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38th Meeting of the Committee of the Whole

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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-SZEGÖ (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 7[1]

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 States[2] (*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

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[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.

applied indiscriminately, for account had to be taken of two basic problems: first, what would be the territorial scope of a treaty which, at the date of the uniting of State A and State B, applied to the territory of State A; and, secondly, what would happen, in the case of the uniting of State A and State B, if a treaty provision which applied to the territory of State A conflicted with another treaty provision which applied to the territory of State B.

3. According to article 30, paragraph 2, any treaty continuing in force in the case of a uniting of States applied only in respect of the part of the territory of the successor State in respect of which the treaty had been in force at the date of the succession of States, unless the successor State and the other States concerned otherwise agreed or, in the case of a general multilateral treaty, the successor State made a notification that the treaty applied in respect of its entire territory. While acknowledging that that rule was based on State practice, he was not sure that it could provide a solution in all the cases that were likely to arise. For example, if State A, which had concluded a commercial treaty with State X, united with State B, would it, in practice, be possible to continue to apply that treaty only to the territory of State A and to the persons who belonged to that State? His opinion was that, in such a case, the treaty must apply to the entire territory of the successor State. He was therefore in favour of the Japanese amendment (A/CONF.80/C.1/L.49), which made the text of article 30 somewhat more flexible.

4. His delegation was grateful to the delegation of the Federal Republic of Germany for having raised the question of the incompatibility of treaty obligations in the amendment it had proposed (A/CONF.80/C.1/L.45/Rev.1). It agreed that an exception should be made to the principle of *ipso jure* continuity when the application of the rules of the convention entailed incompatibility between treaty obligations, either for the successor State or for any other State. Indeed, the problem could arise not only in the context of article 30, but also in that of article 29, as the result of the emergence of a newly independent State formed from two or more territories.

5. His delegation was therefore in a position to support the first part of the amendment proposed by the Federal Republic of Germany, but it could not support the second part of that amendment, for the solution of allowing the successor State to choose which of the two treaties was to apply was too radical. In his delegation's opinion, that solution, which allowed the successor State to settle the matter as it pleased, was not the best way of reconciling the interests of the parties to the treaty. He therefore proposed that the first part of the amendment by the Federal Republic of Germany should be put to a separate vote.

6. He endorsed subparagraph (*a*) of the new article 30 *bis* proposed by the United States of America (A/CONF.80/C.1/L.50), which required the successor State and the other parties to the treaties in question to hold consultations and negotiations in order to eliminate any conflicts that might arise. However, he had some doubts about the rule set forth in subparagraph (*b*), which would provide ammunition to those parties to the treaty which had an interest in the treaty's ceasing to be in force.

7. In general, his delegation considered that the solution to the problem of conflicting treaty régimes was to be found in the first part of the proposal by the Federal Republic of Germany and in a Conference resolution inviting the successor State and the other parties to the treaty to make every effort to resolve any incompatiblity resulting from the application of the rules laid down in the Convention through consultation and negotiation. It would therefore be prepared to support the proposed Conference resolution which the United States had submitted in document A/CONF.80/C.1/L.51. It supported the principle of the amendment by Switzerland (A/CONF.80/C.1/L.44), but thought that it was for the Drafting Committee to decide whether that admendment should be incorporated in article 30 or in article 14.

8. Mr. MUSEUX (France) said he considered article 30 to be a key provision and one of the most important in the Convention. If, despite its importance, that article had been the subject of few comments by Governments, that was probably because it was a well-drafted and balanced article, the basis for which was not questioned by the international community. In his opinion, the principle of continuity enunciated in that article was fully justified, not only because the article related to already independent States—and not to former colonial territories—but also because there was a fundamental difference between cases of scission and cases of union. In all cases of scission, there was conflict between the component parts of a legal entity; that was why the International Law Commission had opted for the "clean slate" principle. Article 30, on the other hand, referred to the case of entities which united because they were compatible: it was therefore logical for the system of obligations and rights which had bound them to continue in force.

9. The International Law Commission had placed certain limits on the principle of continuity. It had, in particular, limited the territorial scope of the treaty, for, under article 30, paragraph 2, the treaty continued to have the same area of application as before the uniting of States. He agreed with that rule, even though it might give rise to some practical difficulties, for he considered that, in the situation referred to in article 30, such difficulties would be inevitable. In his opinion, the adoption of a more radical solution, such as the one of extending the territorial scope of the treaty, might lead to even more serious difficulties. He was therefore in favour of maintaining the same territorial scope as before the uniting of States.

10. The Japanese amendment had the effect, in certain cases, of extending the territorial scope of the treaty. It was obvious that, in the case of an extradition treaty, to which the representative of Japan had referred at the preceding meeting, the application of such a treaty to only part of the territory of the successor State might give rise to practical difficulties. He did not, however, think that the Japanese amendment would enable those difficulties to be overcome, for, if each of the predecessor States had concluded an extradition treaty with a third State, it would not be clear

which of those treaties would apply to the entire territory of the successor State. He considered that the International Law Commission's text, paragraph 2 (*a*) of which provided that the successor State could make a notification that the treaty would apply in respect of its entire territory, was flexible enough and that it was not necessary to provide for a binding obligation, as was done in the Japanese amendment. In his opinion, it would, moreover, be difficult to determine the cases in which the territorial scope of the treaty was to be extended in that way.

11. He was grateful to the Federal Republic of Germany for having drawn the Committee's attention to the particular difficulties which might result from the incompatibility of treaty provisions. He was, however, of the opinion that such incompatibility was limited, for every treaty had its own territorial scope and there was not usually any overlapping between the scopes of various treaties. There could, of course, be borderline cases. It therefore had to be decided how far it was possible to go in resolving the problem of the incompatibility of treaty provisions. The representative of the United Kingdom thought that the Committee should not go too far, that it was sufficient to adopt the first part of the subparagraph (*c*) proposed by the Federal Republic of Germany and to seek a solution through negotiation, as provided for in subparagraph (*a*) of the article 30 *bis* proposed by the United States.

12. In his opinion, the amendment proposed by Switzerland was not, strictly speaking, an amendment of substance, but, rather, a rule of interpretation concerning the scope of paragraph 2 of the text proposed by the international Law Commission. Like the representative of the United Arab Emirates,[3] he thought that the problem which that amendment was designed to solve was a matter to be considered by the Drafting Committee. He did not think that the International Law Commission had wanted to rule out the solution proposed by the Swiss amendment or to disregard the problem raised by variations in the frontiers of the territorial entities composing the successor State. In his opinion, the problem was one of a drafting nature, for article 30, paragraph 2, appeared to come down on the side of a crystallization of territorial limits. He was therefore in favour of the principle of the Swiss amendment, it being understood that the Drafting Committee would decide on the final wording of that amendment and its position in the Convention. In his opinion, the best place for that amendment might be in article 30, paragraph 2, since it related to the interpretation of that paragraph.

13. Mr. MAKAREVICH (Ukrainian Soviet Socialist Republic) said that he was satisfied with the contents of article 30 as submitted by the International Law Commission, which in his view required only a few minor drafting changes. He considered that the principle which should apply in the case of a uniting of States was that of *ipso jure* continuity, which was consistent with the principle *pacta sunt servanda* and ensured the stability of treaty relations.

14. He shared the views of the representative of the United Arab Emirates[4] concerning the amendment submitted by the Federal Republic of Germany. That amendment conflicted with certain principles of international law, particulary the principle *pacta sunt servanda,* and jeopardized the rights of other States parties to the treaty. Under the amendment, the successor State could settle unilaterally the problem posed by the incompatibility of the treaties to which it had succeeded, without basing itself on the objective criteria set forth in article 30, paragraphs 1 (*b*) and 3, namely, the object and purpose of the treaty. The extremely complicated problem of the separability or non-separability of treaty provisions had not been solved by the Vienna Convention on the Law of Treaties,[5] and no attempt should be made to solve it in the present convention. He could not, therefore, support the amendment of the Federal Republic of Germany.

15. The case referred to in the Swiss amendment was not assimilable to the case of the uniting of States referred to in article 30, in which the predecessor States ceased to exist in order to form a new State. In his opinion, it was the principle of *de jure* continuity and not the moving frontiers principle that should apply in the case referred to in article 30, whereas in the case referred to in the Swiss amendment article 14 was applicable. The amendment therefore seemed to him to be superfluous.

16. The Japanese amendment was at variance with the provisions of article 30 and might have undesirable consequences. According to that amendment, if a small State which had concluded a customs tariff agreement for the import of goods united with a much larger State, which had not concluded an agreement of that kind, the customs preferences provided for by the agreement in question would be extended to the entire territory of the new State, in other words, to a much larger territory than that to which they had applied originally. Thus, the Japanese amendment might place the successor State in a very difficult position. He could not, therefore, support it. If a general multilateral treaty was to be applicable to the entire territory of the successor State, the successor State must make a notification, as stipulated in article 30, paragraph 2 (*a*).

17. His delegation reserved the right to state its position on the article 30 *bis* proposed by the United States, at a later stage.

18. Mr. SCOTLAND (Guyana) said that article 30 dealt with two aspects of the question of treaty succession. In paragraph 1 it considered the existence or subsistence of the treaty relationship when two or more States united to form a new State. In paragraph 2 it considered the territorial scope or object of the treaty. He stressed that paragraph 1 of article 30 contained a presumption in favour of the continuity of treaty relations; since at least one of the

[3] See 37th meeting, para. 19.

[4] *Ibid.*, para. 17.

[5] 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.*

entities forming part of the new State was a party to the treaty in question, it should not be deprived of its status as a party only because it had united with another State to form a new State. In addition, the principle *pacta sunt servanda* ensured that the treaty obligation continued to be enforceable in respect of the territory of the former State which had been a party to the treaty. He pointed out, with regard to the wording of the article, that the effect of subparagraph 1 (*a*), when read with the *"chapeau"* of the paragraph, served to maintain treaty relations for the successor State even if that State did not intend to maintain them. It could, of course, be argued that recourse could be had to the procedure for terminating such relations established in the treaty, but such a procedure was open only to the parties to the treaty in question, and the contention of the successor State would be that, as a new entity, its only obligations were those it expressly assumed when it came into being, in accordance with the "clean slate" principle. In the opinion of his delegation, however, such an argument would seriously impair the stability and security of treaty relations. In fact, article 30 was not an appropriate instance for the application of the "clean slate" principle. All States uniting to form a new entity would have existing treaty obligations at the moment of their union, unlike newly independent States. For those States, the fact of entering into treaty relationships as sovereign States, followed by the fact of participating voluntarily in a union of States, constituted an affirmation of their sovereignty and an unmistakable expression of their right to self-determination. That was why his delegation considered that the presumption of continuity set forth in paragraph 1 was justified and that an act of the new State was necessary to terminate treaty relations contracted previously by an entity now forming part of its territory.

19. In paragraph 2, which related to the territorial scope of the treaty relations, the presumption of continuity was limited to the part of the territory of the successor State to which the treaty obligation in question had applied. If the two States or all the States forming the new entity had been parties to the same treaty, each of them would enter the union with the obligations it had previously assumed with respect to its territory. The presumption in paragraph 2 was properly made since it was later on provided that decisions to the contrary could be reached by agreement.

20. It appeared to his delegation that it could further examine the article from the point of view of the effective date of entry into force of the treaty for the successor State. If, as was established in the *"chapeau"* of paragraph 2, the treaty obligations rested upon only a part of the territory of the new entity, those treaty obligations would apply only in respect of the part of the territory of the successor State in respect of which the treaty had been in force but fell to be discharged by the successor State in its capacity as sovereign. For the successor State, therefore, the date of entry into force of the treaty would be the date on which the part of the new territory to which the obligation had applied assumed that obligation as an independent entity. When the successor State and the other States were parties to a multilateral treaty under which the consent of all parties was required for another State to become party to that treaty, or when the successor State and the other State party to a bilateral treaty reached agreement to the contrary, the effective date of entry into force, with respect to the successor State, could be fixed by agreement. When as in paragraph 2 (*a*) the successor State had to make a notification, the date of notification would appear to be the effective date.

21. It was not clear from a reading of the *"chapeau"* of paragraph 2 and subparagraph (*a*) of that paragraph whether the continuity of the obligation with respect to part of the territory of the successor State was maintained in the face of a notification as envisaged in subparagraph 2 (*a*) or was overridden by it—in the sense that the notification represented the only new obligation to be assumed by the new State in respect to the treaty—or whether the notification was regarded as being only another obligation assumed by the new sovereign State in addition to the obligations which were contracted before the date of succession by an independent State that had subsequently become a part of the new State, which obligation the new State had to fulfil.

22. Those questions notwithstanding, the fact remained that the *"chapeau"* of paragraph 1 provided for the continuity of obligations existing at the date of succession, except in certain circumstances. The problem dealt with in article 30 could assume various forms, and the text put forward by the International Law Commission was perhaps the best that could be proposed at the moment.

23. The amendment proposed by Switzerland related to a particular problem but did not appear to his delegation to be required to meet a genuine juridical need. Nevertheless, his delegation was not opposed to it; the Drafting Committee might be able to find some other way of settling the matter in the draft.

24. The amendment proposed by the Federal Republic of Germany was likely to create more difficulties than it would resolve. The effect of the amendment was to leave the successor State free, not only to decide whether it would continue to be bound by a treaty but also to determine, in the event of incompatibility between treaty obligations, which obligations it would accept. The latter option would, of course, leave all the other parties to the treaties in question in a state of uncertainty until the successor State had reached a decision. In the opinion of his delegation, the question of incompatibility was covered by paragraph 1 (*b*); it should be settled by the successor State and the other States parties to the treaties in question.

25. As to the second part of that amendment, it seemed that the successor State, as a sovereign State, could resort to reservations to indicate the provisions of the particular treaty by which it did not wish to be bound. His delegation could not, therefore, support the amendment of the Federal Republic of Germany.

26. The Japanese amendment seemed to reverse the scheme of things. According to paragraph 2 of article 30, the treaty obligation applied only to the part of the territory of the successor State in respect of which the

treaty had been in force at the date of the succession of States, unless the States concerned otherwise agreed or the successor State made a notification. Under the Japanese amendment, the obligation would in certain circumstances be applicable to the entire territory of the successor State. It seemed that the particular circumstances referred to in that amendment should lead the other States parties to a treaty to request the successor State to apply the treaty to its entire territory or to repudiate the treaty altogether. The possibility of choice, which was explicitly provided for by the International Law Commission, should not be limited in any way. Subparagraphs (*a*), (*b*) and (*c*) of paragraph 2 allowed the successor State to determine the course it intended to follow in the light of the circumstances.

27. In introducing his delegation's amendment[6], the representative of Japan had said that article 30 might be prejudicial to extradition treaties and to the Non-Proliferation Treaty. It was not conceivable, however, that a State would conclude a treaty in good faith while at the same time admitting exceptions or limitations, whether territorial or other, which would defeat, or conflict with, the very object and purpose of that treaty, or that the other States parties to the treaty would suffer in silence the continued existence of such a treaty relationship. For that reason, his delegation could not support the Japanese amendment.

28. The new article 30 *bis* proposed by the United States seemed to satisfy some of the concerns expressed at the 37th meeting, but he could not take a position on that amendment until he had had time to study it.

29. Mr. PÉREZ CHIRIBOGA (Venezuela) stressed the importance that article 30 would have in the future and the difficulties involved in drafting such a provision, which had to cover a great variety of cases. It was in an attempt to fill certain gaps that several delegations had submitted amendments to the article.

30. His delegation could support the amendment of the Federal Republic of Germany. In view, however, of the comments made in the course of the discussion, it would be preferable for the first part of that amendment to be voted upon separately, as proposed by the representative of the United Kingdom.

31. The Japanese amendment introduced a very interesting element, and his delegation could support that amendment as well. Many problems might arise if provision was not made for the case covered by that amendment. The application of a treaty to only part of the territory of the successor State could, in many cases, be highly prejudicial to one or more parties to the treaty, which was contrary to the purpose of uniting. So far as form was concerned, the Japanese amendment might perhaps be reworded to take account of the comments made during the debate.

32. The Swiss amendment covered the particular case of a federal State. The International Law Commission had referred to that case in its commentary when it had noted that the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, was irrelevant for the operation of the provisions of article 30. He failed to see how the Swiss amendment would apply. If two States united to form a new State, thus occasioning a succession of States, and if the territory of one of the parts of the successor State was subsequently modified, such modification was purely internal in character and was totally unrelated to article 30. The case referred to by the Swiss amendment was an altogether different one, which was perhaps covered by article 14. It seemed, however, that there was no need to provide for it in the convention. If the Committee were nevertheless to consider that the amendment should be incorporated in the convention, it ought perhaps to be introduced elsewhere than in article 30.

33. As to the wording of the Swiss amendment, in the Spanish version, the word *"cuando"* should be replaced by the words *"en el caso"* in order to show clearly that no subsequent modification occurred.

34. Mr. MEISSNER (German Democratic Republic) observed that article 30 was the first article in part IV of the draft, which related to the uniting and separation of States, in other words, to those cases of succession of States which would doubtless be the most common in the future. His delegation endorsed article 30 as drafted by the International Law Commission. Since, under article 6, a uniting of States must be effected in conformity with "the principles of international law", it was natural that the principle of continuity should be the basic principle in the case of article 30. Nevertheless, exceptions were provided for in order to avoid legal consequences which would render a uniting more difficult, if not impossible, or which would annul the obligation to succeed should that obligation be incompatible with the object and purpose of the treaty or necessitate the consent of all the contracting parties.

35. Consequently, his delegation saw no reason to modify the substance of article 30, as was proposed in the amendment of the Federal Republic of Germany. In the final analysis, that amendment considerably weakened the principle of continuity. The objections which had already been raised when article 29 had been considered were not convincing, since that provision covered a qualitatively different situation, arising from decolonization, and, in that case, the "clean slate" principle was fully justified. Article 30, on the other hand, covered the case in which previously existing sovereign States, having of their own volition previously established treaty relations, wished to unite. In that case, it was the principle of continuity that should apply. Since article 30 allowed sufficient latitude to contracting States, it was difficult to understand why such major changes were being proposed to that article.

36. His delegation shared the misgivings expressed by the Hungarian delegation[7] with regard to the Swiss amendment.

37. His delegation failed to see the justification for the Japanese amendment.

[6] See 37th meeting, para. 8.

[7] *Ibid.*, para. 25.

38. Mr. SETTE CÂMARA (Brazil) said that his delegation fully supported article 30 as proposed by the International Law Commission. The amendments to that article were designed to clarify it and to remove any uncertainties to which its interpretation might give rise, but none of them seemed really necessary.

39. With regard to the Swiss amendment, he observed that, the article, as it stood, covered the case in which the component parts of the successor State retained the capacity to bind themselves by treaty. The commentary of the International Law Commission left no room for doubt on that point. The possibility of applying article 14 and the moving frontiers rule would be assured in all cases. Furthermore, he doubted whether it was appropriate to use an expression as vague and imprecise as *"mutatis mutandis"* in a legislative text.

40. The amendment submitted by the Federal Republic of Germany related to incompatible successive treaty obligations, a problem dealt with very fully in article 30 of the Vienna Convention on the Law of Treaties. Paragraph 3 of that article stated that the earlier treaty would apply only to the extent that its provisions were compatible with those of the later treaty. It might be worthwhile recommending that the successor State should indicate the treaty whose provisions were to continue to apply, although he, like the representative of the United Kingdom, found it difficult to see on what legal basis that could be done.

41. He considered that subparagraphs (*a*), (*b*) and (*c*) of article 30, paragraph 2, should adequately cover the case envisaged by the Japanese amendment.

42. At first sight, the new article 30 *bis* proposed by the United States of America seemed to relate to the settlement of disputes, and it should therefore be considered at a later stage. He had no objection to the proposed Conference resolution submitted by the United States of America in document A/CONF.80/C.1/L.51.

43. Mr. CASTRÉN (Finland) said he considered the text for article 30 proposed by the International Law Commission to be well-balanced; the present text was a marked improvement on the text adopted in first reading by the Commission, and was more broadly acceptable. The Commission had made the necessary exceptions to the principle of continuity.

44. The amendment of the Federal Republic of Germany concerned the application, in respect of the successor State, of treaties whose provisions were incompatible. In his view, the successor State should not be entitled to free itself of obligations of that sort, as that amendment, which he considered unacceptable, envisaged.

45. The Japanese amendment did not take into account the rights of all the States involved. It tended to expand the principle of continuity beyond reasonable limits.

46. The Swiss amendment would be acceptable as far as substance was concerned, but its content was already covered by article 14, which applied to States in general, of any kind. The International Law Commission had not considered it necessary to define the term "State", and that term probably, therefore, applied also to the States members of a federal State which enjoyed a limited capacity to bind themselves by treaty. Nevertheless, his delegation would have no objection to referring the Swiss amendment, which might possibly supplement article 14, to the Drafting Committee.

47. Finally, his delegation was prepared to vote in favour of the proposed Conference resolution submitted by the United States of America in document A/CONF.80/C.1/L.51.

48. Mr. PASZKOWSKI (Poland) said he considered the principle of *ipso jure* continuity to be highly relevant to cases of uniting of States. In fact, it seemed to be the only acceptable principle, in the light of contemporary international law and State practice. The International Law Commission had always sought to maintain stability in treaty relations; the "clean slate" doctrine was merely an important exception to the application of that principle, made for the benefit of newly independent States. The characteristics of successions of States occurring when newly independent States came into being called for special rules consistent with the principle of self-determination, since those States had not expressed their will before their independence. It was an entirely different matter when independent States united, bringing with them all the treaty commitments to which they had freely consented. As the International Law Commission had concluded in paragraph 27 of its commentary on articles 30-32, they ought not to be able at will to terminate those treaties by uniting in a single State (A/CONF.80/4, p. 98).

49. His delegation believed that the present wording of article 30 reconciled the dynamic development of international life and the stability indispensable to any legal order. Article 30 was flexible enough to enable any problems which a uniting of States might pose to be resolved. His delegation did not, therefore, find the text of article 30 to be in need of improvement. Some of the amendments proposed might hold out dangers. A uniting of States should not serve as a pretext for terminating treaties, and his delegation could not agree to an amendment which would give the successor State that power. The discussion on article 30 had confirmed his delegation in its belief: article 30 as drafted took into account all the points which had been raised.

50. Mr. TORNARITIS (Cyprus) said he fully subscribed to the United Kingdom representative's views on draft article 30. His delegation found the International Law Commission's text acceptable and considered that care should be taken not to alter its balance. He shared the views of the representative of the Ukrainian SSR regarding the Japanese amendment, and those of the representative of France on the Swiss amendment. The amendment of the Federal Republic of Germany, which sought to resolve the problem of possible incompatibility between several treaty obligations, did not propose an acceptable solution, because it ran counter to certain principles of international law and principles which had served as a basis for formulating the

draft article. However, the Drafting Committee might consider inserting a sentence in the draft article, specifying that, in the event of a conflict between treaty obligations, the Vienna Convention on the Law of Treaties should apply. Finally, his delegation reserved its position on the article 30 *bis* proposed by the United States, which it had not yet had time to study.

51. Mr. RYBAKOV (Union of Soviet Socialist Republics) said that his delegation supported the International Law Commission's text, the provisions of which clearly reflected the principle of succession. In preparing the draft Convention, the Commission had taken as its starting-point the idea that the "clean slate" principle would be applicable only to cases of succession of States occurring as a result of decolonization. A uniting of States bore no relation to the exercise of the right to self-determination.

52. As analysed by the members of the Committee, the amendment of the Federal Republic of Germany modified the substance of the International Law Commission's draft. It ran counter to the rule of *pacta sunt servanda*, it was prejudicial to the stability of international relations and it might serve to undermine the "clean slate" principle. As the representative of the United Arab Emirates[8] had noted, that amendment would affect the rights of the other States parties to treaties. For that reason, the Soviet delegation shared the misgivings expressed by the representatives of Guyana and France. However, it did not agree with the view of the United Kingdom representative that the first part of the amendment would be acceptable because, in point of fact, both parts of the amendment would have the same practical and juridical consequences. The arguments adduced in support of the amendment carried little conviction, since the Vienna Convention on the Law of Treaties met the concerns of the proposal's sponsor. Furthermore, should the Committee wish to deal with the problem of conflicting treaty obligations, its task would be complicated considerably. It stood to reason that the only way for the States concerned to resolve a conflict of treaty obligations was by mutual consultation. His delegation, like many others, therefore found the amendment unacceptable, for it failed to take account of the right to self-determination and affected the vital interests of third States.

53. His delegation also shared the misgivings expressed concerning the usefulness of the other amendments. In particular, it had the same problems as the Hungarian delegation with respect to the Swiss amendment. It had not had time thoroughly to study the article 30 *bis* proposed by the United States, but, at first sight, it seemed contrary to the ideas set forth in the original text. However, his delegation was ready to discuss the proposal contained in document A/CONF.80/C.1/L.51 at a later stage.

54. In conclusion, he welcomed the trend which had emerged in favour of retaining the text proposed by the International Law Commission, which met the major concerns of the members of the Committee.

55. Mr. DIENG (Senegal) said he believed that the draft article in its present wording was sufficiently balanced to command the support of the members of the Committee. The International Law Commission had drafted the text in the light of the need to preserve the stability of international relations, the only limitations being the wishes of the States concerned, the compatibility of the treaties in force before the uniting of States with the new situation, the effects of the change on the application of the treaties and the territorial scope of the treaties. For that reason, his delegation would be able to agree to an amendment only if it filled a gap or provided a useful clarification.

56. The amendment proposed by the Federal Republic of Germany dealt with a case on which there was no point in dwelling, since it was provided for by the Vienna Convention on the Law of Treaties. While acknowledging the possibility of a conflict between treaty obligations, his delegation was of the opinion that it would be less serious to have to solve such a problem than systematically to call treaties in question on the grounds of incompatibility with other obligations. Since, moreover, that amendment would entitle the successor State to choose which treaties would remain in force and which would not, his delegation found it unacceptable.

57. His delegation had no objection to the substance of the Swiss amendment. It did, however, doubt whether that amendment should be included as paragraph 4 of the draft article. Since the amendment added little to the draft article, it might be referred to the Drafting Committee. Lastly, his delegation considered that the Japanese amendment, by reversing the normal order, might be contrary to the spirit of the draft article and therefore found it unacceptable. It reserved the right to comment at a later stage on the article 30 *bis* proposed by the United States, which it had not yet received in French.

58. Mr. NATHAN (Israel) said that, whereas the "clean slate" principle was the basis for the provisions of part III of the draft convention, draft article 30 rested on the principle of the continuity of treaty relations in the event of a uniting of States. The distinction drawn between the case of newly independent States and other States derived from the fact that the former had had treaty obligations imposed on them, whereas the constituent parts of a unified State had entered into such obligations of their own free will. The amendments submitted by the delegation of the Federal Republic of Germany and the delegation of Japan concerned situations which were mainly likely to occur in cases of uniting of States.

59. After weighing up the arguments adduced in support of the amendment of the Federal Republic of Germany, he doubted whether that amendment solved the difficult problem of the incompatibility of treaty régimes, a question which was not in fact dealt with directly in the draft article. It was very likely that, if the successor State were to make a choice between the treaties which would remain in force in respect of its territory, it would be guided by subjective criteria and would opt for those treaties which were most likely to satisfy its interest. That choice would necessarily prejudice the interests of the third States with

[8] *Ibid.*, para. 17.

which treaty relations would be severed. For that reason, before it was able to take a unilateral decision on any treaty, the successor State should be required to negotiate with the third States in order to reach a satisfactory solution. If the negotiations failed, the successor State would have two possibilities: either to terminate all the conflicting treaty obligations, or to choose from among those obligations the ones which it wished to maintain in force. His delegation preferred the latter solution, despite the various disadvantages which it entailed. The three interested parties, namely, the successor State and the two groups of third States between which a conflict existed in regard to treaty relations, would suffer from a severance of treaty relations; thus, that solution, although the most logical in the strictest sense, would serve no useful purpose. On the other hand, if the successor State was entitled to make a choice between the treaties, the only parties affected would be the group of States in respect of which the treaties would cease to apply. However, in the event of failure in the negotiations with the two groups of States, the successor State should not be empowered to exercise its right of selection unconditionally. It should be possible to work out objective criteria on which the successor State would base itself in exercising that right. Lastly he observed that article 44 of the Vienna Convention on the Law of Treaties might also, *mutatis mutandis*, apply in certain cases.

60. Turning to the Japanese amendment, he said it could indeed happen that, at the time of a succession of States, a treaty was applicable to only part of the territory concerned; in addition to the examples given at the preceding meeting, he would cite that of double taxation agreements. The International Law Commission's text provided that, in such a case, the treaty would cease to apply, subject to the right of the successor State to apply the treaty to its entire territory. The Japanese amendment seemed to contribute more to the progressive development of international law than to its codification, since the amendment was not based on State practice. However, the automatic extension of treaty obligations to the entire territory of the successor State could give rise to considerable difficulties and in some cases affect the interests of third States, which were entitled to raise objections. Consequently, he wondered whether, there again, it would not be advisable to provide for negotiations such as those envisaged in the case of a conflict between treaty régimes.

61. Mr. DUCULESCU (Romania) said it was only after a lengthy examination of State practice and the writings of experts in international law that the International Law Commission had decided to adopt the principle of the continuity of treaty relations. For that reason, his delegation supported the text proposed by the Commission. While appreciating the concerns of the sponsors of the amendments, he considered that the draft article itself, other draft articles and the Vienna Convention on the Law of Treaties provided a solution to the problems addressed by those amendments. The issues dealt with by the amendment of the Federal Republic of Germany should be resolved in the light of the need to ensure the maintenance of international relations and to solve outstanding problems through negotiations. His delegation supported the idea enunciated by the United States delegation in its proposed resolution (A/CONF.80/C.1/L.51), but reserved the right to speak at a later stage on the proposed article 30 *bis*.

Statement by the chairman of the delegation of the United Nations Council for Namibia

62. Mr. JAIPAL (United Nations Council for Namibia) said that his delegation was pleased to be participating in the resumed session of the Conference at a time when the Security Council had just adopted measures to ensure Namibia's rapid accession to independence, by means of free elections held under the supervision and control of the United Nations, and thus to put an end to the illegal occupation of the international territory by South Africa. As the lawful Administering Authority of Namibia, the Council would continue to represent and protect the interests of the Namibian people until they were able freely to exercise their inalienable right to self-determination and independence, and to the territorial integrity of a united Namibia, including Walvis Bay, which had been forcibly seized by South Africa.

63. The Council's delegation would continue to play an active part in the deliberations of the Conference and in the adoption of the remaining articles. In that connexion, it congratulated the International Law Commission on its work, which represented a further step in the progressive development and codification of international law.

64. His delegation endorsed the essential ideas which were embodied in the draft articles and were in general based on the Vienna Convention on the Law of Treaties, the general principles of international law, State practice and the Charter of the United Nations. It noted with satisfaction that the International Law Commission had adopted the "clean slate" principle in accordance with which the newly independent State had the right to decide whether or not it wished to remain a party to a treaty concluded by the predecessor State. That principle safeguarded the legitimate interests of newly independent States and enabled them to reject colonial heritages which might prejudice their economy and the well-being of their inhabitants. It thus helped to safeguard the interests and natural resources of Namibia. In that connexion, he drew attention to General Assembly resolution 2145 (XXI), in which the Assembly had terminated South Africa's Mandate over Namibia and had decided that the Territory would be the direct responsibility of the United Nations until its independence.

65. The Council regretted that exceptions had been made to the "clean slate" principle which might create misunderstandings in countries such as Namibia, that had been subjected to dismemberment and illegal military occupation. In resolution 385 (1976), the Security Council had affirmed the right of Namibia to territorial integrity and national unity. In resolution 32/9 D the General Assembly had declared that Walvis Bay was an integral part of Namibia. In resolution 432 (1978), the Security Council

had stated that Walvis Bay should be returned to Namibia. There was thus no doubt than when Namibia attained independence, Walvis Bay should also be decolonized.

66. For that reason his delegation had requested, at the first session of the Conference, that the relevant draft articles should be amended so as to take account of historical reality and, in particular, the fact that South Africa was not the predecessor State in the case of Namibia. It had also endeavoured to amend draft article 2 in order to take account of the fact that the United Nations was responsible for Namibia's international relations.[9]

67. The Council considered that, in the case of Namibia, failure to apply the "clean slate" principle would impose an intolerable burden on the Territory once it had become independent.

68. The Council could not refrain from referring to the question of exceptions to that principle, because it might be inferred from its silence on that point that it approved of the attempts made by South Africa to dismember Namibia, in defiance to the inalienable right of the Namibian people to self-determination and to the preservation of the territorial integrity of their country, and of General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples.

69. The Conference should not legalize arbitrary acquisitions of territory by a racist, colonialist State whose claims were based on leonine treaties. The dismemberment of Namibia and the detachment of Walvis Bay were attributable solely to economic and strategic considerations and to a deliberate desire to keep Namibia in a situation of economic subordination in relation to South Africa and other colonialist countries whose objective was to derive benefit from the natural resources of Namibia. Namibia's claims to Walvis Bay could not be challenged, given the historical, geographical, cultural and ethnic context. Before the arrival of the first European settlers in South Africa, Walvis Bay had formed an integral part of Namibia and had been inhabited by the indigenous race, the Namas. In 1870, the captain of a British warship had taken possession of the Bay in the name of the Queen of England. In 1884, the rest of Namibia, then known as South-West Africa, had been occupied by the Germans. But unlike the other adjoining regions, Walvis Bay had not been incorporated into the Cape Colony. In 1915, the South African forces had occupied Namibia, and at the time of the establishment of the Union of South Africa, Walvis Bay too had been occupied by the South Africans. Subsequently South Africa had extended to Walvis Bay the legislation applicable to the whole of the territory of South-West Africa. In 1922, it had incorporated Walvis Bay into Namibia by adopting a series of laws under which Walvis Bay had finally been placed under the territorial jurisdiction of Namibia.

70. Despite the measures adopted by the General Assembly of the United Nations in 1966 and 1967, and despite the advisory opinion of the International Court of Justice confirming that South Africa's Mandate over Namibia[10] had come to an end, South Africa had continued to defy the United Nations by refusing to withdraw from Namibia. Recently, South Africa had taken legislative and administrative measures with a view to detaching Walvis Bay from Namibia. It was those acts of defiance of the United Nations which obliged the Council to insist that the future convention should take account of the status of international territory under the responsibility of the United Nations with which Namibia was endowed. For that reason, at the first session of the Conference, the Council had proposed that an amendment should be added to the proposed preamble for the convention (A/CONF.80/DC.13), with a view to ensuring that South Africa would not be the predecessor State in the case of Namibia.

The meeting rose at 12.55 p.m.

[9] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties... op. cit.*, 5th meeting, para. 55.

[10] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, p. 16.

39th MEETING

Tuesday, 1 August 1978, at 3.25 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)[1] (*concluded*) *and*

PROPOSED NEW ARTICLE 30 *bis* (Conflicting treaty régimes)[2]

1. Mr. KOROMA (Sierra Leone) said that the existing draft of article 30 laid undue stress on the principle of *pacta sunt servanda* at the expense of the principle of consent. That was a matter of the utmost importance to African States, many of which realized that harsh present-day realities compelled them to unite.

2. He shared the view of the representative of the Federal Republic of Germany that the existing draft of the

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

[2] Proposed by the United States of America in document A/CONF.80/C.1/L.50. Statements were also made on the proposed article 30 *bis*, submitted at the 38th meeting, during the discussion of article 30.