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MEMORANDUM INTERIEUR

TO: Mr. Virendra Dayal  
At: Chef de Cabinet

THROUGH:  
S/C DE:

FROM:  
DE:

Carl-August Fleischhauer  
Under-Secretary-General for Legal Affairs  
The Legal Counsel

SUBJECT:  
OBJET:

The Soviet Seat on the Security Council

REFERENCE:

DATE: 16 October 1991

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USSR

I would like to comment briefly on the article from The Christian Science Monitor of 4 October 1991 by Riesenfeld and Abbott "A UN Dilemma", a copy of which you sent to me.

I.

The authors draw up three different scenarios for the possible constitutional developments in the Soviet Union and their consequences for the Soviet seat in the Security Council:

(a) In the eventuality of a total disintegration of the Soviet Union, they foresee, based on what is described as the "clear line of succession to the Russian Republic", customary law on State succession. This scenario is unrealistic because it presupposes a generally accepted total disintegration and the existence of customary law of States succession in this respect. However, it is extremely difficult to decide whether a State has disintegrated to the degree of losing its own legal personality and there is no customary international law which would apply to the seat of one of the permanent members of the Security Council.

(b) The second scenario is a constitutional development in the Soviet Union where a new form of federative government could take the place of the existing Soviet Government. The authors see no consequences for the Security Council provided that the new federative government is principally responsible for collective defense. This again presupposes that a clear distinction can be made between a process of constitutional change in a State and the dissolution of the legal personality of that State. Moreover, while the competence for defense is certainly one indicator in the analysis of the situation, competence for defense is not the only or determinative factor. I do not see much past practice on which one could build in this respect.

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(c) The third scenario is what the authors call "a challenge from within"; they draw a parallel to the substitution of the Beijing government in the General Assembly by the Taiwan government. This overlooks the fact that the two Chinese governments were totally united on the view that there was only one China and that China would continue to exist regardless of whether it was represented in the General Assembly by the government in Taiwan or by the government in Beijing.

## II.

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I think that if the constitutional disintegration of the Soviet Union continues, the situation will be much more confused than the authors of the article suppose. It might be extremely difficult to determine whether the process of disintegration has been completed and the Soviet Union has ceased to exist; I recall in this instance that the question as to whether the German Reich ceased to exist as a legal personality in 1945 or not was never resolved to the satisfaction of all members of the community of States. It may become necessary for the Security Council to make a finding or determination for its own purposes. This might entail a constitutional difficulty for the United Nations where the competence for the handling of cases of disputed representation lies with the General Assembly rather than with the Security Council. Therefore, while the Secretariat should follow the events in the Soviet Union attentively, we should be very careful before taking a position on the question of up to which point the Soviet Union exists as the legal entity which holds the Security Council seat.