United Nations Conference on Succession of States in Respect of Treaties

Vienna, Austria
First session
4 April – 6 May 1977

Document:-
A/CONF.80/C.1/SR.30

30th meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on Succession of States in Respect of Treaties (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

30th MEETING

Thursday, 28 April 1977, at 11.10 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 25 (Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party)

1. The CHAIRMAN said that, since no amendments to article 25 had been submitted, if no delegation wished to speak he would take it that the Committee of the Whole decided to adopt the article provisionally and refer it to the Drafting Committee.

It was so decided.[1]

ARTICLE 26 (Multilateral treaties) *and*

ARTICLE 27 (Bilateral treaties)[2]

2. The CHAIRMAN said that since the Committee had before it an amendment by the delegation of Finland (A/CONF.80/C.1/L.31) which concerned both article 26 and article 27, those articles would be considered together. Before inviting the representative of Australia to submit his amendment to article 26, he would request the delegation of Finland to confirm that, in accordance with the textual changes made to its amendment to article 23 (A/CONF.80/C.1/L.30) at the Committee's 29th meeting, the text of its amendment to articles 26 and 27 should likewise be amended, to read:

Article 26

In paragraphs 1 and 3 of article 26, after the words "... by reason of its conduct..." add the words "... and in particular by applying the treaty..."

Article 27

In subparagraph (*b*) of article 27, after the words "... by reason of their conduct..." add the words "... and in particular by applying the treaty...".

3. Mr. FREY (Finland) said that his delegation fully accepted the textual amendments read out by the Chairman, and had no further comments.

4. Mr. GILCHRIST (Australia), introducing his delegation's proposed amendment to article 26 (A/CONF.80/C.1/L.34), said that his delegation, too, could accept the amended wording read out by the Chairman.

5. Australia was well aware that newly independent States, especially small ones, not only faced an immense burden arising from treaty arrangements, but often lacked the expertise to deal with it. The purpose of his delegation's amendment was to reduce the administrative problems of such States by placing the onus on the other parties, should they not agree to provisional application of a treaty as between themselves and the successor State, to reject such application expressly in writing. The procedure outlined in the Australian amendment was the opposite to that in the International Law Commission's text, but the effect, of course, would be the same.

6. The International Law Commission had regarded provisional application of a multilateral treaty as hardly possible, except in the case of a "restricted" multilateral treaty, and then only with the agreement of all the parties, since the final clauses of such treaties rarely contemplated the possibility of provisional participation; it had also noted, according to paragraph (2) of the commentary to article 26, that "multilateral" provisional application on a consensual basis did not appear to occur in practice (A/CONF.80/4, pp. 84-85). As noted in paragraph (3) of the commentary (*ibid.*, p. 85), the International Law Commission had preferred a different theoretical basis, namely, provisional application arranged bilaterally through collateral agreements.

7. That basis was the one adopted in the Australian amendment, which would lead to provisional application explicable as a network of collateral bilateral agreements between the successor State and all parties which had not expressly rejected provisional application by notice in writing.

8. The changes proposed in the Australian amendment were procedural and would obviate the presumption that conduct was in some cases to be regarded as agreement. They would lead to a reduction in the volume of communications needed to establish provisional application of a treaty, since only those States wishing to notify rejection—presumably a minority—would need to take any action. The procedure proposed would thus be of considerable practical help to successor States.

9. The Australian amendment should not be treated as a drafting proposal; it was an amendment of substance, though not, in his delegation's view, one of principle. His delegation hoped, therefore, that the

[1] For resumption of the discussion of article 25, see 35th meeting, paras. 51-52.

[2] The following amendments were submitted: Finland (to articles 26 and 27), A/CONF.80/C.1/L.31, and Australia (to article 26), A/CONF.80/C.1/L.34, the revised version of which (A/CONF.80/C.1/L.34/Rev.1) was also sponsored by Ireland.

Committee of the Whole would take a decision on its amendment at the end of the debate on article 26.

10. Mr. MARESCA (Italy) said that a newly independent State always began its existence with the good wishes of the international community, which would surely wish to see all multilateral treaty provisions concerning the new State's territory applied as flexibly and indulgently as possible.

11. In draft article 26, paragraph 1, his delegation thought the words "by reason of its conduct" might not be sufficiently explicit; not everyone took silence to mean consent. In that context, his delegation viewed the Australian amendment with sympathy; the element of certainty provided by the proposed new wording for paragraph 1, particularly the words "in writing expressly", would be an assurance to a successor State. In his delegation's view, those words were most appropriate and an improvement on the International Law Commission's text both technically and legally.

12. Mr. RANJEVA (Madagascar) said that the "clean slate" principle did not preclude provisional application of treaties, especially multilateral ones; some form of legal continuity was desirable.

13. His delegation was pleased to note that the International Law Commission's text referred to the express agreement of a party and thus avoided all ambiguity. The expression of consent was explicit in practice; the Australian amendment, however, sought to use another formula, namely, that of rejection. While his delegation appreciated the concern to avoid interrupting the continuity of international relations, it foresaw possible problems as a result of the Australian delegation's proposal.

14. In the first place, to require express rejection from other parties would destroy a right recognized by the principle of succession, namely, the right to participate in an international convention in accordance with *sui generis* modalities. A successor State would be hampered if it had to re-negotiate a treaty because of an express rejection; in particular, the attendant delays and periods of uncertainty could give rise to great difficulties for such a State. If the Australian delegation could so clarify its amendment as to remove that danger, his delegation could support the proposal.

15. Secondly, the proposed formulation was based on a purely theoretical speculation. The very fact that it might be difficult for one party to show its express will to exclude a newly independent State could mean that States which did not wish the treaty in question to extend to the newly independent State might destroy the effects of the treaty itself.

16. With regard to article 27, his delegation reiterated what it had said in the debate on article 22 concerning the difficulty of knowing what was to be inferred from different types of conduct.[3] The Vienna Convention on the Law of Treaties stated rules which gave rise to no difficulty. But when it came to the provisional application of treaties in the event of a succession of States, it would be dangerous to include the idea of inferring intentions from conduct.

17. As the representative of Senegal had said recently, treaties and other legal matters often failed to receive early attention by a newly independent State, which had many more pressing tasks before it.

18. Mr. ŠAKO (Ivory Coast) said that his delegation had no difficulty in supporting the Australian amendment because it introduced a presumption of the consent of the other parties to a treaty. It would thus facilitate the provisional application of treaties by the successor State, which would not be obliged to wait until the other parties had expressly agreed to provisional application.

19. Mr. MIRCEA (Romania) said that draft article 26 referred to the intentions of the successor State and the other States parties to the treaty in question. Any such reference to the intentions of the parties to a bilateral treaty was, however, lacking in draft article 27, which gave a good example of what was meant by tacit consent in a case of a succession of States in respect of treaties. His delegation would like the Expert Consultant to explain what kind of conduct could be taken as an indication of a State's intention to apply a treaty on a provisional basis.

20. In the amendment submitted by Finland, as orally amended, the words "by applying the treaty" did not make it clear whether the treaty would be applied definitively or provisionally. The amendment was, moreover, similar to the International Law Commission's text of draft article 27 in that it did not require the States parties to give notice of their intentions with regard to the application of the treaty. It was therefore unacceptable to his delegation.

21. The amendment to draft article 26 submitted by Australia had the advantage of eliminating the idea of tacit consent, but it introduced a presumption of consent to which his delegation could not agree. Indeed, it preferred the approach adopted by the International Law Commission in paragraph (3) of its commentary to draft article 26 (*ibid.*), where it referred to the case in which a multilateral treaty was, by a collateral agreement, applied provisionally between the newly independent State and a particular party to the treaty on a bilateral basis. The two parties thus had an opportunity of holding consultations to decide whether they would apply the treaty definitively or provisionally.

22. Mr. HELLNERS (Sweden) said that draft article 26 seemed to be based on the reasoning that the

[3] See above, 29th meeting, para. 5.

successor State should be given an opportunity to apply provisionally as many multilateral treaties as possible. Paragraph 1 accordingly provided that a multilateral treaty would apply provisionally between the newly independent State and any party which expressly so agreed or by reason of its conduct was to be considered as having so agreed. Thus, the International Law Commission's text imposed a definite requirement on the parties to the treaty in question. His delegation was generally favourable to the underlying idea. It thought that the amendment submitted by Australia which also favoured the successor State, merely said the same thing as the latter part of the International Law Commission's text, although in a different way.

23. Mr. SATTAR (Pakistan) said that, in principle, his delegation had no objection to the substance of draft article 26. It nevertheless wondered why the International Law Commission had considered it necessary, in paragraph 1, to introduce the idea of the express agreement of the other parties to a multilateral treaty, when it had not laid down the same condition in article 16. His delegation considered that, if a newly independent State could establish its status as a party to any multilateral treaty in force at the date of the succession of State without the consent of the other States parties, it should have the same right in regard to the provisional application of a multilateral treaty. He would like the Expert Consultant to explain why the International Law Commission had decided not to include the words "Subject to paragraphs 2, 3, 4 and 5" at the beginning of draft article 26, paragraph 1.

24. As to the question of the date when a multilateral treaty would begin to apply provisionally as between a newly independent State and the other States parties, the Australian amendment seemed to imply that the treaty would begin to apply provisionally as from the date of the notification of acceptance of the treaty by the newly independent State. His delegation believed, however, that it would be desirable for the multilateral treaty to apply provisionally from the date when the other States parties received notice of the newly independent State's intention that it should so apply, especially as some of the other parties might also be newly independent States. Subject to a clarification of that point, his delegation would be able to support the Australian amendment.

25. Mr. MEDJAD (Algeria) said that his delegation supported the Australian amendment, which wisely placed the burden of express rejection of provisional application on the shoulders of the other States parties to the treaty.

26. With regard to the question of "conduct" raised by the representative of Romania, his delegation also considered that the words "by reason of its conduct", at the end of draft article 26, paragraph 1, were likely to give rise to practical difficulties, and would be grateful to the Expert Consultant for an explanation of the meaning of those words.

27. Miss OLOWO (Uganda) said that, although her delegation supported the Australian amendment, it agreed with the representative of Sweden that the words "provided that a party may by notice in writing expressly reject provisional application as between itself and the successor State" had the same basic effect as the words "any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed" at the end of paragraph 1 of draft article 26 in the International Law Commission's text. That would be even clearer if the Australian proposal was amended to read: "provided that a party does not expressly reject in writing provisional application as between itself and the successor State".

28. Sir Francis VALLAT (Expert Consultant), replying to the question raised by the representative of Pakistan, said he did not think there were any real substantive reasons for the differences in wording between draft article 16, paragraph 1, and draft article 26, paragraph 1. The two articles were, however, rather different in structure: in article 16, the provisions of paragraph 1 were in fact subject to the provisions of paragraphs 2 and 3, whereas in draft article 26, the provisions of paragraph 5 were subject to the provisions of the preceding four paragraphs.

29. Referring to the question raised by the representative of Romania, concerning the kind of conduct which would be relevant under draft articles 26 and 27, he drew attention to paragraph (2) of the commentary to draft article 27 (*ibid.*, p. 86). The point the International Law Commission had tried to make in those two draft articles was that, although two States parties to a treaty would not necessarily agree expressly on the provisional application of a treaty, it might clearly be their intention that the treaty should apply provisionally. The application of the treaty alone might not be sufficient; it could also be necessary to have some supplementary evidence to show that the conduct of a particular State indicated that it intended the treaty to apply provisonally.

30. For example, if the successor State informed the other State concerned that it intended to apply a customs treaty provisionally and the other State admitted goods from the successor State at the rates of duty provided for in the treaty, such conduct might constitute evidence of acceptance of the successor State's intention to apply the treaty provisionally, but it would not necessarily constitute sufficient evidence, because there would be little to connect the conduct with the provisional application of the treaty. If, on the other hand, the other State party wrote a letter stating that it was content to apply the treaty provisionally, then the actual admission of the goods, combined with the letter, would clearly be conduct which would show that there was an implicit agreement to apply the treaty provisionally. Such conduct

was quite normal in relations between States and it had been the thinking of the International Law Commission that it should be possible to provide for the provisional application of treaties by conduct of that kind. Of course, exactly what kind of conduct would be required in particular cases would vary, as was only to be expected when applying any general principle.

31. Mr. MIRCEA (Romania) said that the question he had asked seemed to have been misunderstood. It had in fact related only to draft article 27, although he had referred by way of comparison to draft article 26. Nevertheless, the example given by the Expert Consultant had confirmed the fact that express agreement was necessary and that conduct was not enough: the successor State must inform the other State party to the treaty that it intended to apply the treaty provisionally. That element of intention was missing in draft article 27.

32. Mr. EUSTATHIADES (Greece), Mr. MANGAL (Afghanistan) and Mr. HASSAN (Egypt) supported the Australian amendment.

33. Mr. SIEV (Ireland) said that he supported the Australian amendment, but wished to raise a few additional points.

34. It would be useful if, in paragraphs 1 and 3 of article 26, the newly independent State was required to give notice in writing of its intention that the treaty should be applied provisionally.

35. The Australian amendment did not fix any time-limit within which a State party might reject the provisional application of a treaty. It might reasonably be required to do so within six months of receipt of the newly independent State's notice in writing of its intention. A provision should also be included to the effect that written notice should be sent to the depositary of the treaty or to the contracting States as the case might be.

36. Mr. MUDHO (Kenya) said that he welcomed the Australian amendment which dealt with the practical difficulties newly independent States would encounter in applying article 26. He also agreed with the Irish representative's proposals, particularly with regard to fixing a time-limit for rejection of the provisional application of a treaty.

37. Mr. NAKAGAWA (Japan) said that, although he recognized the practical advantages of the Australian amendment, he preferred draft articles 26 and 27 as they stood. Any provisional application of a treaty required the consent of the parties concerned and it should be given in a positive rather than a negative form.

38. Mr. SAKI (Sudan) said that he, too preferred draft article 26 to the Australian amendment, which presumed the provisional continuation of a treaty unless it was expressly rejected; the International Law Commission's text assumed the contrary, and that was more in line with article 23.

39. Mr. GILCHRIST (Australia), thanking speakers for their support of the Australian amendment, proposed that the Committee should defer taking a decision on it until the following meeting to give his delegation time to produce a text which took account of the comments made by the representatives of Ireland and Pakistan.

40. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished to postpone further consideration of articles 26 and 27 until the following meeting.

It was so decided.[4]

ARTICLE 28 (Termination of provisional application)

41. Miss WILMSHURST (United Kingdom) said that since, in the case of treaties falling within the category mentioned in article 16, paragraph 3, the refusal of only one party would suffice to prevent provisional application to a newly independent State under article 26, paragraph 2, it was logical that notice by only one party or contracting State should likewise suffice to terminate provisional application. She therefore suggested the addition of the words "one of" before the words "the parties" and before the words "the contracting States", in the last two lines of paragraph 1, subparagraph (*b*) of article 28.

42. Mr. MIRCEA (Romania) said that article 28 was closely linked with articles 26 and 27 and proposed that further consideration of it should be postponed until a decision had been taken on the Australian amendment to article 26.

43. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished to postpone further consideration of article 28 until the following meeting.

It was so decided.[5]

The meeting rose at 12.45 p.m.

[4] For resumption of the discussion of articles 26 and 27, see 32nd meeting, paras. 14-36.

[5] For resumption of the discussion of article 28, see 32nd meeting, paras. 37-46.