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**A/CN.4/L.215 and corr.2**

# Draft articles on succession 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 safeguard.

64. Article 6 raised the basic question of the field of application of the draft. Should it apply only to international 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 materiae* 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 international 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 organizations and another for other organizations, the Commission 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 organizations did not exist. It was possible to discern a common tendency in the different laws of international organizations, 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 enormous differences between organizations. Among those in the United Nations system, certain characteristics had been established for practical purposes, but even when the International Court of Justice had created the notion of "functional competence" it had specified that that notion was to be understood as it appeared in practice. It could not be extended to any and every type of organization.

67. Certain international organizations did not conclude headquarters agreements; it was their member States which did so. Recently, a European Patent Office had been set up by a Convention[11] which itself determined the headquarters agreement; there was a provision merely specifying that the patent office could amplify the provisions on the headquarters agreement. For the Latin American Energy Organization, also recently established,[12] 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 affirmed that every international organization had the right to conclude treaties, that would be giving a definition of an international organization. It was, however, necessary to take account of developments in that sphere: many entities were on the way to becoming international organizations and that development must mot be obstructed. In the practice of the North Atlantic Treaty Organization, member States had taken many precautions to ensure that that entity did not conclude external agreements, especially not a headquarters agreement, but if the practice were known, it might perhaps be found that some small international agreements had been concluded.

69. The Commission would have to choose between the two texts proposed for article 6. Personally, he was inclined to prefer the second version. (A/CN.4/279, para. (20) of commentary). The term "capacity", borrowed from private law, was not the most attractive, but it was the term used in the Vienna Convention; besides, private law was old and its notions were concrete. As Special Rapporteur, however, he gave his preference to the first version, since it followed from the discussion that the capacity of international organizations to conclude treaties derived from international law.

70. The competence of States to create new subjects of international law in the form of international organizations itself derived from international law. That point should be made in the commentary, but it was implicit in the first version of article 6. The principal merit of that provision, which could not be deleted as Mr. Ushakov had suggested, was that it respected simultaneously the will of States, which satisfied those who considered that will the only source of international law, the social reality, which satisfied those who emphasized that aspect of the problem, and the autonomy of international organizations, which feared restriction of their creative power.

71. Mr. USHAKOV, referring to article 2, paragraph 1 (*f*), reiterated that he did not understand how a State or an international organization could become a "contracting State" or a "contracting organization" to a treaty that was already in force. Not only the draft under consideration, but also the Vienna Convention and the draft articles on succession of States in respect of treaties raised that question.

72. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to refer draft articles 2, 3, 4 and 6 to the Drafting Committee.

*It was so agreed.*[13]

The meeting rose at 6.05 p.m.

[11] See *International Legal Materials*, vol. XIII (1974), p. 268.

[12] *Ibid.*, p. 377.

[13] For resumption of the discussion see 1291st meeting, para. 9.

## 1280th MEETING

*Tuesday, 18 June 1974, at 10.10 a.m.*

*Chairman:* Mr. Endre USTOR

*Present:* Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

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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