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SUCCESSION OF STATES IN RESPECT OF TREATIES

Report of the Secretary-General

CONTENTS

* A/10150.

I. INTRODUCTION

1. In the report on the work of its twenty-sixth session, the International Law Commission submitted to the General Assembly in 1974 a set of draft articles on succession of States in respect of treaties. 1/ After considering the report, the General Assembly adopted, at its 2319th plenary meeting on 14 December 1974, resolution 3315 (XXIX). Paragraphs 1 to 4 of section II of the resolution read as follows:

> "The General Assembly,
>
> "...
>
> "1. Expresses its appreciation to the International Law Commission for its valuable work on the question of succession of States in respect of treaties and to the Special Rapporteurs on the topic for their contribution to this work;
>
> "2. Invites Member States to submit to the Secretary-General, not later than 1 August 1975, their written comments and observations on the draft articles on 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 should be completed;
>
> "3. Requests the Secretary-General to circulate, before the thirtieth session of the General Assembly, the comments and observations submitted in accordance with paragraph 2 above;
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> "4. Decides to include in the provisional agenda of its thirtieth session an item entitled 'Succession of States in respect of treaties'."

2. By a letter dated 31 January 1975 the Secretary-General brought paragraphs 2 and 3 of section II of General Assembly resolution 2926 (XXVII) to the attention of Member States.

3. The comments and observations received by the Secretary-General from Member States by 6 September 1975 are reproduced below. Any comments and observations received after that date will be circulated as addenda to the present document.

4. Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the International Law Commission at its twenty-fourth session, held in 1972 are reproduced in the Commission's report on the work of its twenty-sixth session. 2/

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

2/ Ibid., annex I. Those observations were originally reproduced in documents A/CN.4/275 and Add.1 and 2 and A/CN.4/L.205.

II. COMMENTS AND OBSERVATIONS OF MEMBER STATES

AUSTRIA

[Original: English]
[24 July 1975]

The Austrian Federal Government maintains the view that codifying international law is tantamount to developing it. The draft articles on succession of States in respect of treaties have been thoroughly studied by the competent Austrian authorities, who have reached the following conclusions.

A specific comment on article 19, paragraph 2, stipulating that a newly independent State may under certain conditions formulate a new reservation when establishing its status as a party or a contracting State to a multilateral treaty must however be made. The idea embodied in that provision seems to arise from a misunderstanding of the concept of succession. A new State inherits conventions in precisely the same State in which they apply to its territorial predecessors and therefore inherits the latter's reservations. It may waive these reservations because that is also the right of its predecessor, but it may not make new ones since its predecessor cannot do so. If a newly independent State wishes to make reservations, it ought to use the process of ratification or accession to become a party to the multilateral treaty.

Beyond that, however, the Austrian Federal Government does not consider essential the proposed draft article 12 bis which, according to paragraph 75 of the report of the International Law Commission, could not be dealt with by the International Law Commission because of insufficient time. This for the reason that in the proposed draft article, at least if one judges by the arguments set forth in the explanatory note concerning it, 3/ the nature of the notification of succession seems to be misunderstood, inasmuch as the latter is always retroactive to the date of independence. Thus the alleged hiatus which the proposed draft article 12 bis seeks to eliminate in respect of "multilateral treaties of universal character" does not exist in respect of any multilateral treaty.

As regards the proposed draft article 32, which concerns the settlement of disputes, 4/ experience from previous conventions codified under the auspices of the United Nations shows that the formulation of such a provision, usually requiring a great amount of negotiation, is best undertaken in the framework of a diplomatic conference.

Convening such an international diplomatic conference therefore appears to be called for only on the completion of the draft Convention on the Succession

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3/ Ibid., foot-note 57.

4/ Ibid., foot-note 58.

of States in Respect of Treaties by the International Law Commission. As the International Law Commission has been seized with proposed draft articles 12 bis and 32, the Austrian Federal Government holds - notwithstanding Austria's objections in the Sixth Committee of the General Assembly at its twenty-ninth session to these proposed draft articles - that any further consideration of these articles should for the time being rest with the International Law Commission.

Should the International Law Commission not reach consent on how to draft the articles in question, the adequate solutions seems to be the drafting of alternative proposals.

These alternatives may then be considered at an international diplomatic conference, the convening of which is favoured by the Austrian Federal Government.

BELGIUM

/Original: French/
/25 August 1975/

1. The Belgian Government has studied with great interest the draft articles on succession of States in respect of treaties as adopted in second reading by the International Law Commission at its twenty-sixth session. It feels that this draft satisfies the need for certainty and clarity which has often been lacking in the past in this very important field of international relations. The draft is also important because its ultimate adoption by the international community will complete the task of codification of the general law of treaties.

2. The Belgian Government can on the whole express its agreement with the fundamental principles outlined in the draft; in its view, the draft is a successful compromise between the principle of continuity - derived from the rule pacta sunt servanda - and the "clean slate" principle which is derived from the right to self-determination.

3. The Belgian Government considers the draft articles to be generally acceptable; it is pleased that the International Law Commission has expanded considerably the provisions concerning cases of succession other than newly independent States while including all the proposals relating to such States. The Belgian Government wishes to emphasize that it interprets the "clean slate" principle to mean that a new State is entitled to opt to be party to a treaty or not to be party; according to this interpretation, the "clean slate" principle cannot mean that a newly independent State should be deprived automatically at the date of the succession, of the rights stemming from treaties concluded by its predecessor.

The "clean slate" principle - articles 11 and 12 of the draft

4. It seems natural that a newly independent State, like any sovereign State, should be free to decide which of the treaties concluded by its predecessor will remain in effect and which treaties will be denounced. It would be contrary to the principle of the sovereign equality of States to consider newly independent States bound automatically, by virtue of the rule pacta sunt servanda, by treaty obligations which they did not contract themselves.

5. Moreover, it is in the interest of international society to ensure that the succession of States in respect of treaties does not disturb existing treaty relations established in accordance with international law, and does not jeopardize the balance indispensable for the maintenance of international order which will benefit the newly independent State also.

6. The Commission adopted the "clean slate" principle as one of the basic principles of the draft. The Belgian Government considers that this decision is not without drawbacks from the viewpoint of legal security. However, since the Commission made an effort to reach a compromise between this principle and the

principle of continuity, and despite the fact that the draft has a slight bias against the principle of continuity, the Belgian Government is ready, bearing in mind inter alia the far-reaching changes that international relations are undergoing, to accept the general structure of the draft. In fact, it considers that the Commission has applied the "clean slate" principle with prudence and flexibility and that, in addition, the scope of application of the principle is limited. Indeed, boundary and other territorial régimes are excluded from the application of the "clean slate" principle; articles 11 and 12 of the draft stipulate that a succession of States does not affect those régimes as such. The Belgian Government feels that the withdrawal of these matters from the application of the "clean slate" principle will help to guarantee the stability of international relations.

7. Moreover, these articles should not apply only to newly independent States but also to third States which, in the absence of such provisions, might take advantage of a succession of States in order to terminate some of their international commitments, thereby tending to jeopardize the territorial integrity of newly independent States. Application of the "clean slate" principle in territorial matters might introduce a factor of uncertainty that would be dangerous for the international community.

8. The Belgian Government feels that to argue that articles 11 and 12 are contrary to the right of people to self-determination might in fact be detrimental to the interests of the newly independent States.

Article 12 bis 5/

9. The Belgian Government cannot, at this stage, agree to the proposal to insert an article 12 bis under which a multilateral treaty of universal character would remain in force between the newly independent State and the other States parties to the treaty until such time as the newly independent State gives notification of termination of the said treaty for that State.

10. While agreeing that it is of the utmost importance that all States should be party to certain treaties, sometimes referred to as multilateral treaties of universal character, such as the Geneva Conventions of 1949, 6/ the Belgian Government feels that to insert an article 12 bis as currently worded would only complicate and distort the general structure of the draft. In addition, there is no agreement among jurists on the meaning or exact scope of the term "multilateral treaty of universal character".

11. The Belgian Government, however, is prepared to review its opinion in the event that the problem of assigning a specific meaning to the term "multilateral treaty of Universal character" might be satisfactorily resolved.

5/ Ibid., paras. 76-78.

6/ United Nations Treaty Series, vol. 75, Nos. 970-973.

Problem of the settlement of disputes

12. The Belgian Government regrets that the draft makes no provision for the settlement of disputes that might arise over the application or interpretation of the complex rules governing the succession of States in respect of treaties. It agrees that it would be natural, in a convention designed to complete the codification of the law of treaties, to adopt a procedure for the settlement of disputes based upon or similar to those of the Vienna Convention of the Law of Treaties. 7/ It hopes that the Commission can resolve this problem before the codification is finalized.

Article 7

13. This article recalls the rule of non-retroactivity, a general principle of the law of treaties contained in article 28 of the Vienna Convention; the Belgian Government feels that article 7 of the Commission's draft is therefore a duplication. It seems to have been included in order to allay the misgivings which had been voiced about the implications of article 6 with respect to past events.

14. It is, however, legitimate to wonder whether this is the right place for such a provision. It was felt that to make only one specific article non-retroactive might raise doubts as to the retroactive effect of the other articles; consequently the text was presented not as part of article 6 but as a general autonomous provision which, however, immediately followed article 6. The Belgian Government feels that, in order to dispel doubts of this nature, it would be more appropriate to recall a general principle such as that of non-retroactivity in the final general provisions of the draft and that that would in no way detract from its interpretative value as regards article 6.

Article 22

15. This article, the appropriateness of which has also been questioned, deals with the legal effects of a notification of succession. The draft seeks to provide for the element of continuity implied by the notion of succession of States, having regard for the legal bond between a multilateral treaty and the territory of the newly independent State on the date of succession, at the same time avoiding the untoward consequences of granting retroactive effect to the notification of succession on the rights and obligations that exist, by virtue of the treaty, between that State and the Parties to the treaty. The Commission finally decided that that goal could be achieved by stipulating that a newly independent State which notifies its succession to a multilateral treaty should be considered a party to the treaty from the date of the succession, but that the operation of the treaty would be considered suspended between the date of a succession of States and the date on which notification is made.

7/ 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. 287).

16. Although this text does not agree completely with all the provisions of the Vienna Convention, it does not diverge from the spirit of articles 28 (non-retroactivity of treaties) and 57 (possibility of suspension of the operation of a treaty by consent of the parties) of the Convention; article 73 of which provides, in addition, that its provisions shall not prejudge any question that may arise in regard to a treaty from a succession of States.

17. Besides, the solution advocated in article 22 is consistent with the general tenor of the draft, based on the compromise which it seeks to establish between the principle of de jure continuity and "clean slate" principle. It would give retroactive effect to the notification with respect to the newly independent State's position as party to the treaty, and at the same time avoid the consequences of considering the treaty as retroactively in operation between that State and the other parties.

18. The Belgian Government can therefore accept the wording of article 22.

Final phase of codification

19. The International Law Commission has recommended that the General Assembly should invite Member States to submit written comments and observations on both the final draft and the manner in which the final phase of codification should be considered. The Belgian Government feels that it would be premature for the Assembly to take a decision on the codification procedure at the present stage.

20. In the interest of efficiency, any decision on subsequent stages of dealing with the draft articles should be postponed until the Sixth Committee completes a further study of the draft in the light of Governments' written comments and observations on the substance, the procedure to be followed to complete the work and the ultimate legal form of the draft articles. The result of this study should be considered by a conference of plenipotentiaries.

21. Given the complex nature of the matter dealt with and its potential implications for the stability of international relations and the evolution of public international law in general, it would be imprudent to give the draft at this stage the legal form of an international instrument binding upon all the High Contracting Parties (in other words a Convention). It seems advisable, in the present state of affairs, to give it the form of a declaration of principle.

DENMARK

[Original: English]
[26 March 1975]

In its earlier written observations, 8/ the Government of Denmark expressed its satisfaction with the scope and structure of the first set of draft articles on succession of States in respect of treaties. The additions and changes made by the International Law Commission during the second reading in 1974 are also generally acceptable to the Danish Government.

The Danish Government would like, however, to comment on the two proposals referred to in paragraph 75 of the report of the International Law Commission on the work of its twenty-sixth session. 9/

The Danish Government has studied with interest the proposed draft article 12 bis concerning multilateral treaties of a universal character. The Government considers it important that the multilateral treaties in question be defined with sufficient precision and that the definition include humanitarian conventions, for example, the Geneva Conventions of 1949 10/ for the protection of war victims (cf. also the principle underlying article 60, paragraph 5, of the Vienna Convention on the Law of Treaties).

As to the proposed draft article on a procedure for the settlement of disputes, it is the opinion of the Danish Government, as expressed in its earlier written observations, that the draft ought to be supplemented by provisions on the settlement of disputes stemming from the application or interpretation of the draft rules. The Danish Government supports the view that, in a convention which is supposed to be supplementary to the Vienna Convention on the Law of Treaties, it would be right to adopt procedures for the settlement of disputes based on the provisions of that Convention. Consequently, the Danish Government is in favour of the present wording of the proposed draft article on this subject and of the proposed annex.

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

9/ Ibid., Supplement No. 10 (A/9610/Rev.1).

10/ United Nations, Treaty Series, vol. 75, Nos. 970-973.

FRANCE

/Original: French/
/2 September 1975/

I

The French Government believes that it should first communicate its views on the course which should be followed and the procedure which should be adopted in order to complete the work on the draft articles prepared by the International Law Commission.

As it has indicated through its representative on the Sixth Committee during the twenty-ninth session of the General Assembly, the French Government considers that it would be premature to envisage convening a diplomatic conference on the succession of States in respect of treaties, and it has doubts on the timeliness, and even the possibility, of giving the draft the form of a convention.

In this connexion it was very impressed by the relevance of the remarks which appear in paragraph 62 of the Commission's report. 1/

The question may indeed be raised as to what value there would be in codifying the law of the succession of States in respect of treaties in the form of a convention, in view of the fact that under the general law of treaties a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under the customary rule embodied in article 28 of the Vienna Convention on the Law of Treaties, the provisions of a treaty, in the absence of a contrary intention, "do not bind a party in relation to any act or fact which took place ... before the date of the entry into force of the treaty with respect to the party concerned". The proposed convention would not be binding on the new successor State unless and until it became party to it. There is a serious risk that the convention would not be binding upon it in respect of any acts which took place before the date on which it became a party, and that other States too would not be bound in relation to it before that date. The French Government has carefully taken note of the explanations given on this subject by the Chairman of the International Law Commission at its twenty-ninth session, concerning the scope of article 7 of the draft in conjunction with article 28 of the Vienna Convention. However, it believes that the question deserves further study.

The question may therefore be raised as to whether it would not be preferable to give the text some form other than that of a convention, once it has proved that it contains solutions which are generally acceptable to States as a whole. Although the French Government does not yet have a definite position on this subject, it considers that the text might possibly take the form of a resolution.

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

If, however, a majority emerges in favour of a convention, the French Government considers that its elaboration should be entrusted to a diplomatic conference.

With regard to the time for initiating the procedure for the completion of the work concerning the succession of States in respect of treaties, the French Government feels obliged to point out that it is difficult for Governments to finalize their views on the draft articles before they have an over-all view of the study on the question of the succession of States in respect of matters other than treaties.

Moreover, from a practical point of view, it would seem inopportune for the time being to add to the number of legal topics now being discussed at the international level.

II

With regard to the substance of the draft, the French Government will limit itself at the present stage to considerations of a general nature which it has already had the opportunity to expound through its representatives on the Sixth Committee.

While recotnizing that the study made by the International Law Commission is very comprehensive and very detailed, it feels bound to point out that the draft does not seem to it to be entirely satisfactory in its conception.

With regard to the approach taken by the Commission, it should be noted that it is not possible in the present state of international law to maintain that international law lays down absolute rules in respect of succession to treaties. It does not seem reasonable either to base the articles on a theory which gives successor States the right to succeed to the treaties of their predecessors and at the same time imposes on them the obligation to do so, or to base them on an absolute application of the so-called "clean slate" theory.

However, two intermediate approaches are possible:

(a) To adopt the principle that there is succession and envisage exceptions to that principle, or

(b) To adopt the principle that there is no automatic succession, and also envisage exceptions.

The Commission seems to have chosen this second course in respect of the treaties of States which it designates as "newly independent".

The French Government has no objection to this approach to the problem for the purposes of elaborating the draft articles.

However, it has doubts about the method adopted by the International Law Commission to reach the proposed conclusions.

Firstly, the Commission seems to consider that the adoption of the "clean slate" principle would constitute a codification of existing international law, this doctrine being derived from the practice of States and confirmed by the principle of self-determination.

The French Government recalls that opinions and practice on this subject are far from coherent. Moreover, the positions that may be adopted by the depositaries of treaties cannot be the source for a customary rule and cannot bind States parties to the treaties concerned, because the role of the depositary is purely administrative.

Furthermore, in the case of the succession of treaties, it would seem difficult to base the "clean slate" principle on the principle of self-determination. There is no clear link between the principle of self-determination and the fact that each new State should appear on the international scene free from all treaty commitments. The French Government has noted that, in accordance with article 33 of the draft, if a part of a State secedes, the successor State thus formed is bound by the treaties of the predecessor State, unless the new State has acquired its independence "in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State". It can clearly be seen that this rule is difficult to accept because it would make the continuation or the disappearance of the treaty obligation depend on subjective assessments. But above all it illustrates the difficulties which the Commission has encountered through introducing in its draft a distinction between the States which it describes as "newly independent" and the States which it considers as having emerged from the separation of a part of that State. In so doing, it has referred to a political concept, the timeliness of whose inclusion in the draft is debatable, and which led it to solutions which could give rise to contradictions.

Subject to the preceding comments, and while admitting that the "clean slate" principle could be adopted as a general working hypothesis, the French Government wonders whether the International Law Commission has adequately considered all the exceptions which could be made to the rules it lays down, so that those rules might be acceptable.

Firstly, with regard to the right of the successor State to take over the multilateral treaties of its predecessor, the Commission has perhaps not sufficiently envisaged all the hypotheses where under current practice this right is subject to the express consent, or to the unambiguous tacit consent, of the other parties.

Above all, if the absence of any general obligation on the part of the successor State with regard to the treaties of its predecessor is to be admissible, it is essential that certain categories of treaties should be considered as necessarily binding on the successor State. The Commission has only retained in this respect boundaries, boundary régimes, and certain territorial régimes established by treaty (article 11). The French Government cannot but approve the

Commission's intentions on this point. However the Commission could certainly have made a more careful search for other categories of treaties which could be considered as binding on the successor State. What happens for example to treaties creating financial responsibilities? Perhaps this problem will be considered in the study on the succession of States in respect of matters other than treaties which has been undertaken by the Commission. It would be worth ascertaining the final result of this study before finalizing positions on the question.

The French Government has considered the draft article concerning "multilateral treaties of universal character" 2/ that the International Law Commission has not been able to study through lack of time. While understanding that the concerns which motivated this proposal at least partly coincide with those which have been expressed above, it does not consider that the proposed criterion is objectively satisfactory.

Furthermore, with regard to the draft article concerning the settlement of disputes, 3/ the French Government considers that the question would only arise if the draft articles finally took the form of a convention. A diplomatic conference should then be given the task of adopting the solutions which seem to it to be the most appropriate.

III

In conclusion, the French Government wishes to note that it finds the draft prepared by the International Law Commission very interesting. Several of its provisions suggest solutions which would be useful to meet particular difficulties. However, bearing in mind the complexity of the question, the French Government is not convinced that the Commission is completely ready to prepare and adopt final texts.

2/ Ibid., p. 33.

3/ Ibid., p. 35.

IRELAND

[Original: English]
[25 August 1975]

The Government of Ireland consider that neither the Sixth Committee nor the General Assembly should be given the task of elaborating the Convention on this matter, but rather that a diplomatic conference should be convened for this purpose. It might be appropriate to convene such a conference in the year following the conclusion of the final session of the Third United Nations Conference on the Law of the Sea.

The Government of Ireland also consider that the International Law Commission should be invited, during the interval, to re-examine the draft articles in the light of comments made by Governments thereon and, on completion of this re-examination, to resubmit their draft articles to the General Assembly.

MEXICO

[Original: Spanish]
[25 August 1975]

I. Draft articles

As a general comment, it is considered that an express reference should be made in the draft articles to the Vienna Convention on the Law of Treaties in terms similar to those which appear in the International Law Commission's report: "the draft articles should be understood and applied in the light of the rules of international law relating to treaties, and in particular of the rules of law stated in the Vienna Convention ... matters not regulated by the draft articles would be governed by the relevant rules of the law of treaties." 14/

Article 7 (Non-retroactivity of the present articles)

This article should be omitted since, on the one hand, the non-retroactivity of treaties is a general principle of the law relating to treaties reflected in article 28 of the Vienna Convention, and on the other hand, if an article like that suggested in the paragraph above is included, this question is sufficiently covered.

Articles 8 and 9 (Devolution agreements and unilateral declarations)

Such agreements and declarations have been made in the past precisely because of the absence of clear rules of international law on the succession of States in respect of treaties. The draft articles, if approved, will govern the effects of a succession of States and therefore the agreements and declarations referred to in articles 8 and 9 will become superfluous. Articles 8 and 9 could therefore be omitted.

Article 12 (Territorial régimes)

Although the exception to the "clean slate" principle contained in article 11 seems reasonable, since it guarantees a definite frontier to a new State, the same cannot be said of article 12, paragraph 1, which is broad enough to cover all types of difficult situations for the new State, such as, for example, the maintenance of foreign bases on its territory. The successor State should be given the opportunity to refuse to accept obligations of this nature contracted by the predecessor State and, consequently, it is considered that paragraph 1 should be omitted.

14/ Ibid., chap. II, D, part I, art. 8, para. 22.

Article 13 (Questions relating to the validity of a treaty)

This article may be omitted if, as suggested in the first paragraph, of these observations a general and express reference to the Vienna Convention is included.

Article 33 (Succession of States in cases of separation of parts of a State)

In this case, the "clean slate" principle should also apply. As several representatives stated in the Sixth Committee of the General Assembly, the right to self-determination is applicable to all peoples and, therefore, all new States deserve equal treatment, regardless of whether they have been colonial dependencies or not.

Articles 38 and 39 (Cases of State responsibility, outbreak of hostilities and military occupation)

These articles should be omitted because they refer to matters outside the scope of the succession of States, as the International Law Commission itself recognizes. Moreover, both military occupation and the outbreak of hostilities are entirely abnormal conditions and the rules governing their legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States, as the Commission affirms in paragraph 4 of its commentary on draft article 39. Finally, the cases of the responsibility of a State have already been covered by article 73 of the Vienna Convention to which the necessary reference should be made, as is proposed in the first paragraph of these observations.

II. Proposals mentioned in paragraph 75 of the report of the International Law Commission

A. Multilateral treaties of universal character

Although the motives for the concern of some members of the Commission concerning treaties of a general or universal character, particularly those of a humanitarian character, are understandable, given the difficulty of finding a formula which would allay this concern without endangering the "clean slate" principle, it is considered that no exception should be made for such treaties, since, moreover, its provisional application is not excluded in the draft articles (article 26).

B. Settlement of disputes

It would be useful if the draft articles included an article on the settlement of disputes following the lines of article 66 of the Vienna Convention. The General Assembly could request the Commission to continue its study of this question at its next session.

NETHERLANDS

/Original: English/
/2 September 1975/

1. In submitting its comments on the articles in second reading, the Netherlands Government notes with satisfaction that some of its concerns as set out in its comments on the 1972 draft 15/ have been met by the International Law Commission.

General observations

2. In the draft articles, the central position of States attaining independence as a result of the process of decolonization has been maintained. However, now that the process of decolonization is nearly completed, the question may be asked whether rules intended to govern State succession in future in all its forms should still focus primarily on this specific but soon outdated form of State succession.

3. The Netherlands Government would like to stress this point, notwithstanding the fact that the present draft, as compared with its predecessor, turns out to be more balanced, or at least more symmetrical, inasmuch as certain provisions, notably articles 31, 32 and 35-37 have been added to part IV, whereas the former draft dealt with the aspects covered by these articles only in part III. Furthermore, a growing appreciation of the controversial advantages of a too strict application of the "clean slate" formula appears from the different wording of article 33, paragraph 3, as compared with the corresponding article of the first draft (art. 28, para. 2). A State emerging as a result of separation of territory is no longer automatically put in the position of a newly independent State. In the present wording, this legal position is provided for only under the condition that such a territory "... 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 ...". However preferable the tenor of this paragraph in its present drafting may be, the present wording is likely to give rise to differences of opinion with regard to its interpretation, especially on the question which "circumstances" warrant a position similar to that of a newly independent State.

4. The foregoing observations, however, should not be read as to mean that the Netherlands Government does not endorse the application of the "clean slate" principle as such in respect of newly independent States. The Government agrees that obligations voluntarily agreed upon are more likely to be met than obligations which are looked upon as being imposed. However, whereas the presumption of "imposed" obligations forms the rationale for application of the "clean slate" principle, this presumption does not necessarily reflect reality in all cases of formerly dependent Territories. Especially in cases where full independence is

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15/ Ibid., annex I, p. 154.

preceded by a period of self-government, future independent peoples will have exercised rights of advice and consent in respect of the acceptance of such treaty relations as affected their interests and their Territories. The Netherlands Government would have welcomed some reflection of this "fact of political life" in the present draft.

5. In connexion with a major exception to the rule of continuity, to wit the possibility of invoking a "fundamental change of circumstances", the Netherlands Government maintains its preference 16/ for formulating this principle in an umbrella-article at the beginning of the draft. In addition, it must be observed, the present phrasing of this exception, as well as the phrasing of its twin, to wit "incompatibility with the object and purpose of a treaty" (for instance, in art. 16, para. 2, art. 17, para. 3 and art. 18, para. 3) does not exclude uncertainty as to their correct interpretation, notably with regard to the question by whom and under which conditions these exceptions may be invoked.

Comments on separate articles

Draft article 12 bis

6. The Netherlands Government maintains its earlier suggestion that the "clean slate" principle ought to be mitigated in respect of certain general multilateral conventions of world-wide applicability, embodying fundamental rules of international law. Such conventions should, in view of the desirability of their continuing applicability, escape the application of the "clean slate" rule; instead, the successor-State could opt out of such a convention, should it so decide. In this way, the undesirable effects of a "legal vacuum" as a result of a too strict application of the "clean slate rule" would be avoided. The main argument which led to rejection of this solution by the International Law Commission is the difficulty of clearly identifying or defining the relevant category of treaties. The endeavour undertaken to this end by one member of the International Law Commission, which resulted in draft article 12 bis and the annexed proposal for a "new paragraph for inclusion in article 2", is therefore highly commendable. The proposed definition of the term "multilateral treaty of universal character" in paragraph X has the advantage of laying down a formal criterion. However, actual State practice shows that almost all multilateral conventions which are, by object and purpose, of world-wide scale, are not "open to participation by all States". To maintain these last-mentioned words in the definition would therefore deprive article 12 bis of the greater part of its intended usefulness.

Article 22, paragraph 2

7. This new provision contains a logical consequence of the "clean slate" rule, thereby clarifying the legal situation between the date of succession and the date of notification of succession.

16/ Ibid., annex I, p. 154, para. 6.

Article 29

8. The Netherlands Government recalls its earlier comments in which it stated that, in case of a merger of formerly separate territories into one State, a situation of conflicting treaties might arise. Such treaties cannot at the same time be applied in the entire territory of the new component State. In such cases, the component State will have to either indicate its preference for one of the treaties by issuing a notification of succession with regard to only that treaty, or let both of them lapse. It is therefore deemed desirable that article 29 be redrafted to cover this contingency as well.

Draft article on settlement of disputes 17/

9. It certainly needs no argument that any set of rules governing international relations without an effective procedure for the settlement of disputes relating to its interpretation and application is incomplete. The above-mentioned uncertainties as to the correct interpretation of several terms in the draft articles may well illustrate the necessity for adequate provisions in this field. The article on dispute settlement, drafted by one member of the International Law Commission offers a valuable starting-point. In the view of the Netherlands Government, the proposed procedure could gain strength by adding a provision to the effect that one of the parties to the dispute may request a final judgement from the International Court of Justice, in case the conciliation-procedure would not result in a solution accepted by all parties concerned within a certain period.

A further amelioration could be found by following the lines of the draft procedure on disputes settlement as has been informally proposed for inclusion in a future Convention on the Law of the Sea. Under this system, a Contracting Party, when ratifying or otherwise expressing its consent to be bound by the Convention, may make a declaration that it accepts, in relation to disputes concerning the interpretation or application of the Convention, the jurisdiction of the International Court of Justice or an arbitral tribunal.

Either of these procedures may be resorted to by either party to the dispute, if the dispute is not settled by conciliation, or if a conciliation procedure is already in advance deemed to be fruitless by the parties to the conflict. The question put to the International Court of Justice or the arbitral tribunal for final decision should only concern the question whether a certain treaty is still in force between the parties to the conflict following a State succession.

Final form and procedure

10. As regards the final form to be given to these draft articles, the form of a convention seems to be obvious, in view of their being drafted as a Supplement to the Vienna Convention on the Law of Treaties. This draft could be finalized preferably by the General Assembly of the United Nations, whose Sixth Committee offers a wealth of legal expertise. This course of action, which was followed in the case of some other multilateral conventions as well, seems commendable in view of the existing calendar of forthcoming legal conferences.

17/ Ibid., chap. II, foot-note 58.

SWEDEN

/Original: English/
/28 July 1975/

The Swedish Government, having in the course of the International Law Commission's work on the matter, submitted both comments of a general character and observations on particular articles, 18/ does not deem it necessary at the present stage to discuss the substance of the draft. Accordingly, the following remarks are limited to questions regarding the procedure which might be followed in dealing with the draft.

Attention has been drawn to two proposals which the Commission, as stated in paragraph 75 of its report, did not have sufficient time to discuss at its session. One concerned "multilateral treaties of universal character", the other "settlement of disputes".

With respect to the latter proposal, the Commission, according to paragraph 81 of its report, is willing, if this should be the wish of the General Assembly, to consider the question of the settlement of disputes for the purposes of the present articles and to prepare a report thereon.

The Swedish Government is in favour of accepting this offer by the Commission. The reasons, referred to in paragraphs 79 and 80 of the Commission's report, why a procedure for the settlement of disputes is needed, are weighty. It is undeniable that the draft articles "in many instances lay down tests which are considered by the Commission to be right in principle, but which may lead to difficulties in their application". It would furthermore seem reasonable and consistent in articles intended to be "supplementary to the Vienna Convention on the Law of Treaties" to provide for "procedures for the settlement of disputes based on the provisions of that Convention".

The proposal regarding multilateral treaties of universal character, which the Commission did not have time to consider, aimed at eliminating certain unsatisfactory consequences of the application of the "clean slate" principle to humanitarian conventions and other types of multilateral treaties which are of a "worldwide scale". However, the Commission concluded that, "in the time at its disposal", it "was not able to find a solution to this problem". Having regard to the importance of the matter, the Swedish Government finds it unsatisfactory that lack of time should be allowed to prevent the Commission from pursuing its examination of this problem and from proposing appropriate solutions. The Swedish Government feels therefore that the Commission should also be asked to examine the draft proposal regarding "multilateral treaties of universal character".

In summary, the Swedish Government recommends that the two proposals mentioned in paragraph 75 of the Commission's report be referred back to the Commission and that, until it has received the Commission's report on these matters, the General Assembly does not take any other action on the draft articles.

18/ Ibid., annex I.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

/Original: English/
/31 July 1975/

It will be recalled that the United Kingdom Government, in a note verbale dated 29 October 1973, 19/ commented on the draft articles in the form in which they were set out in the report of the International Law Commission for its twenty-fourth session. 20/ The United Kingdom Government would not wish to repeat those observations in relation to the current version of the draft articles; they would, however, maintain the position set out in those observations in so far as they are relevant to the present draft.

The United Kingdom Government welcome the two new proposals which are referred to in paragraph 75 of the Commission's report on its twenty-sixth session and set out in the foot-notes to paragraphs 76 and 79. In their view, articles of the kind proposed would add to the utility of a convention. They would suggest, however, that the International Law Commission should have a further opportunity to examine the draft articles, in particular that relating to multilateral treaties of universal character. It would be appropriate that their consideration should take into account, on the one hand, the desirability of avoiding a multiplicity of different categories of treaties and, on the other, the desirability of clearly defining the treaties to which the article might apply. In particular, it would be appropriate to examine the terms of the participation clauses of those multilateral treaties to which the draft article might apply in order to determine whether they are consistent with the proposed definition of multilateral treaties of universal character.

With regard to the procedure by which, and the form in which, work on the draft articles should be completed, the United Kingdom Government would suggest that consideration might be given to the completion of this work in the Sixth Committee of the General Assembly itself at the thirty-first session.

19/ Ibid.

20/ Ibid., Twenty-seventh Session, Supplement No. 10 (A/8710/Rev.1).

UNITED STATES OF AMERICA

/Original: English/
/5 May 1975/

Introduction

The Government of the United States of America has reviewed with great interest the draft articles on succession of States in respect of treaties as adopted in second reading by the International Law Commission in the course of its twenty-sixth session. In its view, the revisions that the Commission has made in the articles on the basis of the comments of Governments have resulted in a draft with fewer questions and open issues than the 1972 draft articles. This is particularly true with respect to the articles in part IV that deal with succession in the cases of the uniting and separation of States.

Relationship between the draft articles and the Vienna Convention on the Law of Treaties

The maintenance of the close relationship between the draft articles and the Vienna Convention on the Law of Treaties is an essential and important element. Obviously parallelism can be maintained only to a limited extent, but where there are common features, as in articles 1 to 5 inclusive, then, from the standpoint of the proper codification of international law, both the content and the language of the articles should be as near uniformity as possible. This should not mean, on the other hand, that articles of the Vienna Convention should be incorporated into the succession on articles if there are sound reasons for not doing so.

Non-retroactivity (article 7)

The United States Government considers that article 7 of the draft on non-retroactivity, which is modelled, in part, on article 4 of the Vienna Convention, is uncertain in its application and that there are sound objections to including this type of non-retroactivity provision in the Convention. For example, the articles contain, in section 2 of part III, a series of provisions regulating the procedural aspects of succession when a newly-independent State decides to maintain in effect a multilateral convention which had been applied in its territory prior to independence. These include article 16, which provides for establishing status as a party to such a multilateral treaty "... by a notification of succession", article 19 dealing with reservations and article 20 on consent to be bound by part of a treaty and choice between differing provisions. There does not seem to be any basis, in principle, for preventing a State, which becomes newly independent prior to entry into effect of the draft articles, from becoming a party thereto after their entry into effect and making use of these provisions in regulating its treaty relationships to the fullest extent possible in light of the situation as it exists at the time the articles become applicable to the successor State. Whatever other effects article 7 may

have, it certainly seems designed to make the draft articles less attractive to newly-independent States.

Boundary régimes and other territorial régimes (articles 11 and 12)

The changes in articles 11 and 12 on boundary régimes and other territorial régimes are useful clarifications. The Government of the United States continues to consider these articles as a codification of international custom which makes a positive contribution to broader understanding of the principles of sovereign equality and the development of friendly relations among nations.

Proposal concerning "multilateral treaties of universal character"

The United States has repeatedly expressed its support of the freedom of choice principle embodied in the articles relating to newly-independent States. Because of this belief that the newly-independent States should have the right to determine for itself whether or not to become party to a multilateral treaty applicable in the territory prior to independence, the United States must oppose the proposal regarding multilateral treaties of universal character discussed in paragraphs 76 to 78 inclusive of the report of the International Law Commission on the work of its twenty-sixth session.

The proposal is subject to a variety of objections. An important technical objection is the lack of any consensus as to what is meant by a "multilateral treaty of universal character". The definition suggested is one "... which is by object and purpose of world-wide scale, open to participation by all States ...". Under this definition, a convention open to all Members of the United Nations or of any specialized agency would not appear to qualify as a treaty of universal character. The definition would appear to raise aspects of the lengthy and inconclusive discussions regarding the nature of general multilateral treaties at the Vienna Convention on the Law of Treaties. What treaties have "world-wide scale" is also uncertain. The various commodity agreements, for example, have certain world-wide effects, but are of primary interest to the interested producing and consuming nations. In the aviation field, certainly the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, 21/ and the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 22/ would meet the test, but would the Convention on the International Recognition of Rights in Aircraft done at Geneva on 19 June 1948? 23/ The examples of treaties whose status would be uncertain under the definition are too numerous to require further illustration.

21/ League of Nations, Treaty Series, vol. 137, No. 3145, p. 11.

22/ United Nations, Treaty Series, vol. 15, No. 102.

23/ United Nations, Treaty Series, vol. 310, No. 4492.

A more important problem is that the proposal could impose upon the newly-independent States a host of obligations, including financial ones, that might be unknown or imperfectly known to it. The newly-independent State could well be in a position where it could not undertake the legal research and analysis necessary to determine the nature and extent of its obligations under these treaties of universal character except over a period of several years. Nevertheless it could be held to have breached its obligations under such a treaty, however unknowingly or inadvertently.

The articles that the Commission has proposed avoid problems of the nature described and preserve the principle of freedom of choice by the newly-independent State. This principle should be maintained.

Notification of succession to multilateral treaties; absence of provisions concerning effects of objections to such notifications

The United States, in its comments on the 1972 draft articles, expressed concern that the retroactive effect of a notification of succession to a multilateral treaty could give rise to severe practical problems. Consequently it supports the addition of paragraph 2 in article 22, which provides that the operation of a multilateral treaty shall be considered as suspended between the date of succession and the date of notification of succession. This is a solution which preserves the theoretical basis of the nature of succession to treaties, but avoids the adverse consequences of carrying application of the theory to an extreme.

On the other hand, the United States wishes to renew its expression of concern that no provision is made in the draft articles regarding the effect of an objection to a notification of succession on the ground that such succession would be incompatible with the object and purpose of the treaty and notes that the problem has become more troublesome with the addition to article 16 of the further qualification if the succession "would radically change the conditions for the operation of the treaty". These same qualifications appear in article 17 on participation in treaties not in force at the date of the succession of States; in article 18 on participation in treaties signed by the predecessor State subject to ratification, acceptance or approval; in article 29 on newly-independent States formed from two or more territories; in articles 30, 31 and 32 on the effects of a uniting of States, in respect of treaties in force at the date of the succession of States, in respect of treaties not in force at the date of the succession of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval; in articles 33 and 34 on succession of States in cases of separation of parts of a State and the position if a State continues after separation of part of its territory; and in articles 35 and 36, concerning the effects, as regards succession, of separation of parts of a State on treaties not in force for the predecessor State to which that State had expressed its consent to be bound and on treaties signed by the predecessor State subject to ratification, acceptance or approval.

It would appear likely that objections to notifications of succession will be made on the basis of the qualifications common to the 11 articles mentioned

in the preceding paragraph. Common sense would indicate that provision should be made for dealing with such objections. Two methods are available. One would be to write rules regarding the effect of objections into the draft articles. The Commission rejected the first course and possibly with good reason. It would be difficult to work out, in the abstract, rules for disposing of objections to notifications of succession in view of the myriad of differing treaty relationships that might be affected.

Settlement of disputes

The second course would be to set up a system for settling disputes that arise under the treaty. Any objections to a notification of succession could then be handled under the disputes-settlement system. The Commission's report indicates that it gave some consideration to including provisions on disputes-settlement in the draft articles, but reached no decision owing to lack of time. Instead the Commission offered, if requested, to consider the matter at its next session and to prepare a report thereon. The United States would not consider it necessary for the Commission to reconsider the matter. Inasmuch as the present draft articles should be considered as having a close relationship to the Vienna Convention on the Law of Treaties, it would be appropriate to use the same procedures as are provided in the Vienna Convention for dealing with disputes regarding the validity of treaties.

Article 66 of the Vienna Convention provides for questions regarding jus cogens to be referred to the International Court of Justice and other questions to be decided by a conciliation procedure. As there are no issues in the present articles comparable in fundamental importance to determining the existence and content of a peremptory norm of international law, the conciliation procedure in the annex to the Vienna Convention on the Law of Treaties could be incorporated in the present articles in substantially identical language. However, there are States which do prefer determination by judicial procedure or arbitration rather than by conciliation. There would not appear to be any substantial reason why States that preferred judicial or arbitral determination should not be able, under the convention, to use that system in disputes among themselves, while conciliation would be the procedure applicable in all other cases. To achieve this result, the annex to the Vienna Convention and article 13 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (General Assembly resolution 3166 (XXVIII)), could be combined.

Part IV (Uniting and separation of States)

The United States welcomes the changes that have been made in part IV on the uniting and separation of States. The inclusion of new articles to deal with treaties not in force, or which have been signed by the predecessor State prior to the uniting or separation, are valuable additions.

The combination of the 1972 articles on dissolution and on separation of States in one set of articles on the separation of States is a substantial

improvement. The result is to eliminate the extremely difficult question of distinguishing between what is a dissolution of a State and what is a separation. The maintenance in force of treaties previously applicable in the dissolved territory, except with respect to any part of a State which becomes a new State in circumstances essentially of the same character as those surrounding the formation of a newly-independent State, provides a reasonable compromise between the principle of continuity and the principle of freedom of choice. The exception, however, may give rise to difficulties in application. The draft articles do not lay down tests for determining what are the circumstances in which a new State should be considered to be "a newly-independent State". The single test would appear to be whether it had been a "dependent territory" within the meaning of article 2. There have been a number of cases in which parts of a State that were formally described as integral parts of a State were treated as dependent territories. On the other hand, there are cases in which the question would be extremely difficult to answer. The United States is inclined to the view that the circumstances in each case of dissolution that may arise in the future can be so diverse that any further attempt to elaborate the definition would be self-defeating. The existence of this difficult problem, however, underscores the necessity for having an effective and impartial procedure for the settlement of disputes.

Procedure by which work on draft articles should be completed

Finally, the United States considers that the importance of the subject-matter and the value of the draft articles support their consideration by a diplomatic conference at an early date.
