Draft articles on succession of States in respect of treaties: article 12 bis (with new paragraph for insertion in article 2) proposed by Mr. Ushakov - reproduced in A/9610/Rev.1, footnote 57

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
1974, vol. II(1)
vant rules of the organizations would provide a safe-

guard.

64. Article 6 raised the basic question of the field of 
application of the draft. Should it apply only to inter-
national organizations in the United Nations system, only 
to organizations with a universal mission, or to all 
international organizations? In his opinion it should 
apply to all international organizations. The sedes materiæ of the subject under study was not the law of 
international organizations, but the law of treaties. The 
object was to supplement the Vienna Convention, as 
could be seen from the attitude adopted by the General 
Assembly and by the Commission itself.

65. The draft could not be confined to certain interna-
tional organizations when the régime of the treaties to 
which international organizations were parties depended 
on general international law and not on the law of each 
organization, except where the formation of consent 
was concerned. For instance, any agreements which the 
Arab League might conclude with the United Nations 
would derive their legal force from the law of treaties, 
not from the Charter or from the Statute of the Arab 
League. If, in addition to the Vienna Convention, there 
were to be one convention for certain large organiza-
tions and another for other organizations, the Commis-
sion would be moving towards extremely difficult rules 
on co-ordination. The only set of draft articles relating 
to international organizations which was likely to 
become an international convention was the draft 
concerning representation of States in their relations 
with international organizations. There would probably 
be no other: moreover, apart, perhaps, from a few very 
general principles, the law of international organiza-
tions did not exist. It was possible to discern a common 
tendency in the different laws of international organiza-
tions, but at present there was no single legal régime.

66. The number of international organizations, which 
was about two hundred, was greater than the number of 
States and would continue to increase. There were enor-
mos differences between organizations. Among those 
in the United Nations system, certain characteristics 
had been established for practical purposes, but even 
that provision, which could not be deleted as Mr. Usha-
kov had suggested, was that it respected simultaneously 
the will of States, which satisfied those who considered 
that the only source of international law, the social 
reality, which satisfied those who emphasized that as-
pect of the problem, and the autonomy of international 
organizations, which feared restriction of their creative 
power.

67. Certain international organizations did not con-
clude headquarters agreements; it was their member 
States which did so. Recently, a European Patent Office 
been set up by a Convention which itself deter-
mimed the headquarters agreement; there was a provi-
sion merely specifying that the patent office could am-
plify the provisions on the headquarters agreement. For 
the Latin American Energy Organization, also recently 
established, there was no general capacity either, but 
it was provided that a headquarters agreement could be 
negotiated.

68. True, it followed clearly from the draft articles that 
an international organization could be a subject of 
international law, which almost necessarily implied that 
it participated in conventional acts. But if it were af-
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Succession of States in respect of treaties

A/CN.4/275 and Add. 1 and 2; A/CN.4/278 and Add. 1-5;
A/8710/Rev.1

Item 4 of the agenda
(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 21

1. The CHAIRMAN invited the Special Rapporteur to introduce article 21, which read:

   Article 21

   Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

   1. When under article 19 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

   (a) does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party;

   (b) is not suspended in operation in the relations between them by reason only of the fact that it has subsequently been suspended in operation in the relations between the predecessor State and the other State party;

   (c) is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party.

   2. The fact that a treaty has been terminated or, as the case may be, suspended in operation in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered as in force, or as the case may be, in operation between the successor State and the other State party if it is established in accordance with article 19 that they so agreed.

   3. The fact that a treaty has been amended in the relations between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 19 in the relations between the successor State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

2. Sir Francis VALLAT (Special Rapporteur) said that the purpose of article 21 was to make it clear that any changes in the relations between the original parties to the treaty which took place after the date of the succession of States did not affect the position between the successor State and the other States parties.

3. Since the situation was crystallized at the date of the succession of States, the rule in article 21 was self-evident. Nevertheless, it was desirable to include the article, despite its length, because otherwise there might be some doubt about the possible effect of any changes in the treaty occurring after the date of succession of States.

4. The only specific comment on article 21 had been made by the United Kingdom Government, to the effect that paragraphs 2 and 3 appeared to restate the rules in paragraph 1, so that the article could probably be simplified (A/CN.4/275). At first sight that proposition seemed attractive, but on reflection, it became apparent that the situations dealt with in paragraphs 2 and 3 were not the same as those dealt with in paragraph 1.

5. Paragraph 1 dealt with the situation in which a bilateral treaty was considered as being already in force between a newly independent State and the other State party; the other two paragraphs dealt with situations in which the newly independent State had a right to become a successor. If the article dealt with one type of situation and not with the other, doubts would arise about its interpretation and it would do more harm than good.

6. He therefore recommended that the various situations should be dealt with separately and that article 21 should be kept essentially in its present form.

7. Mr. YASSEEN said he supported the Special Rapporteur’s conclusion. Article 21 stressed the fact that, from the date of the succession, the treaty no longer belonged to the predecessor State; it was the successor State which became a party to it. Not only should the article be retained, but it should stay in its present detailed form, since it was important, for the sake of clarity, to deal successively with the questions it covered.

8. Mr. TABIBI said that, as he understood it, the rule in article 21 was simply that even if a treaty was terminated as between the predecessor State and the other State party, it would remain in force under article 19 for the newly independent State. He hoped the Special Rapporteur would devise a simpler form of words to express that idea.

9. The relevant rule of international law was that no State, whether new or old, could derive any benefit from a treaty to which it was not a party. If, under the provisions of article 19, the newly independent State and the other State party agreed to bring into operation a treaty which had been terminated as between the predecessor State and the other State party, it could only be a new treaty.

10. Mr. RAMANGASOAVINA said he endorsed Mr. Yasseen’s views. Article 21 appeared to be difficult, because it dealt with a whole series of special cases, but the Special Rapporteur had been right in saying that they should all be included.

11. Succession in respect of bilateral treaties did not operate in the same way as succession in respect of multilateral treaties. In the case of bilateral treaties, a completely independent relationship was established between the new State and the other State party, from the