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20th meeting of the Committee of the Whole

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56. Draft article 12 was supported neither by doctrine nor by practice of States, and a distinction should be made between treaties and agreements concluded within the framework of certain situations in Europe and those concluded in favour of colonial interests. His delegation considered that draft article 12 should be deleted *in toto.*

57. Mr. YIMER (Ethiopia) said that a conference for the codification of rules of international law was not an appropriate occasion to bring up political controversies, as the representative of Somalia had just done. The Conference should not be used as a forum for airing unfounded claims and opinions relating to other States, even though it was true that a neighbouring State to the east of Ethiopia was participating in an international conspiracy to dismember Ethiopia.

58. Mr. OSMAN (Somalia), speaking on a point of order, said he failed to understand why his statement had caused such concern to the representative of Ethiopia, since he had confined himself to expressing his delegation's views on draft articles 11 and 12, without expressly mentioning Ethiopia.

59. Mr. YIMER (Ethiopia), speaking on a point of order, said that he had merely been replying to the insinuations of the representative of Somalia. While it was a fact that Somalia had committed aggression against Ethiopia, the Conference had not been convened to discuss political problems, but to make law. His delegation appealed to all States to refrain from interfering in the internal affairs of countries represented at the Conference, for otherwise it would be impossible to make any progress.

60. The CHAIRMAN, replying to a question by the representative of Somalia, said that the right of reply was recognized when one delegation mentioned another in such a way that it could be identified, even if it was not expressly named. He asked delegations to refrain from expressly mentioning other countries to call their conduct in question.

61. Mr. TABIBI (Afghanistan) moved the immediate adjournment of the meeting under rule 25 of the Conference's rules of procedure (A/CONF.80/8).

It was so agreed.

The meeting rose at 9.55 p.m.

20th MEETING

Wednesday, 20 April 1977, at 11.15 a.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976
[Agenda item 11] *(continued)*

ARTICLE 12 (Other territorial régimes) *(continued)*[1]

1. Mr. MUDHO (Kenya) said that, when expressing support for the retention of article 11, his delegation had made some reservations concerning article 12.[2] Subsequently, it had had a chance of hearing the statements of other delegations and had been particularly impressed by the views of the representatives of Austria[3] and the United Republic of Tanzania.[4] The former had sounded a word of caution by emphasizing the obvious political implications of the article under discussion, while the latter had shown that its literal interpretation and application would entail an unacceptable curb on the sovereignty of a successor State. Nevertheless, it appeared from a study of the commentary by the International Law Commission that a provision along the lines of the proposed article was desirable. As his delegation had pointed out in 1974 in the Sixth Committee, such a provision must always be interpreted to mean that "in cases of localized treaties a newly independent State did not inherit the territorial régime created but it did inherit an obligation where necessary to renegotiate the provisions of such a treaty so as to achieve the protection of the vital interests of a beneficiary State while not jeopardizing the successor State's independence" (A/CONF.80/5, p. 157). "A State in exercise of its sovereignty might confer any benefit or undertake any obligations it so desired with respect to its territory by treaty. It was for the State to judge for itself what it should receive in return. Once such a choice was made the States concerned must respect their mutual undertakings. It was, however, going too far to say that a newly independent State should, with respect to the enjoyment of its territory and use of its resources for the benefit of its peoples, be permanently fettered by servitudes imposed on the territory by the former colonial Power for the benefit of other States in consideration of motives which might have been satisfactory to the predecessor State but not consented to by the successor State. Such a proposal could hardly be

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[1] For the amendments submitted to article 12, see 19th meeting, foot-note 7.

[2] See above, 18th meeting, paras. 27-29.

[3] See above, 19th meeting, paras. 34-40.

[4] See above, 19th meeting, paras. 25-30.

consistent with the principle of self-determination" (*ibid.*, p. 156).

2. He therefore believed that if the amendments proposed by Mexico (A/CONF.80/C.1/L.19) and Cuba (A/CONF.80/C.1/L.20), as well as the Argentine subamendment to the Mexican amendment (A/CONF.80/C.1/L.27), were combined into one provision, which might form a separate paragraph in article 12, the article would be more widely acceptable. Since the amendments proposed by Finland (A/CONF.80/C.1/L.18) and Malaysia (A/CONF.80/C.1/L.21) related to drafting points, they should be referred to the Drafting Committee.

3. Mr. SANYAOLU (Nigeria) said that he approved the contents of article 12, which complemented the relevant provisions of the Vienna Convention on the Law of Treaties. In formulating the article, the International Law Commission had adopted the same standpoint as in the case of boundary régimes. The rules stated in article 12 was another exception to the "clean slate" principle and the moving treaty-frontiers rule. His delegation, while not opposed to those exceptions being made, was not entirely satisfied with the language used in article 12. In particular, he wondered why the term "foreign State", which was not used in legal parlance, had been chosen instead of the term "third State", which appeared in the earlier articles.

4. Turning to the amendments, those proposed by Finland and Malaysia could help to improve the wording of the article, but the Malaysian amendment also contained the expression "foreign State" which caused his delegation concern. The Argentine subamendment had such political overtones that he was unable to see what role it could play in the article under discussion. With regard to the Mexican and Cuban amendments, he noted, with their sponsors, that the Commission had failed to indicate in its commentary what principle it attached to treaties concerning military bases. That question should therefore be examined by the Committee of the Whole with a view to amplifying article 12 to reflect the two amendments in question.

5. Mr. BADAR (Oman) said that his delegation was convinced of the need to strengthen relations between States and for States to become good neighbours. Consequently, it could accept article 12, as it had accepted article 11, although it shared the concern expressed by some delegations about the effects that article 12 might have on the sovereignty of some States. Interesting views had been expressed concerning transit rights, navigation rights and other servitudes, but those issues were more a matter for the United Nations Conference on the Law of the Sea, as the International Law Commission had indicated in its commentary.

6. Mr. KEARNEY (United States of America) said that in 1972, as Chairman of the International Law Commission, he had submitted to the Sixth Committee the provisional draft on succession of States in respect of treaties.[5] Wording apart, articles 11 and 12 of that draft had not really differed from articles 11 and 12 of the present draft and had given rise to a discussion very similar to the one now taking place. Many delegations had drawn attention to the principle of self-determination and to that of permanent sovereignty over natural resources. When summing up the discussion, he had emphasized that a reference to those principles in article 12 would not bring about their general application because the article was confined to the obligations relating to the use of a territory and established by treaty for the benefit of any territory of a foreign State. Those obligations invariably attached to the territories of neighbouring States. Generally speaking they aimed at solving certain problems such as transit for land-locked States, the use of waterways, frontier traffic and movement of persons. The obligations and corresponding rights had a bearing on the relations between the neighbouring States concerned. Consequently, if the notion of self-determination were introduced into article 12, it would apply essentially to relations between two newly independent neighbouring States. The principle would not be invoked against a distant imperial Power but against a neighbouring State, usually another newly independent State. In point of fact, the scope of article 12 was restricted to relations between neighbouring States; it had nothing whatever to do with the usual application of the permanent sovereignty principle to natural resources held by a former imperial Power.

7. For a newly independent State, article 12 had the virtue of providing a basis for a request to open negotiations between neighbouring States concerning the use of certain resources. In the interests of peace and harmonious relations between States, it seemed that such negotiations ought to take account of the existing situation.

8. Those considerations showed that the amendment suggested by Mexico and the subamendment suggested by Argentina were irrelevant. After making it clear that he was not speaking from a nationalist point of view and that his country was always prepared, in the case of a succession of States, to renegotiate agreements concerning military bases, he warned the Committee against the dangers of incorporating in article 12 a notion that had no connexion with that provision. Article 12 dealt with the use of the territory of a State for the benefit of a territory of another State, and such a direct link did not exist when military bases were established. As the International Law Commission itself had found, article 12 had no connexion with the problem of military bases. Furthermore, the principle of permanent sovereignty over natural resources could not really come into play under article 12, which ought normally to apply to

[5] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1316th meeting, paras. 8 *et seq.*

two newly independent States. Usually such States sought to resolve disputes concerning natural resources by reference to other principles than that of permanent sovereignty over natural resources.

9. The provision contained in the Mexican amendment, according to which treaties relating to military bases would cease to be in force by reason of a succession, had nothing to do with article 12. It concerned the validity of treaties, a question which the International Law Commission had wisely considered to be outside the scope of the proposed convention.

10. In his opinion, the procedural rules put forward by the Commission for purposes of solving succession problems connected with territorial treaties were admirable. They did not claim to provide a solution for all those problems, particularly political ones. If elements belonging to the law of treaties but unconnected with the law of succession were introduced into the draft, it might become less attractive to certain delegations and thus less likely to command widespread acceptance. Accordingly, article 12 should not be altered except in respect of the drafting amendments.

11. Mr. HELLNERS (Sweden) said that he was not entirely clear why the International Law Commission had adopted article 12 and he wondered what conclusions should be drawn from its commentary to the article. The cases mentioned by the International Law Commission in connexion with article 12 had been variously interpreted by some delegations, which was proof that the deductions to be drawn from them did not emerge very precisely from the commentary.

12. He therefore hoped that the Expert Consultant would explain whether, in stating the rule contained in article 12, the International Law Commission had essentially relied upon the practice of European States, as claimed by some delegations. Personally, he did not think that that was the case, seeing that the Commission had cited only two cases drawn from European practice, namely that concerning the Free Zones of Upper Savoy and the District of Gex[6] and that of the Åland Islands.[7] He therefore wished to know on what practice the International Law Commission had based the rule formulated in article 12 and to what extent it had been swayed by those two cases.

13. He also wished to know exactly what stand the Commission had taken on the question of agreements concerning military bases, which was dealt with in paragraph (25) of its commentary (A/CONF.80/4, pp. 43-44).

14. Finally, he would like to know the Commission's view, in the context of succession of States in respect of treaties, on the subject of State sovereignty over natural resources, dealt with in the Argentine subamendment. Personally, he doubted whether it was opportune to introduce into the draft convention such a wide notion, which might give rise to misunderstandings.

15. Mr. STEEL (United Kingdom) said that article 12, like article 11, embodied a correct principle which accorded with State practice and the interests of the international community. Treaties were rarely a one-sided proposition, and usually were mutually advantageous to all the parties concerned. The "clean slate" rule enabled a successor State to continue a treaty if it felt that it gained by so doing. It must be remembered that article 12 did not deal with the relations between a successor State and a predecessor State but with the relations between a successor State and the other parties to the treaty, which might be a group of States or even all the States of the international community. Those relations might arise from the particular position of the successor State itself (for example, if it controlled access to a specific region or passage through an international waterway) or from the particular position of other States, such as landlocked or other geographically disadvantaged States.

16. During the debate, emphasis had been given to the obligations of the successor State, but that was only one aspect of article 12, which also dealt with the rights of the successor State. In cases of succession of States, the question of the rights of the successor State arose as often as the question of its obligations, since the successor State was very often the beneficiary of the treaty. Often, therefore, the effect of article 12 would be to preserve for the benefit of the successor State a right which existed over the territory of a neighbouring State and had been obtained under a treaty concluded with that State by the predecessor State specifically for the benefit of what was now the successor State. If a territorial régime were challenged on a succession of States, it was not the predecessor State which would be affected by the problem but the successor State and the neighbouring States, or even the international community as a whole. Article 12 was thus necessary and in harmony with the rest of the draft.

17. The amendments proposed by Mexico and Cuba and the subamendment proposed by Argentina suffered, to a varying degree, from certain defects. All were unnecessary because they were irrelevant to the matter dealt with in article 12. Treaties concerning military bases, which were mentioned in the three amendments, did not come within the scope of article 12, which in no way sanctioned the continuance of such treaties.

18. Moreover, the three amendments in question, and particularly that of Cuba, were cast in extremely

[6] See P.C.I.J., series A/B, No. 46, p. 96.

[7] See League of Nations, *Official Journal, Special Supplement No. 3* (October 1920).

vague and subjective terms and their tone was too political. He was not altogether sure of the meaning of the following words in the Cuban amendment: "treaties which were concluded and concessions which were granted in conditions of inequality or which disregard or detract from the sovereignty of the successor State". Any treaty naturally imposed some limits on the sovereignty of the contracting parties and it was difficult to decide objectively whether a treaty had been concluded "in conditions of inequality". The treaties which were referred to in the Cuban amendment were actually treaties which had been concluded between the predecessor State and third States. If there was any inequality, it was that of the predecessor State and not the successor State. But that was surely not what the Cuban delegation had in mind.

19. Also, the Cuban amendment raised the question of the legality of treaties. It was therefore out of place in the draft, since the proposed convention dealt exclusively with the effects of a succession of States and not with the validity or legality of treaties, which fell within the scope of the 1969 Vienna Convention on the Law of Treaties. Moreover, draft article 13 stipulated that "nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty".

20. Nor did article 12 deal with the question whether treaties which were not covered by it continued or ceased to be in force when a succession of States occurred. It simply provided an exception to the "clean slate" rule in regard to territorial régimes. Treaties which did not fall within the scope of that exception continued to be governed by the "clean slate" principle, expressed in article 15. Under that article, a successor State was free to succeed to a multilateral treaty if it wished or to a bilateral treaty if the other parties to the treaty consented. Quite obviously it would not avail itself of that opinion unless the treaty appeared beneficial. There was consequently no reason to deny a successor State that option.

21. In short, the question of the validity or legality of a treaty did not fall within the scope of the proposed convention; neither did the matter of the cessation or maintenance in force of a treaty come under article 12. The Cuban and Mexican amendments and the Argentine subamendment were therefore unjustifiable and would only create unnecessary difficulties.

22. With regard to the amendments submitted by the delegations of Malaysia and Finland, he appreciated the efforts made by those two delegations to make article 12 more concise and clear, but he did not feel they had succeeded; it would be difficult to formulate the rule embodied in article 12 more succinctly than the International Law Commission had done. However, he saw no reason why the two amendments should not be referred to the Drafting Committee if they could in fact improve the International Law Commission's text.

23. With regard to the Afghan amendment, under which articles 11 and 12 would be combined, he saw no harm in it but he had so far failed to understand what was thought to be its advantages. He looked foreward to hearing a fuller explanation from the delegation of Afghanistan.

24. Mr. SHAHABUDDEEN (Guyana) said first that his delegation's appreciation of the need for stability in international relations inclined it to accept the principle embodied in article 12. He agreed that it should be possible to shorten the wording of the article but, in doing so, care should be taken not to impair the substance of the basic text. Before examining the amendments before the Committee, it was necessary to look more closely at the type of situation contemplated in article 12.

25. Paragraph 1, subparagraph (*a*) seemed to deal with a situation where a servitude attached to part of the territory of one State—the servient territory—for the benefit of the territory of another State—the dominant territory. In paragraph 2, subparagraph (*a*), on the other hand, the International Law Commission had envisaged the case where a given territory was used for the benefit of a group of States or of all States, considered as States, and not for the benefit of any particular territory considered as territory. That was presumably why in paragraph 1, subparagraph (*a*) the International Law Commission had used the word "territories" in the plural, whereas in paragraph 2, subparagraph (*a*) it had used "territory" in the singular; and why it had made a deliberate distinction between the two situations.

26. On the assumption that the International Law Commission had had good reasons for its course of action, the Committee should maintain the distinction if it decided to abbreviate the text of the draft article. The Malaysian amendment did not preserve the distinction at all clearly, since in subparagraph (*a*) it referred not to obligations attaching to a particular territory, but only to obligations attaching to "territories"; the same objection applied to subparagraph (*b*). The Finnish delegation's amendment had got around the problem of the distinction but was a little ambiguous, since there was a doubt in his mind as to what territory was meant at the end of subparagraph (*a*). Was it the territory referred to at the beginning of that subparagraph or the one mentioned further on? The same question could be asked with regard to subparagraph (*b*).

27. Having said that, he agreed with the view of the Malaysian representative that the Committee should avoid prolixity, but not at the expense of clarity. Despite its lengthiness, the Finnish amendment retained the main concepts of the International Law Commission's text and could therefore serve the

Drafting Committee as a basis for combining the provisions concerned.

28. The amendments proposed by Mexico and Cuba and the subamendment proposed by Argentina, concerning the addition of a new paragraph to article 12, contained a principle which appeared acceptable to his delegation: that where there was a treaty by which the predecessor State granted another State rights relating to a dependent territory which were fundamentally inconsistent with the exercise of sovereignty by the newly independent State over its territory, those rights were automatically abrogated when the territory became independent. In accordance with article 1 as adopted by the Committee, the proposed convention would "apply to the effects of a succession of States in respect of treaties between States". Since the convention would thus deal with all the reasonable effects of a succession of States on pre-existing treaties, the Committee should take full account of any legal norms which operated to produce a succession of States, the most important such norm being the rule of *jus cogens* concerning self-determination. If a dependent territory could throw off the control of the predecessor State, it should also be entitled to end the control exercised by any other State in accordance with rights granted to that State by the predecessor State. It was not difficult to conceive of the case in which the predecessor State had, by treaty, granted another colonial State territorial and other concessions which greatly affected the day-to-day life of the people of the newly independent State. What would be the point in such a case in severing the bonds with the predecessor State if the concessions granted to the other State were not affected by the succession? The application of the principle of self-determination ought not to produce such an absurd result. In accordance with that principle, when a colonial State ceased to exercise its authority over a territory, all the lesser rights which the predecessor State had granted to other States in respect of the territory in question and which were fundamentally inconsistent with the sovereignty of the new State terminated automatically. In other words, as a rule of *jus cogens,* the right of self-determination restricted the sphere of competence of the administering Power, thus barring it from granting other States rights which would deprive the principle of self-determination of all its meaning. In the understanding of his delegation, the new paragraph under consideration was intended to make it clear that the provisions of paragraphs 1 and 2 of article 12 did not save from the operation of the "clean slate" principle the treaties concluded by the predecessor State which granted such rights to other States.

29. Concerning the observation made by several representatives that article 12 was not intended to save treaties establishing military bases, it would do no harm to state explicitly an idea that was already implicit in the draft article under consideration; it was proper not only to codify generally accepted rules but also to undertake the progressive development of international law, namely by reflecting in the draft the implications of the recognition of the right of self-determination as a rule of *jus cogens*. In conclusion, he considered that the three delegations which had proposed a new paragraph should collaborate in the preparation of a unified text.

30. Mr. RITTER (Switzerland) said that, following on the questions raised by the Swedish representative, he would like to ask the Expert Consultant two questions concerning in particular the juridical technique used by the International Law Commission in drafting article 12. The first related to the parallel drafting of the two paragraphs of article 12. His delegation wondered why the International Law Commission had not sought to reduce the four subparagraphs to two paragraphs, as the Finnish and Malaysian delegations had done in their amendments. The Committee was aware of the arguments put forward by those delegations and, in order to be able to judge the merits of their amendments, it might usefully know in addition the reasons why the International Law Commission had decided to draft article 12 in its present form.

31. With regard to paragraph 2, subparagraph (*b*) of the draft article, he supposed that the notion of rights established for the benefit of a group of States and relating to the use of a territory referred to situations of the kind created by the Convention of Constantinople of 1888.[8] He would therefore like the Expert Consultant to make it clear whether the International Law Commission's intention had been to imply that, in the event of a succession, the State benefiting from an international régime should transmit the benefit of that régime to each of the successor States; if so, the words "does not ... affect" had been curiously chosen, since the succession would in fact affect several States.

32. Mr. NAKAGAWA (Japan) pointed out that article 12 related not only to the interests of a given State but also to the interests of the international community. The rules set out in articles 11 and 12 reflected customary international law, which had been recognized both in the writings of jurists and in State practice. His delegation did not share the view that the provisions of article 12 were too wide in scope and should be drafted more stringently. He considered that qualifications contained in the article, such as "attaching to the territories" and "attaching to that territory" solved that problem by adequately limiting the scope of the provisions under discussion. Japan welcomed the position adopted by the International Law Commission, which had considered it preferable to deal with legal situations resulting from treaties rather than with treaties themselves. His

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[8] Convention destinée à garantir en tous temps et à toutes les Puissances le libre usage du canal maritime de Suez, signée à Constantinople le 29 octobre, 1888. See G. F. de Martens, ed., *Nouveau Recueil général de Traités,* Gotinga, Dieterich, 1890, 2nd series, t. XV, p. 557.

delegation could therefore support the provisions suggested by the International Law Commission. He observed that there were certain legal situations created by treaty, for example the settlement of specific claims, which might have a dispositive character and ought not to be affected by a succession of States.

33. In conclusion, the Malaysian and Finnish amendments concerned points of drafting and should be referred to the Drafting Committee. However, he could accept neither the Argentine subamendment nor the Cuban amendment because they made too general an exception to the provisions of paragraphs 1 and 2, so that they might embrace any treaty of a territorial character, since nearly all territorial treaties could be interpreted as restricting the sovereignty of a State.

34. Sir Francis VALLAT (Expert Consultant) said that from the point of view of drafting and purport, article 12 was the most difficult of all the articles drafted by the International Law Commission, and he would therefore reply to the questions of the representative of Switzerland at the next meeting.[9]

35. With regard to the three questions put by the representative of Sweden, the answer to the first—whether the International Law Commission had relied mainly on the practice of European States in drafting article 12—was in the negative. The International Law Commission had in fact taken into account the principle underlying the practice of States not only in Europe but in other regions of the world; he drew the attention of the Committee to paragraphs (22) and (23) of the commentary (A/CONF.80/4, p. 43), where mention was made of situations which had occurred in North America and Africa and had weighed as heavily as European precedents in the Commission's decision with regard to article 12. In addition to the principle underlying the practice, the International Law Commission had taken into consideration the attitude of States with regard to territorial problems in general, the writings of jurists and the fundamental principles which should govern the codification of rules of law on the succession of States in respect of treaties.

36. Turning to the second question, concerning treaties relating to military bases, he said that there the International Law Commission had come up against a problem common to all codification work: whereas its task was to set forth rules and principles in general terms, it had had to consider how far it ought to go in dealing with particular cases. It was extremely difficult to strike a balance between the attention which should be paid to particular cases and the demands of codifying general rules. The International Law Commission had sought to limit the scope of article 12 to the effects of a succession of States and to avoid the questions of the validity of a treaty or a State's treaty-making capacity. That was why, as the representative of the United States had pointed out, the International Law Commission had not considered the case of treaties relating to military bases and had judged it best not to deal in its commentary with questions lying outside the subject matter of the draft articles.

[9] See below, 21st meeting, paras. 17-19.

37. Lastly, the question of the sovereignty of States over their natural resources in the context of succession of States was mentioned in passing in paragraph (29) of the commentary (*ibid.*, p. 45), but the remarks he had just made on the subject of treaties relating to the establishment of military bases applied equally to that question. The International Law Commission had decided that the problem had no connexion with article 12.

The meeting rose at 1 p.m.

21st MEETING

Wednesday, 20 April 1977, at 3.50 p.m.

Chairman: Mr. RIAD (Egypt)

Consideration of the question of succession of States in respect of treaties in accordance with resolutions 3496 (XXX) and 31/18 adopted by the General Assembly on 15 December 1975 and 24 November 1976
[Agenda item 11] (*continued*)

ARTICLE 12 (Other territorial régimes) (*continued*)[1]

1. Mr. TABIBI (Afghanistan), replying to the request for further explanations made by the representative of the United Kingdom, said that his delegation's amendment (A/CONF.80/C.1/L.24) was merely of a drafting and procedural nature; it proposed that draft articles 11 and 12, which dealt with similar questions and formed the subject of the same commentary by the International Law Commission, should have the same title and be combined in a single article.

2. During the discussion of draft articles 11 and 12, however, he had noted that most delegations thought that boundary régimes and other territorial régimes should be dealt with separately. In order to respect the wishes of the majority of delegations, he would therefore withdraw subparagraph (*b*) of his delegation's amendment, but he would still prefer the two draft articles to have the same title, as proposed in subparagraph (*a*). He hoped the Drafting Committee would take that proposal into consideration.

[1] For the amendments submitted to article 12, see 19th meeting, foot-note 7.