# United Nations Conference on Succession of States in Respect of Treaties

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## 21st meeting of the Committee of the Whole

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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.

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.*

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

## 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.

3. Mr. KAPETANOVIĆ (Yugoslavia) said that although his delegation had been in favour of draft article 11, it could not lend its full support to article 12. It accepted the explanations provided by the International Law Commission in paragraph (44) of its commentary on articles 11 and 12 (A/CONF.80/4, p. 47), but considered that article 12 was too general and somewhat unclear, and that it might lead to misinterpretation and other problems. The International Law Commission had not paid sufficient attention to the fact that, in all cases in which disputes had arisen in connexion with territorial régimes, the will of the parties had been involved; such disputes should be considered in the light of the sovereign right of every State to accept or reject certain obligations. However, his delegation did not question the validity of territorial régimes which had been recognized by customary international law and the practice of States as being generally acceptable.

4. The amendments to draft article 12 submitted by the delegations of Cuba (A/CONF.80/C.1/L.20) and Mexico (A/CONF.80/C.1/L.19), with the subamendment to the Mexican amendment submitted by the delegation of Argentina (A/CONF.80/C.1/L.27) would enable his delegation to accept draft article 12, because they introduced a new element which made the article clearer. Those amendments embodied the principles which constituted the foundation of the non-aligned movement, to which his country was very strongly attached, and which had been confirmed by the fifth Summit Conference of Non-Aligned Countries held in 1976 in Sri Lanka. Although those principles were well known and easily understandable, it was sometimes necessary to repeat them in international conventions. Those who accepted them would see no harm in having them clearly expressed in the draft convention; for those who found them suspicious, their inclusion would provide double protection. Problems would, of course, arise if it was desired to include something in the draft convention that was illegal or difficult to recognize as a just and uncontested principle. But in the present case his delegation could foresee only the problem of the political will to accept the principles contained in the amendments under consideration. He felt sure that the delegations of Cuba, Mexico and Argentina would be able to reach agreement on a single amendment which would be acceptable to all delegations.

5. Some delegations had stated that the amendments in question were too political and therefore unacceptable. But since the members of the Committee were both jurists and representatives of their countries, it was only natural for them to present not only their legal views, but also their political positions. The purpose of the Conference was not to adopt an empty legal text with no political meaning, but to prepare a future convention which would have legal and political value. In that connexion, the views of the representative of the United Nations Council for Namibia,[2] which represented a people still under colonial domination whose interests would be affected by the substance of the future convention, were very pertinent and should be duly respected by the Committee. His delegation would do everything possible to help the delegation of the Council for Namibia to ensure that the people of Namibia would be able to benefit from the provisions of the future convention.

6. Mr SIEV (Ireland) said it was his delegation's understanding that draft article 12 did not relate to treaties of a political nature concluded by predecessor States. As Professor O'Connell would put it, the draft article was concerned with treaties the legal effect of which is to impress on a territory a status which is intended to be permanent and which is independent of the personality of the State exercising sovereignty.

7. His delegation was concerned about some of the amendments to draft article 12, which would limit or alter its scope and intention. When his country had gained independence, it had examined a large number of treaties and, in so doing, had made a distinction between treaties or agreements of a political nature and other types, such as commercial or administrative agreements. By making that distinction, his country had been in a position to accept certain treaties or agreements, such as those of a commercial character, and to reject others of a political character.

8. The amendments submitted by Mexico and Cuba and the subamendment submitted by Argentina dealt, in particular, with treaties relating to military bases. Those amendments seemed to imply the existence of, or the need to create, a separate category or régime for such treaties, which were of a political nature. His delegation believed that it was unnecessary, and might in fact be detrimental, to include a paragraph dealing with military bases in draft article 12. Hence it would not be able to support the amendments submitted by Cuba and Mexico and the subamendment submitted by Argentina.

9. His delegation agreed with the representative of Guyana[3] that the two paragraphs of article 12 dealt with two different sets of circumstances and that any attempt to fuse them could defeat the whole purpose of the article. It was therefore in favour of retaining draft article 12 as it stood. Nevertheless, he suggested that the Drafting Committee might consider deleting the words "considered as" in each subparagraph of the article. The use of those words was rather vague and their deletion might make for greater clarity.

10. Mr. MUPENDA (Zaire) said that draft article 12 clearly reflected current efforts to promote international co-operation for the maintenance of peace and security. In recent years, the efforts made by the international community within the United Nations,

[2] See above, 19th meeting, paras. 31-33.

[3] See above, 20th meeting, paras. 24-26.

the non-aligned movement and other regional groupings had been designed to stimulate economic co-operation, not only in the context of bilateral relations, but also and, in particular, in the context of regional economic integration. In dealing with the question of the law of the sea, the international community had, for several years, been trying to find suitable ways of providing land-locked countries with access to the sea and of guaranteeing them rights of passage and other navigation rights.

11. If the purpose of such servitudes was to strengthen the ties of friendship between peoples and to promote economic co-operation among States or the economic integration of a specific region, his delegation could only welcome the efforts made by the International Law Commission, But if the international community was using such servitudes to try to curb economic co-operation in various regions, it might be asked how the developing countries were ever to be able to solve the problems they encountered in their relations with the industrialized countries. His delegation was convinced that the establishment of a new international economic order was necessary and that it must be based on economic co-operation among neighbouring countries, which should be prepared to make certain sacrifices, particularly with a view to promoting regional economic integration.

12. For all those reasons his delegation supported draft article 12. It was, however, grateful to the delegations which had pointed out that the International Law Commission had not solved the whole problem of territorial régimes, and it therefore supported the amendment submitted by Mexico, which was specific and constituted a safeguard clause, particularly for newly independent States.

13. He hoped that the Drafting Committee would be able to make use of the drafting amendments submitted, in order to find wording for article 12 which would be acceptable to all delegations.

14. Mr MARESCA (Italy) said that article 12 was one of the most important articles in the draft. It was, however, also one of the least clear. It had every appearance of being a corollary to draft article 11 and yet the roles of those two articles were very different. Article 11 provided that the successor State was bound to respect treaties establishing boundaries concluded by the predecessor State and embodied the principle of peaceful and passive coexistence of States, whereas article 12 was designed to deal with specific situations and embodied the principle of active co-operation among States for the benefit of the international community as a whole.

15. As the representative of Switzerland had stated at the 20th meeting, article 12 was not a simple one. There was something disturbing, if not vaguely nightmarish, about it. Although the two paragraphs seemed to be the same because of the repetitive wording they contained, they were quite different and were designed to deal with different situations involving the obligations and rights established by treaties. In order to have a clear idea of the meaning of the draft article in its entirety, it was necessary to consider it as being aimed at the achievement of the higher goal of broad co-operation among all States.

16. His delegation was of the opinion that, since article 11 related to passive co-operation among States and article 12 to active co-operation, those two articles should be kept separate. Hence it could not support the amendment proposed by Aghanistan. It found the amendments submitted by Finland (A/CONF.80/C.1/L.18) and Malaysia (A/CONF.80/C.1/L.21) quite attractive, as they were designed to make the wording of draft article 12 clearer and more comprehensible. The amendments submitted by Cuba and Mexico and the subamendment submitted by Argentina introduced elements beyond the scope of the draft convention, in which it would be much wiser not to deal with such a controversial matter as military bases. At the previous meeting, the Expert Consultant had said that, in its discussions on draft article 12, the International Law Commission had never referred to the question of military bases and had not intended the draft convention to apply to such a specific matter.[4] His delegation was convinced that the present wording of the article was general enough to cover most, if not all, of the situations which might arise in connexion with territorial régimes and that its scope should not be limited to the type of treaty referred to in the amendments submitted by Cuba and Mexico and in the subamendment submitted by Argentina.

17. Sir Francis VALLAT (Expert Consultant), replying to the two questions asked by the representative of Switzerland at the previous meeting,[5] said that a partial answer to the question why the International Law Commission had divided draft article 12 into two paragraphs, each having two subparagraphs, rather than drafting it in a more compact form, had been given in paragraph (37) of the commentary to articles 11 and 12 (A/CONF.80/4, p. 47), which made it clear that the article dealt with two distinct and quite different cases. In the case of an agreement between two States relating to a right attaching to a territory, it was the attachment of the right to a territory which was the distinguishing feature of the right in question. For drafting purposes, it was convenient to keep that case separate from the case dealt with in paragraph 2, which concerned something done for the benefit of a group of States or of all States, when the right or obligation did not, as such, attach to the territory of the group of States or of all States.

18. It might then be asked why a distinction should be made between rights and obligations. The answer

[4] See above, 20th meeting, para. 35.

[5] See above, 20th meeting, paras. 30-31.

was that the rights and obligations were not really identical. Paragraph 1 of article 12 made it clear that there was a difference between the obligations dealt with in subparagraph (*a*) and the rights dealt with in subparagraph (*b*). In subparagraph (*a*), it was necessary to consider the obligations as attaching to the territories in question, namely, the territories for the benefit of which the obligation was created. In the case of rights, the situation was not quite the same, as shown in subparagraph (*b*). In paragraph 2, there was a similar difference between obligations and rights. Consequently, if an attempt was made to condense those two paragraphs, further drafting difficulties would be encountered and it would be no easy matter to maintain the exact balance which the International Law Commission had struck between paragraphs 1 and 2.

19. In his second question, concerning paragraph 2, subparagraph (*b*), the representative of Switzerland had referred to the case in which a right was created for the benefit of a group of States or for the benefit of all States, and in which the number of States concerned increased as a result of the division of one State and the consequent creation of a new State. He had asked whether that case involved a change in the obligation of the group of States or of all States, suggesting that it was not right to say that a succession of States did not affect the obligation. He (the Expert Consultant) wondered whether that was really so, for if a right was established for all States, it surely made no difference how many States were involved. If a right to use a sea were established for the benefit of the States bordering on the sea and by division of one of the States two new States were created, both of which bordered on the sea, it seemed to him that the nature of the obligation was not changed in the slightest. If, however, one of the States bordering on the sea divided into two States, one of which did not border on the sea, he did not think that paragraph 2, subparagraph (*b*) would operate for the benefit of that new State, because it would not be a member of the group for which the right had been established. The right would remain the same, but the new State would not benefit from it under the provisions of paragraph 2, subparagraph (*b*). It therefore seemed to him that the correct view was that the essence of the right as such was not altered in such cases.

20. Mr. KATEKA (United Republic of Tanzania) said that the Expert Consultant had perhaps been unaware of the objection made by the United Republic of Tanzania to the interpretation of the its Government's position on the Belbases Agreements recorded in paragraph (24) of the commentary to article 11 and 12 (A/CONF.80/4, p. 43). His delegation had made it clear that no self-respecting country could accept the idea of a lease in perpetuity of the type in question, which stemmed from an insulting provision by an administering authority. Since the Government of the United Republic of Tanzania had manifestly not accepted the obligation involved, it was wrong to invoke that instance as an example of State practice.

21. The United Kingdom and United States representatives had said that questions of military bases and of sovereignty over natural resources were irrelevant, and the Expert Consultant had deemed those questions extraneous. The delegation of the United Republic of Tanzania disagreed; article 12 as it stood could be so interpreted as to cover those questions.

22. His delegation was troubled too by the expression "foreign State", which, as the Nigerian representative had pointed out,[6] was not the sort of wording normally used in treaty language for provisions of that type. He was not satisfied by the explanation that the wording meant a neighbouring State.

23. His delegation supported the amendments submitted by Mexico and Cuba and the subamendment submitted by Argentina. As the Yugoslav representative had noted, the political aspect was a legitimate part of the Conference's work.

24. Mr. ESTRADA-OYUELA (Argentina) said he failed to see how certain previous speakers could infer that article 12 was mainly concerned with treaty relations between neighbouring States. The text contained nothing to warrant such an inference of to imply that treaties of a political nature should somehow be distinguished from other treaties.

25. Those who argued that the scope of article 12 did not extend to matters such as military bases and sovereignty over natural resources had implicitly invoked a conception of territory which was not used elsewhere in the draft convention and, if they were right, was being used in article 12 in a way that was not in keeping with legal doctrine. For territory, as such, was never a legal person and could not have benefits conferred on it; in that respect, therefore, the wording in paragraph 2 was inappropriate. Benefits would accrue not to a territory, but to its users.

26. The text as it stood was too wide in scope and required clarification by means of an amendment such as the one his delegation had submitted. The clarification just given by the Expert Consultant concerning paragraph 2, subparagraph (*a*) substantiated the Argentine delegation's argument. An obligation and a right must apply to one and the same entity; it was inadmissible to say that one related to a territory and the other to a State.

27. It might well be that the International Law Commission had not intended to include military bases and sovereignty over natural resources in the way that the Argentine subamendment did; but if that were so, the International Law Commission's text was defective. The point to consider was not what the International Law Commission had intended yet failed to say, but what the amendments

[6] See above, 20th meeting, para. 3.

of Cuba and Mexico and the subamendment of Argentina did say.

*Mr. Ritter (Switzerland), Vice-Chairman, took the Chair.*

28. Mr. STUTTERHEIM (Netherlands) said that his delegation could accept article 12 as it stood and thought that the amendments submitted by the delegations of Mexico and Cuba and the subamendment submitted by Argentina would detract from the value of the article. The amendments submitted by Finland and Malaysia were concerned with drafting and should be referred to the Drafting Committee.

29. Mrs. HUMAIDAN (Democratic Yemen) said there seemed to be general agreement that the provision for an exception to the "clean slate" rule should not apply to military bases and sovereignty over natural resources. However, article 12 as worded by the International Law Commission could be taken to mean that the exception did apply to those matters. It therefore appeared that an additional paragraph was needed, and her delegation thought that the text of the Mexican and Cuban amendments and the Argentine subamendment, if suitably merged, could provide appropriate wording. She hoped that the three delegations concerned would agree to pool their texts for that purpose.

30. The Finnish and Malaysian amendments concerned drafting only, and in any case did not, in her view, provide acceptable alternative wording.

31. Mr. TREVIRANUS (Federal Republic of Germany) said that article 12 must be viewed in close connexion with article 11. Both articles were considered to be a correct expression of customary international law, and article 11 had already been provisionally adopted by a majority decision of the Committee.

32. A number of members of the International Law Commission had explained the limited context of article 12. The obligations or rights in question must have been established by treaty for the benefit of a territory of a foreign State, generally a neighbouring State, and must be considered as attaching to the territory in question in order to fall within the category of dispositive treaties. His delegation endorsed the limitation placed by the International Law Commission on that conception of dispositive treaties; it thought that the substance of article 12 was sound and that the text should remain as it stood unless it could be shown that article 12 was superfluous.

33. In his delegation's view, the Finnish and Malaysian amendments were both useful and should be referred to the Drafting Committee. His delegation could not *prima facie* agree with the Irish representative that the words "considered as" should be deleted; perhaps that part of the text should be studied more closely.

34. His delegation found the Mexican and Cuban amendments and the Argentine subamendment unacceptable; they concerned the legal fate of treaties, which was not within the purview of article 12 at all. The International Law Commission had rightly refrained from taking up the matter of military base treaties—or of any other category of treaties. The three amendments in question did very little to serve the purpose of codification in the special field of succession of States to treaties, and his delegation could not support them.

35. Mr. BEDJAOUI (Algeria) said that his delegation found the International Law Commission's draft of article 12 somewhat heavy and not too clear, and it appreciated the efforts at clarification made by those delegations which had submitted drafting amendments. As noted by the Italian representative and other speakers, there was a certain parallelism between the subparagraphs of each of the article's two main paragraphs.

36. Whilst his delegation appreciated the Finnish and Malaysian amendments, it noted that in substance the purpose of article 12 was to promote good relations between neighbour States, while not losing sight of successor States' interests. The amendments submitted by Mexico and Cuba and the subamendment submitted by Argentina reflected a political approach which some Latin American, African and other delegations found appropriate but which others deemed contrary to the meaning and purpose of the article drafted by the International Law Commission. Where such an important article was concerned, it was important to find a solution acceptable to all delegations, so as to secure ratification of the resultant convention by as many States as possible. His delegation was prepared to suggest wording which might be found acceptable.

37. The question of self-determination was also involved in article 12, which *inter alia* would confer rights on a successor State. The problem of "unequal treaties" was not within the purview of the article; and in any case, preoccupation with that topic in the context of article 12 would imply that former colonial Powers had been weak in their dealings with third States and had left a legacy of disadvantageous treaties, which in general was surely not the case.

38. Undertakings in perpetuity by a former administering authority constituted a further problem. According to the Charter of the United Nations, an administering authority for a dependent territory had administrative and trusteeship power only; it would be contrary to the principle of self-determination for it to be able to assume external obligations on behalf of the territory concerned.

39. His delegation appreciated the efforts of the Mexican, Cuban and Argentine delegations in submitting their respective amendments and subamendment, but it appreciated the concern of other speak-

ers regarding a specific reference to military bases, and it also believed that the question of sovereignty over natural resources had been clearly accepted by the International Law Commission elsewhere. Perhaps a third paragraph could be added to article 12, to the effect that its provisions were without prejudice to the principle of sovereignty over natural resources; on that point, he suggested that the Mexican, Cuban and Argentine delegations might consult with colleagues on the Drafting Committee.

40. Mr. MIRCEA (Romania) said that his delegation's position of principle appeared in the Analytical compilation of comments of Governments (A/CONF.80/5, p. 167).

41. In his view, the commentary to article 12 was not convincing. The provisions of article 12 might impose on successor States conditions not in their best interests, particularly with regard to rights in their natural resources. The problem of the effect of treaties vis-à-vis third States had already been examined during the preparation of the Vienna Convention on the Law of Treaties. But as the Argentine delegation had noted, the philosophy of the "objective régime" reflected in that Convention did not appear in article 12. The International Law Commission's text of that article was not in accordance with the Vienna Convention. The question was whether, given the specific character of the present draft convention, the Conference had before it all the material necessary for studying the categories of treaties that would be involved; in his delegation's view, the Conference did not have the means to study them in depth without the risk of making errors or prejudging solutions elsewhere.

42. The approach of the International Law Commission to the question of obligations and rights attaching to a territory seemed different from that adopted in other international forums—for example, the United Nations Conference on the Law of the Sea, at which certain principles of contemporary international law had been invoked in connexion with freedom of transit. The susceptibility of the International Law Commission's text to differing Interpretations was shown by the submission of the Mexican and Cuban amendments and the Argentine subamendment, which his delegation could support.

43. Most delegations seemed to agree that the notions of "objective régimes" should be retained. His own delegation could accept the International Law Commission's text of article 12, but it was not convinced that such a provision was necessary, or that it was even acceptable to the majority of States.

44. Mr. AL-KATIFI (Iraq) said that article 12 as drafted by the International Law Commission faithfully reflected a well established rule of positive international law. In its statement, the delegation of Austria had clearly explained both the foundations of article 12 and why its retention was necessary for peace and stability in international relations.[7] Some delegations considered that articles 11 and 12 were based on article 62, paragraph 2, subparagraph (*a*) of the Vienna Convention on the Law of Treaties. His delegation was of the opinion that those articles were only an application of the general principle of law contained in article 70, paragraph 1, subparagraph (*b*) of the same instrument. The effect of that general principle was that, once a legal situation had been established by a valid treaty, it existed independently of that treaty and continued to apply even when the treaty itself had been terminated for any reason whatsoever, including a succession of States.

45. With regard to the proposed amendments to article 12, those of Finland and Malaysia concerned only its drafting and could be referred to the Drafting Committee, which would be assisted in its consideration of them by the explanations given by the Expert Consultant in answer to the representative of Switzerland. His delegation understood the motives which had led the delegations of Cuba, Mexico and Argentina to seek to exclude treaties concerning military bases from the category of real treaties, for those motives were entirely in keeping with the policy of its own Government. Considered from a purely legal standpoint, however, treaties concerning military bases were not real treaties, but political instruments, often of temporary effect, and as such they were not binding on a successor State.

46. His delegation also sympathized with the concern of Argentina over treaties restricting the full exercise by a successor State of its sovereignty over its natural resources, but he believed that the exception to article 12 proposed by Argentina was so broad that it might empty the article of all content and might also lead to difficulties, particularly between neighbouring States. Furthermore, the concept of permanent national sovereignty over natural resources was well recognized and had been repeatedly reaffirmed by the United Nations General Assembly and in existing international instruments. He doubted, therefore, whether any useful purpose would be served by mentioning it in a convention on succession in respect of treaties.

47. Mr. SNEGIREV (Union of Soviet Socialist Republics) said that the provisions of article 12, in the wording proposed to the Conference, defined with sufficient clarity the mutual rights and obligations of States in respect both of concrete territorial régimes applying in relations between two States, especially neighbouring States, and also of concrete régimes established in the interests of all States, such as the right of navigation in international canals and straits, and the neutralization and demilitarization of territory.

48. In that connexion, his delegation took the view that article 12 did not in any way relate to the ques-

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

tion of military bases, since bases could not be considered as régimes attaching to any specific territory. Accordingly, he regarded article 12 in its present wording as quite sufficient and acceptable to his delegation. However, if the majority of the participants in the Conference were in favour of including in the draft article a stipulation that its provisions did not apply to military bases in foreign territories, his delegation would have no objection, in principle, to such a stipulation. Nevertheless, it reserved its right to express its views at a later stage on the specific wording of the stipulation, since it regarded the present wording of the amendments as preliminary.

49. Mrs. DAHLERUP (Denmark) said she considered article 12 one of the most important provisions in the draft. The Committee's discussion of the article had left her more convinced than ever of the wisdom of the International Law Commission's draft, which, as the representative of Austria had said[8] had been prepared with the utmost care. While the text was somewhat abstract, and therefore a little difficult to understand, the explanations given by the representative of the United States of America[9] had shown that the article was limited in scope and applied only to relations between two or more newly independent neighbouring States.

50. As a consequence of its support for the original proposal, her delegation was unable to accept the amendments submitted by Cuba and Mexico and the subamendment submitted by Argentina, although it understood why they had been put forward. It was sure that account could be taken elsewhere of the considerations which underlay those amendments, but believed that the codification and progressive development of international law should not lead to overlapping of basic instruments, such as the Vienna Convention on the Law of Treaties and the draft convention before the Conference, as would to some extent occur if the amendments were accepted. The amendments of Finland and Malaysia could be referred to the Drafting Committee, whose consideration of them would be facilitated by the analysis made by the representative of Guyana.[10]

51. Mr. PANCARCI (Turkey) observed that the draft convention as a whole was based on the "clean slate" principle and that, if it was to be acceptable, the exceptions it permitted to that principle must be clearly stated. Furthermore, it should be borne in mind that the object of the efforts to codify the principles and rules of customary international law, which had been in progress since the end of the eighteenth century, was to eliminate misunderstandings between States and to consolidate international peace and stability. It was with that object in view that the third paragraph of the preamble to the Charter of the United Nations called for the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

52. It was understandable, therefore, that boundary treaties, which often put an end to a period of armed conflict, and the neglect or denial of which could lead to anarchy in the international community, occupied a special place in international law, and that article 12, like article 11, should be essential to the draft convention. The deletion of, or any substantial change in, article 12 would have a negative effect on all the other provisions and compromise the implementation of the entire draft. Finally, the article should be retained as it stood, since it reflected current State practice, jurisprudence and the rules and principles of contemporary international law.

53. The amendments submitted by Finland and Malaysia related essentially to the drafting of the article and should therefore be referred to the Drafting Committee. The amendments submitted by Cuba, and Mexico and the subamendment submitted by Argentina related to another sphere of international law from that with which the Conference was concerned, and his delegation was therefore unable to support them.

54. Mr. ROBINSON (United Nations Council for Namibia) considered the questions raised by the representative of Sweden[11] with regard to paragraph (25) of the commentary relating to article 12 (A/CONF.80/4, pp. 43-44) to be both pertinent and important. His delegation did not agree that, as had been claimed, matters relating to the cessation of treaties governing the establishment of military bases were "extraneous" to article 12; they would seem rather to be directly relevant to the article, for its present wording sought to establish rules governing, *inter alia,* obligations relating to the use of territory. That being so, to classify the implications of the article on the lines proposed in the amendments submitted by Cuba and Mexico and the subamendment submitted by Argentina could only improve it.

55. His delegation was much concerned at the fact that some speakers seemed to think that the question of military bases was no longer important. The United Nations Council for Namibia was well aware that there were military bases in Namibia established by the illegal occupier of the territory with the complicity of other States and contrary to the wishes and interests of the Namibian people. Since it was hardly likely that the illegal occupier would voluntarily dismantle those bases when the territory finally attained independence, there would seem to be great merit in the codification by the Conference of legal norms which would ensure that the dismantlement of military and other bases in the territory of a successor

[8] See above, 19th meeting, paras. 39-40.

[9] See above, 20th meeting, paras. 6-10.

[10] See above, 20th meeting, paras. 24-29.

[11] See above, 20th meeting, para. 13.

State was not left to the goodwill or morality of the predecessor State.

56. In the light of those remarks, he would like the Expert Consultant to explain what would be the status, following a succession, of a treaty relating to the use of the territory of the successor State for the establishment of military bases, if that treaty had been concluded with third States by an illegal occupier of the territory concerned, purporting to act as the administering authority.

57. Mr. HELLNERS (Sweden) said that, despite the explanations given by the Expert Consultant in answer to his own questions,[12] he still found the text of article 12 insufficiently clear and thought that, whatever the problems to which that might give rise, an attempt should be made to shorten and simplify it.

58. His delegation was, on the whole, very much in sympathy with the intended aims of article 12 as it stood. It also appreciated the importance of the questions of military bases and permanent sovereignty over natural resources raised in the amendments submitted by the delegations of Cuba and Mexico and in the subamendment submitted by Argentina, which the Expert Consultant had said the article was not at present intended to cover. In seeking to expand the scope of the article, however, great care must be taken not to empty it of its real content: as they stood, two of the substantive amendments would have the undoubtedly unintentional effect of making treaties such as demilitarization treaties null and void in the event of a succession, since such instruments inevitably fell into the category of agreements affecting the sovereignty of the territory concerned.

59. Of the three substantive amendments, his delegation preferred that of Mexico, although it considered the final sentence too categorical. He agreed with other speakers that the amendments submitted by Cuba and Argentina could give rise to excessive instability in treaty relations. In the Cuban amendment, the phrase "Treaties ... which disregard or detract from the sovereignty of the successor State" could be interpreted in widely different ways, and it would be very difficult to find any treaty which did not in some way detract from sovereignty. His delegation understood the Argentine subamendment to be an attempt to give effect, within the framework of article 12, to the numerous United Nations resolutions on the question of national sovereignty over natural resources, but it doubted whether the principle stated in those resolutions could be implemented in the way the amendment suggested. The consequences of the principle were broader than could be stated in a few lines and were, moreover, still the subject of difficult discussions in many United Nations bodies.

[12] See above, 20th meeting, paras. 35-37.

60. His delegation believed that, in view of the importance of article 12, an attempt should be made to find some common denominator between the views of those who favoured the expansion of the text and those who favoured its retention without change. His delegaion would be willing to participate in any efforts to reach a solution along the lines suggested by the representative of Algeria.

61. Mr. MANGAL (Afghanistan) said that the purpose of his statement was to elaborate further on his delegation's position regarding article 12, particularly paragraph 1 thereof, and to make a number of additional points which his Government considered to be of great importance for the interpretation of that article.

62. Afghanistan took the view that there were certain fundamental rights and obligations under international law which were unaffected by a succession of States: for instance, the right of free access to and from the sea of land-locked States and their right of free transit, which were based on firmly established and legally binding principles of international law, such as the freedom of the high seas and the newly established principle of recognition of the international area of the sea beyond the limits of national jurisdiction of States as the common heritage of mankind, rights which were so vital for their foreign trade and economic development. Afghanistan believed that the exclusion of the rights of land-locked countries from the application of the "clean slate" principle did not infringe the sovereignty of a successor State which was also a coastal or transit State. The establishment of such an exception in favour of land-locked States was in conformity with the provisions of the United Nations Charter and the spirit of international co-operation, and was conducive to the strengthening of friendly relations between States. That point, which was also covered by the draft articles on the most-favoured-nation clause prepared by the International Law Commission, was of vital importance for one fourth of the international community and should therefore be dealt with in the preamble to the future convention.

63. Mr. YANGO (Philippines) referred to the statement on articles 11 and 12 made by Philippines representative to the Sixth Committee of the United Nations General Assembly in 1975. That representative had observed that both articles might possibly be contrary to the right to self-determination and in some cases to the interests of newly independent States which challenged a boundary, but that if those matters were removed from the application of the principle of continuity, the stability of international relations could be jeopardized, so that his delegation had an open mind on articles 11 and 12 (A/CONF.80/5, p. 166).

64. Conscious of the need to promote international stability, security and amity, his delegation, at the 19th meeting of the Committee, had supported ar-

ticle 11 as drafted by the International Law Commission. In doing so, it had also taken into account, in particular, the clarifications provided by the Expert Consultant,[13] who had said that the provisions of article 11 were without prejudice to any agreements which might be reached by the parties concerned in accordance with the provisions for peaceful settlement of disputes embodied in the Charter of the United Nations.

65. His delegation could not, however, give similar support to article 12, for the reasons he had mentioned relating to the right to self-determination. The Committee had before it a number of amendments to that article, and he was inclined to agree with other delegations that those submitted by Malaysia and Finland could be referred to the Drafting Committee. However, substantive proposals had been submitted by the delegations of Cuba, Mexico and Argentina, on which a polarization of views had occurred. At the 20th meeting, it had been argued that the matters dealt with in those proposals—namely, foreign military bases and sovereignty over natural wealth and resources—were extraneous to article 12. He submitted that that was not the case, since what was proposed was to make certain exceptions to the rule laid down in article 12 concerning the continuity of restrictions upon the use of any territory and, as he saw it, foreign military bases were restrictions within the meaning of that article.

66. Paragraph (25) of the commentary to article 11 and 12 related to the West Indian bases granted by the United Kingdom to the United States in 1941. On the approach of the West Indies territories to independence, the commentary stated, "the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status should continue to bind it after independence" (A/CONF.80/4, pp. 43-44). Thus, the United States had acknowledged that military bases constituted restrictions upon the territory of the successor State. The International Law Commission's commentary also referred to leases in perpetuity; if agreements of that kind were considered to be restrictions on sovereignty, it could equally well be argued that military bases leased by a sovereign State to a military power entailed such restrictions.

67. As to the question of permanent sovereignty over natural resources, it should be borne in mind that the Conference was endeavouring to promote the progressive development of international law, and that the concept of permanent sovereignty was gradually gaining acceptance as an established principle of international law. It was true that that matter was also being discussed in other United Nations forums, but the tendency was to consider it not only in connexion with trade negotiations, for instance, but also at gatherings such as the United Nations Conference on the Law of the Sea. The concept of permanent sovereignty over natural resources had the support of more than 100 States Members of the United Nations—a fact which the Conference could not ignore.

68. His delegation firmly believed that the purpose of promoting amity, co-operation and international peace and security would be served by the inclusion in article 12 of provisions establishing exceptions to continuity in the case of agreements relating to military bases and affecting permanent sovereignty over natural resources. Both of those matters were burning contemporary issues and the subject of growing concern. The non-aligned States favoured the abolition of all foreign military bases and were steadily gaining support, while the issue of permanent sovereignty over natural resources would inevitably assume increasing importance in the near future as a result of the efforts to establish a new international economic order.

69. To sum up, he was sympathetic to the substance of the proposals submitted by the delegations of Mexico, Cuba and Argentina and supported the idea that those three delegations should consult one another with a view to working out a consolidated text which would find general acceptance.

70. Mr. KRISHNADASAN (Swaziland) said that his delegation's comments on article 11[14] largely reflected its view on article 12. His delegation had abstained from voting on article 11 and, at present, would take the same position on article 12. It did not believe that the adoption of article 12 would ensure order or that its non-adoption would cause chaos.

71. He had understood the Expert Consultant, in answering a question put by the representative of Sweden, to say that it was unfair to maintain that the International Law Commission had based itself only on European legal practice,[15] since paragraph (22) of the commentary to articles 11 and 12 (A/CONF.80/4, p. 43) referred to the legal practice of Canada and Newfoundland. But the practice of Canada and Newfoundland differed little from European practice and the International Law Commission had been heavily, and in his view, unfortunately, influenced by the case of the Free Zones of Upper Savoy and the District of Gex[16] and the case of the Åland Islands.[17] The commentary also made mention of a number of cases, in particular, the Belbases Agreements and the Nile Waters Agreement, in which legal practice appeared to militate against the establishment of an exception to the "clean slate" principle. Both the Sudan and Tangyanika had declined to consider themselves bound by the latter Agreement. It appeared that the International Law

[13] See above, 18th meeting, para. 48.

[14] See above, 18th meeting, paras. 66-69.

[15] See above, 20th meeting, para. 35.

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

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

Commission had been influenced by pragmatic considerations and had acted out of a concern to ensure stability.

72. He had understood the Expert Consultant also to say that it was very difficult to strike a balance in the matter under consideration and that the International Law Commission had not attempted to deal with the questions of military bases and permanent sovereignty over natural resources. That very fact made it all the more important for the Conference to consider the proposals submitted by the delegations of Cuba, Mexico and Argentina. In his view if article 12 was to be retained, some form of addition along the lines indicated in those proposals was necessary. The United Kingdom representative had said[18] it was impossible to conclude that article 12 gave any authorization for military treaties; by the same token, that provision did not prohibit military bases, and the inclusion of a provision covering them would be advisable, if only *ex abundante cautela*.

73. With regard to the situation of land-locked countries, his delegation believed that customary international law, treaty law and the fundamental principles of international law all established a right of transit and a right of access to and from the sea for land-locked States. A provision covering that point would, it was to be hoped, be embodied in the future convention on the law of the sea. To that extent, he did not believe that the provisions of article 12 either made or broke the case concerning the transit rights of land-locked States.

74. He supported the substance of the proposals submitted by the delegations of Cuba, Mexico and Argentina and agreed that those three delegations should consult one another in order to formulate a joint proposal. He had also taken note of the Swedish representative's suggestion that he and the representative of Algeria might together prepare a compromise or consensus solution. His delegation thought it would be well for a group of some kind to meet and reconsider article 12 before a final decision was taken. The Swedish representative's suggestion that the substantive amendments to article 12 should exclude demilitarization treaties should be regarded with sympathy and put into effect.

75. Sir Francis VALLAT (Expert Consultant) said that the following question had been put to him by the representative of the United Nations Council for Namibia: "What would be the status of a treaty relating to the use of the territory of a successor State for the establishment of military bases, if that treaty had been concluded with other States, albeit excluding the successor State, by the illegal occupier of the successor State purporting to act as administering authority?"

76. While considering that question strictly outside his functions, he could express the personal opinion that a treaty of that kind could not be valid or legally binding on a successor State.

77. Mr. KEARNEY (United States of America) said he wished to clarify his earlier remarks concerning the amendment submitted by Mexico and the Argentine subamendment thereto.[19] He had not wished to cast aspersions on any particular delegation, but merely to suggest that it would be short-sighted and unwise to adopt a provision of the kind contained in the last sentence of those two proposals, which in effect declared that treaties concerning military bases—and, in the case of the Argentine subamendment, also treaties bearing some relationship to natural resources—would become invalid on the occurrence of a succession of States.

78. Such a provision would be quite contrary to the provisions of the Vienna Convention on the Law of Treaties, article 42, paragraph 1 of which stated that "The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention".[20] The following articles contained a definitive list of circumstances which justified the invalidation of treaties. Part V of the Vienna Convention had been worked out with the utmost care and as a result of a thorough study of all available precedents and thinking on the subject. The draft articles on which that Convention was based had twice been considered by the General Assembly and had twice been the subject of comments by governments. He did not think it would be wise to attempt to modify part V of the Vienna Convention, by adding two further grounds for declaring a treaty invalid, under the conditions of the present Conference, without having first undertaken the detailed study and review necessary. The Conference was of course empowered to take any decision it wished, but it should be realized that its decisions had later to be accepted by States and that the addition of fresh grounds for invalidating treaties might seriously diminish the number of ratifications of the future convention. The Conference should refrain from such precipitate action.

79. Mr. GILCHRIST (Australia) said that in the light of the Expert Consultant's explanation, his delegation thought that the substance of article 12 was acceptable and deserved a place in the future convention, even if the text was capable of improvement. The amendments proposed by Cuba and Mexico and the subamendment proposed by Argentina would introduce further complications into an article which was already complex and was closely related to articles 11 and 13. Like other speakers, he thought there was a need for caution; the Committee should not

[18] See above, 20th meeting, para. 17.

[19] See above, 20th meeting, paras. 8-9.

[20] *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. 295.

take a final decision on article 12 without allowing itself further time for consultations.

80. Mr. SEPÚLVEDA (Mexico) said he had little imagined that in submitting his amendment he would be opening Pandora's box. He had merely intended to infuse substance into article 12, eliminate doubt and enlarge the scope of the future convention. Thanking the numerous delegations which had expressed support for the whole or for the first part of his amendment, he acknowledged that the last sentence was open to criticism. However, he was not wedded to the text.

81. He had been surprised by some of the assertions made during the discussion. It had been claimed that treaties relating to military bases were merely political and imposed no restrictions on the use of the territory. In his view, every treaty was political: international law was full of political considerations and he could see no distinction between treaties establishing military bases and those imposing other restrictions on the use of territory. On that point, he seemed to have the agreement of the International Law Commission, which in paragraph (25) of the commentary to articles 11 and 12 (A/CONF.80/4, pp. 43-44) referred to military bases as restrictions.

82. It had been asserted that the Latin-American amendments, which covered a spectrum of political ideas, had no place in a legal instrument. But the draft articles were impregnated with politics: the succession of States was in itself a political issue to which an attempt was being made to apply legal rules. Although the question of military bases was political, it had a legal character as well. It had also been said that since the Latin-American amendments were of a political nature, their incorporation would render the future convention less acceptable to States. He asked whether the Conference was aiming at an anodyne convention which avoided controversy at the cost of practical value.

83. He suggested that the Committee should defer a decision on article 12, so as to allow time to work out a common text combining some of the fundamental principles of the three Latin American amendments, together with some of the ideas expressed during the discussion, which commanded wide support. He was aware that there were a number of technical difficulties, since between them, in addition to the question of military bases, the three Latin American amendments covered natural resources and unequal treaties. Some delegations were more concerned with one of those matters than the others and a text should be found which was generally satisfactory. Some delegations had expressed their willingness to take part in consultations and his own delegation was prepared to assist in drafting a text which would serve the collective interests of the international community.

84. Mr. YIMER (Ethiopia) said that he was not opposed to postponing a decision on article 12, but he thought some time-limit should be set.

85. The CHAIRMAN observed that experience had shown that it was very difficult to forecast how long such consultations might take, so that a time-limit would be inadvisable. If there were no objections, however, he would take it that the Committee agreed to postpone a decision on draft article 12.

*It was so agreed.*

86. The CHAIRMAN asked the Committee whether it wished the consultations on a common text for the Latin American amendments to article 12 to proceed informally or to take place in the informal consultations group which was already discussing articles 6 and 7.

87. Mr. MARESCA (Italy) urged that the matter should be entrusted to the informal consultations group

88. Mr. MBACKÉ (Senegal), supported by Mr. YIMER (Ethiopia), thought it could be handled more expeditiously by the three delegations which had proposed the amendments.

89. Mr. KRISHNADASAN (Swaziland) suggested that the three delegations should first work out a common text and then submit it to the informal consultations group for comment.

90. Mr. ESTRADA-OYUELA (Argentina), while commending the suggestion of the representative of Swaziland, said that valuable ideas had also been advanced during the discussion. He suggested that the initial work on the text should be carried out by the three Latin American delegations concerned, in conjunction with those who had expressed a desire to collaborate with them.

91. Mr. HERNANDEZ ARMAS (Cuba) said that from their practical experience and legal knowledge, the African and Asian groups could also make a contribution. He supported the suggestions of the representatives of Swaziland and Argentina. The three sponsors of the amendments concerned should be assisted by those speakers who had taken up strong positions during the discussion. The text should then be referred to the more broadly based informal consultations group.

92. Mr. YACOUBA (Niger), speaking on behalf of the African Group, said that the silence of that group did not indicate lack of interest: it was endeavouring to find ways and means of making draft article 12 acceptable to all.

93. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished the delegations of Argentina, Cuba and Mexico to

work out a common text, which would then be submitted to the informal consultations group.[21]

*It was so agreed.*

PREPARATION OF A DRAFT PREAMBLE AND DRAFT FINAL CLAUSES

94. The CHAIRMAN drew the Committee's attention to the statement he had made at the 15th meeting requesting delegations which intended to submit proposals for the preamble and final clauses of the draft convention to do so as soon as possible.[22] In order to facilitate the Committee's work, he suggested that such proposals should be submitted direct to the Drafting Committee, which should be entrusted with the preparation of the draft preamble and draft final clauses for submission to the Conference.

95. If there was no objection, he would take it that the Committee decided to adopt that suggestion.

*It was so decided.*

*The meeting rose at 7.45 p.m.*

[21] See the report of the informal consultations group at the 34th meeting, paras. 7-8.

[22] See above, 15th meeting, para. 1.

## 22nd MEETING

*Thursday, 21 April 1977, at 11.05 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 13 (Questions relating to the validity of a treaty)

1. Mr. TABIBI (Afghanistan) said that article 13, like article 6, stated a cardinal principle of the draft and constituted a proviso to articles 11 and 12. Furthermore, it served the aims of part V of the Vienna Convention on the Law of Treaties and met the requirements of the whole régime of conventions whose purpose was to deal with situations in accordance with international law and the Charter of the United Nations. The brevity of the International Law Commission's commentary to the article was due to the positive character of the rule which the article contained; it was a rule which did not require any explanation. The reasons why the International Law Commission had included the rule in the draft were explained in paragraphs (43) and (44) of the commentary to articles 11 and 12 (A/CONF.80/4, pp. 47-48), where it was pointed out that those two articles were not contrary to the principle of self-determination and had no effect on the validity of treaties establishing boundary or other territorial régimes or on the validity of such régimes themselves. His delegation therefore supported draft article 13, which the Committee should adopt and refer to the Drafting Committee.

2. Mr. SETTE CÂMARA (Brazil) observed that, in the International Law Commission's discussion of the provisions appearing in articles 11 and 12, it had been found necessary to include a saving clause of a general nature covering the draft as a whole and not just those two articles, for without such a proviso the other provisions of the draft might possibly have been interpreted as prejudicing a question relating to the validity of a treaty; it had also been thought necessary to include the saving clause in part I of the draft, entitled "General Provisions". Although his delegation did not feel that article 13 was indispensable, it had no objection to its inclusion in the draft and was prepared to support it.

3. Mr. RANJEVA (Madagascar) said that his delegation had no particular objection to article 13, but that at the same time it prompted a number of comments which should be brought to the attention of the Drafting Committee. In article 13, the International Law Commission had drawn a distinction between two basic questions, namely the validity of a treaty, a matter covered by the Vienna Convention on the Law of Treaties, and succession of States; in his view, however, making that distinction did not add anything new to the draft. He therefore hoped that the Expert Consultant would explain why the International Law Commission had found it necessary to restate a truism, for behind that truism lay the whole problem of the effects of a treaty. Although it was self-evident that a succession of States in no way prejudiced the validity of a treaty, on the other hand the effects of a treaty were directly influenced by a succession, since a new subject of law appeared on the international scene. Might there not arise a conflict between the provisions of a treaty and the rules of law governing succession of States? A treaty which was valid but incompatible with the rules of law relating to succession of States might be rendered inoperative. It would therefore be interesting to know how the International Law Commission had reconciled the following three factors: the validity of a treaty, the effects of a treaty and the problem of a succession of States *stricto sensu*.

4. Sir Francis VALLAT (Expert Consultant) said that in the first place several articles provisionally adopted by the Committee stated rules that were more or less obvious. The International Law Commission had