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Summary record of the 1280th meeting

Topic:
Succession of States with respect to treaties

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Succession of States in respect of treaties
(A/4-CN.275 and Add. 1 and 2; A/4-CN.278 and Add. 1-5;
A/8710/Rev.1)

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

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 21

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

   Article 21

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

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

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

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

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

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

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

2. Sir Francis VALLAT (Special Rapporteur) said that the purpose of article 21 was to make it clear that any changes in the relations between the original parties to the treaty which took place after the date of the succession of States did not affect the position between the successor State and the other States parties.
date of the succession. If a link subsisted between the predecessor State and the other State party, it derived from another treaty. Nor was there any question of a trilateral treaty, for the ties linking the other State party with the successor State, on the one hand, and the predecessor State, on the other, were independent, even though their purpose was the same.

12. It was useful to provide for the case in which relations between the other State party and the predecessor State were suspended, and the case in which the treaty was amended in the relations between the predecessor State and the other State party. Those situations in no way affected the relations between the newly independent State and the other State party.

13. Mr. BEDJAOUI said he supported article 21, the wording of which was felicitous, although too detailed. At first he had thought that paragraph 1 could be condensed, but he was now convinced that it should be kept as it stood, in an easily readable and understandable form.

14. As soon as article 19 applied, the treaty no longer belonged to the predecessor State. There was not a trilateral treaty, but two treaties of identical content, each with its own legal existence. Consequently, whatever might affect the legal existence of the treaty between the predecessor State and the other State party could not affect the new collateral treaty between the successor State and the other State party.

15. Article 21 was faultless and should be retained.

16. Mr. CALLE Y CALLE said that he fully accepted article 21, which stated self-evident rules. He was, however, concerned at the use of the expression "by reason only of the fact", which could give rise to misunderstanding. It might be construed to mean that there could be facts which produced a different result.

17. He therefore proposed that the word "only" should be deleted.

18. The CHAIRMAN, speaking as a member of the Commission, asked whether the rules stated in article 21 for bilateral treaties did not also apply to the "restricted" multilateral treaties referred to in article 12, paragraph 3. If so, that fact should perhaps be stated.

19. Sir Francis VALLAT (Special Rapporteur) said that the situation with respect to bilateral treaties needed to be clarified because, as a result of the succession of States, there were two bilateral treaties in the place of one. Under a multilateral treaty, no new treaty was created. All the treaty mechanics continued, and they were not affected by the succession of States. The life of a multilateral treaty was independent of succession.

20. It would be a mistake to try to deal with multilateral treaties in article 21; each of those treaties operated under its own provisions. Those considerations applied with equal and possibly with even greater force to "restricted" multilateral treaties.

21. The CHAIRMAN, speaking as a member of the Commission, said that the rules in article 21 would apply to "restricted" multilateral treaties even if the draft articles did not say so. Under article 19, to which article 21 referred, the consent of both parties to a bilateral treaty was necessary for the treaty to be considered as remaining in force after a succession. The situation would be similar for a "restricted" multilateral treaty; for it to remain in force, the consent of all the three or four parties to it would be required. That point could perhaps be explained in the commentary.

22. Mr. USHAKOV said it would be necessary for the Special Rapporteur to prepare a draft article on the matter.

23. Sir Francis VALLAT (Special Rapporteur) said that, in the present draft articles, a clear-cut distinction had been made between bilateral treaties and multilateral treaties. The treaties referred to in article 12, paragraph 3 were still multilateral, even if they were "restricted". Hence he did not think it advisable to suggest in any way that those treaties were in the same position as bilateral treaties.

24. THE CHAIRMAN, speaking as a member of the Commission, said he was satisfied with that explanation.

25. Speaking as Chairman, he suggested that article 21 should be referred to the Drafting Committee.

It was so agreed.

**ARTICLE 22**

26. The CHAIRMAN invited the Special Rapporteur to introduce article 22, the first article in part III, section 4 (Provisional application), which read:

**Article 22**

**Multilateral treaties**

1. A multilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and another State party to the treaty if the successor State notifies the parties or the depositary of its wish that the treaty should be so applied and if the other State party expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. However, in the case of a treaty which falls under article 12, paragraph 3, the consent of all the parties to such provisional application is required.

27. Sir Francis VALLAT (Special Rapporteur) said that the comments made by the Swedish Government on the need to include articles 22, 23 and 24, on provisional application (A/CN.4/275), must be viewed in the light of the adoption of the clean slate principle. The Swedish criticism of the basic philosophy of the draft articles need not detain the Commission, since it had already agreed not to prepare an alternative set of draft articles based on continuity.

28. The Swedish Government had also raised the question of the apparent inequality between the successor State and the other State party with regard to the operation of article 22. In fact, however, that inequality was not a matter for concern, since it related to the mechanics of the provision. A successor State wishing to apply the treaty provisionally would have to notify its wish to the depositary, or to the parties as the case

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1 For resumption of the discussion see 1294th meeting, para. 42.
might be. The other State party, could either agree expressly to such provisional application or show its agreement by its conduct.

29. The articles on provisional application were of great practical value. They provided a very useful bridge between non-application and notification of succession, and would help to minimize any hardship that might result from the clean slate principle. That was particularly true of article 22, about which a number of detailed suggestions had been made by Governments.

30. The Swedish Government had objected to the words “or by reason of its conduct is to be considered as having so agreed” at the end of paragraph 1. The effect of deleting those words would be to require the express consent of the other State in all cases, and it could be argued that to attach legal effect to mere conduct always left room for doubt and might give rise to disputes. Nevertheless, he thought the provision should be kept as it stood, because there was some State practice to support it and because it was useful to allow other States parties to make the position clear by their conduct.

31. The United Kingdom Government had suggested that the expression “successor State” in article 22 should be replaced by the expression “newly independent State”, in the interests of consistency with the earlier articles in part III of the draft (A/CN.4/275). He thought that change would be an improvement.

32. The same Government had pointed out that the possibility of provisional application between the newly independent State and the predecessor State itself would seem to be excluded by the use of the term “another State party”, since according to article 2, paragraph 1 (m), the term “other State party” meant a party “other than the predecessor State”. He himself saw no reason why the predecessor State should not itself have the benefit of provisional application, and thought that the wording of article 22 should be clarified to that end.

33. For the reasons given in his report (A/CN.4/278/Add.4, para. 340), he suggested that, in paragraph 1, the word “so” should be deleted from the phrase “its wish that the treaty should be so applied”.

34. The Spanish delegation in the Sixth Committee had criticized the wording of article 22 as being unduly involved. That criticism was really a comment on the classification of multilateral treaties in article 12, so it did not call for any alteration in the language of article 22. It was, however, true to say that the relationship between the two paragraphs of article 22 was not sufficiently clear, particularly with regard to the application of the procedural provisions of paragraph 1 to the situations contemplated in paragraph 2. He had therefore proposed a redraft of article 22 (ibid., para. 342) in which he had attempted to make the meaning clearer by combining the two paragraphs of the article.

35. Mr. KEARNEY said he fully supported the philosophy of section 4, on provisional application. The provisions it contained were essential in view of the recent history of State succession. Owing to the pressing problems faced by newly independent countries and the time they required to consider their position in regard to a large number of treaties, it was likely that in most cases provisional application would continue for a very long time.

36. He agreed that article 22 gave rise to a number of difficult drafting problems and thought the Special Rapporteur’s proposals for dealing with them were basically sound. He was not certain, however, that the complete redraft appearing in the report fully met the case. In redrafting the article, it might perhaps be desirable to deal not only with the possibility of the predecessor State benefiting from temporary application, but also with a situation in which two successor States made a notification of provisional application. There would seem to be no objection to provisional application between two successor States, although neither of them was, strictly speaking, a party to the treaty.

37. With regard to the formalities required, he found the language of article 17 much clearer than that of article 22. The meaning of article 22 was that, where there was a depositary, the notification had to be made to the depositary, and where there was no depositary, it had to be made to all the parties. That should be made quite clear.

38. Lastly, he wished to draw attention to a question arising from the provisions of article 12. Paragraph 1 of that article enabled a newly independent State to establish its status as a party to a multilateral treaty by a notification of succession. Paragraph 2, however, ruled out the application of paragraph 1 “if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty”. What would be the effect of that provision on provisional application? The relationship established by provisional application was in the nature of a bilateral arrangement under a multilateral treaty, but it might have some side effects on the other parties to that treaty. Another State party might, in those circumstances, complain that provisional application was incompatible with the object and purpose of the treaty. That point did not appear to have been considered on first reading.

39. Mr. USHAKOV said there was a deep-seated contradiction between article 22 and article 12. Article 22 dealt not only with the provisional application of a multilateral treaty, but with the bilateral application of a multilateral treaty by only two of the parties.

40. It had been said that there was a choice in the matter of provisional application. If that was so, the choice lay not with the newly independent State, but with the other State party. The newly independent State was required, under paragraph 1 of article 22, to notify its wish for provisional application to all the parties. When that notification was made, the other parties to the treaty could agree to provisional application or refuse it, either expressly or by their conduct. That situation was in flat contradiction with the provisions of article 12. For if a newly independent State made a notification of succession under article 12, the other States parties had no choice; the treaty would be automatically applicable, regardless of their consent.

41. Another contradiction lay in the absence of any time-limit for the application of article 22.
42. Behind what appeared to be a lucid draft, the article thus concealed some very difficult problems of substance. He would not discuss the improvements in drafting suggested by the Special Rapporteur; what he was concerned about was the meaning and purpose of article 22.

43. Mr. MARTÍNEZ MORENO said that he accepted the three articles on provisional application. The clean slate rule had two results: the first was that a newly independent State came to life free of treaty obligations, except in so far as it wished to be bound by them; the second was that a newly independent State had a right to participate in multilateral treaties, except “restricted” multilateral treaties.

44. It had been repeatedly stressed that a newly independent State required time to consider the desirability of accepting its predecessors’ treaties. The articles on provisional application would be of great assistance in that respect, since they would allow the treaty to continue to operate until the newly independent State had reached a decision.

45. It had to be recognized, however, that the resulting uncertainty could create problems for the other States parties. That uncertainty should not be prolonged unduly, and he suggested that a reasonable period of provisional application should be allowed, at the end of which the newly independent State would be required to decide whether it wished to become a party to the treaty or not.

46. Lastly, he supported the drafting improvements proposed by the Special Rapporteur to meet the valid points made by the United Kingdom Government.

47. Mr. PINTO said he had no objection to the retention of articles 22, 23 and 24, which constituted a complement to the clean slate principle.

48. With regard to the text of article 22, he had at first shared the misgivings of the United Kingdom Government: the possibility of the predecessor State benefiting from temporary application seemed to be excluded by the wording of the article. On reflection, however, he thought the use of the singular form “another State party” was due to grammatical considerations and that the intention was to refer to all other States parties, including the predecessor State.

49. It was appropriate to emphasize the question of express consent in article 22 because of the kind of relationship produced by provisional application. There was no contradiction with the provisions of article 12; if a newly independent State established its status as a party to a multilateral treaty under the provisions of article 12, the other State party would still be free to express its views on the question.

50. Lastly, he suggested that consideration should be given to covering the case of a multilateral treaty which expressly provided for provisional application: such a treaty might well, at the time of the succession, be provisionally in application in the territory to which the succession related.

51. Mr. RAMANGASOAVINA said he approved of the three articles on the provisional application of treaties.

52. In the preceding articles, particularly in article 12, the Commission had dealt with the situation of a successor State which, by a notification of succession or a devolution agreement, expressed its will to become a party to a treaty. But it had also noted, in regard to article 12, that a successor State could maintain a waiting attitude, and it had wondered whether it would not be advisable to set a reasonable time-limit for that period of uncertainty, which put the other States parties at some disadvantage. Article 22, however, dealt with an intermediate situation—that of the provisional application of the treaty. That situation presented a twofold advantage: it served to fill the temporary gap which existed so long as the successor State had not expressed its will; and it enabled the successor State to take a positive position, even if that position was only a provisional one.

53. After thus providing for that transitional period the Commission specified, in article 24, the conditions in which it would terminate. There were two possibilities: termination of the treaty, as provided for in article 24; and maintenance in force of the treaty, if the successor State finally agreed to be bound, thus confirming the situation it had accepted provisionally. He thought the second possibility had not been sufficiently emphasized.

54. Mr. QUENTIN-BAXTER said that as the Special Rapporteur had pointed out, once the fundamental decision had been made to follow the clean slate method, the articles in section 4 came to play an essential part in the mechanism of the draft. Once it was decided that a newly independent State should have an absolute right to become a party to a multilateral treaty, there was no reason to be restrictive as to the procedure by which it might indicate its desire to apply that treaty provisionally.

55. As he understood it, the practice which the Commission had intended to reflect in articles 22 and 24 was, precisely, the State practice which had grown up around the institution of the unilateral declaration. Reference was made to such declarations in article 9, where it was stated, however, that they could have effect only “in conformity with the provisions of the present articles”.

56. Like many members, he really had no difficulty in principle about the relationship between article 22 and article 12. It did not seem to him strange that there should be an absolute right to become a party under article 12, while under article 22 the wishes of the other State party should also affect the equation. Because the procedure in question was a permissive one, the other State should be entitled to say that, while the successor State had an absolute right to become a party, it was so inconvenient to have any uncertainty about the treaty that it wished the successor State to regularize its position.

57. In his opinion, there was no need to reconcile the bilateral nature of provisional application with the procedure established in article 12, by which a newly independent State could notify its intention to succeed to a treaty; but once the question of time-limits had become prominent in the discussion, as it had in connexion with articles 12 and 13, it seemed to him inevitable that, as Mr. U'shakov had pointed out on one
occasion, the problem should be considered in relation to the procedure laid down in article 24 for the termination of provisional application. Once it was established that either State could terminate the provisional application on reasonable notice, it would seem to be highly unreasonable that by subsequent action under article 12 the newly independent State should be able to claim that its succession related back to the date of the succession of States.

58. In logic and in practical convenience, there surely had to be a connexion between those two things. The practice was a permissive one: the new State only had to make its declaration, which would normally be conveyed to the Secretary-General of the United Nations and circulated to member States. Article 22 assumed that the other States parties to a multilateral treaty would not be too hasty in concluding that the newly independent State wished to sever its connexion with that treaty.

59. The various drafting suggestions which had been made during the discussion should provide a good basis for reconsideration of the articles in section 4 by the Drafting Committee.

60. Mr. CALLE y CALLE said he was in fundamental agreement with the provisions of article 22. Mr. Ushakov had said that the article actually concerned the possibility of bilateral application of a multilateral treaty, and its background was to be found in article 16 of the draft submitted by Sir Humphrey Waldock in his fourth report,2 which provided that a new State could declare that it was willing to apply a multilateral treaty “on a reciprocal basis with respect to any party thereeto”. That had indeed been a bilateral relationship with respect to the application of a multilateral treaty, but article 22 of the present draft abandoned the concept of reciprocity and dealt with a treaty which was essentially multilateral. The treaty could be applied provisionally, but the consent of the other parties to that procedure did not establish a bilateral relationship.

61. Article 22 presented certain drafting problems, which had been skillfully solved by the Special Rapporteur in his proposed redraft. By eliminating the idea of the “other State”, he had brought the text closer to the very nature of the multilateral treaty, so that it could also include the predecessor State or, as Mr. Kearney had suggested, the other successor States which might exist at the same time.

62. He suggested, however, that the order of subparagraphs (a) and (b) of the redraft should be reversed. Sub-paragraph (a) referred to the case of a treaty falling under article 12, paragraph 3, which was a special case, whereas sub-paragraph (b) contained the more general rule governing the provisional application of multilateral treaties, which should come first.

63. Mr. REUTER said he wished to make a theoretical observation in order to place the problem raised by Mr. Ushakov within the framework of the general law of treaties. The Vienna Convention on the Law of

Treaties3 contemplated cases in which a treaty might give rise to a collateral agreement—the expression used by Sir Humphrey Waldock, especially in connexion with the articles concerning the effect of treaties on third parties. If that effect did not exist, it could nevertheless be generated by a collateral agreement concluded between a third State and all or some of the other States parties to the original treaty. There was no reason, therefore, why a multilateral treaty could not give rise to a provisional collateral agreement. It was not, of course, the multilateral treaty which applied under that provisional bilateral agreement: it was the rules stated in the multilateral treaty, which became the subject of a collateral bilateral agreement. That was a completely classical situation, which did not give the successor State all the rights of the parties to the multilateral treaty, but merely settled, in a collateral agreement, the question of the application of the rules.

64. In his opinion, therefore, the only problem that arose was purely a matter of drafting: it was necessary to word the article in such a way that the collateral character of the provisional application would appear more clearly than it did in the present text.

65. Mr. USHAKOV said he thought the situation contemplated by Mr. Reuter was possible not only in regard to provisional application, but in regard to any kind of application whatever; for as Mr. Yasseen had pointed out, everything depended on the will of the parties. In his opinion, what was involved was a rule laid down in the Vienna Convention, which added nothing to the draft since it did not relate to a multilateral treaty as such. Thus the article said nothing new about the possibility of two States applying any multilateral treaty whatsoever as between themselves, by mutual consent.

66. Mr. CALLE y CALLE, referring to the rule in article 25 of the Vienna Convention, which permitted the provisional application of a treaty, said that there was a difference between that classical rule and the rule in draft article 22. The article in the Vienna Convention referred to treaties which, although not in force, could be applied provisionally by agreement between the parties, whereas article 22 of the draft referred to treaties which were already in force, and might therefore call for somewhat different treatment.

67. Sir Francis VALLAT (Special Rapporteur), summing up the discussion, said it would be difficult for him to comment on all the points that had been raised, but he thought a large majority of the Commission was prepared to support articles 22, 23 and 24.

68. Mr. Reuter had singled out the central point at issue when he had spoken of “collateral agreements”. To think too restrictively in terms of the bilateral application of multilateral treaties would only result in unnecessary confusion. A collateral agreement, however, could apply between a successor State and one party to a multilateral treaty and would present no insuperable doctrinal difficulties.

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69. The time factor, which had been mentioned by Mr. Ushakov and Mr. Martínez Moreno, was a special question which would call for much reflection. Also linked with the question of time-limits was another problem he found rather troublesome, which had been mentioned by Mr. Quentin-Baxter: the possibility of the retroactive effect of a notification of succession after a period of provisional application. If that period was terminated, it would surely be unreasonable to allow the successor State to become a party to the treaty a year later with retroactive effect.

70. Another point was that raised by Mr. Calle y Calle in connexion with article 25 of the Vienna Convention, on provisional application. Since the Commission was using language parallel to that of the Vienna Convention, the interpretation of its draft articles should be on the same basis, but the language of article 25 would not seem to apply to multilateral treaties already in force. It was, of course, a matter for the Commission whether it wished, or was able, to provide for such cases.

71. The other questions of detail which had been raised were primarily drafting points. With reference to Mr. Ushakov's comment on article 12, he had already observed that if article 22 were regarded as providing for collateral agreements, there would be no basis for any conflict with article 12 and the question of the bilateral application of multilateral treaties would not arise.

72. The CHAIRMAN suggested that article 22 should be referred to the Drafting Committee.

It was so agreed.  

ARTICLE 23

73. The CHAIRMAN invited the Special Rapporteur to introduce article 23, which read:

**Article 23**

**Bilateral treaties**

A bilateral treaty which at the date of a succession of States was in force in respect of the territory to which the succession of States relates is considered as applying provisionally between the successor State and the other State party if:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

74. Sir Francis VALLAT (Special Rapporteur) said that the discussion on article 22 had made any long discussion of article 23 unnecessary, but he would like to draw the Commission's attention to paragraphs 345 and 346 of his report (A/CN.4/278/Add.4), which contained his observations on the comments of the Zambian and United Kingdom Governments.

75. Mr. YASSEEN said he thought that article 23 met a need for symmetry, but did not deal with the same problem as article 22, of which it was the counterpart. It concerned the application of a general principle of international law, which affirmed that States were free to provide for the provisional application of a treaty as between themselves. He did not see anything in it which called for a discussion.

76. In his view, the merit of article 23 might be that it stressed the possibility of provisional application by reason of the conduct of States. He therefore considered that the article should be retained and that the question whether to replace the expression “the successor State” by “the newly independent State”, should be considered in the Drafting Committee.

77. Mr. USHAKOV suggested that, since article 23 presented no problems of substance it should be referred to the Drafting Committee.

It was so agreed.  

The meeting rose at 12.50 p.m.

5 For resumption of the discussion see 1295th meeting, para. 13.

1281st MEETING

Thursday, 20 June 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

**ARTICLE 24**

Termination of provisional application

1. The CHAIRMAN invited the Special Rapporteur to introduce article 24, which read:

**Article 24**

**Termination of provisional application**

1. The provisional application of a multilateral treaty under article 22 terminates if:

(a) the States provisionally applying the treaty so agree;

(b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires; or

(c) in the case of a treaty which falls under article 12, paragraph 3, either the successor State or the parties give reasonable notice of such termination and the notice expires.

2. The provisional application of a bilateral treaty under article 23 terminates if:

(a) the successor State and the other State party so agree; or

(b) either the successor State or the other State party gives reasonable notice of such termination and the notice expires.

4 For resumption of the discussion see 1295th meeting, para. 2.