Document:-
A/CN.4/SR.1286

Summary record of the 1286th meeting

Topic:
Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-
1974, vol. I

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application of a treaty by a State which was unaware that the treaty had been given retroactive effect. He was not radically opposed to offering States that possibility, but the questions it would raise must be duly settled in the draft.

85. It would also be advisable to define the meaning of the expression "entry into force", which could mean either entry into force for the parties concerned, or entry into force when the requisite number of ratifications had been obtained.

86. The discussion on article 6 *bis* had raised a number of problems which the Drafting Committee could examine, for it was important for the Commission to take a definite position on each of them.

The meeting rose at 1 p.m.

1286th MEETING

Friday, 28 June 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. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205, L.206 and L.209; A/8710/Rev.1)

[Item 4 of the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 6 *bis* (Non-retroactivity of the present articles) *(continued)*

1. Mr. TSURUOKA said that at the previous meeting the Commission had almost agreed to refer article 6 *bis* back to the Drafting Committee, in view of the fundamental questions it raised. His remarks would therefore be addressed to the Drafting Committee.

2. The codification of the topic under consideration was governed by the principle of the continuity of treaties, subject to application of the principle of the sovereign equality of States, since strict observance of the continuity principle would be unjust to newly independent States which had not participated in the formulation of pre-existing rules of international law. That group of States should accordingly be given certain privileges, but those privileges should be clearly delimited, because of their exceptional nature. The notion of newly independent States had to be transposed from the political to the legal plane and carefully defined. The privileges accorded to newly independent States had to be justified, especially if they appeared to be contrary to the principle of the sovereign equality of States. The commentary should therefore stress the condition of dependence in which the territories of newly independent States must have been before their accession to independence. Unless the Commission made that clear, it might give the impression that it attached little importance to certain major principles of international law.

3. The deletion of article 6 *bis* might suggest that the Commission had ignored the fundamental principle of the sovereign equality of States. He was reluctant to delete the article, yet the contents of article 6 seemed sufficiently clear for the retention or deletion of article 6 *bis* to make little difference in practice.

4. Although the article formed a counterpart to article 6, he would not press for its retention. The reason why opinions differed about article 6 *bis* was that all States should be equal and the provision conferred privileges on some of them. That difficulty could be overcome if the Commission defined the expression "newly independent States" in a manner which took due account of two elements: the creation of a new State and the previous situation of dependence of its territory.

5. Mr. USHAKOV agreed that the majority of the Commission were in favour of referring article 6 *bis* back to the Drafting Committee. In view of the close links between articles 6 and 6 *bis*, the Committee should re-examine the two provisions simultaneously; article 6 *bis* might become unnecessary if article 6 was suitably amended.

6. With regard to the concern expressed by Mr. Ramangasoavina, it should be borne in mind that newly independent States emerging a few years before the entry into force of the future convention might well agree that it should apply to the effects of their succession; the draft articles provided that a newly independent State could make a notification of succession within a reasonable period, and it would then be regarded as a party to the future convention from the date when it came into being. That possibility was open to newly independent States in cases of separation, but it was doubtful whether the rule could apply to cases of uniting or dissolution, since the principle governing them was the continuity of treaties.

7. As to the position of third States bound by treaties to the predecessor State, which had caused Mr. Ago some concern, it might be settled by stipulating a fixed time-limit or "reasonable" period. That question was not related to either article 6 or article 6 *bis*. General retroactivity of the draft articles, which was absolutely impossible, should not be confused with retroactivity to the date of succession, as provided for in the draft itself.

8. Some of the rules laid down in the draft, such as those in articles 29 and 30, were existing rules of international law from which no derogation was possible and which applied independently of the entry into force of the future convention.

9. Mr. SETTE CÂMARA said that during the enlightening discussion on article 6 *bis*, Mr. Ushakov had emphasized the link between that article and article 6.

Article 6 stated the principle that the Commission's draft applied only to a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. In other words, the Commission was not establishing rules for application to abnormal cases of succession of States, such as succession resulting from war and military occupation.

10. Article 6*bis* contained two elements. The first was a saving clause providing that principles of international law to which the effects of a succession would have been subject independently of the draft articles would always apply; the second was the statement that the articles applied only to the effects of a succession which had occurred after their entry into force. The obvious purpose of the second element was to exclude the retroactive application of the articles to successions that had occurred in the past.

11. Several speakers had questioned the need for article 6*bis*, because articles 4 and 28 of the Vienna Convention on the Law of Treaties[1] established in clear-cut terms the non-retroactivity of international treaties, unless the parties expressly agreed otherwise. But the present wording of article 6*bis* raised certain doubts. First, what was to be understood by the "entry into force" of the articles? Mr. Ago had rightly pointed out that there was an important nuance in that wording. Was the "entry into force of the treaty" the moment at which the treaty, having received the required number of ratifications, came into force for the international community as a whole? Or was it the moment at which, as a result of the deposit of the necessary individual instrument of ratification, it came into force for a State party to the convention?

12. That distinction was very important, since ratification by a newly independent State might occur when the treaty had already been in force for some time. In that case, its retroactive effect for that State would cover the period during which it had already been in force for other States. But was that the result which the Commission was seeking? Would that be in the interest of the newly independent State or in the interests of third States? The answers might vary from case to case, and he was not sure whether it was wise to include a provision which would give retroactive effect to the present articles.

13. Intertemporal law raised extremely complex and delicate problems which the Commission had been careful to avoid in many instances. He did not think it was the Commission's task to restrict the application of the articles in time; provisions of that kind would be proposed at the future diplomatic conference adopting the convention or during its discussion in the Sixth Committee, if Governments considered them necessary.

14. Furthermore, if the number of ratifications necessary for the entry into force of the future convention was much lower than the thirty-five required for the Vienna Convention on the Law of Treaties, the former instrument would come into force before the latter. In that case, the rule stated in article 6*bis*, which, as it stood, admitted a form of retroactivity, would prevail over the general rules in articles 4 to 28 of the Vienna Convention.

15. In the light of the discussion, he was inclined to share the doubts of Mr. Elias, Mr. Yasseen and Mr. Ramangasoavina regarding the need for article 6*bis*. Moreover, if, as Mr. Ushakov had contended, the price of avoiding the complicated problems of intertemporal law involved in the application of the draft articles was to abandon article 6 as well, he thought the Commission could go that far. The principle stated in article 6 was in accordance with international reality and, if he was not mistaken, the Commission had in the past considered it unnecessary to include in its draft conventions a provision specifically excluding from their application situations contrary to international law and to the principles embodied in the Charter of the United Nations.

16. Mr. ŠAHOVIĆ said he too thought that article 6*bis* should be referred back to the Drafting Committee, but with precise instructions. The Commission should first try to clarify the situation. The discussion on retroactivity had begun during the consideration of article 6, as a result of remarks made by Mr. Ushakov.[2] He (Mr. Šahović) had then suggested that explanations might be given in the commentary.[3] Instead, the Commission now had before it a new draft article which, although he did not oppose it, had raised many points on which the Commission should make its position clear, since the article could be interpreted in several ways. The rules relating to the non-retroactivity of treaties had been codified, in particular in articles 4 and 28 of the Vienna Convention, and it was obvious that they had to be applied in the present case. That did not appear to be denied by anyone, but some members questioned the need to restate those rules in the draft articles.

17. What was most important was to clarify the relationship between article 6 and article 6*bis* and determine how far the latter provision should be interpreted in the light of the former. The purpose of article 6 was to draw attention to the lawfulness of the situations to which the future convention related; that of article 6*bis* was to settle the question whether the convention would apply to old situations and whether the present criterion of lawfulness would be valid for situations governed by a body of international law that differed from the present law. Those questions could be settled in the commentary to article 6 without going into the general question of the retroactivity of the draft, which was already governed by the Vienna Convention. If the Commission wished to include an article 6*bis*, it should be worded on the lines of article 4 of the Vienna Convention. The cases of certain territorial régimes, such as those dealt with in articles 29 and 30, should be regulated separate-

[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), pp. 290 and 293.

[2] See 1266th meeting, para. 31.

[3] *Ibid.*, para. 38.

ly, in accordance with the principle of *uti possidetis* and the practice of States.

18. Mr. KEARNEY said he regretted that he did not share the view of the last two speakers that article 28 of the Vienna Convention was a clear article. On the contrary, he thought it was evident from the discussion that that article was not easy either to understand or to apply.

19. The conclusion to be drawn from article 6*bis* was that the present articles applied to a succession of States occurring after their entry into force. But article 28 of the Vienna Convention dealt with two possibilities, the first being an act or fact which had taken place before the entry into force of the treaty, and the second, a situation which had ceased to exist before that entry into force. It was therefore necessary to consider whether the Commission was dealing with an act or fact, or with a situation. If succession was viewed as a situation, it was obvious that that situation would not cease to exist before the draft articles entered into force, unless one succession was succeeded by another. There was no doubt that the act of the replacement of one State by another in responsibility for the foreign relations of territory was an act completed on the date of the succession, but did that necessarily mean that the succession of the State was completely terminated in all its implications and ramifications?

20. Assuming, for example, that succession took place before the entry into force of the draft articles and that the new State made a declaration of provisional application with respect to a group of treaties, that declaration would be an act which took place before the entry into force of the draft articles, so that they would not affect the declaration whatever the purposes it was designed to achieve. But if, after the entry into force of the draft articles, the new State decided to change from provisional to full application, would the Commission's rules apply in the case of reservations which had originally been provisionally applied? To his mind, the situation of the successor State would not be clear under article 28 of the Vienna Convention, and for that reason he would suggest that article 6*bis* should be referred back to the Drafting Committee.

21. Lastly, he thought that definite limits had to be placed on retroactivity; he questioned the wisdom of adopting a provision which would permit retroactivity in cases of State succession to extend back beyond the entry into force of the present articles. In any case, what the Commission decided in the case of article 6*bis* need not affect article 6 or articles 29 and 30, which constituted separate units with their own separate rules.

22. Mr. USHAKOV said some members of the Commission had observed that article 6 raised the question of the lawfulness of successions, that was to say the replacement of one State by another. In his view, the present wording of the article did not limit that lawfulness in time. If the territorial changes that had taken place in previous centuries were considered in regard to their lawfulness under contemporary international law, it would be concluded that most of them were unlawful. It was because some States tried to apply the principles of present-day international law to very old situations and thus met with great difficulties, that he had proposed article 6*bis*, to limit the scope of the preceding article. Article 6*bis* would become unnecessary, however, if the Drafting Committee could find adequate wording for article 6. For example, in the French text the Committee might replace the words *"une succession d'Etats se produisant conformément au droit international"* by the words *"une succession d'Etats qui se produira conformément au droit international"*.

23. Mr. YASSEEN said that although he appreciated Mr. Ushakov's concern, he thought article 6 determined the field of application of the draft without calling in question the lawfulness of successions of States in regard to time. There was no indissoluble link between articles 6 and 6*bis*, and article 6 did not seem to prejudge the question of the retroactivity of the future convention.

24. The CHAIRMAN, speaking as a member of the Commission, said that most members seemed to agree that the articles the Commission adopted would be subject to the general rule of treaty law on non-retroactivity, as laid down in article 28 of the Vienna Convention. But in view of the uncertain meaning of that article, to which Mr. Kearney had drawn attention, and of the fears expressed by Mr. Ushakov that article 6 might have the effect of excluding non-retroactivity, it would be useful to include a provision which clearly stated that the general rule of non-retroactivity would apply throughout the draft. All members seemed to think that article 6*bis* should be returned to the Drafting Committee for further consideration, and Mr. Ushakov had proposed that article 6 should also be referred back to that Committee. It would be necessary to draft detailed commentaries making the situation clear to the General Assembly.

25. Mr. AGO said he agreed with the Chairman. In view of the concern that had been expressed, it would be better to refer articles 6 and 6*bis* back to the Drafting Committee with very broad instructions, so that it could either amend article 6 or draft one or two additional provisions.

26. The CHAIRMAN suggested that articles 6 and 6*bis* should be referred back to the Drafting Committee.

It was so agreed.[4]

ARTICLE 7[5]

27.

Article 7

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

1. The obligations or rights of a predecessor State 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 State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

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[4] For resumption of the discussion see 1296th meeting, para. 63.

[5] For previous discussion see 1267th meeting, para. 1.

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.

28. Mr. HAMBRO (Chairman of the Drafting Committee) said that the only changes made by the Drafting Committee in the title and text of article 7 were of a stylistic nature and related only to the English version. In the title, the Committee had replaced the expression "from a predecessor to a successor State" by "from a predecessor State to a successor State"; article 2 defined two distinct terms, "predecessor State" and "successor State", and all the provisions of the draft should be consistent with the definitions in that article. For the same reason, the Committee had replaced the words "the predecessor and successor States", in paragraph 1, by the words "the predecessor State and the successor State". No corresponding change had been required in the French and Spanish versions. The possessive form "State's" had appeared in the first line of paragraph 1 of the English text, and since that was somewhat unusual in English legal drafting, the Committee had amended the opening phrase to read: "The obligations or rights of a predecessor State . . .".

29. Mr. AGO suggested that in paragraph 1 of the article the words "relating to that territory" should perhaps be added after the words "treaties in force in respect of a territory at the date of a succession of States", as the present wording was too vague.

30. The CHAIRMAN pointed out that the term "date of the succession of States" was defined in article 2, paragraph 1 (*e*), as "the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

31. Sir Francis VALLAT (Special Rapporteur) said that the answer to Mr. Ago's point was to be found in the link between the definitions of "predecessor State", "successor State" and "date of the succession of States".

32. The CHAIRMAN suggested that the Commission should approve article 7.

It was so agreed.

ARTICLE 8[6]

33.

Article 8

Unilateral declaration by a successor State regarding treaties of the predecessor State

1. The obligations or rights of a predecessor State 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 or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the 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.

34. Mr. HAMBRO (Chairman of the Drafting Committee) said that the only change made in article 8 related to the English version of the title, which had formerly read: "Successor State's unilateral declaration . . .".

35. The CHAIRMAN suggested that the Commission should approve article 8.

It was so agreed.

ARTICLE 9[7]

36.

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.

37. Mr. HAMBRO (Chairman of the Drafting Committee) said that only minor changes had been made in article 9; they related to the Spanish version only and were intended to bring it into closer conformity with the English and French versions. In the title of the article, the words *"que estipulan"* had been replaced by *"en que se prevé"*. In the first lines of paragraphs 1 and 2, the words *"a raíz de"* had been replaced by *"en caso de"*.

38. Members would recall that doubts had been expressed about the latter part of paragraph 1 of the article reading: "or, failing any such provisions, in conformity with the provisions of the present articles". In the Committee's view, that phrase referred to treaties which, like some commodity agreements, provided for the option mentioned in the first part of the paragraph, but contained no provision indicating the procedure by which it should be exercised. In such cases recourse to the draft articles might be necessary. The Committee wished, however, to reserve the possibility of reviewing that question in the light of the draft articles as a whole. For the time being, therefore, it did not propose any change.

39. Mr. AGO said that paragraph 2 of the article caused him some concern in regard to the situation of third States pending the expression by a newly independent State of its consent to be bound by a treaty. Rights and obligations certainly could not be attributed to a State before it existed, but the position of third States should also be safeguarded. In order to protect the interests of both the successor State and third States, it might perhaps be possible to amend the last part of paragraph 2 to read: "such a provision does not take

[6] For previous discussion see 1267th meeting; article 8 was discussed in conjunction with article 7 (see para. 67).

[7] For previous discussion see 1268th meeting, para. 1.

effect if the successor State expressly declines to be so considered". Article 9 raised the problem of a time-limit, which also arose in regard to other articles, and should therefore be considered later in connexion with all the provisions concerned.

40. The CHAIRMAN, speaking as a member of the Commission, said that article 9 formed part of the general provisions and would therefore seem to apply both to newly independent States and to the other types of succession, regarding which continuity of treaties was the prevailing rule. It was not clear to him, however, whether paragraph 2 applied to forms of succession such as the uniting and separation of States or whether it constituted an exception to the continuity principle.

41. Sir Francis VALLAT (Special Rapporteur) said he had assumed that the Commission had intended paragraph 2 to be a general exception in the special case in which a treaty provided that the successor State should be considered as a party. Having regard to the historical background of such treaties, it might be desirable for a newly independent State to express its acceptance in writing rather than to be considered a party by virtue of its conduct or by some other means.

42. The CHAIRMAN, speaking as a member of the Commission, said that, on the dissolution of a State, a treaty which did not include a special provision concerning succession would be automatically binding on the States created by the dissolution. He did not see, therefore, why the situation should be different in the case of a treaty which contained an express provision to the effect that it would be binding on a successor State, regardless of the type of succession.

43. Sir Francis VALLAT (Special Rapporteur) said that history suggested there was always a risk that a treaty providing that a successor State should be considered as a party might be imposed on such a State; for that reason, he believed that the exception provided for in paragraph 2 was necessary.

44. Mr. USHAKOV said that no answer had yet been given to the question raised by Mr. Ago about a possible time-limit. It might therefore be better to refer article 9 back to the Drafting Committee. He himself found the article perfectly clear as it stood, since it provided that a treaty could only apply to a successor State with its express consent.

45. The CHAIRMAN, speaking as a member of the Commission, said that he withdrew his objections to paragraph 2.

46. After a brief discussion, in which Mr. HAMBRO, Mr. YASSEEN, Mr. AGO and Sir Francis VALLAT took part, Mr. ELIAS proposed that the Commission should approve article 9 provisionally, subject to further consideration by the Drafting Committee in the light of the other provisions of the draft articles.

It was so agreed.[8]

[8] There was no further discussion of this article in the Commission; it was adopted without change at the 1301st meeting (para. 23).

Draft articles adopted by the Commission: second reading

Articles 29 and 30

47. The CHAIRMAN invited the Special Rapporteur to introduce articles 29 and 30, which read:

Article 29

Boundary régimes

A succession of States shall not as such affect:

(*a*) a boundary established by a treaty; or

(*b*) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 30

Other territorial régimes

1. A succession of States shall not as such affect:

(*a*) obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a particular territory of a foreign State and considered as attaching to the territories in question;

(*b*) rights established by a treaty specifically for the benefit of a particular territory and relating to the use, or to restrictions upon the use of a particular territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States shall not as such affect:

(*a*) obligations relating to the use of a particular territory, or to restrictions upon its use, established by a treaty specifically for the benefit of a group of States or of all States and considered as attaching to that territory;

(*b*) rights established by a treaty specifically for the benefit of a group of States or of all States and relating to the use of a particular territory, or to restrictions upon its use, and considered as attaching to that territory.

48. Sir Francis VALLAT (Special Rapporteur) said it would be convenient to deal with articles 29 and 30 together, since they had a joint commentary in the Commission's 1972 report (A/8710/Rev.1). The underlying principles were substantially the same in both cases, although the nature of the obligations and rights dealt with in article 30 made its drafting more difficult than that of article 29.

49. The history of the two articles went back to the former Special Rapporteur's first report, in which he had proposed a draft article 4 on boundaries resulting from treaties.[9] Although that article related only to boundaries, the question of so-called "dispositive" or "localized" treaties was discussed in paragraph (3) of the then Special Rapporteur's commentary, so it could be said that the subject-matter of articles 29 and 30 had been before the Commission for a very considerable time and that the provisions of those articles were the result of fairly mature consideration.

50. The articles had received a very broad measure of support at the 1972 General Assembly, from delegations representing a variety of viewpoints. To judge by the debates in the Sixth Committee, if they had been submitted to a conference of plenipotentiaries at that time,

[9] See *Yearbook ... 1968*, vol. II, p. 92.

they would in all probability have been adopted by a large majority.

51. Difficult and controversial as the articles might be, they could therefore be approached with confidence. The criticisms made of them were, in his view, largely due to a misconception of the purpose they were intended to achieve. The two articles in fact constituted saving clauses of a limited character, and no more. Their inclusion in the draft was necessary because, as a result of the operation of one or other of the draft articles, a treaty as such might cease to be in force in the relations between the successor State and another State. Since boundary treaties were usually bilateral, it was necessary to ensure that the rights and obligations arising from a boundary régime were not destroyed by the fact of a treaty ceasing to be in force through the operation of the draft articles. Similar considerations applied to other territorial régimes.

52. It was important to remember that the scope of articles 29 and 30 was limited to the effects of succession *qua* succession. They did not touch upon questions pertaining to the international law of treaties; that was made absolutely clear by the negative form in which the articles were cast.

53. The articles were concerned with the results of certain treaties and not with the treaties themselves. In that connexion, it should be borne in mind that the words "established by a treaty" could only mean "validly established by a valid treaty". The obvious intention was to refer to situations lawfully and validly created. Moreover, there was nothing in the articles which in any way precluded adjustment by self-determination, negotiation, arbitration or any other method acceptable to the parties concerned.

54. Abundant comments, both oral and written, had been made by Governments; they were summarized in his report (A/CN.4/278/Add.6). In addition, a letter (A/CN.4/L.205) had been received from the permanent mission of Ethiopia to the United Nations, stating the views of the Ethiopian Government on the grazing provisions of the 1897 Anglo-Ethiopian Agreement relating to the boundary between Ethiopia and the former British Somaliland Protectorate. He thought the questions raised in that letter could more appropriately be discussed in the commentary than in connexion with the principles involved in articles 29 and 30.

55. Government comments were largely favourable to articles 29 and 30; only three Governments had taken a totally negative view. Legal writing, State practice and judicial precedents provided support for the view that there were certain rights and obligations with regard to boundaries and territorial régimes that could be regarded as "running with the land", to use an expression familiar to English lawyers. That view underlay several of the decisions of the Permanent Court of International Justice and the International Court of Justice mentioned in the Commission's 1972 commentary to the two articles (A/8710/Rev.1, chapter II, section C).

56. Considerations derived from the general principles of law and the need to maintain peace and stability also supported the underlying doctrine of articles 29 and 30. Acceptance of the idea that a bilateral boundary treaty could be swept aside by a succession of States would result in chaos. It was unthinkable that it should become necessary to renegotiate a boundary whenever a succession of States occurred.

57. The inclusion of articles 29 and 30 had been criticized on the ground that the question of boundary and territorial régimes was not germane to succession of States in respect of treaties or even to State succession at all. He could not accept that view because the draft articles would affect the operation of boundary treaties; some reference to the subject-matter of articles 29 and 30 was therefore inescapable.

58. Another argument advanced against articles 29 and 30 had been that a boundary established by a treaty which was in itself not lawful could have no permanency. The Commission had accepted that principle, although perhaps not quite in that form, but that did not affect the articles. Clearly, if there were grounds for impeaching the treaty itself, the boundary would lose the basis on which it rested, but nothing in articles 29 and 30 affected the position in that respect. He believed that the point was made reasonably clear in the commentary to the two articles, but he would be prepared to deal with it more fully, if that was considered necessary.

59. Where the question of self-determination was concerned, he wished to stress that there were always two points of view on a boundary dispute. If the people on one side of the border had the right of self-determination, so had those on the other side. If there was room for self-determination, articles 29 and 30, which merely maintained the *status quo*, would not prevent the exercise of that right.

60. The Commission had been criticized for relying on article 62, paragraph 2(*a*), of the Vienna Convention on the Law of Treaties. In fact, all that the Commission had done was to take note of the fact that, when the Vienna Conference had adopted article 62, on fundamental change of circumstances, it had made an exception for boundary régimes. In view of the large majority of States which had supported that exception at the Conference, it was not unreasonable to take the same view for the purposes of the present draft articles 29 and 30.

61. His own general conclusion was that articles 29 and 30 should be maintained substantially as they stood. He appreciated the anxiety of certain Governments concerning their own specific problems, but wished to draw attention to the Commission's long-standing belief that, in the process of codification, it was not part of its task, or of that of the conference of plenipotentiaries, to try to settle individual disputes. The Commission and the codification conferences concentrated on the task of laying down principles for general application. In doing so they took State practice fully into account, but were not unduly affected by individual disputes.

62. Where the commentary was concerned, he would take the utmost care—again in accordance with the Commission's long-standing tradition—accurately to reflect the views of individual States.

63. An interesting point had been raised in the Sixth Committee by the Egyptian delegation, which had asked how, in legal theory, the rights and obligations of parties under a treaty could be separated from the international instrument which had created those rights and obligations (A/CN.4/278/Add.6, para. 417). He wished to stress that the provisions of articles 29 and 30 did not deal with the question of the existence of a treaty. Nevertheless, rights and obligations could clearly exist only in the context of the treaty from which they derived. If the treaty disappeared, the rights and obligations would also disappear. He believed that it was precisely the merit of articles 29 and 30 that they referred to rights and obligations deriving from treaties, but not to the treaties themselves.

64. A number of other questions had been raised by Governments with which, in his opinion, it would be inappropriate to deal in the present context. One was the suggestion by the delegation of Morocco that provision should be made for arbitration in certain circumstances (*ibid.*, para. 447). Another was the comment by the delegation of Kenya that article 30 should not be placed on the same footing as article 29 (*ibid.*, paras. 450 and 451). For the reasons given in his report (*ibid.*, para. 453), the comments made on the subject of "unequal treaties" likewise did not, in his view, call for any change in articles 29 and 30.

65. As a matter of drafting, it had been suggested that the provisions of article 30 should be simplified by combining sub-paragraphs (*a*) and (*b*) in each of the two paragraphs. The Drafting Committee should consider that suggestion and act on it if it was possible to do so without disturbing the meaning or detracting from the clarity of the text.

66. The United States Government had made the more specific comment that it might not be advisable to provide, as was done in paragraph 1 of article 30, that the rights and obligations had to attach to a particular territory in the State obligated and to a particular territory in the State benefited (*ibid.*, para. 418). The language used in the article might be construed as excluding, for example, the case in which transit rights accrued to a landlocked State, for the right in that case was not attached to a particular territory in the landlocked State which benefited from the treaty. The point thus raised was essentially one of drafting and should be given careful consideration.

67. The United Kingdom Government had suggested that the term "territory" should be defined (*ibid.*, paras. 418 and 460). That question had already been discussed by the Commission, which had decided not to adopt a definition.[10] For his part, he did not recommend that the discussion on that point should be reopened.

68. The Netherlands Government had suggested that the system embodied in article 30 should also be adopted for certain treaties which guaranteed fundamental rights and freedoms to the population of the territory to which a succession of States related (*ibid.*, para. 418). That suggestion was a very interesting one but the Commission had so far refrained from creating special categories of treaties. Moreover, it was difficult to see how the case mentioned by the Netherlands Government could be covered in a section which dealt with rights and obligations arising from boundary and other territorial treaties, that was to say rights and obligations running with the land. Clearly, the matter should be dealt with in the context of other articles of the draft.

69. In conclusion, he recommended that articles 29 and 30 should be retained substantially as they stood and that the greatest care should be taken to make the commentary as full and as accurate as possible.

The meeting rose at 1 p.m.

1287th MEETING

Monday, 1 July 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR

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

Succession of States in respect of treaties

(A/CN.4/275 and Add.1 and 2; A/CN.4/278 and Add.1-6; A/CN.4/L.205; A/8710/Rev.1)

[Item 4 of the agenda]
(continued)

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING

ARTICLE 29 (Boundary régimes) and

ARTICLE 30 (Other territorial régimes) (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of articles 29 and 30.

2. Mr. SETTE CÂMARA said that, during the Commission's long discussion on those articles in 1972[1] a consensus had emerged that the so-called "dispositive treaties", "treaties of a territorial character", "real treaties" or "localized treaties" could not be considered as governed by either the clean slate rule of article 11 or the moving treaty-frontiers rule of article 10. Since the time when the distinction between "real" and "personal" treaties had been recognized, the former had been regarded as transmissible and the latter as not transmissible. The legal basis for that treatment had been traced by some writers to the old Roman Law

[10] See *Yearbook ... 1972*, vol. I, p. 247, article 22 *bis* and p. 275, para. 7.

[1] See *Yearbook ... 1972*, vol. I, pp. 247-249, 250-254, 258-266 and 275-276.