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13th meeting of the Committee of the Whole

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55. Referring to the amendement submitted by the United States of America, he drew attention to subparagraph (*b*), the last part of which stated that the present articles would apply in respect of a succession that occurred before the entry into force of the articles, "except when the status of the successor State in relation to the treaty has been resolved prior to the entry into force of these articles". In other words, if conflicts arising in connexion with colonial treaties had not been resolved, the future convention would apply. He did not object *a priori* to the contents of that amendment, which was an attempt to promote the progressive development and codification of customary international law, but he thought it would be acceptable only if it were drafted in a much more flexible manner.

56. His delegation fully supported the amendment submitted by Cuba (A/CONF.80/C.1/L.10/Rev.1) because it dealt with the consequences of the decolonization process and the liberation struggle occurring before the entry into force of the future convention and provided that emerging countries had the option of deciding, in the exercise of their sovereign rights, whether treaties concluded against their will and consent by colonial Powers should be maintained, rejected or modified. In order to make that point clear, he formally proposed that, in the Cuban amendment, the words "if they so wish and in the exercise of their sovereign rights" should be added between the word "may" and the word "avail".

57. Mr. ALMODOVAR (Cuba) said that his delegation had no difficulty in accepting the subamendment proposed by the representative of Somalia.

58. Sir Francis VALLAT (Expert Consultant), replying to the question raised by the representative of France concerning the meaning of the words "except as may be otherwise agreed" at the end of draft article 7, said he thought that question had been raised in the context of the relationship between draft articles 7 and 8, which, in his opinion, covered entirely different subject-matters. More specifically, however, he could say that the International Law Commission had decided that there were occasions when it was better to use the wording contained in draft article 7, no matter how vague it might be, than to try to identify the parties concerned, because such an attempt at identification could give rise to serious difficulties. Thus, the words "except as may be otherwise agreed" referred implicitly to the States concerned by, or involved in, a succession of States. A precedent for that wording was to be found in article 11 of the Vienna Convention on the Law of Treaties.

59. Referring in a general way to the discussion which had taken place on draft article 7, he said he thought that it was the kind of discussion the International Law Commission would have liked to hear on that article, which had been expected to give rise to considerable difficulties. He himself was more and more convinced that, quite apart from the provisions of article 7, the problem of the retroactivity or non-retroactivity of the draft articles needed to be solved by some procedural device to be included in the final clauses. In that connexion, he drew attention to article 24 of the Vienna Convention on the Law of Treaties and, in particular, to paragraph 4 of that article, which stated that "The provisions of a treaty regulating [...] other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text".[11] That article might be of interest and assistance to delegations in their efforts to solve the problems raised by draft article 7.

60. The CHAIRMAN said that the consideration of draft article 7 would be suspended in order to allow for informal consultations between the Vice-Chairman and interested delegations.

The meeting rose at 6.15 p.m.

[11] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (*op. cit.*), p. 292.

13th MEETING

Friday, 15 April 1977, at 10.40 a.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976 [Agenda item 11] (*continued*)

ARTICLE 8 (Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State)[1]

1. Sir Ian SINCLAIR (United Kingdom), introducing his delegation's amendment to article 8 (A/CONF.80/C.1/L.11), explained that its main purpose was to spell out the intention of the International Law Commission in proposing the article under discussion. Paragraph 1 of the article presented no difficulties for his delegation: it stated in clear terms the effects of devolution agreements. In reading the commentary to the article (A/CONF.80/4, pp. 24-29), he had noted that the International Law Commission emphasized the connexion between article 8 and articles 35 to 37 of the Vienna Convention on the Law of Treaties. In paragraph (22) of its commentary, the International Law Commission had ob-

[1] The following amendments were submitted: United Kingdom of Great Britain and Northern Ireland, A/CONF.80/C.1/L.11; Malaysia, A/CONF.80/C.1/L.15.

served: "The Commission, however, confirmed its view that article 8 is in accord with the principle that a treaty does not create an obligation for a third State unless the third State expressly accepts the obligation and that otherwise the possible effects of devolution agreements as treaties should be left to be governed by the relevant rules of international law. Throughout the Commission has proceeded on the basic assumption that the draft articles should be understood and applied in the light of the rules of international law relating to treaties, and in particular of the rules of law stated in the Vienna Convention, and that matters not regulated by the draft articles would be governed by the relevant rules of the law of treaties" (*ibid.*, p. 28). With those considerations in mind, his delegation had submitted an amendment designed to add, at the end of article 8, paragraph 2, a phrase reflecting the view taken by the Commission.

2. Mr. CHEW (Malaysia), introducing his delegation's amendment to article 8 (A/CONF.80/C.1/L.15), said that the article did not adequately reflect the practice adopted by a large number of States on their emergence from being colonial territories into independent statehood. Such States had often entered into devolution agreements the main aim of which had been to provide for continuity in respect of treaties concluded by the former colonial Powers. The Commission had cited a number of examples in its commentary to article 8. However, the article in its present form would nullify the effects of such devolution agreements. Certainly it should not be possible under international law for a treaty concluded between two States to pass rights and obligations to another State, but it seemed that third States should have the option of deciding whether or not to be bound by such a treaty.

3. Although he agreed with the spirit of article 8, he considered that it should cater for the cases where States were willing to accept the contents of a devolution agreement. His delegation had therefore proposed a change at the end of paragraph 1 of the article under discussion. That slight alteration would enable States which adopted the "clean slate" principle to elect to keep particular treaties in force with the consent of third States parties to those instruments.

4. Mrs. THAKORE (India) said that she was in favour of retaining article 8, as it stood. A unilateral declaration was a better expression of the free will of a newly independent State than a devolution agreement, but a devolution agreement could be useful because it enabled such a State to exercise certain rights and discharge certain obligations immediately after attaining independence. As devolution agreements were still being concluded, it was fitting that they should be dealt with in the draft.

5. The article under discussion had been well drafted. Paragraph 1 indicated that a devolution agreement did not constitute a notification of succession by a newly independent State, which must express its consent to be bound by a treaty, and that the same was true of third States. India had acted in conformity with that principle on attaining independence. The Indian Government had found that although it wished to be bound by certain pre-1947 treaties other parties to those treaties were not and that consequently the treaties in question could not be regarded as having devolved on India *ipso jure*. Other pre-1947 treaties had continued in force by express agreement between the parties. Article 8, paragraph 1, was therefore fully acceptable to her delegation.

6. Paragraph 2 established the primacy of the proposed convention over devolution agreements. It was useful to the extent that it emphasized the positive aspects of devolution agreements. She wished to point out that, although based on the same philosophy, unilateral declarations differed from devolution agreements and must be dealt with in a separate article. She therefore opposed the idea of merging articles 8 and 9. She was also against combination of paragraphs 1 and 2 of article 8 into a single paragraph. Article 8 in its present form seemed perfectly satisfactory.

7. Both the amendments to article 8 were constructive and useful. The United Kingdom amendment was based on the International Law Commission's commentary to the article and made explicit what was implicit. Her delegation favoured that amendment and the idea underlying the Malaysian amendment, which would benefit third States.

8. Mr. SETTE CÂMARA (Brazil) pointed out that article 8 was one of those which had given rise to prolonged debate in the International Law Commission. In dealing with the article, the first Special Rapporteur, Sir Humphrey Waldock, had concluded after examining the extensive practice of States and depositaries that since the practice in question differed so widely it was impossible to hold that a devolution agreement should be regarded as creating a legal nexus between a predecessor and a successor State or between a successor State and third States. The International Law Commission's final text had been accepted by most of the Governments that had made written or oral observations, and also by the second Special Rapporteur, Sir Francis Vallat. It embodied the generally accepted view that devolution agreements were no more than solemn declarations of intent concerning the maintenance in force of agreements concluded earlier by the predecessor State. As the recent practice of the Secretary-General and other depositaries confirmed, a new expression of the will of the successor State, in conformity with the normal procedure for the conclusion of treaties, was always required. In modern times it could no longer be held that devolution agreements implied a tacit consent or a novation of rights and obligations. Even supposing, as some writers still did, that such agreements justified a presumption of continuance, that presumption could not really be considered a legal presump-

tion. That was why the recent practice of the United Nations Secretariat had been restricted to inviting new States to become parties to treaties and protocols signed by the predecessor State.

9. Article 8, paragraph 1, stated the negative rule that the rights and obligations of the predecessor State did not pass to the successor State or other States parties by the mere fact that a devolution agreement existed. That view was consistent with the philosophy of the whole draft, which lay within the general framework of the law of treaties; by virtue of that law, there could be no treaty rights and obligations without the formal consent of the parties concerned.

10. However, devolution agreements undeniably served a purpose. They helped to fill the gap which inevitably occurred on independence, when all treaty links were automatically severed except as provided for in the proposed convention. Because of the complexities of modern international life, it was extremely difficult to re-create at once the web of treaty relations at present binding each country. Devolution agreements had often induced newly independent States to conclude treaties without which internal coexistence would be impossible.

11. Article 8, paragraph 2, embodied the principle of the primacy of the proposed convention over devolution agreements. In enunciating that principle, the International Law Commission had avoided expressing an opinion on the intrinsic validity of devolution agreements, which in fact had always been tainted with a presumption of political and economic coercion. As they were negotiated at a time when the territory in question was still in a position of dependence vis-à-vis the metropolitan State, they were naturally regarded as unfair bargains. If they were viewed as mere declarations of intent, the question of their intrinsic validity did not arise.

12. The two amendments to article 8 were provisos implicit in the article itself. As he had no particular views about them, he would express his full agreement with the International Law Commission's draft of article 8.

13. Mr. STUTTERHEIM (Netherlands) said that the International Law Commission, in paragraph (3) of its commentary to article 8 had mentioned the devolution agreement concluded between the Netherlands and Indonesia. He wished to point out that after the conclusion of that agreement, his Government had realized that devolution agreements served little purpose, and it had not concluded one when Surinam had attained independence.

14. Commenting on the Malaysian amendment, he said that it was not of great use since its content was already apparent from the article itself. On the other hand, he had no objection to the United Kingdom amendment.

15. Mr. YIMER (Ethiopia) said that he favoured article 8 in its present form. The United Kingdom amendment sought to add a proviso on a point already regulated in the Vienna Convention on the Law of Treaties. The Malaysian amendment was even less satisfactory; it appeared to give third States the right of deciding, on behalf of the successor State, whether devolution agreements would be applicable to it, regardless of its wishes in the matter. If that was indeed the intention of its sponsors, the amendment was unacceptable.

16. Mr. WALKER (Barbados) approved draft article 8. Paragraph 1 of the article reflected the existing practice according to which, in respect of devolution agreements, there was no legal nexus between the successor State and third States. Nevertheless, devolution agreements had certain merits; they clarified the position as between the predecessor State and the successor State; third States parties to a treaty were more ready to grant a new State the benefits of the treaty if the latter had solemnly undertaken to be bound by it; States and international organizations which drew up lists of parties to treaties or which were depositaries of multilateral treaties might be willing to accept a devolution agreement as evidence of a succession.

17. Mr. MARESCA (Italy) said that the principles underlying the proposed convention should be elaborated and put together in such a way as to constitute a coherent whole. The balance of the draft under examination depended on the weight given to the "clean slate" principle and the continuity principle respectively. In article 8, the Commission had favoured the "clean slate" principle, with devolution agreements being regarded as binding exclusively the States which had concluded them. That principle, already a clear one, had been further elucidated by the International Law Commission in its commentary. One of the soundest principles of the 1969 Vienna Convention on the Law of Treaties was that treaties must be respected but only by those States which had concluded them, and that they conferred no rights or obligations on third States. Nevertheless, there were other rules of customary international law which had been embodied in the 1969 Convention, such as the principle that treaties could produce certain effects for third States which consented to them. That principle was expressed in articles 35 and 36 of the 1969 Convention.

18. His delegation had examined the two amendments to article 8 from that point of view. The United Kingdom amendment was drafted extremely well; it safeguarded the application of the rules of international law governing the rights and obligations arising for a third State from a treaty as laid down in articles 35 and 36 of the 1969 Vienna Convention. The Malaysian amendment also improved article 8; it sought to safeguard the wishes of other States parties to the treaties in question.

19. Mr. FERNANDINI (Peru) approved article 8 of the draft, which had been drafted in the light of practice. Although his delegation did not oppose the Malaysian and United Kingdom amendments, it did not think they introduced any new material.

20. Sir Francis VALLAT (Expert Consultant) said that the amendment by Malaysia, like that by the United Kingdom, had presumably been drafted with a view to clarifying the intentions of the International Law Commission. In that connexion, he wished to point out that not all of the International Law Commission's discussions were reflected in the summary records of its meetings, since a great deal had been discussed in the Drafting Committee or in the corridors. The Commission had duly considered each of the questions involved in the two amendments to article 8. Generally speaking, it had taken the view that they were dealt with implicitly in article 8 and that any change in the provisions thereof would give rise to considerable difficulties.

21. With reference to the United Kingdom's amendment, he pointed out that the International Law Commission had at all times taken care to set the draft within the general framework of the 1969 Vienna Convention. That concern might well be reflected in the preamble to the future convention, since such a clarification would facilitate its interpretation. In principle, the Commission had not referred to particular aspects of the law on treaties and, in the circumstances, preferred the explanations contained in paragraph (22) of its commentary on article 8 to a specific reference of the kind proposed by the United Kingdom delegation. The point had already been considered in detail by the International Law Commission's Drafting Committee, although it could still be considered by the Drafting Committee of the Conference.

22. The Malaysian amendment raised more or less the same problem. Article 8, paragraph 1, had been drafted with great caution, in order to avoid adopting a negative attitude towards devolution agreements or to exaggerate their importance. But it was clear that article 8 did not preclude wider application of the devolution agreements in certain circumstances. However, it would be better to reflect further on the question of whether it sufficed for the other States parties to the treaties in question to agree to the application of such agreements. Again, that matter had been considered by the International Law Commission's Drafting Committee, but it could still be examined by the Drafting Committee of the Conference.

23. Mr. SCOTLAND (Guyana) said that, according to the International Law Commission's commentary on article 8, international law, unlike municipal law, did not recognize that a party to a contract could assign or transfer its rights under that contract without the consent of the other party to the contract. Therefore, a devolution agreement concluded between the predecessor State and the newly independent State immediately after the latter's accession to independence could not, by itself, substitute the newly independent State for the predecessor State as a party to the treaties concluded by the predecessor State with other States, for the other States parties had to consent to such substitution. Accordingly, the draft convention prescribed the cases in which the other parties were to be understood as giving their consent. In the case of multilateral treaties, the other parties could be deemed as giving their consent when the new State established its status in relation to the treaty in accordance with the notification procedure prescribed in the convention. In the case of bilateral treaties, under article 23 of the draft a party to a treaty was considered as consenting to the substitution of the successor State for the predecessor State when it did so expressly or when its conduct implied consent.

24. Some Governments had pointed out in their comments on the draft articles that, when it entered into force, the convention would govern the effects of a succession of States in respect of treaties and that devolution agreements and unilateral declarations would then become superfluous. They had therefore taken the view that article 8 should be deleted, together with its counterpart, article 9. But, in the absence of a specific provision in that regard, it could also be maintained that the intention of the convention was not to deal exhaustively with the matter and to invalidate a transfer of treaty obligations and rights by methods not expressly forbidden by the convention. Article 1 of the convention did say that the "present articles apply to the effects of a succession of States in respect of treaties between States". However, it did not say that the effects of a succession of States were governed exclusively by those articles; hence, it did not preclude the possibility of them being governed by rules other than those enunciated in the convention.

25. In order to prevent such arguments from being advanced later, it would be better to settle the matter now, in the convention, especially since devolution agreements had become an important aspect of succession of States as a result of the process of decolonization. The convention could not ignore their existence if its intention was to deal exhaustively with the effects of State succession in respect of treaties between States. He viewed paragraph 1 of article 8, as proposed by the International Law Commission, in that way and was ready to accept the principle set forth therein.

26. The Malaysian amendment to paragraph 1 stated, in effect, that a devolution agreement could be valid if the other parties to the treaty consented to it. But paragraph 1 of the draft article said quite simply that a devolution agreement alone was not enough to effect a valid transfer of treaty rights and obligations. It followed that, if the transfer was to be valid, it had to be based on something other than the actual devolution agreement. However, article 23 of

the draft convention showed that the consent of the other party to the treaty was sufficient basis for a valid transfer. It was pointless, therefore, to insert at the end of paragraph 1 an exception concerning cases in which the other parties agreed to the transfer. Hence, the Malaysian amendment was seeking to exclude from the scope of paragraph 1 cases to which the paragraph would never apply.

27. He was not fully convinced of the need for the provision in paragraph 2 of the article. If that paragraph was deleted, paragraph 1 would state that devolution agreements were not, by themselves, enough to effect a transfer of treaty rights and obligations, and article 23 and others would indicate how a transfer was to be made. Consequently, there appeared to be nothing to add to the provision in paragraph 1. He questioned the value of paragraph 2 and, in particular, of the words "Notwithstanding the conclusion of such an agreement", words which seemed to indicate that it was a safeguard clause. Such a clause would be warranted only if the aim was to limit the application of an agreement which, although recognized as valid by the convention, might conflict with the provisions of the convention, but it was pointless in the case of an agreement whose validity was not recognized by the convention itself. If the words "Notwithstanding the conclusion of such an agreement" were deleted, it was difficult to see how the remainder of paragraph 2 could conflict with any provision of the convention.

28. In his opinion, concern to emphasize a principle that had already been enunciated could not, alone, warrant the retention of paragraph 2. Retention of that paragraph was not only unjustified from the drafting point of view—it might even give the impression that the convention, in the final analysis, recognized that a devolution agreement could in some way suffice to produce a transfer. It was true that an agreement of that kind could have some effect on the relations between the predecessor State and the successor State. However, it was not those relations that were covered by article 2 but the transfer to the successor State of the treaty rights and obligations of the predecessor State towards other States parties to the treaties in question.

29. It was difficult, in any case, to explain why the words "Notwithstanding the conclusion of such an agreement" did not also appear at the beginning of paragraph 2 of article 9. There was a "difference in tone", which the International Law Commission had noted in paragraph (20) of its commentary on article 9 (*ibid.*, p. 34). The difference was probably due to the fact that the conclusion of a devolution agreement sometimes involved pressure by the predecessor State on the newly independent State. He appreciated those considerations, but could not allow them to influence the drafting of an international instrument in a way that might later give rise to difficulties of interpretation.

30. His delegation was, in principle, ready to accept paragraph 1 of article 8, without the Malaysian amendment, for which it saw no need. Paragraph 2 seemed superfluous, but if it was to be retained, he would propose the deletion of the words "Notwithstanding the conclusion of such an agreement".

31. Mr. HELLNERS (Sweden) approved the principle enunciated in paragraph 1 of article 8 and the way in which it was formulated. As to paragraph 2, like the representative of Guyana he felt that the words "Notwithstanding the conclusion of such an agreement" were pointless and might be interpreted wrongly. He therefore proposed that the Drafting Committee should deal with their deletion. The United Kingdom's amendment did not call for any comment. The Malaysian amendment, as the representative of Brazil had pointed out, was already covered in paragraph 1 by the words "in consequence only of the fact that".

32. Consequently, the two amendments were not necessary. However, if the Malaysian amendment met with acceptance, the word "other" should be deleted, for it might be misleading and give the impression that the successor State had no say in the matter of its own position regarding the treaty.

33. Mr. ESTRADA-OYUELA (Argentina) said that he was fully satisfied with article 8, as submitted by the International Law Commission. Like the representative of Brazil, he considered the two amendments to be not only pointless but also dangerous.

34. By stipulating that devolution agreements were not by themselves enough to transfer to the successor State the obligations and rights of the predecessor State towards the other parties to a treaty, article 8 took into account the fact that, at the time when such agreements were concluded, the successor State was not always free to manifest its will, since it might be under pressure from the predecessor State. For that reason, in the practice of the Secretary-General, mentioned in paragraph (13) of the International Law Commission's commentary on article 8, "Some further manifestation of will on the part of the newly independent State with reference to the particular treaty is needed to establish definitively the newly independent State's position as a party to the treaty in its own name" (*ibid.*, p. 26). The Commission also stated in paragraph (18) of its commentary that "The practice of States does not admit[...] the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States parties in relation to treaties applicable to the successor State's territory prior to its independence" and that "neither successor State nor third States nor depositaries have as a general rule attributed automatic effects to devolution agreements" (*ibid.*, p. 28).

35. In paragraph 1, of the draft article, the words "in consequence only of the fact that" opened up a

possibility, as the representative of Brazil had pointed out. The Malaysian amendment and the United Kingdom's amendment would be more far-reaching and would be dangerous in that they might create difficulties of interpretation. Accordingly, he would prefer to retain article 8 in its present form, but would not object to the proposal by Guyana to delete the opening words of paragraph 2.

36. Mr. SATTAR (Pakistan) said that he had no objection to article 8 as proposed by the International Law Commission.

37. Mr. KOH (Singapore) fully endorsed the explanation given by the Expert Consultant as to why article 8 had been drafted as it was without the qualification proposed by Malaysia in its amendment. He felt that article 8 stated quite clearly the principle that a devolution agreement alone was not sufficient to assign to a successor State the obligations or rights of a predecessor State vis-à-vis other parties to a treaty, and he considered it both unnecessary and undesirable to limit that principle by introducing the proviso suggested by Malaysia. Furthermore, the wording of the Malaysian amendment was unsatisfactory: the term "other States Parties" could give the impression that a devolution agreement might bind the successor State without its consent if third States so decided. He was therefore unable to accept that amendment.

38. Mr. PEDRAJA (Mexico) said that article 8 should be deleted, since it completely nullified devolution agreements, which conflicted with the "clean slate" principle, while half recognizing them. Moreover, the International Law Commission had stated in paragraph (21) of its commentary to article 8: "The validity of a devolution agreement in any given case should [...] be left to be determined by the relevant rules of the general law of treaties as set out in the Vienna Convention, in particular in articles 42 to 53" (*ibid.*, p. 28).

39. His delegation felt that the provisions in article 8 were out of place. The article stipulated that devolution agreements would be governed by the convention; that would be the case anyway, without it being necessary to say so expressly. It was unnecessary to repeat that irregular treaties should be governed by the convention, since it was quite evident that the convention would apply to them. Article 8 was therefore superfluous. Not only did it simply repeat an established principle, but also it might give rise to confusion which could be detrimental to newly independent States.

40. The Malaysian amendment would only increase the confusion arising from article 8 by compelling a successor State to act in a manner contrary to its sovereign will.

41. The United Kingdom amendment conflicted with the "clean slate" principle, on which the Commission's draft was based, in that it imposed burdens on the successor State in favour of the third State.

42. He felt that article 8 did not belonging in the draft convention and that the proposed amendments failed to correct its shortcomings. He would therefore be unable to support them.

43. Mr. TABIBI (Afghanistan) observed that article 8 provided for a mainly procedural régime designed to effect the smooth transfer of power from the predecessor State to the successor State. Consequently, it had no legal effect on the treaty and even less on the State or States parties to the treaty.

44. In addition, a devolution agreement was considered legal, firstly, if the treaty giving rise to the rights and obligations to be transferred from the predecessor State to the successor State was valid; secondly, if the treaty itself expressly provided that it should continue in force and devolve on the successor State; and, thirdly, if the other contracting parties agreed to the act of devolution. Unless those three conditions were met, a devolution agreement was not only without any legal effect but might in some cases violate international law, for a devolution agreement might be forced on the successor State by the predecessor State and represent the "price of independence". It could also create an unfavourable situation for the other contracting Parties. A devolution agreement could therefore have legal effects and in some cases affect the rights of third parties, particularly in regard to bilateral treaties. Articles 34 and 35 of the Vienna Convention on the Law of Treaties safeguarded the rights and interests of third States, since it was not just the intention of a single contracting party but the intention of all parties to the treaty which was the foundation of the legal rights and obligations deriving from a bilateral or multilateral treaty. A devolution agreement between the predecessor State and the successor State was therefore only a procedural agreement concluded solely for administrative purposes. Accordingly, he agreed with the view expressed by the Commission in paragraph (6) of its commentary to article 8 to the effect that "a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State" (*ibid.*, p. 25). In his view, that statement was particularly true in regard to bilateral treaties.

45. Regarding the assignment of rights, the Commission also said in paragraph (8) of its commentary that it was "crystal clear that a devolution agreement cannot bind the other States parties to the predecessor's treaties (who are "third States" in relation to the devolution agreement) and cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other States parties. Consequently, however wide may be the language of the devolution agreement and whatever may have been the intention of the predecessor and successor States, the devolution agreement cannot of its own force

pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it independently of that agreement" (*ibid.*).

46. A devolution agreement should therefore be considered solely as an act whereby the newly independent State manifested its intentions with regard to the treaties concluded by its predecessor and the predecessor State formally announced that it was no longer bound by the obligations arising from those treaties in respect of the territory which had become independent. As a result, the devolution agreement referred to in article 8 and the unilateral agreement referred to in article 9 had no bearing on the legal position of third States, any more than they had on the treaty itself. The situation was different in the case of article 10, as the treaties referred to in that article expressly provided that on the occurrence of a succession of States, a successor State should have the option to consider itself a party thereto. That was so in particular with the General Agreement on Tariffs and Trade,[2] the Second International Tin Agreement, 1960,[3] the Third International Tin Agreement, 1965,[4] the International Coffee Agreement, 1962[5] and the International Sugar Agreement, 1968.[6]

47. He was therefore inclined to support the United Kingdom amendment and, in principle, the Malaysian amendment, since they established a legal nexus between article 8, which was basically procedural, and the other draft articles. As article 9 was also concerned with procedure, the same link should be established between that article and the remainder of the draft.

48. Mr. MEDJAD (Algeria) said that he was entirely satisfied with article 8 inasmuch as it reflected an established international practice. The International Law Commission had considered that the decisions of the successor State were not entirely free at the time of a succession of States, owing to the pressure which the predecessor State could bring to bear on the successor State to pay a "price for its independence". Consequently, the International Law Commission had attributed only very limited effects to the devolution agreement and had regarded it as a simple declaration of intent by the successor State in respect of treaties concluded by the predecessor State in regard to its territory.

49. He was therefore unable to accept the Malaysian amendment to paragraph 1 of article 8, which would only impair the position of the successor State. In his view, the existing wording of draft article 8, paragraph 2 was perfectly adequate and the United Kingdom amendment to the paragraph contributed nothing new to the provision. He therefore hoped that article 8 would remain unchanged.

50. Mr. YASSEEN (United Arab Emirates) said that he favoured article 8 as proposed by the International Law Commission. Paragraph 1 of the article was in conformity with the general provisions of the law of treaties, since it confirmed that a succession of States in respect of treaties was not based on an agreement between the predecessor State and the successor State but involved other factors. The second paragraph was very important, as it made it clear that the assignment of the treaty rights and obligations of the predecessor State to the successor State should take place in accordance with the provisions of the proposed convention. He could therefore see nothing that warranted the amendments submitted by Malaysia and the United Kingdom.

51. The Malaysian amendment was not only unnecessary but likely to cause confusion. The United Kingdom amendment doubtless had it merits, but the safeguard it provided was self-evident; that safeguard applied to the entire draft and did not need to be repeated in each article. He therefore favoured leaving article 8 as it stood.

52. Mr. MIRCEA (Romania) said that he could go along with the view of the majority of the Committee and accept the Commission's proposal for article 8. He nevertheless wished to make a number of reservations. Paragraph 1 was generally acceptable to his delegation. However, although Romania regarded devolution agreements as simple declarations of intent, it was clear from paragraph 1, as the Malaysian amendment confirmed, that a devolution agreement had broader implications than a declaration of intent. As to the idea of assessing the validity of a devolution agreement, that should of course be done when the territory concerned acceded to independence, not only in order to take account of a possible "price of independence" but also from the legal point of view. Moreover, his delegation felt that there was a contradiction between paragraph 1 and paragraph 2 of the draft article: either the States parties to a given treaty would accede to the devolution agreement, thereby solving the problem of succession, or else the parties concerned would decide to apply the proposed convention.

53. Finally, his delegation was unable to accept the Malaysian amendment, which only compounded the difficulties raised by paragraph 1. As to the United Kingdom amendment, his delegation was uncertain whether the reference to a third State meant third States in relation to the proposed convention or third States in relation to the devolution agreement. It favoured the first idea but felt that it would be going too far to adopt the second. He hoped that the Expert Consultant would explain the reasons why the

[2] GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1), p. 1.

[3] *United Nations Tin Conference, 1960 — Summary of Proceedings* (United Nations publication, Sales No. 61.II.D.2), p. 25.

[4] *United Nations Tin Conference, 1965 — Summary of Proceedings* (United Nations publication, Sales No. 65.II.D.2), p. 29.

[5] *United Nations Coffee Conference, 1962 — Summary of Proceedings* (United Nations publication, Sales No. 63.II.D.1), p. 56.

[6] *United Nations Sugar Conference, 1968 — Summary of Proceedings* (United Nations publication, Sales No. E.69.II.D.6), p. 56.

Commission had decided not to merge the two paragraphs of article 8 into a single provision.

54. Sir Francis VALLAT (Expert Consultant) said that he could not explain straightaway exactly why the International Law Commission had decided not to combine the two paragraphs of article 8. However, he would refer the Committee to paragraph 64 of the summary record of the International Law Commission's 1267th meeting, which might answer the question put by the representative of Romania. A member of the Commission had stated: "The proposal that the two paragraphs should be merged raised a number of problems, without removing the ambiguities the Commission was trying to eliminate."[7] Drafting considerations had made it difficult to combine the two paragraphs; one of the difficulties concerned the relationship between draft article 8 and draft article 15, entitled "Position in respect of the treaties of the predecessor State". The International Law Commission had finally decided that it was best to have two separate paragraphs in the interests of clarity.

55. Mr. JELIĆ (Yugoslavia) said that he favoured the Commisson's version of article 8. The Malaysian amendment, far from clarifying the article, greatly altered its meaning; as he saw it, the International Law Commission had considered devolution treaties as treaties whose purpose was solely to govern the relations between the predecessor State and the successor State and neither to impose obligations nor confer rights on third States. The idea underlying article 8 was that devolution agreements concerned only the intentions of the predecessor State and the successor Sate, and that the successor State should accept in a separate and additional act the rights and obligations arising from the treaties concluded by the predecessor State. Under the Malaysian amendment, devolution could become final simply through the acts of third States, and the Yugoslav delegation could not accept that. As to the United Kingdom amendment, it did not clarify article 8 and appeared unnecessary.

56. Sir Ian SINCLAIR (United Kingdom) said that the United Kingdom amendment was a technical one and that his delegation had submitted it solely with a view to sounding out the Committee's views on the matter. The amendment might therefore be referred to the Drafting Committee, which might bear in mind that it involved a more general problem, namely the relationship between the draft under consideration and the Convention on the Law of Treaties. The Drafting Committee might envisage that point being dealt with in the preamble. His delegation was prepared to accept whatever view the Drafting Committee took regarding its amendment.

57. Mrs. HUMAIDAN (Democratic Yemen) said that she favoured retention of article 8 of the draft; the amendments submitted were not particularly useful. She suggested, however, that the first phrase of paragraph 2 should be deleted, but would not insist on that point if the suggestion gave rise to difficulties.

58. Mr. NAKAGAWA (Japan) supported the idea expressed in article 8 that the *res inter alios acta* principle applied to devolution agreements. Furthermore, as the International Law Commission had stated in paragraph (6) of its commentary, "the institution of 'assignment' found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law" (*ibid.*). Turning to a question which had not been explicitly dealt with in article 8, namely, the meaning of a devolution agreement for other States parties, he said that, first, article 8, paragraph 2, in no way detracted from the value of a devolution agreement as an expression of the successor State's intention to continue the treaty in question. Third States could regard it as indicating the intention of the successor State. Secondly, a devolution agreement could have certain legal consequences for the third State: that question was dealt with in the Convention on the Law of Treaties. Paragraph 2 should not, in any case, jeopardize application of the rules set forth in the Convention on the Law of Treaties to a devolution agreement. That was why his delegation welcomed the United Kingdom's amendment, but deemed unnecessary the Malaysian amendment, which quite obviously did not refer to the same question as paragraph 1 of the draft article.

59. Mr. YACOUBA (Niger) said that at first sight article 8 seemed satisfactory, because it ensured protection of a fundamental principle, namely, that of the autonomy of the will of the parties. The members of the Committee had expressed conflicting views on the question of whether the successor State should or should not succeed to the rights and obligations contracted by the predecessor State. The convention would therefore have the merit of resolving that problem if article 8 was maintained, because the International Law Commission had succeeded in establishing a balance between the two opposing theses. He endorsed the Commision's analysis of the system of specific notification of succession and agreed that notification was more important than the devolution agreement. He rejected the Malaysian amendment for the reasons given by other delegations, and considered that the United Kingdom's amendment, which did not in essence modify the scope of article 8 since it referred to a fundamental principle of international law, could be referred to the Drafting Committee.

60. Mr. HERNANDEZ ARMAS (Cuba) said that he shared the opinion of the International Law Commis-

[7] *Yearbook of the International Law Commission, 1974*, vol. I, p. 86, 1267th meeting, para. 64.

sion on the subject of devolution agreements, which were a price States acceding to independence had to pay to liberate themselves from the colonial Power. Article 8 was clear, precise and balanced. The International Law Commission could not be held responsible for the presence of the article in the draft, because devolution agreements definitely existed and it had to regulate them. Such agreements should be examined, not from the point of view of third States, as delegations favouring amendment of the article had done, but from the point of view of the successor State, on which harsh conditions were imposed in favour of a third State, which was generally acting in complicity with the colonial Power. His delegation deplored the fact that one delegation had proposed the deletion of paragraph 2, because it was a safeguard clause which the successor State could, once a devolution agreement had been concluded, invoke in order to put an end to treaties which were prejudicial to it but which it had had to accept by signing the devolution agreement.

61. Mr. KOECK (Holy See) said that if, as certain delegations proposed, article 8 was deleted because it might give the impression that devolution agreements enabled the predecessor State to transmit to the successor State rights and obligations which would not otherwise have been transmitted to it, there would be a serious gap in the convention from which it might be inferred that the International Law Commission had decided not to settle the question. It was desirable, therefore, that article 8 should be so worded as to make it clear that in itself the devolution agreement had no effect on international treaty relations; he suggested the deletion of the word "only" from the phrase "only of the fact" in paragraph 1.

62. Mr. KRISHNADASAN (Swaziland) said that, although a devolution agreement could be concluded under coercion, it was important to retain article 8 because it reflected past practice and, in view of the debate on possible retroactive application of the convention, clarified the question of the succession of States in respect of treaties. His delegation had no objection to the substance of article 8. Paragrpah 1 should be retained as drafted; he could not accept the Malaysian amendment because, in his opinion, the words "only of the fact" in paragraph 1 met the point made by the Malaysian delegation and the proposed addition would not facilitate understanding of the paragraph. The Holy See's proposal to delete the word "only" from the phrase "only of the fact" related to a question of substance, not of drafting, and ran counter to Swaziland's views. The United Kingdom's amendment to paragraph 2, which must be retained, should be referred to the Drafting Committee.

63. Mr. EUSTATHIADES (Greece), referring to the United Kingdom's amendment, said that his delegation wished to urge the Drafting Committee to examine thoroughly the question raised in that amendment, which, in his opinion, was not a drafting matter. Referring to paragraph (22) of the International Law Commission's commentary on article 8, he drew attention to the relationship between article 8 and the general law of treaties and, in particular, between that article and articles 35 to 38 of the Convention on the Law of Treaties. He hoped that the Drafting Committee would make its opinion on that point known to the Committee.

64. Mr. TJIRIANGE (Observer for SWAPO), speaking at the invitation of the Chairman, said that the organization he represented attached great importance to the Conference on Succession of States in respect of Treaties, because the oppressed people of Namibia, who had been deprived of their sovereign rights, considered that the question of succession of States in respect of treaties was currently one of the fundamental problems of the liberation movement. Although many countries and nations had obtained their independence during the past 30 or 40 years, millions of human beings were still subject to colonial and foreign domination and deprived of their sovereign rights. Most subject peoples had organized liberation movements to fight for national independence, and no power would stop their march to independence. Once they had regained their sovereign rights over their territories, those peoples would come up against the problems which formed the subject of the Conference.

65. He emphasized that Namibia was a special case and that the world community had special responsibilities with respect to it. The United Nations was supposed to assume responsibility for the territory until power had been transferred to the Namibian people, and, to that end, it had established a special body, the United Nations Council for Namibia. The United Nations had taken a number of legal measures with respect to Namibia. It had, in particular, terminated South Africa's mandate over Namibia, which meant that South Africa was no longer entitled to exercise authority over the territory. It continued to occupy the territory illegally, in violation of United Nations resolutions and against the wishes of the Namibian people. Any action by South Africa concerning Namibia was accordingly illegal.

66. South Africa could not, therefore, be regarded as a predecessor State of Namibia, within the meaning of article 8 and article 2, paragraph 1, subparagraph (*c*) of the draft. Only the United Nations Council for Namibia could claim the right to assume responsibility for the territory's treaty relations with other interested States. The convention under consideration did not take account of situations such as that of Namibia. SWAPO deplored that shortcoming and hoped that the Conference would give Namibia's case the attention it deserved.

67. Article 8 raised no problems for SWAPO and he fully shared the point of view expressed by the rep-

resentative of Algeria concerning the article. It was obvious, however, that peoples who were deprived of their sovereign rights and had no say in their country's affairs, could not be held responsible, once they had regained their sovereignty, for treaties which had been imposed on them. That did not mean that all treaties concluded by the predecessor State would necessarily be terminated with the accession to independence, but the Namibian people reserved the right, after examining the treaties, to take such decisions as they deemed appropriate in the light of their interests.

68. He drew the Commission's attention to the attempt made by South Africa, assisted by its allies, to annex part of Namibia's territory, namely Walvis Bay, which had formerly been occupied by United Kingdom colonial forces and the administration of which had been handed over to the Cape Colony. The territory of Namibia had been clearly defined in the course of the long struggle of the Namibian people and of the progressive forces supporting them. The future free and independent State of Namibia would cover the whole of the territory to which it was entitled, including Walvis Bay. South Africa was trying to impose its will on the Namibian people, but so far as SWAPO was concerned the problem of Walvis Bay did not exist or existed only in the minds of those who had created it. The fact was that the whole of Namibian territory was illegally occupied and one day it would all be liberated.

69. The CHAIRMAN said that unless he heard any objection he would consider that the Committee agreed to refer the United Kingdom's amendment to the Drafting Committee.

70. Mr. ESTRADA-OYUELA (Argentina) pointed out that the United Kingdom amendment was not merely one of drafting, and reminded members that the representative of the United Kingdom had suggested that account should be taken of it in the preamble to the draft.

71. Sir Ian SINCLAIR (United Kingdom) said that account could, indeed, be taken of his amendment in the preamble to the draft, but that it was up to the Drafting Committee to take a decision on the matter. He reiterated that his delegation would support any decision the Drafting Committee deemed appropriate concerning the amendment.

The meeting rose at 1.15 p.m.

14th MEETING

Friday, 15 April 1977, at 3.55 p.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976 [Agenda item 11] (*continued*)

ARTICLE 8 (Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State (*continued*)[1]

1. Mr. ARIFF (Malaysia) said that, as some delegations seemed to have misunderstood the purpose of the amendment to draft article 8 submitted by his delegation (A/CONF.80/C.1/L.15), he wished to make it clear that his delegation supported the general principle that a devolution agreement had no effect on other States parties to the treaties of the predecessor State. In other words, the obligations or rights of the predecessor State did not become the obligations or rights of the successor State towards other States parties to the predecessor State's treaties. That principle was, of course, correct, for as had been pointed out in paragraphs (5) and (6) of the International Law Commission's commentary to draft article 8 (A/CONF.80/4, p. 25), the assignment of obligations or rights by a devolution agreement could not bind other States parties to the predecessor State's treaties, since they were third parties or strangers to the devolution agreement.

2. There were, of course, always exceptions to the general rule. Devolution agreements had occasionally been concluded between predecessor States and successor States for the sake of continuity of the treaty régime, apart from other reasons. He noted that draft article 8, as it stood, completely ignored the existence of international relations as practised by predecessor States and successor States during the period of transition designed to ensure the continuity of the treaty régime. In international relations, there had been occasions when other States parties to the predecessor State's treaties had agreed to accept obligations or rights under previous treaties assumed by the successor State in the devolution agreement. When Singapore had separated from Malaysia, those two States had concluded a devolution agreement, as was mentioned in the International Law Commission's commentary to draft article 8 (*ibid.*, paragraph (3)), and a number of agreements which had been concluded between Malaysia's predecessor State and third States, and which had been applicable to the

[1] For the amendments submitted to article 8, see 13th meeting, foot-note 1.