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33rd meeting of the Committee of the Whole

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ferences between those two types of treaty did not affect the question of provisional applicaton, and it should be provided that the provisional application of a bilateral treaty could be terminated if either party gave notice of its intention not to become a party to that treaty.

44. Mr. BRECKENRIDGE (Sri Lanka) said that his delegation preferred the text of draft article 28 as it stood, and would object to the inclusion of the words "one of", suggested by the United Kingdom representative.

45. Miss WILMSHURST (United Kingdom), replying to a question by the CHAIRMAN, said that her proposal should be viewed as a formal amendment of substance and put to the vote.

The United Kingdom amendment was rejected by 34 votes to 13, with 30 abstentions.

46. The CHAIRMAN said that, if there was no objection, he would take it that the Committee provisionally adopted the text of draft article 28 and referred it to the Drafting Committee for consideration.

It was so decided.[18]

ARTICLE 29[19] (Newly independent States formed from two or more territories)

47. The CHAIRMAN invited the delegations of Swaziland, Finland and Malaysia to introduce their amendments to article 29.

48. Mr. KRISHNADASAN (Swaziland) said that the reasons why the delegations of Swaziland and Sweden had proposed the deletion of article 29, paragraph 3, were similar to those which had prompted them to propose the deletion of article 18 (A/CONF.80/C.1/L.23).

49. During the discussion on the latter article,[20] it had been argued that the proposed deletion would deprive the successor State of a right. He did not think that the question of a right arose, either in article 18 or in article 29, paragraph 3. The appropriate procedure in both those cases was that of accession. The representative of Portugal had observed that, under article 18, the successor State would at best be succeeding to an intention, and had pointed out that there were many cases in which States signed treaties that were not subsequently approved. The United Kingdom representative had also expressed scepticism about article 18 and had said that it was the practice of his country not to infer an intention from the signature of a predecessor State, but to consult the Government of the successor State as to its participation in a treaty.

50. Parts of the International Law Commission's commentary to article 18 (A/CONF.80/4, pp. 61-62) were equally relevant to article 29.

51. Mr. FREY (Finland) said that his delegation's amendment (A/CONF.80/C.1/L.32) was essentially concerned with drafting. The insertion of the words "multilateral or bilateral" at the points indicated in paragraph 2 and subparagraph (*a*) of that paragraph, would make it clear to what type of treaty those provisions applied. His delegation had also proposed the deletion of the word "multilateral" in subparagraphs (*b*) and (*c*) of paragraph 3, because it was clear from the opening phrase of paragraph 3 that those subparagraphs applied only to multilateral treaties.

52. Mr. CHEW (Malaysia) said that his delegation's amendment (A/CONF.80/C.1/L.43) was consequential upon its amendment to article 17 (A/CONF.80/C.1/L.42 and Corr.1); as a suggestion relating only to drafting, it might appropriately be referred to the Drafting Committee for consideration.

53. Mr. SETTE CÂMARA (Brazil) said that, like the representative of Swaziland, he had some misgivings about the reference to "signature" in paragraph 3. Sir Humphrey Waldock, the first Special Rapporteur on succession of States in respect of treaties, had himself expressed doubt as to whether the signature of the predecessor State constituted a sufficient legal nexus between a treaty and the territory of the successor State to allow that State to treat the signature as if it were its own. The formula used in paragraph 3 was not very felicitous.

The meeting rose at 12.55 p.m.

33rd MEETING

Friday, 29 April 1977, at 4.35 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 29 (Newly independent States formed from two or more territories)[1] (*continued*)

1. Mr. MIRCEA (Romania) supported the proposal submitted by Swaziland and Sweden (A/CONF.80/

[18] For resumption of the discussion of article 28, see 35th meeting, paras. 59-85.

[19] The following amendments were submitted: Swaziland and Sweden, A/CONF.80/C.1/L.23; Finland, A/CONF.80/C.1/L.32, and Malaysia, A/CONF.80/C.1/L.43.

[20] For the discussion of article 18, see 27th meeting, paras. 27-58.

[1] For the amendments submitted to article 29, see 32rd meeting, foot-note 18.

C.1/L.23) to delete paragraph 3 of article 29. His position was in conformity with that taken by the Romanian delegation on article 18, concerning participation by a newly independent State in treaties signed by the predecessor State subject to ratification, acceptance or approval.[2] In the case of article 29, it was even more difficult to see how the newly independent State could ratify, accept or approve such treaties. Moreover, it would be very difficult to establish that the predecessor State or States had intended the treaty in question to extend to one or more of the territories from which the newly independent State was formed.

2. Mrs. THAKORE (India) expressed her full agreement with article 29, which provided that a newly independent State formed from two or more territories was subject to the same basic rules as any other newly independent State in regard to participation in multilateral or bilateral treaties or their provisional application. In her view, however, the same rule should apply to cases of uniting and separation of States. It was hard to see why the International Law Commission had applied the rule of continuity of treaty obligations to cases of uniting and separation of States, and the "clean slate" rule to other cases. Why should the principle of self-determination apply only to newly independent States and not to States formed by the uniting or separation of States?

3. Of the amendments to article 29, the Indian delegation supported that of Finland (A/CONF.80/C.1/L.32), which clarified the text of the article and could be referred to the Drafting Committee. It could not, however, accept the amendment by Swaziland and Sweden. The Malaysian amendment (A/CONF.80/C.1/L.43) was only consequential on the amendment to article 17 submitted by that country.

4. Mr. MUSEUX (France) supported the proposal of Swaziland and Sweden to delete paragraph 3 of article 29. It might seem illogical to maintain a proposal previously submitted in respect of another article and rejected; but he still hoped that the Committee might reconsider its decision. For the mere signature of a treaty by the predecessor State could not be regarded as a sufficient legal nexus to enable the newly independent State to succeed to the treaty. In addition, article 29, paragraph 3, introduced the predecessor State's intention. In criminal law, the notion of intention as applied to natural persons was already very difficult to grasp; one could imagine what difficulties that notion would raise if it had to be applied to States. He was therefore in favour of deleting paragraph 3 of the article, especially as there was no legal need for it.

5. Mr. STEEL (United Kingdom) said that his delegation had some difficulties with article 29. It seemed difficult to take a final decision on that article without having considered article 30 and the subsequent articles, with which it was closely linked. Moreover, it was open to question whether the formation of a newly independent State from two or more territories, and the uniting or separation of States, should really be placed under different legal régimes. Unnecessary anomalies should not be introduced into the draft.

6. The application of article 29 raised certain difficulties; first of all, where two territories forming part of a new State had been subject to different treaty régimes before the succession. For example, a treaty might have applied to territory A, which provided for the granting of certain facilities to a State C, whereas a treaty applying to territory B contained provisions incompatible with the granting of those facilities. The solution offered by article 29 consisted in giving the newly independent State the option, not the obligation, of succeeding to such treaties. But that solution did not solve all the problems, in particular where bilateral treaties were concerned. Moreover, the incompatibility between the two treaty régimes might only become apparent much later, at the time when the treaties were actually executed.

7. The application of article 29 also raised problems concerning reservations. A treaty in force in territory A might be subject to reservations which were incompatible with its application in territory B. It might be asked which reservations would take precedence when the treaty applied to the whole of the new State's territory. Those problems would arise in an even more acute form in connexion with article 30. His delegation was aware of the difficulties, but at the moment it had no solution to suggest.

8. He agreed with the French representative that it was artificial and unnecessary to ascribe an intention to the predecessor State at the time of signature, concerning the field of application of a treaty.

9. With regard to the amendments, those of Finland and Malaysia related only to drafting and could be referred to the Drafting Committee. His delegation supported the amendment submitted by Swaziland and Sweden, which dealt with substance, as it had supported a similar proposal relating to article 18.

10. Mr. NATHAN (Israel) also feared that the application of article 29 might cause difficulties, which would be even more serious in the case of article 30. Article 29, paragraph 2, subparagraph (*b*) gave the newly independent State the right to declare that the application of a treaty previously in force in respect of the territory to which the succession related would be restricted to the territory in respect of which it had been in force at the date of the succession. The application of that provision to law-making treaties, such as those relating to the traffic in narcotic drugs, copyright and industrial property, was likely to cause difficulties. In fact, such treaties could not be applied to only part of the territory of a newly independent

[2] See above, 27th meeting, para. 50.

State. For that reason he thought that the right which paragraph 2, subparagraph (*b*) conferred on a newly independent State should perhaps be restricted. Such restriction would not be contrary to the "clean slate" principle, on which the provision was based, since the new State could consent to be bound in conformity with articles 16 and 17.

11. With reference to the comments of the United Kingdom representative on the simultaneous application of different treaty régimes, he wondered whether the newly independent State should not have the right to choose which bilateral or multilateral treaty would apply in the event of incompatibility between the provisions of several treaties.

12. For the same reasons as the United Kingdom, his delegation supported the amendment of Swaziland and Sweden. The amendment submitted by Finland should be sent to the Drafting Committee.

13. Mr. FLEISCHHAUER (Federal Republic of Germany) said that he was not opposed to the substance of article 29, but he had doubts about its drafting. The article dealt with a special case of succession: that of a newly independent State formed from two or more previously dependent territories. The International Law Commission had provided for the application of the "clean slate" rule, but had given the new State the faculty of becoming bound. It might happen, however, that treaties, or reservations to treaties, which had been applicable to several territories, were incompatible. The solution provided by article 29, paragraph 2, subparagraph (*b*) was to give the new State the faculty of restricting the application of such treaties to the territories to which they had applied. That solution was not entirely satisfactory, since there might still be incompatibility, even if two treaty régimes did not apply to one and the same territory; and it did not seem that the saving clause in paragraph 2, subparagraph (*a*) was enough to solve the problem. Furthermore, a mixed treaty régime could raise serious domestic problems for the newly independent State.

14. All those problems were even more acute in the case of article 30, because that provision was based on the automatic continuation of treaty obligations. The Committee should not take a final position on article 29 until a satisfactory solution had been found for the case dealt with in article 30.

15. Mr. MANGAL (Afghanistan) said that the views expressed by his delegation on devolution agreements, referred to in article 8, and on unilateral declarations, referred to in article 9, also applied to the article under consideration.[3] The acceptance of bilateral or multilateral treaties by means of a devolution agreement or a unilateral declaration was a matter of procedure. Such acts by a newly independent State could be regarded as valid only on two conditions: if the establishment of the new State formed from two or more territories was in conformity with the principle of self-determination and was not the outcome of colonial arrangements; and if the treaties applied were lawful and the other parties to them agreed to their application. Subject to those two conditions, his delegation approved of article 29.

16. Mr. MARESCA (Italy) stressed the particular nature of article 29. It dealt with a special case of succession, which was subject to a rule embodied in article 29 of the 1969 Vienna Convention on the Law of Treaties: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[4] It was that legal presumption which the International Law Commission had applied, to both bilateral and multilateral treaties, whether they were already in force or not. All such cases called for the same rule. Consequently, his delegation was not in favour of deleting paragraph 3 of article 29.

17. On the proposal of Mr. MALINGA (Swaziland), who drew attention to the large number of questions raised, the CHAIRMAN suggested that the Committee should defer taking a decision on article 29 and the amendments thereto until the 34th meeting.

It was so decided.

REPORT OF THE DRAFTING COMMITTEE ON THE TEXT OF ARTICLE 11 AND ON THE TITLES AND TEXTS OF ARTICLES 13 TO 15 ADOPTED BY THE DRAFTING COMMITTEE (A/CONF.80/C.1/2)

18. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee's second report (A/CONF.80/C.1/2) related to the text of article 11 and to the titles and texts of articles 13 to 15. With regard to article 11, he observed that when, at its 19th meeting, the Committee of the Whole had adopted the text of that article proposed by the International Law Commission and had referred it to the Drafting Committee, it had been on the understanding that it did so without prejudice to the decision which the Committee of the Whole would take, during its consideration of article 12, on the amendment to articles 11 and 12 submitted by Afghanistan (A/CONF.80/C.1/L.24) which, *inter alia*, would change the title of article 11. Consequently, the Drafting Committee had not yet examined the title of article 11, which had, however, been retained in square brackets in document A/CONF.80/C.1/2 for the convenience of the members of the Committee of the Whole.

19. The Drafting Committee had adopted the text of article 11 which the Committee of the Whole had referred to it and which was in conformity with the

[3] See above, 13th meeting, paras. 43-47.

[4] *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. 293.

text proposed by the International Law Commission, though in the French version the words *"n'affecte pas"* had been replaced by the words *"ne porte pas atteinte"*, which seemed more in keeping with French usage. The words *"ne porte pas atteinte"* had, for example, been used in articles 70 and 71 of the Vienna Convention on the Law of Treaties, when the words "does not affect" appeared in English and the words *"no afecterá"* in Spanish.

20. Mr. TABIBI (Afghanistan) observed that it had been agreed that the Committee would wait until it had completed consideration of article 12 before taking a decision on the amendment submitted by his delegation,[5] which would change the titles and combine the texts of articles 11 and 12. He thought it would be preferable for the Committee to wait until it had completed consideration of article 12 before it adopted article 11, since both those articles dealt with territorial régimes and it would be logical to adopt them at the same time.

21. Mr. YIMER (Ethiopia) pointed out that the amendment submitted by Afghanistan, which would combine articles 11 and 12, was purely a drafting proposal and did not affect the substance of article 11. In his opinion, that article was in no way related to article 12; it was a separate article which the Committee had provisionally adopted by an overwhelming majority. He therefore proposed that article 11 should be put to the vote immediately.

22. Mr. SEPÚLVEDA (Mexico) said he too saw no reason to postpone the vote on article 11, which was a separate article that could stand on its own merits. Articles 11 and 12 did not deal with the same subject-matter: the former dealt with boundary régimes while the latter concerned the use of a territory. Moreover, it was unlikely that article 12 would be adopted at the current session. Here therefore supported the proposal made by the representative of Ethiopia.

23. Mr. TABIBI (Afghanistan) formally moved the adjournment of the debate on article 11.

24. Mr. MUDHO (Kenya) said that the adoption of article 11 would in no way prejudge the decision the Committee would take on the amendment submitted by Afghanistan. He therefore supported the proposal made by the representative of Ethiopia.

25. Mr. SATTAR (Pakistan) said that all the Committee had to do was to approve the draft submitted by the Drafting Committee. In clarification of his delegation's position, he referred to a statement made the previous day by the Prime Minister of Pakistan in the Parliament concerning his Government's intention to settle all border disputes with Afghanistan on an equitable basis.

[5] See above, 19th meeting, para. 7.

26. Mr. TABIBI (Afghanistan) said he would not press his motion for the adjournment of the debate, or his proposal that articles 11 and 12 should be combined.

27. The CHAIRMAN said that, if there was no objection, he would take it that the Committee of the Whole approved, on second reading, the text of article 11 proposed by the Drafting Committee.

It was so decided.[6]

The meeting rose at 5.40 p.m.

[6] For resumption of the discussion of article 11 and its adoption (without a title) by the Conference, see 5th plenary meeting.

34th MEETING

Monday, 2 May 1977, at 5. 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)*

REPORT OF THE DRAFTING COMMITTEE ON THE TEXT OF ARTICLE 11 AND ON THE TITLES AND TEXTS OF ARTICLES 13 TO 15 ADOPTED BY THE DRAFTING COMMITTEE (A/CONF.80/C.1/2) *(continued)*

Article 13 (Questions relating to the validity of a treaty)[1]

1. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Drafting Committee had made only one change in article 13: it had replaced the word "prejudicing" by the word "prejudging" in the English text, the words *"préjudiciant [...] à"* by the words *"préjugeant [...] d'"* in the French, and the words *"en modo alguno en perjuicio de"* by the words *"de manera que prejuzgue de modo alguno"* in the Spanish, so as to bring out the meaning which the Committee of the Whole wished to give that article.

2. The CHAIRMAN said that, if there were no objections, he would take it that the Committee adopted on second reading the title and text of article 13 proposed by the drafting Committee.

It was so decided.[2]

[1] For earlier discussion of article 13, see 22nd meeting, paras. 1-13.

[2] For the adoption of article 13 by the Conference, see 5th plenary meeting.