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SUCCESSION OF STATES IN RESPECT OF TREATIES

Report of the Secretary-General

Addendum

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COMMENTS AND OBSERVATIONS OF MEMBER STATES

AUSTRALIA

[Original: English]
[2 October 1975]

1. By resolution 3315 (XXIX) adopted on 14 December 1974 by the General Assembly of the United Nations, Member States were invited to submit to the Secretary-General their written comments and observations on the draft articles on the succession of States in respect of treaties contained in the report of the International Law Commission on the work of its twenty-sixth session, 1/ including comments and observations on proposals referred to in paragraph 75 of that report, which the Commission was prevented from discussing by lack of time, and on the procedure by which and the form in which work on the draft articles could be completed.

A. Draft articles on succession of States in respect of treaties

2. The Australian Government considers that the draft articles adopted by the International Law Commission are generally acceptable. They reflect a balance achieved with considerable difficulty between the need to recognize the continuity of international obligations and the need to accord newly independent States the right to self-determination.

3. As the Commission itself noted, a close examination of State practice affords no convincing evidence of any general doctrine to which the various problems of succession in respect of treaties could find their appropriate solution. The diversity in regard to solutions adopted makes it difficult to explain State practice in terms of any fundamental principles of "succession" producing specific solutions to each situation.

4. Neither the general principles of the law of treaties nor the principles of the Charter provide any clear solution to many of the detailed problems of State succession to treaties.

5. It was inevitable, therefore, that the International Law Commission had to follow in certain areas of the draft articles the path of compromise between different points of view.

6. In regard to the "clean slate" principle, the Australian Government notes that the International Law Commission has applied it only in certain parts of the draft articles; and it agrees with the view of the Commission that the metaphor of the clean slate principle, applied without qualification, is at once too broad and categoric.

1/ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10 (A/9610/Rev.1).

7. The Australian Government welcomes in the draft articles the provisions dealing with boundary and other territorial régimes which reflect the weight of opinion among jurists that treaties of a territorial character constitute a special category and are not affected by a succession of States. These provisions are a necessary qualification on a clean slate principle and stem from the fact that a newly independent State is not born into a legal vacuum but becomes a member of an international society by virtue of the laws constituting and governing that society. These provisions are binding not only on the newly independent State but also on third States which are bound to respect the territorial integrity of the newly independent State.

8. In regard to article 15 governing the position in respect of the treaties of the predecessor State, the Australian Government would like to observe that there have been many cases of State practice where, without difficulty or controversy, the States have continued to apply treaties after a succession of States has taken place. This practice seems to indicate a widely held presumption of continuity.

9. The Australian Government also notes the many cases where newly independent States, including Australia, concluded that they succeeded to treaties by operation of law.

10. In so far as a newly independent State judges freely for itself that a presumption of continuity is desirable, the Australian Government believes that such a presumption is wholly reconcilable with the principle of self-determination.

11. In this area it seems clear that States will be guided less by the application of general principles than by their own conception of their legitimate interests and the interests of the international community as a whole.

12. A major advantage of a presumption of continuity based on the notion that certain treaties are succeeded to by operation of law is that a newly independent State can temporarily leave open the question of which treaties it has succeeded to with a reduced risk, compared to cases where a clean slate principle is applied, that third States will use the lack of determination to consider treaties favourable to the newly independent State as not applying to that State. It will be recalled, of course, that the clean slate principle operates both ways, conferring freedom of decision on not only newly independent States but on third States as well.

13. A major advantage of the "clean slate" principle, on the other hand, is that it makes it easier for the newly independent State to avoid being bound by obligations which it regards as unreasonable or unjust.

14. It seems to the Australian Government that the question of which approach is the better one from the point of view of the newly independent State can only be answered satisfactorily by having regard to the particular circumstances of each country. The circumstances in which new States emerge vary enormously and it is not possible to give a simple answer which will hold good universally. That fact, the Australian Government believes, has been amply demonstrated by State practice.

15. For this reason the Australian Government believes that it is inevitable that the draft articles, if they are to be universally acceptable, must take adequate account of the diversity of circumstances and of legitimate national interests. A too simplistic doctrinal approach, or a too narrow nationalistic one, taken in regard to the principles of State succession as a whole is likely to produce only an unbalanced and unworkable régime of law.

16. In regard to draft article 15, the Australian Government wishes in particular to draw attention to the problem of transitional legal or constitutional arrangements which may exist in the period preceding independence. In some cases the dependent territory may either enjoy in the transitional period a limited competence in treaty making and conclude agreements in its own name as a free exercise of its semi-sovereign rights, or it may participate directly with the colonial or metropolitan State on the conclusion of treaties, in some cases endorsing the ratification or implementation of a treaty by legislative or executive action. On the peaceful attainment of independence, the newly independent State might well wish to consider the treaties entered into before independence as still in force. To maintain rigidly in such a case that no such treaty could continue to remain in force without consensual validation, which in the case of a bilateral treaty would involve the consent of a third State, would seem to be unreasonable.

17. In regard to part IV of the draft articles, the Australian Government notes that the emphasis is placed in this part on the continuity of treaty obligations in respect of the uniting and separation of States, except in the case where a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State. This is in contrast with the provisions on newly independent States where the emphasis is on the principle of self-determination.

18. The inclusion of a provision in paragraph 3 of article 33 to cover a situation assimilable to the circumstances existing in the case of the formation of a newly independent State raises the question whether a similar exception should not be recognized in regard to article 15 to cover the case where the emergence of a newly independent State takes place in circumstances closely similar to the circumstances covered by article 33 (1). The inclusion of such a provision would seem to cover the case of countries like Australia which obtained full independence and sovereignty after being British colonies. In Australia's case it was decided to consider treaties concluded by Britain and applying to Australia before independence as continuing to apply to Australia after independence. This decision was, of course, more than a consequence of policy but was based on a universally accepted interpretation of the applicable law.

19. Finally the Australian Government would like to express its concern that the "clean slate" principle should not be invoked in such a way as to cast doubt on the general or customary law-making character of certain multilateral treaties. In this regard, the Australian Government welcomes the observation of the Commission in its commentary on draft article 15 that the law contained in a treaty, in so far as it reflects customary rules, will affect the newly independent State (and, it may be added, third States) by its character as accepted customary law.

B. Proposals referred to in paragraph 75 of the International Law Commission's report

20. For the reason given in the preceding paragraph, the Australian Government considers that an article on "multilateral treaties of universal character" would be desirable. Such an article would make clear and explicit the status of provisions of a treaty which had become part of customary international law.

21. The Australian Government is also in favour of provisions covering the settlement of disputes in any draft Convention governing the succession of States to treaties.

C. Procedure by which and the form in which work on the draft articles could be completed

22. The Australian Government believes that a debate in the Sixth Committee in the light of the views submitted by Governments on the draft articles will help to determine whether or not the time is propitious to proceed to the drafting by Governments of a comprehensive instrument governing the succession of States to treaties. The Australian Government reserves its position on this question until it has had the chance to study all the views expressed by Governments. The Australian Government considers, however, that if the time is propitious for the preparation of an instrument such as a convention, the convening of a conference should await the moment when the present heavy schedule of international legal conference activity has been significantly reduced.
