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Summary record of the 1269th meeting

Topic:
Succession of States with respect to treaties

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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.

8. It was thus clear that the text of article 11 should be acceptable to the Commission.

9. Mr. USHAKOV said that, as he had pointed out at the previous meeting in connexion with article 10, the words "Subject to the provisions of the present articles" were inappropriate. In the case of article 11, they might be replaced by the words "Subject to the provisions of the other articles in this part", or by a reference to specific articles.

10. Mr. ELIAS said that whatever the arguments which had led to the adoption, in 1972, of the compromise text of article 11 with the opening words "Subject to the provisions of the present articles", the Commission should now adopt the article without that proviso. He was strongly of the opinion that the proviso was not justified, and that it would only weaken the force of the principle stated in article 11, which was generally accepted.

11. Mr. YASSEEN said that the article under consideration was an important one, since it expressed the Commission's view of the position of newly independent States. The Commission had opted for the clean slate principle, while recognizing that it might be subject to qualification in certain cases. The Commission would have to consider, in succession, all the situations which might justify a relaxation of the clean slate principle, taking international considerations into account. Those situations must be clearly defined, so that States would not be able to depart from the principle in other cases.

12. Mr. MARTÍNEZ MORENO said that the records of the discussion in 1972[2] showed the legal reasoning that had led the members of the Commission to accept the clean slate rule stated in article 11, which was the cornerstone of the system of participation of newly independent States in multilateral treaties. The first consideration had been the principle of self-determination, which was one of the essential principles of the United Nations Charter, ranking equally with the sovereign equality of States and the other principles set out in Article 2 of the Charter.

13. An interesting legal argument had been put forward in support of that principle during the 1972 debate by Mr. Ruda, then a member of the Commission, who had said that according to the definition adopted, a new State "constituted a new legal person in international law and should be treated as a third State in relation to its predecessor's treaties. The general rule *pacta tertiis nec nocent nec prosunt* would therefore apply and it followed that no obligations could be imposed on a third State, whether old or new, without its consent.[3] Mr. Ruda had gone on to say that article 35 of the Vienna Convention on the Law of Treaties[4] even provided that no obligation could arise for a third State unless it "expressly accepts that obligation in writing".

14. The clean slate rule adequately reflected the trend of State practice, which was not, however, absolutely unanimous. For example, he understood that Bangladesh had made a declaration accepting the totality, not only of the internal legislation, but also of the international treaty obligations, formerly applicable to its territory as part of Pakistan. It was also worth noting that, on attaining independence early in the nineteenth century, the majority of the Latin American States had adopted the rule of continuity with regard to colonial legislation and treaties. Nevertheless, the clean slate principle, as reflected in article 11, was now generally accepted.

15. As to the opening proviso, he agreed that it detracted from the force of article 11, which was a fundamental article. He suggested that the Commission should try to identify the articles, such as articles 29 and 30, which should be specified in a proviso of that kind in order to allow for exceptions to the rule.

16. Lastly, he urged that the Drafting Committee should be asked to clarify the phrase "by reason only of the fact". He realised that those words had been carefully chosen, but he still thought they could be taken to imply that other facts might exist by reason of which a newly independent State could be under an obligation to maintain in force, or to become a party to, a treaty which had been in force in respect of its territory at the date of the succession.

17. Mr. TSURUOKA said that article 11, which confirmed the right of peoples to self-government, should be retained in its entirety.

18. It was possible, however, that strict application of the clean slate principle might lead to contradictory results, and that point should be dealt with in the commentary, so as to prevent wrong interpretations of the article. For example, on 6 February 1974, Australia and Japan had concluded an Agreement for the protection of migratory birds and birds in danger of extinction, and their environment. The Australian Government had stated that, under the present relationship between Australia and Papua New Guinea, it was incumbent on the Australian Government to consult the Papua New Guinea Government and to obtain its concurrence before concluding an international agreement applicable to that territory. The Australian Government had consequently requested that the Agreement should become applicable to Papua New Guinea only from the day when the concurrence of the Papua New Guinea Government had been notified to the Japanese Government by the Australian Government. It would thus appear to have been agreed between Australia and Papua New Guinea that the territory already enjoyed a certain degree of autonomy.

19. In such a case, article 11 could not be applied literally, for there was not "only" the fact of a treaty having been in force: there was also an agreement between Australia and Papua New Guinea relating to the degree of self-government already possessed by the territory. Care should be taken not to apply article 11 in a contradictory manner which in fact denied the self-government enjoyed by such a territory prior to full

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[2] See *Yearbook ... 1972*, vol. I, pp. 69-76.

[3] *Ibid.*, p. 73, para. 6.

[4] 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.

independence, and some explanations on that point should be included in the commentary.

20. Mr. ŠAHOVIĆ said it was logical that the Commission should have incorporated in the draft a rule which derived directly from the right of self-determination.

21. The introductory phrase "Subject to the provisions of the present articles" had a twofold purpose, as could be seen from the commentary to article 11, paragraph (19) of which stated that: "First, it sets out to safeguard the newly independent State's position with regard to its participation in multilateral treaties by a notification of succession, and to obtaining the continuance in force of bilateral treaties by agreement. Secondly, the proviso preserves the position of any interested State with regard to the so-called 'localized', 'territorial', or 'dispositive' treaties dealt with in articles 29 and 30 of the present draft." (A/8710/Rev.1, chapter II, section C). The first reason was scarcely convincing, since it referred to cases in which the newly independent State's position appeared to be sufficiently safeguarded by the wording of article 11. The second reason was more convincing, but he still doubted whether the introductory proviso should be retained in article 11, since the draft as a whole provided for judicious application of the clean slate principle.

22. The Commission would be able to decide whether to retain the proviso when it had considered the nature of the rights and obligations devolving on the successor State under the rule stated in article 11. It might perhaps be better to postpone a decision on that point until other articles in the draft had been considered.

23. Mr. TABIBI expressed his full support for article 11, which embodied the well-known clean slate doctrine. State practice supported that doctrine, although there were some writers who considered that new States were bound to observe certain general multilateral treaties containing rules of general international law.

24. With regard to the question whether articles 29 and 30 constituted exceptions to the rule in article 11, he thought those articles contained safeguards of the same kind as that in article 62, paragraph 2(*a*), of the Vienna Convention on the Law of Treaties. It should be remembered that the rights of a third State were always subject to the principles embodied in articles 46 to 53 of the Vienna Convention, which dealt with invalidity of treaties. A treaty which was void under article 46 of that Convention because it had been concluded in violation of a provision of internal law regarding competence to conclude treaties, or was void under article 51 or article 52 because it had been imposed by coercion, could not become binding upon a third State in any circumstances.

25. Similarly, the articles of the present draft were governed by the important provisions of article 6, which ruled out the possibility of succession in cases of violation of international law and, in particular, of any principle of international law embodied in the Charter of the United Nations.

26. Mr. RAMANGASOAVINA said that the Commission had been in agreement for a long time past on the principle stated in article 11. That principle might appear to be too rigid, especially in view of the title of the article, which might give the impression that there was a complete break with any treaties the predecessor State might have concluded on behalf of the territory to which the succession related. Nevertheless, article 11 had been cautiously drafted: it provided that a newly independent State was not bound to maintain a treaty in force or to become a party to it; in other words it could, for instance, conclude a devolution agreement or make a unilateral declaration.

27. Moreover, article 11 should be considered in the general context of the draft, which contained articles calculated to provide the necessary flexibility in the application of that provision.

28. He therefore considered the opening words of article 11 to be unnecessary.

29. The CHAIRMAN, speaking as a member of the Commission, said that he supported article 11 with the necessary drafting amendments, particularly those relating to the opening words.

30. Sir Francis VALLAT (Special Rapporteur) said that the question whether the opening words should be deleted, retained in their present form or perhaps amended so as to refer to particular articles, was a typical drafting problem of a kind that frequently arose when articles were being drafted with a view to the conclusion of a Convention.

31. The CHAIRMAN said that if there were no further comments he would take it that the Commission agreed to refer article 11 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[5]

ARTICLE 12

32.

Article 12

Participation in treaties in force

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

2. Paragraph 1 does not apply if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the successor State may establish its status as a party to the treaty only with such consent.

33. Sir Francis VALLAT (Special Rapporteur), introducing article 12, said that it constituted the main counterbalance to the principle embodied in article 11; it provided for continuity of participation in multilateral treaties from the date of the succession of States or from a later date specified in the notification.

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[5] For resumption of the discussion see 1290th meeting, para. 42.

34. Article 12 was an important article, with important consequences. The application of its provisions, combined with those of articles 17 and 18, meant that it would not be possible to say, at the date of the succession, what, if any, date would be chosen for the effective application of the treaty in relation to the newly independent State. There was always a possibility of delay in making the notification under article 17 and of a consequent delay in the operation of the retroactive effect of succession. Those two factors had affected the views on article 12 expressed by Governments.

35. Government comments dealt with two main points. The first was the possible classification of multilateral treaties, and particularly the recognition of a class of "law-making treaties". The second was the problem of setting some reasonable time-limit for making the notification of succession.

36. As a matter of doctrine and principle, and in the light of the Commission's discussions at earlier sessions, the idea of establishing any new category of law-making treaties did not appear to be a practical proposition in the context of the present draft articles. As to the suggested time-limit, it was a matter of policy which was not so much for the Commission as for Governments to decide in due course. Hardship would undoubtedly result for the other parties to a multilateral treaty in the event of delay by the newly independent State in making a notification of succession which, when made, had retroactive effect. He saw great difficulty in trying to alleviate that hardship by means of a provision which would place an interim obligation upon the newly independent State. The only protection which seemed feasible was to set some time-limit.

37. In his report, for convenience of presentation, he had grouped the government comments under six main headings (A/CN.4/278/Add.2, para. 220). The first was that of law-making treaties, in regard of which he drew attention to the comments of the Netherlands Government, which had suggested the possibility that "certain general multilateral conventions of world-wide applicability, embodying important rules of international law, would escape the application of the clean slate rule" (A/CN.4/275/Add.1, para. 4). The Netherlands Government had added that, in the case of those conventions, there should be a presumption of continuity together with the possibility, for the newly independent State, of opting out.

38. The idea of giving separate treatment to law-making treaties was an attractive one, but he did not see how those treaties could be identified on the basis of any principle. The expression "law-making" was itself misleading. No treaty was purely of a law-making character. Even codification conventions, which in any case contained elements of progressive development, included material of a non-legislative character. His conclusion, therefore, was that no attempt should be made to introduce the proposed new category of treaties.

39. As to the question of time-limits, he thought the Commission might well adopt a more positive attitude. The records of its earlier discussions showed that that question had been more or less set aside with the idea of reverting to it if necessary. No firm decision appeared to have been taken one way or the other.

40. It was difficult to deal with the problem of time-limits without examining article 18. From the point of view of drafting, however, it was easier to provide for a time-limit by inserting, after the words "notification of succession" in paragraph 1 of article 12, some such wording as "made within ... years of the succession of States". Such an amendment deserved serious consideration.

41. In that connexion, the United States Government had raised an extremely difficult point, which he had discussed in his report (A/CN.4/278/Add.2, paras. 235 to 238). That point could be illustrated by imagining a case in which a court pronounced judgement in the territory of another State party to the treaty, on the assumption that the treaty was not in force in relation to the newly independent State. Subsequently, a notification of succession was made by the latter State with retroactive effect; under article 18, the treaty would enter into force as from the date of succession. As a result, the judgement pronounced earlier would come to be based on a false assumption.

42. Situations of that kind could result in hardship, not only for the other States parties, but also for individuals, and it was the duty of the Commission to do whatever it could to improve the position. If provision were made for a fixed time-limit the position would be easier; in case of doubt, the court could postpone its decision until the expiry of the time-limit.

43. The question of the interim régime was dealt with in paragraphs 239 to 242 of his report. The Polish Government had pointed out that, as a result of the operation of the provisions of articles 12 and 18, there would be an interim period during which the position of the newly independent State in relation to other States parties to the treaty was not clear. In those circumstances, the idea had been put forward of making provision for some form of good faith obligation on the lines of article 18 of the Vienna Convention on the Law of Treaties, under which it would be incumbent on the newly independent State and the other parties to the treaty to refrain from certain acts pending the notification of succession.

44. He believed that an obligation of good faith of that kind would exist in any case, and that to introduce a specific provision on the subject would only create confusion. Still less would it be advisable to provide that the other parties were required to regard the treaty as provisionally in force during the interim period; a provision to that effect would run counter to the whole basis of the draft.

45. Clearly, the best the Commission could do to solve that problem was to include a time-limit, which would reduce the hardship for the other States parties. He himself fully supported the idea of freedom of action for the newly independent State, but he thought that States parties other than the predecessor State deserved equitable consideration. It should be remembered that the other States parties were wholly innocent of the exercise

of any pressure on, or control over, the newly independent State.

46. With regard to the grounds for excluding the application of paragraph 1 of article 12, which were set out in paragraph 2 of the same article, there had been suggestions by the Belgian delegation in the Sixth Committee, by the United States Government, by the Spanish delegation in the Sixth Committee and by the United Kingdom Government. In paragraphs 243 to 246 of his report he explained his reasons for not submitting any proposals pursuant to those suggestions.

47. The question of the effect of an objection to a notification of succession had been raised by a number of Governments, whose comments were discussed in paragraphs 247 to 253 of the report. The Netherlands Government's subsequent comments also raised that question. That Government had suggested that, in accordance with the principle of equality of all parties to a treaty, which was acknowledged in a number of articles of the draft, each "other State party" should be given the right to refuse to establish treaty relations with a particular successor State (A/CN.4/275/Add.1, para. 8).

48. He was strongly opposed to that Netherlands proposal. It would be deplorable to introduce a system of objections into the present draft articles. It was quite appropriate to admit objections in the case of reservations, since a State making a reservation was departing from the provisions of the treaty. In the present context, however, the newly independent State would be continuing the application of the treaty and there was no reason whatsoever for introducing an objections mechanism.

49. Lastly, there was the isolated suggestion by the Polish Government that there should be explicit regulation of problems arising from the termination, suspension or amendment of a multilateral treaty before notification of succession. He thought it was open to doubt whether such provisions were really required and he had explained, in paragraph 255 of his report, his reasons for not submitting any proposal for an amendment to meet that suggestion. An explanation of that point should be introduced into the commentary.

50. Mr. ELIAS said he shared the Special Rapporteur's view that there was no need to make any alteration to article 12. There appeared to be nothing in the government comments that had not been discussed during the Commission's earlier consideration of the present draft.

51. That applied even to the suggested time-limit. For his part, he did not favour that suggestion and did not see on what basis a particular period of years could be selected. It was necessary to have regard to the circumstances in which the original treaties had been concluded and also to the availability of the texts of the treaties which the newly independent State was supposed to be inheriting. He suggested that the matter should be left to be adjusted by the competent court.

52. Mr. HAMBRO said he entirely agreed with the Special Rapporteur that it would be unwise to introduce the suggested distinction between law-making treaties and other multilateral treaties.

53. He had listened with interest to the arguments put forward by the previous speaker, but thought, nevertheless, that the Commission should consider introducing a time-limit.

54. Mr. KEARNEY said that the Special Rapporteur should be congratulated on his excellent treatment of the very difficult problems raised by article 12. He agreed that it was not feasible to make a distinction between law-making treaties and other general conventions, and that any attempt to do so would raise considerable difficulties. The International Law Association, which largely supported the thesis that law-making treaties should be given continuity, had seemed unable to work out a viable distinction. The Commission's position on that point was the correct one and should be maintained.

55. The answer to the problem of time-limits, which should be considered in conjunction with that of the interim régime, was not as simple as Mr. Elias had suggested. It was complicated by the increasing number of multilateral treaties dealing with areas of private law, and particularly with the unification of legal procedures. That trend had to be taken into account in dealing with succession, because the decisions already taken by the Commission on the effect of article 12 and the consequential article on retroactivity could substantially affect private rights under such treaties.

56. For example, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commerical Matters,[6] which was rapidly gaining adherents, provided a simplified method of ensuring the delivery of judicial documents in a foreign country. Evidence of such delivery was a basis for initiating legal proceedings in the knowledge that the defendant had in fact been notified of the suit, thereby eliminating one of the grounds for voiding the judgement. Under article 16 of that Convention, in the case of default judgements, a defendant who had not been notified of the suit was, under certain conditions, entitled, within one year of discovering that a default judgement had been rendered against him, to contest that judgement in the court which had rendered it. If the court was in a successor State which had delayed notification of its succession to the Convention for several years, and the period had elapsed within which a defendant who had not received proper notice of the suit was entitled to contest the judgement, the defendant would be harmed by the retroactive application proposed under the draft articles.

57. Similar problems would arise if the draft Convention on Prescription (Limitation) in the International Sale of Goods[7] was adopted. Under the present terms of that Convention, a claim for breach of certain sales contracts for example would have to be brought within four years. In a case of succession, if the four years had expired before the successor State had given notification of succession to the Convention with retroactive effect,

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[6] *International Legal Materials (1965)*, vol.IV, p.341.

[7] See *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717) p.8.

a court could not rectify the situation because retroactive application of the time-limit would bar the action, even though the claimant might have been relying on general internal law which afforded a longer period.

58. The Special Rapporteur's conclusion that it was not possible to deal specifically with the problem raised by the effect of retroactivity on statutes of limitation in the present draft was debatable, but the Commission might not be able to deal with that problem in the time available. Nevertheless, from the point of view of protecting private rights, the provisions could result in inequitable situations if the Commission ignored the question of a time-limit for notification of succession. A balance would have to be struck between the difficulties which accession to treaties raised for newly independent States and the protection of private individuals in their legal relationships under the law a of a successor State, whose courts would often not be in a position to redress inequities.

59. The Commission should therefore consider the possibility of applying some reasonable time-limit for the notification of succession if it maintained the retroactive effect of such notification.

60. He agreed with the Special Rapporteur that it would be deplorable to institute a system that would enable States to raise objections to notifications of succession to treaties, but the present draft did not appear to exclude such a system. Paragraph 2 of article 12 seemed to imply that any State party to a multilateral treaty had the right to object on the grounds that succession of the successor State to the treaty was incompatible with its object and purpose. If that was true, what would be the effect of such an objection? Treaties concluded within international organizations might have a set of rules that would help to determine the effect of paragraph 2, but in many multilateral treaties there were no such rules.

61. In limiting the right to notify succession in the present articles, the Commission would have to consider the consequences of the limitation in terms of the treaty in question. The issue could not be ignored, as the present draft would lead to disputes for whose settlement there were at present no rules. It was necessary to give special study to the subject.

62. Mr. SETTE CÂMARA said that after carefully considering the Special Rapporteur's excellent summary of the problems raised by article 12, he would hesitate to make any substantial changes in the present wording of the article, which seemed sound and well balanced.

63. Several Governments were in favour of considering newly independent States as being automatically bound by so-called law-making treaties on the basis of an "opting-out" provision, instead of the present "opting-in" provision. He strongly supported the retention of the present provision, which was in accordance with the fundamental clean slate principle and at the same time would enable newly independent States to notify succession to a treaty. Their right to choose freely was clearly stated. An "opting-out" provision would raise difficulties and in some cases could not be reconciled with the clean slate principle.

64. It was clearly difficult to define "law-making treaties", and even the Governments in favour of making such treaties automatically binding on a successor State defined them in different ways. A strong argument against such an approach was that no State was considered to be automatically bound by a treaty whatever its purpose; every member of the international community had the right to choose whether to become a party or not. Automatic participation could not be imposed on successor States, even if they had the right to opt out. Such a right would in fact be a burden for a newly independent State, which would have to decide hastily whether or not to participate in the treaty, without time for proper reflection.

65. On the question of a time-limit for the notification of succession, he agreed with the Special Rapporteur that the objections raised by some Governments were well founded. In the absence of a time-limit, undue delay in notifying succession could create international problems due to the retroactive effect of the notification. States dealing with a newly independent State would be in doubt as to its rights and obligations. He was therefore in favour of considering a time-limit, perhaps somewhere between the seven years suggested by Poland and the three years suggested by the United States; that would be fair to the successor State and would protect the interests of the international community. The wording proposed by the Special Rapporteur in paragraph 234 of his report would be acceptable.

66. He agreed with the Special Rapporteur that the Commission should not undertake the difficult task of establishing rules for the suspension of periods of prescription. Mr. Kearney's remarks had confirmed his belief that the problems involved would be very difficult to solve. He also doubted whether the question of the interim régime should be discussed in the present context. The "opting-out" system would solve some problems, but would create many others.

67. He was in full agreement with the Special Rapporteur's conclusions on the other matters he had listed in paragraph 220 of his report.

68. Mr. TAMMES said that the discussion in progress was in fact concerned with the application of the clean slate principle, in different degrees, to multilateral conventions. The draft articles could not lay down that conventions of a universal character, open to all States, would be subject to a régime of automatic continuity, though the proposed convention on succession would itself, perhaps, be in that category. On the contrary, the consent of the successor State was always required.

69. The main point at issue was that there might be a presumption of consent in the case of certain kinds of treaty, subject to subsequent repudiation by the successor State—the "opting-out" system, as opposed to the "opting-in" system provided for in the present draft of article 12. The Special Rapporteur, after inviting the Commission, in paragraph 224 of his report, to consider whether, on balance, it would be more satisfactory to provide for the right to opt out, had indicated that such an approach would avoid long delays in the notification of succession, would not impose an unacceptable bur-

den on newly independent States because of the nature of the treaties involved, and would promote continuity and stability in treaty relations. He had then mentioned two possible objections: first, such an option would involve treaty obligations for a newly independent State before it had had an opportunity to examine their implications, and secondly, it was difficult to identify and define "law-making" multilateral treaties.

70. The Special Rapporteur's conclusion that the balance of considerations in favour of the "opting-out" approach did not justify its adoption in article 12 was a little surprising. However, the comments and arguments in the report seemed to provide a basis for solving the definition problem in a way that would enable the Commission to decide between the two approaches.

71. To overcome the technical difficulties, the Commission might first recommend that future diplomatic conferences, when preparing or revising general conventions, should indicate their nature for the purposes of succession. That could be done on the basis of the Nigerian suggestion that an exception to the clean slate principle should be made in the case of law-making treaties concluded under the auspices of the United Nations, since they had not been made by foreign Powers, but were acts of the world community intended to regulate international relations (A/CN.4/278/Add.2, para. 218). Secondly, the Commission might consider the possibility of making the "opting-out" system applicable to all multilateral treaties not falling within the scope of article 12, paragraph 3. Thirdly, the General Assembly might be invited to legislate along the lines suggested by the Netherlands Government (*ibid.*), perhaps taking the number of parties to a treaty as a criterion. At all events, it should not be beyond the capacity of the legal mind to find solutions to such technical problems in order to meet the overwhelming need for continuity and stability in treaty relations.

72. On the other aspects of article 12 he entirely agreed with the observations and proposals of the Special Rapporteur.

73. Mr. USHAKOV said he thought that if the Commission decided to provide for a time-limit, the best solution would be to stipulate a "reasonable" period and to leave it to international practice to establish what was meant by "reasonable".

74. With regard to law-making treaties, he would prefer to speak of "treaties of a universal character". Under the principle of presumed participation referred to by Mr. Tammes, the successor State would be considered to be a party to the treaty until its non-participation had been notified. A solution of that kind would ensure the treaty's continuity and at the same time safeguard the clean slate principle.

75. Mr. TSURUOKA said he was in general agreement with the comments made by the Special Rapporteur in his report and with his verbal explanations, but wished to stress the importance of establishing a time-limit within which newly independent States must exercise their right to notification of succession. It was right to protect the interests of new States, but the interests of other parties must not be injured in the process, so he thought it would be better to lay down a precise time-limit to safeguard the rights of all concerned. For instance, a time-limit of 20 years could be prescribed, since it was obvious that after 20 years a State could no longer be regarded as "newly independent".

76. On the subject of law-making treaties, he fully agreed with Mr. Ushakov.

77. Mr. YASSEEN said that on the subject of law-making treaties, which the Commission had discussed at length two years previously, his convictions remained unchanged. He still believed that it was impossible to impose such treaties, whether they were declaratory or whether they embodied progressive development of international law. He was convinced, however, that under the United Nations system of progressive development and codification, new States would have no difficulty in acceding to those treaties.

78. As to the question of a time-limit, he understood the reasons of certain Governments and some members of the Commission who wished to avoid difficulties in bringing treaties into effect. But he thought it difficult to fix a figure, because the length of the time-limit would depend on the nature of the treaty and on practical considerations relating to the newly independent State. Some treaties needed a longer period of reflection than others. Mr. Elias had rightly emphasized the difficulty of choosing a specific period; like him, he thought that the problem could be left to the courts and international practice. To provide a basis for judicial interpretation, the article might perhaps stipulate a "reasonable" time-limit, as Mr. Ushakov had suggested.

79. The CHAIRMAN drew attention to the suggestion that a law-making or universal treaty should be presumed to be binding on a newly independent successor State until it had notified its acceptance. Did that mean that in the case of other kinds of treaty there would be a presumption of non-continuity? The Special Rapporteur might wish to consider that point.

The meeting rose at 1 p.m.

1270th MEETING

Tuesday, 4 June 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

Present: Mr. Bedjaoui, 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. 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.1-4; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)