

United Nations Conference on Succession of States in Respect of Treaties

Vienna, Austria
Resumed session
31 July-23 August 1978

Document:-
A/CONF.80/C.1/SR.37

37th Meeting of the Committee of the Whole

Extract from volume II 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)*

SUMMARY RECORDS OF MEETINGS OF THE COMMITTEE OF THE WHOLE

37th MEETING¹

Monday, 31 July 1978, at 4 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 30 (Effects of a uniting of States in respect of treaties in force at the date of the succession of States)²

1. The CHAIRMAN invited the Committee to resume its consideration of the draft articles submitted by the International Law Commission³ by examining article 30. He drew attention to the amendments to that article proposed by the Federal Republic of Germany (A/CONF.80/C.1/L.45/Rev.1), Switzerland (A/CONF.80/C.1/L.44) and Japan (A/CONF.80/C.1/L.49).

2. Mr. TREVIRANUS (Federal Republic of Germany), introducing the amendment submitted by his delegation, said that article 30 marked the entry to a new field, for Part IV of the draft clearly contained rules of progressive development and the article was the first, with the

¹ The records of the 1st to 36th meetings of the Committee of the Whole, held in 1977, are contained in the *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), pp. 21 *et seq.*

² The following amendments were submitted: Switzerland, A/CONF.80/C.1/L.44 (1977 session); Federal Republic of Germany, A/CONF.80/C.1/L.45 (1977 session), the revised version of which (A/CONF.80/C.1/L.45/Rev.1) was submitted at the resumed session; Japan, A/CONF.80/C.1/L.49 (resumed session).

³ *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (A/9610/Rev.1), chap. II. (The report of the International Law Commission on the work of its twenty-sixth session also appears in the *Yearbook of the International Law Commission, 1974*, vol. II, part one, pp. 157 *et seq.*) The Conference had before it a reprint of chapter II of that report (A/CONF.80/4) and a working paper (A/CONF.80/WP.1) containing the draft articles adopted by the International Law Commission in English, French, Spanish and Russian; separate texts in Arabic and Chinese were also issued under the same symbol. In this volume, for practical reasons, Conference document A/CONF.80/4 is used as the reference for the draft articles adopted by the International Law Commission and for the commentaries on them.

exception of articles 11 and 12, to introduce the principle of continuity. His delegation was generally in favour of the International Law Commission's decision that there should be continuity of treaty régimes in the event of the uniting of States. That was, indeed, necessary in order to preserve stability in treaty relations.

3. There was, however, a marked contrast between the "clean slate" formula and the other provisions which the Conference had adopted in relation to newly independent States, taken together, and the principle of continuity that was now proposed. His delegation had no fear that the "clean slate" formula would lead to difficulties, since newly independent States had historically shown a tendency to maintain the treaty links of their predecessors. The *pacta sunt servanda* rule as laid down in the draft articles was mitigated only by a limited number of escape clauses. It was, however, his delegation's impression that the escape clauses contained in article 30 left too much scope for differing interpretations. It was in order to render those clauses less ambiguous and, at the same time, to ensure that the article took into account the elements qualifying the *ipso jure* continuity to which the International Law Commission had referred in paragraph 28 of its commentary on articles 30, 31 and 32 (A/CONF.80/4, p. 98) that his delegation proposed its amendment.

4. The situation that would obtain after the uniting of States required special treatment. In a State composed of several previously independent entities, there would be different treaty régimes, with different rules applying in individual areas of the new State, or even within the same area. Conflicts were therefore inevitable. Some treaties might even become inoperable due to the application of another instrument in the same or another part of the new State. Such situations were particularly likely to arise in connexion with agreements in the field of trade, tariffs, most-favoured-nation treatment, or extradition. The escape clauses currently provided in article 30 were inadequate to provide a just and equitable solution to such conflicts, since they concerned one treaty only and did not take account of the possibility that other treaties might be in force in the territory concerned.

5. The first part of his delegation's amendment illustrated its belief that, where treaties were wholly or partly incompatible, automatic continuity of an existing treaty régime would be impossible. Contrary to what had been proposed in the first version of the amendment (A/CONF.80/C.1/L.45), the second part of the proposal no longer provided for the extinction of both the incompatible treaties, but left it to the new State to choose between the conflicting provisions. That would enable the new State to suit its domestic needs and would, at the same time, ensure

at least a measure of stability in treaty relations. The objection that a State having freedom of choice would inevitably select the régime that was most favourable to itself and might in so doing neglect its partners' interests could also be raised against the possibility of the extension of the territorial scope of a treaty offered by the International Law Commission in paragraph 2, subparagraph (a), of its version of article 30. The International Law Commission's provision, however, said nothing about what would happen if a treaty that was extended to the entire territory of a successor State was incompatible with other obligations of that State or of one of its parts.

6. His delegation was well aware that its proposal might not represent the only solution to the problem, and it therefore remained open to other suggestions. It also appreciated that some delegations might wish to put the second part of its amendment to a separate vote. It was, however, convinced that the first part of the amendment was essential in order to remedy a genuine omission from the current text of article 30.

7. Mr. RITTER (Switzerland) said that the amendment proposed by his delegation took account of the possibility that the boundaries of a State which became part of a federal successor State might be subject to modification after the date of the succession. That such a situation might arise in practice could be seen from reference to, for example, the case of the Canton of Geneva. Following its accession to the Swiss Federation in 1848, the Canton of Geneva had maintained a certain capacity to conclude international treaties, as permitted by the Swiss Constitution, and its boundaries had changed. If paragraph 2 of the International Law Commission's draft article were applied without modification to an entity like the Canton of Geneva, the effect would be to institute a double régime, under which treaties concluded by the entity prior to its accession to the Federation would apply within the boundaries that had existed prior to that accession, whereas the territorial scope of treaties concluded after that date would vary as the boundaries of the entity changed. To avoid that problem, his delegation proposed that the Conference adopt the principle of the mutability of treaties, in keeping with the variations in the boundaries of the States which concluded them. The effect of its amendment would be, in essence, to ensure that the constituent parts of a federal successor State were subject to the same régime as the federation as a whole. That would meet a practical need and ensure security of the law for individuals.

8. Mr. NAKAGAWA (Japan), introducing the amendment submitted by his delegation, said that his delegation shared the view that the uniting of States would probably become a more frequent method of the formation of successor States in the future. It was, therefore, all the more important that the Conference should formulate a reasonable and equitable rule governing the effects of the uniting of States in respect of treaties. Basically, his delegation had no difficulty in endorsing the principle of continuity as proposed by the International Law Commission in its draft

article 30. It nevertheless felt that the number of exceptions to that rule for which the article currently provided must be increased. That was because there might be situations in which it would be practically impossible, or inequitable, to limit the territorial scope of a treaty, since such limitation might, for example, enable a criminal to evade the application of an extradition treaty by moving to a part of the territory of the successor State to which that treaty did not apply. That shortcoming could not be completely remedied by the extension of a treaty to the entire territory of the successor State through notification by the successor State or agreement between the States parties concerned in accordance with paragraph 2 of article 30. It could, however, be rectified by reversing the general rule laid down in article 30 and by providing that a treaty would apply to the entire territory of the successor State if the two conditions set forth in his delegation's proposed amendment were fulfilled.

9. Mrs. THAKORE (India) said that, in article 30, the International Law Commission had adopted the principle of *ipso jure* continuity of treaty obligations with respect to treaties in force at the date of the succession of States, on the basis of State practice, the opinion of the majority of writers, and above all the need to preserve the stability of treaty relations. Her delegation, however, had some doubts about the advisability of rigidly pursuing the principle of continuity in the case of succession of States arising from a uniting of States, and could not understand why the principle of self-determination should not be applied in that case, as in the case of a newly independent State. In the view of her delegation, it should be left to the new State created by the uniting or separation of States to decide whether or not it wished to accept the obligations contracted by its predecessor State.

10. As the international community was likely to be confronted in the near future with more cases of succession of States arising from a uniting of States, because of the increasing tendency of States to group themselves into new forms of associations, the importance of that category of succession of States hardly needed to be emphasized. It might therefore be questioned whether considerations of stability of treaty relations in that case were so paramount as to require the sacrifice of the principle of self-determination. Stability would not necessarily result from the indiscriminate application of the principle of continuity, without regard to the wishes of the State in question. The principle of consent was the basic principle of the law of treaties, and adherence to that cardinal principle was more likely than anything else to contribute to the stability of treaty relations and the promotion of international co-operation.

11. As to the amendments to article 30, the Indian delegation viewed with sympathy the idea underlying the amendment proposed by the Federal Republic of Germany and was of the opinion that the principle underlying that amendment would also apply to articles 33, 34, 35 and 36. The amendment proposed by Switzerland might perhaps be considered by the Drafting Committee with a view to bringing out its intention more clearly. She would comment

on the Japanese proposal, which had just been circulated, later on.

12. Mr. ROVINE (United States of America) said that his delegation viewed with favour article 30 as drafted by the International Law Commission. The continuity rule was the proper approach for both bilateral and multilateral treaties in the case of a uniting of States, and was not inconsistent with the right of self-determination. The problem with article 30, however, was that it omitted to address itself to the serious problem of conflicting treaty obligations, a problem which had not been focussed on by the International Law Commission either in its articles or in the commentary; the Conference should therefore examine the question of conflicting treaty régimes, which could easily be envisaged as arising in such matters as trade agreements, for example.

13. One possible solution had been suggested by the Federal Republic of Germany, (A/CONF.80/C.1/L.45/Rev.1) namely, that the successor State would make a choice, but such a solution might not protect all the treaty interests involved and might result in one State being unhappy with an approach sanctioned by a rule of the convention. A second possibility, that originally proposed by the Federal Republic of Germany (A/CONF.80/C.1/L.45) was to negate such conflicting treaty provisions, a harsh but nevertheless possible solution. A third approach, which was to be proposed by the United States as article 30 *bis* (A/CONF.80/C.1/L.50), would require nations which had succeeded to conflicting treaty régimes to try to end conflicts by consultation and negotiation with the other treaty party or parties; if after a reasonable period it proved impossible to resolve the conflicts, then the conflicting treaty provision would come to an end. Any questions of separability could be resolved by reference to article 44 of the Vienna Convention on the Law of Treaties⁴ A fourth possible solution was negotiation alone, by imposing a requirement on States to negotiate with the parties in question where there were conflicting treaty provisions to which they had succeeded. Such a solution might take the form either of an article or of a simple conference resolution to indicate awareness of the problem but the absence of a precise rule. The Conference had a duty to consider all four approaches in greater depth.

14. Mr. STUTTERHEIM (Netherlands) said that his delegation favoured the continuity principle with regard to treaties, unless there were major reasons for admitting an exception as in the case of newly independent States. The settlement of disputes should be expressly provided for.

15. His delegation had some difficulty with the amendments proposed by the Federal Republic of Germany in that a successor State in the sense of the article, was different from a decolonized State. It therefore preferred the inclusion of a provision such as the article 30 *bis*,

⁴ See the text of the Convention in *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), pp. 287 *et seq.*

proposed by the United States, or a resolution recognizing the problem. It could support the amendment proposed by Switzerland. It had not had time to consider the Japanese proposal.

16. Mr. YASSEEN (United Arab Emirates) said that the provisions of article 30 as drafted by the International Law Commission invoked the principle of *pacta sunt servanda* and that it was not possible for any State, in the case of a uniting of States, to forgo such contractual obligations. His delegation could support an article invoking that fundamental principle.

17. Of the amendments before the Committee, that of the Federal Republic of Germany was not acceptable, since it offered a new State the possibility of choosing between one obligation or another; it would clearly not have the freedom to choose if international law were invoked.

18. His delegation approved the spirit of the Japanese proposal but saw technical difficulties in that the territory of the new State was not bound to apply the treaty, yet was bound by the treaty itself; such a situation ran counter to the principle of *pacta sunt servanda* and was therefore unacceptable. Account had to be taken of States joined by a convention but not parties to original treaties in force in other territories.

19. The Swiss proposal raised the question of the application of the moving frontiers theory. His delegation had no technical objection to the amendment but was not certain whether it was in fact necessary. It did, however, deserve further consideration.

20. With regard to the point made by the United States, he did not consider it part of the task of the Conference to consider the question of conflicting treaty obligations, which was a vast question and in his opinion was already settled by the Vienna Convention on the Law of Treaties.

21. Mr. MARESCA (Italy) said that article 30, which marked the dividing line between the two main sections of the draft articles, reflected that same spirit of dynamism which had always animated the international community in the matter of succession of States. It seemed to him, however, that paragraph 1 was lacking in one important element, since subparagraph (b), which provided for an exception to the rule laid down in the opening clause in cases where the application of the treaty "would be incompatible with its object and purpose or would radically change the conditions" for its operation, did not extend to cases of possible conflict with previously existing rules. Paragraph 2 likewise gave him some cause for concern for, as he read it, its terms would apply irrespective of the form of union adopted by the new State. Taking the case of Italy, for example, had all the treaties existing prior to its unification remained in force, there would have been utter chaos: happily, that had not been the case. He therefore considered that some provision should be added to paragraph 2 to avoid what he would term a "patchwork" effect on the whole of the new territory.

22. On those grounds, he welcomed the amendment proposed by the Federal Republic of Germany which laid

down in clear terms that incompatibility with any existing obligations would also be a reason for avoiding the automatic application of a treaty. Paragraph 2 of the article could perhaps be accepted on the understanding that the successor State must have opened negotiations with the predecessor States and that only in the event of the failure of such negotiations would the successor State be the sole judge in the matter. Alternatively, paragraph 2 could be deleted, although personally he would prefer it to be retained.

23. He likewise welcomed the amendment proposed by Switzerland, since it defined the scope of paragraph 2 as it applied to the case of a federal, as opposed to a unitary, State. Its inclusion in the draft article would reflect the principle of the mutability of frontiers.

24. Lastly, he endorsed the amendment proposed by Japan which, by providing for the application of a treaty throughout the whole of a federated State, would introduce an element of balance in regard to paragraph 2.

25. Mrs. BOKOR-SZEGŐ (Hungary) said that the Swiss amendment seemed to differ from the terms of article 30 in that it dealt not with a succession of States in the strict sense but rather with a change occurring in the territory of a subject of international law following unification. To assist her in the comprehension of that amendment, she would ask the Swiss representative to elaborate on his proposal.

26. Mr. RITTER (Switzerland) said he agreed that any change in the frontiers between the States members of a union, whether federal or other, was not a succession of States within the terms of the convention. The purpose of his delegation's proposal, however, was not to assimilate that question to a succession of States as such but rather to deal with the effect of paragraph 2 in the event of a change of frontiers. In such a case, there were two possibilities: if the members of the federal State did not have capacity to conclude treaties, as was the case under the constitutions of many such States, there would be no objection to applying the terms of paragraph 2 as drafted, for even if the frontiers were changed subsequently, the former frontiers would be maintained for the purposes of the treaty. On the other hand, if the members of the federal State did retain some capacity to conclude treaties, as was the case under certain other constitutions, paragraph 2 would give rise to a dual situation in the case of treaties concluded prior to the creation of a federal state, the internal frontiers would be frozen at the time of the creation of that State, but in the case of treaties concluded subsequent to its creation, the principle of mutability would apply. To avoid that situation, his delegation therefore proposed that, where the members of a federated State retained their capacity to conclude treaties, the principle of the mutability of frontiers should be re-established.

27. The representative of the United Arab Emirates, if he had understood him aright, was not opposed to the spirit of the Swiss amendment but asked whether it would in fact add anything to the draft article. In his own view, the answer was clearly in the affirmative. The opening clause

of paragraph 2 made it quite clear that the intention was to do away with the principle of mutability of frontiers within a federated State. If, however, that principle were accepted, then the draft article would have to be amended.

The meeting rose at 5.25 p.m.

38th MEETING

Tuesday, 1 August 1978, at 10.20 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*)

COMMUNICATION CONCERNING ARTICLE 7¹

1. Mrs. VALDÉS PÉREZ (Cuba) announced that her delegation was withdrawing its amendment to article 7 (A/CONF.80/C.1/L.10/Rev.2), which had been referred to the Informal Consultations Group for consideration.

ARTICLE 30 Effects of a uniting of States in respect of treaties in force at the date of the succession of States² (*continued*)

2. Sir Ian SINCLAIR (United Kingdom), noting that article 30 was based on the principle of *ipso jure* continuity, said he agreed with the International Law Commission that that principle must be considered as the basic one to be applied in the case of a uniting of two already independent States. Article 30 did not deal with the case of the formation of a newly independent State, in which the application of the "clean slate" principle was justified by the fact that, at least in some instances, a treaty might have been applied to a territory by the metropolitan Power without the consent of the people of the territory in question. Although the logic of the principle of self-determination required that the "clean slate" rule should be applied in the latter case, the same was not true in the case of a uniting of two already independent States, in which the principle of *ipso jure* continuity seemed to apply. However, the principle of *ipso jure* continuity could not be

¹ For the discussion of article 7 at the 1977 session, see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), pp. 64-88, and 233.

² For the amendments submitted, see 37th meeting, foot-note 2.