Document:-
**A/CN.4/SR.1268**

**Summary record of the 1268th meeting**

Topic:
**Succession of States with respect to treaties**

Extract from the Yearbook of the International Law Commission:-
**1974, vol. I**

the Law of Treaties, under which the rules relating to succession would have priority in the interpretation of article 7 of the present draft, might also be mentioned.

67. He suggested that, in view of the similarity of articles 7 and 8 and the fact that most speakers had dealt with both articles in their comments, the discussion on both articles should be regarded as concluded and that the Special Rapporteur should be invited to sum up.

*It was so agreed.*

68. Sir Francis VALLAT (Special Rapporteur) said the discussion had shown that there was general support for keeping articles 7 and 8 as separate articles, and for retaining the principles stated in them. A large majority of members were also in favour of keeping the two paragraphs in each of those articles separate. He appreciated the reasons for that preference in so far as they were based on points of presentation, but points of law and interpretation had also been invoked. He nevertheless remained unconverted. Nothing in the draft he had proposed suggested that a devolution agreement was to be considered void or invalid on any grounds whatsoever. On the contrary, the reference to an agreement meant *prima facie* a valid agreement. That criticism therefore seemed unjustified.

69. On the other hand, some risks would be incurred in adopting the present text. Articles 7 and 8 now formed part of an entire draft and should be read in relation to the rest of that draft. Paragraph 1 excluded certain consequences of devolution agreements, indicating that they did not in themselves affect the legal effects of a succession of States. Paragraph 2 made the slightly different, complementary point that the effects of the succession would be governed by the present articles; that was the principle the article was intended to establish. Paragraph 2 was therefore the effective paragraph.

70. Some speakers had advocated a special reference to devolution agreements and their consequences, but if paragraphs 1 and 2 were read in the context of the rest of the draft, some doubts arose about the relationship of paragraph 1 to article 11, for example. The "provisions of the present articles" mentioned in article 11 included paragraph 1 of article 7, so if that paragraph was retained as well as paragraph 2, there would be doubts about the interpretation of article 11 in relation to article 7. Some articles dealing with multilateral treaties provided for notification of succession—a procedure which would have to be followed whether there was devolution agreement or not. Again, the phrase "in consequence only of the fact that..." in paragraph 1, might be taken to imply that devolution agreements would play a part in such cases. In the case of article 19, which was concerned with bilateral treaties, devolution agreements might have a role to play, not by virtue of paragraph 1 of article 7, but by virtue of paragraph 2 of that article and the provisions in paragraph 1 of article 19.

71. Consequently, from the point of view of the draft as a whole, article 7 would be a clearer and more satisfactory provision, not casting any doubt on the validity of devolution agreements, if the two paragraphs were combined, as he had suggested. However, no harm would be done by keeping them separate. The suggestion in paragraph 184 of his report had been made, not merely for drafting reasons, but with the general acceptability of the draft articles as a whole in mind.

72. The CHAIRMAN suggested that articles 7 and 8 should be referred to the Drafting Committee for further consideration in the light of the comments made.

*It was so agreed.*[2]

The meeting rose at 1 p.m.

[2] For resumption of the discussion see 1286th meeting, paras. 27 and 33.

## 1268th MEETING

*Thursday, 30 May 1974, at 10.15 a.m.*

*Chairman:* Mr. Endre USTOR

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

### Succession of States in respect of treaties

**(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-3; A/8710/Rev.1)**

[Item 4 of the agenda]

*(continued)*

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 9

1. The CHAIRMAN invited the Special Rapporteur to introduce article 9, which read:

*Article 9*

*Treaties providing for the participation of a successor State*

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be so considered.

3. In cases falling under paragraphs 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed.

2. Sir Francis VALLAT (Special Rapporteur) said it might be advisable to make paragraph 2 more flexible

by not requiring acceptance in writing, but permitting tacit consent, as suggested in the comments of the Governments of the United Kingdom and Venezuela (A/CN.4/278/Add.2, paras. 191 and 192). In some cases it might be difficult for a Government to declare its acceptance in writing. Paragraph 2 might therefore be amended, as he had suggested in paragraph 196 of his report, to read "... only if it is established that it was the intention of the successor State to be so considered".

3. Mr. TSURUOKA said that he was in favour of the change proposed by the Special Rapporteur. The important point was that it should be well established that the successor State agreed to be bound by the treaty. As Mr. Tabibi had already observed, new States often experienced considerable delays and difficulties in the procedure for succession to treaties. He himself had found it very difficult to get the new States in Africa, which had succeeded France and the United Kingdom to declare in writing that they did not intend to invoke article 35 of the General Agreement on Tariffs and Trade against Japan, though they actually had no intention whatever of doing so. He was therefore in favour of making the procedure more flexible.

4. Mr. USHAKOV said he was not in favour of amending article 9, paragraph 2 by adapting the terms of article 37, paragraph 1, of the Vienna Convention on the Law of Treaties,[1] as the Special Rapporteur had suggested. That article of the Vienna Convention applied to third States, which were not parties to the treaty and, consequently, could give their consent tacitly, without a formal act. Draft article 9, however, dealt with States wishing to become parties to a treaty, whose intention must, consequently, be expressed in an official act. He therefore preferred the original text.

5. Mr. CALLE Y CALLE said he was opposed to making the provision more flexible; he reminded the Commission that Sir Humphrey Waldock, in his third report, had advocated express consent in writing in such cases.[2] The article provided for two situations, one in which the successor State had, under a treaty, the option of considering itself a party to that treaty, and the other in which the obligations under the treaty passed automatically to the successor State. In such cases, acceptance of participation must be in writing and tacit consent would not be sufficient, especially where the treaty dealt with matters of particular importance to the parties.

6. Mr. PINTO said he approved of paragraphs 1 and 2 and of the principle of express consent, preferably in writing in all cases. The article should not leave acceptance of participation in treaties to be inferred from the successor State's conduct, or permit acceptance by tacit consent. Even for newly independent States the requirement of written consent should not prove unduly burdensome, as it would often be a simple formality.

7. Under paragraph 3 of the article, difficulties might arise if the successor State was not in a position to fulfil its obligations under the treaty between the date of succession and the date of notification of succession or of acceptance. The successor State should perhaps be considered a party from the date of notification under paragraph 1, or the date of acceptance in writing under paragraph 2, unless the treaty provided otherwise. Continuity of obligations on succession could not be presumed.

8. Mr. ELIAS said that article 9 should be retained in its present form and that the element of flexibility suggested by the United Kingdom and Venezuela should not be introduced. The successor State should be left to overcome any difficulty it might have in complying with the requirement of express acceptance in writing. The principle embodied in articles 11 and 35 of the Vienna Convention on the Law of Treaties, that express consent was fundamental where a party would be bound by a treaty, should be retained in the present articles. The arguments advanced in the Special Rapporteur's own commentary seemed to indicate that the suggested amendment should not be adopted.

9. There was danger in always equating the position of the successor State to that of a third State under the general law of treaties, but in the present instance those positions were identical. If there was a devolution agreement between the predecessor and the successor State, or a unilateral declaration to which a State affected by it was not a party, it was essential to provide for express written consent on the part of the successor State. If the successor State's conduct indicated continuance of the treaty, a third State could always ask the successor State to confirm its acceptance of the treaty. Constitutional and other problems did not seem important enough to prevent that. What really mattered was that the successor State should be free to decide whether it wished to be considered a party. The present draft met all the requirements.

10. Mr. ŠAHOVIĆ said he preferred the present text of article 9, paragraph 2, because acceptance in writing was necessary in the case to which it applied. In his opinion, it was only by an express notification in writing that a successor State could express its will to remain a party to a treaty.

11. Mr. RAMANGASOAVINA observed that the discussion was turning on the way in which a successor State should express its consent to remain bound by a treaty. The Venezuelan delegation, in its oral comments, had indicated that in practice such consent could be given either in the act of signature itself or by the execution by the successor State of acts which clearly showed its intention of continuing to be bound by the treaty (A/CN.4/278/Add.2, para. 191). But he thought that if the successor State was able thus to express its will to continue to remain bound by the treaty, there was no reason why it should not do so by a notification in writing sent to the depositary of the treaty and subsequently transmitted to the parties. It was true that that procedure sometimes met with difficulties, as Mr. Tsuruoka had observed. But it was better that the successor State's consent should be expressed explicity, which in his opinion could only be done in writing.

[1] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 294.

[2] See *Yearbook ... 1970*, vol. II, p. 29, article 5, para. 2.

12. Mr. YASSEEN said he agreed with Mr. Elias that the case covered by article 9, paragraph 2 was identical with that covered by article 35 of the Vienna Convention on the Law of Treaties, which the Commission must take into consideration. For succession to a treaty not only conferred rights, but also imposed obligations, and the Vienna Convention provided that consent to be bound by a provision creating an obligation must be expressed in writing. That had not been the Commission's initial position; the Vienna Conference had adopted the provision in an amendment. States had been unwilling to treat the acceptance of rights and the acceptance of obligations in the same way, and had expressed their will to make a distinction by requiring written consent in the latter case. He himself did not see any difference between the case covered by article 9, paragraph 2, and that covered by article 35 of the Vienna Convention.

13. He considered that article 9 should be retained as it stood.

14. Mr. SETTE CÂMARA said he agreed with most of the previous speakers that there was no special reason to change the text of article 9. The written form was of the essence in treaties. Accession to treaties was an important matter for new States and the draft covered all cases which might depart from the clean slate principle. The article should therefore remain unchanged.

15. Mr. BILGE said he thought the Special Rapporteur should place more emphasis on the possible difference between article 9 and articles 35 and 36 of the Vienna Convention.

16. The CHAIRMAN said that the majority of members seemed to be in favour of retaining the present text of article 9. Under the Vienna Convention on the Law of Treaties any new treaty relations established between the successor State and other States had to be agreed in writing, and it was logical to require acceptance in writing in the present case.

17. That logic applied to the whole draft. Article 17, which dealt with the related question of notification of succession, required notification of succession in respect of a multilateral treaty to be in writing. The definition of "notification of succession" given in article 2, paragraph 1 (*g*), however, did not specify that it must be in writing. And article 19, which dealt with bilateral treaties, did not specify acceptance in writing. It might therefore be necessary, at some stage, to reconsider the relevant articles in order to ensure that they were consistent in specifying written form in all cases where succession was established.

18. Mr. ELIAS agreed that the matter should be clarified if that appeared necessary. The present text seemed clear, however. Paragraph 1 of article 9 could not be interpreted without reference to article 17, a general provision defining the nature of notification, which should govern all preceding and subsequent articles referring to notification.

19. Sir Francis VALLAT (Special Rapporteur) thought that the point raised by the Chairman related more to the definition of notification and to article 17 than to article 9.

20. Replying to Mr. Pinto, he said that the question of continuity in the cases to which article 9 applied had been discussed in the Commission and in the Drafting Committee. The Committee had intended paragraph 3 to ensure continuity of application of the treaty by providing that, as a general rule, the successor State, if it consented to be considered a party, would be so considered from the date of succession.[3] The Commission had thus concluded that continuity of the treaty would be appropriate in such cases.

21. There was a slight difference between the position of a successor State under article 9 and that of a third State. Since provision for succession by a successor State, in a treaty made by the predecessor State, implied that the treaty had some reference to the territory of the successor State, there was an element of succession and an element of legal nexus. Consequently, in view of the nature of the provisions under consideration, it was reasonable to make the treaty continuous in every respect from the date of the succession, subject to the consent of the successor State. He was therefore in favour of retaining the present text of paragraph 3.

22. Mr. YASSEEN said he agreed that paragraph 3 should be retained in its present form. It contained a rule which was in accordance with the principles of the law of treaties and should be clearly stated in the article.

23. The CHAIRMAN suggested that article 9 should be referred to the Drafting Committee for further consideration.

*It was so agreed.*[4]

24. Sir Francis VALLAT (Special Rapporteur) asked members whether they wished to suggest any additional articles for inclusion in part I, which at present consisted of articles 1 to 9. The point he had raised about the relationship between the articles and the law of treaties had perhaps been adequately dealt with in the discussion at the previous meeting; it would be reflected in the commentary, which would have to explain the Commission's views on the relationship of the draft articles to article 73 of the Vienna Convention on the Law of Treaties, in particular.

25. The CHAIRMAN agreed that that question should be dealt with at least in the commentary and that the Commission should not exclude the possibility of adopting an article on the lines of article 73 of the Vienna Convention on the Law of Treaties, defining the relationship between the present articles and that Convention.

26. Mr. USHAKOV said he intended to submit a text based on article 4 of the Vienna Convention, to supplement draft article 6.

27. Mr. ELIAS said he thought that an additional article on the lines suggested by the Chairman might be necessary, but that it would be unwise to try to draft it, or decide what form it should take, at that stage. As its number indicated, article 73 of the Vienna Convention on the Law of Treaties had been drafted towards the

---

[3] See *Yearbook . . . 1972*, vol. I, pp. 182-183, para. 57.

[4] For resumption of the discussion see 1286th meeting, para. 35.

end of the Commission's work on that Convention. He suggested that the Commission should take note of the point raised by the Special Rapporteur and consider at a later stage what kind of provision was needed, and whether it should be included in part I or in some residual article at the end of the draft.

28. Mr. YASSEEN observed that when the Vienna Conference had adopted article 73 of the Vienna Convention on the Law of Treaties, it had not known what the provisions on succession of States in respect of treaties would be. The article was, in fact, a saving clause. He therefore agreed with Mr. Elias that the Commission should wait until it had completed its work before taking a decision on the problem of the relationship between the draft articles and the Vienna Convention.

ARTICLE 10

29. The CHAIRMAN invited the Special Rapporteur to introduce article 10, which read:

*Article 10*

*Transfer of territory*

When territory under the sovereignty or administration of a State becomes part of another State:

(*a*) treaties of the predecessor State cease to be in force in respect of that territory from the date of the succession; and

(*b*) treaties of the successor State are in force in respect of that territory from the same date, unless it appears from the particular treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose.

30. Sir Francis VALLAT (Special Rapporteur) drew attention to three points raised by Governments (A/CN.4/278/Add.2, paras. 197 and 198). He was inclined to agree with the suggestion that the words "subject to the provisions of the present articles" should be inserted at the beginning of article 10, as that would indicate that it should not be considered in isolation, but was related to other provisions. However, that was perhaps a matter for the Drafting Committee to consider.

31. The proposed deletion of the words "or administration" raised the problem of the definition of a "successor State" and "succession of States", and the question whether the test of responsibility for international relations or a sovereignty test should be applied. The Commission seemed to be in favour of the responsibility test, because to rely on sovereignty as a test would be unsatisfactory and would narrow the scope of the draft articles. The use of the word "administration", however, was not entirely appropriate in the present context. The point raised by the United States Government should perhaps be treated largely as a drafting problem, applying the definition of succession of States when one had been decided on. He had suggested, in paragraph 205 of his report, that the introductory words of the article should read: "Subject to the provisions of the present articles, when a succession of States occurs by a transfer of territory from the predecessor State to the successor State". That wording would be appropriate whatever definition was ultimately adopted and would also be in accordance with the drafting technique used in other articles.

32. Lastly, there was the question whether a test more flexible than that of incompatibility should be adopted from other articles, for example, article 25, as suggested by the Spanish Government. That suggestion was worth considering. The transfer of territory had similarities with the separation of part of a State, and a transfer might well create a situation which, although not necessarily incompatible with the object and purpose of the treaty, would radically change the conditions for its operation. The phrase "or would radically change the conditions for the operation of the treaty" might therefore be added, as well as the introductory phrase he had suggested.

33. He was not in favour of the United Kingdom suggestion that the compatibility test should be replaced by one based on the restricted territorial scope of the treaty, impossibility of performance and fundamental change of circumstances. That was precisely the kind of test he thought should be avoided in the draft articles, as it would involve incorporating part of the law of treaties in them, which would create confusion.

34. Mr. TAMMES said article 10 was meant to cover two different cases: that in which a territory passed from State A to State B and both States continued to exist after the transfer; and that in which the transferred territory was identical with State A, which was then incorporated in State B and disappeared as a subject of international law. The latter situation was often called "total succession". If both cases were to be covered, the present introductory phrase of the article seemed more appropriate than the one suggested by the Special Rapporteur. The word "transfer" could hardly be applied to the second case, where one State was incorporated in another. However, the addition of the words "Subject to the provisions of the present articles" would improve the present text.

35. The distinction between transfer of territory and total succession also had certain practical consequences. In cases of transfer there was no doubt about the applicability of the moving-treaty-frontiers rule, but such a doubt did arise where one State was incorporated in another. For example, the admission of Texas into the United States of America had, after some hesitation, been recognized in international practice as a case for application of the moving-treaty-frontiers rule. But the applicability of that rule had not been clear in the case of the extension of Sardinian treaties to Italy, which, as the successor State, had had to conclude a number of new commercial treaties with third States. Article 10 would have applied in the first case and article 26 in the second—under paragraph 2 of article 26 the treaty-frontier would not move. Hence it would not always be clear whether article 10 would be subject to the provisions of article 26 or vice versa. But that would not detract from the usefulness of the words "Subject to the provisions of the present articles" in regard to other provisions, particularly those on boundary régimes.

36. There was some merit in the idea put forward in paragraph 211 of the Special Rapporteur's report, that an article on fundamental change of circumstances might be included in the general provisions. Admittedly, article 62 of the Vienna Convention on the Law of

Treaties applied to all treaties, including those which had been the object of succession, but from the text of that article and the Commission's commentary on it,[5] it was clear that the article had not been written for the exceptional kind of fundamental change that succession might entail for treaty relations. As doubts on that point might arise in the context of other draft articles, the Commission might have to consider the possibility of including a general article on fundamental change of circumstances at a later stage, when the need for it became apparent. Article 73 of the Vienna Convention on the Law of Treaties was almost an invitation to do so.

37. Mr. TABIBI said that his former doubts about article 10 had been largely dispelled by the wording adopted in 1972.

38. His first concern was that the article should conform with the spirit and the real purpose of the United Nations Charter, with its emphasis on the sovereignty and territorial integrity of Member States. Conditions had greatly changed as a result of the entry into force of the Charter. There were now very few cases of transfer of territory, and the importance of territory itself took second place to that of the people inhabiting it.

39. Viewed in that light, the title of article 10 was misleading. It was not so much the "transfer of territory" that was in question as the fate of the people who lived in it. The purposes and principles of the United Nations required that prior consideration be given to the wishes, intentions and views of those people.

40. His second concern was with the statement in paragraph (1) of the commentary (A/8710/Rev.1, chapter II, section C) that article 10 "concerns cases which do not involve a union of States or merger of one State in another, and equally do not involve the emergence of a newly independent State". Article 10 clearly dealt with borderline cases, and it was difficult to draw the line separating them from the cases it was intended to exclude.

41. He was not altogether satisfied with some of the examples set out in paragraph (5) of the commentary. For instance, the absorption into India of certain former Portugese possessions had been a clear case of the exercise of the right of self-determination by the inhabitants of the territories concerned. As to the example of Eritrea in 1952, when it had become an autonomous unit federated with Ethiopia, in the Special Political Committee of the General Assembly he had supported the idea of the federation as being mutually advantageous to the Eritreans and the Ethiopians. In that case, too, it was essential to think first of the people concerned and to remember that the main effect of the process of federation had been that Eritreans had become Ethiopian nationals.

42. With regard to the wording of article 10, the only change he favoured was the deletion of the words "or administration". Those words give a wrong impression; if, for example, a State was entrusted by the United Nations with the administration of a territory, it would be wrong to suggest that part of the territory could be transferred to another State otherwise than by its own inhabitants in the exercise of their right of self-determination.

43. With that change, and on the understanding that article 10, like all the articles of the draft, had to be read in the light of the provisions of article 6, he was prepared to accept the 1972 text. The provisions of article 6 provided a vital safeguard by making it clear that article 10 would only apply to lawful transfers of territory, that was to say, those made in accordance with the right of self-determination, possibly under United Nations auspices.

44. Mr. USHAKOV said that only one of the three proposed changes to article 10 was acceptable, namely, the addition, at the end of the article, of the words "or would radically change the conditions for the operation of the treaty".

45. To add the words "Subject to the provisions of the present articles" at the beginning of the article would be rather absurd, since all the draft articles were implicitly subject to that proviso. He thought the real purpose of the proposed addition was to reserve the general provisions in part I and articles 29 and 30 in part V. If that were so, the proviso should be attached to each of those articles.

46. The introductory phrase of article 10, in the wording adopted by the Commission at its twenty-fourth session, referred to two cases of transfer of territory: the transfer of territory belonging to a State, in other words under its sovereignty, which was the most frequent case; and the transfer of a "dependent territory", in the meaning with which those words were used in the definition of the term "newly independent State" in article 2, paragraph 1 (*f*). Although such a territory did not belong to the administering Power, it could be transferred to an existing State, as was shown by the examples given by the previous Special Rapporteur, Sir Humphrey Waldock. It was essential that article 10 should cover that case, no matter what term was substituted for the word "administration". The proposed new wording evaded the case, and it might also give the impression that a dependent territory was under the sovereignty of the metropolitan State, which was quite unacceptable. It was important not to alter the meaning of the article by a change in drafting.

47. Sir Francis VALLAT (Special Rapporteur) explained that there would be no need to insert the opening proviso "Subject to the provisions of the present articles" if it were only a matter of applying to article 10 the general provisions of part I. The proviso was necessary because of the absolute terms in which article 10 was cast; without it, article 10 might be interpreted as excluding some of the later articles.

48. He would have no objection to the proviso being placed in square brackets until the Commission discussed those later articles. With or without square brackets, however, the proviso was a perfectly reasonable one, bearing in mind the absolute rule in article 10 on the change of treaty régime and the fact that later

[5] See *Yearbook . . . 1966*, vol. II, pp. 256 *et seq.*

articles of the draft clearly established a different treatment.

49. The use of the words "or administration" had been explained in paragraph (6) of the commentary (A/8710/Rev.1, chapter II, section C). He understood the intention of the Commission to be that the articles on State succession should apply to all cases of "the replacement of one State by another in the responsibility for the international relations of territory", to use the wording of the definition in article 2, paragraph 1(*b*). Accordingly, article 10 should cover cases in which the territory transferred was not under the sovereignty of the predecessor State, but only under its administration, which, of course, made that State responsible "for the international relations" of the territory. That idea would have to be retained, and it might be advisable to adjust the drafting of article 10 and the definition in article 2, paragraph 1(*b*) accordingly.

50. Mr. USHAKOV said that there were some articles which might be reserved, but, except for the general provisions, the other articles of the draft, in particular those relating to unions of States or newly independent States, had nothing in common with article 10.

51. Sir Francis VALLAT (Special Rapporteur) explained that he had in mind in any case articles 29 and 30, which did have an impact on the situation envisaged in article 10. He suggested that the Commission should not embark on the discussion of a controversial question at the present stage; the words "Subject to the provisions of the present articles" should be left in square brackets and it could be decided later which particular articles to specify.

52. Mr. ELIAS said that, for the reasons given by other speakers, in particular Mr. Tammes, he was in favour of retaining article 10 without any of the changes suggested by the Special Rapporteur.

53. For the reasons stated by Mr. Ushakov, he did not favour the inclusion of the proposed opening proviso "Subject to the provisions of the present articles", even if it were placed in square brackets. The only article in the draft which included such a proviso was article 11, and when the Commission came to consider that article he would raise the question whether the proviso should be retained.

54. He appreciated the point made by the Special Rapporteur regarding the relevance of articles 29 and 30. If the Commission reached the conclusion that reference should be made to those articles in article 10, he would be prepared to consider a formula such as "Subject to articles 29 and 30...". But if the Commission was unable to decide which articles were relevant, the best course would be not to include the proviso.

55. He was not in favour of deleting the words "or administration". The purpose of using the formula "under the sovereignty or administration" had been to express two ideas. The first was that of the transfer of territory from the sovereignty of one State to that of another; the second was that of a dependent territory, including under that term not only colonies, but also territories under the administration of a metropolitan Power. With the new wording put forward by the Special Rapporteur those two ideas would become blurred.

56. As to the suggested addition, at the end of the article, of the words "or would radically change the conditions for the operation of the treaty", he thought that cogent reasons for rejecting it had been given by the Special Rapporteur himself in his report (A/CN.278/Add.2, para. 211). Clearly, if there was any doubt on the questions of impossibility of performance and fundamental change of circumstances, they should be dealt with in one or more new articles. The suggested addition to article 10 would not solve the problem adequately; it should be discussed at a later stage, when the Commission could consider whether a general provision on the subject should be included.

57. Mr. KEARNEY said that the previous speaker's last point raised the basic question of the relationship of succession to treaties to the general rules which governed treaties under the 1969 Vienna Convention. If the suggested final proviso was to be rejected on the ground that elements of the Vienna Convention should not be imported into the draft, it would also be necessary to eliminate the test of compatibility with the object and purpose of the treaty from such provisions as article 27, paragraph 2(*b*).

58. An even more fundamental problem arose from the suggestion by the United Kingdom Government that provisions should be included on impossibility of performance and fundamental change of circumstances—concepts which were also taken from the Vienna Convention on the Law of Treaties. Should one or both of those concepts be introduced into the present draft, there would appear to be no reason to exclude others.

59. For those reasons he was inclined to believe that it was necessary to include a general article dealing with the relationship between the Vienna Convention on the Law of Treaties and the present draft articles.

60. With regard to the proposed opening proviso "Subject to the provisions of the present articles", he thought that some proviso of that kind would be needed to deal with the relationship between article 10 and some of the other articles of the draft. The problem was that of determining primacy among articles for the purposes of a particular situation. There were rules of interpretation on the subject, but they were far from clear. Hence, it was highly desirable to specifiy that a certain article had primacy over another—in the present case article 10—in a particular situation. The wording best calculated to achieve that purpose would have to be considered.

61. The question whether to retain the words "or administration" or to rely on some adjustment of the definition of succession of the States in article 2, paragraph 1(*b*), raised a major psychological problem. He himself still had the same doubts, which he had expressed when the Commission had discussed the article in 1972.[6] The concept of "administration" was totally

[6] See *Yearbook ... 1972*, vol. I, p. 157, para. 40 and p. 182, para. 46.

unsuitable in the context of State succession. Some types of withdrawal by a State from certain administrative activities did not measure up to the standards of State succession. The retention of the words "or administration" would unduly broaden the scope of State succession. He was therefore in favour of using the language of article 2, paragraph 1(*b*).

62. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 10, said that different views had been expressed on the suggestion that the words "or would radically change the conditions for the operation of the treaty" should be added at the end of the article, and it was difficult to assess the measure of support for that suggestion. But since it was basically a matter of drafting, he thought it could safely be left to the Drafting Committee.

63. As to the proposed opening proviso, he suggested that it should be left in square brackets and that the Commission should reach a conclusion when it had settled the contents of the relevant articles.

64. He was still concerned about the use of the word "administration", which was not a technical term and was not used in the Commission's other draft articles. An effort should be made to find a more suitable expression.

65. He realized that, in his rewording of the opening sentence of article 10, he might have excluded the case of total absorption. It had to be admitted, however, that the title of the article, "Transfer of territory", did not at all suggest that total absorption would be covered by its provisions; he was working on the assumption that it would not. That problem, too, should be left to the Drafting Committee.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 10 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*[7]

The meeting rose at 12.55 p.m.

[7] For resumption of the discussion see 1290th meeting, para. 26.

## 1269th MEETING

*Friday, 31 May 1974, at 10.10 a.m.*

*Chairman:* Mr. Endre USTOR

*Present:* Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

### Succession of States in respect of treaties

**(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-3; A/8710/Rev.1)**

[Item 4 of the agenda]

*(continued)*

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 11

1. The CHAIRMAN invited the Special Rapporteur to introduce article 11, which read:

*Article 11*

*Position in respect of the predecessor State's treaties*

Subject to the provisions of the present articles, a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates.

2. Sir Francis VALLAT (Special Rapporteur) said that article 11 was the keystone of the whole structure of part III of the draft articles, on newly independent States. The question of the impact of the principle of self-determination on those provisions was discussed in the general commentary preceding the draft articles in the Commission's 1972 report (A/8710/Rev.1, paras. 35 to 38). It had also been discussed at length in the Sixth Committee and he himself had dwelt on it in chapter II of his first report (A/CN.4/278, paras. 24 to 30 and 88 to 92).

3. In view of the strong support it had received, he did not think it was necessary to discuss the clean slate principle underlying article 11.

4. In his report he had summarized the comments of the Government of Tonga, although Tonga was not a Member of the United Nations; he believed that he had answered the arguments of that Government adequately in paragraph 216. The views of the Government of Tonga were contrary to those of the great majority of States and appeared to be coloured by that Government's own assessment of Tonga's special position as a former "protected State". It should be noted that the question of protected States had been considered at length by the Commission in its earlier discussions.

5. Of the Members of the United Nations, Sweden seemed to be the only one to have criticized the clean slate principle. In his own introductory remarks at the present session he had discussed the Swedish Government's proposal for an alternative set of draft articles and had given his reasons for not supporting it.[1]

6. The United Kingdom Government, in its comments (A/CN.4/275), had expressed some doubts about the clean slate principle, but had not proposed any alternative.

7. In the Netherlands comments (A/CN.4/275/Add.1), which had arrived after the preparation of his report, it was stated that the Netherlands Government had come to support article 11, in the form in which the Commission had adopted it in 1972, as striking an adequate balance between the principle of self-determination and the fact of the "legal nexus" between the treaty régime and the territory of the new State prior to its independence.

[1] See 1264th meeting, para. 13.