regard to any treaty referred to in paragraph 1 shall be in force for the newly independent State under the same conditions as for the predecessor State.

3. The consent of the predecessor State, under a treaty referred to in paragraph 1, to be bound by only a part of the treaty, or the choice by the predecessor State, under a treaty referred to in paragraph 1, of different provisions thereof, shall be in force for the newly independent State under the same conditions as for the predecessor State.

4. Notice of termination of a treaty referred to in paragraph 1 shall be given by the newly independent State in accordance with article 17.

5. A treaty referred to in paragraph 1 shall cease to be in force for the newly independent State three months after it has transmitted the notice referred to in paragraph 4.

New paragraph for inclusion in article 2:

(*x*) "multilateral treaty of universal character" means an international agreement which is by object and purpose of worldwide scale, open to participation by all States, concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

55. He would therefore call on Mr. Ushakov to introduce the new article, which could then be discussed in conjunction with article 18.

56. Mr. USHAKOV said that if the treaty whose operation was suspended had no legal effect, as some speakers maintained, there was no reason to suspend its operation until the date of the notification of succession; it would be more logical simply to say that the treaty was in force from that date.

57. In his 1972 commentary to article 18 (A/8710/Rev.1, chapter II, section C), the previous Special Rapporteur, Sir Humphrey Waldock, had adduced existing practice in support of the principle of retroactivity. That practice was not conclusive, however, since it had no basis in any dispute, and if there had been any disputes concerning retroactivity, the practice would very probably have been different.

58. His proposed article 12*bis* was based on the principle that not every treaty could have retroactive effect, but that in the case of multilateral treaties of a universal character, such as humanitarian conventions, it was extremely important, not only for a newly independent State, but for all States, that the continuity of the treaty should not be broken. That principle did not conflict with the clean slate principle, for a newly independent State could terminate the application of a treaty to itself at any time. He had used the expression "multilateral treaty of universal character", but he would be prepared to accept any other adequate expression. He would also be prepared to accept another definition of that expression than the one he had suggested for inclusion in article 2.

59. The CHAIRMAN asked the Special Rapporteur whether it would be correct to say that the suspension provided for in paragraph 1(*b*) of the Drafting Committee's text of article 18, would have the same result as a provision on the non-retroactive effect of a notification of succession.

60. Sir Francis VALLAT (Special Rapporteur) said that, since, under paragraph 1(*a*) of article 18, the newly independent State was considered as a party to the treaty from the date of the succession, there would clearly be certain legal consequences. It was true that under paragraph 1(*b*) the operation of the treaty was considered to be suspended as between the newly independent State and the other parties to the treaty, so that no liability would arise in the event of a breach. At the same time, however, there would be an element of continuity. The newly independent State would, as a rule, be considered a party to the treaty from the date of the succession of States. The machinery provisions of the treaty would operate retroactively and the depositary would have to communicate to the newly independent State all notifications received throughout the interim period, that was to say the period between the date of succession or of entry into force, whichever was the later, and the date of making of the notification of succession.

61. The CHAIRMAN said that, under the system proposed by Mr. Ushakov, the multilateral treaties of a universal character covered by his proposed article 12*bis* would remain fully in force for the newly independent State under the same conditions as for the predecessor State. Where other multilateral treaties were concerned, the clean slate rule of article 12 would apply for all purposes and the depositary's duties in relation to the newly independent State would begin only with the notification of succession.

62. Mr. USHAKOV said that, in regard to multilateral treaties which were not of a universal character, it would be possible to consider the formula proposed by the Drafting Committee in article 18. If the Commission adopted his proposed article 12*bis* for multilateral treaties of a universal character, it would be necessary to amend article 12, which the Commission had approved at its 1290th meeting, by inserting an opening proviso such as "Subject to the provisions of article 12*bis*".

63. Mr. KEARNEY said that he found the position somewhat confusing. He had understood that Mr. Ushakov could not accept the actual concept of suspension embodied in paragraph 1(*b*) of draft article 18 as proposed by the Drafting Committee. There would appear to be no difference from that point of view between multilateral treaties of a so-called "universal" character and other multilateral treaties. If suspension as such was objectionable for one kind of multilateral treaty, it would be objectionable for all multilateral treaties.

64. Mr. AGO said he was grateful to the Special Rapporteur for having indicated that the system of suspension made it possible formally to consider a new State as a party to a treaty. He noted, however, that article 18 made no reference to a reasonable period of time and he wondered how long the operation of a treaty would remain suspended if a newly independent State delayed making a notification of succession.

65. Sir Francis VALLAT (Special Rapporteur) said that that was a subsidiary question which would have to be left to be decided by practice. The essence of the Drafting Committee's text for article 18 was that the newly independent State would be entitled to receive, on a retroactive basis, all notices relating to such matters as reservations, which were received by the depositary during the interim period. At the same time, there would be no retroactive application, as between the parties, of the substantive provisions of the treaty—the application to which objection had been raised.

66. Mr. USHAKOV, in reply to Mr. Ago's comment, said that, as provided in article 18, paragraph 1(*a*), only a State which made a notification of succession was to be considered a party to the treaty. If there was no notification of succession, the treaty was neither in force nor suspended; the slate was clean.

67. The CHAIRMAN replying to a question by Mr. Elias, said that, regardless of the expression chosen to describe the multilateral treaties in question and of the definition of that expression, the Commission should consider at the present stage whether it wished to accept the idea underlying Mr. Ushakov's proposal. That idea was that there were certain important multilateral treaties which remained in force for a newly independent State under the same conditions as for the predecessor State, unless the newly independent State gave notice of termination.

68. Mr. USHAKOV repeated that he was not wedded to the expression "multilateral treaties of universal character". He could accept any other wording that reflected the situation contemplated in article 12 *bis*, the essential purpose of which was to establish a presumption of continuity for the important multilateral treaties in question.

69. Mr. ŠAHOVIĆ said that Mr. Ushakov's proposal should be examined very carefully, since it called in question one of the basic principles of the draft prepared by the Commission two years previously. The Commission had decided to uphold the clean slate principle stated in article 12, as against the position taken by the International Law Association.[10] It had also decided to apply that principle to all treaties and not to distinguish between different categories. He himself was convinced that the solution adopted in article 12 was a good one, since it was consistent with the rest of the draft and was based on a correct interpretation of the clean slate principle. If Mr. Ushakov's proposal was adopted, that principle would have to be interpreted differently.

70. Mr. ELIAS said that the discussion on the proposed new article 12 *bis* amounted to a reopening of the decision the Commission had taken on article 12 at its 1290th meeting. If the Commission continued on that course, other members might wish to reopen the discussion on other articles of the draft. The Commission might then be unable to adopt the draft articles as a whole on second reading at the present session, which had only two weeks to run.

71. Mr. AGO observed that the rather strict system laid down in article 18 did, nevertheless, raise a problem: if a newly independent State made a notification of succession, the depositary was obliged to consider it a party to the treaty during the interim period between the date of the succession of States and the date of the notification of succession; but if the newly independent State did not make a notification, was it to be considered retrospectively a party to the treaty during that period? The treaty was considered to be in force during that period only as a matter of form. In fact it was not in force, since it did not give rise to obligations or rights. Hence it would be logical for it to be applicable only from the date of notification.

72. Although that system might be acceptable, it left one very serious question unanswered: to what conventions did it apply? Did it apply to essential humanitarian conventions, such as the Red Cross conventions or the Convention on Genocide? And if the Commission adopted Mr. Ushakov's proposal, it would have to find some procedure for settlement of the disputes that might arise. He did not think the Commission had sufficiently explored all the possibilities open to it—in particular the possibility of resorting to the conciliation procedure provided for in article 66 of the Vienna Convention, which formed part of the law of treaties. Whatever solution the Commission adopted, a conciliation procedure of that sort would be indispensable because of the many practical problems that would inevitably arise.

73. Mr. YASSEEN reminded the Commission that the consensus two years previously had been that law-making treaties were not binding on newly independent States and that those States remained entirely free to accept or not to accept such treaties. It had been suggested that newly independent States were perhaps under a moral obligation to recognize such treaties, but were legally free not to do so. The conventions mentioned by Mr. Ago, however, contained rules of customary law rooted in the conscience of the international community. He believed that those rules, as customary rules, demanded some degree of continuity, but the conventions as such could not be invoked against newly independent States.

74. Mr. USHAKOV said that his proposal was justified in as much as the Commission had deleted from article 18 the provision in paragraph 2 of the 1972 text.

75. Mr. YASSEEN replied that the Drafting Committee had indeed changed its position on article 18, because of the Commission's concern about giving retroactive effect to treaties. The Drafting Committee had overcome that difficulty, but he did not think the Commission had consequently changed its opinion on the principle of the continuity of treaties.

The meeting rose at 1.05 p.m.

[10] See The International Law Association, *Report of the Fifty-third Conference* (Buenos Aires) (1968), pp. xiii-xv and 589 *et seq.*