Document:-

A/CN.4/SR.1267

Summary record of the 1267th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

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difficulties. It was true that article 6 was clearly related to article 1, but in a sense all the first six articles were interconnected. It was, of course, possible to rearrange them, but his own feeling was that the article on the use of terms should be as near the beginning of the draft as possible. He therefore saw no advantage in moving article 6 from its present place. That was, of course, essentially a matter for the Drafting Committee.

64. All members shared the concern about certain conceptual points expressed by Mr. Quentin-Baxter, but viewing the matter realistically, he did not see how article 6 could be improved unless a specific proposal was put forward.

65. He hoped that general agreement would be reached on the need to keep article 6 in its present form, possibly with minor drafting improvements.

66. Mr. KEARNEY proposed, as a drafting improvement, the insertion at the beginning of the article of the proviso: "Without prejudice to articles 29 and 30...".

67. Sir Francis VALLAT (Special Rapporteur) said that that proposal would be considered by the Drafting Committee.

68. Mr. TABIBI said he opposed Mr. Kearney's proposal. The majority of members, both in 1972 and during the present discussion, had supported article 6 in its present form.

69. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 6 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

The meeting rose at 12.55 p.m.

[6] For resumption of the discussion see 1285th meeting, para. 15.

1267th MEETING

Wednesday, 29 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 7

1. The CHAIRMAN invited the Special Rapporteur to introduce article 7, which read:

Article 7

Agreements for the devolution of treaty obligations or rights from a predecessor to a successor State

1. A predecessor State's obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties to those treaties in consequence only of the fact that the predecessor and successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles.

2. Sir Francis VALLAT (Special Rapporteur) said that article 7, on devolution agreements, and article 8, on unilateral declarations, (A/8710/Rev.1, chapter II, section C) had some common features, and many of the considerations that applied to the one also applied to the other. When discussing article 7, it was therefore desirable to bear in mind also the contents of article 8.

3. Government comments on article 7 fell into two groups. The first, which included the observations by Kenya and Zambia (A/CN.4/278/Add.2, para. 180), related to the assessment of the value of a devolution agreement, compared with a unilateral declaration. It was, of course, quite understandable that, from the political point of view, a unilateral declaration should be a more acceptable instrument to a newly independent State, but the only way of dealing with that point was to discuss it in the commentary. It was difficult to see how any allowance could be made for such a preference in the text of the articles.

4. The second group of comments related partly to the drafting of article 7 and partly to the effect of its provisions. The United States Government (A/CN.4/275, section B) had proposed that paragraphs 1 and 2 of the article should be combined and, in doing so, had raised the question of the relationship between article 7 and the provisions of part III, section 4 (Treaties and third States) of the Vienna Convention on the Law of Treaties,[1] which comprised articles 34 to 38.

5. In its written comments (A/CN.4/275/Add.1), the Netherlands Government had accepted as correct the negative rule formulated in article 7, which was also embodied in article 34 of the Vienna Convention, but had criticized the failure to include any rules on the lines of articles 35 and 36 of the Vienna Convention, recognizing the positive aspect of devolution agreements. On that point, there was a link between the Netherlands and United States comments.

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

6. The comments by those two Governments raised the general issue of the relationship between the present draft and the principles of the Vienna Convention on the Law of Treaties. On that point, his philosophy—which, he believed, accorded with that of the Commission—was that, basically, the present draft articles were concerned with the effects of succession of States, but were not concerned with the law of treaties as such. That point had to be kept clearly in mind. The Commission could not rewrite the law of treaties in the present context; that would be an immense task and the results would probably be unsatisfactory. The relationship between draft article 7 and articles 35 to 37 of the Vienna Convention could be dealt with in the commentary.

7. If, as he believed, a devolution agreement was a treaty, the rules of the general law of treaties should apply to it except in so far as might be otherwise agreed. Since succession of States involved something not covered by those rules, a definite procedure for dealing with its effects was provided for in the draft articles, in the form of notification in the case of multilateral treaties and agreement in the case of bilateral treaties.

8. He drew attention to the redraft he had prepared, combining paragraphs 1 and 2 of article 7 (A/CN.4/278/Add.2, para. 184), which read:

> Notwithstanding the conclusion of an agreement between a predecessor and a successor State providing that the obligations or rights under treaties in force in respect of a territory at the date of the succession of States shall devolve upon the successor State, the effects of the succession of States on those treaties shall be governed by the present articles.

A text on those lines would meet the wishes of the United States Government for a simplification of the article. It would not, however, affect the substance of the article, because, in a sense, the present paragraphs 1 and 2 said the same thing in different ways.

9. In conclusion, he suggested that the Drafting Committee should consider the possibility of condensing article 7, bearing in mind that the Commission had at times been criticized for the length of some of its draft articles.

10. Mr. SETTE CÂMARA said that the present wording of article 7 was the result of long discussion at the 1972 session, when it had been generally accepted that devolution agreements were little more than solemn statements of intention concerning the future maintenance in force of pre-existing treaties concluded by the predecessor State. A new manifestation of will on the part of the successor State would always be necessary; that was confirmed by the practice of the Secretary-General and other depositaries in recent years. A mere declaration of intention was nevertheless useful, because it opened the way for the negotiation and conclusion of such treaties as the newly independent State considered it advisable to enter into.

11. The present formulation of article 7 was well-balanced: paragraph 1 stated the negative rule that there was no automatic novation of rights and obligations as a result of succession; paragraph 2 established the primacy of the present articles over devolution agreements.

12. Government comments had not revealed any major objections to the article. The reservations by Kenya and Zambia related only to the degree of emphasis to be given to the rules in articles 7 and 8; a unilateral declaration constituted a better expression of the free will of the State than a devolution agreement, on which the shadow of possible coercion was always present to some extent.

13. He did not favour the adoption of the United States suggestion that paragraphs 1 and 2 should be combined, or the Special Rapporteur's redraft putting that suggestion into effect. As it stood, the article appropriately placed greater emphasis on the negative rule, and proclaimed the real nature of devolution agreements in clear and unmistakable terms. But since no change of substance was involved, he would not object to the redraft if the Commission decided to adopt it.

14. He would not object to the inclusion in the commentary of a reference to the relationship of article 7 with articles 35 to 37 of the Vienna Convention on the Law of Treaties, though he believed that there was no contradiction between those articles and the present draft. Under articles 35 to 37 of the Vienna Convention, the effects of treaties with regard to third States were always subject to the element of assent, which was also the keynote of the present draft article 7.

15. Mr. YASSEEN said that the rule laid down in article 7 was an exception to the general principles of the law of treaties, but was justified by the circumstances of international life. If the rules of the law of treaties were applied strictly, devolution agreements would produce all their legal effects immediately. In matters of State succession, however, it had been considered preferable to stipulate that such agreements produced their effects only if they were subsequently confirmed by the successor State. The intention had been to protect the successor State and give it time for reflection. A devolution agreement concluded between the predecessor and the successor State must not commit the successor State's future or limit its freedom of action.

16. The reason why the rules relating to treaties and, in particular, to third States should not be applied in the present case, was that succession of States was a special field calling for special rules. He therefore approved of article 7.

17. It had been suggested that a distinction should be made between devolution agreements and unilateral declarations by successor States; he was not in favour of such a distinction. The Commission had, indeed, decided that neither devolution agreements nor unilateral declarations produced any direct effects. One of those manifestations of will might be better than the other, but it would be difficult now to distinguish between their legal effects. As the Special Rapporteur had suggested, the question might simply be mentioned in the commentary.

18. It did not appear to be desirable either to merge articles 7 and 8—since a devolution agreement was technically different from a unilateral declaration—or to

combine the two paragraphs of each of those articles. The present wording of article 7 was satisfactory, and it would be preferable for the Drafting Committee not to change it.

19. Mr. TABIBI expressed general support for article 7, the provisions of which would be useful to ensure the continuity of treaty rights and obligations, especially in the case of multilateral treaties. The article did, however, create some difficulties in regard to bilateral treaties.

20. Devolution agreements were important because of the emergence of so many new States in recent years and the increasing number of multilateral conventions. The correct rule of international law on the subject was that stated in paragraph 1 of article 7, which embodied the clean slate doctrine and was in conformity with the principle of self-determination. The practice of concluding devolution agreements was growing in the United Nations family, and those agreements worked satisfactorily provided that they were not contrary to the object and purpose of the treaties in question and did not conflict with the constituent instrument of the organization concerned.

21. He agreed with Mr. Yasseen that there were great differences between articles 7 and 8. A devolution agreement was concluded between the predecessor and the successor State; a unilateral declaration was an act of the successor State alone. There was also the important point that successor States were afraid of entering into devolution agreements because such agreements often constituted the price of independence.

22. On the question of the relationship between draft article 7 and the articles on third States in the Vienna Convention on the Law of Treaties, he supported the Special Rapporteur's position. That applied particularly to bilateral treaties; the rights of a third State which was an original party to the treaty, should be taken into account in article 7 and also in article 8.

23. Mr. ELIAS pointed out that the redrafts of articles 7 and 8 in the Special Rapporteur's report (A/CN.4/278/Add.2, paras. 184 and 188) had been put forward mainly to enable the Commission to consider the questions raised in certain government comments.

24. As he saw it, the suggestions by the United States Government were only intended to clarify and simplify the statement of the rules embodied in articles 7 and 8. He strongly advised against any attempt to change the structure of those articles, which had been adopted in 1972 after a long and thorough debate. In the Sixth Committee, despite some initial criticism, the articles had ultimately been almost universally accepted. The reasonable character of their provisions was shown by the fact that no serious objections had been made by either the United Kingdom or France which, as former colonial Powers, had had experience of devolution agreements equal to that of the Netherlands.

25. He believed that any attempt to introduce provisions on the lines of articles 35 and 36 of the Vienna Convention would create serious difficulties and might even discourage States from participating in a diplomatic conference to adopt a convention based on the draft articles.

26. If the Commission or the Drafting Committee wished to simplify the text of article 7, he suggested that their efforts should be directed to paragraph 1 and paragraph 2 separately; any attempt to combine the two paragraphs might destroy the whole effect of the article. Paragraph 1 was a clear statement of the clean slate principle, which was the basis of the whole draft. Paragraph 2 was useful in emphasizing, to the extent necessary, the positive aspects of devolution agreements. Article 7 was, of course, so completely different from article 8 that it was quite out of the question to combine the two.

27. Lastly, he urged that the points raised by the United States and Netherlands Governments, as well as those raised by the Governments of Kenya and Zambia, should be dealt with in the commentary.

28. Mr. TAMMES said he agreed with previous speakers that the cases of article 7 and article 8 should be kept apart. Those articles reflected different and often contradictory practices of the past, and the Commission had wished to pronounce on each of those practices separately.

29. With regard to article 7, he favoured the Special Rapporteur's redraft, which expressed better than the 1972 text the pre-eminence of the draft articles over the contents of a devolution agreement. The inclusion of that principle implied that the Commission believed that the future convention would have all the advantages of devolution agreements without any of their disadvantages.

30. Part III of the draft (A/8710/Rev.1, chapter II, section C) allowed a newly independent State to declare freely its willingness to participate in treaties in force and also in treaties not yet in force; it thus covered all the possibilities that old devolution agreements were designed to bring about. Those agreements had, however, the disadvantage of imposing a one-sided burden of continuance on the newly independent State, in the form of a promise to the predecessor State. It was true that such agreements served to prepare the future government for its responsibilities in treaty matters, but the metropolitan government had a natural duty of assistance in any case. Moreover, preparation for future responsibilities was largely achieved in cases in which, for a long time, the applicability of treaties had never been extended to the territory of the future independent State without its consent.

31. Mr. KEARNEY said that article 7 expressed a sound principle, but its present drafting had potentialities for future difficulties which the Commission should make every effort to avoid.

32. Those difficulties were due to the statement in paragraph 1 that the predecessor State's treaty obligations and rights did not become those of the successor State "in consequence only of the fact" that a devolution agreement had been concluded. The use of that formula suggested that there might be some other facts, or other law, which had some such effect.

33. As far as the law was concerned, there was article 36 of the Vienna Convention on the Law of Treaties, which specified in the first sentence of paragraph 1 that

"A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right... and the third State assents thereto". The second sentence of the paragraph added that "Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides".

34. As article 7 was now worded, it envisaged the possibility of a devolution agreement by which the successor State accepted the treaty rights and obligations of the predecessor State. If, therefore, a third State party to the treaty gave its assent, article 37, paragraph 1 of the Vienna Convention on the Law of Treaties would come into play and the third State's rights could no longer be revoked without its consent.

35. It was true that paragraph 2 of draft article 7 stated clearly that, notwithstanding the devolution agreement, the effects of a succession of States on treaties were governed by the present draft articles. Paragraph 1 of article 7, however, was also part of the present draft articles, so that paragraph 2 did not eliminate the ambiguity created by paragraph 1. Hence it was necessary to recast article 7 so as to avoid any differences of opinion which might arise out of a conflict in the interpretation of paragraphs 1 and 2, as well as other articles.

36. He was in favour of the Special Rapporteur's redraft, which expressed in clearer and more precise terms the pre-eminence, for that purpose, of the principles of succession of States over the principles derived from the law of treaties. He did not share the fear that that text would weaken support of the draft articles by governments. All that was necessary was to explain the reasons for simplifying article 7 by combining its two paragraphs.

37. Mr. RAMANGASOAVINA stressed the importance of article 7 which, like article 8, related to a specific moment in the life of the successor State. At that stage, the State could choose between several attitudes, in particular, those dealt with in articles 7 and 8. Very often, the successor State entered into a devolution agreement with the predecessor State, but at that time it was generally elated and rather confused, for it could not yet assess the effects of the treaties concluded in its name before its attainment of independence. Article 7 thus constituted a safeguard clause which was needed in that particular case.

38. The situations to which articles 7 and 8 applied were quite distinct. In the case covered by article 8, the successor State made a unilateral declaration in full knowledge of the facts. Its position was rather better than in the case contemplated by article 7, in which it was often ill-prepared to face its new political life, and the devolution agreement it concluded was frequently accompanied by co-operation or defence agreements and might be in the nature of a counterpart arrangement that infringed the principle of autonomy of will. Article 8 was justified, however, by the fact that, even if a unilateral declaration was not made until some time had elapsed, young States often lacked adequate staff and archives to provide them with proper knowledge of the treaties concluded in regard to them by their predecessor States. Even in that case a safeguard clause was necessary.

39. It was not surprising some young States had welcomed articles 7 and 8, even though one of them had expressed the opinion that devolution agreements and unilateral declarations should not be placed on the same footing. It should be noted, however, that the second paragraphs of the two articles were drafted slightly differently: whereas paragraph 2 of article 7 began with the word "Notwithstanding", paragraph 2 of article 8 began with the words "In such a case"—a difference which seemed to reflect the distinction some would like to introduce. Article 7 and 8 should not be merged, even though they were based on the same philosophy.

40. He was unable to support the redraft proposed by the Special Rapporteur in the light of the suggestion made by the Government of the United States of America. True, it did not greatly change the substance of article 7, but it might have an inhibiting effect on young States, for it implied that, no matter what position the successor State adopted, the provisions of the draft would always prevail. Young States might therefore refrain from stating their position by means of a devolution agreement or unilateral declaration, on the grounds that in any event the rules of the draft would apply.

41. Mr. USHAKOV noted that it was not so much the substance as the drafting of article 7 which was at issue. Several versions of the text had been proposed, but they might change the meaning of the provision. He could not, for example, agree to any formulation under which the rights or obligations arising out of treaties would be suspended, whereas the effects of the succession would be governed by the draft. Article 7 in fact provided that certain obligations or rights of the predecessor State under treaties in force with respect to the successor State did not become the obligations or rights of the successor State in consequence only of the fact that the two States had concluded a devolution agreement. The words "in consequence only of the fact" meant that the devolution agreement had legal effects, but that they were not sufficient.

42. That point was even clearer in the case of article 8. A unilateral declaration by the successor State also had legal effects, which were not, however, sufficient. In both article 7 and article 8, paragraph 2 specified that the draft articles would govern the effects of a succession of States on treaties which, at the date of that succession, were in force in respect of the successor State. To avoid any distortion of the meaning of articles 7 and 8, it would be preferable not to change the drafting.

43. Mr. QUENTIN-BAXTER said he shared the view that it was necessary to retain articles 7 and 8 as separate provisions to deal with different situations. He also agreed with the majority of members that there was a great advantage in maintaining the two separate paragraphs of article 7.

44. From his own experience in New Zealand, he had the highest regard for the positive value of devolution agreements and therefore greatly sympathized with the

views put forward by the Netherlands Government in its comments and by Mr. Tammes during the present discussion. It might well be that New Zealand had had very special experience, in that it had grown slowly and gradually to independent status. Nevertheless, a very important part of its inheritance as a State had been the fact that it could claim the benefit—subject, of course, to fulfilling the obligations—of a vast mass of treaties which had been concluded by the United Kingdom over a period of many years and applied to the territory of New Zealand.

45. It was perhaps true to say that all States were born naked of treaty obligations, but it was equally true to say that they very soon needed clothing. On a number of occasions, New Zealand had found it very convenient to rely on an old United Kingdom treaty concluded before it had come into existence as a State. In all those cases, the other State party to the bilateral treaty had accepted the New Zealand view. His own conclusion from that experience was that the area was one in which States were most adaptable and invariably well disposed. For those reasons, he shared the view that devolution agreements could be of great value and that it was the duty of a predecessor State to give the successor State a list of treaties to which it could succeed.

46. With regard to the text of article 7, he thought it should not be lightly altered since it was the result of a considerable effort of drafting.

47. On the question of the respective merits of devolution agreements and unilateral declarations, he appreciated the comments of certain Governments, but believed that the Commission's draft articles kept a proper balance. The qualitative difference between the two kinds of instrument was suitably reflected in the subtle and deliberate difference between the texts of article 7, paragraph 2 and article 8, paragraph 2.

48. Moreover, article 7 dealt with devolution agreements in order to set them aside; those agreements were not mentioned any more in subsequent articles of the draft. But article 8 dealt with unilateral declarations in order to introduce them in subsequent articles, which contained provisions on declarations and notifications that constituted unilateral action. Those differences in the treatment of devolution agreements and unilateral declarations should go a long way to meet the wishes expressed by the Governments of Kenya and Zambia in their comments.

49. Mr. TSURUOKA said he was in favour of the principle of *res inter alios acta* underlying article 7, by virtue of which a devolution agreement did not bind the other parties to the treaty. Article 7 was intended to help new States, and he was therefore in favour of retaining it. In practice, however, other States were often led to believe in good faith what was stipulated in a devolution agreement. He therefore thought that, in the interests of the continuity of treaties and the stability of treaty relations, that side of the matter should be brought out in the commentary.

50. Mr. MARTÍNEZ MORENO said he fully approved of the present content, form and structure of article 7. The drafting could perhaps be improved to make it clear that the "territory" referred to was one which subsequently became part of the successor State.

51. He had carefully considered the comments of Mr. Kearney and the Special Rapporteur on the structure of the article, but still believed that paragraphs 1 and 2 should be kept separate. If the two paragraphs were merged as suggested, the article might lose an essential element—its explicit recognition of the *tabula rasa* principle.

52. Articles 7 and 8 should also be kept separate, since there were fundamental differences between devolution agreements and unilateral declarations. The juridical consequences of devolution agreements were recognized in legal doctrine, but unilateral declarations did not have the same status in international law. He shared the views expressed by Mr. Ushakov on that subject.

53. Mr. PINTO said that articles 7 and 8, although expressed in general terms, were to a large extent concerned with the changes that occurred with the transition from a colonial régime to independent Statehood. He agreed with the principle embodied in those articles that a new State was entitled, but not bound, to assume the rights and obligations of the predecessor State vis-à-vis third parties under treaties contracted by that State. That was the only equitable principle to apply.

54. In article 7 there was a delicate balance between paragraphs 1 and 2. In paragraph 1, the phrase beginning with the words "in consequence only of the fact that..." was perhaps ambiguous, but it left room for the interplay of other forces—political, legal or factual—which would decide the ultimate fate of the treaties. Paragraph 1 rightly adopted that approach, and was logically followed, in paragraph 2, by the statement that the effects of succession on treaties would be governed by the present articles notwithstanding devolution agreements. Thus effect was given to the principle he had mentioned. Consequently, he was not in favour of any major drafting change, or of the combination of paragraphs 1 and 2.

55. He appreciated the point made by Mr. Martínez Moreno about the phrase "in respect of a territory" in paragraph 1. He understood it to mean that certain obligations undertaken by the predecessor State were somehow related to the territory which subsequently became the territory of the new State. The phrase might, however, be taken to mean that the provision concerned only rights and obligations in respect of a particular land area, to the exclusion of other kinds of rights and obligations. Such a provision would be unduly restrictive. The Drafting Committee might consider whether the idea could be expressed more clearly, or whether the phrase could be omitted. In fact he was not sure that the whole tenor of article 7 did not cloud the issue of rights and obligations under a devolution agreement. It would be undesirable to exclude certain rights and obligations by adopting provisions that might be interpreted too restrictively, unless, of course, the agreements in question had been concluded under coercion, in which case the Vienna Convention on the Law of Treaties would apply.

56. He agreed, up to a point, with the comments of Kenya and Zambia on the relationship between articles 7 and 8. But a unilateral declaration made soon after independence would not be very different in effect from a devolution agreement, as it would still have been made in the context of the continuing influence of the colonial Power on the new State's government. The two situations were nevertheless legally different and should be dealt with differently. Admittedly, devolution agreements were not always clearly drafted and sometimes left considerable scope for interpretation. For example, they could often be interpreted as covering only treaties which in fact applied to the successor State. That was the right approach. Devolution agreements were useful, and he agreed with Mr. Quentin-Baxter that it was important for a new State to be able to take advantage of certain rights and fulfil certain obligations soon after independence.

57. Mr. HAMBRO expressed his agreement with the Special Rapporteur and his support for the present draft of article 7. Since the draft articles had already been adopted once, they should not, in his opinion, be changed unless subsequent debates and Governments' comments warranted such changes. On that basis he saw no reason to change either article 7 or article 8.

58. Mr. AGO said he well understood why the present wording of article 7, particularly paragraph 1, had given rise to some uncertainty and to suggestions that its terms should be made more precise. The new wording proposed by the Special Rapporteur did not seem entirely satisfactory, however, for it would be unfair to make a sweeping judgment of devolution agreements and assume that they had all been concluded solely in the interests of the former colonial Power. The situation was sometimes very different, for new States often sought the support of the former metropolitan Power to strengthen their position vis-à-vis third States. Hence devolution agreements should not be regarded as null and void; it should only be stated, as in the present paragraph 1, that a devolution agreement between a former metropolitan Power and a new State did not in itself suffice to create rights and obligations for other States.

59. It should not be forgotten that a devolution agreement was an agreement between two States—the former colonial Power and the new State—which undoubtedly created rights and obligations between those two States. As to third States, it was obvious that such an agreement had no real value in the case of multilateral treaties; but in the case of bilateral treaties it might be asked whether the fact that a new State had signed a devolution agreement was not equivalent to a kind of unilateral declaration or declaration of intent on its part vis-à-vis other States, concerning succession to the treaty. He was sure those who had suggested merging paragraphs 1 and 2, had not intended to rule out that conclusion.

60. The new wording proposed did, however, give the impression that the Commission had meant to eliminate devolution agreements entirely, by treating them as null and void, which would be most unfortunate, not only from the legal, but also from the political point of view. While he recognized that the present text needed revising, he did not think the proposed solution could lead to satisfactory results. As the Special Rapporteur had stressed, it was an extremely delicate matter, and the language used might have considerable legal and extra-legal consequences.

61. Mr. USHAKOV stressed that article 7 had absolutely nothing in common with the clean slate principle to which some members of the Commission had alluded and which was stated in article 11. Article 7 stated a general principle which did not apply only to newly independent States.

62. Mr. CALLE Y CALLE said that article 7 was correctly drafted and appropriately expressed the idea embodied in it; he preferred the present text. Paragraph 1 indicated that devolution agreements were not entirely adequate and needed to be supplemented by other treaties later, although they served as a point of departure. The article made no reference to third parties, but it should be borne in mind that there were also rights and obligations of the predecessor and successor States vis-à-vis third States. A predecessor State might decide to transmit its obligations towards a third State to the successor State. Moreover, as Mr. Ushakov had pointed out, the article did not apply only to newly independent States and there were other cases—for example, where territory was ceded—which involved the devolution of rights and obligations.

63. Mr. ŠAHOVIĆ said he agreed with all the members of the Commission who had urged that the present text of article 7 should be retained. In his opinion the article was very important for the structure of the whole draft. For paragraph 1 stated a general rule expressing the substance of the obligation towards third States arising from devolution agreements, and unless that point was well brought out, the article would not indicate the real nature of devolution agreements and of the rights of the successor State.

64. The proposal that the two paragraphs should be merged raised a number of problems, without removing the ambiguities the Commission was trying to eliminate. He was therefore in favour of keeping the article in its present form.

65. Mr. EL-ERIAN said that in principle he was in favour of the text which the Commission had already adopted for article 7. He was nevertheless prepared to accept the arguments adduced by the Special Rapporteur in support of the draft he had suggested, especially as it had the advantage of simplicity.

66. The CHAIRMAN said that several points raised during the discussion would have to be added to the commentary. As Mr. Ushakov had pointed out, articles 7 and 8 did not apply only to cases of succession in which the successor was a newly independent State. It would be useful to say that the phrase "in consequence only of the fact that the predecessor and successor States have concluded an agreement" should be interpreted as meaning that the situation would still be the same, even if a third party to a treaty had agreed to the devolution of rights and obligations under that treaty. The relevance of article 73 of the Vienna Convention on

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

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

It was so agreed.

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

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

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

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

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

It was so agreed.[2]

The meeting rose at 1 p.m.

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

1268th MEETING

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

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

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

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 9

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

Article 9

Treaties providing for the participation of a successor State

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

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

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

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