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Summary record of the 1282nd meeting

Topic:

Succession of States with respect to treaties

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58. Lastly, he hoped that the Special Rapporteur would give careful consideration to the relationship between the present articles and the Vienna Convention on the Law of Treaties.

59. Sir Francis VALLAT (Special Rapporteur), summing up the discussion, said that the most important point of substance raised had been in connexion with sub-paragraph (*b*), but speakers had perhaps lost sight of the fact that that sub-paragraph dealt primarily with notification of succession. Even if article 25 did not exist, there could still be a situation in the case of a newly independent State in which there was a legal nexus between part of its territory and a multilateral treaty. It would then be only natural to allow it to make a notification of succession with respect to the part affected by that nexus. But the introductory paragraph of article 25 stated that in such cases the treaty should be considered as applying in respect of the entire territory of the State. It was that provision which made sub-paragraph (*b*) appear to be an exception. In fact, however, it would correspond to the natural, rightful position of the State, so that it would be a mistake to deprive the State of the possibility of limiting its notification to that part of the territory for which the treaty was in force.

60. While appreciating the comments made by Mr. Kearney and Mr. Tammes, he thought that there should first be a general presumption that the entire territory was affected, and that the *status quo* should be maintained as in sub-paragraph (*b*). Views in the Drafting Committee might differ, but he suggested that for the time being sub-paragraph (*b*) should be retained.

61. He agreed with Mr. Calle y Calle that the phrase "effect of the combining of the territories" in sub-paragraph (*a*) was not an altogether happy one.

62. Mr. Pinto's comment concerning identical treaties and treaties which were not identical should be given further consideration by the Drafting Committee. He would prefer to retain the expression "the entire territory", but that was a minor point which could be considered later.

63. As to use of the expression "radically to change the conditions for the operation of the treaty" in sub-paragraph (*a*), he thought that it should be further clarified in some part of the commentary, perhaps in connexion with article 10, and that some explanation should be given why wording different from that of article 62 of the Vienna Convention had been chosen. He could see certain advantages in the use of the expression, if applied reasonably, because it was more flexible.

64. With regard to the question of provisional application, he thought that, as a matter of principle, a newly independent State should not be deprived of that possibility merely because it was formed from two or more territories. However, the use of the words "in force", in the first paragraph of article 25, would seem to exclude the provisional application of multilateral treaties by such newly independent States. The Drafting Committee should consider whether it might not be better to reverse the order of sections 4 and 5.

65. Mr. Ushakov had suggested that the reference to "articles 12 to 21" in the opening paragraph should be made more specific by singling out the exact articles concerned. That raised the problem of cross-references, which, on the basis of his own experience, he thought should be as broad as possible. In any case, that was a point to be considered by the Drafting Committee. The drafting of sub-paragraph (*b*), in particular, would call for careful consideration, since it was linked to article 12, paragraph 3. The commentary should also be expanded to include a new reference to article 13.

66. He agreed that there might be certain advantages in deleting the reference to treaties which were not identical, since such a reference only tended to make the draft more complicated. The fundamental problem was always to keep in mind the relationship between the present articles and the Vienna Convention, a matter to which he was sure the Drafting Committee would give its closest attention.

67. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion other provisions, such as article 15 on reservations, also applied to the newly independent States referred to in article 25. He therefore suggested that since part III dealt with newly independent States, it should be introduced with some such wording as: "The following part applies to newly independent States as defined in article 2, paragraph 1 (*f*) and subject to certain rules in article 25 concerning newly independent States formed from two or more territories".

68. Sir Francis VALLAT (Special Rapporteur) said that the point could also be clarified by expanding the definition in article 2, paragraph 1 (*f*) to include a newly independent State formed from two or more territories. That would be another question to be dealt with by the Drafting Committee.

69. The CHAIRMAN suggested that article 25 should be referred to the Drafting Committee.

It was so agreed.[5]

The meeting rose at 12.40 p.m.

[5] For resumption of the discussion see 1295th meeting, para. 29.

1282nd MEETING

Friday, 21 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. 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.1-6; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 26

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26, which read:

Article 26

Uniting of States

1. On the uniting of two or more States in one State, any treaty in force at that date between any of those States and other States parties to the treaty continues in force between the successor State and such other States parties unless:

(*a*) the successor State and the other States parties otherwise agree: or

(*b*) the application of the particular treaty after the uniting of the States would be incompatible with its object and purpose or the effect of the uniting of the States is radically to change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 is binding only in relation to the area of the territory of the successor State in respect of which the treaty was in force at the date of the uniting of the States unless:

(*a*) the successor State notifies the parties or the depositary of a multilateral treaty that the treaty is to be considered as binding in relation to its entire territory;

(*b*) in the case of a multilateral treaty falling under article 12, paragraph 3, the successor State and all the parties otherwise agree; or

(*c*) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraphs 1 and 2 apply also when a successor State itself unites with another State.

2. Sir Francis VALLAT (Special Rapporteur) said that part IV, on the uniting, dissolution and separation of States, probably contained the most important articles in the draft having regard to cases which might arise in the future, and deserved very careful consideration. Articles 27 and 28 would also have to be considered in relation to the articles in part III.

3. Introducing article 26, he pointed out that the Commission had already adopted the comparatively simple principle of *ipso jure* continuity of treaties, not only for what had previously been called "union of States", but also for the uniting of States generally. Members would be aware of the transition which had taken place between Sir Humphrey Waldock's original proposals[1] and the adoption of the concept of "uniting of States" for the purposes of article 26. He was convinced that that change had been justified, since it obviated the need to examine the internal structure of successor States and the difficult question of what, precisely, was meant by a union of States, which was not easy to define. The present formulation had the advantage of covering all conceivable cases in which a new State might be formed by the joining together of two or more old States.

4. Although the principle of *ipso jure* continuity was not based on much practice and diverged from the general view taken of newly independent States, he thought that the wisdom of the Commission in adopting that principle had been endorsed by almost all Governments, the only dissenting opinion having been expressed by Belgium, which took the view that one category, that of the "new State", would have sufficed (A/CN.4/278/Add.5, para. 364).

5. In paragraph 371 of his observations he had referred to the relation between a "transfer of territory" under article 10 and a "uniting of States" under article 26, which involved the question, raised by Mr. Tammes, whether article 10 covered cases of the complete absorption of the territory of one State by another.[2] He believed that articles 10 and 26 ought not to overlap, and that cases of complete absorption were really cases of union, which should be covered by article 26. Article 10 should apply where part of the territory was transferred, but not where the whole of it was absorbed. He would welcome the views of the Commission on that point.

6. Another interesting comparison was that between articles 25 and 26. Paragraph 2 of article 26 established the presumption that a treaty was binding only in relation to the area of the territory of the successor State in respect of which it had been in force at the date of the uniting of the States, subject to an exception in the case of multilateral treaties if the successor State so decided. That seemed to him to emphasize the desirability of retaining sub-paragraph (*b*) of article 25; the two situations were broadly parallel, though they were based on two different assumptions, both of which should be borne in mind when considering the two articles.

7. With regard to paragraph 1 (*b*) of article 26, the United Kingdom Government had questioned the test of incompatibility and the test of a radical change of conditions (A/CN.4/275). He had discussed that problem in connexion with article 25 in paragraph 376 of his observations (A/CN.4/278/Add.5), while in paragraph 378 he had stressed that the significance of a radical change should be further clarified in the commentary.

8. With regard to paragraph 2, the Australian Government had said that there might be a strong case for dropping the principle of consent, but had not given any reasons for such a change (*ibid.*, para. 364). He himself thought paragraph 2 should be left as it stood, though he would be interested to hear the views of other members of the Commission.

9. As to paragraph 3, he had expressed his own doubts about the need for that paragraph in paragraphs 380 and 381 of his observations; it seemed to him that if a

[1] Article 19 and Excursus A; see *Yearbook ... 1972*, vol. I, pp. 158-173 and 271-272.

[2] See 1268th meeting, paras. 34 and 35.

successor State united with another State, it would become a predecessor State.

10. The Netherlands Government had suggested that the provisions of part III concerning the rights of a successor State to complete the signature of its predecessor would be equally useful in the cases referred to in articles 26 and 27 (*ibid.* para. 365). The provisions in question would seem to be article 13 (Participation in treaties not yet in force), article 14 (Ratification, acceptance or approval of a treaty signed by the predecessor State), article 15 (Reservations) and article 16 (Consent to be bound by part of a treaty and choice between differing provisions). The applicability of those articles would have to be considered in the light of the basic principle of *ipso jure* continuity set out in article 26. That principle differed fundamentally from the clean slate principle and might lead to different conclusions.

11. In the case of article 13, where the predecessor State gave its consent to be bound by a treaty, a legal nexus existed and the newly independent State should be able to take advantage of that consent, partly as a matter of law and partly as a matter of policy. In his view, however, the legal nexus was very thin in the case of articles 14, 15 and 16, and the question arose whether a mere signature would be sufficient for *ipso jure* continuity. He himself did not think it would, since the situation was not the same as when there was consent to be bound. The only obligation would be one of good faith, as the International Court of Justice had made clear in the *North Sea Continental Shelf cases.*[3]

12. With regard to articles 15 and 16, the uniting of States did not normally call for a notification of succession, and the case of reservations would not arise under the principle of *ipso jure* continuity unless it was provided for by applying article 14 for the purposes of the completion of signature. If article 14 were adapted for the purposes of article 26, the question would arise whether it would not be logical to make provisions corresponding to the provisions in articles 15 and 16.

13. Mr. TAMMES said he understood from what the Special Rapporteur had said when discussing article 10, and from what was implied in paragraph 371 of his report, that he did not think article 10 should cover cases of absorption or total succession. That opinion was an important one, since the Drafting Committee would soon reach article 10 and there was no doubt that that article, as drafted at present, did cover cases of absorption. That was confirmed by paragraph (11) of the commentary to article 26 (A/8710/Rev.1, chapter II, section C), in which the Commission had discussed the admission of Texas into the United States of America in 1845 as "a case for the application of the moving treaty-frontier principle".

14. In the present draft, however, it was necessary to be careful, since if the concept of absorption was removed from the scope of article 10, there would be no place for it elsewhere, although cases of the absorption of one State by another might well occur in the future. Neither article 10 nor article 26 would then apply, since the latter article dealt, precisely, with the emergence of a new State from a process of uniting in which all the States involved disappeared as such. That was clear from paragraph (2) of the commentary to article 26 which stated that "The succession of States envisaged in the present article involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State".

15. In order to make the Commission's intention quite clear, he suggested that the words "in one State", in the first sentence of article 26, should be replaced by the words "in a new State", since the present wording could apply equally well to cases of total absorption. In Sir Humphrey Waldock's original formulation the intention had been quite clear, since his draft had begun with the words "When two or more States form a union of States",[4] though the Commission had later dropped the concept of a union of States.

16. But even if the suggested improvement were made and article 10 was left as it stood, the situation would not be quite clear, since there would always be cases in which the question whether a State had absorbed another, while itself remaining intact, or had united with another State so that a new State had emerged, would be decided by a political judgement. He need only recall the prolonged discussions on whether Italy had come into existence as the result of a succession of incorporations into the Kingdom of Sardinia, or as a new State resulting from a union between the Sicilies and other States, as Anzilotti had maintained.

17. He shared the Special Rapporteur's doubts about the desirability of retaining paragraph 3.

18. So far as the application of articles 13-16 to the case of *ipso jure* continuity was concerned, he could follow the Special Rapporteur's arguments in paragraphs 382-389 of his report, but would reserve his final opinion until he had fully studied article 27.

19. Mr. RAMANGASOAVINA said he approved of the principle stated in part IV of the draft. Part IV was completely different from the preceding part, which dealt with newly independent States, and the Special Rapporteur had been right to base it on the principle of *ipso jure* continuity of treaties.

20. In that connexion, he found it surprising that in their observations on article 26 some States—in particular Belgium—should have said that the Commission had linked the clean slate principle to the principle of self-determination. In his opinion, the clean slate principle did not apply to part IV. Articles 10 and 25 related to territories which had become part of a new State that was entering international life for the first time; it was therefore logical that the clean slate principle should be applied to that State. Part IV, on the other hand, dealt with States which, although new, had been formed through the uniting or dissolution of States which had had international responsibility.

21. Where a number of States united to form a single State, it was natural that they should retain their inter-

[3] ICJ Reports 1969, p. 3.

[4] See *Yearbook ... 1972*, vol. I, p. 158, para. 62.

national responsibility, in the same way as the different parts of a State which parted from each other to become separate States. Strictly speaking, those were not so much cases of succession as of inheritance, since before the new State was formed, what was to become its patrimony had already included a number of treaties. And in the interests of the stability of international relations it was reasonable to take the principle of continuity of those treaties as the starting point, it being clearly understood that the newly created State, by virtue of its independence, could adjust the treaties in question to suit its particular circumstances. Thus article 26 concerned, not a successor State, but a State party which had changed its form, either by uniting with other States or by splitting up to form two or more independent States. Thus the principle stated in article 26, paragraph 1 was fully justified, since it was only natural that a State formed through the fusion of a number of States should inherit the treaties they had concluded.

22. It might be questioned whether sub-paragraph (*b*) of paragraph 1 was necessary and whether it was not already implied in sub-paragraph (*a*), since the consent of the parties was always required and it was always open to the newly formed State to seek an adjustment of an existing treaty or to withdraw from it with the consent of the other parties. Nevertheless, he thought that sub-paragraph (*b*) was necessary.

23. He approved of the principle stated in paragraph 2, that the treaty applied only to the area of the territory of the successor State in respect of which it had been in force at the date of the uniting of the States—unless, of course, the successor State asked that the treaty should apply to the whole of its territory.

24. Paragraph 3 raised a more difficult question and some doubt might be expressed about its application.

25. He approved of the principle set out in article 26 and did not think the clean slate principle should be applied in that case. Agreements previously concluded by the States which had become part of the new State should indeed be maintained, on the understanding that the new State could always limit their application to the territory in respect of which they had been in force or seek their revision in the light of the changes that had taken place.

26. Mr. PINTO said he agreed with the principle of *ipso jure* continuity embodied in article 26, as distinct from the clean slate principle adopted in part III. The Special Rapporteur had raised the question whether part IV should not cover some of the situations covered in part III, such as those referred to in articles 13 to 16, but had answered that question in the negative. He himself had not yet reached any conclusion on the point, but might do so later.

27. Some uncertainty seemed to arise out of the contrast between the provision in article 25, sub-paragraph (*b*) and that in article 26, paragraph 2 (*a*). On the basis of article 25, sub-paragraph (*b*) and the clean slate principle, the continuity of treaty application in respect of a particular territory was a matter of choice by the successor State, coupled with a presumption that the treaty would apply to its entire territory. In article 26, paragraph 2, on the other hand, the situation was different, since the continuing in force of the treaty was automatic and was subject to the principle that, unless the contrary was established, it would apply only to the particular area in respect of which the treaty had been in force at the date of the uniting of the States. He did not, however, see any reason why there should be a presumption that the treaty would apply to two or more sections of the territory, and he hoped the Special Rapporteur would elaborate on that point.

28. With regard to the use of the expression "uniting of States", referred to in paragraph 369 and the following paragraphs of the Special Rapporteur's report, he thought it might be necessary to distinguish between different kinds of "uniting". For example, could it not be considered a kind of "uniting" when a metropolitan country took over territories as colonies?

29. The words "at the date of the uniting of the States", in paragraph 2, should perhaps be replaced by the expression defined in article 2, paragraph 1 (*e*): "date of the succession of States".

30. He supported the proposal to delete paragraph 3, which served no useful purpose.

31. Mr. USHAKOV said that article 26, like articles 27 and 28, bore signs of hasty drafting and raised numerous problems which the text did not settle.

32. With regard to the relationship between article 26 and article 10, he found the wording of article 10 unsatisfactory, because without its title it could be interpreted as applying to the uniting of States and not to the transfer of territory. Perhaps the Drafting Committee could add an introductory paragraph to article 10 to make its meaning clear.

33. The date of the uniting of States, referred to in article 26, paragraph 1, had not been defined, whereas the "date of the succession of States" had been defined in article 2. If the Commission had seen fit to define the latter expression, it should also define the former.

34. The use of the plural in the expression "other States parties" in paragraph 1 and its sub-paragraph (*a*) seemed to indicate that the article applied only to multilateral treaties, whereas paragraph 2 (*c*) concerned bilateral treaties.

35. With reference to the expression "otherwise agree" in paragraph 1 (*a*), he observed that article 26 should envisage the possibility of provisional application of a bilateral or multilateral treaty, in the same way as part III. That point might well be dealt with by interpretation, by a reference in the commentary or by a separate provision.

36. Paragraph 2 (*a*) did not refer to the notification of succession provided for in articles 17 and 18, but to a notification of an entirely different kind. Paragraph 1 of article 17 provided that a notification of succession must be made in writing, but that point was not mentioned in paragraph 2 (*a*) of article 26.

37. Lastly, with regard to article 16, paragraph 1 (*b*), he wondered how the Commission would deal with the problem of the continuation in force of a treaty where

one predecessor State made one choice, in conformity with a treaty, between differing provisions, and another predecessor State made another choice. That situation was not dealt with in article 26 and it might also arise in connexion with reservations. The question of ratifications, covered by article 14, also presented difficulties in the case of article 26.

38. Mr. KEARNEY, referring to the relationship between article 10 and article 26, said he was not sure that the case of the absorption of a State was necessarily covered by article 10. In support of that idea, Mr. Tammes had referred to the example of Texas, but he himself doubted that the United States of America had ever specifically advocated the principle of the moving treaty-frontier in that connexion. The case of Texas had certain unique aspects and could hardly be cited as an example of that principle.

39. There was a problem of overlapping between articles 10 and 26, and he thought that the cases of total absorption should be covered by the latter article rather than the former. Article 10 applied rather to cases in which there was a transfer of territory from one State, which remained in existence, to another State.

40. He agreed with Mr. Pinto that it was very difficult to follow the logic of the differentiation between article 25 and article 26. However, he recalled that in his own country Justice Holmes had once said that the spirit of law was not logic, but experience, and in the present case perhaps the Commission had to rely on experience.

41. As to the question whether it was necessary to introduce rules to cover newly independent States into part IV, there might be cases of reservations or choices that would be affected if treaties were extended to the new territory in its entirety. That was a point which the Drafting Committee should bear in mind.

42. Lastly, in situations where one or more of the unified States had become a contracting party to a treaty, he could see no objection to the application of the contracting party rule, but he wondered whether it was not the unified State which should become a party, rather than a part of it.

43. Mr. ŠAHOVIĆ said that part IV of the draft marked a turning point, since it no longer applied the clean slate principle, but the principle of continuity. That point had been noted both during the first reading of the articles and in the commentary to article 26.

44. As to the link between article 26 and article 10, he observed that the difficulties raised by article 10 were due to its drafting, its position in the draft and its title. On reading that article, which was placed near the beginning, one had the impression that the Commission had wished to lay down a general rule applicable to the whole draft. In his opinion, article 10 applied only to transfers of parts of a territory. If that was the case, the provision should be made more clearly understandable, particularly in regard to its legal consequences; the title should be amended, even if it was to disappear later.

45. With regard to the relationship between articles 25 and 26, to which Mr. Pinto had already drawn attention, it should be noted that according to article 26, paragraph 2, the treaties which continued in force were binding only in relation to the area of the territory of the successor State in respect of which they had been in force before the uniting of States. In article 25, on the other hand, the Commission had applied a different principle: the treaties applied to the entire territory of the newly independent State. That provision did not seem to have been prompted by considerations relating to the consequences of the application of the continuity principle, and he wondered whether the Commission could go so far as to make a distinction between States which united in accordance with article 26 and States which united in accordance with article 25.

46. Paragraph 3 of article 26 could be deleted for the reasons given by the Special Rapporteur (A/CN.4/278/Add.5, para. 381).

47. Mr. BILGE said that, except for paragraph 3, he approved of the substance and the drafting of article 26.

48. Since, in article 26, the Commission had abandoned the clean slate principle in favour of the principle of continuity, the relationship between those two principles should be explained in the commentary. Did one of them constitute the rule and the other the exception, or were they, as he supposed, to be regarded as parallel principles?

49. In paragraph 366 of his report the Special Rapporteur rightly stressed that the principle of *ipso jure* continuity involved an element of progressive development of law. That point should be reflected in the commentary, for the rule stated in article 26 was certainly not a customary rule. After the union of Egypt and Syria, for instance, Turkey had continued to apply, with Syria only, a certain treaty which it had concluded with both countries. It had been for practical reasons, however, not because it had felt obliged to act in that manner that Turkey had continued to apply the treaty.

50. With regard to the relationship between articles 10 and 26, he was in favour of retaining both those provisions and emphasized that the former had a rather limited scope. It would be advisable to specify in the commentary to article 26 what situations the Commission had in view, and to illustrate them by examples drawn, in particular, from the practice in regard to peace treaties.

51. Paragraph 3 of article 26 could be dropped, as it did not refer to any specific situation and contained no separate rule.

52. Lastly, he thought it would be useful to introduce provisions corresponding to articles 13 to 15 into part IV of the draft. The part dealing with newly independent States was longer than that devoted to other cases of State succession, but it was, precisely, the latter cases which would be the most numerous in the future.

53. Mr. USHAKOV said it might happen that a multilateral treaty, because of its nature, could not be applied to only part of the territory of a State. In that case it would not be possible to apply the rule in article 26, paragraph 2. For example, if only one of the States which had united was a party to a treaty banning nuclear weapons tests, it was unthinkable that the suc-

cessor State should be bound to observe that ban in respect of part of its territory only and be free to carry out nuclear tests in the rest. He suggested that the Special Rapporteur should draft a clause to deal with that obvious exception to the rule in paragraph 2.

54. On article 10, he had a drafting proposal. The article should be recast to deal separately with two distinct situations: first, the case of transfer of territory envisaged in the present text, and secondly, the case of a dependent territory which severed its links with the former administering Power, but instead of becoming independent chose to become part of an existing State.

55. Mr. QUENTIN-BAXTER said that the present discussion had shed some light on the comments made by the Australian delegation in the Sixth Committee, reserving its position with respect to article 26, paragraph 2 (A/CN.4/278/Add.5, para. 364). It was very likely that the Australian Government, when considering articles 25 and 26, had had in mind its responsibility for bringing to independence the territories of Papua and New Guinea, which was a classic case for the application of article 25. In that context, the Australian Government had naturally approved of the main rule in article 25, namely, that treaties were considered as applying in respect of the entire territory of a newly independent State formed from two or more territories. Naturally also, the Australian Government had been struck by the contrary presumption in article 26, paragraph 2; hence the comment to which he had referred.

56. Actually, article 26, paragraph 2 applied to a different case—that of two or more States which united to form a single State—and good reasons had been given to explain the difference between the rule it stated and the rule in article 25, which dealt with the merging of two or more formerly dependent territories to form one newly independent State.

57. On the question of the relationship between articles 10 and 26, he thought further reflexion was required. There was an important difference between the case contemplated in article 10, in which the old international personalities continued, and that dealt with in article 26, in which an entirely new character came on the international scene. During the long discussion in 1972, which had led to the adoption of article 10,[5] the Commission had not been conscious of the particular case contemplated in the present article 26. That article, like all the later articles of the draft, had not then been formulated by the Special Rapporteur.

58. In view of the introduction, at a later stage, of the distinction between various kinds of new States, such as a State formed as a result of the uniting of States, he thought the Drafting Committee should give careful consideration to the need for provisions on further machinery. If it was decided to draft such provisions, those on newly independent States could be used to the extent that they were applicable.

59. The CHAIRMAN, speaking as a member of the Commission, said that the Commission's guiding principle for the whole draft had been the desire to maintain the stability of treaty relations. The clean slate doctrine was simply an important exception to that principle, made for the benefit of newly independent States.

60. In the case of uniting of States, it was necessary to consider the different kinds of union. The first was that resulting from transfer of territory dealt with in article 10; in that case, the application of the moving treaty-frontier principle was an exception to the general rule of continuity.

61. The case of the merging of two or more formerly dependent territories to form a single new State also constituted an exception to the rule of continuity and article 25 laid down special rules for that case. Article 26 dealt both with the case of two independent States which united to create a new State, and with the case of absorption of one State by another.

62. As Mr. Pinto and Mr. Ushakov had pointed out, however, there could be cases of a mixed character, half way between those dealt with in articles 25 and 26. For example, a former dependent territory could unite with an old-established State. A case of that kind might be said to be covered by article 10, but the rule in that article did not seem suitable where the former dependent territory was much larger than the old State. It would seem strange for all the treaty relations of the larger territory to disappear and be replaced by those of a much smaller pre-existing State. He thought that case, and all the other mixed cases that might arise, deserved careful consideration by the Special Rapporteur and the Drafting Committee.

63. Mr. USHAKOV said that no provision could be made for cases of absorption, because they were bound to be wrongful under contemporary international law. A State could not absorb the territory of another State without using force.

64. Article 26 referred to cases of uniting to form a unitary State, a federal State or a State based on some kind of linguistic, cultural or other unity. In all such cases, uniting took place by the will of the peoples concerned and in accordance with international law, never by absorption. When the Commission had examined the draft articles on first reading, it had reached the conclusion that all those cases constituted uniting of States. It had distinguished the case of transfer of territory from the case in which a newly independent State was formed by the uniting of territories formerly under the administration of different States—for instance, Nigeria.

65. The CHAIRMAN, speaking as a member of the Commission, said that in mentioning the case of absorption of one State by another, he had really meant voluntary fusion. He had kept well in mind article 6, which expressly stated that the draft articles applied only to the effects of a succession of States occurring in conformity with international law.

66. Mr. AGO said that on the substance he agreed with the Chairman. Perhaps it would be better not to speak of "absorption". What the Commission had in mind was not "absorption"—a term which implied that a State wrongfully extended its power over another

[5] Formerly article 2; see *Yearbook ... 1972*, vol. I, pp. 43-50, 152-154, 156-158 and 181-182.

State by force—but rather "incorporation", which would take place in full conformity with the law and with the will of the country incorporated. That case could not be excluded. At the present time, for example, one could not exclude the possibility that certain islands in the Caribbean Sea under the administration of European countries were preparing either to become independent States or to be incorporated into Venezuela. In the latter event, they would not be absorbed by that country by force, but would be incorporated in it of their own free will and in their own interests.

67. It caused him some concern that the Commission still seemed to interpret the notion of a newly independent State as applying solely to States created by decolonization. History provided examples of newly independent States which did not fall into that category, such as Poland and Czechoslovakia, which had been formed from territories separated in 1918 from Hungary, Austria and Germany. There was no reason why such cases should be treated differently from that of Nigeria. Just because many States had recently acceded to independence as a result of the process of decolonization, which was nearly at an end, there was no reason to neglect the other cases of creation of newly independent States. It should be noted, moreover, that the definition of the expression "newly independent State" in article 2, paragraph 1 (*f*), could apply to a case like that of Czechoslovakia.

The meeting rose at 1.5 p.m.

1283rd MEETING

Monday, 24 June 1974, at 3.5 p.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. Sette Câmara, 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. 1-6; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 26 (Uniting of States) (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 26.

2. Sir Francis VALLAT (Special Rapporteur) said that the problems involved in article 26 were perhaps not quite so complex as they seemed during the discussion.

3. The relationship between article 26 and article 10 would need to be made clear in the commentary. There had been considerable dissent from the view expressed by Mr. Tammes that cases of absorption were covered by article 10.[1] He himself had carefully examined the records of the 1972 discussions and they had strengthened his impression that article 10[2] had been intended to deal solely with transfers of territory. There was also much force in the comment made by several members that the idea of one State taking over another was repugnant to the contemporary international community. If one State voluntarily united with another, the case would be covered by article 26, but absorption was unacceptable, both as a concept and as a term, whether in English or in any other language.

4. With regard to the relationship between articles 25 and 26, those articles had been compared largely because of their proximity in the draft; fundamentally, their provisions were quite different. Article 25 dealt with the case of a newly independent State, while article 26 dealt with a combination of independent States. The Commission had adopted different principles for those two cases. In article 25 the ordinary doctrine of the clean slate was applied; clearly, whether the newly independent State was formed from one territory or several, that doctrine would still be applicable. For the case dealt with in article 26, the applicable principle was that of *ipso jure* continuity. He would consider whether it was advisable to clarify that point further in the commentary.

5. As to the possibility of making provision for further categories, he believed that it would be a mistake to try to develop rules for rare and unusual cases. In the process of codification in its broad sense, there was always a risk in trying to be too detailed. It was generally better to leave a few such cases unanswered, to be dealt with by analogy.

6. He would endeavour to formulate a provision on the possible case, falling between articles 25 and 26, of a former dependent territory being joined with an independent State—a situation that was not clearly covered by the draft. Cases of that kind would probably be rare in the future, since dependent territories were vanishing.

7. He found less difficult, in principle at least, the case of a union formed from parts of the territory of independent States. It seemed to him clear that if, for example, a part of each of three States separated and the three seceding territories immediately formed one new State, the provisions of article 28 would apply. The case had to be treated by analogy with a newly independent State, unless the three seceding territories formed independent States and remained independent for a time before uniting, in which case article 26 would apply.

8. It was always necessary, however, to bear in mind the possibility of new situations arising in the future.

[1] See previous meeting, para. 13.

[2] Formerly article 2; see *Yearbook ... 1972*, vol. I, pp. 43-50, 152-154, 156-158 and 181-182.