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Summary record of the 1272nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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open to accession. That aspect of article 14 should be considered if the draft articles were to be made as universal as possible; unusual cases should also be borne in mind.

74. The main, but not necessarily insuperable, problem in article 14 was the impossibility of establishing, by any objective test, the intention of a signatory State at the time of signature. There was, in fact, a precedent in article 29 of the Vienna Convention on the Law of Treaties. Although it dealt only with treaties in force and binding on the parties, and not with the question of the scope of signature, he thought there should be no difficulty in providing for a presumption as to the scope of signature based on the precedent of that article. That was a matter which the Drafting Committee might consider.

75. The question of the time from which article 14 would operate also arose in connexion with articles 12, 13 and 18 and might be considered later, as the relationship between those articles would have to be examined in some detail. Time would indeed be a major feature of the Commission's discussions at its present session.

76. He doubted whether a provision was needed to deal with the question of reservations. If the doctrine of the Vienna Convention on the Law of Treaties was applied, a ratifying State would be entitled to maintain or withdraw reservations at the time of ratification. It might in fact be desirable for a newly independent State to make its position clear, but there seemed to be no basic problem which could not be solved by applying the law of treaties. However, if a newly independent State failed to indicate its attitude towards any reservations made by the predecessor State at the time of signature, a difficulty might arise. That point should perhaps be considered by the Drafting Committee with a view to clarifying the text of article 14.

77. The CHAIRMAN suggested that article 14 should be approved provisionally and referred to the Drafting Committee for further consideration with a view to working out a compromise text.

It was so agreed.[5]

The meeting rose at 1 p.m.

[5] For resumption of the discussion see 1290th meeting, para. 71.

1272nd MEETING

Thursday, 6 June 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. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Draft report of the Commission on the work of its twenty-sixth session

1. The CHAIRMAN said it had been the Commission's practice in the past to annex to its report to the General Assembly the observations submitted by Governments. He therefore suggested that the observations of Governments on the provisional draft articles on succession of States in respect of treaties, circulated as document A/CN.4/275 and Add.1 and 2, should be annexed to the Commission's report on the work of its twenty-sixth session. It would be helpful if a decision to that effect could be taken at once, so that the Secretariat could put the necessary work in hand.

It was so decided.

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]

(resumed from the previous meeting)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 15

2. The CHAIRMAN invited the Special Rapporteur to introduce article 15, which read:

Article 15

Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation which was applicable in respect of the territory in question at the date of the succession of States unless:

(*a*) in notifying its succession to the treaty, it expresses a contrary intention or formulates a new reservation which relates to the same subject-matter and is incompatible with the said reservation; or

(*b*) the said reservation must be considered as applicable only in relation to the predecessor State.

2. When establishing its status as a party or a contracting State to a multilateral treaty under article 12 or 13, a newly independent State may formulate a new reservation unless:

(*a*) the reservation is prohibited by the treaty;

(*b*) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(*c*) in cases not falling under sub-paragraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.

3. (*a*) When a newly independent State formulates a new reservation in conformity with the preceding paragraph the rules set out in articles 20, 21, 22 and article 23, paragraphs 1 and 4, of the Vienna Convention on the Law of Treaties apply.

(*b*) However, in the case of a treaty falling under the rules set out in paragraph 2 of article 20 of that Convention, no objection may be formulated by a newly independent State to a reservation which has been accepted by all the parties to the treaty.

3. Sir Francis VALLAT (Special Rapporteur) said that the most important point of substance raised by Governments in their comments was the suggestion—by Australia, Belgium, Canada and Poland—that the presumption, in paragraph 1, of the continuity of reservations should be reversed. The Netherlands had made the

same suggestion in regard to multilateral law-making treaties. The arguments adduced in support of that suggestion were presented in paragraphs 280 to 282 of his report (A/CN.4/278/Add.3). He did not agree that the presumption of the continuity of reservations in the case of newly independent States was in some way inconsistent with the clean slate principle. That principle, as elaborated in articles 11, 12 and 13, provided for continuity of the treaty if the newly independent State wished it to continue. Logic would seem to require that a newly independent State should inherit a treaty in the form in which it had applied to the predecessor State, and hence as modified by any reservations. On that basis the presumption in paragraph 1 was correct and should be maintained.

4. For practical purposes that point was linked with the question whether a newly independent State should or should not be entitled to formulate a new reservation when notifying its succession. It seemed reasonable to allow a newly independent State to benefit from any existing reservations from the outset and to make new reservations if it wished, thus placing it in the most favourable position on notification of its succession. That went beyond the provisions of the Vienna Convention on the Law of Treaties,[1] but article 73 of that Convention provided that its provisions "shall not prejudge any question that may arise in regard to a treaty from a succession of States" and the present case seemed to warrant a departure from the framework of the Vienna Convention.

5. The question of the maintenance of objections to reservations, dealt with in paragraph 289 of his report, did not appear to raise any serious problems that could not be solved under the law of treaties, as he had pointed out in his reply to Mr. Reuter at the previous meeting.[2] In most cases the objection would not be expressed as preventing the treaty's entry into force and would therefore have little significant effect; but where it was so expressed it would, in fact, prevent succession.

6. The remaining points raised by Governments were essentially of a drafting nature. The United States had made it clear that new reservations formulated under paragraphs 2 and 3 of article 15 should not have retroactive effect. As some provisions of the draft allowed retroactivity in other matters, it might be well to clarify that point by inserting a provision on the lines suggested in paragraph 298 of his report. Paragraph 287 dealt with the more difficult question of the implied withdrawal of an existing reservation if a newly independent State entered a new reservation on the same subject. Paragraph 1(*a*) provided for the test of incompatibility, but the rule might be easier to apply if it clearly specified that the formulation of a new reservation by a newly independent State would imply the withdrawal of any existing reservation on the same subject.

7. In general he was opposed to the practice of legislation by reference, as it nearly always led to drafting difficulties. The Commission had, however, enquired whether the adoption of that method in paragraph 3(*a*) would be acceptable, and Governments had not objected. It might therefore be appropriate to use the same method in paragraph 2, instead of repeating the corresponding provisions of the Vienna Convention on the Law of Treaties.

8. Mr. TSURUOKA said he was in favour of reversing the presumption in paragraph 1 of article 15 and providing, in accordance with the clean slate principle, that a new State wishing to maintain reservations made by its predecessor must renew them. Silence on the part of the successor State would then be interpreted as non-acceptance of the reservations made by the predecessor State. That presumption would be more in accordance with the general interest of the international community, which required a treaty to be accepted as a whole.

9. With regard to paragraph 1(*a*), he agreed with the Special Rapporteur that if the successor State formulated a new reservation which related to the same subject-matter as the reservation formulated by the predecessor State and was incompatible with it, only the new reservation would be valid.

10. Mr. RAMANGASOAVINA said that the question of reservations dealt with in article 15 could be reduced to a few very simple points. First, with regard to the date on which the notification of succession took effect, it was obvious that when a State wished to succeed to a treaty, either as a contracting State or as a party, it declared, clearly and with full knowledge of the facts, the position it wished to take and stated its point of view. Consequently, when a State merely made a notification of succession, unaccompanied by new reservations, the treaty in question, with the reservations formulated by the predecessor State, would naturally form part of the inheritance of the successor State. But when a successor State formulated new reservations or tried to withdraw reservations previously formulated by the predecessor State, the date on which the notification took effect would naturally be that of the notification of succession, whereas when a successor State accepted the treaty as a whole, with the reservations formulated by the predecessor State, the effective date could only be the date on which the succession took place.

11. He thought it would be difficult to reverse the clean slate principle adopted by the Commission without causing some confusion. In his view, when a newly independent State made a notification of succession, it accepted the treaty at the outset with the reservations already formulated, it being understood that, subsequently, its acceptance could always be accompanied by other reservations, which might amount to withdrawal of the reservations previously formulated. The subject-matter of the succession was, in fact, the whole set of rights and obligations of the predecessor State provided for in the treaty at the time of the succession. Those rights and obligations might represent advantages or disadvantages for the successor State, and it was at that point that it would be able to exercise its right to make a judicious choice between possible reser-

[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. 289.

[2] Para. 76.

vations, including those formulated by the predecessor State. The successor State could express its point of view on those reservations, which would not necessarily be the same as that of the predecessor State. It could withdraw some reservations and add others.

12. According to the new draft of paragraph 1 proposed by the Special Rapporteur in paragraph 290 of his report (A/CN.4/278/Add.3), the successor State was assumed to accept the treaty as a whole, with the reservations made by the predecessor State, but it could always formulate new reservations. Article 19 of the Vienna Convention, referred to in the new draft of paragraph 2 proposed by the Special Rapporteur (*ibid.*, para. 296), provided that a State might formulate a reservation "when signing, ratifying, accepting, approving or acceding to a treaty". Thus notification of succession was not expressly mentioned among the cases provided for in article 19 of the Vienna Convention, but the situation of the newly independent State did correspond to one or other of those cases.

13. He therefore believed that the clean slate principle adopted by the Commission ought to be maintained, but that the successor State should be enabled, in so far as the context of the treaty allowed—for there were incompatible reservations—to make a judicious choice on the basis of the treaty as a whole, including the reservations formulated by the predecessor State. Newly formulated reservations should not have retroactive effect, since they could only take effect from the date of the notification of succession.

14. Mr. MARTÍNEZ MORENO expressed his support for the present draft of article 15, with the changes suggested by the Special Rapporteur. He could not agree to the proposed reversal of the presumption concerning reservations in paragraph 1. Any reservations formulated by the predecessor State should be presumed to be maintained on succession, in order to enable the newly independent State to give the matter due consideration before deciding whether or not to withdraw the reservations. The provision should not oblige a newly independent State to make a hasty decision. Paragraphs 1 and 2 accurately reflected the Commission's intention in regard to reservations. Paragraph 3 harmonized the article with other parts of the draft and with the relevant provisions of the Vienna Convention on the Law of Treaties.

15. There were valid arguments for and against legislation by reference in the present case. Reproduction of provisions of the Vienna Convention might make the text cumbersome, whereas a reference to those provisions would show that different international instruments were in agreement. Foreign ministries might not always be familiar with, or have access to, the international instruments referred to, however, and there might be uncertainty and misunderstandings; besides, the State concerned might not be a party to those instruments. It might therefore be wise to reproduce the relevant provisions of the Vienna Convention. Whichever drafting method was adopted, it should be used consistently in paragraphs 2 and 3.

16. Much of the draft now under consideration was based on the Secretary-General's practice. The Secretary-General had been criticized by some Governments, which considered that he had acted outside his competence in the matter of reservations. He himself believed that the Secretary-General had acted correctly and had not exceeded his powers as a depositary; his practice had made a valuable contribution to the development of international law and had provided a basis for the Commission's work on a most useful convention.

17. Mr. ELIAS said that the Special Rapporteur's comments and suggestions were well founded. The Commission should accept article 15, with some drafting changes on the lines proposed by the Special Rapporteur in paragraphs 290 and 296 of his report. The additional provision suggested in paragraph 298 seemed unnecessary.

18. The presumption in favour of the maintenance of reservations in paragraph 1 was not contrary to the clean slate principle, but an affirmation of it. In his opinion, that principle would not be observed if the successor State did not inherit the treaty as modified by the reservations formulated in accordance with article 21 of the Vienna Convention on the Law of Treaties and in effect at the time of the succession. The requirement of renewal might indeed strengthen multilateral treaties, but it might also discourage newly independent States from notifying succession. The consequences of reversing the present presumption were uncertain, and the Commission should retain the approach it had decided upon after carefully considering the same arguments. If the argument in favour of deleting paragraph 2 was valid, and the deletion would obviate the need for applying the test of compatibility, there was perhaps something to be said for deleting sub-paragraph (*b*) of paragraph 1.

19. The Polish Government's argument concerning objections to reservations (A/CN.4/275) did not appear to be well founded. The reasoning which supported the present presumption in favour of the maintenance of reservations would seem to support a similar presumption in the case of objections to reservations. There was no need, however, to complicate further an already complicated article by introducing the notion of objections.

20. He saw no inconsistency between paragraphs 1 and 2, and the arguments adduced by Australia, the United Kingdom and the United States seemed sufficient reason for maintaining paragraph 2, which was a logical extension of the principle stated in paragraph 1: a newly independent State was given an opportunity of making its position clear in order to establish its status in regard to the treaty.

21. Little would be gained by deleting paragraph 2 or changing paragraph 1 to reverse the principle of the maintenance of reservations and objections. The reference in the proposed new text to article 19 of the Vienna Convention on the Law of Treaties was quite valid, however, since that article allowed a State to formulate a reservation only when signing, ratifying, accepting, approving or acceding to a treaty, not when notifying its succession to a treaty. Nevertheless, notification of succession was so clearly analogous to the acts listed in article 19 of the Vienna Convention that there should be

little difficulty in accepting paragraph 2 of article 15. The United Kingdom's suggestion that the method of reference should be used in paragraph 2, as it was in paragraph 3, was logical and would make the draft more elegant without changing its substance.

22. Mr. SETTE CÂMARA said that the clean slate principle was a corollary to self-determination. The present draft was intended to preserve the right of a newly independent State to choose freely whether or not it would be bound by a treaty concluded by the predecessor State. A State formulated reservations with very specific motives to suit its own needs, and the clean slate principle would not be observed if the successor State was required to adopt those reservations. The Special Rapporteur seemed to suggest, in paragraph 283 of his report (A/CN.4/278/Add.3) that the maintenance of existing reservations would benefit the successor State, but that might not always be the case. There was no reason why reservations should be considered as being permanently attached to a treaty. He therefore believed that the presumption in favour of the maintenance of reservations in paragraph 1 should be reserved. If that reversal was acceptable, the Polish Government's suggestion concerning objections to reservations was equally valid; for the reasons why objections should not devolve upon newly independent States were even stronger.

23. The Austrian and Swedish Governments had expressed the view that newly independent States should not be entitled to make new reservations when notifying succession to a treaty. The Special Rapporteur, in paragraph 292 of his report, described that view as well founded in principle, in the light of article 19 of the Vienna Convention on the Law of Treaties, which did not include notification of succession among the occasions when a State was permitted to formulate reservations. For the purposes of the present draft article, however, notification of succession was the time when consent to be bound by the treaty was given, so it was the equivalent of the occasions on which the Vienna Convention permitted reservations to be formulated.

24. Legislation by reference was often misleading and dangerous and should be avoided if possible, but sometimes its avoidance complicated drafting. The drafting methods adopted should be consistent, however. If provisions from article 19 of the Vienna Convention were to be reproduced in paragraph 2, the relevant provisions should also be reproduced in paragraph 3, not merely referred to.

25. Mr. HAMBRO said he fully approved of the way in which the Special Rapporteur had presented his comments, and of his proposals.

26. Mr. AGO said he supported the Special Rapporteur's thesis, but could not agree with Mr. Sette Câmara. One should not be enslaved by a metaphor and believe that if the clean slate principle applied to a treaty, it must also apply to reservations. Reservations did not exist separately from a treaty: they were only a means of limiting the scope of the treaty itself in the relations between certain States parties to it. It would therefore be a serious error to believe that the clean slate principle could be applied to reservations in order to preserve the independence of new States. The freedom of the newly independent State was fully respected when it was laid down that the successor State was at liberty not to maintain the predecessor State's reservations and to formulate new reservations.

27. What the Commission was trying to establish in article 15 was a certain presumption of succession to a treaty, which represented a set of rights and obligations. But it was impossible to succeed to rights and obligations which did not exist, and it was perfectly clear that, of the rights and obligations deriving from a treaty, only those that were not the subject of reservations existed. Hence one could not speak of succession to a treaty that was not in force for the territory in respect of certain rights and obligations to which reservations applied. That would be illogical, and he fully agreed with the Special Rapporteur, who had grasped that point and given it prominence. According to the Special Rapporteur, the principle of succession could apply only to rights and obligations which had been in force for the territory at the time of the succession. By virtue of the freedom granted to it, the newly independent State could extend those rights and obligations by withdrawing certain reservations, or further restrict them by adding new reservations, or it could change the whole system by withdrawing some reservations and replacing them by others. But to reverse the presumption established in paragraph 1 would be a mistake which the Commission must not make.

28. He could accept the Special Rapporteur's method of referring to the Vienna Convention on the Law of Treaties without repeating the content of the relevant articles. Nevertheless, he had doubts about the soundness of that method, for what would happen if some States ratified the convention on succession of States in respect of treaties without having ratified the Vienna Convention?

29. He noted that, although paragraph 2 provided that a newly independent State could only formulate new reservations if they were compatible with the provisions of the Vienna Convention, it contained no provision about the right of other States to make objections to such reservations and, consequently, not to be bound by new reservations formulated by the successor State. He was not sure that article 15 provided sufficient safeguards on that point.

30. Mr. USHAKOV said he had some doubts about the soundness of the proposals put forward by Governments and by the Special Rapporteur. Changing the wording of an article sometimes changed its meaning, and that applied to the redrafts proposed in paragraphs 290 and 296 of the report (A/CN.4/278/Add.3).

31. He was firmly opposed to drafting by reference to another convention, such as the Vienna Convention on the Law of Treaties. That procedure seemed all the more dangerous because the Vienna Convention was not yet in force. It might well be asked what would happen if a State which was not a party to the Vienna Convention became a party to the convention on succession of States in respect of treaties. Moreover, there

was a danger that drafting by reference would lead to the omission of essential elements. There was also a risk of referring to articles which had nothing to do with the situation in question. For instance, in the new paragraph 2 proposed in paragraph 296 of his report, the Special Rapporteur, instead of expressly stating the provisions to be observed, referred to article 19 of the Vienna Convention, which had nothing to do with notification of succession. Again, paragraph 3 of article 15 referred to article 23 of the Vienna Convention, which also had nothing to do with notification of succession, whereas it should refer to article 17 of that Convention.

32. With regard to the new paragraph 4 which the Special Rapporteur proposed to add, he was prepared to accept the principle of the non-retroactivity of reservations. The significant date, however, was not the date of the notification of succession, but the date on which the reservation was accepted by the other States parties.

33. Mr. BILGE said that in his opinion the presumption stated in article 15, paragraph 1 should not be reversed. The effect of that presumption was not very great; its sole purpose was to make the position clear by specifying that reservations were maintained unless a successor State expressed a contrary intention. It had been suggested that such a presumption was not consistent with the clean slate rule, which was the basis of article 11. As the Special Rapporteur had so rightly stressed, the effect of that rule should not be exaggerated; its purpose was merely to leave a new State free to claim to be, or to become, a party to treaties concluded by the predecessor State in respect of its territory. The rule was not absolute, and the presumption stated in article 15, paragraph 1 was certainly in line with succession. It should be noted, too, that the presumption did not confer any new right on the newly dependent State.

34. The right of the new State to make new reservations was an innovation, since no provision had been made for it in the Vienna Convention on the Law of Treaties. Where succession was concerned, however, that right was justified by considerations of equity and it should certainly be included in the draft.

35. The method of making reference to the Vienna Convention on the Law of Treaties might cause difficulties for States which were not parties to that Convention. That applied to Turkey, which could not accept that disputes relating to rules of *jus cogens* should not be submitted to an international court for compulsory settlement, and was consequently not prepared to become a party.

36. Mr. CALLE Y CALLE said that he favoured the positive presumption in paragraph 1. The successor State inherited the treaty régime as it had existed for the predecessor State, that was to say, as restricted by any reservations made by that State. It was, of course, open to the successor State to withdraw any such reservations.

37. The principle was that the newly independent State had all the elements of treaty-making capacity. It therefore had the right to formulate any further reservations of its own at the first opportunity available to it, namely, when notifying its succession to the treaty. He supported that approach, which gave the newly independent State the widest possible freedom in regard to reservations. That departure from the former restrictive practices regarding reservations was a comparatively recent development, but he believed that newly independent States should get the full benefit of the contemporary freedom to make reservations. As he saw it, a newly independent State had always been a State, but one which had been deprived by another State of the exercise of its sovereign rights.

38. As a matter of drafting, he was not altogether satisfied with the expression "a new reservation", as used in paragraphs 2 and 3(*a*). It was appropriate in paragraph 1(*a*), but in paragraphs 2 and 3(*a*) the reference was rather to a reservation of its own made by the newly independent State.

39. On the question of legislation by reference, he was in favour of keeping paragraphs 2 and 3(*a*) as they stood. In paragraph 2, it was appropriate to state the actual rule, rather than simply refer to provisions of the Vienna Convention; the paragraph contained substantive rules on succession of States in respect of treaties and those rules should be explicitly stated.

40. Paragraph 3(*a*), on the other hand, merely dealt with the machinery for making and withdrawing reservations and objections. In that context, it was quite sufficient to refer to the appropriate articles of the Vienna Convention. In the case of article 23 of that Convention, however, he was not satisfied with the reference to paragraphs 1 and 4 only; paragraph 2 might be applicable in certain circumstances, bearing in mind, in particular, draft article 14, which the Commission had referred to the Drafting Committee at its previous meeting. He therefore suggested that in paragraph 3 of article 15 the words "article 23, paragraphs 1 and 4" should be replaced by the words "the relevant provisions of article 23".

41. Lastly, the Special Rapporteur's proposed additional paragraph 4 (A/CN.4/278/Add.3, para. 298) on non-retroactivity seemed to him to be self-evident. Clearly, a reservation could not have any effect before being made in connexion with the notification of succession.

42. Mr. AGO said he thought the new paragraph 4 proposed by the Special Rapporteur might be of some use if doubts arose about situations prior to the notification of succession. In its present form, however, the provision was not entirely satisfactory, at least in the French version, for it was not a matter of determining the date on which a new reservation took effect, but what consequences it might have for previous situations.

43. The CHAIRMAN, speaking as a member of the Commission, said that on all matters of substance he agreed with the Special Rapporteur's proposals. He saw no need for the proposed additional paragraph 4, however, because its contents were self-evident. It would be sufficient to explain the matter in the commentary.

44. Like other members, he preferred to avoid drafting by reference; occasionally, however, exceptions had to be made to that rule. In the present instance, he thought the matter could safely be left to the Drafting Committee.

45. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 15, said that all the interesting points made had been carefully noted and would be borne in mind by the Drafting Committee.

46. Strong reasons had been given for maintaining the presumption in paragraph 1. A number of drafting points had also emerged from the debate, particularly with regard to the time when reservations had to be formulated. The need for clarification of those points would be taken into account by the Drafting Committee.

47. As he had already said, he did not favour the method of legislation by reference; but it could be justified in certain circumstances. The reproduction of a whole series of provisions could be quite out of proportion to the importance of the issue involved. It should also be borne in mind that the present articles had been drafted within the essential framework of the Vienna Convention on the Law of Treaties, so it was not unreasonable to rely in some instances on the articles of that Convention, particularly where the main purpose was to provide a mechanical structure to make the provisions workable.

48. As to the reference to article 23 of the Vienna Convention, he believed it correct to restrict that reference to paragraphs 1 and 4. Paragraph 2 dealt with a reservation formulated when signing a treaty subject to ratification, acceptance or approval, and specified that the reservation "must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty". The situation contemplated in the present draft article 15 was quite different: the article dealt with reservations formulated in connexion with a notification of succession.

49. Similarly, there was no reason to refer to paragraph 3 of article 23 of the Vienna Convention, since that paragraph dealt with an "express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation" and specified that such express acceptance or objection did not itself require confirmation. The case referred to in that paragraph simply did not arise under the present draft articles.

50. He did not believe that the operation of article 14 would give rise to any real difficulty. That article departed from the procedure of notification of succession and, where a treaty had been signed by the predecessor State, allowed the newly independent State to step directly into the shoes of the predecessor State. It might well be that, in that context, a provision on the lines of article 23, paragraph 2 of the Vienna Convention might be required. That question, however, was outside the scope of draft article 15, which dealt with reservations in connexion with notification made under draft articles 12 and 13. It would be for the Drafting Committee to examine that point and see whether article 14 was really complete.

51. Mr. AGO had raised the question whether objections could be made to a reservation formulated by the newly independent State. He would like to reflect on that question, but his tentative reply was in the affirmative. The matter appeared to be adequately covered by the reference in paragraph 3(*a*) of draft article 15 to articles 21, 22 and 23 of the Vienna Convention, which contained detailed provisions on the subject of objections. Those provisions would apply to a reservation made on the notification of a succession. That point, incidentally, illustrated very well the problems which arose from legislation by reference.

52. The question raised by Mr. Calle y Calle on the use of the adjective "new" before the word "reservation" in paragraphs 2 and 3 was essentially a drafting point. That adjective was the most convenient one to use for distinguishing a reservation made by the newly independent State from one made by the predecessor State.

53. With regard to the proposed additional paragraph 4, he realized how difficult it was to draft short provisions to deal with the problem of retroactive effects. Texts on non-retroactivity usually spoke of the application of provisions to events, facts or situations occurring before a certain date. He had endeavoured to deal with that question in a short text, which was of course open to improvement by the Drafting Committee. At the same time, he did not think it would be enough to deal with the problem in the commentary. The additional paragraph 4 could have been safely dispensed with if the draft articles had not contained any provisions on retroactivity. In point of fact, however, certain provisions of the draft, such as article 18 (Effects of a notification of succession) did provide for retroactive effects. In the circumstances, it was desirable to include in article 15 a provision on the lines of the proposed paragraph 4, to indicate that no retroactive effect existed in the situations contemplated in the article.

54. In conclusion, he understood the general sense of the Commission to be that the presumption in paragraph 1 of article 15 should be maintained as it stood and that it was not necessary to deal with the question of objections by the predecessor State, whatever provision might be considered necessary for the newly independent State's own objections.

55. Mr. USHAKOV reiterated his opposition to the method of drafting by reference. A newly independent State which became a party to the convention now being prepared, but was not a party to the Vienna Convention on the Law of Treaties, would find itself bound, through article 15, by certain provisions of the Vienna Convention.

56. Mr. YASSEEN said he approved of the content of article 15. There was nothing anomalous about the method of drafting by reference. International law formed a single whole, and the Commission, which was called upon to draft conventions codifying international law, should not hesitate to legislate by reference, since that method brought out the unity of international law and of the Commission's work.

57. The CHAIRMAN suggested that draft article 15 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

ARTICLE 16

58. The CHAIRMAN invited the Special Rapporteur to introduce article 16, which read:

Article 16

Consent to be bound by part of a treaty and choice between differing provisions

1. Except as provided in paragraphs 2 and 3, when a newly independent State establishes its status as a party or contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining the predecessor State's:

(*a*) consent, in conformity with the treaty, to be bound only by part of its provisions; or

(*b*) choice, in conformity with the treaty, between differing provisions.

2. When so establishing its status as a party or contracting State, a newly independent State may, however, declare its own choice in respect of parts of the treaty or between differing provisions under the conditions laid down in the treaty for making any such choice.

3. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any such choice.

59. Sir Francis VALLAT (Special Rapporteur) said that there had been few comments by Governments on article 16, a fact which perhaps reflected an absence of intrinsic difficulties.

60. The presumption embodied in paragraph 1 of the article was similar to that in paragraph 1 of article 15 and, broadly speaking, the same considerations applied to both. Paragraph 2 made it clear that where a newly independent State made a choice of its own, that choice only operated from the date of the notification of succession. In paragraph 3, he would favour replacing the concluding words "any such choice" by the words "any such consent or choice". That drafting change would bring the paragraph into line with paragraphs 1 and 2, which referred to consent as well as to choice.

61. Mr. KEARNEY proposed that article 16 should be referred to the Drafting Committee.

62. Mr. TSURUOKA said that the reasons adduced for maintaining the presumption in article 15 had not convinced him. He proposed that the presumption in article 16 should be reversed, for the same reasons as he had given in connexion with article 15.

63. Mr. USHAKOV said that, in principle, he approved of the clause proposed by the Special Rapporteur for addition to paragraph 2 (A/CN.4/278/Add.3, para. 304). The Drafting Committee should reword it, however, in the light of article 17, paragraph 3 (*b*) and (*c*); for it was not, strictly speaking, the date of the notification that was concerned, but the dates mentioned in those two sub-paragraphs.

64. Mr. SETTE CÂMARA said that he supported Mr. Tsuruoka's proposal.

65. Mr. CALLE Y CALLE said he had some misgivings about the proposed drafting change at the end of paragraph 3. If a reference to "consent" were introduced, the question would arise whether it meant the consent of the successor State or the consent of the predecessor State. For his part, he could not see how it would be possible to modify the consent given by the predecessor State. He urged the Commission to retain the formula "any such choice", which would cover both the case of a treaty divided into parts and that of a treaty which offered an option between differing provisions.

66. Mr. TSURUOKA urged that the Commission should take due account of the fact that when a predecessor State decided what provisions of a treaty it intended to accept, its choice was not necessarily dictated by the interests of the territories under its rule.

67. The CHAIRMAN, speaking as a member of the Commission, said he saw no difficulty in embodying in article 16 a presumption similar to that in article 15; the successor State inherited the treaty in the form in which it stood for the predecessor State. If the successor State was not satisfied with the predecessor State's choice or with the consent given by it to only part of the provisions of the treaty, the successor State was completely free to change the situation simply by making a notification.

68. The question raised by Mr. Ushakov involved more than a mere drafting point. He himself believed that, when the successor State changed the position taken by the predecessor State with regard to consent or choice, that change in position could only have effect from the time when the change was made. The Special Rapporteur had referred to that question of non-retroactivity in paragraph 304 of his report.

69. Sir Francis VALLAT (Special Rapporteur), summing up the discussion on article 16, said that the resumption in paragraph 1 had been accepted by the Commission, subject to the reservations of two members.

70. The wording of article 16 had also proved generally acceptable, with the possible addition of a clarification regarding non-retroactive effect. In his own redraft of paragraph 2, he had relied on the structure of article 17 of the Vienna Convention on the Law of Treaties.

71. There was room for doubt about the interesting point raised by Mr. Calle y Calle concerning the concluding words of paragraph 3. He would reflect on the matter and the Drafting Committee would deal with it.

72. The CHAIRMAN suggested that article 16 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[4]

The meeting rose at 12.55 p.m.

[3] For resumption of the discussion see 1293rd meeting, para. 2.

[4] For resumption of the discussion see 1293rd meeting, para. 15.